COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	DATE FILED March 10, 2025 6:18 PM FILING ID: CCCC8BF1AC32D CASE NUMBER: 2024SC456
Certiorari to the Court of Appeals, 2024CA1002 District Court, City and County of Denver, 2018CV30838	
Petitioner: Jonah Energy LLC, **v.** **Respondents**: Riggs Oil & Gas Corporation; Gasconade Oil Co.; Helm Energy, LLC; McLish Resources, L.P., LLLP; W. Clifton Arbuckle Trust Dated 1/1/1996; Los Feliz Oil Company, LLC; Samis Oil Company, Inc.; MKB Energy, L.L.C.; Westar Oil & Gas, Inc.; JJB Energy Ventures, LC; Callaway Oil, L.L.C.; Anadarko Partners II, L.P.; Cartel Petroleum, Inc.; Castlebay Energy LLC; Coyote Energy LLC; S.N.S. Oil & Gas Properties, Inc.; Winchester Energy, LLC; El Dorado Corporation; and Ridgeview Exploration, Inc.	**▲COURT USE ONLY▲**
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BRIEF OF AMICI CURIAE COLORADO TRIAL LAWYERS ASSOCIATION AND COLORADO DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER	

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 28.1, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

- **The brief complies with the applicable word limits set forth in C.A.R. 29(d).** It contains 3,460 words (brief does not exceed 4,750 words).

- **The brief complies with the content and form requirements set forth in C.A.R. 29(c).**

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 29, and 32.

Dated March 10, 2025.

/s/ Geoffrey C. Klingsporn

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I. INTRODUCTION

The Colorado Trial Lawyers Association ("CTLA") and Colorado Defense Lawyers Association ("CDLA"), as amici curiae, join Petitioner Jonah Energy LLC in urging this Court to reject the "hard line rule" adopted by the court of appeals below. The hard-line rule punishes reasonable supervision of legal assistants and paralegals, hinders access to justice, and punishes parties for a user-interface problem. The Court should reverse the court of appeals.

II. STATEMENT OF INTEREST

The Colorado Trial Lawyers Association has over 1,000 member-attorneys. CTLA exists to protect and promote individual rights through the judicial process, advance advocacy skills, promote high ethical standards and professionalism, as well as improve and protect the state's judicial system. CTLA members and other attorneys volunteer their time and resources to prepare and submit amicus briefs on matters of importance to CTLA, Colorado consumers, and injury victims.

The Colorado Defense Lawyers Association is a nonprofit association that supports and serves the interests of lawyers involved in the defense of

civil litigation. CDLA has roughly 800 members from all corners of Colorado. CDLA's mission includes anticipating and addressing issues significant to the defense of civil matters and the civil justice system as well as improving the civil justice system and the legal profession.

Together, amici have a special interest in this case because it involves requirements for all appeals in Colorado and could affect the enforcement of filing deadlines more broadly. Frequently, CTLA and CDLA themselves file appellate briefs like this one and are thus directly affected. Even more often, CTLA and CDLA members serve as appellate counsel for private individuals and organizations and are thus affected. Finally, explication of the standard by which Colorado courts determine timeliness and excusable neglect serves CTLA and CDLA's missions by helping to secure the more efficient administration of justice and respect for the law.

III. ARGUMENT

A. The hard-line approach punishes reasonable supervision of legal assistants and paralegals.

Whatever rule this Court adopts will apply to all attorneys—those at large firms, those at small firms, and solo practitioners alike. In the practice

of law, attorneys in firms of all sizes rely on legal assistants and paralegals to file pleadings and complete other administrative tasks. So long as their supervision of legal assistants is reasonable, attorneys should not be punished for delegating. But the "hard line" approach adopted by the court of appeals defines "reasonable supervision" too narrowly and, thereby, increases the malpractice risk for all Colorado attorneys.

Delegation of tasks to legal assistants and paralegals is not only common and necessary in the practice of law but also an essential tool for managing the spiraling costs of litigation and ensuring access to justice. Delegation, when accompanied by proper supervision, is consistent with an attorney's ethical obligations and should not be discouraged. But the hard-line approach adopted by the court of appeals threatens to penalize attorneys for delegating even the ministerial task of filing a notice of appeal to legal assistants or paralegals.

1. Delegation is a reality of the practice of law and promotes efficiency.

As the Colorado Bar Association has recognized, "[t]he proper use of assistants who are not licensed lawyers significantly increases the ability of

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lawyers to provide quality professional services to the public at reasonable cost." Colo. Bar Ass'n Ethics Comm., Formal Op. 61, *Legal Assistants* (1982; addendum issued 1995).

Delegation is, simply put, commonplace and necessary for the practice of law. The Supreme Court has observed that "encouraging the use of lower cost paralegals rather than attorneys wherever possible . . . 'encourages cost-effective delivery of legal services and reduc[es] the spiraling cost of litigation[.]'" *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989) (citing *Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 846 (7th Cir. 1984)). Indeed, "the delegation of such tasks to specialized, well-educated non-lawyers may well ensure greater accuracy in meeting deadlines than a practice of having each lawyer in a large firm calculate each filing deadline anew." *Pincay v. Andrews*, 389 F.3d 853, 856 (9th Cir. 2004).

2. Reasonable supervision, not prohibition, is the appropriate standard for delegation.

The Colorado Rules of Professional Conduct explicitly permit attorneys to delegate tasks to legal assistants and paralegals, provided that attorneys supervise the work and retain responsibility for the outcome.

Rule 5.3 of the Colorado Rules of Professional Conduct states that an attorney "shall make reasonable efforts to ensure that the [legal assistant or paralegal's] conduct is compatible with the professional obligations of the lawyer." A comment to Rule 5.5, which delineates the scope of the unauthorized practice of law, clarifies that "[t]his Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work." C.R.P.C. 5.5 cmt. 2. These rules reflect the understanding that delegation, with proper supervision, is consistent with an attorney's ethical duties.

In this case, counsel delegated the filing of the notice of appeal to his legal assistant and instructed her to "file after 4 PM with the Colorado Court of Appeals the attached Notice of Appeal." *Riggs Oil & Gas Corp. v. Jonah Energy LLC*, 2024 COA 57, ¶ 11. The legal assistant's mistake—filing in the wrong court—did not result from a failure by counsel to properly instruct. Counsel understood the requirements of and made a concerted effort to comply with the applicable procedural rules; his assistant (as

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further discussed below) simply selected the wrong option in the Colorado Courts E-Filing system.

The court of appeals' decision applies an unreasonably narrow definition of reasonable supervision. The practical consequence of that definition will be to force attorneys to mitigate the risk of missing deadlines either by personally handling every related task, no matter how small or routine, or by supervising such tasks so closely as to defeat the purpose of delegating them in the first place. This approach conflicts with the principles of delegation and supervision embodied in the Colorado Rules of Professional Conduct and could have a chilling effect on the use of legal assistants and paralegals, all to the detriment of both attorneys and clients.

"Responsible supervision does not mean that the lawyer must duplicate the employee's work or scrutinize and regulate it so closely that the economic and other advantages of the delegation are lost." *In re Cater*, 887 A.2d 1, 16 (D.C. 2005). Instead, Colorado Rule of Professional Conduct 5.3(b) as well as Colorado and out-of-state authority interpreting that and similar provisions emphasizes that "reasonable supervision" means exactly

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that—*reasonable* supervision, not constant micromanagement. *See, e.g.*, C.R.P.C. 5.3(b) (requiring that "a lawyer having direct supervisory authority over [a] nonlawyer shall make *reasonable* efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer" (emphasis added)); *see People v. Peters*, 82 P.3d 389, 394 (Colo. O.P.D.J. 2003) (rejecting alleged C.R.P.C. 5.3(b) violation where lawyer took reasonable and adequate steps to instruct and supervise process server who, it later turned out, had not always effected service as represented and required).

The court of appeals here decided that the erroneous filing could have been immediately remedied if counsel had more closely read the submission receipt from the district court and had immediately taken steps to refile the notice. *Riggs Oil*, ¶ 63. It is unclear from the opinion whether the division had specific knowledge of circumstances in this case (such as the legal assistant's availability or counsel's proficiency with the e-filing system) that would have permitted filing in the late hours between the submission receipt and the midnight deadline. Regardless, this application of the rule sets the bar for reasonable supervision so high as to threaten the

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purposes of delegation altogether. Ultimately, "Rule 5.3(b) requires 'reasonable efforts,' not overkill." *Cater*, 887 A.2d at 16.

3. Discouraging delegation increases the cost of litigation.

Delegating routine tasks to legal assistants and paralegals is one of the few tools available to attorneys to reduce costs and make legal services more affordable. As the Ninth Circuit noted in *Pincay*, "[s]uch delegation has become an integral part of the struggle to keep down the costs of legal representation." 389 F.3d at 856. And this Court has explicitly held in the fee-shifting context that "charging an attorney's hourly rate for clerical services that are generally performed by a non-lawyer . . . is unreasonable as a matter of law." *In re Green,* 11 P.3d 1078, 1088 (Colo. 2000).

By discouraging delegation, the court of appeals' decision threatens to exacerbate the problem of high litigation costs. If attorneys are forced to handle every task personally, or to constantly peer over the shoulders of their legal assistants, they will have less time to devote to more substantive work or complex legal issues, and clients will face higher bills for routine matters. This outcome is contrary to the public interest and undermines the

goal of ensuring the "just, speedy, and inexpensive determination of every action." C.R.C.P. 1.

B. The hard-line approach hinders access to justice.

The hard-line approach endorsed by the court of appeals also hinders access to Colorado's appellate courts in other ways, particularly for the pro se parties who make up an increasing proportion of litigants in Colorado's appellate dockets.

Recent studies reveal that, in Colorado, "approximately 98% percent of defendants in civil county court cases, 40% of litigants in civil district court cases not involving domestic relations, and 75% of parties in domestic relations cases proceeded without a lawyer." Lino S. Lipinsky de Orlov & Katayoun Donnelly, *The 2024 Amendments to C.A.R. 5(e): Expanding the Scope of Limited Legal Services in Civil Appellate Proceedings*, 53 Colo. Law. 34, 35 (citing Colo. Access to Just. Comm'n, *2022 Access to Justice Commission Pro Bono Report* 5).[1] As this Court is aware and as the Colorado

[1] The Colorado Access to Justice Commission report is available at https://www.coloradoaccesstojustice.org/_files/ugd/c659b2_ec0faebe44f04021a9137e58f9bf9151.pdf.

Judicial Branch has statistically documented, the number of self-represented litigants continues to increase even from these already remarkable levels. *See* Colo. Jud. Branch, *Research and Data*, https://www.coloradojudicial.gov/court-services/research-and-data ("Case/Parties Without Representation" reports by fiscal year).[2]

While similar data for Colorado's appellate dockets is unavailable,[3] it stands to reason that "[m]any of these self-represented litigants go on to represent themselves on appeal." Lipinsky & Donnelly, *supra*, at 35. Recognizing the trend, this Court has taken steps to ensure that these litigants have access to Colorado's appellate courts. *See* Colo. Bar Ass'n

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[2] In this context, the Court has also recently recognized that "[s]elf-represented (*pro se*) parties in particular face significant barriers to accessing justice," including "dismissals or delays in their cases due to procedural mistakes." Chief Justice Monica M. Márquez, *Colorado Judicial Branch FY2025-26 Budget Request* 187–88, *available at* https://www.coloradojudicial.gov/sites/default/files/2024-11/FY26%20JUDICIAL%20BRANCH%20BUDGET%20REQUEST_UPLOAD.pdf.

[3] Undersigned counsel inquired with the Clerk of the court of appeals regarding the number and proportion of self-represented litigants in appeals and received the response that the court of appeals "do[es] not have a report that can pull this information." Email from Polly Brock, Clerk of Ct./Ct. Exec. (Feb. 25, 2025) (on file with author).

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Ethics Comm., Formal Op. 101, *Unbundling/Limited Scope Representation*, at 1, 2 (rev. May 21, 2016) (noting that, "driven, in part, by the increasing number of pro se litigants . . . [i]n 2012, the Colorado Supreme Court adopted Colorado Appellate Rule 5(e) to allow for unbundling in appellate proceedings in specific instances").

The hard-line rule endorsed by the court of appeals here moves in the wrong direction. "When weighing competing concerns about equity and efficiency, it is important to consider the impact of harsh deadline enforcement on unrepresented parties." James Mooney, *Deadlines in Civil Litigation: Toward A More Equitable Framework for Granting Extensions*, 37 Yale L. & Pol'y Rev. 683, 706 (2019). This is not to suggest that unrepresented litigants should be treated more favorably or that deadlines should be less rigorously enforced against them. *See People v. Romero*, 694 P.2d 1256, 1266 (Colo. 1985) ("By electing to represent himself the defendant subjected himself to the same rules, procedures, and substantive law applicable to a licensed attorney.") Rather, it is to recognize that hard-line rules hit harder, and more frequently, upon those without the benefit of counsel.

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A recent court of appeals decision, *In re Marriage of Byarlay and Tippmann*, No. 23CA1708, 2024 WL 4233444 (Colo. App. Sept. 19, 2024), demonstrates this. There, a mother appealed an order allowing relocation of her child. *Id*. at *1. After she filed her pro se notice of appeal eight days late, a motions division ordered her to show cause why the appeal should not be dismissed as untimely. *Id*. The mother explained that she had mailed the order to the court, but it was returned as undeliverable, and that the trauma of the case affected her ability to meet strict deadlines. *Id*. Considering these equitable factors, the motions panel excused the late filing. *Id*. However, Judge Lipinsky (author of the opinion under review here) dissented as a member of the motions panel. Likewise, when the case proceeded to the merits panel, Judge Tow dissented on jurisdictional grounds. *Id*. at *5–6. According to both dissenters, the hard-line rule of *Riggs Oil* should have foreclosed the mother's appeal.

A hard-line rule adversely affects represented parties, too, denying them their right to an appeal on the merits without enough offsetting benefit to the legal system. Even sophisticated litigants hire attorneys precisely because non-lawyers find it difficult to navigate the complexities

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of appellate procedure. The question at the root of this case—where to file the notice of appeal—provides an apt example. That seemingly straightforward question in fact has different answers in different jurisdictions and courts. *Compare* C.A.R. 3(a) (notice of appeal must be filed with the clerk of the appellate court) *with* Fed. R. App. P. 3(a)(1) (notice of appeal must be filed with the clerk of the district court); *see also* Christopher M. Jackson & Aja R. Robbins, *How (Not) to Mess Up an Appeal: Volume II*, 54 Colo. Law. 22 (Mar. 2025) (describing the many procedural complexities and open legal questions regarding notices of appeal).

Rigid enforcement of deadlines, without any consideration of equitable factors, effectively punishes clients for attorney mistakes that clients cannot reasonably be expected to monitor or even recognize. *See Taylor v. HCA-HealthONE LLC*, 2018 COA 29, ¶ 91 (Berger, J., concurring) ("There are other fairer and more effective ways to police lawyers' competence than visiting lawyers' sins on their clients.").

Article II, section 6 of the Colorado Constitution provides that "[c]ourts of justice shall be open to every person." That right to access (which includes the right to appeal) should not be jeopardized by an

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interpretation of procedural rules that deters civil litigants from proceeding, whether with or without counsel, and if they proceed, prevents consideration of the merits of their appeal. The result of the hard-line approach "is to place in jeopardy the one due process right that pro se litigants clearly have: the right to a meaningful opportunity to be heard." Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659, 670 (1988).

Respondents argue that the hard-line rule is necessary to protect "the finality of property rights and financial obligations" and the resources of the court system. Brief in Opp'n to Pet. for Writ of Cert. 4; *see* Resp'ts-Intervenors' Brief in Opp'n to Pet. for Writ of Cert. 15–16 ("[T]he legal system would groan under the weight of a regimen of uncertainty." (quotation omitted)). But these concerns cannot outweigh the right to access an appeal. Little efficiency is gained by the rigid enforcement of deadlines which are, in practice, repeatedly and routinely extended prior to their expiration. Nor should a theoretical increase in "finality" be purchased at the price of avoiding any consideration of the merits.

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In sum, "[l]arge gains in equity are worth small sacrifices in efficiency, especially when litigants' substantive rights are at stake." Mooney, *supra*, at 708. When interpreting "excusable neglect" under C.A.R. 4(a)(4), this Court's commitments to equity and access to justice should weigh against the court of appeals' hard-line approach.

C. The hard-line approach punishes parties for a user-interface problem.

In this case, the court of appeals rested its analysis of excusable neglect upon the reason for the delay. *Riggs Oil*, 2024 COA 57, ¶ 28 (quoting *Bosworth Data Servs., Inc. v. Gloss,* 587 P.2d 1201, 1203 (Colo. App. 1978)) ("[T]he critical question is the *reason* for the late filing."). Applying this standard, the division concluded that the reason for the delay was "counsel's failure to supervise his nonlawyer assistant and, even more seriously, his failure to read the submission receipt he received from the district court." *Id*. at ¶ 62; *see id*. at ¶ 66 (implying that the error constituted "the product of counsel's common carelessness and negligence" (cleaned up)). This analysis fails to consider another fundamental reason underlying the mistake: the user-interface design of the e-filing system itself.

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The excusable neglect standard of Rule 4(a) predates electronic filing in Colorado.[4] The drafters of the rule, and the cases from the twentieth century first explicating it, contemplated a world in which notices of appeal were filed in person (or by post), not remotely. *See* John A. Martin & Elizabeth A. Prescott, *The Problem of Delay in the Colorado Court of Appeals*, 58 Denv. L.J. 1, 5 (1980) (describing procedures under earlier version of the Rules). When filing on the deadline, the attorney or their agent would appear at the court to submit the notice directly to the clerk. If the attorney mistakenly attempted to file in the wrong court, that mistake would immediately become obvious to both the attorney and the clerk.

That protection no longer exists. The Colorado Courts E-Filing system does not prevent notices of appeal from being filed in the district court. On the contrary, it presents the user with the option to file a "Notice of Appeal" in the district court, making no distinction between the "notice

[4] Electronic filing was first implemented in 2000. *See* Colo. Jud. Branch, *Integrated Colorado Courts E-Filing System: The Next Generation of Electronic Filing in Colorado Courts*, https://www.courts.state.co.us/userfiles/file/Administration/JBITS/PAS_ICCES/E-File_Article.pdf (describing this history).

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of appeal required by C.A.R. 3" and the "advisory copy [to be] served on the lower court" described in C.A.R. 4(a)(1). Nor does the interface warn users who file a notice of appeal in the district court that they might be filing incorrectly or ask for confirmation that the notice of appeal was also properly filed in the court of appeals. And rather than rejecting the filing immediately, as in a face-to-face encounter, the clerk is not likely to review the filing and email a notification of the error until, as in this case, hours or even days later. This is a user-interface problem, not solely a matter of user error. *See* Casey Flaherty, *Developing Technological Competency As A Lawyer*, Mich. B.J., June 2017, at 70 ("If users aren't able to navigate a product successfully, the first question should be about product design rather than user error.").

As e-filing is mandated for attorneys, and especially as it becomes available and encouraged for unrepresented parties, mistakes like this should be judged under a standard that accounts for new technical complexities and design shortcomings layered on top of existing procedural complexities. There is "no reason to categorically exclude errors resulting from computer system problems or failures from a finding of first

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level excusable neglect." *Taylor*, ¶ 76 (Berger, J., concurring); *see Chiles v. Littauer*, 247 N.E.3d 859 (Mass. App. Ct. 2024) (unpub.), *review denied*, 250 N.E.3d 532 (Mass. 2025) (finding excusable neglect for late filing of notice of appeal where counsel "failed to realize that he had not received a filing confirmation e-mail on the day he believed he had filed the notice of appeal"); *Fam. Dollar Stores of R.I., Inc. v. Araujo*, 204 A.3d 1089, 1096 (R.I. 2019) (finding excusable neglect for thirty-day delay in filing notice of appeal where "it appears that the underlying cause of the delay was counsel's lack of familiarity with the electronic filing system and not with the rules"); *Williams v. Golden Peanut Co.*, No. 19-cv-667-SMD, 2021 WL 11421552, at *1 (M.D. Ala. Apr. 15, 2021) ("An electronic filing error constitutes excusable neglect where the delay is unintentional and does not prejudice the parties.").

The Court should avoid endorsing rules that punish parties and their counsel for mistakes where part of the "reason for the delay" is the design of the computer systems they are required to use. For this reason, too, the Court should reject the court of appeals' hard-line approach to excusable neglect.

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IV. CONCLUSION

CDLA and CTLA join Petitioner Jonah Energy LLC in urging this Court to reject the "hard line rule" adopted by the court of appeals below. The Court should reverse the court of appeals.

Respectfully submitted this 10th day of March 2025.

BERG HILL GREENLEAF RUSCITTI LLP

[Pursuant to C.A.R. 30, the signed original is on file at Berg Hill Greenleaf Ruscitti LLP]

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March 2025, a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE COLORADO TRIAL LAWYERS ASSOCIATION AND COLORADO DEFENSE LAWYERS ASSOCIATION IN FAVOR OF PETITIONER** was served electronically via Colorado E-Filing to the following:

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