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PRESERVATION OF ERROR FOR APPELLATE REVIEW

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Introduction

At the appellate level, there are numerous instances where the court is unable to reach the substantive merits of an issue because the assigned error is not preserved in the record. The purpose of this article is to highlight the situations in which this commonly occurs and set forth the applicable procedure to preserve the error. This article is by no means intended as an exhaustive guide, but is merely designed to illustrate some of the more common issues that have appeared in reported Nebraska decisions. First, the article sets forth proper method of preserving the record, which is essential to preserving any error. Second, it explains how to preserve particular errors—evidentiary, jury instruction, and other errors—for appellate review. The third and final section sets forth the proper method of requesting the preparation of the record for appellate review.

I. Making an Evidentiary Record in Trial Court

There are two parts of an appellate record—a transcript and a bill of exceptions. The transcript contains the filings from the court proceeding below.[1] The bill of exceptions contains the evidence that will be considered on appellate review. An appellate court may not review evidence unless it has been preserved in the bill of exceptions.[2]

The official court reporter is required to "make a verbatim record of the evidence offered at trial or other evidentiary proceeding . . . ."[3] The record may not be waived.[4] This record—the

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[1] *See* NEB. CT. R. APP. P. § 2-104 (listing contents of transcript).

[2] Ottaco Acceptance, Inc.v. Huntzinger, 268 Neb. 258, 262, 682 N.W.2d 232, 236 (2004).

[3] NEB. CT. R. APP. P. § 2-105(A)(1).

[4] *Id*.

bill of exceptions—is either created by the court reporter during the proceeding, or subsequently transcribed by the court reporter from an audio recording of the proceeding. However, the bill of exceptions does not automatically include

> any pretrial matters; the voir dire examination; opening statements; arguments, including arguments on objections; any motion, comment, or statement made by the court in the presence and hearing of a panel of potential jurors or the trial jury; and any objection to the court's proposed instructions or to instructions tendered by any party, together with the court's rulings thereon, and any posttrial proceeding.[5]

Thus, counsel must request that a verbatim record of any of these proceedings be made, if it is desired. When there is no bill of exceptions, the appellate court's review of the case is extremely limited;[6] the court only reviews whether the judgment is supported by the pleadings.[7]

It is crucial to ensure that the individual exhibits are actually marked and offered into evidence so that they become part of the record. Problems with this rule typically arise in the context of a summary judgment motion where a party fastens exhibits to the summary judgment motion but fails to offer the exhibits into evidence. In a motion for summary judgment, proposed exhibits *do not* become part of the evidentiary record by virtue of being attached to the motion for summary judgment.[8] They must be offered into evidence in order to be considered as evidence on appeal.[9]

A similar problem can arise when a trial court takes judicial notice of an adjudicative fact, but the judicially noticed item is not part of the record. A court may take judicial notice of a fact "not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[10] In this context, a court may "examine its own records and take judicial notice of its own proceedings and judgment in the same case or a related case."[11] However, a request that the court take judicial notice of a

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[5] NEB. CT. R. APP. P. § 2-105(A)(2).

[6] *See* Atokad Agric. & Racing Ass'n v. Governors of the Knights of Ak-Sar-Ben, 237 Neb. 317, 321, 466 N.W.2d 73, 77 (1991), *overruled on other grounds by* Eccleston v. Chait, 241 Neb. 961, 492 N.W.2d 860 (1992)).

[7] *See Atokad*, 237 Neb. at 321, 466 N.W.2d at 77.

[8] *See* Hogan v. Garden County, 264 Neb. 115, 119–20, 646 N.W.2d 257, 261–62 (2002).

[9] *Id*. at 120–21, 646 N.W.2d at 261–62.

[10] NEB. REV. STAT. § 27-201 (Reissue 2008).

[11] Everson v. O'Kane, 11 Neb. App. 74, 79, 643 N.W.2d 396, 400–01 (2002).

particular item does not necessarily preserve the item in the record unless the item is also made part of the bill of exceptions for that case.[12] Items that are judicially noticed—just like evidence—should be "separately marked, offered, and received as evidence to enable efficient review."[13]

II. Preservation of Error for Appellate Review

In order to obtain appellate review of an error, it is necessary to make a proper objection[14] or motion[15] on the record of the trial court. Normally, an appellate court will not consider an error that is not raised at the trial court level.[16] In the absence of an error raised at the trial court level, a Nebraska appellate court may review for "plain error."[17] The Nebraska Supreme Court has defined plain error as

> an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[18]

It is relatively uncommon for an appellate court in Nebraska to find plain error.

A. Evidentiary Errors

1. Making an Objection

An evidentiary objection must be made in a way that alerts both the trial court and the appellate court to the perceived error.[19] When objecting to evidence, simply making an objection

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[12] *See id*. at 79-80, 643 N.W.2d at 401; *see also* Saunders County v. Metro. Utils. Dist., 11 Neb. App. 138, 143–45, 645 N.W.2d 805, 811–12 (2002) (same).

[13] *Saunders County*, 11 Neb. App. at 144, 645 N.W.2d at 812.

[14] *See* Shipler v. Gen. Motors Corp., 271 Neb. 194, 227, 710 N.W.2d 807, 836 (2006).

[15] *See infra* section II.C.

[16] Walsh v. State, 276 Neb. 1034, 1043, 759 N.W.2d 100, 108 (2009) ("An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.").

[17] *See* Russell v. Stricker, 262 Neb. 853, 861, 635 N.W.2d 734, 740 (2001).

[18] Worth v. Kolbeck, 273 Neb. 163, 175, 728 N.W.2d 282, 293–94 (2007).

[19] *See* State v. Harris, 263 Neb. 331, 341, 640 N.W.2d 24, 35 (2002) ("A true objection does not wander among the Nebraska Evidence Rules in the hope of eventually ending its odyssey at the doorstep of a particular rule of

is usually not sufficient to preserve error. Where counsel states an objection without stating a ground for the objection, it is most often treated as if there were no objection at all for purposes of appellate review. *State v. Hall*[20] is illustrative of this point. In *Hall*, defense counsel objected to exhibits offered by the prosecution by stating as follows: "Judge, I'm going to object to that. I wasn't counsel of record at the time and I'm not sure all proper objections were made to those exhibits."[21] On appeal, the Nebraska Supreme Court declined to consider the defendant's assignments of error regarding the admission of the exhibits because "defense counsel's objection did not sufficiently enlighten the trial court as to the basis for any objection to these exhibits."[22]

Thus, in order to preserve error, an objection must be specific. The Nebraska Supreme Court has stated that

> [u]nless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal.[23]

For example, if particular evidence is hearsay, unfairly prejudicial, privileged, etc., it is sufficient to state the particular ground listed in the evidentiary rules in Chapter 27 of the Nebraska Statutes.[24] If there is more than one ground for the objection, it is important to state all grounds. In this regard, the Nebraska Supreme Court has often stated that "an objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground."[25]

To the extent possible, it is also important to avoid making a general, nonspecific objection on the basis of "insufficient foundation" because it often does not preserve any error at all. When a general objection for insufficient foundation is overruled, it is not appealable unless "(1) the ground for exclusion was obvious without stating it or (2) the evidence was not

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evidence. In seeking to exclude evidence, counsel must adhere to a basic and straightforward approach: Tell the court the reason why the evidence is inadmissible.").

[20] 270 Neb. 669, 708 N.W.2d 209 (2005).

[21] *Id*. at 672, 708 N.W.2d at 213.

[22] *Id*. at 676, 708 N.W.2d at 215.

[23] *Id*. at 675, 708 N.W.2d at 215 (quoting State v. Farrell, 242 Neb. 877, 883, 497 N.W.2d 17, 21 (1993)).

[24] *See* State v. Coleman, 239 Neb. 800, 812, 478 N.W.2d 349, 357 (1992).

[25] State v. Molina, 271 Neb. 488, 504, 713 N.W.2d 412, 431 (2006).

admissible for any purpose."[26] Thus, in making an insufficient foundation objection, it is necessary to specify the manner in which foundation is lacking in order to raise the error on appeal.[27]

After objecting, it is necessary to get a ruling on the objection. By failing to do so, the error is waived and the evidence is admitted into the record.[28] Even if the trial court reserves its ruling on an objection but fails to later rule on the objection, the error is waived.[29]

2. Making an Offer of Proof

When the trial court rules that evidence is inadmissible and excludes it from the record, the party who offered the evidence normally must make an offer of proof to preserve the issue of admissibility for appellate review.[30] The general rule in this regard is that

> [e]rror may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.[31]

The Nebraska Court of Appeals has observed that "it would be an unusual circumstance where an offer of proof would not be required in order to enable the trial court, and the appellate courts, to know what the evidence is which the questioner seeks to elicit."[32] Additionally, for no offer of proof to be necessary, the record must "show[] that [the evidence] is relevant and

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[26] State v. Davlin, 263 Neb. 283, 306, 639 N.W.2d 631, 651 (2002).

[27] Of course, this alerts opposing counsel as to what foundation is lacking and provides an opportunity to correct the problem and perhaps seem more credible in front of the fact finder.

[28] *See* Griffith v. Griffith, 230 Neb. 314, 316–17, 431 N.W.2d 609, 611 (1988) (quoting Syllabus of the Court in *In re* Estate of Kaiser, 150 Neb. 295, 34 N.W.2d 366 (1948)).

[29] *Id*.

[30] Sturzenegger v. Father Flanagan's Boys' Home, 276 Neb. 327, 338, 754 N.W.2d 406, 421 (2008).

[31] Anderson v. Neb. Dep't of Soc. Servs., 253 Neb. 813, 818, 572 N.W.2d 362, 366 (1998); NEB. REV. STAT. § 27-103(1)(b) (Reissue 2008).

[32] State v. Eldred, 5 Neb. App. 424, 431, 559 N.W.2d 519, 526 (1997).

competent."[33] Even a leading question asked on cross-examination may not be a sufficient offer of proof.[34]

An offer of proof is made by either (1) presenting the testimony itself to the trial court,[35] or (2) offering a "secondary" source of the contents of testimony—such as counsel's statement[36] or a report.[37] An offer of proof is always made outside the presence of the jury, if there is one.[38] The best method of making an offer of proof consists of introducing the actual evidence to the trial court because this ensures that the precise nature of the evidence is preserved in the record. Unless it is quite specific, a "secondary source" may not provide a sufficient offer of proof. For example, a generalized statement regarding the gist of a witness's testimony, such as a statement that the excluded testimony would support another witness's testimony, is not sufficient.[39]

3. Timing of Objection

As a preliminary matter, it is clear that a timely objection must be made at trial and not at a pretrial motion in limine to exclude the opposing party's evidence. A trial court's ruling on a motion in limine is merely a preliminary ruling and is not an appealable "final ruling upon the ultimate admissibility of the evidence."[40] If the trial court denies a motion in limine, in order to preserve the evidentiary issue on the record, it is still necessary to object to the opposing party's evidence when it is offered at trial.[41] A failure to object at trial constitutes a waiver of the previous objection that was made pretrial.[42] Conversely, if opposing counsel has won a motion

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[33] State v. Kramer, 238 Neb. 252, 259, 469 N.W.2d 785, 790 (1991) (emphasis omitted).

[34] *Id*. at 258–60, 469 N.W.2d at 789–90. The question "As a matter of fact, you have been convicted of two felonies?" was not sufficient to preserve an error for appellate review.

[35] Gerken v. Hy-Vee, Inc., 11 Neb. App. 778, 783, 660 N.W.2d 893, 898–99 (2003).

[36] Deuth v. Ratigan, 256 Neb. 419, 430–31, 590 N.W.2d 366, 374–75 (1999).

[37] *See* Turner v. Welliver, 226 Neb. 275, 283–84, 411 N.W.2d 298, 305 (1987).

[38] *See* Thrift Mart, Inc. v. State Farm Fire & Cas. Co., 251 Neb. 448, 454, 558 N.W.2d 531, 536 (1997), *overruled on other grounds by* Hornig v. Martel Lift Sys., 258 Neb. 764, 606 N.W.2d 764 (2000).

[39] Zuco v. Tucker, 9 Neb. App. 155, 160–61, 609 N.W.2d 59, 64 (2000).

[40] Olson v. Sherrerd, 266 Neb. 207, 214, 663 N.W.2d 617, 623 (2003).

[41] *Id*. at 214–15, 663 N.W.2d at 623.

[42] State v. Timmens, 263 Neb. 622, 627, 641 N.W.2d 383, 388 (2002).

in limine to exclude your evidence, it is still necessary to make an offer of proof at trial—outside of the presence of the jury—to preserve the issue of admissibility for appeal.[43]

At trial, it is necessary to make an evidentiary objection "at the earliest opportunity after the ground for the objection becomes apparent."[44] When an exhibit is offered into evidence, one must object before the court admits it into evidence.[45] In the context of testimony, the objection must be made as the testimony is being offered,[46] and the lawyer must move to strike any objectionable testimony given before the objection so that the fact finder may not consider it.[47]

B. Jury Instructions

Preserving errors related to jury instructions entails a process distinct from preserving other errors. In order to request a jury instruction, a party must file a written request for the instruction with the clerk of the court.[48] The written request must be filed prior to the formal instruction conference, which occurs at the conclusion of the evidence.[49] An oral request for a jury instruction may not preserve the issue for appellate review. An oral request preserves the issue only "when the record demonstrates that a trial court understood the nature of the orally requested instruction."[50] The judge or a pretrial order may require the submission of instructions prior to the conclusion of the evidence, but unless the order specifies that the submitted instructions will be used at trial, it is still necessary to follow the statutory procedure outlined above.

To preserve an objection to a jury instruction, it is necessary to make an objection on the record at the formal jury instruction conference.[51] An objection can be registered by objecting to

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[43] McCune v. Neitzel, 235 Neb. 754, 761, 457 N.W.2d 803, 809 (1990). For information on how to make an offer of proof, read *supra* section II.A.2.

[44] State v. Rodgers, 237 Neb. 506, 510, 466 N.W.2d 537, 540 (1991); State v. Sanders, 15 Neb. App. 554, 571, 733 N.W.2d 197, 214 (2007).

[45] *Rodgers*, 237 Neb. at 509–10, 466 N.W.2d at 539–40.

[46] Ashby v. First Data Res., Inc., 242 Neb. 529, 539, 497 N.W.2d 330, 338 (1993).

[47] *See* Steele v. Sedlacek, 267 Neb. 1, 13, 673 N.W.2d 1, 12 (2003).

[48] NEB. REV. STAT. §§ 25-1111 (submit in writing), 25-1114 (file with clerk) (Reissue 2008).

[49] Although there is no statutory requirement, the instructions could not be filed after the instruction conference because it is at the conference that the court determines which instructions to give.

[50] State v. Parks, 253 Neb. 939, 945, 573 N.W.2d 453, 457 (1998) (quoting State v. Grant, 242 Neb. 364, 370, 495 N.W.2d 253, 257 (1993)).

[51] *See* Wilkins v. Bergstrom, 17 Neb. App. 615, 618–19, 767 N.W.2d 136, 140–41 (2009).

the instruction or by offering a more specific instruction at the jury instruction conference.[52] When offering a more specific instruction, it is also necessary to actually object to the proposed instruction at the conference.[53] Although it is probably also necessary to file the more specific instruction with the clerk, filing the instruction without objecting to the instructions actually given does not preserve for appellate review any error related to the court's failure to give the more specific instruction.[54]

C. Other Matters

This section discusses a potpourri of other matters that trial counsel must raise at trial in order to preserve error for appellate review. This is not intended to be an all-inclusive list of such matters, but is merely illustrative of the more commonly occurring issues.

1. Disqualification of Trial Judge

In some rare situations, it may be necessary to make a motion to recuse the trial judge. In anticipating a possible appeal, it is important to know both the circumstances under which it is appropriate to do so and the proper time to make such a motion. The issue of timing is fairly simple—a motion must be made prior to submitting the case for disposition.[55]

Deciding whether it is appropriate to make a motion for recusal is a more difficult matter. In Nebraska, there are both what are best characterized as "automatic" and "discretionary" grounds for judicial disqualification. In the case of "automatic" grounds for disqualification, it is usually clear from the facts whether disqualification is appropriate, and the judge will often recuse himself or herself before the case is in front of the judge. Under statute, a trial judge in Nebraska is automatically disqualified, unless all parties consent in writing on the record, if the judge is a party, is related[56] to a party, is related to an attorney or the attorney's copartner, or has represented one of the parties in that particular action or proceeding.[57] Because it is fairly

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[52] *See* State v. Sanders, 269 Neb. 895, 913, 697 N.W.2d 657, 672 (2005); *Wilkins*, 17 Neb. App. at 618, 767 N.W.2d at 140. Remember that it is also necessary to state the ground for the objection.

[53] *See* Olson v. Sherrerd, 266 Neb. 207, 213, 663 N.W.2d 617, 622 (2003); *Wilkins*, 17 Neb. App. at 619, 767 N.W.2d at 140–41.

[54] *See Olson*, 266 Neb. at 213–14, 663 N.W.2d at 622–23.

[55] *See* Mooney v. Gordon Mem'l Hosp. Dist., 268 Neb. 273, 278, 682 N.W.2d 253, 258 (2004).

[56] We use the term "related," but section 24-739 provides a very technical definition of each kind of relationship that is sufficient to merit automatic recusal. NEB. REV. STAT. § 24-739 (Reissue 2008).

[57] § 24-739. The statute also sets forth a scenario where the judge shares office space with an "ex-copartner." In addition to the statutes, section 5-203(E) of the Nebraska Code of Judicial Conduct also sets forth standards on when a judge should recuse himself or herself. While the two put have generally the same standards, the Code provides some additional grounds on which a judge should recuse himself. NEB. CODE OF JUDICIAL CONDUCT § 5-203(E).

obvious when such circumstances are present, a motion to recuse made under these circumstances should be successful and not cause controversy.

When the ground for disqualification is "discretionary," there are reasons to exercise extreme discretion in deciding whether to make a motion to recuse the trial judge. The ground for judicial disqualification that is characterized as "discretionary" is the ground of judicial bias or prejudice. In the context of bias and prejudice,

> a trial judge should be recused when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.[58]

The reason for characterizing these grounds as "discretionary" is that (1) this determination is generally a question of fact,[59] and (2) the trial judge's decision is reviewed for abuse of discretion. As the court of appeals repeated in *Dinges*, "[a] motion to recuse for bias or impartiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion."[60] Because the trial judge determines the motion to recuse in the first instance and the trial judge's decision is normally overturned only in the presence of what are best characterized as compelling circumstances,[61] a trial attorney should give thoughtful consideration prior to making any such motion.

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[58] *In re* Estate of Cooper, 275 Neb. 322, 332, 746 N.W.2d 663, 670 (2008).

[59] *See* Dinges v. Dinges, 16 Neb. App. 275, 278, 743 N.W.2d 662, 666 (2008); *see also* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009). *Caperton* was a 5-4 decision in which West Virginia Supreme Court justice was disqualified on due process grounds because the "probability of actual bias on the part of the judge or decisionmaker [was] too high to be constitutionally tolerable." *Id.* at 2257 (internal quotations and citations omitted). The justice in question had received about three million dollars in campaign contributions from one of the litigants before the court.

[60] *Dinges*, 16 Neb. App. at 278, 743 N.W.2d at 666.

[61] There are several recent examples of situations in which an appellate court determined that such a motion should have been granted. For example, in a proceeding to remove a personal representative, the trial judge conducted an ex parte hearing at which no evidence was offered but the party appearing had a conversation with the judge in which the judge asked several questions about the case. *Cooper*, 275 Neb. at 331–32, 746 N.W.2d at 670. Another case involved a sentencing proceeding for sexual assault of a child where the victim and the offender were of the same sex during which the judge read a biblical passage that opposed homosexuality. State v. Pattno, 254 Neb. 733, 579 N.W.2d 503 (1998). *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004), involved another sentencing proceeding for a sexual assault where the victim and offender were of the same sex; the judge identified himself as the judge in *Pattno* and made reference to his previous biblical comments in that case. Recusal was also appropriate in a proceeding where a trial judge, of his own accord, recited "facts" unfavorable to a party that were not contained in the record. Mihm v. Am. Tool, 11 Neb. App. 543, 664 N.W.2d 27 (2003). Finally, recusal was required when a judge presiding over a dissolution proceeding prematurely decided an issue that the parties had agreed to save for a later hearing. Gibilisco v. Gibilisco, 263 Neb. 27, 637 N.W.2d 898 (2002).

2. Discovery Rule Violations

This section addresses only those discovery rule violations that first become apparent at trial[62] and the appropriate method of preserving such errors in both civil and criminal cases.

In the context of a civil trial, such violations become apparent when the opposing party offers evidence that was requested in discovery, which the opposing party was obligated to provide under the discovery rules, but did not timely provide.[63] The essence of the problem is that the party that made the discovery request is "surprised" with previously undisclosed information and has not received an adequate opportunity to prepare a response to this information.[64] Nebraska civil cases have specifically dealt with this issue in two contexts—requests for admission that were not timely answered—and thus deemed admitted—where the court later allowed the requests to be answered at trial[65] and interrogatories regarding expert testimony that were untimely "supplemented" by trial testimony.[66] In the context of the expert witness testimony, pursuant to section 6-326(e)(1)(B) of the Nebraska Court Rules of Discovery, a party is required to seasonably supplement responses to questions regarding "the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony," which clearly has not happened when a party is "surprised" by such information at trial. In the context of requests for admission, a party is required to file a timely response to requests for admission (typically 30 days), or the requests are deemed admitted, and thus a response permitted during a trial after the response period could be considered a "surprise."[67] Although the reported decisions in civil cases are limited to expert witness disclosures and requests for admission, a similar scenario could arise in any instance where one party's failure to provide appropriate responses to discovery requests becomes apparent at trial and "surprises" the party that made the discovery request.[68]

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[62] There are numerous other discovery rule violations that are the subject of pretrial and posttrial proceedings that are not discussed in this article.

[63] *See* Norquay v. Union Pac. R.R. Co., 225 Neb. 527, 407 N.W.2d 146 (1987) (failure to fulfill obligation to supplement discovery responses regarding expert witnesses); State v. Soto, 11 Neb. App. 667, 659 N.W.2d 1 (2003) (failure to timely answer requests for admissions).

[64] *See generally Norquay*, 225 Neb. 527, 407 N.W.2d 146.

[65] *Soto*, 11 Neb. App. at, 677–79, 659 N.W.2d at 9–11.

[66] Paulk v. Cent. Lab. Assocs. 262 Neb. 838, 636 N.W.2d 170 (2001); *Norquay*, 225 Neb. 527, 407 N.W.2d 146.

[67] NEB. CT. R. DISC. §6-336(a) (generally, a party has 30 days to respond to requests for admission); *see also Soto*, 11 Neb. App. at 679, 659 N.W.2d at 11 (discussing proper method to preserve error related to failure to respond to requests for admission in a timely manner).

[68] For further information, please read the Nebraska Court Rules of Discovery regarding required responses to discovery.

To preserve an error related to surprise, the party must (1) object to the evidence on the ground of surprise, (2) if the expert (or other witness offering "surprise" testimony) testifies, move to strike that witness' testimony and request a continuance to further investigate and develop rebuttal evidence, and (3) move for a mistrial, if appropriate.[69] Because this process is somewhat complex, an illustration may prove useful.

Paulk v. Central Laboratory Associates[70] illustrates a correct method of preserving an error related to a discovery rule violation. In this case, the Nebraska Supreme Court determined that a mistrial was appropriate after a party had failed to supplement discovery responses regarding a medical expert's opinion on causation as the discovery rules required. The patient's estate had sued doctors for failing to correctly diagnose malignant melanoma.[71] The doctors offered an expert's previously undisclosed opinion that, at the time of the misdiagnosis, the cancer had already metastasized—a fact that would have refuted the plaintiff's theory of causation that the misdiagnosis prevented the proper treatment and ultimately the metastasis of the cancer.[72] The plaintiff's counsel obtained a continuance (of only 24 hours) in which counsel gathered evidence to rebut the expert testimony, and also moved for a mistrial.[73] The Nebraska Supreme Court held that a mistrial was warranted under the circumstances because the "surprise" information was of "critical importance" and the plaintiff was denied an adequate opportunity to prepare for cross examination of the expert witness and develop rebuttal evidence.[74]

In the context of a criminal prosecution, the procedure for preserving an error resulting from the belated disclosure of evidence involves a similar process, but there are some differences. As a general observation, the same rules apply whether a disclosure is not timely or does not happen at all, and whether the error is noticed prior to trial or during trial. Under section 29-1912 of the Nebraska Statutes, if the defendant so requests, the prosecutor must provide the defendant with the opportunity to inspect and copy or photograph certain pieces of evidence which could be used by the prosecution, but this is subject to certain exceptions enumerated in the statute.[75] The statute provides a laundry list of items which the defendant, if

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[69] *See Norquay*, 225 Neb. at 541–42, 407 N.W.2d at 156.

[70] 262 Neb. 838, 636 N.W.2d 170 (2001).

[71] *Id*. at 840, 636 N.W.2d at 173.

[72] *Id*. at 843–44, 848, 636 N.W.2d at 175–76, 179.

[73] *Id*. at 844, 848-49, 636 N.W.2d at 176, 179. The language of the opinion is not explicit as to the details of how the plaintiff's counsel objected, but from what the court held and the applicable law, it can be inferred that plaintiff's counsel did move for a continuance and a mistrial. Counsel could have also moved to strike the testimony, but did not do so.

[74] *Id*. at 848–49, 636 N.W.2d at 179.

[75] NEB. REV. STAT. § 29-1912 (Supp. 2009).

charged with a felony offense or an offense for which imprisonment is a possible penalty, may request, which includes the defendant's statements, the defendant's prior criminal record, the "names and addresses of witnesses on whose evidence the charge is based," results of physical and mental examinations and scientific tests, tangible objects that could be used as evidence, and information related to jailhouse witnesses.[76] The defendant's ability to acquire such items is limited where the disclosure would possibly result in bodily harm to witnesses or the coercion of witnesses.[77] Pursuant to section 29-1916, the trial court may also grant reciprocal discovery to require the defendant "to grant the prosecution like access to comparable items or information included within the defendant's request" provided that the defendant has "possession, custody, or control" of the item or information, "[t]he defendant intends to produce [the item or information] at the trial," and the item or information is "material to the preparation of the prosecution's case."[78] Finally, discovery in the criminal context is subject to a continuing duty—until the trial is complete—to notify the other party and the court of newly discovered evidence that the party would have been required to disclose under a previous discovery order.[79]

Whether late disclosure results in prejudice and thus whether a remedy is available for late disclosure depends upon whether the information is "material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal."[80] Pursuant to section 29-1919, where a party has failed to comply with a discovery order the court may "(1) Order such party to permit the discovery or inspection of materials not previously disclosed; (2) Grant a continuance; (3) Prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed; or (4) Enter such other order as it deems just under the circumstances."[81] Where the prosecution's belated disclosure of evidence causes "prejudice,"[82] counsel must first request a continuance if it can cure the prejudice caused by the delay.[83] The failure to do so may waive the

[76] § 29-1912(1).

[77] § 29-1912(4).

[78] NEB. REV. STAT. § 29-1916 (Reissue 2008).

[79] NEB. REV. STAT. § 29-1918 (Reissue 2008).

[80] State v. Larsen, 255 Neb. 532, 545, 586 N.W.2d 641, 650 (1998).

[81] NEB. REV. STAT. § 29-1919 (Reissue 2008).

[82] The Nebraska Supreme Court has stated that in determining whether prejudice has resulted, the trial court should consider "whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal." State v. Van, 268 Neb. 814, 837, 688 N.W.2d 600, 622 (2004).

[83] State v. Harris, 263 Neb. 331, 338–39, 640 N.W.2d 24, 33 (2002).

defendant's right to discovery under section 25-1912.[84] If the continuance cannot cure the prejudice, the defendant may move for a mistrial, which is only appropriate where the defendant has shown "that a substantial miscarriage of justice has actually occurred."[85] For example, the State's failure to provide a defendant charged with murder information regarding an anonymous phone call that indicated that someone else (who had previously been implicated in the crime) had committed the murder was sufficient grounds for a mistrial.[86]

3. Other Errors Preserved By a Motion for Mistrial

Errors related to other events that occur "during the course of a trial which [are] of such a nature that [their] damaging effects would prevent a fair trial" must be preserved by a motion for a mistrial.[87] Such errors "may include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters."[88] This includes both the above-discussed circumstances where a motion for mistrial is appropriate and a variety of other circumstances.

A motion for a mistrial must be made "at the first reasonable opportunity" or it is waived.[89] The time of the "first reasonable opportunity" is defined in relation to the timing of the incident on which the motion is based. In the instance of a prejudicial closing argument, the motion for mistrial must be made no later than the conclusion of the closing argument.[90] Under some circumstances, waiting until the next day to move for a mistrial is too long. In one instance, after opposing counsel made an improper statement in a question, counsel objected, had the jury excused, and had the question stricken from the record but did not immediately move for a mistrial.[91] Counsel then finished questioning her witnesses, rested her case and moved for a mistrial on the following day.[92] The Nebraska Supreme Court held that the motion for mistrial

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[84] *Id*. at 339, 640 N.W.2d at 33.

[85] State v. Robinson, 271 Neb. 698, 711, 715 N.W.2d 531, 547–48 (2006); *Harris*, 263 Neb. at 338, 640 N.W.2d at 33.

[86] State v. Kula, 252 Neb. 471, 487–89, 562 N.W.2d 717, 727–28 (1997).

[87] Malchow v. Doyle, 275 Neb. 530, 537, 748 N.W.2d 28, 35 (2008).

[88] *Id*. Reference to an insurance carrier that is indemnifying a party at trial can constitute grounds for mistrial. *See* Genthon v. Kratville, 270 Neb. 74, 86–87, 701 N.W.2d 334, 346–47 (2005). Opposing counsel's misconduct during closing arguments can also constitute such grounds. *See* Wolfe v. Abraham, 244 Neb. 337, 342–43, 506 N.W.2d 692, 696–97 (1993).

[89] Nichols v. Busse, 243 Neb. 811, 824, 503 N.W.2d 173, 183 (1993).

[90] Wolfe v. Abraham, 244 Neb. 337, 343, 506 N.W.2d 692, 697 (1993).

[91] *Nichols,* 243 Neb. at 824–25, 503 N.W.2d at 183.

[92] *Id*. at 825, 503 N.W.2d at 183.

was not timely.[93] Thus, it is best to move for a mistrial as soon as the ground for a mistrial is apparent.

III. Requesting Record for Appellate Court Review

After trial, if there is an appeal, counsel must take additional steps to prepare the record for appellate review. In addition to a notice of appeal—which typically must be filed within 30 days of the lower court's decision[94]—the appealing party must file requests for the documents that are to compose the appellate record. There are two separate sets of rules that cover this. The first is the Nebraska Court Rules of Appellate Practice (Appellate Rules), which apply to appeals from district court to either the Nebraska Court of Appeals or the Nebraska Supreme Court. The second set of rules is the Uniform County Court Rules of Practice and Procedure (County Court Rules), which apply when a final order is appealed from county court to the district court, the Nebraska Court of Appeals, or the Nebraska Supreme Court.[95] Although the two sets of rules are substantially similar, this article discusses the procedure prescribed by each set separately because there are some notable differences.

In order to obtain a transcript, the Appellate Rules require the appellant to file a praecipe with the court from which the appeal is taken and direct the clerk to prepare a transcript containing (1) "the pleadings upon which the case was tried, as designated by the appellant," (2) the final order and accompanying memorandum opinion, if any, (3) a copy of the supersedeas bond or a recital that a cost bond was given or a deposit made as required by Neb. Rev. Stat. § 25-1914, (4) an order granting or denying in forma pauperis status, if any, and (5) any other portions of the transcript which the appellant requests and are material to the assignments of error, which may include jury instructions.[96]

County Court Rules state that in an appeal taken from county court, the appellant must file a request for transcript of pleadings "by listing the name of the pleading and its filling date." The transcript will automatically contain the items listed in categories (1) through (4) listed above plus an arraignment sheet showing the plea entered if it is a criminal matter, and the notice

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[93] *Id*. at 825, 503 N.W.2d at 183–84.

[94] *See* NEB. REV. STAT. §§ 25-1912, 25-2729 (Reissue 2008). Note that this is a general statement and that there are some subject-matter-specific exceptions embedded in the statutes.

[95] NEB. CT. R. § 6-1452. Section 6-1452(A) sets forth the rules for an appeal from county court to district court and section (B) sets forth the procedure for requesting the bill of exceptions. Finally, section 6-1452(C) provides that appeals from county court to either the Nebraska Court of Appeals or the Nebraska Supreme Court follow the same procedure for requesting a transcript and bill of exceptions as if the appeal were going to a district court.

[96] NEB. CT. R. APP. P. § 2-104(A)(1)–(2).

of appeal and request for transcript.[97] In county court, the appellant must specifically order all other portions of the record that are material to the appeal.[98]

Note that in both cases the transcript is not limited to those items initially requested by the appellant. Either the appellant or the appellee may request a "supplemental transcript."[99] Such a request must be in writing.[100]

The appellant must also file a request for the preparation of a bill of exceptions with the clerk of the court at the same time the notice of appeal is filed.[101] Pursuant to the Appellate Rules only, the appellant must also provide the court reporter with a copy of the request.[102] Under both sets of rules, the request must "specifically identify each portion of the evidence and exhibits offered at any hearing which the party appealing believes material to the issues to be presented for review."[103] If the appellee believes that additional evidence should be included in the bill of exceptions, the appellee may, within 10 days after service of the appellant's request for bill of exceptions, request a supplemental bill of exceptions.[104] The Appellate Rules require that the supplemental request also be filed with the clerk of the district court and delivered to the court reporter.[105]

Conclusion

The purpose of this article was to highlight various issues that commonly arise in the context of making and preparing an appellate record. We hope that it was helpful. Because this article was an overview as opposed to a comprehensive study, we encourage you to also conduct your own study of any particular or unique issue that arises in your practice.

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[97] NEB. CT. R. § 6-1452(A)(2)(a)–(b).

[98] § 6-1452(A)(2)(a)(v).

[99] § 2-104(C); § 6-1452(A)(5).

[100] § 2-104(C); § 6-1452(A)(5)(a).

[101] NEB. CT. R. APP. P. § 2-105(B)(1)(a); § 6-1452(B)(1).

[102] § 2-105(B)(1)(a).

[103] § 6-1452(B)(1); *see* § 2-105(B)(1)(b) (there is a slight variation in that in that the final phrase reads "presented to the Supreme Court for review.") (emphasis added).

[104] § 2-105(B)(1)(c); §6-1452(B)(3).

[105] § 2-105(B)(1)(c).

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