Civil Appeals - An Emphasis on Preserving Error, Stays and Supersedeas, and Ethical Considerations on Appeal

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TABLE OF CONTENTS

INTRODUCTION

All lawyers who practice in superior court should know some basics about appellate procedure and about the legal ethics of representing clients in the appellate courts. This handout, which accompanies the presentation given on February 16, 2024 for the Spokane County Bar Association, covers each topic in part.

A recent study hints at the value of knowing procedural rules. Researchers found a correlation between appellate counsel's experience and their clients' chances of success in the U.S. Court of Appeals for the Ninth Circuit.[1] We suspect that experienced attorneys have a better chance of succeeding in appellate courts because they likely know more about the appellate process, including the rules for preserving arguments and evidence for later review.

Time for some caveats about this handout. It is a starter reference; it does not cover every detail. Even appellate specialists regularly consult primary authorities (the Rules of Appellate Procedure, statutes, and appellate opinions) and secondary sources (like the WSBA's two-volume *Washington Appellate Practice Deskbook*). And not every question has a clear answer. Novel issues pop up all the time. So consider this handout to be a jumping-off point, not the final word. Keep in mind too that our focus here is on appeals in state court, not the federal system. Finally, you are solely responsible for your clients' cases, and you should do your own research and analysis for your clients' specific situations.

PRESERVING ISSUES FOR REVIEW

Volumes can be written on preservation of error. And a Westlaw search reveals 5,516 Washington appellate decisions that cite RAP 2.5(a), the court

[1] Gregory C. Sisk & Michael Heise, *"Too Many Notes"? An Empirical Study of Advocacy in Federal Appeals*, 12 J. of Empirical Legal Studies 578 (2015).

rule that explains when the appellate courts will reach an issue not decided below. So this handout cannot cover every topic or every case involving preservation of error. Below are just a few basics to get you started.

A. General Principles

1. No New Issues

The appellate courts review only the record generated in the trial court (court filings, trial exhibits, and transcripts of hearings and trial).[2] Unless the your client's circumstances meet the stringent circumstances laid out in RAP 9.11, the appellate courts will not consider any new evidence not submitted to the trial court.

The same basic rule—no new issues—applies to your arguments. Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." The word "may" confirms that this rule is discretionary. But this discretion under RAP 2.5 "is rarely exercised."[3] This presumption has several exceptions, including arguments over jurisdiction, the failure to establish facts upon which relief can be granted, and manifest constitutional errors. But you should be careful to raise every argument in the trial court that you intend to raise on appeal.

That said, we have some practical advice: Focus on winning your client's case at trial. Your primary goal should be to advance a strong case and keep things as simple as possible for the judge, not to preserve issues for an appeal that may or may not happen. If the cost of great tactics and a winning trial strategy is forgoing the chance to appeal an issue here or there, that's a pretty good tradeoff. But if the issue is crucial for your client's case, be sure to bring it to the judge's attention.

2. Exceptions—By Rule

RAP 2.5(a) contains express exceptions: "a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right."

a. Trial Court Jurisdiction

A lack of trial-court jurisdiction refers to subject-matter jurisdiction, not personal jurisdiction. An older, pre-RAP 2.5 case reached the issue of personal jurisdiction despite not being raised in the trial court.[4] But personal jurisdiction is waivable, whereas subject-matter jurisdiction is not.[5] So RAP 2.5(a)(1) is best understood as encompassing arguments pertaining to subject-

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[2] *See* Title 9 RAP.
[3] *Karlberg v. Otten*, 167 Wn. App. 522, 531, 280 P.3d 1123 (2012).
[4] *Burns v. Stolze*, 111 Wash. 392, 397, 191 P. 642 (1920).
[5] *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

matter jurisdiction.

Some confusion can arise about whether an issue concerns "jurisdiction" or something else. For example, in *Neilson ex rel. Crump v. Blanchette*,[6] Division Three decided the appellant's argument whether the trial court had statutory authority under former RCW 26.50 to issue a domestic-violence protection order. The appellant insisted that he and the protectee did not have a relationship covered by the statute. Though not raised below, Division Two reached the issue, citing RAP 2.5(a)(1) and saying that it concerned the trial court's jurisdiction.[7] But Division One later tried to recast *Neilson*, describing it as Division Three merely using its discretion to reach a new issue, as permitted in RAP 2.5(a) ("may").[8]

Division Two has held that a federal preemption claim might bear on subject-matter jurisdiction.[9]

b. Failure to Establish Facts

This exception to RAP 2.5(a) is murkier. It surely mirrors the concept of CR 12(b)(6), at least in some respects. For example, a defendant in an age-discrimination case may argue for the first time on appeal that the plaintiff did not produce evidence showing that he was within the protected class.[10] Also, a criminal defendant also may raise the sufficiency of evidence supporting the verdict for the first time on appeal.[11]

c. Manifest Error Affecting a Constitutional Right

RAP 2.5(b)(3) provides an exception in civil appeals, not just criminal cases, where these arguments usually arise.[12] For a constitutional error to be "manifest," the trial-court record must be developed well enough for the appellate court to decide the issue, and the appellant must demonstrate actual prejudice.[13]

3. Exceptions—By Caselaw

Even though appellate courts generally admonish that they will rarely exercise their discretion to raise issues not raised below, they are more likely to reach certain categories of new issues. Below are some examples.

a. Closely Related Issues

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[6] 149 Wn. App. 111, 201 P.3d 1089 (2009).
[7] *Id.* at 115.
[8] *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 206, 258 P.3d 70 (2011).
[9] *Fowlkes v. Int'l Bhd. of Elec. Workers, Local No. 76*, 58 Wn. App. 759, 764, 795 P.2d 137 (1990), *as amended,* 808 P.2d 1166 (1991)
[10] *Gross v. City of Lynnwood*, 90 Wn.2d 395, 400, 583 P.2d 1197 (1978).
[11] *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).
[12] *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).
[13] *E.g.*, *id.* at 602-03.

Appellate courts show some inclination to reach new issues that are closely related to those presented in the trial court.[14]

b. Necessary to Reach Proper Decision

Appellate court also will decide new issues if necessary to reach a proper decision.[15]

c. Right to Maintain the Action

The Supreme Court has "consistently stated that a new issue can be raised on appeal 'when the question raised affects the right to maintain the action.'"[16]

d. Fundamental Justice

Some courts have read into RAP 2.5(a) an implied exception that "permits consideration on review of a theory not theretofore advanced where fundamental justice may require it."[17]

4. Raising New Issues as Respondent

And as the respondent, you will be free to make new arguments. How can this be? The appellate courts are geared to affirming the trial courts. Because much time, effort, and money goes into trial-court proceedings, especially jury trials, the appellate courts want them to stick. Given these concerns, the appellate courts generally will not throw out a decision if there is some basis to affirm it, even if no one raised that argument below.[18]

5. Guiding Principles for Presenting an Issue in the Trial Court

As a general guiding principle, you will preserve an issue for appellate review if you have timely presented your argument to the trial court and have backed it up with legal authority and evidence. CR 46, while not an appellate rule, lights the way:

Formal exceptions to rulings or orders of the court are

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[14] *Cave Properties v. City of Bainbridge Island*, 199 Wn. App. 651, 662, 401 P.3d 327 (2017) ("[W]hen an argument is related to the issues addressed in the superior court, we may exercise our discretion to consider newly-articulated theories for the first time on appeal.").

[15] *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 792-93, 357 P.3d 1040 (2015).

[16] *Bennett v. Hardy,* 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (quoting *Maynard Inv. Co. v. McCann,* 77 Wn.2d 616, 621, 465 P.2d 657 (1970)).

[17] *Greer v. Nw. Nat. Ins. Co.*, 36 Wn. App. 330, 339, 674 P.2d 1257 (1984), *aff'd in part, rev'd in part,* 109 Wn.2d 191, 743 P.2d 1244 (1987) (citing *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972)); *Siegler*, 81 Wn.2d at 461-62 (dissenting justice noting that strict liability was not an issue presented to the Court for review, only *res ipsa loquitur* was).

[18] RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground."); *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002) ("We may affirm the trial court on any grounds established by the pleadings and supported by the record.").

> unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

These generalities can be broken down into three guidelines:

1. *Give the trial court an opportunity:* "A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error."[19]

2. *Be timely:* If you wait to see how the trial court will rule or what the verdict will be, the appellate court will be much less likely to reach your argument or review your evidence. If you didn't have the chance to raise the issue or didn't think of it earlier, raise it as soon as you can and when there is still an opportunity for the trial court to make a course correction.[20]

3. *Make a record:* Again, the appellate court reviews a specific record. You must show the appellate court that you presented the issue in the trial court and document the legal arguments and evidence produced to the trial court.[21]

B. Preserving Appellate Review of Specific Issues

Below are some examples of the rules for preserving issues for appellate review, depending on the type of issue. This list is not exhaustive.

1. Legal Arguments

a. Generally

While you must make some attempt to preserve your arguments for appeal by presenting them to the trial court, there is no requirement to articulate every "precise point[] of law" or use "magic words" when preserving a legal error for appellate review.[22] Whether an appellant preserved a purely

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[19] *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn.52, 81, 322 P.3d 6 (2014) (citing *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)).

[20] CR 46; *Seth v. Dep't of Labor & Indus.*, 21 Wn.2d 691, 693, 152 P.2d 976 (1944) ("[S]uch action must be taken before the case gets beyond recall.").

[21] *See, e.g.*, *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999) ("An appellate court may decline to address a claimed error when faced with a material omission in the record." (collecting cases)).

[22] *State v. Griggs*, 33 Wn. App. 496, 499, 656 P.2d 529 (1982) (concluding that the party preserved error related to proposed jury instruction even without citation to "precise" legal authority below); *Logan v. Gomez*, 122 F.3d 1072, 1997 WL 525182, at *1 (9th Cir. 1997) (unpublished) (holding that there is no requirement to use "magic words" to preserve a legal issue for appeal).

legal issue is somewhat of a judgment call for the court. If you're unsure whether you've preserved your arguments, consider asking to revisit the topic before the ruling, making an offer of proof, or submitting a quick pocket brief during the trial.

Once you've preserved a legal issue in the trial court, feel free to expand on your argument and conduct new research once you've reached the appellate court. New authorities are fine on appeal. While the opposing attorney's brief might castigate you for citing new case law, you have ample ammunition to cite in response to an argument like that.[23]

Indeed, the courts have shown some inclination to consider previously uncited statutes and court rules that bear on the issue, because they do not want to issue caselaw that contravenes these primary authorities.[24] Also, appellate courts' analysis is not limited to the authorities that the parties cite in their briefs; they can consider other relevant authorities.[25] It follows that the parties can cite authorities not discussed in the trial court.

b. How—Motions for Summary Judgment

If you raise a purely legal argument in a motion for summary judgment, that presentation will preserve the argument for appellate review.[26] You do not need to take any more steps. But of course, you might want to file, say, a CR 50 motion during trial if the evidence at trial develops more favorably for your client than the summary-judgment record had.

c. Examples

The Court of Appeals might apply RAP 2.5(a) very leniently. For example, in one of our cases, concerning a trial court's order vacating a dissolution decree after finding the husband failed to disclose assets, the husband insisted that the wife had a duty of due diligence. We argued that the husband failed to preserve that argument. But the Court of Appeals disagreed.

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[23] "RAP 2.5(a), which bars errors raised for the first time on appeal, does not prohibit parties from citing new authorities on appeal." *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183 n.1, 401 P.3d 468 (2017) (citing *Greenfield v. W. Heritage Ins. Co.*, 154 Wn. App. 795, 801, 226 P.3d 199 (2010)); *see also Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000); *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 408, 105 Cal. Rptr. 2d 863 (2001) ("Appellate work is most assuredly not the recycling of trial level points and authorities.").

[24] *See, e.g.*, *Rahman v. Washington*, 170 Wn.2d 810, 823–24, 246 P.3d 182 (2011), *overruled on other grounds by* Laws of 2011, ch. 82 ("The failure of the State to timely cite RCW 42.52.160 in the Court of Appeals does not foreclose its consideration, as an appellate court is entitled to consider relevant law in deciding an issue, regardless of whether any party has cited it.").

[25] *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065, 1070 (2000) ("[A]ny court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.").

[26] *E.g.*, *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 803, 65 P.3d 16 (2003); *Univ. Vill. Ltd. Partners v. King Cnty.*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001) ("Although we ordinarily do not review an order denying summary judgment after a trial on the merits, we will review such an order if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law." (footnotes omitted)).

In a single sentence, the husband's response to the motion to vacate had asserted that he had not withheld information about his assets. The Court of Appeals said that sentence was "[i]mplying that [the wife] should have requested more information about assets," and the Court believed that this implication was "analogous to arguing that [the wife] failed to exercise due diligence." So the Court reached (but rejected) the husband's due-diligence argument.[27]

In another of our cases, we argued that a state agency owed a duty of care to our client's husband, who died. On appeal, we cited two sections in the *Restatement (Second) of Torts* that supported our argument. The agency objected, arguing (correctly) that these sections hadn't been cited in the briefing below. Still, the Supreme Court considered these grounds for finding a duty. The Court concluded that these sections touched on the same basic issue that was before the Court (a so-called "exception to the public duty doctrine") and that "the record has been developed to consider this issue."[28]

2. Jury Selection

If the judge denies your peremptory challenge, you do not necessarily waive the issue by accepting the panel. Object at the end of voir dire and raise the issue again in a motion for a new trial. By taking those steps, the objecting party will preserve the issue for appellate review even after accepting the panel.[29]

3. Opening Statements

If you find something opposing counsel says during opening statement to be objectionable, you must object at that time.[30] Without a timely objection, the issue of counsel misconduct can only be argued if the misconduct was "so flagrant that no instruction could have cured the prejudicial effect."[31]

4. Evidence

a. Motions in Limine

If you *win* your motion in limine, you must object if the defendant violates the trial judge's order.[32] Your original motion is not enough. If you *lose* your motion in limine, ask the judge for a standing objection. If the judge denies you a standing objection, you should object when the other side offers the

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[27] *In re Marriage of Bresnahan*, 21 Wn. App. 2d 385, 403, 505 P.3d 1218 (2022)

[28] *Turner v. Wash. State Dep't of Soc. & Health Servs.*, 198 Wn.2d 273, 293 & n.15, 493 P.3d 117 (2021).

[29] *State v. Bird*, 136 Wn. App. 127, 133-34, 148 P.3d 1058 (2006).

[30] *See M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 858, 282 P.3d 1124 (2012).

[31] *Id*.

[32] *See A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400 (2004) ("In a situation where a party prevails on a motion in limine and thereafter suspects a violation of that ruling, the party has a duty to bring the violation to the attention of the court and allow the court to decide what remedy, if any, to direct." (footnote omitted)).

offending evidence.[33]

b. Offers of Proof

In general, a timely and specific offer of proof is necessary to preserve error with respect to excluded evidence. Our Supreme Court explains why:

> An offer of proof, properly presented, serves three purposes. First, it should inform the court of the legal theory under which the offered evidence is admissible. Second, it should inform the trial judge of the specific nature of the offered evidence so the court can judge its admissibility. Third, it thereby creates a record adequate for appellate review.[34]

Thus, "[i]t is the desirable practice to have the offered evidence in the form of questions and answers from the witness rather than conclusionary statements by counsel."[35] Be thorough. For example, if the disputed testimony involves a medical expert, ask your expert if their opinions are made to a reasonable degree of medical certainty.[36]

c. Objections

In general, make a timely objection to any error you wish to preserve for appeal.[37] This rule can be harsh, but the Supreme Court says it's worthwhile: "While this rule insulates some errors from review, it encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality."[38] When objecting, tell the judge "the specific ground of the evidentiary objection."[39]

d. Late-Filed Declaration

If you would like the trial court to consider a declaration that you submit after the deadline for opposing a defense motion, you cannot count on the trial judge applying the *Burnet*[40] factors unless you take the initiative. Don't just submit a late declaration and assume the judge will consider it if the defense doesn't object. You might reasonably think that the *Burnet* factors should be only a basis for excluding evidence, not allowing it. But the Court of Appeals

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[33] *See id.* ("A standing objection to evidence in violation of a motion in limine, preserving the issue for appeal, is only allowed to the party losing the motion.").
[34] *Mad River Orchard, Inc. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).
[35] *Id.*
[36] *Medcalf v. State, Dep't of Licensing*, 133 Wn.2d 290, 310–11, 944 P.2d 1014 (1997) (Madsen, J., concurring) (offer of proof was insufficient when testimony was not given to reasonable degree of medical certainty).
[37] *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017).
[38] *Id.* (quotation omitted)
[39] *DeHaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986).
[40] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); *Keck v. Collins*, 184 Wn.2d 358, 368-69, 357 P.3d 1080 (2015).

has held otherwise.[41] To trigger a *Burnet* analysis for an untimely declaration, the proponent should "file a motion for permission to file late or file a motion for reconsideration after a ruling."[42] Otherwise, the trial court may just ignore a late-filed declaration without making a finding of willfulness, prejudice, etc.[43] And the appellate court will hold that a *Burnet* analysis was not preserved for appellate review.[44]

5. Sufficiency of Evidence

A denial of a summary-judgment motion that raises only the sufficiency of the evidence is reviewable only on discretionary review under RAP 2.3(b), not on appeal.[45]

If you believe insufficient evidence supported the defendant's affirmative defenses, you can bring a motion either for judgment as a matter of law under CR 50 after the close of the defendant's case, or for a new trial under CR 59.[46]

6. Jury Instructions

Appellate courts are stingy when it comes to preserving error related to jury instructions. "Unless there is a proper objection, jury instructions become the law of the case."[47] "For objections to jury instructions in particular, an appellate court usually considers a claimed error only if the appellant raised the specific issue at trial."[48]

A party's objection to a trial court's failure to give its competing instructions will preserve any objection to the instruction actually given.[49]

Keep in mind that proposed instructions should be included in the record on appeal,[50] and when briefing, you must separately assign error to each jury instruction you challenge in your appeal.[51]

7. Closing Arguments

Unless opposing counsel objects, the appellate courts will typically not

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[41] *Boyer v. Morimoto*, 10 Wn. App. 2d 506, 535, 449 P.3d 285 (2019), *review denied*, 194 Wn.2d 1022, 455 P.3d 121 (2020).
[42] *Id.*
[43] *See id.*
[44] *See id.* at 536–37.
[45] *E.g.*, *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 803, 65 P.3d 16 (2003); *Univ. Vill. Ltd. Partners v. King Cnty.*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001).
[46] *See Palin v. Gen. Const. Co.*, 45 Wn.2d 721, 728, 277 P.2d 703 (1954) (a motion for judgment as a matter of law or for new trial can be based on an "insufficiency of the evidence to sustain the verdict").
[47] *Milles v. Land America Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016).
[48] *Wilcox*, 187 Wn.2d at 788.
[49] *Washburn v. City of Federal Way*, 178 Wn.2d 732, 747, 310 P.3d 1275 (2013).
[50] RAP 9.6(b)(1)(G).
[51] RAP 10.3(g).

review an attorney's improper closing argument.[52] When you object, you should also request a curative instruction and consider whether the conduct warrants a request for a mistrial.[53]

A limited exception applies. The appellate courts will review an improper argument if "the misconduct was 'so flagrant that no instruction could have cured the prejudicial effect.'"[54] But this exception is a high hurdle. Even if an improper argument is prejudicial, the courts will not necessarily find it flagrant.[55]

8. Juror Bias or Misconduct

You must object to known misconduct during trial to preserve the issue for appeal.[56] If you learn about the misconduct or bias after the trial, you should timely move for a new trial under CR 59(a)(2) to address and preserve the error. The bar is high: "A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury."[57]

9. Additur

If you believe the jury's damages award was too low, you must file a post-trial motion for additur under CR 59 to preserve the issue for appeal.[58]

10. Racial Bias

A post-trial motion under CR 59(a)(9) ("substantial justice") may be brought on the ground that racial bias infected the verdict.[59] In the recent landmark case laying down this rule, the Court's recitation of the facts disclosed no contemporaneous objection to the behavior that prompted the post-trial motion, suggesting that a party who harbors concerns may await the result to determine whether their fears were reality.[60]

11. Request for New Trial

If you are kicking yourself after an unfavorable result after trial, realizing that you let an issue slide that you should have objected to, you might be able to preserve the error for appellate review—or, even better, get a new

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[52] *Faust v. Albertson*, 167 Wn.2d 531, 547, 222 P.3d 1208 (2009).
[53] *City of Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993).
[54] *M.R.B.*,169 Wn. App. at 858 (quoting *Collins v. Clark Cnty. Fire Dist. No. 5*, 155 Wn. App. 48, 94, 231 P.3d 1211 (2010)).
[55] *See id.*
[56] *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986) (jury inattentiveness).
[57] *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003).
[58] *Torno v. Hayek*, 133 Wn. App. 244, 253, 135 P.3d 536 (2006).
[59] *Henderson v. Thompson*, 200 Wn.2d 417, 421, 518 P.3d 1011 (2022), *cert. denied,* 143 S. Ct. 2412 (2023).
[60] *See id.* at 423-29.

trial right away—by filing a motion for a new trial under CR 59.[61] But don't count on a motion or a new trial being good enough to preserve error.[62]

STAYS AND SUPERSEDEAS

A. Stays

Many clients will incorrectly assume that an appeal automatically stays the case while the decision is being reviewed. Not true. In general, the trial court's final orders and judgments are enforceable pending an appeal, unless your client obtains a stay order or posts a supersedeas bond or other security to stay enforcement of the financial parts of the final orders.

CR 62(a) supplies a brief, automatic 10-day stay of enforcement after a judgment is entered. That automatic stay is extended another four days, to 14 days total, if the appealing party files a notice of appeal within that timeframe. Other than this short automatic stay, however, an appellant must take affirmative steps to obtain a stay.

RAP 8.1 governs the procedures for seeking a stay pending an appeal. This typically means the posting a bond or cash in the amount of the judgment in the trial court, plus any interest and recoverable attorney fees that the prevailing party may incur during the 12-18 months an appeal typically takes to conclude. The court can always approve alternative security upon request, and the parties can stipulate to a stay agreement. This means filing a motion proposing just terms for a stay, but be aware the rule usually requires some sort of "supersedeas bond, cash or other security."[63]

There is also a catchall stay provision in the appellate rules—RAP 8.3 authorizes the Court to "issue orders, before or after acceptance of review … to insure effective and equitable review, including authority to grant injunctive or other relief to a party." Washington appellate courts grant stays under RAP 8.3 when a party presents "debatable issues" on appeal and "the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation."[64] It may be necessary to seek a stay under RAP 8.3 in appeals raising an issue about something other than money or property (for example, a parenting plan) or if the parties seek interlocutory review of some decision made prior to trial.

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[61] *See State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979) ("Ideally, this will be done during the course of trial, but the error may be raised in a motion for a new trial.")

[62] *See, e.g.*, *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 340, 878 P.2d 1208 (1994) (holding that statements in a motion for a new trial have no bearing on whether counsel preserved an objection to the trial court's refusal to give a particular jury instruction).

[63] RAP 8.1(b)(3).

[64] *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998); *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986).

B. Supersedeas

As described above, supersedeas procedures and amounts are governed by RAP 8.1. The right to stay a money judgment is automatic upon filing a supersedeas bond or cash with the trial court.[65] The opposing party will often contest the amount of the supersedeas bond,[66] arguing perhaps that it lowballs the recoverable fees or costs the opposing party is expected to incur on appeal.[67] It could be in both parties' interests to agree to some amount if possible.

As a practical matter, supersedeas bonds are expensive. Bond companies charge a premium and often require collateral in the amount of the bond anyway. While costs of obtaining the bond can be recovered if you prevail,[68] often clients prefer cash or alternative security. When filing a notice of cash supersedeas, you should direct the court to place it in an interest-bearing account to mitigate inflation losses during the appeal.[69] Though be aware the interest is likely far below what can be obtained in the market.

Finally, you should consider whether simply paying the money judgment is a better alternative to posting supersedeas or cash. If the judgment is reversed, the prevailing party is entitled to recover amounts paid to partially or wholly satisfy a judgment, and anything else (such as interest) appropriate to restore its interests.[70] Consider your opponent; the risk of being unable to recover should you succeed is greater against a private individual than say a deep-pocketed corporation or government entity.

When it comes to judgments affecting property, the supersedeas amount is the amount of "any money judgment" plus interest, attorney fees, costs, and expenses likely to be awarded on appeal, plus "the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review."[71] Typically, this means the fair market value of the use of the property during review.

The appellate court can review any supersedeas decision by motion.[72]

ETHICAL CONSIDERATIONS

Below are some key ethical considerations relevant to appellate practice.

A. Competency

Be sure you comply with RPC 1.1's competency requirement for appellate representation. To do so, you must deliver "the legal knowledge, skill,

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[65] RAP 8.1(b)(1).
[66] RAP 8.1(e) (objection to supersedeas).
[67] RAP 8.1(c)(1).
[68] RAP 14.3(a).
[69] RCW 36.48.090.
[70] RAP 12.8.
[71] RAP 8.1(c)(2).
[72] RAP 8.1(h).

thoroughness and preparation reasonably necessary for the representation."[73] Consult comment [1] to RPC 1.1 and consider whether you need to associate with an appellate specialist or refer your client to another lawyer. Even great trial lawyers might not be competent to represent a client in the appellate courts unless they learn appellate procedure and know how to write a competent brief for this unique setting.

Recall the duty under RPC 5.1 and RPC 5.3 to supervise junior attorneys and staff. You or your staff should also be competent to meet the unique filing requirements in the appellate courts. Staff should familiarize themselves with the Washington State Appellate Courts' e-filing portal[74] and the formatting requirements of the RAPs. The good news is there's help; don't ever be afraid to contact the clerk's office with questions.

Consider sharing a draft brief with your client before filing it with the appellate court. In superior court, a lawyer violates RPC 1.1 if the lawyer, without consulting with the client beforehand, files a complaint that contains many errors.[75] By analogy, if an appellate lawyer files a brief in a case in which the lawyer did not represent the client below, the lawyer would be wise to provide a draft to the trial lawyer or the client or both before filing the brief.

B. Promptly Communicate and Act

The professional-conduct rules for communication and diligence confirm the need to speak with your client without delay.[76] Taking this step quickly is critical because the deadline to file a notice of discretionary review or appeal is only 30 days.[77] Don't wait until the last minute. Same with cross review. If a defendant files a notice of appeal or a notice of discretionary review, you need to quickly determine whether your client should seek cross review; the deadline for seeking cross review is generally 14 days.[78] Bottom line: communicate, and do it fast. Continue to communicate during the appeal.

C. Withdraw with Care

If you wish to withdraw after judgment, you must do so with care. Withdrawal is generally appropriate if it "can be accomplished without material adverse effect on the interests of the client."[79] Your client should have sufficient time to find lawyer for a potential appeal and might lose the right to appeal if you do not act timely. Before withdrawing, then, inform your client about the right to appeal and consider how else you can "take steps to the

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[73] RPC 1.1.
[74] WASH. COURTS, WASH. STATE APP. CT.'S PORTAL (2021), https://ac.courts.wa.gov/.
[75] *In re Disciplinary Proceeding Against Kagele*, 149 Wn.2d 793, 814, 72 P.3d 1067 (2003)
[76] RPC 1.3; RPC 1.4.
[77] RAP 5.2.
[78] *See* RAP 5.1(d); RAP 5.2(f).
[79] RPC 1.16(b)(1).

extent reasonably practicable to protect [your] client's interests."[80] That might mean discussing appeal options early and withdrawing only after filing the notice of appeal.

D. Pursue Appellate Review Only If Meritorious and for a Proper Purpose

The issues you raise on behalf of your client must have merit, and an appeal must not be used for an improper purpose, such as delay.[81] If an appellate court smells a rat, the court may sanction any lawyer or client "who uses the[] rules for the purpose of delay, files a frivolous appeal, or fails to comply with the[] rules."[82] A sanction may include "terms," including reasonable attorney fees, "or compensatory damages."[83]

E. Your Briefs Must Disclose Controlling Authority

As you evaluate the merits, recall that you will have to level with the appellate court, even if your candor harms your client's argument. Under RPC 3.3(a)(3), your appellate briefing must "disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party." Sure, the rule doesn't demand "a disinterested exposition of the law" (although your briefing will be more persuasive if your legal analysis *seems* disinterested).[84] But you will have to come clean with controlling authority. (Note that unpublished Washington opinions are technically not controlling authority.[85])

What about unpublished decisions? While not binding, those decisions are still described as "authorities" in GR 14.1(a). Thus, an unpublished opinion could be deemed to be an "authority" within the meaning of RPC 3.3(a)(3). Such a technical reading, however, seems unlikely, especially read in context with RPC 3.4(c). That rule, which prohibits a lawyer from knowingly disobeying a court rule, suggests court rules have primacy. And a court rule, GR 14.1(a), makes citation of unpublished opinions an option for parties, not mandatory. Also, GR 14.1(c) urges Washington courts to not cite unpublished opinions "unless necessary for a reasoned decision." Besides these court rules, a snippet of text in RPC 3.3(a)(3) limits the duty of disclosure to those authorities that are "directly adverse to the position of the client." Because GR 14.1(a) deems that unpublished opinions have no more than persuasive value, not binding authority, they arguably cannot be "directly adverse" to anyone's position. At

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[80] *See* RPC 1.16(d).
[81] RPC 3.1; RPC 3.2.
[82] RAP 18.9(a).
[83] *Id*; *see also Streater v. White*, 26 Wn. App. 430, 613 P.2d 187 (1980); Philip A. Talmadge, *et al.*, *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 Seattle U.L. Rev. 437, 451-53 (2010).
[84] RPC 3.3 cmt. 4.
[85] *See* GR 14.1.

least, those are the arguments. We are aware of no appellate opinion or WSBA advisory opinion that addresses this topic.

What about opinions from other divisions when you are in the Court of Appeals? A few years ago, our Supreme Court rejected horizontal stare decisis among the three divisions of the Court of Appeals.[86] The Supreme Court endorsed the argument that opinions issued by another division is "persuasive rather than binding."[87] Taken at face value, this analysis would imply that the "controlling jurisdiction" for purposes of RPC 3.3(a)(3) is the division in which the appeal will be heard, not the other divisions. But even if that is the right conclusion to draw, you should still cite—and distinguish or urge the rejection of—directly adverse authorities from other divisions. That is so for two reasons. First, even without horizontal stare decisis, divisions rarely disagree with each other. If you ignore the other division's authority, you will harm your credibility and deprive yourself of the opportunity to explain why the opinion should not be followed in your case. Second, if you start your appeal in Division Two, there is a good chance your appeal will be transferred out and thus actually be heard and decided by Division One or Division Three. So you can't assume that the division where you file your brief will be the division that is the "controlling jurisdiction."

F. Be Candid with Your Client

RPC 2.1 provides that "a lawyer shall exercise independent professional judgment and render candid advice." This candid advice can encompass more considerations than just an opinion about the applicable law.[88]

Candid advice can be jarring for a client, especially after he or she just got done watching you passionately arguing the case to the jury. But in the confidential setting of attorney–client communication, it's time to remind the client that you also have to play the role of advisor too, not just advocate.[89]

Your client will likely need your help to understand how they might be suddenly facing lower odds than you gave them when deciding whether to go to trial. That discussion might be especially painful if the client declined a decent pre-trial settlement offer. So you might explain how appellate courts make independent decisions about only a few things (generally, only questions of law are reviewed *de novo*) but otherwise will defer to the trial judge's and jury's decisions. An appeal is not a do-over where a new group of judges simply reevaluates contested facts.

In short, you should brace your client for the possibility of an unpleasant result on appeal. That's true even if your client prevailed at trial and is the respondent—reversals and vacations of jury verdicts can and do happen. And

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[86] *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 148-49, 410 P.3d 1133 (2018).
[87] *Id.* at 152.
[88] RPC 2.1.
[89] *See* RPC Preamble ¶ 2; RPC 2.1 cmt. 1.

even some victories can be Pyrrhic after the case is remanded and the client incurs additional fees.

G. Attorney Fees

RPC 1.5 applies to fee agreements and attorney fees collected, no matter whether in the appellate courts or in superior court. Alternative fee structures, such as contingency fees and flat fees, are ones that we have seen for appellate representations. If you pursue one of those structures with a client, be sure to carefully consult RPC 1.5(a) (reasonableness), RPC 1.5(c) (contingency fees), and RPC 1.5(f) (flat fees).

Keep these and your other ethical responsibilities in mind.

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That's all. We wish you well as you learn more about appeals.