"Going Up? Don't Forget To Take Your Issues: The Preservation Rule"

Litigation Department Training Presentation
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I. Utah's Preservation Rule

- **What is the preservation rule?**
  - Utah appellate courts, and appellate courts generally, have a self-imposed rule that a claim not preserved in the trial court cannot be raised on appeal.[1]
  - Rule 24 of the Utah Rules of Appellate Procedure:
    - The appellant must provide a "citation to the record showing that the issue was preserved in the trial court."[2]
- **What does it mean for an issue to be "preserved"?**
  - Three elements for preservation:
    - The issue must be raised in a timely fashion;
    - The issue must be specifically raised; and
    - The party must introduce evidence or legal authority in support.[3]
  - Courts generally apply the notice-opportunity test:
    - The appellant must have put the trial court on notice of the asserted error such that the court had an opportunity to correct the error or otherwise rule on the issue.[4]
  - The difficulty is the Goldilocks issue:
    - Appellants want to specifically preserve an issue, but not so specifically that they are foreclosed from raising related, ancillary issues.

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[1] *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 18, 163 P.3d 615.

[2] Utah R. App. P. 24(a)(5)(A).

[3] *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)

[4] *Id.*

- Example: A party timely raises an issue regarding Part X of a jury instruction, but fails to also point out a flaw in Part Y.

- Appellants also do not want to be so general that the issue lacks specificity.

  - "A party may not preserve an issue by merely mentioning it."[5]

  - Example: A party challenges the sufficiency of the evidence supporting a claim, but fails to identify a particular element for which the evidence fell short.

- Appellants want the issue to be "<u>just right</u>" for preservation.

- **Why are appellate courts so concerned with preservation?**

  - Practical Standpoint: An unpreserved argument is much easier to dispose of.

    - Many judges do not want to spill any more ink than they have to.

    - Many judges see it as their duty not to create any law that does not have to be created.

  - Policy Standpoint: There are multiple policy reasons supporting the preservation requirement.

    - Judicial Economy

      - The preservation rule requires a party to present "his entire case and his theory . . . of recovery to the trial court."[6] This allows for a record that the appellate court can review.

      - Also, it may be that the trial court could easily have resolved the issue, or the opposing party could have countered it convincingly, avoiding the time and expense of appeal.

      - If courts routinely reviewed unpreserved issues that could have been resolved below, it would incentivize more appeals and shoddy trial preparation.

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[5] *In re Guardianship of A.T.I.G.*, 2012 UT 88, ¶ 21, 293 P.3d 276.

[6] *Patterson v. Patterson*, 2011 UT 68, ¶ 15, 266 P.3d 828.

- Fairness
- Appellate courts view it as unfair to reverse a trial court on a basis that was never presented to the trial court.
    - "Under our adversary system, the responsibility for detecting error is on the party asserting it, not on the court."[7]
- Courts view it as unfair to the appellee, who won on the issue below.
- Appellate courts are concerned that parties do not raise issues for strategic reasons, and then assert the issues on appeal after their trial strategy failed. Courts do not want to reward such crafty strategies.

- **Is preservation a jurisdictional requirement?**
    - No. The rule is "self-imposed and is therefore one of prudence rather than jurisdiction."[8]
- **Does it make a difference that it is not jurisdictional?**
    - Yes. A court is much more likely to tweak, bend, or massage a rule if it is "self-imposed" and based on policy, but not if it is jurisdictional.
    - A court might be more willing to directly review an arguably unpreserved issue if
        - It is really, really important (i.e., one that affects lives rather than pocketbooks).
            - Think adoptions, criminal convictions, etc.
        - Bending the rules will not offend the policies that underlie the preservation rule: fairness and judicial economy.
        - Somewhere in the record the appellant at least tangentially raised the argument.
            - This is usually combined with the "really, really important" factor.

[7] *Id.* ¶ 16.

[8] *Id.* ¶ 13.

- **Is an unpreserved argument "forfeited" or "waived"?**
    - This is a trick question. There is a difference between forfeiture and waiver, and the distinction matters on appeal.[9]
        - If a party merely failed to assert an issue, it is forfeited. A forfeited issue is "unpreserved" for appeal. It is reviewable, but, as Alan will explain, is reviewed under a heightened standard.
        - If a party voluntarily and purposely relinquished an issue, it is "waived." A waived argument is generally unreviewable.
        - The Tenth Circuit has been more explicit with this distinction: "Where . . . a plaintiff pursues a new legal theory for the first time on appeal, that new theory suffers the distinct disadvantage of starting at least a few paces back from the block. If the theory was intentionally relinquished or abandoned in the district court, we usually deem it waived and refuse to consider it."[10]
- **Is there a difference between preserving an "issue," "argument," "claim," "matter," etc.?**
    - No. Although some jurisdictions recognize a "distinction between new 'issues' or 'theories' and new 'arguments,' allowing the latter but not the former to be raised for the first time on appeal," Utah courts have expressly declined to recognize this distinction. The terms are used interchangeably.[11]
- **Examples**
    - Example 1:
        - In the trial court, Party A argues that an amendment to a trust is valid. The party asks the trial court to distinguish or "overturn" a potentially damaging Utah Supreme Court decision under which the amendment is almost certainly *invalid*. But Party A fails to raise the issue of a new statute that abrogates the Utah Supreme Court decision.
            - Did Party A preserve an argument that the statute governs and abrogates the Utah Supreme Court decision?

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[9] *See In Re Adoption of Baby EZ*, 2011 UT 38, ¶ 51, n.1., 266 P.3d 702 (Lee, J., dissenting).

[10] *Richison v. Ernest Grp.*, 634 F.3d 1123, 1127 (10th Cir. 2011).

[11] *Patterson*, 2011 UT 68, ¶ 14.

- Answer: The issue of the validity of the trust amendment was preserved, and it does not matter that Party A failed to raise certain authority for the argument challenging the Utah Supreme Court decision.

    - Quote: "[W]e routinely consider new authority relevant to issues that have properly been preserved, and we have never prevented a party from raising controlling authority that directly bears upon a properly preserved issue. Further, we are unwilling to disregard controlling authority that bears upon the ultimate resolution of a case solely because the parties did not raise it below."[12]

- Take-away: If you accidentally failed to cite the winning case or statute, you still may use it on appeal so long as you framed the issue below.

- Example 2:

    - Party B fails to file a response to Defendant's motion in limine to exclude written-off medical expenses. Party B tells the court that the motion "probably does not need an opposition," and the court grants the motion in limine. On the morning of trial (3 months after the motion in limine ruling), Party B asks the court to reconsider the motion in limine, citing the collateral source rule. The court denies the motion as untimely, but asks Party B if he would like a continuance for the court to consider the merits of the motion. Party B declines, and the trial proceeds without evidence of written-off medical expenses.[13]

        - Did Party B preserve a challenge to the motion in limine?

        - Answer: No. The "choice not to seek a continuance constituted a failure to preserve the issue for appeal." Had Party B requested a continuance, this could have given the court time to rule on the merits of the motion, and thereby preserve the issue for appeal. Not only was the argument unpreserved, it was "abandoned"—i.e., it was waived.

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[12] *Id.* ¶ 18; *see also Torian v. Craig*, 2012 UT 63, ¶ 20, 289 P.3d 479 ("A litigant has no obligation to 'preserve' his citation to legal authority. If the foundation of a claim or argument is presented in a manner that allows the district court to rule on it, a party challenging the lower court's resolution of that matter is free to marshal any legal authority that may be relevant to its consideration on appeal.").

[13] *Tschaggeny*, 2007 UT 37.

- Take-away: Even if your motion is untimely, file it if you think it is a potential winner. But if the court wants more time to rule, give the court more time.

II. Preservation Considerations in Pre-trial Stage

- Make an appellate battle plan in early stages of proceeding. Consider the legal theories at issue in your case, including the elements of each cause of action and defense you plan to allege, as well as the other side's theories. Consider whether the case presents any constitutional claims, which are of interest to appellate courts and more likely to receive their attention.
    - A party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory. Contradictory theories not preserved.
        - Even related theories are typically insufficient, e.g.:
            - Negligent failure to warn/negligent design
            - Breach of contract/tortious conversion of negotiable instrument
- Always consider what is in the record and what is not in the record. Remain mindful of record preservation as you move through stages of discovery, pretrial motions, and hearings.
    - An issue that appears in an Answer, the pre-trial order, or even in memoranda may not be preserved if not appropriately pursued in the trial court.
- Correct any misstatement of fact of the Court or of opposing counsel, even if made in motions or hearings, as these can come back to frame the issues and even frame the statements of fact in the appeal.
- **Summary Judgment**
    - Remember that some pre-trial issues in the summary judgment context may become un-appealable after a jury has rendered a verdict.
        - "Appellate courts may review the denial of a pretrial summary judgment motion if the motion was decided on purely legal grounds." *Normandeau v. Hanson Equipment, Inc.*, 2009 UT 44, 219 P.3d 152
        - Where the court denies the motion based on the undisputed facts, rather than because of the existence of a disputed material fact, the

party denied summary judgment may challenge that denial on appeal without having raised it at trial in a directed verdict motion.

- When disputed facts bear on the decision or when new material facts emerge at trial that change the nature of the legal determination, parties then have an obligation to reraise the issue at trial in order to preserve it for appeal.

- *Hone v. Advanced Shoring & Underpinning, Inc.*, 2012 UT App 327: Whether a summary judgment decision is reviewable is a case by case inquiry that requires the court to "compare evidence presented in connection with the summary judgment motion with the evidence adduced at trial."

- **Objections to Evidence: DUCivR 7-1(b)(1)**

  - "For motions for which evidence is offered in support, the response memorandum may include evidentiary objections. If evidence is offered in opposition to the motion, evidentiary objections may be included in the reply memorandum. While the court prefers objections to be included in the same document as the response or reply, in exceptional cases, a party may file evidentiary objections as a separate document. If such an objection is filed in a separate document, it must be filed at the same time as that party's response or reply memorandum. If new evidence is proffered in support of a reply, any evidentiary objection must be filed within seven (7) days after service of the reply. A party offering evidence to which there has been an objection may file a response to the objection at the same time any responsive memorandum, if allowed, is due, or no later than seven (7) days after the objection is filed, whichever is longer. Motions to strike evidence as inadmissible are no longer appropriate and should not be filed. The proper procedure is to make an objection. See Fed. R. Civ. P. 56(c)(2)."

    - Can be difficult to do in Reply memoranda due to page limitations.

III. <u>Preserving Objections to Jury Instructions</u>

- **Make objections on the record and prior to submission of instructions to jury.**

  - FRCP 51(c)(1): "A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection."

  - FRCP 51(b)(2): "The court must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered."

- URCP 51(f): "Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. ***Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid manifest injustice***." (emphasis added)

- "At trial, the district court erroneously held initial jury instruction conferences off the record with inadequate procedures for preserving the objections for appellate review. In its affidavit, the district court averred that [defendant] stated on the record his reasons for his objection. On the contrary, [defendant's] statements during the on the record jury instruction conference did not qualify as proper objections to the instruction. [Defendant] knew the conferences were off the record. Thus, he knew, or should have known, that he needed to properly renew his objection on the record to preserve it for appeal." *United States v. Bornfield*, 184 F.3d 1144, 1146 (10th Cir. 1999) (citations omitted).

- **Objections to jury instructions must be specific. It is not enough to generally object to the instructions as a whole or even to a particular instruction without any particularity. It also not enough to offer a proposed alternative instruction.**

  - URCP 51(f): "In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection."

  - "When considering a party's challenge to jury instructions, our initial inquiry is whether the party properly preserved that issue for appeal by objecting at the district court level to the instruction on the same grounds raised on appeal. A party's objection to a jury instruction must be sufficiently clear such 'that the grounds stated in the objection [are] obvious, plain, or unmistakable.' *Aspen Highlands*, 738 F.2d at 1514. Moreover, 'the offering of a proposed instruction does not preserve a challenge to the court's instructions under Rule 51, absent a specific objection.' *Id.* at 1515." *Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 660 (10th Cir. 1991).

  - "As set forth above, rule 19(c) of the Utah Rules of Criminal Procedure provides that in order to preserve an issue involving a jury instruction, the objecting party must make an objection in the trial court, '*stating distinctly* the matter to which he objects and *the ground of his objection.*' Utah R.Crim. P. 19(c) (emphasis added). This rule therefore requires that (1) an objection be made in the trial court to the particular instruction, and (2) that the objecting party state all the grounds for his or her objection. Accordingly, absent a showing of manifest injustice, not only will we

refuse to review jury instructions to which the party did not object in the trial court, but we will also refuse to consider grounds for error which were not raised or asserted in the court below." *State v. Rudolph*, 970 P.2d 1221, 1227 (Utah 1998).

- **If you want a different instruction, be sure to offer it to the Court and then specifically object if proposed instruction is rejected.**

    - "[Appellant] did not preserve this claim for appellate review. A party who does not request a jury instruction cannot later complain that it was not given." *State v. Soules*, 2012 UT App 238, 286 P.3d 25, 27.

    - "[T]o assert that the trial court erred in either giving or failing to give an instruction, a party must first submit correct instructions and then, should the court fail to give them, timely except." *Paulos v. Covenant Transp., Inc.*, 2004 UT App. 35, ¶ 10, 86 P.3d 752.

- When objecting to the failure to include a proposed jury instruction, the proposed instruction must be specifically offered to the Court and rejected. It is not enough to offer a similar instruction.

    - "At trial, Defendant did not request a lesser-included offense instruction nor did he object to the trial court's failure to include a lesser-included offense instruction in its proposed jury charge. Instead, defense counsel requested a merger doctrine instruction based on *Finlayson*, 2000 UT 10, 994 P.2d 1243. On appeal, Defendant argues that the trial court erred by refusing to give Defendant's requested jury instruction explaining the lesser-included relationship between aggravated kidnapping and aggravated assault. Defendant conflates the merger doctrine with the lesser-included offense legal concept. The jury instruction Defendant requested pertained to his merger doctrine argument and instructed the jury on the merger doctrine not the concept of a lesser-included offense." *State v. Zaragoza*, 2012 UT App 268, 287 P.3d 510, 513.

- **If an objection is not preserved, the manifest injustice/plain error standard on appeal is difficult to meet.**

    - "When reviewing a claim of manifest injustice, we generally use the same standard that is applied to determine whether plain error exists under rule 103(d) of the Utah Rules of Evidence. *See State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989). That standard is two-pronged. 'First, the error must be "obvious." Second, the error must be of sufficient magnitude that it affects the substantial rights of a party.' *Anderson*, 929 P.2d at 1109." *State v. Rudolph*, 970 P.2d 1221, 1226 (Utah 1998).

- **Even if there is plain error or manifest injustice in a jury instruction, if trial counsel indicates agreement with the instruction, then appellate courts might not reverse based on the invited error doctrine.**

    - "[T]he supreme court has 'held repeatedly that on appeal, a party cannot take advantage of an error committed at trial when that party led the trial court into committing the error.' *Anderson*, 929 P.2d at 1109 (citation omitted) (concluding any error in giving a jury instruction was invited error because 'defense counsel read the instruction and then affirmatively stated that she had no objection')." *State v. Rush*, 2003 UT App 156.

    - "[T]he trial court gave defendant ample opportunity to object to the jury instruction[s] or to request a lesser included offense jury instruction, and he failed to do so. Consequently, we conclude that this defendant cannot lead the court into error by failing to object and then later, when he is displeased with the verdict, profit by his actions." *State v. Rush*, 2003 UT App 156 (citations omitted).

IV. <u>Plain Error</u>

- **Is plain error or exceptional circumstances the required standard of review?**

    - Ways to avoid preservation obstacles:

        - Claim vs. Argument

            - Utah

                - In *Patterson v. Patterson*, the Utah Supreme Court explained that, although some courts had drawn a distinction between issues and arguments, it declined to do so. 2011 UT 68, ¶14, 266 P.3d 828.

            - Federal

                - *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (addressing an argument Lebron raised for the first time in the Supreme Court because it was merely "a new argument to support what ha[d] been his consistent claim")

            - You may be able to avoid the plain error death trap if you can plausibly claim that you are merely "adducing additional support for [your] side of an issue upon which the district court did rule, much like citing a case for the first time on appeal." *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007).

- Point out that the new point is "purely legal," and does not depend on predicate facts. *Patterson*, 2011 UT 68, ¶ 20.

- Try to demonstrate that the failure to raise the issue/argument below was "inadvertent" rather than "tactical." *Id.* ¶ 20.

- **Jury Instructions**

  - Civil

    - Federal Rule of Civil Procedure 51(d)(2) - "A court may consider a plain error in the instructions that has not been preserved . . . if the error affects substantial rights."

    - Utah Rule of Civil Procedure 51(f) – "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice."

  - Criminal

    - Federal Rule of Criminal Procedure 52(b) – "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

    - Utah Rule of Criminal Procedure 19(e) – "Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice."

      - "Manifest injustice" is the equivalent of "plain error." *State v. Casey*, 2003 UT 55, ¶ 40, 82 P.3d 1106.

  - In Utah, the standard for instructional plain error appears to be the same in both civil and criminal cases. *Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 799 (Utah 1991). The same is true in federal court. *Compare United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005), *with Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 36 (1st Cir. 2006).

- **Non-instructional problems**

  - "As a general rule, we will review issues raised for the first time on appeal only if exceptional circumstances or 'plain error' exists." *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994).

  - "It is the settled rule in this Circuit that issues not raised and presented to the trial court will not be considered on appeal, except that in exceptional cases, where a question of law is raised, consideration will be given to prevent manifest injustice." *Gomes v. Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970).

- **Three Requirements in Utah:**
    - Error
    - Obvious
        - Under federal criminal law, the error need only be "plain" at the time of appellate review. *Henderson v. United States*, Slip Op. no. 11–9307 (Feb. 20, 2013). This may or may not apply to civil cases, which do not implicate the same liberty interests as criminal cases.
            - An error is obvious when it violates controlling case law.
            - It can also be obvious when it involves a clearly erroneous application of statutory law and where it violates well-settled legal principles.
                - Statute – *United States v. Story*, 635 F.3d 1241, 1248 (10th Cir. 2011).
                - *Patterson* – "Refusing to consider Randy's statutory argument in this case would cause us to issue an opinion in contravention of a duly enacted controlling statute." *Id.* ¶20; *see also id.* ¶ 21 ("[W]e decline to ignore controlling law because counsel failed to argue it below.").
                - Legal Principles – *United States v. Brown*, 352 F.3d 654, 664 (2d Cir. 2003).
    - Prejudice
        - Is there a "reasonable probability" of a different outcome?
            - Does the error affect "substantial rights"? – This means that the error "affected the outcome of the proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993).
    - And sometimes a fourth in Federal Court – Fairness of judicial proceedings
        - Some federal courts, including the Tenth Circuit, require the appellant to also demonstrate that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005).

- The Supreme Court added the fourth requirement to account for the fact that "Rule 52(b) is permissive, not mandatory." In other words, a federal court may but is not required to correct plain error. *United States v. Olano*, 507 U.S. 725, 735 (1993).

- Example of court finding the fourth prong satisfied: *United States v. Thomas*, 274 F.3d 655, 671-72 (2d Cir. 2001).

- Example of court finding the fourth prong unsatisfied: *Gonzalez-Huerta*, 403 F.3d at 738.

- **Invited Error Precludes Plain Error Review**

  - As already discussed, there is a difference between waiver and forfeiture.

  - When a party "waives" an issue, counsel has "invited" the error, thereby precluding plain error review. *State v. Lee*, 2006 UT 5, ¶ 16. This is especially common with respect to jury instructions.

  - What does it mean to "invite" error? Counsel invites error when she manifestly assents to the error, even if the manifestation is lukewarm at best.

    - In Justice Lee's view (as expressed at the Utah Bar Convention last summer), the dividing line between invited error and uninvited error is verbal assent, a view that is basically consistent with the Supreme Court's case law. *See State v. Sellers*, 2011 UT App 38, ¶ 12 (holding that counsel invited the alleged error with the instruction because when asked if there was "anything else" counsel wanted to put on the record, counsel responded, "No. That's fine.")

    - And it may be broader: *State v. Cox*, 2012 UT App 234, ¶ 5 n.5 (declining to decide whether the error was invited based on the attorney giving "no verbal response" when asked if she "had anything else to add to the jury instructions").

    - Other courts have questioned such a hard, fast, and easily satisfied standard for invited error, and have instead addressed, on a case-by-case basis, whether "a deliberate, strategic reason could have justified the attorney's affirmative approval of a jury instruction." *United States v. Rucker*, 417 F. App'x 719, 721-22 (10th Cir. 2011).

- **It feels good to win!**

  - Appellee is not bound by the same preservation principles

- The appellate court may affirm for any "reason apparent from the record," even if that reason was not pressed by either party below – *Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158.

- This is an opportunity to get creative
  - Examples