

Appellate News

June 2005

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MESSAGE FROM THE CHAIR

Steve Tucker, Chair

I am proud and honored to be asked to serve as Chair of the Appellate Practice Section for 2005. As one of those who helped get the Section started about fifteen years ago, I have been pleased to see it grow roots and branches over that period of time. It is healthy in its finances and, more importantly, in its people.

The primary objective of the Section is, and always has been, to take the lead in delivering to the New Mexico bar educational courses and materials in the field of appellate practice. The relationship of the members to appellate practice presents a broad spectrum. Some rarely do appeals but are nonetheless interested in appellate practice and want to be educated and prepared in the event an appeal is necessary. At the other end of the spectrum are those whose practice consists entirely or primarily of appellate practice. The great majority of the Section falls in the middle — lawyers who do appeals “every now and then” or perhaps have one “now.” My goal for 2005 is to ensure that the Section is doing its best to serve all of its members, especially the non-specialists.

The cornerstone of the Section’s work is the Appellate Practice Institute. The first Appellate Practice Institute was held at the Eldorado Hotel in Santa Fe about 1990 – before the formation of the Appellate Practice Section. I was among those who helped put it on. Steve Meilleur, who was the State Bar’s CLE director at the time, had the idea of calling it an “Institute,” and the idea took hold. In my mind at least, the concept of an Institute inherently carries the notion that this event is not just a one-time “seminar,” but is an ongoing, collaborative effort which is permanent in character. The name itself gives rise to a long-term commitment to pursue a discipline. At the first Institute, all attendees were invited to join the yet-to-be formed Appellate Practice Section and to join in that commitment. Fortunately, many fine people did and many continue to do so.

This year, the Appellate Practice Institute will take place at the State Bar Center in Albuquerque on August 19, 2005. Having conducted a more “nuts and bolts” program in 2004, the Section has shaped this year’s program to address issues which are not uncommon in appellate practice but are a step beyond the basics.

Keep your eye out for the details of the program, but it will include pieces on post-trial motions and finality, petitions for extraordinary writs and certiorari, ethics, appellate jurisdiction, and interlocutory appeals. It will also include perennial favorites: a judges’ panel and recent developments in appellate practice. We have some excellent speakers lined up and feel it will be a very good program.

The Section is also putting on a very basic “nuts and bolts” program as part of the 2005 State Bar Annual Meeting in Ruidoso in September of 2005. The theme of the meeting is “Back to the Basics: Building Blocks to a Better Practice.” The Section saw its role as presenting a step-by-step walk-through of how to do an appeal. The program is aimed at those who have never done an appeal and those who have not done one recently and could use a good overview of the process as well as some practical advice on “do’s and don’ts.”

Another project we are undertaking this year, which I am personally excited about, is trying to get useful forms on our website for use by the Section and others. Some of us who do appeals regularly are frequently asked for forms for various documents including docketing statements, briefs, petitions – even notices of appeal. Past-Chair, Ed Ricco, generously volunteered to head up this challenging but important project. We feel it would be useful for the entire bar to have access to model forms for these various documents on an as-needed basis. Collecting samples we are comfortable with and keeping them current in light of changes in the rules is an ambitious undertaking but I am confident we will get it done.

Finally, I encourage not only membership but active participation in the Section by anyone who has an interest in appellate practice. We welcome that participation including ideas on how we can make the Section and its work better. Feel free to contact me directly.

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RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

Compiled by Edward Ricco
Rodey, Dickason, Sloan, Akin & Robb, P.A.

January 2005

(Cases from *Bar Bulletin*, Vol. 43, Nos. 1-52)

FINALITY/APPEALABILITY

Alba v. Peoples Energy Resources Corp., 2004-NMCA-084, ¶¶ 11-13, 136 N.M. 79, 94 P.3d 822, *cert. denied*, 2004-NMCERT-007, 136 N.M. 452, 99 P.3d 1164.

Where district court, on appeal from zoning commission, remands to commission for further proceedings to determine actual zoning of land, but applicant's use would not be permitted under either zoning category that could possibly be found to apply, order is final for purposes of review on certiorari by Court of Appeals under doctrine of practical finality: "The practical effect of this ruling was as final as one can imagine." Court notes that "issues surrounding finality are sometimes subtle"; viewed in context, the order "was in fact final and the remand portion of it incidental."

State v. Griego, 2004-NMCA-107, ¶¶ 8-15, 136 N.M. 272, 96 P.3d 1192.

Order in criminal case denying motion in limine to bar impeachment of victim, as result of which victim would not testify, or would testify falsely in which case state would not offer victim as witness, could not be appealed under practical finality doctrine despite prosecution's contention that it would be forced to dismiss case; dismissal did not result from any judicial determination but from state's decision that it could not present its sole witness because of its duty not to present perjured testimony.

Board of Trustees v. Sanchez, 2004-NMCA-128, ¶¶ 6, 11-12, 136 N.M. 528, 101 P.3d 339, *cert. denied*, 2004-NMCERT-011, 136 N.M. 656, 103 P.3d 580.

Grant of peremptory writ of mandamus by district court is not final and appealable where court has reserved ruling on petitioners' claim for damages. Where issue of damages remains, order or judgment is not final, does not fall under doctrine of practical finality, and does not lie within "twilight zone of finality." Policy disfavors piecemeal appeals; even though reversal of liability determination would render issue of damages moot, the requirements of finality apply.

MOOTNESS

City of Sunland Park v. N.M. Pub. Regulation Comm'n, 2004-NMCA-024, ¶¶ 5, 6, 135 N.M. 143, 85 P.3d 267, *cert. denied*, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

Appeal challenging PRC jurisdiction over utility condemned by city was not moot after condemnation was affirmed and PRC abandoned efforts to regulate utility; rights of utility customers with respect to rates during time PRC claimed jurisdiction, and other

rights and obligations of city in other litigation, still depended on determination of question.

PARTIES TO APPEAL

Henry v. Daniel, 2004-NMCA-016, ¶¶ 14, 15, 135 N.M. 261, 87 P.3d 541, *cert. denied*, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

Under appellate rules, court has discretion regarding how appeal is to proceed where party dies during trial court or appellate proceedings; court allowed appeal to proceed on merits with counsel for appellant representing appellant.

NOTICE OF APPEAL – TIMING

Wilson v. Mass. Mut. Life Ins. Co., 2004-NMCA-051, ¶¶ 7-12, 135 N.M. 506, 90 P.3d 525, *cert. denied*, 2004-NMCERT-004, 135 N.M. 563, 91 P.3d 604.

Notice of appeal due on July 29 was dispatched by UPS second-day delivery on July 24 but was not delivered until July 30. Request for extension of time (originally misdirected to appellate court) was granted by district court on finding of good cause; more than 60 days after due date, district court amended order to find circumstances beyond control of party (the correct standard). Amended order was ineffective because district court lacked authority to grant extension at time of amendment. Grounds to allow untimely appeal did not exist: party relied on timeliness of delivery service; there was no error by court; party did not pursue options to ensure timely filing, such as following up on delivery or filing notice by fax.

State v. Boblick, 2004-NMCA-078, ¶¶ 6, 7, 135 N.M. 754, 93 P.3d 775, *cert. denied*, 2004-NMCERT-006, 135 N.M. 787, 93 P.3d 1292.

In single, bifurcated criminal prosecution and civil forfeiture proceeding, defendant filed notice of appeal from criminal conviction prior to entry of final order in civil forfeiture – a jurisdictional defect which continued through briefing in the criminal appeal and prompted state to argue in its answer brief that appeal should be dismissed. After close of briefing, trial court entered order releasing property and declaring all proceedings concluded. "Upon the entry of that order, this Court acquired jurisdiction based on the notice of appeal that was already filed." Court would not cause unnecessary delay by remanding solely to require new notice of appeal.

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RECENT DEVELOPMENTS

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INTERLOCUTORY APPEALS

Brenneman v. Bd. of Regents, 2004-NMCA-003, ¶ 3, 135 N.M. 68, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

In deciding an interlocutory appeal, court observed that in application for interlocutory review, in addition to raising statutory grounds, appellants “noted discrepancies among district court decisions on the issue.”

CLASS CERTIFICATION APPEALS – RULE 1-023(F)

Salcido v. Farmers Ins. Exch., 2004-NMCA-006, ¶¶ 11, 12, 134 N.M. 797, 82 P.3d 968.

Adopting guidelines for exercise of court’s discretion in considering whether to grant immediate review of class certification rulings pursuant to Rule 1-023(F) NMRA. Court will ordinarily grant review where (1) ruling creates death-knell situation for either party that is independent of merits of underlying claims and is questionable exercise of district court’s discretion; (2) ruling presents unsettled and fundamental issue of law relating to class actions, important generally as well as to the specific litigation; or (3) ruling is manifestly erroneous.

WRIT OF ERROR

Pincheira v. Allstate Ins. Co., 2004-NMCA-030, ¶¶ 7, 8, 135 N.M. 220, 86 P.3d 645, cert. denied, 2004-NMCERT-003, 135 N.M. 319, 88 P.3d 261.

Motion for reconsideration does not toll time within which to file petition for writ of error; time runs from filing of order sought to be reviewed.

Attaching relevant pleadings to petition for writ of error is permitted in order to give appellate court, which does not have access to record proper in considering petition, view of issue presented in context of litigation as a whole.

King v. Allstate Ins. Co., 2004-NMCA-031, 135 N.M. 206, 86 P.3d 631, cert. denied, 2004-NMCERT-003, 135 N.M. 319, 88 P.3d 261.

Under New Mexico law, the only orders that have been held to be collateral orders subject to immediate review by writ of error are orders denying claims of immunity from suit (sovereign immunity, qualified immunity), because of burdens that would be imposed by participating in litigation. Order compelling discovery or granting protective order is not reviewable by writ of error. Party seeking immediate review of discovery order must do so through interlocutory appeal, if granted, or by refusing to comply with order, being held in contempt, and appealing as of right the contempt judgment and the underlying discovery order on which the contempt was based.

RECORD ON APPEAL

City of Sunland Park v. N.M. Pub. Regulation Comm’n, 2004-NMCA-024, ¶¶ 16, 17, 135 N.M. 143, 85 P.3d 267, cert. denied, 2004-NMCERT-002, 135 N.M. 169, 86 P.3d 47.

Materials submitted in support of motion for reconsideration, which was denied by district court on jurisdictional grounds because notice of appeal had been filed, would not be considered on appeal; district court had not considered or relied on them in its ruling.

PRESERVATION OF ISSUES

State v. Balderama, 2004-NMSC-008, ¶ 19, 135 N.M. 329, 88 P.3d 845.

Preservation requirement is satisfied where court makes ruling sua sponte; issue is fairly presented to court and court invokes its own ruling.

State v. Jimenez, 2004-NMSC-012, ¶¶ 9-11, 135 N.M. 442, 90 P.3d 461.

Defendant did not have opportunity to raise in district court the issue whether he should have been denied credit for time served on probation on ground that he was a fugitive, and therefore was not barred from raising issue initially on appeal, where petition to revoke probation did not allege, and state did not argue at revocation hearing, that defendant was a fugitive and court did not itself raise issue of credit or fugitive status at hearing but then issued order sentencing defendant to serve balance of his term without credit; Defendant “could not have known that his status as a fugitive was at issue until the district court filed its order” and “had no opportunity to object to the court’s ruling at the time it was made.”

Garza v. State Taxation & Revenue Dep’t, 2004-NMCA-061, ¶¶ 5-8, 135 N.M. 673, 92 P.3d 685.

In context of administrative hearing, issue whether breath test results were properly admitted was preserved for appeal where, although counsel initially did not object to admission of evidence, ground for objection was revealed during cross-examination of witness and counsel made objection during closing argument to hearing officer. In contrast to trials, formal rules of procedure do not apply to administrative proceedings.

State v. Cearley, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. denied, 2004-NMCERT-006, 135 N.M. 788, 93 P.3d 1293, and cert. granted, 2004-NMCERT-007, 136 N.M. 453, 99 P.3d 1165.

Appellant preserved issue at trial and included issue in docketing statement, but after appeal was placed on general calendar appellant argued in brief only that judgment should be reversed for reasons stated in docketing statement and summary calendar notice. Issues raised by docketing statement or calendar notice are abandoned if not briefed after general calendar assignment. But issue would be reviewed under fundamental error doctrine because it involved conviction where legally required elements of offense were not all present.

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RECENT DEVELOPMENTS

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State v. Rosales, 2004-NMSC-022, ¶¶ 19, 20, 136 N.M. 25, 94 P.3d 768.

Offer of proof is required to preserve error in exclusion of evidence. Offer of proof serves purposes of enabling district court to make informed decision and allowing reviewing court to determine whether exclusion of evidence was reversible error. To serve these purposes, offer of proof must be sufficiently specific to allow district court to determine whether the evidence is admissible and to allow appellate court to review that determination. Because defendant's offer of proof did not show what testimony would have been on point that determined its admissibility, appellate court could not say from unclear record that district court abused its discretion in excluding evidence.

REVIEW BY WRIT OF CERTIORARI – SUPREME COURT

State v. Urban, 2004-NMSC-007, ¶¶ 8-10, 135 N.M. 279, 87 P.3d 1061.

While petitioner must demonstrate jurisdictional basis for writ of certiorari in petition, once writ of certiorari has been granted petitioner need not establish propriety of writ in brief in chief. Respondent may argue in answer brief that writ should be quashed, particularly where jurisdictional argument only becomes apparent during course of briefing. Better practice, where possible, is to present arguments against grant of certiorari in response to petition itself rather than in briefing on merits.

REVIEW BY WRIT OF CERTIORARI – COURT OF APPEALS

Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Although agency incorrectly filed notice of appeal rather than petition for writ of certiorari in § 39-3-1.1 administrative appeal, Court of Appeals would treat notice as petition where it was filed within the 20-day deadline for petition and unique circumstances justified consideration of appeal on merits; circumstances consisted of inconsistencies in Court's prior treatment of appeals involving same agency.

Cassidy-Baca v. Board of County Commissioners, 2004-NMCA-108, 136 N.M. 307, 98 P.3d 316, *cert. quashed*, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 198.

District court did not have authority to extend time within which to file petition for writ of certiorari with Court of Appeals; general rule is that extensions of time to file a document should be requested from court in which document is to be filed. Petition filed in reliance on district court's extension of time was untimely. This case did not present "unusual circumstances" necessary for Court of Appeals to grant extension of time to file petition for certiorari.

STANDARDS OF REVIEW

Brown v. Trujillo, 2004-NMCA-040, ¶ 20, 135 N.M. 365, 88 P.3d 881, *cert. denied*, 2004-NMCERT-004, 135 N.M. 562, 91 P.3d 603.

Standard of review of summary judgment ruling based on trial court's failure to exercise discretion is whether, viewing evidence in light most favorable to nonmoving party, trial court had discretion to exercise; summary judgment will be upheld if facts, even when viewed most favorably to nonmoving party, do not bring case within any situation permitting exercise of discretion.

State v. Barber, 2004-NMSC-019, 135 N.M. 621, 92 P.3d 633.

In criminal cases, fundamental error doctrine is comprised of two strands. One turns on guilt or innocence of defendant and arises where innocence is indisputable or guilt is subject to great doubt; other, focusing less on guilt or innocence and more on process, arises where error in process makes a conviction fundamentally unfair notwithstanding apparent guilt of accused. "Both types of cases may result in a miscarriage of justice." (¶ 17)

Lee v. Martinez, 2004-NMSC-027, ¶ 13, 136 N.M. 166, 96 P.3d 291.

"Legislative facts" which do not concern individual parties and their actions but are intended to aid court in making policy choices are reviewed de novo.

Berry v. Federal Kemper Life Assurance Co., 2004-NMCA-116, ¶¶ 25-26, 136 N.M. 454, 99 P.3d 1166, *cert. denied*, 2004-NMCERT-009, 136 N.M. 515, 100 P.3d 672.

District court's decision to grant or deny class certification is reviewed for abuse of discretion. Discretion is abused if court misapprehends law or acts unreasonably. If court has applied correct law, its decision will be upheld if supported by substantial evidence. Abuse of discretion standard "appropriately recognizes the practical, fact-bound, and case-specific nature of the class certification process." District court "is best able to craft the most efficient, manageable, and just means" of managing case. Within parameters designed to encourage district courts to explicitly consider and resolve issues inherent in class action vehicle, "appellate courts should leave certification requests to the prudent discretion of the district courts."

Brooks v. Norwest Corp., 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39, *cert. denied*, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

Court reviews class certification rulings for abuse of discretion - rejecting contention that less deferential standard should apply to denials of class certification, but noting that abuse of discretion occurs when court misapplies law and that initial decision of what legal standard to apply is reviewed de novo.

BRIEFS

State v. Laney, 2003-NMCA-144, ¶ 33, 134 N.M. 648, 81 P.3d 591, *cert. denied*, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Brief was improper under New Mexico appellate rules where argument did not identify applicable standard of review, cite to record showing where argument was preserved, point to any specific error, or request any particular relief.

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RECENT DEVELOPMENTS

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Pincheira v. Allstate Ins. Co., 2004-NMCA-030, ¶ 8, 135 N.M. 220, 86 P.3d 645, *cert. denied*, 2004-NMCERT-003, 135 N.M. 319, 88 P.3d 261.

Counsel admonished for “the frequent use of underlining and italics, sometimes both, to emphasize large portions of the material in the briefs; this style simply makes the briefs annoying and difficult to read.”

APPEALS TO DISTRICT COURT/ ADMINISTRATIVE APPEALS

Maso v. State Taxation & Revenue Dep't, 2004-NMCA-025, ¶ 17 & n.1, 135 N.M. 152, 85 P.3d 276, *cert. granted*, 2004-NMCERT-002, 135 N.M. 170, 86 P.3d 48.

Party seeking review of administrative decision of Motor Vehicle Division, falling within district court’s appellate jurisdiction, and also seeking to pursue writ of mandamus against agency based on contention that administrative proceedings violated due process, falling within district court’s original jurisdiction, may accomplish both in a single proceeding initiated by filing a notice of appeal to district court. Counsel should indicate in statement of appellate issues that court is requested to exercise original as well as appellate jurisdiction and which issues are brought under each. “We recognize that this procedure . . . may cause confusion when an appellant wants to appeal from a decision the district court has made in the exercise of both its appellate and its original jurisdiction.” But, because issue is not presented, “we do not decide whether such an appeal would be made by filing a notice of appeal pursuant to Rule 12-202 . . . or by filing a petition for writ of certiorari pursuant to Rule 12-505 . . . or by filing both pleadings.”

Dixon v. State Taxation & Revenue Dep't, 2004-NMCA-044, 135 N.M. 431, 89 P.3d 680.

Where appellate review of agency decision by district court is authorized by general administrative appeal statute, NMSA 1978, § 39-3-1.1, and Rule 1-074 NMRA, proper method of obtaining further appellate review is by filing petition for writ of certiorari as provided in Rule 12-505 NMRA, rather than by filing notice of appeal. Court leaves undecided what is proper procedure for seeking further review of district court’s ruling in administrative appeal that is authorized by statute other than § 39-3-1.1.

Jicarilla Apache Nation v. Rio Arriba County Assessor, 2004-NMCA-055, ¶¶ 11, 12, 135 N.M. 630, 92 P.3d 642, *rev'd on other grounds*, 2004-NMCA-035, 136 N.M. 630, 103 P.3d 554.

Where district court properly certifies administrative appeal to Court of Appeals as involving issue of substantial public interest, appellate court lacks discretion to set aside certification order and must decide the appeal. Issue of “substantial public interest” is one that affects entities beyond the parties themselves, raises a question of first impression that is likely to recur, and presents great need for uniformity.

Lantz v. Santa Fe Extraterritorial Zoning Auth., 2004-NMCA-090, ¶ 11, 136 N.M. 74, 94 P.3d 817.

Reasonable interpretation by agency of its own regulation need not be of long standing to be accorded deference by court, as opposed to agency interpretation of statute. Deference is based on agency expertise in its subject area and its knowledge of the intent behind its own language (indicating that deference to agency’s statutory interpretation is based in part on legislature’s inaction over time to modify or correct agency’s interpretation).

SUPREME COURT PRECEDENT – BINDING EFFECT

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 22, 135 N.M. 375, 89 P.3d 47.

Court of Appeals is required to follow Supreme Court precedent – operative fact is the existence of precedent on the matter; it is not necessary for that precedent to have been reconsidered or re-affirmed. Court of Appeals is invited to explain any reservations it might harbor over application of precedent, so Supreme Court will be in more informed position to decide whether to reassess prior case law by writ of certiorari or, preferably under such circumstances, certification.

State v. Duarte, 2004-NMCA-117, ¶ 12, 136 N.M. 404, 98 P.3d 1054.

Court of Appeals follows recent precedent of United States Supreme Court granting broader rights to criminal defendants without waiting for New Mexico Supreme Court to adopt that precedent as controlling over its prior decisions based on older precedent; court “has more latitude” to override past precedent of state supreme court where specific issue has not been considered by that court and is “confident that our Supreme Court would adopt” recent United States Supreme Court precedent and therefore “accept[s] this opportunity” to adopt it.



MARK YOUR CALENDAR

APPELLATE PRACTICE INSTITUTE

Friday, August 19, 2005

State Bar Center, Albuquerque

APPELLATE RULES UPDATE

by Caren I. Friedman ¹

Three rules of appellate procedure – Rules 12-202, 12-211 and 12-213 – have recently been amended. The amendments are effective for cases filed on or after March 15, 2005. The heart of the amendments to each of these rules is that reference to “tapes” has generally been deleted and reference to “audio recordings” has been substituted in its place.²

The rules define an “audio recording” as “any tape, digital or other electronic recording of the proceedings.” Rule 12-211(A)(2). The rules mandate that audio recordings “must comply with standards established by the Supreme Court.” *Id.* Members of the Supreme Court Clerk’s office have promulgated standards and have apprised the district courts of these standards.

Since the rules have generally deleted reference to “tapes,” what was formerly known as a “tape monitor” is now known as a “court monitor.” *See, e.g.*, Rule 12-202(D)(1) & -(3). Thus, a court monitor takes the record of audio recorded proceedings, while a court reporter makes a stenographic transcript of the proceedings. This is significant for purposes of serving the notice of appeal because depending on whether the transcript is audio or steno, either the court monitor or the court reporter must be served. *See id.*

Rule 12-213 governing briefs has also been amended in light of the change from “tapes” to “audio recordings.” In particular, the rule governing the preparation of the table of contents states that

when the transcript of proceedings is a digital or other electronic recording, counsel must include a statement to that effect at the end of the table of contents. *See* Rule 12-213(A)(1). Furthermore, counsel must state whether citations to the transcript refer to elapsed time or to the official log. *See id.* If counsel is referring to elapsed time, the rules state that the citation should refer to the number of minutes and seconds after the start of the recording. *See id.* For example, the citation “Tr. 10:25” would indicate a point occurring ten minutes and twenty-five seconds into the recording. *See id.* If the transcript is on tape, counsel must state the manufacturer and model of the recording device being used and the number of units or counters on one side of a tape on that particular machine. *See id.*

Endnotes

¹ Caren I. Friedman is certified as an appellate specialist by the New Mexico Board of Legal Specialization. She currently serves as a member of the Appellate Rules Committee. Her practice focuses on civil and criminal appeals in federal, state and tribal courts.

² Where tapes are distinguished from digital or other electronic recordings, the rules still refer to “tapes.” *See, e.g.*, Rule 12-213(A)(1).

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