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Preserving Issues for Appeal in Nevada's Federal Courts

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PRESERVING ISSUES FOR APPEAL IN NEVADA’S FEDERAL COURTS

By Micah Echols¹ and Tom Stewart²

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INTRODUCTION

Attorneys in federal courts across the country, including in the District of Nevada, are aware of the age-old rule that, generally, new issues cannot be raised for the first time on appeal.³ The question then becomes, how are these

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³ See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 304–05 (1973) (White, J., concurring) (“[T]he rule that questions not raised in the trial court cannot be raised for the first time on

issues properly raised, and preserved, in the district court so that they are preserved for an appeal before the United States Court of Appeals for the Ninth Circuit or, ultimately, the Supreme Court of the United States? This article provides guiding principles based upon federal case law and the Federal Rules of Civil Procedure to answer these questions on preserving error for an appeal in Nevada's federal district court.

1. PRESERVING CLAIMS AND DEFENSES.

From a case's earliest stages, the best policy is to expressly state what claims the plaintiff is asserting and what defenses the defendant is making in the initial pleadings⁴ or through amendment.⁵ If this practice is not followed, however, any error arising out of claims and defenses may still be preserved under certain circumstances.

When a claim or defense is not expressly stated in a pleading, but "is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."⁶ Indeed, a motion to conform the pleadings to the evidence may

be made throughout the entire period during which the action is in the district court, including at an evidentiary hearing held in connection with a pretrial motion,⁷ in the course of the trial,⁸ after the close of testimony,⁹ after the return

appeal, is not without exceptions, among which are errors 'affecting fundamental rights of the parties . . . or affecting public policy,' . . . if to act on which will work no injustice to any party to the appeal."); *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990) ("Our general rule is that we will not consider issues raised for the first time on appeal.").

⁴ This is consistent with Fed. R. Civ. P. 8's main functions, which are "(1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 (3d ed.).

⁵ Amendment is governed by Fed. R. Civ. P. 15, which "reflects two of the most important policies of the federal rules[:] First, the rule's purpose is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities . . . [and] Second, Rule 15 reflects the fact that the federal rules assign the pleadings the limited role of providing the parties with notice of the nature of the pleader's claim or defense and the transaction, event, or occurrence that has been called into question." 6 WRIGHT & MILLER, *supra* note 4, § 1471.

⁶ FED. R. CIV. P. 15(b)(2). Rule 15(b)(2) further provides that "[a] party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue." However, bear in mind that Rule 15(b) amendment is typically proper unless it results in prejudice, and that when considering prejudice, a court should evaluate "the opposing party's ability to respond and its conduct of the case, not whether the amendment led to an unfavorable verdict." *See Jeong v. Minn. Mut. Life Ins. Co.*, 46 Fed. App'x 448, 450 (9th Cir. 2002) (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)).

⁷ 6A WRIGHT & MILLER, *supra* note 4, § 1494 (citing *Bobrick Corp. v. Am. Dispenser Co.*, 377 F.2d 334 (9th Cir. 1967)).

⁸ *Id.* (citing *Carroll v. Funk*, 222 F.2d 508 (9th Cir. 1955)).

⁹ *Id.*; *Cole v. Layrite Prods. Co.*, 439 F.2d 958, 961 (9th Cir. 1971).

of the verdict or entry of judgment,¹⁰ and on rehearing or on remand following an appeal.¹¹

Because Rule 15 “also provides that a failure to amend will not affect the actual result of the trial as it relates to the adjudication of the unpleaded issues, as long as they are tried with the consent of the parties, the timing of the motion to conform is of little moment.”¹²

2. PRESERVING ISSUES ARISING OUT OF CHALLENGES TO DISCOVERY ORDERS.

Typically, magistrate judges handle the pretrial, non-dispositive issues, as well as day-to-day discovery issues, that arise in Nevada’s federal courts.¹³ In most instances, the magistrate judge’s reports and recommendations are not immediately appealable to the Ninth Circuit;¹⁴ rather, the district court judges review any objections to a magistrate judge’s orders to determine whether “the magistrate judge’s order is clearly erroneous or contrary to law.”¹⁵ Additionally, district courts are not required to review arguments raised for the first time in objections to the magistrate’s report and recommendation.¹⁶ Thus, given that most discovery issues will be first presented to the magistrate judge, and given that a party who fails to timely file an objection to a magistrate judge’s non-dispositive order waives the right to appellate review of that order,¹⁷ the best approach to preserve potential issues arising out of federal-

¹⁰ 6A WRIGHT & MILLER, *supra* note 4, § 1494; *Dunn v. Trans World Airlines, Inc.*, 589 F.2d 408, 413 (9th Cir. 1978) (“Failure to formally amend the pleadings will not jeopardize a verdict or judgment based upon competent evidence. If an amendment to the pleadings to conform to the proof should have been made, the Courts of Appeals will presume that it is so made to support the judgment.” (quoting *Decker v. Korth*, 219 F.2d 732, 739 (10th Cir. 1955))).

¹¹ 6A WRIGHT & MILLER, *supra* note 4, § 1494. Importantly, “[t]he amendment to conform to issues actually tried lies within the sound discretion of the trial judge.” *Save Lake Washington v. Frank*, 641 F.2d 1330, 1340 (9th Cir. 1981) (citing *Cole*, 439 F.2d at 961). Further, “an attempted amendment causing prejudice to the defendant can be rejected by the trial court.” *Id.* (citing *Gonzales v. United States*, 589 F.2d 465, 469 (9th Cir. 1979)).

¹² 6A WRIGHT & MILLER, *supra* note 4, § 1494.

¹³ *See* 28 U.S.C. § 636(b)(1); *see also* D. NEV. LR PART IB.

¹⁴ *See In re San Vicente Med. Partners Ltd.*, 865 F.2d 1128, 1131 (9th Cir. 1989) (magistrate judge order not final or appealable); *Medhekar v. United States Dist. Court*, 99 F.3d 325, 326 (9th Cir. 1996) (discovery orders not immediately appealable).

¹⁵ 28 U.S.C. § 636(b)(1)(A).

¹⁶ *Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (“[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party’s objection to a magistrate judge’s recommendation.” (quoting *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000)); *e.g.*, *United States ex rel. Luke v. Healthsouth Corp.*, 2:13-CV-01319-APG-VCF, 2017 WL 5346385, at *2 (D. Nev. Nov. 10, 2017) (“I have the discretion to consider evidence and arguments presented for the first time in an objection to a magistrate judge’s order, but I am not required to do so.”).

¹⁷ *See* FED. R. CIV. P. 72(a) (objections to magistrate judge’s nondispositive order must be filed within 14 days of service of order and party may not assign error if objection not timely made); D. NEV. LR IB 3-1(a), IB 3-2(a), IB 3-3, IB 3-4 (rulings by magistrate judges shall be final if no reconsideration thereof is sought from the district court within 14 court days);

court discovery disputes is to first raise those issues before the magistrate judge.

3. PRESERVING ISSUES FOR APPEAL THROUGH MOTIONS IN LIMINE.

A motion in limine, which attempts to exclude prejudicial evidence prior to its introduction, generally does not preserve a claim for appellate review.¹⁸ If a party fails to preserve an issue raised in a pretrial motion in limine by contemporaneous objection at trial, an appellate court may nonetheless hear the issue under certain circumstances.¹⁹ For example, an appellate court may permit review when an objection at trial would have been futile²⁰ or when the party was ignorant of the facts supporting the claim raised on appeal.²¹

4. PRESERVING ISSUES FOR APPEAL ARISING OUT OF JURY SELECTION (VOIR DIRE).

In federal court,

you are not required to exhaust your peremptory strikes in order to complain on appeal that the trial court improperly refused to strike a juror for cause.²² If, however, you elect to cure the trial court's error by using a peremptory strike against a juror whom the trial court improperly refused to strike, you lose your ability to complain on appeal.²³ In other words, after objecting to the trial court's denial to strike a juror for cause, you have the option of letting the biased juror sit on the jury and challenging that ruling on appeal, or exercising a peremptory strike against that juror and losing the ability to challenge the ruling on appeal.²⁴ . . . This rule limiting the ability to appeal applies only when there

Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1210 (9th Cir. 2002) (waiver of right to appeal magistrate judge's discovery order where party failed to file objections to order); Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1174 (9th Cir. 1996) ("[A] party who fails to file timely objections to a magistrate judge's nondispositive order with the district judge to whom the case is assigned forfeits [his] right to appellate review of that order.").

¹⁸ Compare Luce v. United States, 469 U.S. 38, 43 (1984) (defendant must testify in order to preserve claim of improper impeachment of defendant after motion in limine denied), with United States v. Lui, 941 F.2d 844, 846 (9th Cir. 1991) (defendant's motion in limine to exclude testimony sufficient to preserve objection when trial court denial was clearly final and court threatened sanctions for making objection) and FED. R. EVID. 103(e) ("A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved."); see also Deborah McCoppin & Mikal J. Condon, *Review Proceedings: Appeals, Twenty-Ninth Annual Review of Criminal Procedure*, 88 GEO. L.J. 1601, 1619–21 (2000).

¹⁹ See, e.g., *Lui*, 941 F.2d at 846; United States v. Johnson, 67 F.3d 200, 203 n.6 (9th Cir. 1995).

²⁰ See, e.g., *Lui*, 941 F.2d at 846.

²¹ See, e.g., *Johnson*, 67 F.3d at 203, 203 n.6.

²² Lisa Blue & Pamela Francis, *Know the Law of Your Jurisdiction—Challenges for Cause—Preserving Error*, 3 LITIGATING TORT CASES § 34:10 (2020) (citing United States v. Martinez-Salazar, 528 U.S. 304 (2000)).

²³ *Id.*

²⁴ *Id.*

is no allegation that the trial court deliberately misapplied the law in order to force you to use a peremptory challenge to correct the trial court’s error and where there is no allegation that the trial court’s ruling resulted in the seating of a juror who should have been dismissed for cause.²⁵

*Batson*²⁶ challenges, however, require a contemporaneous objection in order to be preserved for appeal.²⁷ Indeed, “[t]he Supreme Court has never allowed a *Batson* challenge to be raised on appeal or on collateral attack, if no objection was made during jury selection.”²⁸ That is because, “*Batson* itself presupposes a timely objection.”²⁹ Thus, these objections need to be made contemporaneously in order to preserve error.

5. PRESERVING ISSUES FOR APPEAL THROUGH OBJECTIONS AT TRIAL.

Federal courts emphasize the need for a contemporaneous objection to preserve issues arising out of alleged attorney misconduct at trial.³⁰ However, counsel’s duty to object to offending evidence or testimony extends generally to preserve issues for appellate review.³¹ Some evidentiary issues—namely, issues arising out of offers of proof—need not be renewed to preserve error.³² For the most part, however, a party’s failure to timely object at trial forfeits the issues for appeal, absent plain or constitutional error.³³

²⁵ *Id.*

²⁶ In *Batson v. Kentucky*, the Supreme Court held that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.” *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Under *Batson*, a defendant who alleges the discriminatory use of peremptory challenges must first make out a prima facie case. He must show: (1) “that he is a member of a cognizable racial group,” (2) “that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race,” and (3) “that these facts and any other relevant circumstances raise an inference” of intentional discrimination. *Id.* at 96. *Batson* also applies to civil litigants. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).

²⁷ *Haney v. Adams*, 641 F.3d 1168, 1171–72 (9th Cir. 2011).

²⁸ *Id.* at 1171.

²⁹ *Id.*; see also *Ford v. Georgia*, 498 U.S. 411, 423 (1991).

³⁰ *Kaiser Steel Corp. v. Frank Coluccio Const. Co.*, 785 F.2d 656, 658 n.2 (9th Cir. 1986) (noting that “[m]ost circuits have held squarely that the lack of a contemporaneous objection bars a complaint in a civil appeal about alleged attorney misconduct during summation”).

³¹ FED. R. EVID. 103(a); see, e.g., *United States v. Brown*, 880 F.2d 1012, 1013–14 (9th Cir. 1989).

³² FED. R. EVID. 103(b) (“Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”).

³³ *Crowley v. Epicept Corp.*, 883 F.3d 739, 748 (9th Cir. 2018) (plain error); *Melendez v. Pliier*, 288 F.3d 1120, 1124–26 (9th Cir. 2002) (constitutional error).

6. PRESERVING ISSUES FOR APPEAL DURING THE SETTLING OF JURY INSTRUCTIONS.

“Objections to jury instructions in civil cases are governed by [Fed. R. Civ. P. 51], which requires objections to be timely raised in the district court.”³⁴ An “objection need not be formal,” but must be “sufficiently specific to bring into focus the precise nature of the alleged error.”³⁵

Challenges to jury instructions may be waived, however. Indeed, “[a] party forfeits a right when it fails to make a timely assertion of that right and waives a right when it is intentionally relinquished or abandoned.”³⁶ “Waiver of a jury instruction occurs when a party considers ‘the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction.’”³⁷ “Forfeited rights are reviewable for plain error, while waived rights are not.”³⁸

7. PRESERVING ISSUES FOR APPEAL ARISING OUT OF JURY VERDICT FORMS.

Near the end of trial, the district court judge must resolve proposed verdict forms, which can be a general verdict, a special verdict, or a general verdict with written interrogatories.³⁹ Determining which verdict form should be used may itself create an issue on appeal at the time the jury verdict form is settled on the record.⁴⁰ While a contemporaneous objection need not be made to a special verdict if a party believes a jury’s answers to written interrogatories are inconsistent with its general verdict,⁴¹ “[a] party waives its objection to the jury’s [general] verdict by not objecting to the alleged inconsistency prior to the dismissal of the jury.”⁴²

³⁴ Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 295 (2015); FED. R. CIV. P. 51.

³⁵ *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (quoting *Inv. Serv. Co. v. Allied Equities Corp.*, 519 F.2d 508, 510 (9th Cir. 1975)).

³⁶ *United States v. Kaplan*, 836 F.3d 1199, 1216 (9th Cir. 2016) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)).

³⁷ *Id.* at 1217 (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)).

³⁸ *Perez*, 116 F.3d at 845; *see also* *C.B. v. City of Sonora*, 769 F.3d 1005, 1017–18 (9th Cir. 2014) (en banc) (discussing plain error standard in civil context).

³⁹ *See* 9B WRIGHT & MILLER, *supra* note 4, § 2501 (“Most jury-tried civil cases . . . are resolved, and always have been, by a general verdict in which the jury finds for the plaintiff or for the defendant. [Rule 49], however, makes available two very different procedures as discretionary alternatives to the general verdict for use in appropriate cases[.]” the special verdict and the general verdict with interrogatories.); *see also* FED. R. CIV. P. 49.

⁴⁰ 9B WRIGHT & MILLER, *supra* note 4, § 2501.

⁴¹ *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1354 (9th Cir. 1987) (citing FED. R. CIV. P. 49(b)).

⁴² *Williams v. Gaye*, 895 F.3d 1106, 1130 (9th Cir. 2018) (internal quotation marks omitted) (quoting *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995)).

8. PROPERLY RAISING CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE.

In order to preserve a challenge to the sufficiency of the evidence to support the jury verdict in a civil case, a party must make two motions.⁴³ “First, a party must file a pre-verdict motion pursuant to Fed. R. Civ. P. 50(a).”⁴⁴ Second, a party must file a post-verdict motion for judgment as a matter of law or, alternatively, a motion for a new trial, under Fed. R. Civ. P. 50(b).⁴⁵ Indeed, the Supreme Court has held that Rule 50(b) is to be strictly observed, and that failure to comply with it precludes a later challenge to the sufficiency of the evidence on appeal.⁴⁶

9. RAISING NEW ISSUES IN MOTIONS FOR RECONSIDERATION.

Despite the very high standard to prevail on a motion for reconsideration under Fed. R. Civ. P. 59,⁴⁷ it may be worthwhile for a party to file such a motion to preserve new arguments or evidence for appellate review, if the arguments or evidence could not reasonably have been raised earlier in the litigation.⁴⁸ This typically requires “newly discovered evidence, . . . clear error, or if there is an intervening change in the controlling law.”⁴⁹ If one of these three conditions is not met, the new issues raised on reconsideration are typically not preserved for an appeal.⁵⁰

⁴³ This is typically not necessary following a bench trial. *See* FED. R. CIV. P. 52(a)(5); 9 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 52.63[1] (Matthew Bender 3d ed. 2016).

⁴⁴ *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007); *see* *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001); *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996); *Benigni v. City of Hemet*, 879 F.2d 473, 476 (9th Cir. 1988); *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986).

⁴⁵ *See* *Saman v. Robbins*, 173 F.3d 1150, 1154 (9th Cir. 1999).

⁴⁶ *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 50 (1952); *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 217–18 (1947); *see also* *Desrosiers v. Flight Int’l of Fla., Inc.*, 156 F.3d 952, 956–57 (9th Cir. 1998).

⁴⁷ *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (“Although Rule 59(e) permits a district court to reconsider and amend a previous order, the rule offers an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.” (internal quotation marks omitted)). “Indeed, ‘a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.’” *Id.* (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

⁴⁸ *See id.* at 890.

⁴⁹ *Id.* (quoting *389 Orange St. Partners*, 179 F.3d at 665).

⁵⁰ *See Kona*, 229 F.3d at 890–91 (citations omitted).

10. EXCEPTIONS TO THE PROHIBITION AGAINST RAISING ISSUES FOR THE FIRST TIME ON APPEAL.

The rule that issues cannot be raised for the first time on appeal⁵¹ “is not without exception, especially when the interests of fundamental justice will be served or when justice demands flexibility.”⁵² Indeed, appellate courts carve out an exception for subject-matter jurisdiction arguments, which may be raised at any time and cannot be waived or conferred by the parties.⁵³

Another such exception is “where the issue presented is a purely legal one and the record below has been fully developed.”⁵⁴ The same is true “where the issue involves a pure question of law, the necessary facts are developed, and if refusal to consider it would result in a miscarriage of justice.”⁵⁵ Finally, the Ninth Circuit may consider an issue not raised below if the issue presents significant questions of general impact or of great public concern.⁵⁶

CONCLUSION

Although not exhaustive, the explanations, rules, and case citations provided herein will hopefully provide attorneys practicing in Nevada’s federal courts with the knowledge and information to properly preserve issues should their cases proceed on appeal to the Ninth Circuit or the Supreme Court.

⁵¹ See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”); see also *Centurion Props. III, LLC v. Chicago Title Ins. Co.*, 793 F.3d 1087, 1090 (9th Cir. 2015); *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986). Notably, however, “[a]t the Supreme Court level, so long as the question was considered by the court of appeals, it does not matter that the question was not raised at trial.” *Van Arsdale et al., Issues Not Raised Below*, in 2A FED. PROC., L. ED. § 3:856 (2020).

⁵² *Van Arsdale et al., Exceptions to Rule Barring Consideration of Issues Not Raised Below*, in 2A FED. PROC., L. ED. § 3:857 (2020); see also *Int’l Union of Bricklayers Local 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (“We will not . . . review an issue not raised below unless necessary to prevent manifest injustice.”).

⁵³ See, e.g., *Smith v. Grimm*, 534 F.2d 1346, 1349 n.4 (9th Cir. 1976) (“A federal appellate court may review subject matter jurisdiction even if [it is] not raised below.”).

⁵⁴ See *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1094 (9th Cir. 2014).

⁵⁵ *Van Arsdale et al., supra* note 52, § 3:857; see also *Fry v. Melaragno*, 939 F.2d 832, 835–36 (9th Cir. 1991) (issue of whether defendants enjoyed absolute immunity is purely legal question, which might be dispositive of some of claims); *Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986).

⁵⁶ *Pacific Exp., Inc. v. United Airlines, Inc.*, 959 F.2d 814, 819 (9th Cir. 1992); *United States v. California*, 932 F.2d 1346, 1347–48 (9th Cir. 1991).