THE VIRTUAL RAISE IT OR WAIVE IT:

Preserving an Accurate Appellate Record of Remote Trial Court Proceedings

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Making an accurate record and adequately preserving issues in the trial court are critical elements for a properly presented appeal. This process is complicated enough, even when there is not a public health crisis and court business is conducted in person, as usual. But creating and preserving an accurate appellate record is particularly difficult in the wake of the pandemic and widespread virtual proceedings. Remote hearings and trials can present unforeseen complications due to slow internet connections, muting mishaps, and any number of other technological glitches. The crucial objection that an attorney thought was made in real time may not, due to a momentarily interrupted connection, show up on the transcript when preparing for the appeal months later. As a result, records on appeal require closer scrutiny than ever.

The Appellate Record

Appeals are decided based only on the subset of the trial court record that becomes the record on appeal. Whereas the trial court record consists of all documents and exhibits filed in the district court—including transcripts of proceedings, district court minutes, and docket entries—the record on appeal is limited to the portion of the trial court record that the parties designate for use on appeal. The appellate record is not intended to mirror the entirety of the trial court record.[1] Instead, Nevada Rule of Appellate Procedure 30(b) specifically states that "[b]revity is required" when preparing the record and that the "court may impose costs upon parties or attorneys who unnecessarily enlarge the appendix." Even so, whatever issue an appellant intends to present on appeal must have been raised in the trial court and included in both the trial court record and the appellate record. The consequences of omissions from the appellate record can be severe—since the 19th century, the Nevada Supreme Court has had "no power to look outside the record of a case."[2]

Under almost no circumstances will an appellate court hear arguments raised for the first time on appeal: "A point not urged in the trial court … is deemed to have been waived and will not be considered on appeal."[3] Similarly, in the context of extraordinary writ petitions under Nevada Revised Statutes Chapter 34, the "consideration of legal arguments not properly presented to and resolved by the district court will almost never be appropriate."[4] Instead, appellate courts are limited to considering those issues that were sufficiently pleaded and litigated below, such that the record allows for meaningful review upon appeal. While an appellate court has some discretion to consider an unpreserved issue, it rarely does so, unless it is clear from the record that an error occurred, and the error affects a party's substantial rights.

The appellate record thus marks the outer boundaries within which an appeal is decided, and it should be sufficient to allow for meaningful appellate review of the specific questions presented.

Preserving Issues for Appeal

There is no bright-line rule to follow to properly preserve appellate issues, and courts have articulated different standards based on the circumstances of each particular case. As established in the seminal case of *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981), and its progeny, an issue is almost never preserved for appeal if it is neither mentioned nor ruled upon by the trial court in the final judgment being challenged. In contrast, an issue may still be preserved for appeal, even if not raised in the pleadings, if it is heavily litigated in connection with the merits of the claims, if it is crucial for evaluating the case on its merits, and if no prejudice would result from its consideration on appeal.[5]

Typically, "if a party wishes to preserve an argument for appeal, the party must press and not merely intimate the argument during the proceedings before the district court" and the "argument must be raised to such a degree that the district court has an opportunity to rule on it."[6] This means that a party likely must do more than reference an argument in passing; it must actually litigate that issue and present it to the trial court for decision. A party is better off by ensuring that the court makes a definitive ruling on an issue and adequately supports its decision. If an affirmative defense is pleaded but neither argued nor advanced throughout the litigation, it may have been waived in practice, if not on paper. When a trial court fails to address an issue that was actually litigated and presented, or when its ruling lacks specific findings and reasoning, a party may need to move to amend the findings or judgment to ensure the issue is preserved for appeal.

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Record Preservation in the Era of COVID-19 and Remote Proceedings

Due to the ongoing pandemic, courts are increasingly relying on technology to conduct remote hearings and trials, which adds new challenges to the preservation of an accurate appellate record. Technological glitches may impede the court's ability to consider a party's argument or evidence; may influence the trier of fact's perception of the parties, counsel, and witnesses; and may ultimately undermine the accuracy of an appellate record. If participants are wearing masks, for example, it may be difficult for the court reporter to discern who is speaking during a videoconference. Similarly, a malfunctioning microphone or poor internet connection (particularly on the part of the court or court reporter) can lead to transcription errors and omissions. Where permitted, transcription issues might be mitigated, if not entirely avoided, by having more than one party videorecord a virtual proceeding.

Now, more than ever, there may be circumstances when the record does not reflect what actually happened at trial. What should a practitioner do if they notice that the trial transcript is missing significant testimony or exhibits due to technological issues? At the Nevada Supreme Court or in federal court, issues about whether the trial court record "truly discloses what occurred" must be submitted to and settled by the district court.[7] Questions "as to the form and content" of the record must be presented to the clerk of the Nevada Supreme Court or to the federal court of appeals, respectively. In extraordinary circumstances, it may be possible to supplement the record on appeal directly with the appellate court.[8]

Trial and appellate practitioners alike must anticipate these challenges and develop solutions as remote civil proceedings during the current public health crisis "may well be permissible, even when one of the parties does not consent," and remote civil proceedings may even be constitutionally required.[9] It is unrealistic to assume that an appellate court would reverse the result of a remote trial simply because it is a deviation from the norm. Without a body of case law addressing these issues, attorneys have an obligation to speak up—more than once if necessary—to put an objection on the record when required to protect the client's interests. In this era of widespread virtual proceedings, it can no longer be assumed that the record on appeal will accurately reflect the trial court proceedings. In addition to analyzing the record for appealable issues, appellate practitioners and trial counsel must now analyze the record to evaluate the record itself.

ENDNOTES:

1. *See* NRAP 10(a)-(b); NRAP 30(b); *see also* FRAP 30(b)(2).
2. *Alderson v. Gilmore*, 13 Nev. 84, 85 (1878).
3. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).
4. *Archon v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017).
5. *Res. Grp., LLC as Tr. of E. Sunset Rd. Tr. v. Nev. Ass'n Servs., Inc.*, 135 Nev. 48, 53 n.5, 437 P.3d 154, 159 n.5 (2019); *Saticoy Bay LLC Series 8336 Creek Canyon v. Wells Fargo Bank, N.A.*, No. 79559-COA, 470 P.3d 283 (Nev. Ct. App. August 24, 2020) (unpublished).
6. *United States v. Soza*, 874 F.3d 884, 889 (5th Cir. 2017).
7. NRAP 10(c); *accord* FRAP 10(e)(1), (3).
8. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (recognizing a court's inherent authority to supplement record in extraordinary cases).
9. Michael Shammas & Michael Pressman, *Advocacy through the Computer Screen: The Permissibility & Constitutionality of Jury Trial by Video Conference* (July 30, 2020), https://ssrn.com/abstract=3664014.

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