Don't Get Jammed Up, Preserve Those Issues

BY STEVEN SILVA, ESQ.

> Trial attorneys have one of the most critical roles in appellate litigation – the development of the record on appeal, and thus, the available arguments on appeal. Absent some extraordinary circumstances or fundamental defects in the trial court's power to hear the case in the first instance, **the first step of a successful appeal is the successful preservation of issues**. After all, there's not much an appellate advocate can do to help you if you don't give them something to work with.

Appeals are Limited Vehicles

On a rough and basic level, an appeal is not a do-over but a look-over; it is a review of what the trial court did with what the trial court had in front of it. Appellate courts are courts of limited jurisdiction, and their appellate review is likewise limited in nature. For most issues, the question is whether the trial court erred. It is difficult to say that the trial court's decision on an issue was in error if the trial court wasn't actually presented with an issue to decide. As a result, the appellate courts are generally not the proper forum to try out that killer argument you thought of at the last minute but didn't actually make.

For trial counsel in particular, it is vital to properly preserve matters for appellate review. Failure to do so can result in an otherwise meritorious appeal being turned aside. Non-trial litigation counsel must also make sure they do their share to properly preserve arguments and issues for an appeal, on both dispositive and non-dispositive motions as well as discovery matters.

Arguments not Timely Raised are Generally Lost: Preservation Predicated 'Pon Proper Procedure

Challenges to subject matter jurisdiction are never waived.[1] Certain constitutional issues may be considered by the appellate courts in the first instance;[2] that review is discretionary, and the burden to show why the appellate court should reach the issue in the first instance is fairly high. The appellate courts may also consider plain error in the first instance.[3] And the appellate courts may take judicial notice of certain limited matters outside the record below.[4] But beyond such limited exceptions, the record on appeal's factual and legal issues as developed in the trial court form the universe of appellate consideration.

To keep these issues alive, they must be properly preserved. This means a party must take the proper steps at the proper time and in the proper manner.

The timing and procedure for preservation varies depending on the procedural posture of each issue. The primary mode of issue preservation at trial is a contemporaneous objection made at the trial or hearing. The failure to object to asserted errors at trial bar review of an issue on appeal. An objection must be made contemporaneously to the purportedly improper thing (i.e., a leading question on direct examination, or a question that calls for prejudicial testimony running afoul of Nevada Revised Statute 48.035). Failure to timely object often ends the matter through waiver. The Nevada Supreme Court has directly upheld a trial court ruling turning aside as untimely an objection made to hearsay testimony, concluding that if no objection is made to hearsay,

then the jury should accept the evidence as admissible.[5] In addition to being made contemporaneously, the objection must be properly stated. The objection must briefly state the basis for the objection, to allow the court to make an informed ruling.[6] And, if the objection is made *after* a witness has given testimony, an advocate must make a motion to strike the offending testimony. Where the purported error goes the other way and evidence is wrongly rejected, a mere objection will not ordinarily preserve the issue. Instead, the advocate generally must make an offer of proof under NRS 47.050 detailing specifically what the proof would have been. Critically, whichever form the issue takes, an advocate should ensure that the trial court actually rules on the issue presented.

The motions directly surrounding trial are another set of opportunities for preservation. Motions in limine are useful for fleshing out legal arguments concerning the admissibility of evidence, and they can streamline the court's consideration of objectionable material. On the back end of a trial, the settling of jury instructions contains specific steps leading to appellate preservation. Nevada Rule of Civil Procedure 51 provides both the requirements for settling of jury instructions and the steps the court and parties must take concerning objections to the jury instructions. Rule 51 provides that an opportunity for objection must be given outside the presence of the jury and before the instructions are given. The rule provides a savings provision allowing parties to promptly object after learning that a particular instruction will be or has been given or refused if they were not timely informed of an action on an instruction before the ordinary opportunity. Rule 51 further specifies that the objection must state distinctly the matter objected to and the grounds for the objection, and it obligates the objecting party to cite or provide any statutes, case, or other authority on which they rely. Likewise, parties must comply with the procedures set forth in NRCP 50(a) and (b) to properly preserve contentions that the jury lacked sufficient evidence to reach its verdict. Typically, this requirement means that defense counsel makes an objection at the end of the plaintiff's case in chief pursuant to Rule 50(a) and follows with a renewed (not new) challenge after trial pursuant to Rule 50(b).

Outside of trial, litigation practice offers other opportunities to preserve issues – and traps for the unwary. Certain defenses under NRCP 12 are waived unless asserted in or before the answer. NRCP 12(h). Discovery issues must generally be preserved by following the discovery practice rules of the district court. For the Eighth and Second Judicial Districts, which use discovery commissioners, discovery challenges may be waived if not presented to the discovery commissioner in the first instance.

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The Last Chance

The final opportunity to preserve issues and arguments is a motion for reconsideration. This should emphatically *not* be a primary strategic choice. The Nevada Supreme Court has ruled that it may consider arguments raised for the first time in reconsideration briefing if the novel arguments in the reconsideration motion were actually considered by the district court and the order on reconsideration became part of the record on appeal.[7] However, this approach is of very limited utility. First, many district court judges will refuse to consider arguments made for the first time on reconsideration (often citing by analogy NRAP 40(c)(1)'s prohibition on making new arguments on appellate rehearing). Second, an order denying a motion for reconsideration is not itself substantively appealable, and not all motions for reconsideration are qualifying tolling motions, making it difficult to ascertain whether the order and motion practice on reconsideration will actually become part of the record on appeal. Finally, even if the district court considers the novel arguments, and the briefing and order on reconsideration are part of the appellate record, the Nevada Supreme Court has stated that the court merely "may," but "need not" consider such arguments.[8]

Better practice is to make sure to raise your defenses early, file your motions in limine expeditiously, make your objections contemporaneously, and insist on rulings respectfully. With the issues properly preserved, the trial advocate can thus put their client in the best position to succeed in the appellate court.

ENDNOTES:

1. Arguments going to the jurisdiction of the court can, of course, be raised at any time. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).
2. *McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).
3. NRS 178.602; *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018).
4. NRS 47.130-.150; *Mack v. Estate of Mack*, 125 Nev. 80, 206 P.3d 98 (2009).
5. *In re Dumais*, 76 Nev. 409, 414, 356 P.2d 124, 126 (1960).
6. One cannot simply throw one's hands in the air and yell, "Objection!"
7. *Arnold v. Kip*, 123 Nev. 410, 168 P.3d 1050 (2007), *disapproved of on other grounds by AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 245 P.3d 1190 (2010).
8. *Id.* at 417, 168 P.3d at 1054.

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