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How to Try a Case in Order to Effectively Appeal

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HOW TO TRY A CASE IN ORDER TO EFFECTIVELY APPEAL

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MR. JOHNSON: This may seem like a strange topic, because we assume that you are not trying cases to lose them. You don't deliberately set out to lose a case, at least I never have. I've lost a lot of them, but I've never tried to lose one.

This is what you do when you perceive that things are about to go bad. Maybe the mind of the trial judge is both closed and empty.

JUDGE BLACK: I wondered why they chose me for this panel. Now I know.

JOHNSON: Or maybe it's a steel city. You can't tell, but you know you're not getting through to the trial judge and think to yourself, "What's going to happen now?"

Well, when you're appealing, you have got to try to protect the record. You've got to make objections to keep evidence out, you've got to make a tender of some kind to try to get evidence in, and the standards can sometimes seem more strict than they should be.

It's difficult; you have to be specific and consistent.

Let's talk for a minute about what you do when you feel things are going badly. Let's suppose you have decided to keep some evidence out, and you file a motion in limine. As far as I know, there is nothing in the rules either prohibiting or permitting motions in limine, but they have come into general use now. You see them all the time, and you file them generally to try to keep evidence out—to alert the mind of the trial judge before the trial starts that the other side is trying to enter evidence that has nothing to do with this case.

Even if you lose on your motion, it seems to me that you must object again when the evidence is offered. That sounds a little odd, as if the trial judge were perhaps dozing during your initial presentation. Maybe he had not been alerted, but the cases seem to say that the judge is entitled to think that you have withdrawn your objection if you don't make it again. So you've got to make it again. That's not intuitively obvious, to me at least. It may be to other folks.

One other thing I ought to say, there is a great story that comes out of the "Bert and I" stories.[1] (Those of you from the Northeast may know this.) Bert and I are a couple of folks like Mr. St. John,[2] Yalies—at least one of them is. The story is about Ebenezer, who one day goes to church during a great snowstorm. He is the only

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1. The "Bert and I" stories come from the comic routine of Marshal Smith and Bob Bryan.

2. Robert M. St. John, attorney at law, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico.

person who shows up, and the preacher says, "Well, Eb, do you want a sermon or not?"

Eb says, "Well preacher, when it's feeding time and only one of my cows comes, I feed the cow."

So the preacher preaches the full sermon, and at the end he says, "Eb, how'd you like it?"

And Eb says, "Well, if only one cow comes, I don't give her the whole load."

With that, I think I'll pass off.

Let us say, Judge,[3] that you've heard a motion in limine of which you have not thought much, and now the other side is trying to get the evidence in. Do you require that I object again?

BLACK: I would say it's better practice. One reason is that the current Rule 103[4] is under revision. The Supreme Court has proposed an amendment that will become the law starting in December, if in fact Congress doesn't change it.[5]

Until now, the circuits have been divided on this issue.[6] There are cases that say if you get a tentative ruling and you do not renew your objection at the time the actual evidence is offered, depending on the context, you may have waived your objection.[7] Some cases say you never have to renew; it's there in the record.[8] Other cases say you always have to renew.[9] The middle ground, which the Supreme Court has adopted in the proposed revision, really takes the position that it depends on whether the ruling is tentative.[10] Of course that ends up being a subject of interpretation at the circuit level; so I would say the better idea is to always renew.

If you have any doubt at all, and it isn't crystal clear from the record, renew the objection. I think the Court had some thought that it was a waste of time to renew if the objection was absolutely clear. That certainly is the case, but I would say renew rather than be on the losing side of the argument.

JOHNSON: Yes, it would be embarrassing. As I said to Judge Kelly[11] when he asked me to be on this panel, "This is a cruel joke, isn't it?" I've lost a lot of lawsuits. It is a subject on which I have a lot of experience and very little success.

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3. The speaker is addressing Judge Black.

4. FED. R. EVID. 103.

5. By order dated April 17, 2000, the Supreme Court of the United States approved several amendments to the Federal Rules of Evidence. As amended, Rule 103(a)(2) includes the following statement: "Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

6. FED R. EVID. 103 advisory committee's note.

7. *See, e.g.*, Rosenfeld v. Basquiat, 78 F.3d 84, 90-91 (2d Cir. 1996) (stating that "[w]here a trial court has ruled on a motion made in limine, there must, in some circumstances, be another evidentiary ruling during the trial to preserve the matter for appeal").

8. *See, e.g.*, United States v. Wilson, 118 F.3d 228, 238 (4th Cir. 1997) (saying that a renewed objection was not required so long as a motion in limine was clearly sought and ruled upon by the trial court).

9. *See, e.g.*, Marceaux v. Conoco, Inc., 124 F.3d 730, 733-34 (5th Cir. 1997) (noting that in that circuit, a party whose motion in limine has been overruled must renew his objection at trial); Reeve v. McBrearety, 660 P.2d 75, 77 (Kan. Ct. App. 1983) (stating that when a motion in limine is denied, the moving party must object to the evidence at trial to preserve that issue on appeal).

10. *See supra* note 8 and accompanying text.

11. Paul J. Kelly, Jr., Circuit Judge, United States Court of Appeals, Tenth Circuit.

BLACK: Well, I wondered why he asked me, although I assumed he thought I had a lot of error in my court. Why I would want to teach people how to preserve it wasn't so clear.

JOHNSON: I think he told me there is always an abundant supply in your court.

BLACK: I made up the deficit for you.

JOHNSON: That's right.

BLACK: Let me start by telling you a little story that probably will offend my colleague—Judge Tacha, having been both a law professor and, now, an appellate judge—but there is a point to it.

A law professor, an appellate judge, and a trial judge go duck hunting. The first form breaks the horizon, and the law professor says, "Well that would appear to be a duck. If we have a senior seminar and then perhaps a symposium, we can work through it." Of course by then the form is long since gone.

The next form breaks the horizon. The appellate judge says, "Well, that would appear to be a duck. I can get my clerks to do a bench memo, have a panel conference, and perhaps take it up en banc." The form is long gone.

The third form breaks the horizon. "Bam, bam!" The trial judge says, "Damn, I hope that was a duck."

The point of that story is things look very different depending on your perspective.

Having been an appellate judge, I can tell you that things you spend literally weeks, and sometimes months, cogitating over on appeal literally took thirty to sixty seconds in the trial court. Frequently they went by in a blur with nobody really focusing on the ultimate significance of the thing, if indeed they attributed any significance to it at all.

So, let me tell you about a couple of general rules. A lot of these come out of an excellent article in the Winter 1999 edition of *Litigation*.[12] The title of the article is *Pointers on Preserving the Record* by Sylvia Walbolt and Susan Landy, a couple of Florida practitioners.[13] The general rule is, if it's not in the record, it didn't happen.[14] The Tenth Circuit recognizes "plain error,"[15] but don't count on using it. That is the first rule of trial practice.

Beginning with that, and particularly with motions in limine, I think it's a good idea—partly because I was an appellate judge and think better when I write things out—to present your pretrial motions in writing.[16] If it's in the record and you've made your arguments and cited your authorities, it is absolutely clear. Then there's no question about what happened in the trial court.

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12. Sylvia H. Walbolt & Susan L. Landy, *Pointers on Preserving the Record*, 25 No.2 LITIG. 31 (Winter, 1999).

13. Sylvia H. Walbolt is a shareholder with Carlton Fields in St. Petersburg, Florida, and Susan L. Landy is a senior staff attorney, Second District Court of Appeal, State of Florida. *Id.* at 31, n.1.

14. *Id.* at 31.

15. Unit Drilling Co. v. Enron Oil & Gas Co., 108 F.3d 1186, 1190 (10th Cir. 1997) (reviewing jury instruction for plain error where issue was not preserved for appeal).

16. *See also* Walbolt, *supra* note 15, at 31.

Be clear in your objections to the trial court.[17] Try to make your evidence crisp and concise. Judge Campos,[18] one of my colleagues, left a little pointer on the bench down in Las Cruces that said, "Speak in short sentences, make it clear, ask for what you want, and sit down."

Ask for a particular remedy; make it clear to the court what you are asking for.[19] If you want the pleading stricken or some portion of that pleading stricken, make sure that it's clear in the record. If you want to admit particular evidence or strike some evidence that has already been admitted, ask for the remedy. If you want a cautionary instruction, ask for it. Mistrial? I think that's self-evident. If you don't seek the remedy, the court of appeals may find that you have either acquiesced in what the trial court did or waived your objection entirely. You certainly don't want to end up in that situation.

Always try to obtain a ruling.[20] If it's ambiguous and you've got a tentative ruling—where we started this hypothetical—try to get the judge to rule. If you can't do it, put a de facto ruling in the record: "I assume from what Your Honor has said you have admitted the evidence." Then it is on the record as clear as you can make it without offending the trial judge.

We talked about the proposed amendment to Rule 103. I think that is significant. You want to keep it in mind so you don't end up with a tentative ruling that could go either way in the circuit court in Denver.

I would suggest that it is a good idea—I frankly had not thought of it until I read this article—to keep a checklist.[21] It is always a good idea to have a checklist for exhibits, noting what's been admitted, what's tentatively been admitted, and what you might have to connect up, because often in the course of a trial you forget. If you don't have something there right in front of you, you get caught up in other matters. You get distracted by witnesses who don't appear, or whatever. It's important to have something you can go back to before you rest your case to help answer the questions: Have I moved this? Have I made that motion in limine? Have I filed whatever objection? Is this evidence in the record, or have I made the best record I can as to why it's not?

The same advice applies to offers of proof. Unless it is absolutely clear from the context, Rule 103 says you have to make an offer of proof.[22] Again, if the trial court is not very receptive, you can always do it in writing, and, of course, the rule contemplates that you can make a question and answer form of tender.[23] Sometimes that's the best course, but often I'm not particularly receptive to it, depending on the flow of the trial. The question and answer format can take a long time, and I don't like to keep the jury out. But if you are close to the end of the day or a lunch break where you think that format would be more effective, try it. It can also backfire, as

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17. *Id.*

18. Santiago Campos, United States District Judge, District of New Mexico (deceased).

19. Walbolt, *supra* note 15, at 31.

20. *Id.*

21. *Id.* at 32.

22. FED. R. EVID. 103(a)(2). "In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context...." *Id.*

23. FED. R. EVID. 103(b) (stating that the court "may direct the making of an offer in question and answer form").

most of you know who've tried it. The witness may not give the answer that you anticipated, in which case you might have been better off summarizing and tendering it yourself.

JOHNSON: Almost invariably you're better off doing it yourself, it seems to me. Some of these witnesses are so unreliable they can't remember what you told them to say.

BLACK: I think that's probably right. This is another place where a checklist might be good. Just tell them to take it out of their pocket.

JUDGE TACHA: We have a question.

AUDIENCE MEMBER: Would you allow cross-examination on a proffer?

BLACK: I do.

AUDIENCE MEMBER: Then what is the rule on this? Has the Tenth Circuit made a decision as to whether that is proper?

TACHA: It's pretty common, I think. It's in a lot of transcripts.

JOHNSON: I don't know of a rule that requires it, however.

BLACK: Rule 103 contemplates question and answer format, and I think from that you can extrapolate that it contemplates cross-examination. However, I don't think the language of the rule requires it, and I don't know of any case law on point.

TACHA: Judge Brimmer, what do you do? Do you allow cross-examination?

CLARENCE A. BRIMMER:[24] Not if I can help it, I don't.

TACHA: Oh.

BLACK: I try to discourage question and answer, frankly. It takes a lot of time.

JOHNSON: Generally speaking, when you're making a tender, you anticipate that the evidence is going to be rejected. It has been rejected, at least in theory; so I would be curious as to why cross-examination would be allowed on evidence that is not going to get in.

BLACK: I think it would be allowed for the same purpose—to show the weakness in that evidence and whether it should have been in, and, hopefully, to reinforce your original ruling. I think it gives the appellate court a lot better basis to consider it.

JOHNSON: What do you do, Bruce, when you're defending and the other side asks what is normally a perfectly innocuous question like, "What happened next?" Nothing objectionable there. Then the witness replies, "Sam told me your client is very heavily insured." What do you do then?

BLACK: What do *you* do then? That's the first thing. Then I'll tell you what I do.

JOHNSON: I'd like to do two things: (1) I'd like to strike the evidence, and (2) I'd like to strike the witness. Really, what I want to do is strike the witness.

BLACK: And his counsel, too.

JOHNSON: Yes, because you know very well that answer has been rehearsed. Maybe I'm paranoid, but just because I'm paranoid doesn't mean it doesn't happen. I might ask for a mistrial, but first I would say, "I'd like you to strike the evidence, Your Honor." Are you going to say, "Right"?

BLACK: I would normally do that and then ask whether you want a cautionary instruction. This raises the whole quagmire of whether you really want to draw

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24. District Judge, United States District Court, District of Wyoming.

attention to it, getting you cross-wise between whether you want to win the trial or preserve your record. I think it's a delicate tight rope, and practitioners have different philosophies. A lot of the time you just have to play it by ear and see how damaging you think the answer was in front of the jury.

JOHNSON: Surely this is very damaging in front of a jury. What's more damaging than that? So I would say, "May we approach, Your Honor?" And then, "I think we've tainted the jury, and you can give them all the cautionary instructions in the world, but you can't un-ring the bell. I beg you, Your Honor; do justice here." And you would say, "Oh, give me a break!"

We have had, and Bruce is not one of them, a couple of judges in our district sometimes rule by saying, "Okay" or "Proceed."

BLACK: I recognize one of my colleagues.

JOHNSON: Yes you do. And you stutter for a minute and say, "I assume Your Honor has sustained my objection."

BLACK: Yes. Always go for the win.

JOHNSON: Oh, absolutely. Triumph of hope over experience, to be sure. But you need, as Bruce says, to make a record.

AUDIENCE MEMBER: Going back to the proffer, when you are making a proffer—and maybe this is directed toward the two judges more than anyone else—do you think it is better to say, "If I were allowed...," and then "it would prove...," so that you could get the relevance aspect of your question in? In case, for example, the trial judge did not understand what the basis was for the evidence coming in.

TACHA: Yes.

BLACK: Absolutely. I think the whole idea of preserving a record on appeal is made up of two fundamental principles: (1) if it's not in the record, it didn't happen,[25] and (2) the trial judge gets the first bite of the apple.[26] If it's not clear what you are asking the trial judge to do, then the appellate court is going to say, "Well of course he didn't do that, how could he divine that from your mealy-mouthed objection?"

JOHNSON: "Mealy-mouthed" is a technical term that means you didn't alert the mind of the trial judge to the objection you were making.

BLACK: Right.

TACHA: Yes. A good way to think about this is to remember what my colleagues and I have to do. We review a cold record, and all we have is what it says. Increasingly these days we have videotapes of various things, but that's another story. If you put yourself in the shoes of an appellate judge, you will realize that if it's not on that paper, we cannot know and cannot even divine what the trial judge was thinking. So, every time you provide reasons that support the judge's decision, that's helpful. Every time you give a list of factors, that's helpful.

I see a lot of people in this room who do criminal work and have seen our circuit in the last two years remand more times than I care to tell you for reasons in support

25. Walbolt, *supra* note 15, at 31.

26. *See* Singleton v. Wulff, 428 US 106, 120 (1976) (stating the rule that federal appellate courts do not consider issues not passed on below).

of the district judge's ruling. It's a terrible waste of resources to have to remand for reasons, and it's not the trial judge's fault. It's the fault of the attorney who failed to provide the reasons. That's a piece of the record that I think is easy to establish, either when you make your objections, proffer evidence, or when the court determines sentencing. It is terribly important at the sentencing stage.

We just heard cases this week, actually, where some of the reasons were not as clear on the record as they might have been, and everybody relied on the pre-sentencing report (PSR), but nobody engrafted the PSR onto the record. Remember who is reading the record. It's somebody who never saw any of the action at the trial court level.

I always have my law clerks keep a checklist of every issue on appeal, and before they even take a peek at the law, we look for every objection and every jurisdictional issue. We go through the checklist, and if an objection is not in the record, it'll very likely be waived. It's the biggest shock to new law clerks that they don't immediately research the law. I see some former clerks know that. You don't look at the merits until you've dotted all the I's and crossed all the T's on preservation of the record. If I were a trial judge, nothing would make me madder than getting reversed or remanded on something that was not appropriately raised.

JOHNSON: It sounds, Judge, as if you were in favor of speaking objections.

TACHA: Yes.

JOHNSON: A lot of trial judges feel to the contrary on that, and they castigate one rather severely.

TACHA: I know.

BLACK: I'd prefer citing the rule, either by concept or by rule number, although that's a trap for the unwary. Sometimes, even with them in front of me, I get the rule number wrong; so it is probably better to say both Rule 801 and hearsay if that is your objection. That way the judge is at least thinking about the right thing, even if you get the rule number wrong and give him 805.

JOHNSON: What do you do when the trial judge says calmly, dispassionately...

BLACK: Sleepily.

JOHNSON: ..."Overruled on that ground."

BLACK: I think it's important to listen to the trial judge's ruling. Sometimes you will get a partial ruling, and then it's important for you to think about how to cure it. Ask yourself whether there is another ground he is suggesting. Then take a shot at it. Also, think about whether you need to raise something else, even if the judge ruled in your favor on a sub-point. Do you want to make sure that you also raise this ground for the court of appeals?

MICHEAL C. SALEM:[27] Let me ask you this, when you've had a motion in limine and a preliminary ruling from the judge, is it adequate to preserve the record when the evidence is offered at trial to stand up and say, "Your Honor, I object on the basis of the prior objection that we made"? Should one just refer to it that way so the speaking objection doesn't taint the jury with a bunch of arguments about things that they shouldn't hear?

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27. Attorney at law, Salem Law Offices, Norman, Oklahoma.

BLACK: I think that objection is adequate, certainly for purposes of appeal. However, depending on how far you are into the trial, how long it has been since my ruling, and how many other motions in limine there were, I would prefer that you state the basis for the objection in a very skeleton form. If you start going off on what we call a "West Texas speaking objection," I will have you approach the bench rather quickly to keep the jury from being tainted any more than I can help.

JOHNSON: What is a "West Texas...?"

BLACK: "Your Honor, we don't think this is admissible evidence; it's prejudicial 'cause this person has been proven to be a liar. Besides that, he's a three-time felon and...."

JOHNSON: Okay, I got it.

SALEM: For appellate purposes, would referring to a prior objection satisfy the court of appeals that the objection was preserved?

TACHA: Let me just say that I never speak on behalf of any of my other colleagues, but I think it is fair to say it would.

AUDIENCE MEMBER: What if a motion in limine has led to a ruling in advance of trial that certain items are not to be presented? You wouldn't then, I would assume, try to introduce those things just to get another ruling for purposes of preserving the record on appeal, would you?

TACHA: No.

BLACK: I would think that if it were a tentative ruling you would want to make an offer of proof. If it was a definitive ruling that just said, "The evidence isn't coming in. I don't care what the factual context is; it doesn't matter. Under Rule 403,[28] it is too prejudicial, and I'm not going to let it in," then you are all right.

JOHNSON: Provided it is on the record, of course. A lot of things, in my experience with motions in limine, are done on the fly, and they don't always get in the record. Therefore, you have to make sure that it's in the record.

BLACK: That's why writing is really a good way to do it.

AUDIENCE MEMBER: That's really a case where you might have had a ruling in advance of trial sustaining a motion in limine excluding some evidence.

TACHA: Yes. I must underscore what Bruce said about the preliminary motions being in writing. That really helps. If your motions are in writing, you have a very clear pretrial record.

On this subject I also think—again it's easy for me to say—that it's useful to consider all the way through the trial. Long ago, when I did these things, I always thought about what issues were winners on appeal and what issues weren't. You should have your appeal strategy all through the trial because it's not useful to make the district judge annoyed or get too much in front of the jury, whatever the issue is. There may be a document that got left out all the way through and was excluded forever, but continuing to raise it isn't going to win you anything on appeal and is probably going to annoy somebody along the way, or may even make the jury mad at you. You have to think it's going to be a real winner on appeal to raise the issue.

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28. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

You also have to think about what the standard of review is going to be on each of the issues. Almost everything we have already talked about is abuse of discretion. There are very few abuse of discretion reversals, *very few*. The only one that I can recall in recent times was a case where there was a failure to give reasons for a sentencing decision. So keep the standard of review in the front of your mind when you are thinking about your litigation strategy.

JOHNSON: Let us suppose that you are a persistent adversary. (One of the things you have to be is persistent, because you've got to keep making objections if the other side keeps putting things on.) I preach to try to be specific when you make objections. It's good to be specific so that when it gets up on appeal everyone knows what happened.

What do you do with an objection like, "Judge, isn't that the same document you excluded before?" That doesn't help much and is perhaps somewhat prejudicial. How would you react to an objection like that?

BLACK: It depends on whether I remember what document he's talking about.

JOHNSON: Okay.

BLACK: That's the first problem. If you're not alerting the trial judge, you're probably not going to win it at trial, which of course is your first goal. Secondly, it is probably not going to be very helpful, depending on how many other documents you have excluded, that the record does not identify what document it is. When Judge Tacha reads the record, she does not know which one of the dozen documents you have excluded you are talking about, why it was excluded, or whether the current context would mandate that the document be reconsidered and admitted.

JOHNSON: That's a good answer.

TACHA: Let's open it up. We want to address what interests you. But first, I would just like to add that, from my standpoint, I think all of this is in the process of changing pretty rapidly. I think that all of the videotaping and video conferencing that is occurring is going to change preservation and how the appellate courts and district courts treat it. I invite all of you, as you are working with new technology, to help us think through these issues.

Let me give you some examples. It's troubling to appellate judges to get all these videotapes in the record. The reason it's troubling is that we are not supposed to be the fact-finders. We are, believe it or not, human beings, and it is pretty hard not to go back and second-guess what happened in the facts when you get a videotape of a Fourth Amendment suppression case. I think you are going to want to frame your briefs very specifically to the right issue on appeal, especially when there are videotapes in the record.

Now, I don't know what will happen with the rules with respect to videotapes. We haven't done anything yet, but we've got every patrol car videotape in every Fourth Amendment case. Over time, there may be some questions asked about whether we are playing our proper role, and I think lawyers could be helpful by being more focused.

AUDIENCE MEMBER: Do you look at the videotapes?

TACHA: Absolutely.

AUDIENCE MEMBER: That's a problem.

TACHA: Yes, it is a problem.

AUDIENCE MEMBER: Do you think you are making credibility choices?

TACHA: It's a problem. I readily confess it. I don't know if anybody in here is doing capital work, but we get a lot of confession videotapes in capital work, and we watch them—of course we watch them.

MARY Y.C. HAN[29]: More than once?

BLACK: Stop action?

TACHA: Actually, yes.

SALEM: How do you measure the standard of review when you're looking at a videotape? It would seem to me that "clearly erroneous" might be a little bit more obvious when you have a videotape.

TACHA: That's a good argument. That is the argument on the other side, that some things are a lot more obvious when you see the videotape. Sometimes when you look at a videotape of something that seems kind of crazy based on the written record, you get it in an instant. So there are arguments on both sides.

KRISTEN COOK[30]: How long have you been viewing videos, and what kinds of guidelines have you made as far as what, say in a civil case, I can submit?

TACHA: I can't remember a civil case where I've had a videotape. They are much more common in criminal cases, and mostly on suppression issues. We look at what's designated in the record, and sometimes videotapes are part of the record.

COOK: Often, in civil trials you have videotapes that are part of the record. Does that open the door so that we can start sending videos to the court?

TACHA: No. Let the record here be clear. No. We will not accept them in very many civil cases. I cannot imagine why they would be germane to the issue on appeal. Do your job as lawyers. The facts are not on appeal unless you have something clearly erroneous, and usually a videotape goes only to the facts. So, I would say it would be a highly unusual civil case in which we would accept a videotape.

JOHNSON: Okay. Thank you. Any other questions?

TACHA: Thank you all.

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29. Attorney at law, Kennedy & Han, Albuquerque, New Mexico.

30. Attorney at law, The Williams Companies, Inc., Tulsa, Oklahoma.