Colorado Lawyer Article on Revised CAR 3.4

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On May 23, 2016, the Colorado Supreme Court adopted a revised C.A.R. 3.4, which governs appeals from dependency and neglect proceedings.[1] The revisions seek to increase the efficacy of appellate advocacy while maintaining the expedited nature of such appeals. This article describes why such a revised rule was necessary and highlights those revisions.

1. The Original C.A.R. 3.4: Its Purpose and Unintended Consequences

In 2005, the Colorado Supreme Court adopted C.A.R. 3.4 to expedite the appellate process for dependency and neglect cases. The court did so in recognition of the deleterious effects lengthy appeals had on children and families. Parents faced uncertainty while they waited for appellate decisions; their children were delayed in being placed in permanent homes. The rule established a petition process in lieu of traditional briefing and shortened the time periods in which parties were required to file a petition and response.

Although C.A.R. 3.4 significantly reduced the length of time required to resolve dependency and neglect appeals, the expedited petition process produced unintended consequences. When the Supreme Court adopted the rule, it anticipated that parties would have access to real-time transcripts when preparing the petition and response. Unfortunately, parties did not have consistent access to transcripts before the petition or response was due. This created additional responsibilities for staff attorneys of the Court of Appeals in dependency and neglect cases, which did not exist for any other case type.[2] These responsibilities included reviewing the entire record to verify facts, locating factual references made by the parties, identifying appellate issues the parties might have missed due to their limited access to the record, and verifying compliance with the Indian Child Welfare Act (ICWA).[3]

The petition process of C.A.R. 3.4 also diminished the quality of appellate advocacy in dependency and neglect cases. Because transcripts often were not available before the petition or response was due, parties were not required to cite to the record. Also, appellate counsel were often new to the case, not having participated in the trial court proceedings, and were expected to identify and address important issues on appeal without the benefit of transcripts or a

full record. The petition format also limited counsel to presenting legal issues in a summary fashion, despite the fact that many of these cases involved termination of parental rights.

In 2014, the State Court Administrator established a Respondent Parents' Counsel Work Group to, among other things, evaluate the appellate process and make recommendations for improving the quality of appellate advocacy in dependency and neglect appeals. The Work Group recommended significant revisions to C.A.R. 3.4 and related judicial department forms. It presented these recommendations to the Appellate Rules Committee, which, in turn, proposed the revisions to the Colorado Supreme Court. On May 23, 2016, the Colorado Supreme Court adopted the proposed revisions to C.A.R. 3.4 and related judicial department forms. The changes apply to appellate cases filed on or after July 1, 2016.

2. The Revised C.A.R. 3.4

The revised C.A.R. 3.4 includes a number of significant changes.

A. Summary of Procedural Changes

1. What may be appealed

The revised rule clarifies the types of judgments, decrees, and orders that may be appealed under C.A.R. 3.4, adding the following to those expressly included in the previous rule:

- Orders allocating parental responsibilities (C.R.S. 19-1-104(6));
- Final orders reinstating the parent-child legal relationship (C.R.S. 19-3-612); and
- Final orders placing guardianship and permanent legal custody with a relative of the child (C.R.S. 19-3-605).[4]

Previously, C.A.R. 3.4 only stated that it applied to orders:

- Terminating or refusing to terminate the parent-child legal relationship (C.R.S. 19-1-109(2)(b));
- Decreeing a child to be dependent or neglected (C.R.S. 19-1-109(2)(c)); and

- Final orders of permanent legal custody (C.R.S. 19-3-702).

2. E-Service

The revised rule retains the requirement from the previous rule that an appeal must be filed within 21 days after the entry of the judgment, decree, or order.[5] It also retains the instruction that if notice of the order is mailed to the parties, the time for filing commences from the date of mailing.[6] The revised rule adds that if notice of the judgment, decree, or order is transmitted to the parties by E-Service, the time for filing the appeal commences from the date of E-Service.[7]

3. Responsibility to ensure a timely notice of appeal is filed

The revised rule clarifies that trial counsel is obligated to ensure that a timely appeal is filed.[8] This obligation may be met if different counsel files the appeal, but ultimate responsibility for the appeal rests with trial counsel.[9] Self-represented parties are obligated to file their own appeal.[10]

4. New requirements to be included in the notice of appeal

The revised rule sets out new requirements to be included in the notice of appeal:

- Identification of the party or parties initiating the appeal;
- Identification of the judgment, decree, or order from which the appeal is taken;
- The date the judgment, decree, or order from which the appeal is taken was signed by the trial court;
- A certificate of service in compliance with C.A.R. 25; and
- A copy of the judgment, decree, or order from which the appeal is taken.[11]

The revised rule no longer requires the appellant's signature, a statement by counsel that appellant has authorized the appeal, or a Certificate of Diligent Search (Form 2).[12]

5. Form JDF 545

The revised rule adopts a new form for filing a notice of appeal called a Notice of Appeal (Cross-Appeal) and Designation of Transcripts (JDF 545).[13]

6. Designation of the record

The revised rule automatically designates the entire trial court file and all exhibits, and parties need only designate any transcripts they wish to include.[14]

The revised rule requires the appellant (or cross-appellant who designates additional transcripts) to complete and serve a copy of the designation of transcripts portion of JDF 545 on the trial court's managing court reporter when the notice of appeal is filed.[15] This revision does not affect the requirement that the designating party must arrange to pay for the transcripts within 7 days after service of the designation.[16] Similar to the previous rule, the managing court reporter must file a statement with the clerk of the trial court and the clerk of the Court of Appeals within 14 days after service of a JDF 545, indicating whether arrangements for payment have been made.[17]

7. Request and support for an extension of time to complete the transcript

Similar to the previous rule, the record must be transmitted within 42 days after the initial filing of JDF 545.[18] The revised rule does not affect the availability of a 14-day extension in which to file the record, which will be granted only on a showing of good cause.[19] The revised rule adds that an appellant may request an extension of more than 14 days based on a court reporter's or transcriber's inability to complete the transcript. [20] Like the previous rule, the request must be supported by an affidavit, but the revised rule allows an affidavit by the reporter, transcriber, managing court reporter, or clerk of the trial court.[21]

B. Transition to a Traditional Briefing Process

The previous petition format required "concise statements" of the material facts, legal issues, supporting authority, and an explanation of applicability. The revised rule requires a more traditional briefing format that

substantially mirrors C.A.R. 28 and 32. It includes more requirements regarding the content and format of the brief but offers counsel greater opportunity to fully identify and brief the issues on appeal. While the revised rule returns to traditional briefing, it retains shorter deadlines to encourage expediency.[22]

1. Time to file the opening brief

The revised rule requires the appellant to file an opening brief within 21 days after the record is filed, and the brief's format must comply with C.A.R. 3.4(f).[23] The revised rule does not affect the availability of a single 7-day extension to file the opening brief.[24]

2. Contents of the opening brief

The revised rule requires an opening brief to contain a table of contents, table of authorities, and statement of the issues presented for review.[25] It must also include a concise statement with appropriate references to the record identifying the nature of the case, relevant facts, procedural history, and the ruling, judgment, or order presented for review.[26]

An opening brief also must contain a summary of the arguments.[27] Under a separate heading placed before the discussion of each issue, the arguments must contain statements of the applicable standard of review, with citation to authority, and whether the issue on appeal was preserved below.[28] If the issue was preserved, the argument must contain a citation to the precise location in the record where the issue was raised and ruled upon.[29] Finally, an opening brief must include a short conclusion stating the precise relief sought.[30]

3. Compliance with the ICWA

The revised rule requires the opening brief to include a statement of ICWA compliance.[31]

The statement must include citations to the record, which must identify:

- Each date the court made an inquiry to determine whether the child is or could be an Indian child, and a statement of any identified or potential tribe(s);
- Copies of ICWA notices and other communications intended to provide such notice;
- Postal return receipts for Indian child welfare notices;
- Responses to such notices;
- Any additional notices; and
- Date(s) of any ruling as to whether the child is or is not an Indian child.[32]

The previous rule did not require a statement of ICWA compliance.

4. Time to file the answer brief

The revised rule allows any appellee to file an answer brief within 21 days after service of the appellant's opening brief.[33] Like the opening brief, the revisions do not affect the availability of a single 7-day extension to file the brief.[34]

5. Contents of the answer brief

Under a separate heading following the table of authorities, the revised rule requires a statement of whether the appellee agrees with the appellant's statements concerning ICWA compliance and if not, why not.[35] Likewise, under a separate heading placed before the discussion of each issue, the answer brief must state whether the appellee agrees with the appellant's statements concerning the standard of review, with citation to authority, and preservation for appeal and if not, why not.[36]

The revised rule also requires the answer brief to conform to the requirements of C.A.R. 3.4(f).[37] Separate headings titled statement of the issues or of the case need not be included unless the appellee is dissatisfied with the appellant's statement.

6. Word limits

The revised rule increased the word limit for opening and answer briefs to 7,500 words.[38] The expanded word count accommodates the new requirements, including citations to the record and ICWA compliance.

7. More than one appellant

In cases involving more than one appellant, the revised rule requires the appellee to file a combined answer brief that addresses the legal issues raised by all appellants.[39] The combined answer brief is limited to 9,500 words, and the appellee must file the brief within 28 days of service of the last opening brief filed.[40]

8. Time to file the reply brief

The revised rule allows an appellant to file a reply brief within 14 days after service of the appellee's answer brief.[41]

9. Contents of the reply brief

The reply brief must comply with C.A.R. 3.4(f)(1)(A)-(D) and is limited to 5,700 words.[42]

10. Supplemental briefing

The previous rule allowed the Court of Appeals to order supplemental briefing after reviewing the petition, any response, and the record. The revised rule does not reference supplemental briefing. The change to a traditional briefing process following receipt of the record is anticipated to obviate the need for supplemental briefing in most cases. While the court retains the inherent authority to order supplemental briefing on any issue, reference to that practice has been deleted.

11. Oral argument

Under the previous rule, a party had to make a request for oral argument no later than the date on which the party's petition or response was due. The revised rule provides more time. A party must request oral argument in a separate, appropriately titled document filed no later than 7 days after briefs are closed.[43]

3. Conclusion

The revised C.A.R. 3.4 significantly changes the procedural and formatting requirements for appeals in dependency and neglect cases and places greater responsibility on appellate counsel to fully identify and brief the legal issues on appeal. It is anticipated that the revisions will greatly improve the quality of appellate advocacy and continue to expedite the resolution of appeals in dependency and neglect cases.

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[1] The new rule can be found on the Colorado Supreme Court website under adopted and proposed rule changes: https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2016/2016(07)%20redlined.pdf.

[2] The previous rule stated that "[a]fter reviewing the petition on appeal, any response, and the record, the Court of Appeals may . . . set the case for supplemental briefing on issues raised by the parties or noticed by the court." C.A.R. 3.4(j)(2) (2015).

[3] ICWA compliance is required pursuant to §§ 19-1-126, 19-3-502 (2.7)(a) and (b), 19-3-602 (1.5), 19-5-208 (2.5), C.R.S. (2015) and ICWA itself, 25 U.S.C. § 1901 et seq. Noncompliance with ICWA can significantly impact the rights of tribes and all parties, including children, and can result in significant delay in the resolution of cases.

[4] C.A.R. 3.4(a).

[5] C.A.R. 3.4(b)(1).

[6] *Id.*

[7] *Id.*

[8] C.A.R. 3.4(b)(4).

[9] *Id.*

[10] *Id.*

[11] C.A.R. 3.4(c)(1)-(5).

[12] Form 2 has been deleted by the adoption of the new rule.

[13] The notice of appeal was formerly known as Form 1, and it has also been deleted by the adoption of the new rule. *See* C.A.R. 3.4(c).

[14] C.A.R. 3.4(d)(1).

[15] C.A.R. 3.4(d)(2).

[16] C.A.R. 3.4(d)(5).

[17] *Id.*

[18] C.A.R. 3.4(e)(1).

[19] C.A.R. 3.4(e)(2).

[20] *Id.*

[21] *Id.*

[22] *See* § 19-1-109(1), C.R.S. (2015) ("[Dependency and neglect] [a]ppeals shall be advanced on the calendar of the appellate court and shall be decided at the earliest practical time"); C.A.R. 3.4(j).

[23] C.A.R. 3.4(f)(1).

[24] C.A.R. 3.4(f)(2).

[25] C.A.R. 3.4(f)(1)(C)-(D), (F).

[26] C.A.R. 3.4(f)(1)(G).

[27] C.A.R. 3.4(f)(1)(H).

[28] C.A.R. 3.4(f)(1)(I)(i).

[29] *Id.*

[30] C.A.R. 3.4(f)(1)(J).

[31] C.A.R. 3.4(f)(1)(E).

[32] C.A.R. 3.4(f)(1)(E)(i)-(vi).
[33] C.A.R. 3.4(g)(1).
[34] C.A.R. 3.4(g)(4).
[35] C.A.R. 3.4(g)(2).
[36] C.A.R. 3.4(g)(3).
[37] *Id.*
[38] C.A.R. 3.4(f)(3); C.A.R. 3.4(g)(5).
[39] C.A.R. 3.4(g)(6).
[40] *Id.*
[41] C.A.R. 3.4(h).
[42] *Id.*
[43] C.A.R. 3.4(i).