

Anatomy of a Wyoming Appeal

A Practitioner's Guide for Civil Cases

"You have to learn the rules of the game. And then you have to play better than anyone else."

—Albert Einstein



PRESENTED BY

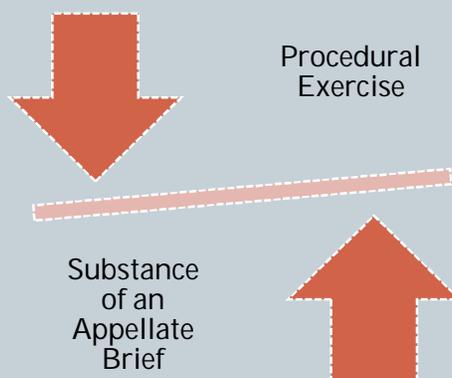
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THE VIEWS AND STATEMENTS IN THIS PRESENTATION ARE THOSE OF THE PRESENTER

General Overview of Today's Presentation



The overall aim of this presentation is twofold: first, to provide practitioners with a roadmap for perfecting an appeal to the Court; and second, to give guidance and helpful hints in drafting a successful appellate brief.



Wyoming Rules of Appellate Procedure (W.R.A.P.)



- Substantial amendments to W.R.A.P. went into effect on July 1, 2015.
- The amendments impacted everything from what must be included in the body of a notice of appeal to the scope of sanctions that the Wyoming Supreme Court (“Court”) can impose on a party for noncompliance with the W.R.A.P.
- For example, the 2015 amendment to W.R.A.P. 1.03 broadened the scope of sanctions:

W.R.A.P. 1.03(b) (2016)



“(b) A party’s failure to comply with these rules may result in imposition of sanctions, including but not limited to:

(1) Appellant or cross appellant who fails to provide a notice of appeal to the appellate court as required by Rule 2.01(a), or whose notice of appeal does not include the appendix required by Rule 2.07(b) and (c), may be subject to a monetary sanction when the case is docketed in the appellate court.

(2) A party who fails to file the required designation or certification of record in the trial court contemporaneously with filing the brief in the appellate court may be subject to a monetary sanction upon notification of non-compliance by the clerk of the trial court. See Rule 3.05. For Supreme Court general orders on sanctions, see www.courts.state.wy.us/WSC/Clerk.”

Compliance with W.R.A.P.



- To avoid the consequences of noncompliance, a notice of appeal should incorporate several related requirements under the W.R.A.P.
 - *We will go over the roadmap to perfect an appeal, and conclude with a checklist for practitioners.*
- But first, we must understand what an “*appealable order*” is

Is there an appealable order?



- First things first, ask yourself whether the district court's decision you wish the Court to review is appealable.
- In 1992, Wyoming's appellate rules were amended to get rid of the rigid concept of a "final order" and implement the more flexible notion associated with an "appealable order."
- Rule 1.05 defines an appealable order as, inter alia, "[a]n order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment."

Appealable Order per the WSC



The Court has applied this definition on many occasions, stating that an appealable order has “three necessary characteristics **It must** affect a substantial right, determine the merits of the controversy, and resolve all outstanding issues.” *In re E.R.C.K.*, 2013 WY 160, ¶ 28, 314 P.3d 1170, 1176 (Wyo. 2013).

Analyzing an Appealable Order



- Whether an order is appealable is not as clear-cut as some would think. As a result, take time to ensure the order meets the standards of appealability. Determine whether all of the claims have been addressed for every party involved, and ask yourself if the order affects a substantial right and effectually determines the entire action. See *In re Estate of Hibsman*, 2012 WY 139, ¶ 17, 287 P.3d 757, 760 (Wyo. 2012) (the court dismissed the appeal because the order did not affect a substantial right of the appellant).
- **If the order is appealable, a notice of appeal must be filed with the clerk of the trial court within *thirty days* from entry of the appealable order or judgment;** as W.R.A.P. 2.01 makes clear, timely filing is jurisdictional.
- Keep in mind that “[a]s a matter of law, ignorance of the rules of appellate procedure cannot constitute the basis for a claim of excusable neglect in a motion to extend the time for filing a notice of appeal pursuant to W.R.A.P. 2.01(a)(1).” *Tusshani v. Allsop*, 1 P.3d 1263, 1265 (Wyo. 2000).

What if you can't determine if the order is appealable?



- If it cannot be determined whether the order or judgment is appealable, and there is concern about possibly missing the deadline to file the notice of appeal, then there is a route that may be of help.
- Consider filing a notice of appeal and if it turns out the order is not appealable, it may be (1) simply dismissed by the Court, or (2) treated as premature.
- If the former happens, counsel will have confirmation from the Court that the order is not appealable and can then file when the actual appealable order is entered down the road.
- If the latter occurs, then W.R.A.P. 2.04 controls.

A quick note on post-trial motions



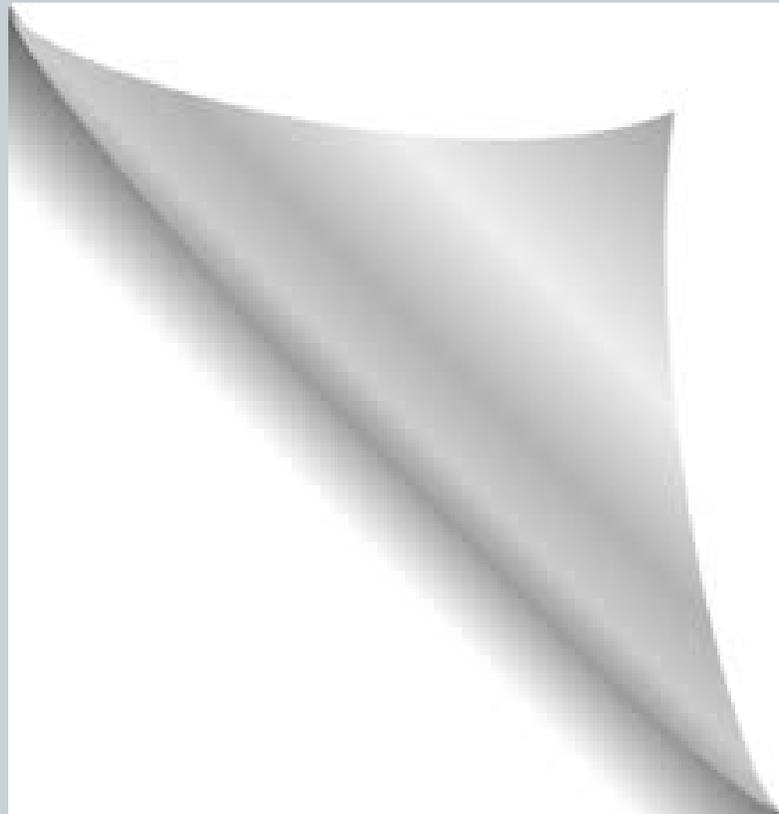
- An interrelated issue is the impact of post-trial motions. Because an appeal arises only from an appealable order, the filing of a post-judgment motion usually suspends the appealability of the order until the motion is decided.
- W.R.A.P. 2.02 provides that if a party timely files any of the ***expressly mentioned*** motions authorized by the Wyoming Rules of Civil Procedure in the district court, the time to appeal is tolled until there is an entry of an order dispensing with the motion or the *deemed denial of the motion*.

Post-trial motions *continued*



- Be careful, though, that the post-judgment motion is not an improper motion to reconsider because such a motion will not toll the time to file a notice of appeal. *See Evans v. Moyer*, 2012 WY 111, ¶ 11, 282 P.3d 1203, 1208 (Wyo. 2012) (“A post-judgment motion which is otherwise titled but, in actuality, only requests reconsideration of the district court’s judgment will be considered an improper motion for reconsideration and will not toll the time for filing a notice of appeal.”).

Let's Now Turn to the Notice of Appeal



Notice of Appeal and Related Requirements



- The guts of a notice of appeal are controlled by W.R.A.P. 2.07
- The notice of appeal shall:
 - Specify the party or parties taking the appeal
 - Identify the judgment or appealable order
 - Name the court to which the appeal is taken
 - Include the certificate required by W.R.A.P. 2.05(a) (*2015 amendments have critically changed this requirement*)
 - Appellant must indicate alignment of parties with their respective counsel when there are multiple appellees

Notice of Appeal *continued*



- *In civil cases the notice of appeal must also have an appendix that includes:*
 - (1) All pleadings that assert a claim for relief whether by complaint, counterclaim or cross-claim and all pleadings adding parties; and
 - (2) All orders or judgments disposing of claims for relief and all orders or judgments disposing of all claims by or against any party; and
 - (3) The judgment or final order and a copy of the trial court's decision letter if one was filed.

First Requirement per W.R.A.P. 2.07



- Regarding identification of the parties, the terms *Plaintiff and Defendant* should be used in the caption.
- If a joint appeal is taken, W.R.A.P. 1.06 enters the picture. Rule 1.06 states: “If two or more parties are entitled to appeal from a judgment or order, and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal.” Ensure that all parties jointly appealing are included on the notice of appeal, and consult with W.R.A.P. 2.08 as it explains the party taking the appeal is the appellant and the adverse party is the appellee.
- The more detailed the information that a practitioner can provide, the better.

Second Requirement per W.R.A.P. 2.07



- Second, the order or judgment being appealed should be identified with particularity. It should include the title of the order, the date it was entered, and any other detailed information to assist in its identification.
- Also, make sure the orders, identified in the notice, are attached in the appendix. ***We will talk about this more in a second.***

Third Requirement per W.R.A.P. 12.07



- As to the third requirement, if the appeal is to the Court, in the body of the notice state: "This appeal is taken to the Wyoming Supreme Court."
 - The reason for this requirement is because the W.R.A.P. govern appeals from circuit courts to district courts, and judicial review of administrative agencies.
- **Side Note**: For judicial review of administrative action, see W.R.A.P. 12. When an appeal is taken to a district court from an order of a circuit court, review of the district court's order comes to the Court, not as a notice of appeal, but as a petition for writ of review pursuant to W.R.A.P. 13. See *Kittles v. Rocky Mountain Recovery, Inc.*, 1 P.3d 1220, 1222 (Wyo. 2000).

Fourth Requirement per W.R.A.P. 12.07



- The fourth requirement has changed critically per the 2015 amendments to the W.R.A.P.
- Pursuant to W.R.A.P. 2.07(a)(4), the certification of a transcript request must be made ***within the body of the notice of appeal.*** *No longer can it be separately filed.*
- The corresponding rule concerning the certificate of compliance is W.R.A.P. 2.05, which states in pertinent part:

"A certificate of compliance with this rule shall be endorsed upon the notice of appeal."

Fourth Requirement per W.R.A.P. 12.07 *continued*



- The 2015 amendments now require what was previously the best practice: to include within the notice of appeal an endorsement that W.R.A.P. 2.05 has been satisfied.
- *Because of the 2015 amendments, a practitioner need not worry about inadvertently forgetting to file a separate certificate of compliance contemporaneously with the notice of appeal.*

Appendix to the NOA



- Turning to the appendix, make sure to follow Rule 2.07(b) in light of the 2015 amendment, which requires that the appendix “**include and be limited to**” what is expressly provided for under the rule.
- The reason for the amendment was because in the past, practitioners were either not including enough or including too much in the appendix, thus, placing a substantial burden on the clerks and the courts.
- Even though including the relevant pleadings, judgments, orders, and decision letters in the appendix of the notice of appeal is a simple task, attorneys incessantly forget this requirement, **which results in sanctions**. See W.R.A.P. 1.03(b)(1) (“Appellant or cross appellant . . . whose notice of appeal does not include the appendix required by Rule 2.07(b) and (c), may be subject to a monetary sanction when the case is docketed in the appellate court.”).
- Simply put, although elementary, the appendix is an important undertaking because the correct documents are necessary for docketing the appeal in the Court.

Related Requirements



- Another related requirement that needs to be satisfied contemporaneously with the filing of the notice of appeal is W.R.A.P. 3.02(b). This rule states in relevant part:

“ In all cases other than criminal and juvenile matters, if the proceedings in the trial court were reported by an official court reporter, appellant shall, contemporaneously with the filing of the notice of appeal, file and serve on appellee a description of the parts of the transcript which appellant intends to include in the record and unless the entire transcript is to be included, a statement of the issues appellant intends to present on appeal. . . . ”

Related Requirements *continued*



- With respect to the aforementioned requirement, The best practice, but unfortunately not the common practice, is to include an endorsement in the notice of appeal stating the requirements of W.R.A.P. 3.02(b) are satisfied.
- ***Doing so will remind practitioners of this task and reassure the Court that no issue will arise due to noncompliance with Rule 3.02(b). ***

Related Requirements *the final related requirement*



- Finally, the required **filing fees** must be paid.
- Rule 2.09 requires that “[a]t the time of filing the notice of appeal, an appellant shall deliver to the clerk of the trial court the filing fee for docketing the case in the appellate court . . . ”
- The district court filing fee is \$70.00.60 The Court filing fee is \$95.00.
- ***Best practice, again not commonly followed, is to include an endorsement in the notice of appeal stating the requirements of Rule 2.09 are satisfied. Although not obligatory, doing this will remind you of the fees courts require and clarify any confusion during the bedlam of filing the notice of appeal.***
- The clerk of the district court will forward the filing fee to the clerk of the Court when the district court clerk submits its notice that the record on appeal is complete. **At that point, the case will be docketed in the Court.**

Ah dang, a mistake in the NOA



- If after the notice of appeal is filed counsel uncovers a mistake, W.R.A.P. 2.01(c) comes into play.
- Notably, the 2015 amendments limit what can be included in an amended notice of appeal. The rule now states:

“An amended notice of appeal shall be limited to the correction of clerical errors or omissions in the original notice of appeal. It may not be used for the purpose of appealing an order or judgment entered subsequent to the filing of the original notice of appeal.”

- The moral of the 2015 amendment to Rule 2.01(c) is to take considerable care when drafting the notice of appeal to ensure that it includes the orders and judgments you wish to appeal. The time you spend is worth the cost.

Bringing It All Together



- A party has ***thirty days*** from the date the appealable order is filed in the district court to file the notice of appeal.
- In addition to filing the notice of appeal, you must also contemporaneously serve copies of the notice of appeal and the related requirements on the other parties and on the clerk of the Court.
- The 2015 amendments added the following to make this point clear: “Contemporaneously with the filing of the notice of appeal with the clerk of the trial court, ***a copy of the notice of appeal shall also be served on the clerk of the appellate court.***”
- It is important to make sure a copy is sent to the Court because that copy is the only documentation the Court initially has to create the file. ***Failing to serve the Court a copy of the notice of appeal will result in a sanction of \$150.00. See General Order 97-1, available on the WSC Clerk’s webpage.***

The Path to Perfecting an Appeal

Notice of Appeal and Other Related Requirements



•At this point, the interplay between the various appellate rules should be understood, so knowing how to perfect an appeal is on the horizon. A checklist incorporating all of the relevant rules is now warranted:

- ✓ Notice of Appeal – W.R.A.P. 2
- ✓ Certification of Transcript Request – W.R.A.P. 2.05(a) and 2.07(a)(4)
- ✓ Appendix to Notice of Appeal – W.R.A.P. 2.07(b)
- ✓ Certification of Payment of Filing Fee – W.R.A.P. 2.09(a)
- ✓ Description of Transcript – W.R.A.P. 3.02(b)

*****Certifications of compliance for all of these requirements ought to be included in the NOA. My recent law review article on this subject provides a template. Stay tuned for the citation so you can consult the article and utilize the template that is provided within.*****

The Record on Appeal and Docketing in the Wyoming Supreme Court



- After the notice of appeal is filed and all of the related requirements are satisfied, you must ensure the record is complete. This includes making sure that the court reporter gets the transcript compiled and timely filed with the clerk of the district court pursuant to W.R.A.P. 2.06 and 3.01.
- Because the Court normally will not consider matters outside the record on appeal, this step is significant. The Court recently reiterated: “When an appeal has been filed, ‘[i]t is the appellant’s burden to bring to us a complete record on which to base a decision.’” *Golden v. Guion*, 2013 WY 45, ¶ 5, 299 P.3d 95, 96 (Wyo. 2013)
- Rule 3.02(b) states, *inter alia*, “[i]f an appellant intends to assert on appeal that a finding or conclusion is unsupported by the evidence or contrary to the evidence, appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.”
- While failure to include a transcript of the evidence does not necessitate dismissal of the appeal, the Court’s review is restricted to the allegations of error that do not require a review of the evidence presented before the district court that has been memorialized in the transcript.

The Record on Appeal and Docketing in the Wyoming Supreme Court



- Pursuant to W.R.A.P. 2.06(a), the court reporter has sixty days from the time the notice of appeal is filed to file with the district court clerk the transcript or the portions of the transcript that have been ordered.
- The court reporter must then notify the Court and all parties to the appeal, *in writing or electronically*, that the transcript was filed in the district court.
- ***It is incumbent upon counsel to see that the transcript is timely filed, so be sure to follow-up with the court reporter and keep the lines of communication open.***

Speaking of the Record



- W.R.A.P. 3.01 sets forth what must be included.
- Practitioners must understand the **difference between subsections (a) and (b) of Rule 3.01**, and be cognizant of the Court's aversion to, and the W.R.A.P.'s preclusion of, counsel designating the entire district court file as the record on appeal in **civil** cases. Invariably there will be filings in the district court that do not bear upon the appeal, and should not be included in the transmitted record.
- The simple truth is that counsel must spend time deciding what is useful and relevant and what is not. This *truth* is why the rule differentiates between what constitutes the **trial court record** (subsection a) and what is **transmitted** to the appellate court after designation (subsection b).

Surrogates to the Record



- If the proceeding was not transcribed or the transcript is unavailable, a party ought to consider filing with the district court a Statement of the Evidence pursuant to W.R.A.P. 3.03.
 - Rule 3.03:
 - ✦ *“If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means including appellant’s recollection. **The statement shall be filed in the trial court and served on appellee within 35 days of the filing of the notice of appeal.** Appellee may file and serve objections or propose amendments within 15 days after service. The trial court shall, within 10 days, enter its order settling and approving the statement of evidence, which shall be included by the clerk of the trial court in the record on appeal. If the trial court is unable to settle the record within 10 days, the judge shall notify the appellate court clerk, trial court clerk, and the parties of the delay and anticipated date of completion.”*
- Alternatively, an Agreed Statement “in lieu of designations of the record” may be filed in the district court by the parties pursuant to W.R.A.P. 3.08.
 - W.R.A.P. 3.08(a)-(b):
 - ✦ *“In lieu of designations of the record, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial court, and may set forth those facts averred and proved, or sought to be proved, which are essential for review. **The parties shall notify the clerk of the trial court, pursuant to Rule 2.05, in writing at the time the notice of appeal is filed that an agreed statement will be used as the record.**”*
 - ✦ *“**The statement shall be filed with the trial court within 45 days of filing the notice of appeal.** The trial court shall, within 15 days, enter its order adopting the statement, or promptly set it for hearing to resolve any disputes. The order and statement shall be included by the clerk of the trial court in the record on appeal.”*
- ****If one of these paths is pursued, Rule 2.05(a) requires a practitioner to state the chosen path on the notice of appeal in place of the endorsement for a certification of a transcript request.****

Docketing of the Appeal and the WSC's Assumption of Jurisdiction

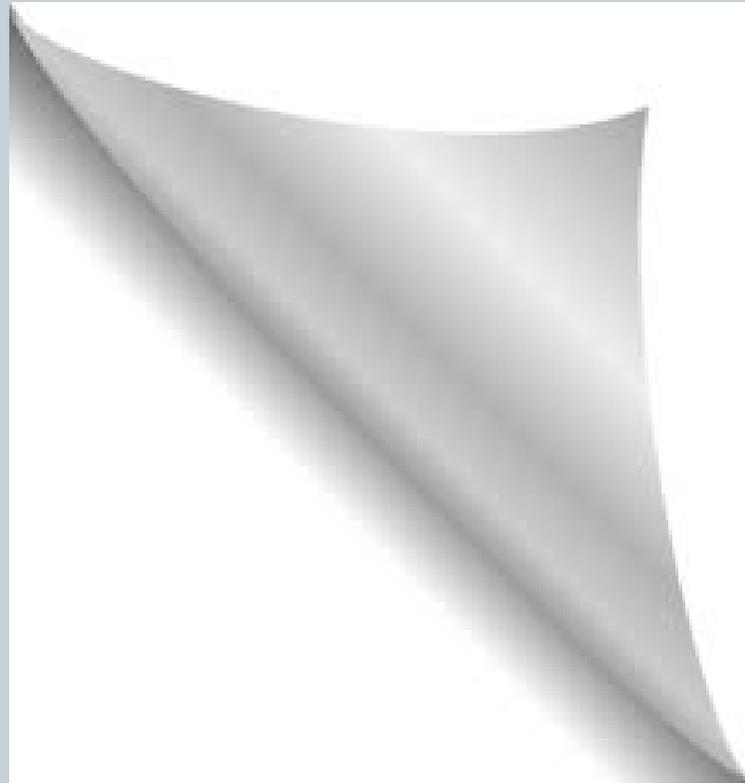


- Once the record is assembled, W.R.A.P. 3.05 requires, within three working days, that the district court clerk advise, in writing, the clerk of the Court that the record is complete and certified in compliance with the W.R.A.P.
- When the Court receives **both** the district court's notice of completion of the record **and** required filing fee, **the Court will docket the appeal.**
- At that point, the Court will assume jurisdiction, and the clerk of the Court will serve the parties to the appeal notice that the appeal has been docketed and set forth the briefing schedule.

Substance of an Appellate Brief



The appeal is perfected and the case is docketed with the Court. Now's it time to write the brief.



Substance of an Appellate Brief



- Now it is time to employ deductive reasoning and decide what issues to appeal, especially in light of the different standards for appellate review.
- Remember, knowing and writing within the controlling standard of review is part of what makes an effective appellate attorney.
- Instead of a handful of gravel approach, select solid issues based on legitimate law and focused facts that will allow the Court to confidently rule in favor of your client.
- Reflect on what the Justices will be thinking. For instance, ask yourself: If the Court rules in favor of my client, what are the broad legal implications? Start with the standard of review, craft the issues accordingly.
- Simply put, draft your brief to lend the Justices a vision as to how the opinion ought to be written

Structure of an Appellate Brief



- Writing at its core is an inspired exercise, through which creative theories and arguments abound. However, the Court requires some structure and uniformity to assist with an effective review.
- Rule 7.01 requires “[t]he brief of appellant shall contain under appropriate headings and in the order indicated,” the following:

Structure of an Appellate Brief



- ✓ Title page consisting of (1) appellate court caption and appellate court case number, (2) identification of the party filing the brief, and (3) the name, address, and Wyoming Bar number of counsel preparing the brief;
- ✓ Table of contents with page references;
- ✓ Table of cases, statutes and other authorities;
- ✓ Statement of issues presented for appellate review;
- ✓ Statement of the case, which is broken down into the nature of the case, course of proceedings, disposition below, and statement of facts (the statement of facts is usually its own section);
- ✓ Argument, which includes the applicable standard of review and summary of the argument. Regarding the former, if there are multiple issues that require different standards of review, each standard of review should be incorporated in the argument section by the issue respectively. As to the latter, although not required, a summary of the argument should always be utilized to provide the Court with a patent path of where you are going and why (take this opportunity to highlight your major points and to educate the Court in a laconic fashion);
- ✓ Conclusion that is short and concise and states the precise relief you seek;
- ✓ Signature of counsel or pro se party;
- ✓ Certificate of service, which reflects electronic service via the Court's C-Track Electronic Filing System (CTEF); and
- ✓ Appendix that includes (1) a copy of the judgment or final order appealed from, (2) the trial court's decision letter or other written and/or oral reasons for judgment, if any, and (3) the statement of costs required by W.R.A.P. 10.01.

Structure of an Appellate Brief

A note on joint appeals



- The 2015 amendments impose a new requirement when there is a joint appeal. Pursuant to W.R.A.P. 1.06, ***“Appellants filing jointly shall file only one combined brief and, if applicable, one combined reply brief.”***
- *****So if parties are hitching their wagons, be mindful of this limitation.*****

A Word on Framing the Issues



- A statement of the issues, coupled with the applicable standard of review, is fundamentally important for an effective appellate brief.
- It is enthusiastically encouraged to frame the issues first by incorporating the standard of review. For example, if the standard of review is abuse of discretion, your issue should begin by stating: “Did the district court abuse its discretion by . . .?”
- Another example, concerning a different standard of review is: “Was the district court’s finding that . . . clearly erroneous?”
- It is also common to present issues as a statement rather than a question by utilizing the term “whether.”
- Whichever way you decide, do not be surprised if the Court rephrases the issues as it sees fit.

A Word on Framing the Issues continued



- Another innovative way to present an issue is the wait-for-it approach, which legal scholar, Bryan Garner coined as a “deep issue.”
- Over the past several years, the Wyoming Attorney General’s Office has consistently framed issues using the wait-for-it approach.
- To see an example of a deep issue in action, see *Merit Energy Co. v. Dep’t. of Revenue*, 2013 WY 145, ¶ 2, 313 P.3d 1257, 1258 (Wyo. 2013).

A Word on Framing the Issues continued



- No matter how you choose to frame the issue, make sure you present it in a clear and cogent manner.
- A particular case may lend itself to framing the issue with a succinct one-sentence question, while another is better suited for a deep issue; do not get stuck on one style.
- After all, the more you think through your issues and phrase them accordingly, the less time the Court will have to devote to rephrasing.

The Appellee's Brief



- The appellee's brief is controlled by W.R.A.P. 7.02, which requires the brief to "conform to the requirements of Rule 7.01, except that a statement of the issues, or of the case, is not required."
- ****However, do not forgo an opportunity to reframe the issues correctly for the Court just because a statement of the issues is not required. In rare circumstances will the appellant frame the issues exactly right. Rest assured, you are allowed to restate the issues; it is common practice.****
- Do not simply regurgitate what the appellant says, rather craft your issues clear and complimentary to your client's case

The Appellee's Brief continued



- A comment is warranted regarding arguments made in an appellee's brief versus those that should be made in a cross-appeal; the latter is controlled by W.R.A.P. 2.01(a)(2).
- The Court addressed this difference in *GOB, L.L.C. v. Rainbow Canyon, Inc.*, 2008 WY 157, ¶¶ 9–12, 197 P.3d 1269, 1271–72 (Wyo. 2008).
- We don't have time to dive into the details of *GOB*, but take a read when you have a chance, as the Court's analysis provides helpful guidance not only for what arguments to make in the appellee's brief, but also for what arguments must be made through a cross-appeal.
- It is best to learn how the Court distinguishes between an appellee's brief and a cross-appeal when the appellant files the notice of appeal. That way, if a cross-appeal is required, the procedures set forth in W.R.A.P. 2.01(a)(2) can be followed, and the appellee/cross-appellant can file a timely notice of appeal.

Reply Briefs



- A reply brief is limited to new issues and arguments presented in the appellee's brief. Reply briefs are controlled by W.R.A.P. 7.03(a), which requires that the appellant "precisely and concisely set forth on the first page those new issues and arguments raised by the brief of the appellee which are addressed in the reply brief."
- Failure to comply with Rule 7.03(a) will subject the party to sanctions—usually the court will disregard the reply brief or parts thereof.
- For an example of noncompliance and a resulting sanction, see the order in *Travelocity.com LP v. Wyoming Dep't of Revenue*, No. 13-0078 (Wyo. Oct. 29, 2013).
 - There, the Court found "that, contrary to W.R.A.P. 7.03, Appellants' reply brief [was] improper, at least in part, because it [was] not 'limited to such new issues and arguments' that [were] 'raised by the brief of appellees.'" It further found the brief "contrary to W.R.A.P. 7.03, [because] the reply brief [did] not 'precisely and concisely set forth on the first page those new issues and arguments raised by the brief of the appellee which [were] addressed in the reply brief.'" As a result, the Court declined to grant the appellant's leave to file a statement of the issues and disregarded the improper portions of the reply brief.
- Also, the 2015 Amendments shortened the page limit to **20** pages.
- So, read the rules, consult my *Law Review Article*, and no doubt you will understand what is required. Do not overlook what is expected because the Court won't.

A Few Minutes on Designating the Record as promised



- Designating the record is controlled by W.R.A.P. 3.05.
- Logistically, counsel must obtain the docket sheet for the case from the district court clerk. The sheet must then be marked to designate the documents the clerk will physically send to the Court. It is very important to get the docket sheet because it will have the consecutive numbering that the clerk of the district court only puts on trial court documents for an appeal.
- Per Rule 3.05, “Appellant shall, ***contemporaneously with filing its brief*** in the appellate court and service of that brief upon appellee, ***file with the clerk of the trial court*** and serve on all parties and the appellate court clerk ***a designation for transmission of all parts of the record***, without unnecessary duplication, to which appellant intends to direct the appellate court in its brief.”

A Few Minutes on Designating the Record continued



- It is essential to file a designation of the record because the appellant has “the burden of providing this Court with a complete record on which to base a decision.”
- Because the record provides support for your client’s issues on appeal, when the required portions are not designated, the appellant has a better chance of losing the appeal and is subject to *sanctions* for not presenting cogent arguments.
- Make sure the designation is also filed at the same time the brief is filed. When a party fails to designate the record with filing the brief, the Court may *sanction* counsel for noncompliance. See W.R.A.P. 1.03(b)(2) (“A party who fails to file the required designation or certification of record in the trial court contemporaneously with filing the brief in the appellate court may be subject to a monetary sanction upon notification of non-compliance by the clerk of the trial court.”).

A Few Minutes on Designating the Record continued



- What about Appellees? W.R.A.P. 3.05(c) provides the answer.
- If the appellee wishes to designate additional parts of the record, not designated by the appellant, the appellee must “file with the clerk of the trial court and serve upon all parties and the appellate court clerk a designation of those parts of the record desired by appellee” **contemporaneously** when filing appellee’s brief.
- *A change per the 2015 Amendments.* An appellee no longer needs to make a certification if the appellee does **not** wish to designate additional parts of the record.

A Few Minutes on Designating the Record continued



Specific Limitation for Civil Cases

- In civil cases, the entire record cannot be designated. W.R.A.P. 3.05(e) states “in civil cases, parties cannot simply designate the entire record.”
- That’s clear enough, but parties continue to try and simply send up the whole record, to their detriment. ***So what happens?***
- If a party designates the entire record in a civil case without an order from the Court, counsel will assuredly be sanctioned for a monetary sum, somewhere around **\$50.00**. See W.R.A.P. 1.03(b)(2).

Electronic Filing and Hard Copies of the Brief



- How do you file? How many copies are required? What types of signatures are required? When should you file?
- At first blush, these questions seem to call for simple and clear answers, but a deeper look at the W.R.A.P., and the *Electronic Filing Administrative Policies and Procedures Manual* (“Manual”), provide somewhat more complicated answers and create concerning circumstances for the unwary.
- By way of example, with the advent of the Court’s C-Track Electronic Filing System (CTEF), one would think that the paperless era has arrived. **Well, sort of.**

Both Electronic and Hard Copies are Required



- Rule 1.01 now provides a clear indication that electronic filing is the general rule.
- Rule 1.01(a) states: “Except as noted below, all briefs, motions and other pleadings shall be filed electronically in the supreme court using C-Track Electronic Filing System (CTEF), and the electronic version shall be the officially filed document in the case.”
- **Unfortunately, there are exceptions to this rule.** In addition to filing briefs electronically, one original paper copy and six paper copies of the brief must be filed with the Court. The seven paper copies of the brief submitted for filing must be identical to the electronically filed brief with the exception of the *original handwritten signature*.
- Thus, the Court requires outdated paper filing (just my opinion) in addition to electronic filing of all documents “[u]ntil otherwise ordered.” W.R.A.P. 1.01(c).
- That is right, **a total of seven hard copies must be filed along with an electronic copy.** The original paper version resides with the Clerk of the Court. The copies are distributed to each Justice and the senior staff attorney.

Electronic Filing



- Turning back to electronic filing, since 2008, the Court requires all briefs by Wyoming attorneys to be e-filed.
- Before you can electronically file a brief, **you must complete a training course and pass the ensuing test.**
 - The training course takes about one hour and the test consists of thirty multiple choice questions; a score of 100% is required.
 - ****A friendly suggestion****: Avoid waiting until the eleventh hour to take the test and file the brief. If counsel is not already a CTEF user, prudence suggests taking the training course and test when the notice of appeal is filed (or even sooner than that).

Electronic Filing continued



- There are several requirements for electronically filing documents in the *Electronic Filing Administrative Policies and Procedures Manual* that compliment the W.R.A.P. For example, **Section 9** of the Manual provides ---
- A notice of electronic filing (NEF) that is automatically generated by the Court's electronic filing system constitutes service of the filed document on CTEF users (with the exception of sealed filings, or other filings required to be filed by conventional means).
- Each registered user of the CTEF system is responsible for assuring that his or her email account is current, is monitored regularly, and that email notices are opened in a timely manner.
- The certificate must state the manner in which service (through the CTEF or by manual service, such as mail, hand delivery, [etc.]) was accomplished on each party and should be signed as "s/name" by the attorney or an authorized agent who made the service. The NEF generated by the Court's electronic filing system does not replace the certificate of service required by the rules of procedure.
- In addition to the service requirements of the Wyoming Court Rules, users must certify that all required **privacy redactions** have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been **scanned for viruses and is free of viruses**.
- Notification of the filing of all Court orders and opinions related to cases will be served electronically through the CTEF to all registered counsel of record and email addresses added for receipt of system generated notices.

Electronic Filing continued



- In turn, W.R.A.P. 14.01 builds from the Manual's requirements. **Study the rule in detail at your convenience after this presentation.**
 - For all cases filed through CTEF, the notice of electronic filing that is automatically generated constitutes service of the document on CTEF users and the additional service of a hardcopy is not necessary.
 - Each registered user of the CTEF system is responsible for assuring that their email account is current, is monitored regularly, and that email notices are opened in a timely manner.
 - The notice of electronic filing generated by CTEF does not replace the certificate of service on the document being filed.
- It is critically important that practitioners make all necessary redactions and ensure the certificate accurately reflects the same. Indeed, W.R.A.P. 1.01(a)(2) now makes this point clear.

“When documents filed do not comply with the rules (such as the Rules Governing Redaction from Court Records), the document will be removed from the public docket and counsel will immediately be notified by email and instructed to re-file the pleading within a specified amount of time. If the pleading is not correctly re-filed within the required time, it shall not be considered timely filed.”

Electronic Filing continued



- An example of a certificate of service that meets the requirements for electronic filing is as follows:

I hereby certify that a true and correct copy of the foregoing [document] was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System (CTEF) to the following:

[Opposing Counsel]

The original paper copy plus six copies of the [document] were sent to the Wyoming Supreme Court by U.S. mail, first class, postage pre-paid this ____ day of ____, 20__.

I have accepted the terms for e-filing and hereby certify the foregoing document, as submitted in electronic form, is an exact copy of the written document filed with the Wyoming Supreme Court Clerk and has been scanned for viruses and is free of viruses. Additionally, I certify all required privacy redactions have been made, and with the exception of those redactions, every document submitted in digital form is an exact copy of the written document filed with the Wyoming Supreme Court Clerk.

s/ [Your Name]

A Quick Word on Hard Copies



- Regarding the filing of the requisite paper copies, the original must have an actual **handwritten signature** and the six additional copies must reflect the same.
- According to the Manual, “the signed paper original accepted for filing plus six copies ***are required to be filed within three days of electronic filing.***”

Timing



- As for timing, W.R.A.P. 7.06 and 14.03 govern.
- The appellant's brief must be filed within **forty-five days** after service of the notice that the case has been docketed in the Court.
- The appellee's brief must be filed within **forty-five days** after service of the appellant's brief.
- With respect to reply briefs, the deadline is **fifteen days** after service of the appellee's brief.
- Per the Manual, documents *received after 11:59:59 p.m., Mountain Standard Time (MST), will be considered submitted on the next business day.*
- *Additionally, per the Manual, Documents submitted on weekends or recognized holidays will be considered submitted on the next business day.*
- Make sure your brief is timely filed; otherwise it will not be accepted by the Court absent a showing of excusable neglect.
- If the deadline simply cannot be met, consult W.R.A.P. 7.10 and consider seeking an extension with the Court. *Be sure to recognize the need for an extension before the deadline because the rule requires a motion for an extension be filed before the brief is due!*

Timing



- There are two valuable resources to confirm your calculations.
- The first is the CTEF system, which has “**Pending Ticklers**” showing what the Court understands the due dates to be. Simply visit the Court’s public docket site, type in the case information, and voilà.
- The second is Appendix 1 to the W.R.A.P., which provides a useful timetable. Although the Appendix is unofficial, it is updated to take into account the 2015 amendments.

Oral Argument



- The appeal has been perfected, the briefs correctly filed, and the matter is set for oral argument pursuant to W.R.A.P. 8.01(a)(2).
- The appellant goes first, and may reserve part of the allotted time for rebuttal.
- On the day of the argument, a check-in sheet will be at the front desk of the clerk's office for counsel to sign and state how much time they need for their arguments.
- Once checked in, counsel will then head to the courtroom and wait for their case to be called and to be given instructions from the Court.
- When the case is called, the appellant and the appellee will take designated spots at the counsel tables.

Oral Argument continued



- Recently, the Court created a helpful reference for practitioners during oral arguments:
 - *Practitioner's Guide to Oral Argument Before the Wyoming Supreme Court.* **A copy can be found in the appendix of my law review article, and also on the WSC's website.**
- Additionally, at counsel table during oral argument there is a sheet that provides abbreviated information and instructions concerning the same.

Oral Argument continued



- The podium, where counsel argues, has a traffic light indicator system to provide a reference for counsel concerning the time remaining for argument.
- The green light will remain on until counsel has five minutes remaining.
- The yellow light will then flicker and remain on until there is no time.
- When time runs out, the terrible—or perhaps saving grace—red light appears. For appellants, when the red light comes on it means their argument-in-chief is finished, but appellants can use their reserved rebuttal time if desired.

Oral Argument continued



- A few more things related to oral argument:
 - Right out of the chute, counsel must state his or her name and the party he or she represents. *If you do not do this, the Chief Justice will stop you and ask that you do so.*
 - Then, counsel must begin educating the Court why their client should win.
 - Keep in mind what the great John Marshall once said: “To listen well is as powerful a means of communication and influence as to talk well.”
 - During the argument, the Court will frequently ask questions—which is a good thing—so listen carefully and answer the question when asked.
 - If you do not know the answer, say so, it is okay. Do not try to shoot from the hip and inadvertently misstate something, as the record and law will eventually be solicitously reviewed by the Court and any distortion will be uncovered. ***Note: If after your argument you uncover authority not cited or discussed, which is relevant to the case, consider filing a Notice of Additional Authority pursuant to W.R.A.P. 7.04. ***

Judicial Opinions



- In 2013, the Court issued an Order Adopting the *Wyoming Supreme Court Internal Operating Procedures*, as Amended (“Order”).
- Pursuant to the Order, “[w]ithin [ninety] days after assignment of an opinion to a justice for writing, an initial draft shall be prepared and shall be circulated to the other justices.”
- Then, other justices must respond to the proffered majority opinion within ten calendar days, indicating a decision to concur, dissent, or specially concur.
- “After all justices have responded to a circulated opinion, thus causing that circulated opinion to be ready for publication, the opinion shall be published within [twenty] days.”
- Of course, there is an exception to these timelines which allows extensions for up to thirty days and “[i]n exceptional cases, such as death penalty cases, or cases involving many issues, or very complex issues, the Court may entirely waive the applicability of this schedule.”
- *The moral is, if your client wants to know exactly when the Court will come down with an opinion, answer accordingly: In four months or so, but it could be a little sooner or perhaps a little longer.*

Law Review Article



- Tyler J. Garrett, *Anatomy of a Wyoming Appeal: A Practitioner's Guide for Civil Cases*, 16 Wyo. L. Rev. 139 (2016).
- You can access the article at: <http://repository.uwyo.edu/wlr/vol16/iss1/6/>
- Or you can wait for your hardcopy, which will be mailed out May 1st.
 - -The article provides:
 - ✦ Detailed examination of the topics discussed today and a lot more!
 - ✦ Notice of Appeal template incorporating all of the requirements to timely perfect an appeal.
 - ✦ Designation of the record template
 - ✦ Statement of Costs template
 - ✦ Copy of the *Practitioner's Guide to Oral Argument*, which was recently issued by the WSC.

Thank You for your Time!



- *Learn the rules of appellate procedure.*
- *Timely perfect the notice of appeal.*
- *Bust out a brief that is clear, cogent, and captures the Court's attention.*
- *Have a collegial conversation with the Justices at oral argument.*
- *Play the game better than anyone else.*