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Basic Appellate Practice: A Guide to Perfecting an Appeal in Wyoming

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Basic Appellate Practice: A Guide to Perfecting an Appeal in Wyoming

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Adhering to the technical requirements of the Wyoming Rules of Appellate Procedure has become increasingly important. In this article, the author discusses the most common problems encountered in perfecting an appeal in Wyoming. This article is a practical guide to appellate practice and should be of value to experienced attorneys as well as to the newest members of the Wyoming Bar.

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The opinions expressed in this article are those of the author, not of the Chief Justice or the Wyoming Supreme Court.

In 1984, 322 cases were filed in the Wyoming Supreme Court, nearly four times the eighty-nine cases filed in 1969.[1] In the same period, the number of justices on the court has increased only from four to five, the maximum number currently allowed by the Wyoming Constitution.[2] Wyoming has no intermediate appellate court, nor has it adopted the practice of assigning cases for hearing by a panel of the court.[3] Our constitution and statutes require that the court act with at least a majority,[4] and the internal operating rules of the supreme court require that the "full court shall sit in consideration of all cases."[5] In addition, the court must decide all cases by written opinion.[6] Because of these constitutional, statutory, and rule restrictions, the increase in the number of cases filed reflects a real increase in the workload of the Wyoming Supreme Court.

Against this backdrop, the provisions of rule 1.02 of the Wyoming Rules of Appellate Procedure (W.R.A.P.), governing failure to comply with the appellate rules, take on alarming significance.[7] Rule 1.02 provides that the timely filing of a notice of appeal is jurisdictional, and therefore the court must dismiss an appeal which is not timely filed. For other rules violations, rule 1.02 authorizes "such action as the reviewing court deems appropriate." Such action includes, but is not limited to, some fairly serious consequences: citing a party or his attorney for contempt; refusing to consider the offender's contentions; assessing costs; and affirming or dismissing the appeal. While rule 1.02 merely authorizes dismissal for violation of the bulk of the rules, other appellate rules, such as rule 1.04, governing final orders, make compliance jurisdictional.[8] In addition the Wyoming Supreme Court decisions have made dismissal mandatory for several other rules violations.[9] Furthermore, the sanctions imposed for

1. This is also nearly twice the 162 cases filed ten years ago in 1974. *See* Appendix I.

2. WYO. CONST. art. 5, § 4(a).

3. The court did try the practice of panelling once, but abandoned the experiment as unsuccessful.

4. WYO. CONST. art. 5, § 4(a); WYO. STAT. § 5-2-106 (1977).

5. WYO. SUP. CT. INT. OPER. PROC. 2(a)(i).

6. WYO. STAT. § 5-2-110 (1977); WYO. R. APP. P. 7.01. Although the practice is laudable, it adds much to the court's workload. *See* Note, *Written Opinions in the Modern Legal System: Publish and Perish*, 41 ALB. L. REV. 813 (1977) for an analysis of the pros and cons of publishing opinions.

7. The timely filing of a notice of appeal is jurisdictional. The failure to comply with any other of these rules or any order of court does not affect the validity of the appeal, but is ground only for such action as the reviewing court deems appropriate, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of costs, or dismissal or affirmance.

WYO. R. APP. P. 1.02.

8. WYO. R. APP. P. 1.04; Molle v. Iberlin Ranch, 614 P.2d 1339, 1340 (Wyo. 1980). *See infra* text accompanying notes 42-104.

9. One such example is untimely filing of the record on appeal. *See infra* notes 167,

those violations which will not result in dismissal often may be difficult to distinguish from dismissal.[10]

While dismissal is neither automatic[11] nor the only sanction for failure to comply with the rules of appellate procedure, it is clearly authorized. "This court has consistently held that compliance with rules promulgated by this court is required and we have regularly invoked the sanction of dismissal for failure of the appellant to comply therewith."[12] While the supreme court has disclaimed any scheme to "concoct a rule violation,"[13] it has criticized failure to follow the rules[14] and has taken an increasingly harsh stand against rules violations over the years.[15] It is clear that as the number of cases increase so do the dismissals.[16] Because an appeal is a privilege only,[17] perhaps in the future the sanction deemed appropriate for a rule violation will more likely be dismissal. The supreme court indeed has said that the orderly administration of justice depends on procedural rules, which cannot be relaxed at the whim of the court.[18]

The spectre of dismissal is not a welcome one to the attorneys of this state. And yet, because the bulk of the dismissal orders are not published (either in the reporter system, or even in the advance sheet service), the bar in general has no convenient method of tracking what the court is doing. In many cases the only individuals to learn from what the court has done are the parties to the appeal. Whatever lesson is to be gleaned

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172 and cases cited therein. In 1984, one appeal was dismissed for failure to file timely the record on appeal.

Another example is failure to file appellant's brief. *See infra* note 220 and cases cited therein. Untimely filing of appellant's brief should also be noted. *See infra* note 219 and cases cited therein; WYO. R. APP. P. 5.11. In 1984, 13 appeals were dismissed for failure to file timely appellant's brief.

One final example is improper number of appellant's brief. *See infra* notes 208-210 and cases cited therein. In 1984 no appeal was dismissed for filing the improper number of briefs, but in International Ass'n of Fire Fighters, Local 279 v. Civil Service Comm'n, No. 84-244 (Wyo. appeal pending March 11, 1985), the City of Cheyenne neglected to file timely appellee's brief, and asked the supreme court to consider the trial brief instead. The court declined to do so. Letter from Chief Justice Rooney, International Ass'n of Fire Fighters, Local 279 v. Civil Service Comm'n, No. 84-244 (Nov. 20, 1984).

10. For example, when an appellant fails to support properly his arguments, dismissal is not the usual sanction. The court merely refuses to consider the specific issue unsupported by authority or cogent argument. *See infra* notes 201, 202 and cases cited therein. Of course, if none of the issues raised were appropriately supported, the court would consider no issue. It is difficult to see how this differs from a dismissal.

11. The court disavowed any automatic dismissal theory in DS v. Department of Public Assistance and Social Services, 607 P.2d 911, 914 (Wyo. 1980).

12. Dixon v. City of Worland, 595 P.2d 84, 86 (Wyo. 1979).

13. "We do not function for the purpose of demonstrating our authority and awesome power to wave a wand and make an appeal disappear, but exist to administer justice to those who come to settle their disputes." Blake v. Rupe, 651 P.2d 1096, 1114 (Wyo. 1982).

14. The court has said it "would be gratified if attorneys in this state would follow our rules. . . ." *In re* Estate of Campbell, 673 P.2d 645, 649 (Wyo. 1983); Graham v. Walker, No. 84-309 (Wyo. motion to dismiss denied Jan. 18, 1985). *See also infra* text accompanying notes 128-130.

15. Compare the old and new approach concerning failure to make cogent argument, *infra* text accompanying notes 200-202.

16. *See* Appendix II.

17. Geraud v. Schrader, 531 P.2d 872, 875 (Wyo. 1975).

18. Mayland v. State, 568 P.2d 897, 899 (Wyo. 1977).

from the dismissal orders can do the parties to the appeal little good—it comes too late, in most cases, to help them. They learn only for their next appeal.

Yet many of the appeals dismissed in 1984 were dismissed on the basis of sound, published precedent. Thus what the court said in 1944 still rings true: "It is rather unfortunate that counsel are so busy that they do not have time to consult the decisions of this court, and that we should continually be presented with a simple question of practice which has been before this court a number of times."[19] Because the supreme court's caseload is increasing at a phenomenal rate, and because changes in the structure of the court, which might help it better deal with its caseload cannot be made without amending the rules, the statutes, or the constitution,[20] one can predict an increasing use of dismissal as a sanction for failure to comply with the rules of appellate procedure. It has long been clear that the court will reach jurisdictional defects on its own motion, if necessary. The court is "duty bound to inquire into the matter and dismiss the appeal if the record discloses a want of such jurisdiction."[21]

The purpose of this article is to point out the most common reasons appeals are dismissed in the supreme court.[22] Not all aspects of appellate practice will be discussed here.[23] While the rules of appellate procedure cover appeals to the district court from inferior courts or administrative agencies,[24] the focus here is on practice in the supreme court alone. In addition, because petitions for certiorari are not yet covered in the appellate rules, they will not be addressed here.[25] While this article is directed

19. York v. James, 60 Wyo. 222, 233-34, 148 P.2d 596, 600 (1944).

20. The Wyoming Legislature has appropriated funds to add two additional attorneys to the supreme court staff on July 1, 1985, to help alleviate the congestion. In addition, it is clearly appropriate and necessary for the court to consider amending the rules to include provisions requiring docketing statements (and a corresponding limited argument calendar), limiting further the length of briefs and record appendices, and expediting the processing of appeals. Since the requirement that all decisions be announced by written opinion is statutory, the legislature may also be required to act to assist the court in dealing appropriately with its increased caseload.

21. Wyoming State Treas. *ex rel.* Workmen's Comp. Dep't v. Niezwaag, 444 P.2d 327, 328 (Wyo. 1968), *citing* Big Horn Coal Co. v. Sheridan-Wyoming Coal Co., 67 Wyo. 300, 313, 224 P.2d 172, 177 (1950). "Even though these jurisdictional deficiencies were not called to our attention by the parties, it was, nevertheless, our unhappy obligation to call them up ourselves." Rutledge v. Vonfeldt, 564 P.2d 350, 352 (Wyo. 1977). *See also* Compton v. State, 555 P.2d 232, 233 (Wyo. 1976).

22. The causes of the 1984 dismissals are summarized in Appendix II.

23. For a complete guide to appellate practice in Wyoming, the reader is directed to R. RIDEOUT & S. HACKL, WYOMING APPELLATE PRACTICE UNDER THE WYOMING RULES OF APPELLATE PROCEDURE (1985).

24. WYO. R. APP. P. 1.01, 1.03; Wood v. City of Casper, 660 P.2d 1163, 1166 (Wyo. 1983); Mayland v. State, 568 P.2d 897, 898-99 (Wyo. 1977). *See* WYO. R. APP. P. 12 and WYO. R. APP. P. Cts. Limited Juris. 1.01.

25. But interested persons should consult WYO. CONST. art. 5, § 3; Kobos v. Sugden, 694 P.2d 110 (Wyo. 1985); State v. Sodergren, 686 P.2d 521 (Wyo. 1984); State v. Heiner, 683 P.2d 629 (Wyo. 1984); City of Laramie v. Mengel, 671 P.2d 340 (Wyo. 1983); Call v. Town of Afton, 73 Wyo. 271, 278 P.2d 270 (1957); City of Sheridan v. Cadle, 24 Wyo. 293, 157 P. 892 (1916). *See also* Note, *The State's Right to Appeal in Criminal Cases. State v. Heiner, 683 P.2d 629 (Wyo. 1984),* 20 LAND & WATER L. REV. 723 (1985). In 1984, the court denied seven petitions for writs of certiorari and granted two in addition to the cases cited above.

primarily at attorneys practicing in Wyoming, the cautions contained herein apply equally to those persons who represent themselves. The Wyoming Supreme Court has held that no special consideration will be given a litigant appearing *pro se.* He has no greater rights than other litigants and he will be treated as if he were represented by an attorney.[26]

THE SCOPE OF THE PROBLEM

Although perfecting an appeal is a fairly simple process, numerous roadblocks can arise.[27] It is unusual for an individual case to encounter more than one obstacle, but two cases filed in 1984 demonstrate that there are many pitfalls along the way.

The case of *Nicholas v. Chaput*[28] is one such case. Nicholas was the attorney and personal representative for the Kicken estate and attorney for the operating receivership. He was relieved of his duties as personal representative on May 23, 1983. After a March 15, 1984 hearing, the trial court entered an order denying various motions and indicating that Nicholas had no standing to participate further in the proceedings. Nicholas appealed from that order on April 19, 1984. His appeal was ultimately dismissed for failure to file timely a brief of appellant.[29] On June 21, 1984, the trial court approved the receivership report, but denied the request to terminate the receivership. Nicholas appealed from that order on June 29, 1984, but his appeal was dismissed for lack of a final order.[30]

On September 18, 1984, the trial court entered an order denying Nicholas' amended motion to intervene. Nicholas appealed from that order, but failed to designate a transcript.[31] On September 25, 1984, the final order and decree granting the petition to dissolve the receivership was entered. Nicholas also appealed from that order.[32] Unfortunately, the notice of appeal from the September 25, 1984 order specified an appeal from all previous orders, judgments and decrees, including the order denying intervention. The court dismissed this second appeal on December 6, 1984, and noted that as to the order denying intervention, the second notice of appeal was not timely, that the other orders were not specified, that there was no designation of transcript or notation of the court to which the appeal was taken, and that Nicholas had no standing to appeal from the order dissolving the receivership.[33] That same order allowed the

26. *In re* Parental Rights of GP, JP, and SP, 679 P.2d 976, 984 (Wyo. 1984); Osborn v. Manning, 685 P.2d 1121, 1125 (Wyo. 1984); Annis v. Beebe and Runyan Furniture Company, 685 P.2d 678, 680 (Wyo. 1984). *See also* Urich v. Fox, 687 P.2d 893, 894 (Wyo. 1984): "While we do not grant pro se litigants special status, neither do we punish them for acting without an attorney."

27. A checklist to help smooth the road to perfecting an appeal appears at Appendix VI.

28. Nicholas v. Chaput, No. 84-112 (Wyo. dismissed July 13, 1984); Nicholas v. Chaput, No. 84-168 (Wyo. dismissed Aug. 13, 1984); Nicholas v. Chaput, No. 84-267 (Wyo. dismissed Dec. 6, 1984); Nicholas v. Chaput, No. 84-268 (Wyo. dismissed Dec. 19, 1984).

29. Nicholas v. Chaput, No. 84-112 (Wyo. dismissed July 13, 1984).

30. Nicholas v. Chaput, No. 84-168 (Wyo. dismissed Aug. 13, 1984).

31. Nicholas v. Chaput, No. 84-268 (Wyo. motion to dismiss denied Dec. 6, 1984).

32. Nicholas v. Chaput, No. 84-267 (Wyo. dismissed Dec. 6, 1984).

33. *Id.*

appeal from the September 18 order denying intervention. However, on December 19, 1984, the supreme court dismissed this appeal also, because the appellant's brief was not timely filed.[34]

The second illustrative case is *Hanson v. State*,[35] a criminal case. Hanson was convicted by a jury of first degree sexual assault on July 9, 1982. On August 27, 1982, his retained counsel filed a notice of appeal which stated that the appeal was from the "verdict of guilt renewed against him on July 9, 1982; from Judge Troughton's denial of the motion of acquittal and motion for new trial on August 19, 1982." On November 4, 1982, the supreme court dismissed the appeal because the notice of appeal failed to state that the appeal was from the judgment and sentence, a final order as defined by rule 1.05 of the W.R.A.P. On November 5, 1982, Hanson's appointed counsel filed a petition to reinstate the appeal. This petition was denied on November 23, 1982.

On March 2, 1984, Hanson filed a petition for post-conviction relief in the district court alleging that ineffective assistance of counsel had deprived him of his right to appeal. On August 14, 1984, the trial judge entered an order *nunc pro tunc* in the belief that Hanson would be allowed to appeal from that order. A timely notice of appeal was filed and Hanson's brief was also timely filed after two timely extensions. On October 31, however, Hanson's appeal was dismissed. The supreme court explained that the order *nunc pro tunc* related back to the original judgment and sentence and thus the appeal was not timely filed.[36] On November 13, 1984, Hanson filed a petition to reinstate the appeal, and in the alternative requested a writ of certiorari. The court denied the petition on December 4, 1984. Apparently the supreme court based its decision on the fact that the trial court had reserved the right to act further and this prevented the order *nunc pro tunc* entered on August 14 from being a final order.[37] The court also noted that Hanson could appeal from the trial court's final disposition.

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34. Nicholas v. Chaput, No. 84-268 (Wyo. dismissed Dec. 19, 1984).

35. Hanson v. State, No. 84-239 (Wyo. dismissed Oct. 31, 1984, reinstatement denied, cert. denied Dec. 4, 1984).

36. *Id.*

37. I say "apparently" because the order seems to indicate this. The court said the proceeding for post-conviction relief was still before the district court because the *nunc pro tunc* order did not relate to substantive error in original judgment, but was intended only to reinstate the judgment in order to circumvent the appellate rules. The court quoted the trial judge:

> the District Court having stated during the hearing on the petition for post-conviction relief that it "had serious questions in its own mind about the inadequacy of the counsel" and "we are going to enter the order for nunc pro tunc and I'm going to reserve, then, on whether to grant Mr. Hanson a new trial" and "if you [the Supreme Court] decide not to give this man an appeal, then you're going to put fairly squarely back on me whether I should give him a new trial" and "I'm going to do everything I can to get you an appeal * * * including informing the Supreme Court, as I have done, that if they don't give you an appeal, I may give you a new trial, even though I don't think there is grounds for it."

The supreme court pointed out that it is "the function of this Court to review alleged errors of the district courts and not the function of the district court to review actions or

Both of these cases demonstrate that even though it is possible and even probable for a litigant to perfect an appeal to the supreme court on his first attempt, some people do not manage it for one reason or another. When that happens, the road to perfecting an appeal can become rocky indeed. There are a number of problems which may arise in an appeal. The most common of these will be examined in greater detail in the following sections in the order in which they confront the practitioner: matters preliminary to the appeal, the notice of appeal, the record on appeal, and briefs.

MATTERS PRELIMINARY TO THE APPEAL

Conducting Litigation: Building the Record

The reord on appeal is built upon the trial court record. Rule 4.01 of the W.R.A.P. requires that the papers and exhibits filed in the district court be included in the record on appeal. Documents which may be pertinent on appeal should, therefore, be filed with the district court. Under rule 4.01, all or part of any transcripts may be included in the record on appeal. The transcript of a proceeding serves as verification that the claimed objection was made, that the witness said what is claimed, or that the trial court ruled as is alleged. When a transcript is not made, or not included in the record on appeal, unless the parties proceed on a stipulated record, there is no way for the supreme court to ascertain what happened at a given hearing or proceeding. The facts necessary for a decision must be before the supreme court.[38] The supreme court is not the place to develop facts.[39] Issues which may arise on an appeal should be brought to the trial court's attention; the supreme court will not consider matters raised for the first time on appeal unless the matters go to jurisdiction or are fundamental.[40]

It is the appellant's responsibility to build a proper record on appeal,[41] but because it cannot be known at the outset of a trial which party will be the appellant, counsel for all parties share the responsibility of developing an adequate record. Therefore, trial counsel should keep in mind the appellate requirements concerning the record, as well as concerning preservation of error, during all stages of litigation.

Final Order Required

The next step to confront the attorney who has conducted litigation with an eye toward building the record on appeal is deciding when and

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alleged errors of this Court." What seemed to be dispositive, however, was "the reservation of potential action by the District Court in the event this Court decides not to give this man an appeal makes that order here attempted to be appealed from not a final order." *Id.*

38. Salt River Enterprises, Inc. v. Heiner, 663 P.2d 518, 520 (Wyo. 1983).

39. Gifford v. Casper Neon Sign Co., 618 P.2d 547, 551 (Wyo. 1980).

40. Nickelson v. People, 607 P.2d 904, 907-08 (Wyo. 1980).

41. *In re* Estate of Manning, 646 P.2d 175, 176 (Wyo. 1982); Scherling v. Kilgore, 599 P.2d 1352, 1357 (Wyo. 1979).

from what to appeal. The simple answer, that an appeal should be taken only from a final order, belies the often complex nature of this decision.

Failure to appeal from a final order always results in dismissal because the supreme court only has jurisdiction to hear appeals from final orders.[42] In a sense, dismissal of an appeal for lack of a final order is not as serious as other dismissals, because the possibility always exists that the order might later become final, or that a different order might be entered.[43] On the other hand, where the appeal is dismissed for failure to meet a time requirement, there is precious little that can be done to correct the situation.

Because there are a great many reported opinions concerning final orders, attorneys have more guidance on the operation of this rule than on many others. Yet lack of a final order is one of the most common reasons for dismissing an appeal, not only on the supreme court's own motion but on appellee's motion as well.[44] Guidance in determining whether an order is final can be taken from *Public Service Commission v. Lower Valley Power and Light, Inc.*: "Generally a judgment or order which determines the merits of the controversy and leaves nothing for future consideration is final and appealable, and it is not appealable unless it does these things."[45] Despite this definition, it is not always clear whether the order in question was a final order. The cases in which the court has been split on whether the order in question is a final order indicate the difficulty of making the determination.[46]

Rule 1.05 of the Wyoming Rules of Appellate Procedure (W.R.A.P.) was taken from and is almost identical to former rule 72(a) of the Wyoming Rules of Civil Procedure (W.R.C.P.). Rule 72(c) of the W.R.C.P. provided that "A judgment rendered or final order made by the district court may be [reviewed]."[47] The same language appears in current rule 1.04 of the W.R.A.P. Under former rule 72(a) of the W.R.C.P. and current rule 1.05 of the W.R.A.P., there are three kinds of appealable orders: orders

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42. A final order is: (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment; (3) an order, including a conditional order, granting a new trial on the grounds stated in Rule 59 (a)(4) and (5), W.R.C.P.; if an appeal is taken from such an order, the judgment shall remain final and in effect for the purposes of appeal by another party.

WYO. R. APP. P. 1.05.

43. Crossan v. Irrigation Dev. Corp., 598 P.2d 812, 813 (Wyo. 1979). *See In re* Estate of Campbell, 673 P.2d 645, 648 (Wyo. 1983) (the first appeal was dismissed for lack of a final order, but that order became final when the final decree of distribution was entered, so the second appeal was allowed).

44. In 1984, the supreme court dismissed twenty-five appeals for lack of a final order. Twenty-three of these dismissals were on its own motion, two on appellee's motion as well as the court's motion, and one on appellee's motion alone.

45. 608 P.2d 660, 661 (Wyo. 1980).

46. Blake v. Rupe, 651 P.2d 1096 (Wyo. 1982) (four opinions filed); Public Service Comm'n v. Lower Valley Power and Light, Inc., 608 P.2d 660 (Wyo. 1980); Arp v. State Highway Comm'n, 567 P.2d 736 (Wyo. 1977); Olmstead v. Cattle, Inc., 541 P.2d 49 (Wyo. 1975).

47. WYO. R. CIV. P. 72(a) (repealed).

which prevent judgment, orders in special proceedings, and orders granting new trials because the amount of judgment is improper— additur or remittitur.

Orders Which Prevent Judgment

The first kind of appealable order is "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment."[48] It has been said that this statement is sufficiently plain that it needs no further interpretation.[49] This may be an oversimplification.

A ruling that the district court has no jurisdiction to proceed is an order affecting a substantial right and determining the action or preventing a judgment.[50] However, the denial of a motion which, if granted, would terminate the action, is not an appealable order.[51] For example, an order denying a motion for summary judgment is not a final, appealable order.[52] An order denying a motion to dismiss is not a final order.[53] Nor is an order denying a free transcript, entered before the petition for post-conviction relief is filed.[54] In 1984, the court decided that the denial of a writ of prohibition is not a final order.[55]

In order to be final, an order must finish something. For example, an order dismissing with prejudice is a final order.[56] But an order purporting to deny a motion to intervene where a hearing is set upon the motion does not terminate the possibility of intervention and is not a final order.[57] The following orders do not finish anything and thus are not final and appealable: an order of taking in eminent domain proceedings;[58] an order referring a matter to arbitration[59] or consolidating arbitration proceedings;[60] an interlocutory order denying discovery;[61] an order striking a de-

48. WYO. R. APP. P. 1.05(1).
49. Note, *The Right of Appeal in Wyoming,* 18 WYO. L.J. 61, 62 (1963).
50. *Id.*
51. *Id.*
52. Kimbley v. City of Green River, 663 P.2d 871, 888 (Wyo. 1983), *citing* Collins v. Memorial Hosp. of Sheridan County, 521 P.2d 1339 (Wyo. 1974). In 1984, one attempted appeal from an order denying summary judgment was dismissed.
53. Stamper v. State, 672 P.2d 106, 106 (Wyo. 1983). One such appeal was dismissed in 1984.
54. Escobedo v. State, 601 P.2d 1028, 1029 (Wyo. 1979). In 1984, two appeals were dismissed on this ground.
55. Wilson v. Christopulos, No. 84-157 (Wyo. dismissed Aug. 9, 1984).
56. CLS v. CLJ, JME, CJE, 693 P.2d 774, 777 (Wyo. 1985).
57. *In re* Land Use Change Application of the Pat O'Hara Company, No. 84-58 (Wyo. dismissed Apr. 3, 1984).
58. Arp v. State Highway Comm'n, 567 P.2d 736, 739 (Wyo. 1977).
59. American Nat'l Bank of Denver v. Cheyenne Housing, 562 P.2d 1017, 1020 (Wyo. 1977); Wyo. Stat. § 1-36-119 (1977).
60. Wyoming Johnson, Inc. v. School Dist. No. 1, No. 83-155 (Wyo. dismissed Sept. 22, 1983); Wyo. Stat. § 1-36-119 (1977).
61. Cubin v. Cubin, 685 P.2d 680, 682 (Wyo. 1984).

mand for a jury trial;[62] and an order not designed to dispose of the matter at hand, but only designed to obtain additional information.[63]

Ordinarily an order setting aside a default judgment and resuming a cause is not a final order, but where the default judgment is set aside for lack of jurisdiction, the order is final.[64] Generally in a criminal case, it is the judgment and sentence which is the final order, but where the record contains no finding of guilt, the judgment and sentence is not considered final.[65]

Because an order does not "determine the action" until it is entered, an oral direction of a verdict by the trial court is not a final order.[66] A memorandum opinion of a trial judge is not a final order.[67] Nor are findings of fact and conclusions of law not in order form.[68]

Generally, any order disposing of a new trial motion is not final.[69] This is because if the motion is denied, the original order is final and appealable.[70] The appellant must appeal from the order which became final upon denial of the new trial.[71] He cannot appeal from both the original order and the order denying a new trial.[72] However, if the motion is granted, there will be no appealable order until the new trial has been held.[73] If a new trial is granted, the original order is no longer in force and thus is not appealable.

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62. Hamburg v. Jones, 510 P.2d 791, 791 (Wyo. 1973).

63. Public Service Comm'n v. Lower Valley Power and Light, Inc., 608 P.2d 660, 661 (Wyo. 1980).

64. First Wyoming Bank-Casper v. Berrett, No. 84-278 (Wyo. dismissed as moot Dec. 19, 1984).

65. Caton v. State, No. 84-256 (Wyo. extension granted; trial judge entered finding of guilt Nov. 7, 1984).

66. Wyoming Farm Bureau Mutual Ins. Co. v. Vanelli, 370 P.2d 738, 738 (Wyo. 1962).

67. Wyoming State Treas. *ex rel.* Workmen's Comp. Dep't v. Niezwaag, 444 P.2d 327, 328 (Wyo. 1968).

68. *Id.* at 329; School Dist. No. 3, Carbon County v. Western Tube Co., 13 Wyo. 304, 327-28, 80 P. 155, 159 (1905); Gramm v. Fisher, 3 Wyo. 595, 595, 29 P. 377, 378 (1892).

69. Sun Land & Cattle Company v. Brown, 387 P.2d 1004, 1006 (Wyo. 1964).

70. Opie v. State, 422 P.2d 84 (Wyo. 1967). In *Opie,* the supreme court allowed an appeal from the denial for a motion for a new trial on grounds of newly discovered evidence, filed more than a year after Opie's conviction had been affirmed. Opie v. State, 389 P.2d 684 (Wyo. 1964). The court affirmed the trial court's dismissal of the motion. The precedential weight of this decision is uncertain since the court said,

> It should perhaps be noted that this court has elected to dispose of the instant case on the merits rather than on the question of whether defendant is entitled to be heard at all. By doing so, we do not mean to imply a decision one way or the other on the right of defendant to be heard in an instance where there has been a delay in filing a motion for new trial.

Opie, 422 P.2d at 88.

71. Rutledge v. Vonfeldt, 564 P.2d 350, 351 (Wyo. 1977); Financial Management Corp. v. Wyoming Electrical Sign Co., 561 P.2d 237, 237 (Wyo. 1977).

72. Sun Land & Cattle Company v. Brown, 387 P.2d 1004, 1006 (Wyo. 1964). Apparently the same is true of a denial of judgment of acquittal in light of Hanson v. State, No. 84-239 (Wyo. dismissed Oct. 31, 1984). *See supra* text accompanying notes 35-37.

73. An exception arises under WYO. R. APP. P. 1.05, which provides that an order granting a new trial under rules 59(a)(4) and (5) of the W.R.C.P. is a final order. Rule 59(a) states as grounds for a new trial: (4) "Excessive damages, appearing to have been given under the influence of passion or prejudice" and (5) Error in the amount of assessment of the recovery, whether too large or too small." WYO. R. CIV. P. 59(a)(4) and (5).

Rule 1.05 of the W.R.A.P. must be examined in light of rule 54(b) of the W.R.C.P.[74] It is especially appropriate to do so here because the bulk of the 1984 dismissals for lack of a final order were for rule 54(b) problems.[75] Orders which do not adjudicate all the claims or the liabilities of all the parties and do not contain an express determination that there is no just reason for delay, "shall not terminate the action as to any of the claims or parties," and thus do not meet the final order requirements of rule 1.05(1) of the W.R.A.P.[76] The interplay of rule 1.05 of the W.R.A.P. and rule 54(b) of the W.R.C.P. is amply demonstrated by a case in which the supreme court said that an order denying a motion to vacate a default judgment and dismiss the action, entered as sanction for failure to allow discovery, may affect a substantial right, as required by rule 1.05 of the W.R.A.P., but it does not have the effect of determining the action or preventing a judgment. Thus, the order disposes of fewer than all of the claims and is not a final order as required by rule 54(b) of the W.R.C.P.[77]

The stated purpose of rule 54(b) of the W.R.C.P. is to avoid unnecessary piecemeal appeals.[78] Piecemeal appeals occur where a party appeals from part of a case. There are two types of rule 54(b) problems: multiple claims and multiple parties. When an order disposes of less than all of the claims or parties, it may nonetheless be a final, appealable order, if the order meets the requirements of rule 54(b). The Wyoming Supreme Court, in *Griffin v. Bethesda Foundation,* explained the requirements of rule 54(b):

> Rule 54(b) calls into play a two-step decision-making process. First, the district court must determine that Rule 54(b) applies, i.e., *are there multiple claims or multiple parties as contemplated by Rule 54(b)?* The answer to this threshold question is by nature

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74. WYO. R. CIV. P. 54(b), provides:

> When more than one (1) claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one (1) or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

75. A total of twenty-five appeals were dismissed for lack of a final order in 1984, twelve of these for rule 54(b) problems. See Appendix II.

76. "As is evident from the annotation which follows Rule 54(b), W.R.C.P. in the Wyoming Court Rules volume, this court has frequently addressed questions concerning the limitations of Rule 54(b)." Griffin v. Bethesda Foundation, 609 P.2d 459, 460 (Wyo. 1980).

77. Tschirgi v. Meyer, 536 P.2d 558, 561 (Wyo. 1975).

78. Molle v. Iberlin Ranch, 614 P.2d 1339, 1340 (Wyo. 1980); Olmstead v. Cattle, Inc., 541 P.2d 49, 51 (Wyo. 1975); Lutheran Hosps. and Homes Soc'y of America v. Yepsen, 469 P.2d 409, 410 (Wyo. 1970); Reeves v. Harris, 380 P.2d 769, 769 (Wyo. 1963). This has not always been the purpose of appellate rules. Logan v. Stannard, 439 P.2d 24, 25 (Wyo. 1968). Actually, the purpose of rule 54(b) can be said to permit piecemeal appeals whenever the trial judge certifies finality.

> one of law and this court gives no special deference to the determination made by the district court.
>
> Once this question has been answered affirmatively, the district court must move on to the second determination, i.e., *is there no just reason for delay?* This determination is reviewable only for an abuse of discretion. This is so because such a decision is more in the nature of a factual determination.[79]

Although the court in *Griffin* indicated the trial judge's determination that there is no just reason for delay is reviewable only for an abuse of discretion, the court has also hinted that the trial judge must be correct.[80]

It is clear that where there are multiple parties there are frequently multiple claims. But multiple claims can also exist where there are but two parties. For example, in *Hoback Ranches, Inc. v. Urroz,*[81] the cross claim of the appellant against the appellee had not been determined in the order granting partial summary judgment. Therefore, not all of the claims had been determined. Because there was no express determination by the trial court that there was no just cause for delay, the appeal was dismissed for lack of a final order.[82] Without an express determination by the trial court, a partial summary judgment is not a final, appealable order.[83] For example, where liability, but not damages, is determined, there is no final order.[84]

Rule 54(b) claims were also at issue in *Griffin v. Bethesda Foundation.*[85] In *Griffin,* the trial court granted partial summary judgment as to two of the four counts of plaintiff's complaint and made the 54(b) certification that there was no just cause for delay. On its own motion, the supreme court recognized a rule 54(b) problem and asked the parties to submit briefs concerning multiple claims.[86] The supreme court determined that all four of plaintiff's claims rested on the underlying contract, even though two sounded in tort and two in contract. Because the four counts arose from one contract, there was really only one claim, and the district court erred in determining there were multiple claims. Because there was only one claim, rule 54(b) did not apply. Therefore, the certification by the trial judge that there was no just reason for delay was meaningless. The court found there was no final order, even with the express determination, and dismissed the appeal.[87]

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79. 609 P.2d 459, 461 (Wyo. 1980) (citations omitted).

80. *See* Molle v. Iberlin Ranch, 614 P.2d 1339, 1340 (Wyo. 1980) (appeal dismissed for lack of a final order despite trial judge's certification). Of course, the determination that there are multiple claims or multiple parties is reviewable.

81. 622 P.2d 948 (Wyo. 1981).

82. *Id.* at 949.

83. Hayes v. Nielson, 568 P.2d 905, 906 (Wyo. 1977); Crossan v. Irrigation Dev. Corp., 598 P.2d 812, 813 (Wyo. 1979).

84. Dexter v. O'Neal, 649 P.2d 680, 681 (Wyo. 1982); Mott v. England, 604 P.2d 560, 563 (Wyo. 1979). Two appeals from partial summary judgment were dismissed in 1984.

85. 609 P.2d 459, 461 (Wyo. 1985).

86. *Id.* at 459-60.

87. *Id.* at 461.

The other type of rule 54(b) problem involves multiple parties—where an order disposes of some, but not all, of the parties. *Olmstead v. Cattle, Inc.*[88] was one such case. There the plaintiff sued nine defendants. The district court dismissed as to three defendants because it had no personal jurisdiction over them. Thus, six defendants were left in the case. Nonetheless, the plaintiff appealed from the order dismissing three of the defendants.[89] In dismissing the appeal, the supreme court explained that because there was no express determination by the trial court that there was no just reason for delay, the order was not final.[90]

In *Wetering v. Eisele*, the court determined that although the granting of a motion to strike is not a final order, where the motion to strike the victim's brother and sister as persons on whose behalf a wrongful death suit could be brought was granted, the order adversely affected the siblings' rights. Therefore it was proper for the trial court to make the rule 54(b) determinations and there was no abuse of discretion in the certification that there was no just reason for delay.[91]

It is clear that it is an oversimplification to state that the first type of final order in rule 1.05 is so obvious that it needs no clarification. Rather, it contains a number of traps for the unwary. Counsel can avoid many of the pitfalls under rule 54(b) of the W.R.C.P. and rule 1.05 of the W.R.A.P. by simply counting up the parties or the claims, as the case may be. A diagram of the suit is often helpful.[92] Where an order does not determine all the claims of all the parties, counsel can draft an order that expressly determines there is no just cause for delay.[93] Or he can delay an appeal until the order becomes final when all the claims and the rights of all the parties have been determined.[94] As noted above, final order dismissals are not as serious as time dismissals, because an order which is not now final will in all likelihood become final. A new notice of appeal may then be filed when the order becomes final.[95]

Orders in Special Proceedings

The second category of appealable order under rule 1.05 is "an order affecting a substantial right, made in a special proceeding, or upon summary application in an action, after judgment." This category of final order was defined, none too clearly, in *Anderson v. Englehart:*

88. 541 P.2d 49 (Wyo. 1975).
89. *Id.* at 50.
90. *Id.* at 51.
91. Wetering v. Eisele, 682 P.2d 1055, 1059 (Wyo. 1984).
92. *See, e.g.*, Big Chief Exploration Co. v. Oil Country Supply, No. 84-254 (Wyo. dismissed Oct. 31, 1984).
93. *See supra* text accompanying notes 78-79.
94. *See* Bacon v. Carey Co., 669 P.2d 533, 536 (Wyo. 1983) (second order, dismissing original parties which were not parties to the appeal, corrected any rule 54(b) defect in the original judgment). *See also* Noonan v. Texaco, No. 84-243 (Wyo. dismissed Oct. 31,1984) discussed *infra* text accompanying notes 178-81.
95. But this is not without difficulties of its own. *See infra* text accompanying notes 181-184.

> [W]e think that a proceeding may be special, within the meaning of the statute governing appeals, although connected with a pending action, and there appears to us to be no good reason for denying to a provisional remedy, which may be disposed of by an order independent of the ultimate determination of the cause, the character of "special proceeding" with respect to what constitutes a final order under the statute.[96]

More recently the court has said:

> Generally, special proceedings are those which were not actions in law or suits in equity under the common law, and which may be commenced by motion or petition upon notice for the purpose of obtaining relief of a special or distinct type. They result from a right conferred by law together with authorization of a *special* application to the courts to enforce it.[97]

Examples of orders made in special proceedings are orders in contempt proceedings, orders granting or denying a temporary injunction, orders dissolving or sustaining an attachment, and orders appointing or discharging a receiver. However, orders granting or denying temporary alimony or support in a divorce case and orders appointing assessors to value land in a condemnation suit do not fall in this category.[98] The court has treated a proceeding to modify a divorce decree as a special proceeding.[99] Juvenile court proceedings are also special proceedings.[100] Beyond the rule, the definitions, and the examples, there is little to guide the determination of what is an order made in a special proceeding. What one commentator has said about special proceedings in Wyoming remains valid today: "It would seem . . . that the only definitive rule that can be stated as to this aspect of a final order is that a special proceeding exists only if the Supreme Court wishes to hear that type of case."[101]

Orders Granting Remittitur or Additur

The third category of appealable orders concerns the trial court's granting of remittitur or additur, and is little seen in Wyoming.[102] It should be noted, however, that this is an exception to the general rule that an order disposing of a motion for a new trial is not a final appealable order.[103]

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96. 18 Wyo. 196, 208, 105 P. 571, 575 (1909).
97. State in Interest of C, 638 P.2d 165, 168 (Wyo. 1981) (citations omitted).
98. Note, *supra* note 49, at 62-63.
99. McMillan v. McMillan, No. 84-285.
100. State in Interest of C, 638 P.2d 165, 168 (Wyo. 1981).
101. Note, *supra* note 49, at 63.
102. *See* Cates v. Eddy, 669 P.2d 912 (Wyo. 1983); Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977); Wheatland Irrigation Dist. v. McGuire, 562 P.2d 287 (Wyo. 1977); Smith v. Blair, 521 P.2d 581 (Wyo. 1974); Elite Cleaners and Tailors, Inc. v. Gentry, 510 P.2d 784 (Wyo. 1973); Vivion v. Brittain, 510 P.2d 21 (Wyo. 1973); McPike v. Scheuerman, 398 P.2d 71 (Wyo. 1965); DeWitty v. Decker, 383 P.2d 734 (Wyo. 1963); Hall Oil Co. v. Barquin, 33 Wyo. 92, 237 P. 255 (1925); Union Pac. R.R. Co. v. Hause, 1 Wyo. 27 (1871).
103. *See supra* text accompanying notes 69-73.

At an earlier date, it was urged that the final decision rule, now contained in rule 1.05 of the W.R.A.P., be amended and simplified.[104] Unfortunately, the rule has been little amended, but there are a number of reported cases which should guide practicing attorneys in this state in determining the scope of the final order rule. Only the most common problems have been discussed here.

Whether to Appeal

After building an adequate record and obtaining a final order, counsel's next task is to consult with his client and decide whether an appeal should be taken. In a criminal matter the decision is easier because there is often little to lose. The decision to appeal is more complicated in a civil case owing to the existence of rule 10.05 of the W.R.A.P.[105] Rule 10.05 provides that an appellant who does not prevail on appeal will be taxed for the cost of appellee's preparation of his brief.[106] In addition, unless the court finds reasonable cause for the appeal, it may assess a fee for the appellee's attorney of up to $500 and a penalty of up to $1,000.[107]

The purpose of rule 10.05 is not to discourage appeals,[108] and penalties have not been frequently imposed.[109] The court has said the rule is not appropriately invoked where a discretionary ruling is challenged.[110] Beyond that, however, it is unclear just when there is no "reasonable cause" for an appeal.

THE NOTICE OF APPEAL

Contents

Once the decision to appeal has been made, the next step is to compose the notice of appeal.[111] The requirements of rule 2.02 of the W.R.A.P.

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104. Note, *supra* note 48, at 64.

105. WYO. R. APP. P. 10.05 provides:

> When, in a civil case, the judgment or final order is affirmed, appellee shall recover the cost for typewriting and reproducing his brief, such cost to be computed at the rate allowed by law for making the transcript of the evidence. Unless the court certifies that there was reasonable cause for the appeal, there shall also be taxed as part of the costs in the case, a reasonable fee, to be fixed by the court, not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), to the counsel of the appellee, and to the appellee damages in such sum as may be reasonable, not exceeding one thousand dollars ($1,000.00), unless the judgment or final order directs the payment of money, and execution thereof was stayed, when in lieu of such penalty, it shall bear additional interest at a rate not exceeding five percent (5%) per annum, for the time for which it was stayed, to be ascertained and awarded by the court.

106. *Id.*

107. *Id.*

108. Reno Livestock Corp. v. Sun Oil Co., 638 P.2d 147, 155-56 (Wyo. 1981) (Rooney, C.J., concurring in part and dissenting in part).

109. *But see* Osborn v. Warner, 694 P.2d 730, 732 (Wyo. 1985); Reno Livestock Corp. v. Sun Oil Co., 638 P.2d 147, 155 (Wyo. 1981); Perry v. Vaught, 624 P.2d 776, 784 (Wyo. 1981); Keller v. Anderson, 554 P.2d 1253, 1263 (Wyo. 1976).

110. James S. Jackson Co. v. Meyer, 677 P.2d 835, 839 (Wyo. 1984); Bacon v. Carey Co., 669 P.2d 533, 536 (Wyo. 1983).

111. A sample notice of appeal is set out in Appendix IV.

are few and simple: "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or final order or part thereof appealed from; and shall name the court to which the appeal is taken." Few published cases even mention this rule. *Board of County Commissioners v. Ridenour* dealt with a premature notice of appeal which the court noted complied with rule 2.02.[112] In *In Re Estate of Campbell*, the court held that the executrix, named as the party appealing in the notice of appeal, was the proper party to prosecute the appeal.[113] *Hopkinson v. State* noted in passing that the notice of appeal complied with rule 2.02.[114] The dearth of comment about rule 2.02 is surprising, because the notices of appeal to the supreme court abound with failure to follow these simple mandates.

The failure to meet any one of the three basic requirements of rule 2.02 has not yet been deemed a jurisdictional defect. Nonetheless rule 1.02 authorizes dismissal. Furthermore, a notice of appeal which does not comply with rule 2.02 is subject to challenge on grounds that it is not a valid notice of appeal.

Parties

The requirement that the parties appealing be designated is fairly straightforward and one with which appellants generally comply. It is helpful, but not necessary, to indicate the trial court status of the parties appealing: plaintiff, defendant, third party defendant, and the like.

Rule 2.05 of the W.R.A.P. provides that the party taking the appeal is the appellant. His opponent is the appellee. Proper use of these terms is sometimes difficult to decipher, as in a recent case filed in the supreme court. The only party who lost below and who did not appeal the district court's ruling, but who had the most to gain by a supreme court reversal was referred to as the appellee.[115]

Order

The order appealed from must be designated with sufficient certainty to identify it.[116] It should also be correctly designated. In *Rutledge v. Vonfeldt*,[117] the notice of appeal stated that the appeal was taken from the denial of a motion for a new trial instead of from the judgment. The supreme court found itself to be without jurisdiction to entertain the appeal because the wrong order was specified and dismissed the appeal.[118] In *Jackson v. State*,[119] the notice of appeal specified an order entered on

112. 623 P.2d 1174, 1179 (Wyo. 1981).
113. 673 P.2d 645, 648 (Wyo. 1983).
114. 664 P.2d 43, 53 (Wyo. 1983).
115. Brief of Third Party Defendants at 1, 3, Condos v. Trapp, No. 84-62 (Wyo. appeal pending March 11, 1985).
116. Shaw v. Lewmont Drilling Assocs., 694 P.2d 117 (Wyo. 1985) (opinion does not mention that it was difficult to tell from what the appeal was taken because the date spaces were left blank and so forth).
117. 564 P.2d 350 (Wyo. 1977).
118. *Id.* at 351.
119. 547 P.2d 1203 (Wyo. 1976).

December 13, which was not in fact entered until December 23.[120] The court dismissed that appeal as well because the order was not properly designated. In *In Re Estate of Campbell*,[121] however, a premature notice of appeal, which named the correct order (one made final and appealable by the subsequent decree of distribution) was held effective to take the appeal to the supreme court.[122]

Ordinarily a notation of the caption (including the trial court case number), date, and court will suffice to designate the order. The judge may also be designated. This lends specificity in multiple-judge districts. Specifying the date the order was signed, combined with the above, is generally sufficient to identify the order. Better practice is to indicate the date the order was entered or filed with the district court clerk. That is the official "date" of the order. An added advantage in this practice is that it helps everyone keep the dates straight—the time limit for a notice of appeal runs from the date the order was entered, not the date it was signed.

Court

Rule 2.02 also requires that the court to which the appeal is taken be specified. An appeal from the district court to the supreme court should say so. Again, the supreme court has, in the past, ignored a failure to so specify.[123] For example, the court was not concerned by a notice of appeal in which the only reference to the supreme court was that papers would be sent to "Rita White."[124]

The rationale for this requirement is better put in perspective when it is remembered that the W.R.A.P. also apply to appeals from an inferior court or an administrative agency to the district court. Under those circumstances, it is obviously necessary to specify in which district court the appeal will be pursued. Nonetheless, the rule as written applies to appeals to the supreme court as well.

Recommended Options

One optional portion of the notice of appeal is the designation of transcript. Rule 4.02 requires the appellant to designate the transcript to be included in the record on appeal and to serve his opponent with that designation within ten days of the filing of the notice of appeal.[125] However,

120. *Id.* at 1204.
121. 673 P.2d 645 (Wyo. 1983).
122. *Id.* at 648-49.
123. Cases in which the court has not mentioned a party's failure to specify the court to which the appeal is taken are: Shaffer v. United States Service, No. 84-225 (Wyo. dismissed for failure to file briefs Nov. 20, 1984); Barnes v. State, 670 P.2d 302 (Wyo. 1983); Simmons v. State, 687 P.2d 255 (Wyo. 1984); Jackson Hole Builders v. Piros, 654 P.2d 120 (Wyo. 1982); Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc., 643 P.2d 468 (Wyo. 1982); Meyer v. Kendig, 641 P.2d 1235 (Wyo. 1982).
124. Buckles v. States, No. 84-27 (Wyo. dismissed for late notice of appeal Jan. 8, 1985). Rita M. White is the clerk of the Wyoming Supreme Court.
125. WYO. R. APP. P. 4.02. Rule 4.02 also provides: "[A]nd, unless the entire transcript is to be included, a statement of the issues [appellant] intends to present on the appeal." *Id.*

because the certificate that the transcript has been ordered must be filed contemporaneously with the notice of appeal, counsel will know what transcript he is designating by the time he files the notice of appeal. Therefore, there is no reason to delay the designation for ten days and it might just as well appear on the notice of appeal lest it be forgotten.

There is an additional, optional item to be included in a notice of appeal, found in rule 2.01: "[A] certificate of compliance therewith [ordering pertinent transcript] shall be filed in the case or endorsed upon the notice of appeal."[126] Thus, the certificate concerning the ordering of the transcript need not be included in the notice of appeal, but because it is so simple to do and must be filed concurrently with the notice of appeal in any event, that practice is recommended. Failure to include the certificate in the notice of appeal is not error, but it must be included somewhere in the record on appeal.

Frequently counsel omits either the certificate or the designation or both and files only the certificate, required by rule 4.02, that "all record papers and relevant transcript which he has designated are included as part of the record on appeal."[127] Thus far, the court has not deemed this practice fatal to the appeal. For example, the court denied a motion to dismiss for failure to designate the transcript and certify arrangements in *Graham v. Walker.*[128] In *Graham,* there had been an oral request for a transcript, forgotten by a busy court reporter, and a supreme court order extending the time for filing the record on appeal. The court said, "Although this Court is troubled by such careless appellate practice, Appellees' motion to dismiss is denied since no prejudice resulted to appellees as a result of appellants' failure to designate the transcript concurrently with filing the notice of appeal under Rule 2.01, W.R.A.P."[129] Justice Rooney dissented, saying:

> Appellants did not comply with our rule. An oral request for a transcript may have been made, but there is no indication that arrangement for payment was made, orally or otherwise. The notice of appeal did not contain a certificate that the transcript

126. WYO. R. APP. P. 2.01. The certificate was neither on the notice of appeal nor certified in the record in *In re* Zabaleta, 638 P.2d 648, 649 (Wyo. 1981) and the appeal was dismissed. The fact that the record on appeal was also late was probably dispositive in *Zabaleta.* Rossi v. State, was dismissed because, *inter alia,* the "appellant failed to file concurrently with his notice of appeal evidence of arrangement for the transcript of evidence and payment for the same." No. 84-257 (Wyo. dismissed Nov. 27, 1984). *But see* Butler v. McGee, 363 P.2d 791, 792-93 (Wyo. 1961) (the court excused the failure of appellant to certify that the transcript had been ordered where appellee moved to dismiss on this ground, because the transcript had been filed timely and the purpose of the rule concerning certification was to provide evidence of due diligence in case the transcript was not filed timely); Shaw v. Lewmont Drilling Assocs., Inc., 694 P.2d 117 (Wyo. 1985) (no designation of transcript and no transcript in record).

127. WYO. R. APP. P. 4.02.

128. No. 84-309 (Wyo. motion to dismiss denied Jan. 18, 1985).

129. *Id.*

had been ordered or that payment therefor had been arranged. If the rules are not to be followed, why have them. I would dismiss the appeal.[130]

Filing

Timely Filing

After the notice of appeal has been drafted, the next step is to file it properly. While rule 1.02 authorizes an appropriate sanction for other rules violations, it requires dismissal for failure to file timely a notice of appeal.[131] The timely filing of a notice of appeal is mandatory and jurisdictional.[132]

The time limit of fifteen days to file a notice of appeal[133] begins to run when the judgment or order is entered,[134] not when the judge signs it, not when the party receives notice of it.[135] Therefore, rule 14.03 of the W.R.A.P., allowing an additional three days to respond when service is made upon a party by mail, does not extend the time for filing the initial notice of appeal.[136] A possible exception arises under the Worker's Compensation Act, which provides that an award is final unless there is an appeal "within 10 days after notice is mailed or delivered."[137]

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130. *Id.*

131. "The timely filing of a notice of appeal is jurisdictional." WYO. R. APP. P. 1.02.

132. *In re* Estate of Campbell, 673 P.2d 645, 648 (Wyo. 1983); Cates v. Barb, 650 P.2d 1159, 1160 (Wyo. 1982); Sanderson v. State, 649 P.2d 677, 679 (Wyo. 1982); Murry v. State, 631 P.2d 26, 28 (Wyo. 1981); State v. Berger, 600 P.2d 708, 709 (Wyo. 1979); Big Horn County Comm'rs v. Hinckley, 593 P.2d 573, 581 (Wyo. 1979); Department of Revenue and Taxation v. Irvine, 589 P.2d 1295, 1301 (Wyo. 1979); Johnson v. Hauffe, 567 P.2d 735, 736 (Wyo. 1977); Carr v. Hopkin, 556 P.2d 221, 223 (Wyo. 1976); Compton v. State, 555 P.2d 232, 234 (Wyo. 1976); Jackson v. State, 547 P.2d 1203, 1205 (Wyo. 1976); Bard Ranch, Inc. v. Weber, 538 P.2d 24, 38 (Wyo. 1975); Bowman v. Worland School Dist., 531 P.2d 889, 891 (Wyo. 1975); Regan v. City of Casper, 494 P.2d 933, 935 (Wyo. 1972); Sun Land & Cattle Co. v. Brown, 387 P.2d 1004, 1006 (Wyo. 1964); King v. State, 376 P.2d 871, 871 (Wyo. 1962). Fourteen appeals were dismissed in 1984 for failure to file timely a notice of appeal.

At the moment the soundness of this proposition, as it relates to criminal appeals, is in question. The Wyoming Supreme Court recently announced its intention to follow Evitts v. Lucey, 105 S. Ct. 830 (1985), *affirming* Lucey v. Kavanaugh, 725 F.2d 560 (6th Cir. 1984). Murry v. State, No. 85-31 (Wyo. order denying petition for writ of habeas corpus and granting writ of certiorari March 7, 1985). In Blair v. Supreme Court of the State of Wyoming, 671 F.2d 389 (10th Cir. 1982), the Tenth Circuit Court of Appeals held it was not a denial of due process for the supreme court to dismiss an appeal on the grounds that the notice of appeal was not timely filed. However, in *Evitts v. Lucey,* the United States Supreme Court found that the failure of retained counsel to timely file a notice of appeal, resulting in dismissal of defendant's one appeal as of right, violated the fourteenth amendment due process right of effective assistance of counsel for federal habeas corpus purposes. In Murry v. State, the defendant's appeal was dismissed for failure to file a timely notice of appeal. 631 P.2d 26 (Wyo. 1981). Murry petitioned for a writ of certiorari or habeas corpus. The Wyoming Supreme Court granted certiorari on the basis of *Evitts v. Lucey.* Justice Rooney dissented from that order. He would distinguish the Wyoming rule which is jurisdictional from Kentucky's rule, which is merely for the convenience of the court.

133. A simplified time chart is contained in Appendix III. For a more thorough timetable, the reader is directed to WYO. R. APP. P. Appendix I.

134. WYO. R. APP. P. 2.01; Jackson v. State, 547 P.2d 1203, 1205-06 (Wyo. 1976).

135. Department of Revenue and Taxation v. Irvine, 589 P.2d 1295, 1301 (Wyo. 1979).

136. *See* WYO. R. APP. P. 14.03.

137. WYO. STAT. § 27-3-402(a), (b) (1977). WYO. R. APP. P. 27 indicates that the rules of appellate procedure only supersede other rules which conflict with the appellate rules.

Premature Notice of Appeal

Prior to the amendment of rule 2.01 of the W.R.A.P., a notice of appeal filed before entry of the order to be appealed was ineffective to bring an appeal before the supreme court for review.[138] As of July 1, 1980, rule 2.01 includes the following provision: "A notice of appeal, in a civil or criminal case, filed prematurely shall be treated as filed on the same day as entry of judgment or final order, provided it complies with Rule 2.02, W.R.A.P."[139] A premature notice of appeal is deemed filed on the entry of judgment.[140] For instance, a notice of appeal from a district court order voiding bequests to subscribing witnesses, which was premature because filed before the final decree of distribution, was treated as if it had been filed on the date the distribution decree was entered.[141]

The implications of the premature notice of appeal rule are several. The first is that it is no longer fatal to be eager and file the notice of appeal before the final order is entered. However, when this happens, counsel should be aware that the time for the filing of the record on appeal then would run from the date the judgment was entered. The second difficulty which has arisen under the premature notice of appeal provision is that counsel often file more than one notice of appeal. In other words, counsel may file a notice of appeal immediately after oral judgment and sentence is pronounced in a criminal case, but stating that the appeal is from the judgment and sentence entered by the district court (thus complying with rule 2.02). On the entry of the judgment, that notice of appeal then becomes effective and is treated as if it were filed on the same day the judgment and sentence was entered. Counsel often cannot leave well enough alone, however, and after the entry of the judgment and sentence files a second notice of appeal. It is unclear what the court might do if the record on appeal were timely filed from the second notice of appeal, but not from the date the first was deemed filed. For instance, if a notice of appeal were filed prematurely on September 1, the judgment entered on September 15, and a second notice of appeal filed on September 30, a record of appeal, filed in the supreme court on October 31, would be timely filed from the September 30 notice of appeal, but not from September 15, the date the September 1 notice of appeal would be deemed filed. In one such double notice of appeal case the record on appeal was fortunately timely filed from both notices of appeal.[142]

A word of caution: when the appeal is docketed in the supreme court during the pendency of motions in the trial court which toll the notice

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In light of *In re* Zabaleta, 638 P.2d 648 (Wyo. 1981), which held that the forty-day period in the W.R.A.P. for filing the record on appeal superseded the seventy-day period in the worker's compensation statutes (WYO. STAT. § 27-12-615 (1977)), perhaps the rules would be construed to supersede WYO. STAT. § 27-3-402(a), (b) (1977).

138. Hayes v. Nielson, 658 P.2d 905, 906 (Wyo. 1977).

139. WYO. R. APP. P. 2.01.

140. *In re* Zabaleta, 638 P.2d 648, 649 (Wyo. 1981).

141. *In re* Estate of Campbell, 673 P.2d 645, 649 (Wyo. 1983).

142. Kennedy v. State, No. 84-206 and No. 84-207 (Wyo. dismissed on other grounds Oct. 2, 1984, reinstatement denied Nov. 1, 1984).

of appeal period, the appeal will still be dismissed as premature.[143] The motions specified in rule 2.01 toll the notice of appeal period because they call into question the finality of the order already entered. Until the motions are decided, the matter is still pending before the trial court and an appeal cannot be heard.

Time Extensions for Filing Notice of Appeal

Prior to the amendment of rule 2.01, the district court could extend the time for filing a notice of appeal upon a finding of excusable neglect,[144] but genuine emergency conditions, such as death, sickness, or undue delay in the mails, were held necessary to support a finding of excusable neglect.[145] The court found no excusable neglect where the appellant failed to obtain the extension to which the appellee had agreed.[146] Furthermore, under the old rule, any extension of time for filing a notice of appeal had to be given before the original period expired.[147]

The addition in 1980 to rule 2.01 of the phrase, "provided the application for extension of time is filed and the order entered prior to the expiration of thirty (30) days from entry of judgment or final order appealed from"[148] appears to ameliorate the harshness of the prior rule. In essence, it gives a fifteen-day grace period. However, the trial court must sign and enter an order to extend the time for filing and the notice of appeal must be filed before the grace period expires.[149] Excusable neglect is still the standard, and cases decided before the amendment still should serve adequately to illuminate that standard. Of course, ignorance of the provisions of the appellate rules has never justified a finding of excusable neglect.[150]

The supreme court should be commended for allowing a grace period. The prior rule, that the application for extension had to be made before the notice of appeal time ran, was no help, even in emergencies. For it is far easier, simpler and quicker to file a timely notice of appeal than to apply for an extension. If an attorney knew the time was about to expire,

143. In 1984, three such appeals were dismissed. *See* WYO. R. APP. P. 2.01.

144. *In re* Estate of Graham, 597 P.2d 967, 968 (Wyo. 1979); Bosler v. Morad, 555 P.2d 567, 570 (Wyo. 1976).

145. Crossan v. Irrigation Dev. Corp., 598 P.2d 812, 813 (Wyo. 1979); Bosler v. Morad, 555 P.2d 567, 570 (Wyo. 1976). *See also* Booth v. Magee Carpet Co., 548 P.2d 1252, 1255 (Wyo. 1976) ("such behavior as might be the act of a reasonably prudent person under the circumstances").

146. Savage v. Wyoming State Treas. *ex rel.* Workmen's Comp. Dep't, 451 P.2d 796, 797-98 (Wyo. 1969).

147. *In re* Estate of Graham, 597 P.2d 967, 969 (Wyo. 1977). *See also* Elliott v. State, 626 P.2d 1044, 1049 n.8 (Wyo. 1981) (dealing with a late brief, but discussing extensions in general).

148. WYO. R. APP. P. 2.01.

149. Denton v. Smith, No. 84-183 (Wyo. dismissed Aug. 13, 1984); Barlow v. State, No. 84-221 (Wyo. dismissed Oct. 18, 1984).

150. Crossan v. Irrigation Dev. Corp., 598 P.2d 812, 813 (Wyo. 1979). *See* Denton v. Smith, No. 84-183 (Wyo. dismissed Aug. 13, 1984) (attorney admitted to practice in Wyoming, but actually practicing in Colorado, relied upon the 1975 supplement to the Wyoming Court Rules volume, so he did not know that the notice of appeal deadline was fifteen days; in addition, the motion for extension of the notice of appeal period was not granted within thirty days).

he could just as well file the notice of appeal as seek an extension. The grace period allows for what is probably the more common situation: the attorney was unaware the period was about to, or already did, expire.

Service

Rule 2.01 of the W.R.A.P. requires the appellant to serve a copy of his notice of appeal on other parties contemporaneously with the filing of the notice of appeal. In *DS v. Department of Public Assistance and Social Services,*[151] the notice of appeal was timely filed, but the guardian ad litem was not contemporaneously served with a copy.[152] Although contemporaneous service of a copy of the notice of appeal on a party is required by rule 2.01, the court said: "We hold that failure to timely serve notice of appeal upon a necessary party is not a jurisdictional defect which automatically requires dismissal and that the circumstances of this case do not warrant dismissal of this appeal."[153] The court noted that the guardian ad litem would have to be served before the supreme court could obtain jurisdiction, "but it does not follow that the tardy observance of all of these requirements will automatically result in dismissal of the appeal."[154] Because there was no prejudice, because the delay was short, and because the appellant demonstrated good faith, the court decided to reach the merits of the case. "We do so with the admonition to all concerned that failure to serve notice of appeal upon all parties contemporaneously with the filing of the notice may, and probably will, in most cases, result in dismissal of the appeal."[155] Although the court in *DS v. Department of Public Assistance and Social Services* indicated there may be exceptions, it is also clear that dismissal is extremely likely.

There is no comfort in the language of *First National Bank of Thermopolis v. Bonham,* where the court forgave failure to serve a notice of appeal. The appellate rule in effect at that time required that copies of the notice of appeal should be served "without unnecessary delay" rather than contemporaneously with filing.[156] The certificate of service indicating that service has been made on all parties should, of course, be included on the notice of appeal.

THE RECORD ON APPEAL

Contents

Once the notice of appeal has been filed properly, the appellant must next see to the record on appeal to be filed in the supreme court. Rule 4 of the W.R.A.P. governs the contents of the record on appeal. Rule 4.01 requires that "[t]he original papers and exhibits filed in the district court, the transcript of proceedings, if any, or any designated portion thereof,

151. 607 P.2d 911 (Wyo. 1980).
152. *Id.* at 914.
153. *Id.*
154. *Id.* at 915.
155. *Id.*
156. 559 P.2d 42, 50-51 (Wyo. 1977).

and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases."[157]

The court will not consider what is not in the record.[158] The absence of potentially enlightening information may be construed adversely. A full and proper review can be insured by including all relevant materials in the record on appeal—and that is guaranteed by filing them in the district court.

Rule 4.02 of the W.R.A.P. governs transcripts. It allows ten days from the filing of the notice of appeal to file and serve on the appellee a designation of transcript. Better practice is to include this right on the notice of appeal, where possible.[159] Rule 4.02 also requires certification by the reporter, the clerk of the district court, and appellant's counsel. The reporter certifies the transcript; the clerk certifies the papers filed and the transcript;[160] and the appellant's counsel certifies all relevant papers and that the transcript is what he has designated.[161] Although the clerk of district court transmits the record to the supreme court, the appellant is responsible for compliance with rule 4.02.

The court must have the transcript before it in order to consider it.[162] In *City of Evanston v. Whirl Inn, Inc.*, the minutes of the city council had not been transcribed and thus the court could not consider them. In *Whirl Inn*, however, the district court, in reviewing the city council's action, also held evidentiary hearings, which were transcribed. Thus, the evidentiary review in the supreme court was sufficient.[163] The parties were not so fortunate in *Salt River Enterprises, Inc. v. Heiner*, where the supreme court was unable to review the propriety of the trial court's findings of fact because the court reporter had not certified the transcript as required by rule 4.02 and thus the court could not consider the contents of the transcript.[164] In *Stanton v. State*, the tape recording of the justice of the peace court proceedings had not been transcribed and thus was not part of the record on appeal. However, because the state did not deny that the prosecutor had made the statement in question, the supreme court treated the statement as established.[165]

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157. WYO. R. APP. P. 4.01. Lawyers would be well-advised to give the clerk guidance in the preparation and transmission of the record because the clerks are not ordinarily familiar with appellate practice.

158. Judicial notice is, of course, an exception. WYO. R. EVID. 201(f) allows judicial notice to be taken at any time.

159. *See* Appendix IV and text accompanying notes 125-29.

160. WYO. R. APP. P. 4.02. The certificate by the clerk of the district court is the last paper in the record on appeal. Simpson v. Occidental Building and Loan Ass'n, 45 Wyo. 425, 430-31, 19 P.2d 958, 960 (1933).

161. A sample certificate appears in Appendix V.

162. Proceedings on a stipulated record, under WYO. R. APP. P. 4.03 are an exception to the transcript requirement, but the court must have something before it on which to decide. Sharp v. Sharp, 671 P.2d 317, 318 (Wyo. 1983); SC v. DN, 659 P.2d 568, 572 (Wyo. 1983). WYO. R. APP. P. 4.04 also allows the record to be supplemented. Meuse-Rhine-Ijssel Cattle Breeders of Canada, Ltd. v. Y-Tex Corp., 590 P.2d 1306, 1308 n.4 (Wyo. 1979).

163. 647 P.2d 1378, 1381 n.3 (Wyo. 1982).

164. 663 P.2d 518, 519-20 (Wyo. 1983).

165. 692 P.2d 947 (Wyo. 1984).

Filing

Once the record has been compiled properly, it must be filed timely in the supreme court. Rule 3.02 of the W.R.A.P. provides that the record on appeal shall be filed within forty days from the time the notice of appeal is filed (or deemed filed).[166] The appeal will be dismissed if the record is not timely filed.[167] A caution is thus in order. When a premature notice of appeal has been filed, the forty-day period likewise begins to run on the day judgment was entered. Even when the notice of appeal is not premature, the fifteen-day notice of appeal period and the forty-day record on appeal requirements are distinct.

Before the W.R.A.P. were adopted, the application for an extension of time in which to file the record on appeal had to be made before the period expired.[168] In addition, rule 3.02 once allowed either the district court or the supreme court to extend the period for filing the record on appeal. The district court could not extend the period beyond sixty days from the first notice of appeal, or in other words, give more than a twenty-day extension. Excusable neglect, or causes beyond control, was the standard. On the other hand, the supreme court could give an unlimited extension, but in only two situations: 1) if "without fault of the appealing party" the transcript is not available and written evidence of proper arrangements for the transcript is produced; and 2) a satisfactory showing of "causes beyond his control."[169]

Now only the supreme court can grant an extension. The two grounds on which the court can grant an extension are basically the same, but yet more stringent. When a party applies for an extension on the grounds that the transcript is not available, in addition to the previous requirements, the application for extension must be "supported by an affidavit from the responsible reporter" which sets forth his pending cases and the estimated completion dates, a justification for the extension in the case in question, and a statement that the district court has been in-

166. *See* simplified time chart at Appendix III.

167. Williams v. Wyoming Bank & Trust Co., 591 P.2d 884, 885 (Wyo. 1979); Henning v. City of Casper, 63 Wyo. 352, 362-63, 182 P.2d 840, 844 (1947); Sayre v. Roberts, 53 Wyo. 491, 494, 84 P.2d 718, 719 (1938); *In re* Federal Lands Emergency Construction Project No. 6, 50 Wyo. 41, 42-43, 57 P.2d 684, 685 (1936); Samuel v. Christensen-Garig, Inc., 47 Wyo. 331, 332-33, 37 P.2d 680, 681 (1934); Porter v. Carstensen, 44 Wyo. 49, 50-51, 8 P.2d 446, 447 (1932).

The first reported opinion on appellate practice in the fledgling territory involved dismissal of appeals for failure to file timely the record on appeal:

> the appellees respectively filed their motions to dismiss the appeal, on the ground, especially, that such appeal had not been perfected by duly filing a transcript in the Supreme Court of the proceedings in the court below. The motion was in each case granted, the court holding that it was then too late to bring up the records of the district court.

Lannier v. Haase, 1 Wyo. 25 (1870).

168. Butler v. McGee, 363 P.2d 791, 793 (Wyo. 1961); Martens v. State Highway Comm'n, 354 P.2d 222, 223 (Wyo. 1960). *See also* Douglas Reservoir Water Users Ass'n v. Garst, 451 P.2d 451, 453 (Wyo. 1969) (dismissed for failure to timely complete record or to move for an extension or permission to file the absent part out of time).

169. WYO. R. APP. P. 3.02 (1977).

formed of the requested extension.[170] As to an application for extension due to causes beyond control, a "satisfactory showing" that "diligence was used by counsel" is also required.[171] The court has not explained what difference due diligence would make if the causes necessitating an extension were truly beyond control.

The requirements for an extension of time in which to file the record on appeal have been made more stringent by amendment of the rule. Of course, without an extension of time, the late filing of a record on appeal will result in dismissal.[172]

Supreme Court Jurisdiction

Rule 3.01 governs the court's appellate jurisdiction.[173] The supreme court assumes jurisdiction of an appeal when the record on appeal is filed.[174] The failure to observe the supreme court's jurisdiction once the record on appeal has been filed raises problems. Until the supreme court releases its jurisdiction, typically when the mandate to the district court has issued and the record has been sent back to the district court,[175] the district court is without jurisdiction to act further in the matter. *Hayes v. State*[176] involved a district court order made before the mandate in Mr. Hayes' appeal had issued.[177] The supreme court said that because the mandate had not yet been issued, the appeal was still pending.[178] Once the appeal was docketed, the case was under the jurisdiction of the supreme court, and the order made by the district court was made without jurisdiction. Therefore, the supreme court vacated the district court order.[179] In *Gresham v. State,* the supreme court granted a motion to hold the appeal in abeyance so that the trial court could hear a new trial motion.[180] This is better practice.

The problems raised by failure to observe the supreme court's jurisdiction can be rather perplexing. For example, an appeal reached the court in 1984 which was dismissed on the court's own motion because the appeal was not from a final order as required by rule 1.05 of the W.R.A.P.[181]

170. *Id.* 3.02 (Supp. 1984).
171. *Id.*
172. Jessen v. State, 622 P.2d 1374, 1377 n.3 (Wyo. 1971). *See also* Williams v. Wyoming Bank and Trust Co., 591 P.2d 884, 885 (Wyo. 1979). In 1984, one appeal was dismissed for late filing of the record on appeal or related matters.
173. WYO. R. APP. P. 3.01 states: "Except as otherwise provided in Rules 4.05 [authorizing the clerk of district court to retain the record for the convenience of attorneys under limited circumstances] and 4.06 [authorizing a hearing by the supreme court before the record is transmitted], W.R.A.P., the Supreme Court shall not acquire jurisdiction over the cause until the record on appeal is filed with the clerk of the Supreme Court."
174. Jessen v. State, 622 P.2d 1374, 1377 n.3 (Wyo. 1981); DS v. Department of Public Assistance and Social Services, 607 P.2d 911, 915 (Wyo. 1980).
175. *See* WYO. R. APP. P. 4.07.
176. 599 P.2d 569, 570 (Wyo. 1979).
177. Hayes v. State, 599 P.2d 588 (Wyo. 1979).
178. 599 P.2d at 570.
179. *Id.* at 570.
180. Gresham v. State, No. 84-305 (Wyo. order of Jan. 7, 1985).
181. Noonan v. Texaco, No. 84-243 (Wyo. dismissed Oct. 31, 1984).

The difficulty was that the order did not determine the rights and liabilities of all the parties as required by rule 54(b) of the W.R.C.P. The record on appeal was filed in the supreme court on October 3, 1984. In the meantime, on October 19, the trial court entered another order, which finally did dispose of all the parties. This was, of course, unknown to the supreme court which, on October 31, 1984, entered its order dismissing the appeal for lack of a final order.[182] On November 5, 1984, the appellant filed in the supreme court a motion to reinstate the appeal, arguing that now there was a final order.[183]

The question arose whether the October 19 order of the trial judge, entered while jurisdiction was in the supreme court, not in the trial court, was anything more than a nullity. In the end, the court apparently decided that the trial court did have jurisdiction over the two defendants who were expressly left in the suit by the previous trial court order, and thus could dismiss the complaint against them without running afoul of the supreme court's jurisdiction. Such an order would then make the original trial court order final as of October 19, the day the second order was entered. Then, applying the premature notice of appeal principles, the previous notice of appeal would date from the October 19 trial court order.[184] The court did not reinstate the appeal, but considered the original notice of appeal effective to appeal from the October 19 order. It extended the time for filing the record on appeal to accommodate the fact that the new period in which to file the record on appeal (from an October 19 notice of appeal) had expired while the motion for reinstatement was pending.

The record on appeal is an important and necessary element of an appeal. If a proper trial court record has been built, the record on appeal is not difficult to compile. The docketing of the record sets the briefing schedule in motion and delineates the supreme court's jurisdiction.

APPELLATE BRIEFS

After the record on appeal has been docketed in the supreme court, the attorney must turn his attention to writing, filing, and serving his brief.

Contents

Rule 5.01 of the W.R.A.P. governs the contents of briefs.[185] Its simple requirements apply to appellants' briefs, appellees' briefs,[186] and briefs in proceedings upon certification of questions of law by federal courts,[187]

182. *Id.*

183. Which, incidentally, failed to comply with the WYO. R. APP. P. 15 requirement that motions for reinstatement be accompanied by a brief.

184. Noonan v. Texaco, No. 84-243 (Wyo. order denying petition for reinstatement of appeal and extending time to file record on appeal and docket appeal Nov. 30, 1984).

185. WYO. R. APP. P. 5.01.

186. *Id.* at 5.02.

187. *Id.* at 11.06.

and presumably, to reply briefs,[188] amicus curae briefs,[189] and briefs in support of applications for rehearing,[190] motions to dismiss,[191] and petitions to reinstate.[192]

Rule 5.01 requires the sections to be included in the briefs to be put "under appropriate headings." In turn, the necessary sections are: a table of contents (with page references); a table of cases (alphabetic, with page references); a table of statutes and other authorities (with page references); a statement of the issues; a statement of the case (nature of the case, course of proceedings, disposition below); an argument (optional summary; contentions, reasons, authorities relied on; parts of the record relied upon); and a short conclusion (relief sought). Counsel submitting the brief must also sign the brief.[193]

The stated purpose of rule 5.01 is to help focus the facts, issues and authorities.[194] But it is also clear that a proper focus eases the court's task of deciding the case before it. Because the court has promulgated all appellate rules, there can be little doubt that rule 5.01 is a statement from the court of what it considers most helpful in a brief. Thus, compliance with the rule is not only proper but is also wise.[195] Indeed, the court has on numerous occasions expressed its displeasure with failure to comply with the mandate of rule 5.01. The court has said that where there is no table of cases, or subject index, and where the names of counsel and the persons represented did not appear, there is no compliance with the rule.[196] The court has also announced that it considers the mere absence of a list of issues to be a clear violation of rule 5.01 and may refuse to consider the contentions of the party erring.[197] The court has also criticized briefs where the arguments do not correspond one to one with the issues.[198] The court's most recent pronouncement is "a firm admonition that we will not

188. *See id.* at 5.03.
189. *See id.* at 5.12.
190. *See id.* at 8.01.
191. *See id.* at 16. Rule 16 states that "[a] motion directed to a subject matter which may substantially affect the disposition of a case" is to be supported "by a memorandum of points and authorities." Thus purely formal motions need not be accompanied by briefs. The non-moving party under a rule 16 motion has ten days to respond.
192. *See id.* at 15. Rule 15 requires that the petition "shall be accompanied" by a brief. The petition for reinstatement and briefs in support must be filed within ten days of the order of dismissal; opposing counsel has ten days to respond.
193. WYO. R. APP. P. 5.01.
194. Strang Telecasting, Inc. v. Ernst, 610 P.2d 1011, 1015 (Wyo. 1980).
195. Only a fool would fly in the face of such a clear indication of what makes the court happy! and it takes a fool to know a fool. *See* Brief for Appellant, Fife v. State, 676 P.2d 565 (Wyo. 1984); Brief for Appellants, Patterson v. State, 691 P.2d 253 (Wyo. 1984).
196. *See* Crozier v. Malone, 366 P.2d 125, 126 (Wyo. 1961) (both parties failed to comply with the Wyoming Supreme Court Rules, Rules 12(a) and (c), but the court said that the failure caused no serious inconvenience and that it was merely observing the failure to comply).
197. *See* Cline v. Safeco Ins. Cos., 614 P.2d 1335, 1337 (Wyo. 1980) (this made it extremely difficult to determine the issues and the court noted "it is not our job to draw a list of issues to frame appellant's argument.").
198. *Id.* at 1337. *See also* Mariner v. Marsden, 610 P.2d 6, 10 (Wyo. 1980) (nine issues, five arguments).

always tolerate such glaring failures to comply with the Rules of Appellate Procedure."[199]

Rule 5.01 requires that the arguments be supported by authority and reference to the record. At one time the failure to clearly frame the issues and cite proper authority was viewed leniently by the court. "Judging from some of the statements made in the brief of respondent and some of the cases cited, it is probably the theory of counsel for plaintiff and respondent that the latter had a right to rescind the contract, and therefore, sue for breach thereof."[200] This is no longer the case. The court will refuse to consider contentions not supported by cogent argument or pertinent authority.[201] Furthermore, the court will not consider an alleged error supported only with perfunctory argument.[202]

The assignment of error must be specific enough to inform the supreme court what error was committed.[203] The appellant must also direct the court's attention to the pertinent parts of the record.[204] Failure to do so may result in the court's refusing to consider the questions raised.[205] Not only are references to the record required, but ". . . an imprecise factual discussion will not profit the advocate's client in this court. We see no reason to tolerate a practice which can only succeed if this court is misled."[206] The supreme court did tolerate the practice in *Strang Telecasting, Inc. v. Ernst,* because the appeal involved the review of an order granting summary judgment. The court warned, however, that in

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199. 37 Gambling Devices v. State, 694 P.2d 711, 712 (Wyo. 1985).

200. Hawkins v. Stoffers, 40 Wyo. 227, 240, 276 P. 452, 457 (1929).

201. Zanetti v. Zanetti, 689 P.2d 1116, 1120 (Wyo. 1984); Osborn v. Manning, 685 P.2d 1121, 1124 (Wyo. 1984); Herman v. Speed King Mfg. Co., 675 P.2d 1271, 1278 (Wyo. 1984); Holding's Little America v. Board of County Comm'rs of Laramie County, 670 P.2d 699, 703 (Wyo. 1983); Knadler v. Adams, 661 P.2d 1052, 1054 (Wyo. 1983); Young v. Hawks, 624 P.2d 235, 238 n.2 (Wyo. 1981); Barnette v. Doyle, 622 P.2d 1349, 1363 (Wyo. 1981); State v. Steele, 620 P.2d 1026, 1027 (Wyo. 1980); Cline v. Safeco Ins. Cos., 614 P.2d 1335, 1337 (Wyo. 1980); Elder v. Jones, 608 P.2d 654, 660 (Wyo. 1980); Dechert v. Christopulos, 604 P.2d 1039, 1045, (Wyo. 1980); Cardin v. Morrison-Knudsen, 603 P.2d 862 (Wyo. 1979); Grable v. State, 601 P.2d 1001, 1002 (Wyo. 1979); Scherling v. Kilgore, 599 P.2d 1352, 1359 (Wyo. 1979). Peterson v. First Nat'l Bank of Lander, 579 P.2d 1038, 1040 (Wyo. 1978). *See* Cubin v. Cubin, 685 P.2d 680, 682 (Wyo. 1984) ("In accordance with our usual rule we will not discuss the issue . . .").

The court will refuse to consider an argument with no citation of authority. Salmeri v. Salmeri, 554 P.2d 1244, 1252 (Wyo. 1976); Clouser v. Spaniol Ford, Inc., 522 P.2d 1360, 1365 (Wyo. 1975); *In re* Estate of Carey, 504 P.2d 793, 798 (Wyo. 1972). *But see* Sanville v. State, 593 P.2d 1340, 1344-45 (Wyo. 1979) (appellant cited no authority for his propositions, but the court decided the merits anyway).

202. Kincheloe v. Milatzo, 678 P.2d 855, 858 (Wyo. 1984); Stephenson v. Mitchell *ex rel.* Workmen's Comp. Dep't, 569 P.2d 95, 97 (Wyo. 1977); First Nat'l Bank of Thermopolis v. Bonham, 559 P.2d 42, 51 (Wyo. 1977).

203. Booth v. Hackney, 516 P.2d 180, 185 (Wyo. 1973).

204. State Surety Co. v. Lamb Constr. Co., 625 P.2d 184, 191 (Wyo. 1981). *See also* Scherling v. Kilgore, 599 P.2d 1352, 1357 (Wyo. 1979) (appellant's burden to present the court a complete record on which to base a decision).

205. *See* Simpson v. Occidental Bldg. and Loan Ass'n, 45 Wyo. 425, 429-30, 19 P.2d 958, 959 (1933). *But see* Rafferty v. Northern Utilities Co., 73 Wyo. 287, 318-20, 278 P.2d 605, 617 (1955).

206. Strang Telecasting, Inc. v. Ernst, 610 P.2d 1011, 1015 (Wyo. 1980).

the future it would feel free to exercise its rule 1.02 discretion less leniently, even in summary judgment cases.[207]

Submission of a trial brief, or reference to a trial brief in the record, does not meet the briefing requirement. The court gave a clear warning in 1975 that it considered this practice to be a failure to comply with the rules.[208] And in 1977, the court said:

> In passing, we want to say we very nearly dismissed this appeal for failure of the appellant to comply with Rule 12 of this court. Since we have been lax in the past in enforcing its provisions, we permitted this appeal to proceed. The appellant filed no acceptable brief in this court. The "brief" merely referred to briefs filed with the district court and appearing in the record but did not attach copies. The rule requires the filing of six [now seven] copies of briefs; there is only one record. Each member of the court must have a copy. Additionally, we expect to recieve briefs prepared for the use of this court, not those prepared for the district court. The requirements very often vary in this court. This is the last case in which that practice will be tolerated. In all future cases, the appeal will be summarily dismissed if the appellant's brief, such as the one received from the appellant here, is filed.[209]

Despite the court's disapproval, the practice of relying on a trial brief continues.[210]

The briefing requirements are simple enough. They are all spelled out in rule 5.01. At the least, the party who does not comply may have his contentions ignored. At the most, the entire appeal may be dismissed.

Rule 5.05 of the W.R.A.P. requires that briefs must not be typed in elite, or twelve-pitch type. Only pica, or ten-pitch type is permitted.[211] Furthermore, the briefs are to be submitted on eight and one half by eleven inch paper, not legal sized.[212]

Filing

The properly composed brief must next be filed. Rule 5.06 of the W.R.A.P. governs the filing of briefs. The requirements are simple. The parties must file seven copies of their briefs in the supreme court and serve one copy on the opposing party or his attorney.[213]

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207. *Id.*

208. Budd v. Bishop, 543 P.2d 368, 371 (Wyo. 1975).

209. Stephenson v. Mitchell *ex rel.* Workmen's Comp. Dep't, 569 P.2d 95, 99-100 (Wyo. 1977).

210. *See* Scherling v. Kilgore, 599 P.2d 1352, 1359 (Wyo. 1979); International Ass'n of Fire Fighters v. Civil Service Comm'n, No. 84-244 (Wyo. appeal pending March 11, 1985).

211. WYO. R. APP. P. 5.05 and Wyo. R. App. Appendix II.

212. WYO. R. APP. P. 5.05. *See* Skurdal v. State, No. 84-123 (Wyo. appeal pending March 11, 1985); Shaw v. Lewmont Drilling, 694 P.2d 117 (Wyo. 1985) (briefs of appellants submitted on legal-size paper).

213. Wyo. R. App. P. 5.01.

The time for filing appellant's brief begins to run from the day the record on appeal is docketed in the supreme court. Appellant has thirty days to file his brief.[214] Appellee has thirty days from the filing of appellant's brief, if appellee is personally served.

The mailing rule applies to briefs. Rule 14.03 provides that when the party served has a certain time in which to respond and service upon him is made by mail, the period allotted for response is extended automatically by three days.[215] The mailing rule thus extends only the time for filing a response, not an original document. If the first paper is due on a certain day, it is due to be filed in court on that day, not to be placed in the mail. Under no circumstances does the mailing rule extend the time in which the person who is originally to file or serve must file or serve. It applies only to his opponent. Thus the mailing rule extends the briefing periods allotted for the appellee and appellant's reply brief. Therefore, appellee has thirty-three days from the filing of appellant's brief if appellee is served by mail.[216] Then, from the filing of appellee's brief, appellant has ten days in which to reply to new issues (or thirteen if served by mail).[217] The basic briefing period is shorter in two kinds of cases: in death penalty cases, in which it is twenty-five days; and in worker's compensation cases, in which it is fifteen days.[218] The ten-day reply period applies to both.

Failure to file timely a brief of appellant results in dismissal of the appeal,[219] as does complete failure to file a brief.[220] Failure of appellee to file timely a brief should not result in dismissal, or else every victor at the trial court level could preserve his victory by failing to file a brief timely. Just what action is appropriate or likely in such a case is unclear, but rule 1.02 authorizes several sanctions. Where the appellee completely fails to file a brief, rule 5.11 provides that the appellee "shall not be heard."[221]

A request for an extension of the briefing period should be made before the brief is due. Rule 5.10 of the W.R.A.P. requires as much. This was not always in the rule. The court had authority to grant an extension in extreme cases even after the time for filing was past.[222] After the effective date of rule 5.10, there can be no extension of time to file briefs after

214. *Id.* at 5.06.
215. *Id.* at 14.03.
216. *Id.* at 5.06, 14.03.
217. *Id.* at 5.06.
218. *Id.;* WYO. STAT. § 27-12-615 (1977).
219. Elliott v. State, 626 P.2d 1044, 1049 (Wyo. 1981) (supreme court review of district court's dismissal of appeal from county court because brief was filed beyond the time allowed in second extension). Grippen v. State, 20 Wyo. 486, 488-89, 124 P. 764 (1928); Nelson v. Sunset Oil Co., 36 Wyo. 245, 247, 254 P. 127, 127 (1927); "W" Sheep Co. v. Pine Dome Oil Co., 29 Wyo. 59, 59, 210 P. 389, 390 (1922). In 1984, thirteen appeals were dismissed for failure timely to file briefs. Note that this result is not mandated by the rules. Rather, "as a matter of practice," the court will dismiss. Elliott v. State, 626 P.2d at 1049.
220. WYO. R. APP. P. 5.11; Reed v. Hunter, 663 P.2d 513, 516 (Wyo. 1983); Carr v. Hopkin, 556 P.2d 221, 223 (Wyo. 1976).
221. WYO. R. APP. P. 5.11.
222. Savage v. Wyoming State Treas. *ex rel.* Workmen's Comp. Dep't, 451 P.2d 796, 797 (Wyo. 1969); Spence v. Nicks Motor Co., 68 Wyo. 443, 445, 235 P.2d 346, 347 (1951).

the period has elapsed.[223] This is based on the notion that there can be no extension of that which has already terminated.[224] It has been suggested that excusable neglect, such as failure in the mail service, may be shown to obtain an untimely extension,[225] although the court has noted that it will frown on a late extension request in appellate matters.[226] However, a notable 1984 case involved an appeal which was dismissed for failure to file timely a brief. The appellant petitioned for reinstatement claiming excusable neglect: the attorney had written "brief due" on the wrong Thursday on his calendar. He also claimed that no prejudice resulted since although he had received only a fifteen-day extension, both the supreme court and the appellee would have given him a thirty-day extension, and the brief was in fact filed within the thirty-day period. The court reinstated the appeal![227]

Service

Rule 5.06 of the W.R.A.P. governs service of a brief on an opponent. The rule specifically requires that one copy be served upon or mailed to the opposite party.[228] Since the amendment of rule 5.06 on July 1, 1980, service upon the other party is to be made concurrently with filing in the supreme court. The old rule allowed the appellant to serve his opponent within the thirty-day period. Because the appellee's time to brief his case begins to run when the appellant's brief is filed in the supreme court, the potential for cheating the appellee was clear. The appellant could file his brief five days after the record on appeal was filed, but not serve his appellee until twenty-five days later—leaving the appellee with only five days to respond, rather than the thirty allotted. The amendment forecloses such opportunity for foul play and gives the appellee his full measure of time.

Rule 5.07 requires the appellant to serve a copy of his brief on the Attorney General if the state is a party, if the state's property is involved, or if a statute is alleged to be unconstitutional. This rule applies to reserved questions in criminal cases and bills of exception as well as appeals.[229] Of particular concern, because it is so easy to forget, is the requirement of service on the Attorney General when "a statute, ordinance or franchise is alleged to be unconstitutional."[230] Failure to serve the Attorney General in these cases is grounds for dismissal.[231] Of course, the appellant who

223. Wood v. City of Casper, 660 P.2d 1163, 1167 (Wyo. 1983); Elliott v. State, 626 P.2d 1044, 1049 (Wyo. 1981).

224. Elliott v. State, 626 P.2d at 1049; Martens v. State Highway Comm'n, 354 P.2d 222, 223 (Wyo. 1960).

225. Elliott v. State, 626 P.2d at 1049.

226. *Id.* at 1049 n.8. In 1984, one appeal was dismissed for failure to obtain a timely extension.

227. Thomas v. South Cheyenne Water and Sewer Dist., No. 84-153 (Wyo. reinstated Dec. 19, 1984). When asked how this result could be justified, one member of the court responded, "Well, this is the time of year when miracles DO happen!"

228. WYO. R. APP. P. 5.06.

229. *Id.* at 5.07.

230. *Id.*

231. Ririe v. Board of Trustees, 674 P.2d 214, 216 (Wyo. 1983).

fails to serve the brief on his opponent also is subject to having his appeal dismissed according the sanctions authorized rule 1.02.[232]

CONCLUSION

The rules which guide an attorney in perfecting an appeal are basic and easy to follow. When they are observed, the appeal will be perfected and the merits of the controlversy will be reached and decided by the supreme court. The best way to insure a decision on the merits, the goal sought by the parties to an appeal, is to follow the rules.

While it is true that an appeal might be dismissed for violation of any of the rules, it should be remembered that the bulk of the appeals to the Wyoming Supreme Court are perfected and decided. The caution urged here is that, perhaps in the future the court will take a less kindly attitude toward failure to follow the appellate rules. Indeed, in the past few years, there have been several amendments which make it more difficult to obtain an exception to a rule or an extension of time. The court has also demonstrated an increasingly harsh stand against rules violations, deciding that dismissal is the appropriate sanction for a violation formerly tolerated, giving stronger warnings, and invoking penalties more often. The court has not always been consistent in its application of sanctions, but dismissal is clearly among those authorized.

The mandate of the rules of appellate procedure is simple and easy to follow. There is little excuse for failure to comply with any of the rules, and even less for failure to comply with those rules which have been discussed and explained repeatedly in published opinions and orders. The cost of failure to comply may be high. Dismissal of an appeal for failure to follow the rules may well be grounds for a malpractice claim. Furthermore, a client whose appeal has been dismissed might feel disinclined to pay the attorney. Other authorized sanctions, short of dismissal, can be nearly as distasteful. In any event, even if a sanction is not imposed, the client gains no advantage from failure to comply with the rules.

The best practice is to become familiar with the appellate rules, watch for amendments and reported opinions and orders, and follow the rules scrupulously.

232. Carr v. Hopkin, 556 P.2d 221, 223 (Wyo. 1976) (decided under WYO. S. CT. R. 12(j)).

APPENDIX I

WYOMING SUPREME COURT TOTALS 1969-1984

Year	Appeals Civil	Criminal†	Total	Original Cases††	Total Cases	Cases Disposed	Cases Dismissed
1969					86		
1970					127		
1971					114		
1972					109		
1973					150	104	26
1974					164	124	21
1975			121	8	129	94	29
1976	82	46	128	10	138	123	37
1977	96	39	105	11	116	162	51
1978	107	42	149	8	157	145	36
1979					177	212	43
1980	135	48	183	24	207	168	53
1981	140	46	186	12	198	205	59
1982	150	48	198	28	226	197	44
1983					276		
1984			332	9	331		82

†including bills of exceptions.
††these are cases in which the supreme court's original jurisdiction is invoked.

APPENDIX II

SUMMARY OF 1984 DISMISSALS

REASON FOR DISMISSAL	COURT'S OWN MOTION	APPELLEE'S MOTION	BOTH	TOTAL
Late notice of appeal	13	1	1	14
Defective notice of appeal			1	1
No filing fee	1			1
Late record on appeal	1			1
Late motion to extend time for filing appellant's brief	1			1
Late appellant's brief	10	2		12
No final order				
54 claims	4		2	6
parties	6			6
premature notice of appeal	3			3
new trial motion tolls	2			2
trial court granted motion to reconsider	1			1
denial of:				
summary judgment	1			1
permissive intervention	1			1
writ of habeas corpus	2			2
writ of prohibition	1			1
free transcript	1			1
motion to dismiss	1			1
granting of:				
new trial motion	1			1
partial summary judgment	1			1
approving receivers report, but not closing estate	1			1
TOTAL no final order	24		2	26
Trial court had no jurisdiction	4			4
Moot		3		3
No standing	1		1	2
Voluntary dismissal by appellant or stipulation and settlement or by joint motion		17		17
TOTAL	53	24	5	82

APPENDIX III

NUMBER OF DAYS*

	Workers Compensation	Death Penalty	All Other Cases
Entry of Judgment or Final Order (in District Court)	0	0	0
Notice of Appeal (filed in District Court)	15	15	15
Record on Appeal (filed in Supreme Court)	40	40	40
Appellant's Brief (filed in Supreme Court)	15	25	30
Appellee's Brief (filed in Supreme Court)	15	25	30
Reply Brief (filed in Supreme Court)	10	10	10

*Entry of judgment or final order is day zero. The time periods indicated are the maximum allowed for the event listed at left. The time period listed begins to run with the preceding event listed at left, regardless of when it actually occurs.

APPENDIX IV

STATE OF WYOMING)
COUNTY OF _____)
)
_____,)
Plaintiff,)
v.)
_____,)
Defendant)

IN THE DISTRICT COURT
_____ JUDICIAL DISTRICT

CRIMINAL/CIVIL ACTION NO.

NOTICE OF APPEAL

Notice is hereby given that _____, the _____ in the above entitled action appeals to the Supreme Court of the State of Wyoming, from the final order/judgment entitled _____ entered on _____.

DESIGNATION OF TRANSCRIPT

Appellant _____ hereby designates the following transcript to be included in the record on appeal:

CERTIFICATION CONCERNING TRANSCRIPT

The undersigned certifies that he has made satisfactory arrangements for the preparation of and payment for a transcript of the proceedings designated above.

CERTIFICATE OF SERVICE

I, _____, attorney for appellant, hereby certify that the foregoing Notice of Appeal and Designation of Transcript was served by placing a true and correct copy thereof in the United States mail, postage prepaid, this _____ day of _____, _____, addressed as follows: (*or* personally this _____ day of _____, _____, on:)

name and address of appellee
and or appellee's attorney

_____
Attorney for Appellant

APPENDIX V

[CAPTION]

CERTIFICATE OF APPELLANT'S COUNSEL

I, _____, attorney of record for _____, appellant, do hereby certify that the foregoing is all of the record papers and relevant transcript that I have designated to be included in the record on appeal and that the foregoing is the original of all those documents designated, unless otherwise specified.

Dated this _____ day of _____, _____.

_____

Attorney for Appellant

APPENDIX VI

CHECKLIST FOR PERFECTING AN APPEAL*

NOTICE OF APPEAL

Does the notice of appeal comply with W.R.A.P. 2.01, 2.02, 4.02?
- Specify party appealing?
- Designate transcript and/or list issues?
- Designate judgment or order being appealed?
- Certify transcript has been ordered?
- Name court to which appeal is taken?

Was the time for appeal extended in accord with W.R.A.P. 2.01?

Includes:
- W.R.C.P. 59: motions for new trial, to alter or amend
- W.R.C.P. 50 (b): motion for judgment not withstanding the verdict
- W.R.C.P. 52 (b): motion to amend or make additional findings of fact
- W.R.Cr.P. 30 (c): motion for judgment of acquittal
- W.R.Cr.P. 34: motion for new trial
- W.R.Cr.P. 35: motion in arrest of judgment

DATE OF JUDGMENT:

Notice of Appeal due: (15 days from entry of judgment) _____

Notice of Appeal filed: _____

Was it timely?

Any other problems?
- Premature notice
- Amendments to notice
- Do these problems undermine jurisdiction?

FINAL ORDER

Is the judgment or order recited in the notice of appeal substantially appealable? (i.e., is it a final order in writing signed by a judge?)

Is W.R.C.P. 54 (b) involved? (i.e., were there multiple parties or multiple claims?) If so, have all of the requisite determinations been made?

RECORD ON APPEAL

Record on Appeal Due: (40 days from filing of notice of appeal, unless extended) _____

Record on appeal filed in Supreme Court: _____

Was it timely filed?

MISCELLANEOUS

Is the appeal a review of an administrative action? Any problems? (See W.R.A.P. Rule 12)

Does the appeal arise from a county or municipal court? Any problems? (See W.R.A.P.C.L.J.)

*The bulk of appeals meeting these requirements will not be dismissed. The checklist does not, however, make provision for every esoteric problem.