The Learned Hand Team presents Mistakes!
January 9, 2018 Presentation
Handout of Authorities

I. Pretrial Mistakes

It is a general rule that a party cannot complain of error which that party was instrumental in bringing about. *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996).

1. Failure to Advise Noncitizen of Possible Immigration Consequences

   If a defendant is not a US citizen, a defense lawyer must advise the client as to the possible consequences of entering a plea or being found guilty. See *Padilla v. Kentucky*, 559 U.S. 356, 374, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010) ("It is our responsibility under the Constitution to ensure that no criminal defendant--whether a citizen or not--is left to the 'mercies of incompetent counsel.' [*McMann v.*] *Richardson*, 397 U.S. [759,] 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 [(1970)]. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

   See, also, Neb. Rev. Stat. § 29-1819(1) (Reissue 2016):
   Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

   IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.

2. Failure to Meet Condition Precedent Prior to Bringing a Lawsuit Against a Political Subdivision

   All tort claims under the Political Subdivisions Tort Claims Act and sections 16-727, 16-728, 23-175, 39-809, and 79-610 *shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision*, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision. . . . Neb. Rev. Stat. § 13-905.

   Notification to the insurance carrier of a political subdivision alone is insufficient to constitute substantial compliance with the notice provision of the Political Subdivisions Tort Claims Act. Written notice must be sent to a person or entity designated in the act. The filing of a notice of claim under the Political Subdivisions Tort Claims Act is a condition precedent to the institution of a suit to which the act applies. The partial payment of an insurance claim by a political subdivision's insurer standing alone is insufficient to create a question of fact precluding summary judgment as to whether the political subdivision is equitably estopped to assert the 1-year filing requirement. *Keene v. Teten*, 8 Neb. App. 819, 602 N.W.2d 29 (1999).

3. Failure to Properly Serve Defendant within 6 Months of Filing Suit

   Neb. Rev. Stat. § 25–217 (Reissue 2008) is self-executing, so that an action is dismissed by operation of law, without any action by either the defendant or the court, as to any defendant who is named in the action and not served with process within 6 months after the complaint is filed. *Davis v. Choctaw Const., Inc.*, 280 Neb. 714, 789 N.W.2d 698 (2010).

4. Failure to Allege Lack of Jurisdiction, Insufficiency of Process, or Insufficiency of Service of Process Before Filing a Demand for Affirmative Relief
A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process may be asserted only under the procedure provided in the pleading rules adopted by the Supreme Court. If any of those defenses are asserted either by motion or in a responsive pleading and the court overrules the defense, an objection that the court erred in its ruling will be waived and not preserved for appellate review if the party asserting the defense either (a) thereafter files a demand for affirmative relief by way of counterclaim, cross-claim, or third-party claim or (b) fails to dismiss a demand for such affirmative relief that was previously filed. If any of those defenses are asserted either by motion or in a responsive pleading and the court overrules the defense, an objection that the court erred in its ruling on any issue, except the objection that the party is not amenable to process issued by a court of this state, will be waived and not preserved for appellate review if the party asserting the defense thereafter participates in proceedings on any issue other than those defenses. Neb. Rev. Stat. § 25-328(2) (Reissue 2016). See also Neb. Ct. R. Pldg. § 1112 (h).

5. Failure to Raise an Affirmative Defense
An affirmative defense must be specifically pled to be considered. *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010); *Rosberg v. Lingenfelter*, 246 Neb. 85, 516 N.W.2d 625 (1994); *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993).

The failure to request a retraction under Neb. Rev. Stat. § 25-840.01 (Reissue 2008) constitutes an affirmative defense which must be raised prior to trial. *Funk v. Lincoln-Lancaster Cty. Crime Stoppers, Inc.*, 294 Neb. 715, 885 N.W.2d 1 (2016).

6. Failure to Give Notice of Remedy Sought
When the plaintiff's pleadings in a declaratory judgment action put the defendant on notice of the remedy sought, a trial court may order relief which is clearly within the scope of its declaratory judgment. Conversely, when a plaintiff's requested relief is not clearly within the scope of a court's declaratory judgment, the court should grant such relief only for a plaintiff's concurrent or subsequent cause of action or the plaintiff's application for supplemental relief under this section. *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

7. Failure to Deny or Contradict Statements Made in Complaint or Answer
If the statements in the complaint are not denied in the answer or contradicted by the documentary proof exhibited, they shall be taken as true. Neb. Rev. Stat. § 25-2178 (Reissue 2016).

Uncontroverted statements in petition and answer will be taken as true. *Fairley v. Kemper*, 174 Neb. 565, 118 N.W.2d 754 (1962).

8. Failure to Move for Suppression of Evidence
Any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. The motion shall be filed in the district court where a felony is charged and may be made at any time after the information or indictment is filed, and must be filed at least ten days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. Where the charge is other than a felony, the motion shall be filed in the court where the complaint is pending, and must be filed at least ten days before trial or at the time of the plea to the complaint, whichever is the later, unless otherwise permitted by the court for good cause shown. Unless claims of unlawful search and seizure are raised by motion before trial as herein provided, all objections to use of the property as evidence on the ground that it was obtained by an unlawful search and seizure shall be deemed waived; *Provided,* that the court may entertain such motions to suppress after the commencement of trial where the defendant is surprised by the possession of such evidence by

the state, and also may in its discretion then entertain the motion where the defendant was not aware of the grounds for the motion before commencement of the trial. In the event that the trial court entertains any such motion after the commencement of trial, the defendant shall be deemed to have waived any jeopardy which may have attached. Neb. Rev. Stat. § 29-822 (Reissue 2016).

9. Failure to Conform with Supreme Court and Local Rules of Pleading
We strongly encourage you to read the entirety of the Nebraska Court Rules of Pleadings, the uniform district court rules, and any operative local court rules every time you draft a pleading.

10. Failure to Raise Facial Constitutional Challenge to Criminal Statute in Motion to Quash
All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue. *State v. Stone*, 298 Neb. 53, 902 N.W.2d 197 (2017). See, also, *Dobrusky v. State*, 140 Neb. 360, 299 N.W. 539 (1941); *Buthman v. State*, 131 Neb. 385, 268 N.W. 99 (1936).

11. Failure to Challenge Defects in Information With Plea in Abatement or Motion to Quash
Demurrer to information or plea of not guilty waives all defects which may be excepted to by motion to quash or plea in abatement. *Green v. State*, 116 Neb. 635, 218 N.W. 432 (1928); *Olsen v. State*, 114 Neb. 112, 206 N.W. 1 (1925); *Reinoehl v. State*, 62 Neb. 619, 87 N.W. 355 (1901). See also *Uerling v. State*, 125 Neb. 374, 250 N.W. 243 (1933).

12. Failure to Give Notice of Alibi
No evidence offered by a defendant for the purpose of establishing an alibi to an offense shall be admitted in the trial of the case unless notice of intention to rely upon an alibi is given to the county attorney and filed with the court at least thirty days before trial, except that such notice shall be waived by the presiding judge if necessary in the interests of justice. Neb. Rev. Stat. § 29-1927 (Reissue 2016).

13. Failure to Preserve Issues in Pleadings in Pretrial Memo
The issues set out in a pretrial order supplant those raised in the pleadings. *Jill B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial. To that end, litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken. *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996).

14. Failure to Offer Exhibits Attached to Motion for Summary Judgment into Evidence
Exhibits which are not offered, marked, or received by the trial judge at a summary judgment hearing may not be considered on appeal. *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 667 N.W.2d 222 (2003).

In order to receive consideration on appeal, any affidavits or other evidence used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. *Hogan v. Garden Cty.*, 264 Neb. 115, 646 N.W.2d 257 (2002).

15. Failure to Preserve Objections to Deposition Questions or Documents
". . . All objections made at time of the examination to the qualifications of the officer taking the deposition, the qualification of the interpreter, or to the manner of taking the deposition, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections." Neb. Ct. R. Disc. § 6-330(c)(1).

"An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)." Neb. Ct. R. Disc. § 6-330(c)(2).

"[Neb. Ct. R. Disc. § 6-330(c) has been divided into three subdivisions. The first addresses the order of examination and the officer's obligation to record all objections. It is substantially similar to former Rule 30(c). . . . The second subdivision is modeled on Rule 30(c)(2) of the Federal Rules of Civil Procedure and is designed to eliminate speaking objections that are made for the purpose of disrupting the questioning or suggesting how the deponent should answer a question. The third subdivision is taken from the last sentence of the former rule." Comment to Neb. Ct. R. Disc. § 6-330(c).

A party who fails to insist upon a ruling to a proffered objection waives that objection. *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004); *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

". . . because other similar evidence was admitted during the deposition and was not objected to, the objected-to evidence was cumulative" *Lowe v. Lancaster Cty. Sch. Dist. 0001*, 17 Neb. App. 419, 430, 766 N.W.2d 408, 417 (2009).

Where a litigant desires to offer all of a deposition in evidence, the proper procedure is to offer the deposition by question and answer, and thereby give the opposing party opportunity to object to the admission thereof, and also give opportunity to the trial court to rule thereon, subject to the statutory limitations applicable to depositions. Hill v. Interstate Transit Lines, 137 Neb. 110, 288 N.W. 508 (1939).

II. Trial Mistakes

1. Failure to Request that Voir Dire be on the Record

   Upon the request of the court or of any party, either through counsel or pro se, the court reporting personnel shall make or have made a verbatim record of anything and everything said or done by anyone in the course of trial or any other proceeding, including, but not limited to, 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. Neb. Ct. R. App. P. § 2-105(A)(2).

2. Use of Peremptory Challenge without Gender- or Race-Neutral Explanation

   State v. Lowe, 267 Neb. 782, 789-790, 677 N.W.2d 178, 184 (2004) (finding prosecution's explanation that "its purpose for using its peremptory strikes in the manner in question was not to remove all of the males from the jury, but was to have a mixture of both males and females on the final jury panel" was "anything but gender neutral."), abrogated on other grounds by *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

3. Failure to State Proper Basis for Objection

   To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence. *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010); *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006); *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997); *Washa v. Miller*, 249 Neb. 941, 546 N.W.2d 813 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

Neb. Rev. Stat. § 27-103(1) (Reissue 2016)
Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

> (a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection, if a specific ground was not apparent from the context*; or
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

The context of an objection does not include the objections made in a pretrial motion when that motion was filed almost 2 months prior to the evidentiary ruling and the connection between the objection and the pretrial motion was not unquestionably apparent. *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

An objection based upon insufficient foundation is a general objection. If such an objection is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Cotton v. State*, 281 Neb. 789, 810 N.W.2d 132 (2011). See, also, *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

4. Failure to Preserve Error Concerning Ruling on Motion in Limine

The overruling of a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review. *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

When a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence which was previously sought to be excluded by the motion is offered during trial. Error cannot be predicated on the admission of evidence to which no objection was made when the evidence was adduced. *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 532 N.W.2d 11 (1995); *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997).

In order to preserve any error before an appellate court, the party opposing a motion in limine which was granted must make an offer of proof outside the presence of the jury unless the evidence is apparent from the context in which the questions were asked. *Thrift Mart v. State Farm Fire & Cas. Co.*, 251 Neb. 448, 558 N.W.2d 531 (1997), overruled on other grounds by *Hornig v. Martel Lift Sys.*, 258 Neb. 764, 606 N.W.2d 764 (2000); *Gerkin v. Hy Vee, Inc.*, 11 Neb. App. 778, 660 N.W.2d 893 (2003).

5. Failure to Timely Move for Mistrial

A motion for mistrial should be made at the first reasonable opportunity. If not timely made, it is waived. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

6. Failure to Specifically Object to Expert's Qualifications

Not every attack on expert testimony amounts to a claim under under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Schafersman v. Agland Coop,* 262 Neb. 215, 631 N.W.2d 862 (2001). *City of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005).

"[I]n order to preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert/Schafersman*, a litigant must object on that basis and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence…." *State v. King*, 269 Neb. 326, 333, 693 N.W.2d 250, 258 (2005).

7. Failure to Object to Jury Instructions
   Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Russell v. Stricker*, 262 Neb. 853, 635 N.W.2d 734 (2001). See, also, *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014).

8. Asking a Negative and Confusing Question?
   The Eighth Circuit Court of Appeals has noted that the question, "Isn't it true that the officer found weapons and firearms at your home on November 27, 2013?" was "a negative and confusing question for the witness and fact finder and also invades the province of the fact finder as to what is true. A proper question would be: 'Did the officer find firearms at your home on November 27, 2013?'" *United States v. Hardison*, 859 F.3d 585, 588, fn 4 (8th Cir. 2017). Nebraska has not yet decided a similar issue.

III. Post-Trial/Appeal Mistakes

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

1. Failure to Correct Defective Verdict Before Jury is Discharged
   Defects in a verdict which are matters of substance must be corrected before the jury is discharged; therefore, the trial court could not reassemble the jury, interrogate it as to its intended verdict, and then modify the amount of the verdict. *Eich v. State Farm Mut. Automobile Ins. Co*., 208 Neb. 714, 305 N.W.2d 621 (1981).

   The verdict shall be written, signed by the foreman, and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury before they are discharged, be corrected by the court. Neb. Rev. Stat. § 25-1123 (Reissue 2016).

   When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out for further deliberation. Neb. Rev. Stat. § 25-1124 (Reissue 2016).

   A district court has no authority to set aside a judgment after the term when any mistake, inadvertence, or neglect was the party's own. The purpose of Neb. Rev. Stat. § 25-2001(3) (Reissue 1989) is to address mishaps beyond a party's control. *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

2. Failure to Move for a New Trial
   In criminal cases alleged errors of the trial court not referred to in the motion for a new trial will not be considered on appeal. Alleged errors must be pointed out to the trial court in a motion for a new trial and a ruling obtained thereon. *State v. Seger*, 191 Neb. 760, 217 N.W.2d 828 (1974).

   An aggrieved party wishing a mistrial because of an opponent's misconduct during argument is required to move for such before the cause is submitted. In addition to being timely, a motion for mistrial must be premised upon actual prejudice, not the mere possibility of prejudice. *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

3. Failure to File Assignment of Errors 10 Days after BOE in Appeal from County to District Court
   Within 10 days of filing the bill of exceptions in an appeal to the district court, the appellant shall file with the district court a statement of errors which shall consist of a separate, concise

statement of each error a party contends was made by the trial court. Each assignment of error shall be separately numbered and paragraphed. Consideration of the cause will be limited to errors assigned and discussed, provided that the district court may, at its option, notice plain error not assigned. This rule shall not apply to small claims appeals. Unif. Dist. Ct. R. § 6-1518.

4. Failure to Timely Appeal

The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and, except as otherwise provided in sections 25-2301 to 25-2310 and 29-2306 and subsection (4) of section 48-638, by depositing with the clerk of the district court the docket fee required by section 33-103. Neb. Rev. Stat. § 25-1912(1) (Reissue 2016).

A motion which merely seeks to correct clerical errors or one seeking relief that is wholly collateral to the judgment is not a motion to alter or amend a judgment, and the time for filing a notice of appeal runs from the date of the judgment. *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open. See Neb. Rev. Stat. § 25-2221.

All courts and their offices may be closed on Saturdays, Sundays, days on which a specifically designated court is closed by order of the Chief Justice of the Supreme Court, and these holidays: New Year's Day, January 1; Birthday of Martin Luther King, Jr., the third Monday in January; President's Day, the third Monday in February; Arbor Day, the last Friday in April; Memorial Day, the last Monday in May; Independence Day, July 4; Labor Day, the first Monday in September; Columbus Day, the second Monday in October; Veterans Day, November 11; Thanksgiving Day, the fourth Thursday in November; the day after Thanksgiving; Christmas Day, December 25; and all days declared by law or proclamation of the Governor to be holidays. Such days shall be designated as nonjudicial days. If any such holiday falls on Sunday, the following Monday shall be a holiday. If any such holiday falls on Saturday, the preceding Friday shall be a holiday. Court services shall be available on all other days. If the date designated by the state for observance of any legal holiday pursuant to this section, except Veterans Day, is different from the date of observance of such holiday pursuant to a federal holiday schedule, the federal holiday schedule shall be observed. See Neb. Rev. Stat. § 25-2221.

5. Failure to Include Summary Application Form in an Error Proceedings Appeal by a County Attorney

Application for leave to commence an original action shall be made by filing with the Supreme Court Clerk a verified petition setting forth the action. Applicant must also file with the clerk a statement setting forth the basis of the court's jurisdiction and the reasons which make it necessary to commence the action here. One copy of each must accompany the petition and the statement. No oral argument will be permitted except as may be ordered by the court. Neb. Ct. R. App. P. § 2-115(A)(2).

6. Failure to Send Copy of Praecipe for Bill of Exceptions Directly to Court Reporter
Neb. Ct. R. App. P. § 2-105(B)(1)

> (a) Appellant shall file a request to prepare a bill of exceptions in the office of the clerk of the district court at the same time the notice of appeal is filed. At the same time, appellant shall deliver a copy of the request to the court reporting personnel.
> (b) The request shall specifically identify each portion of the evidence and exhibits offered at any hearing which the party appealing believes material to issues to be presented to the Supreme Court for review. . .
> (c) If the appellee believes additional evidence should be included in the bill of exceptions, the appellee shall, within 10 days . . . file a supplemental request for preparation of bill of exceptions. The request shall be filed with the clerk of the district court, and a copy shall be delivered simultaneously to the court reporting personnel by the appellee.

7. Failure to Properly Request Extension of Time for Record Preparation
See Neb. Ct. R. App. P. § 2-105(B)(4): Request for additional time may be made by any party by motion, which must be accompanied by the original copy of the affidavit of the court reporting personnel setting forth specific information; and a request for extension must be made not later than 7 days prior to the expiration of the time originally prescribed (or from extension previously granted), AND each request shall bear the approval of the appointing (trial) judge.

8. Failure to Preserve Separation of Powers Constitutional Argument
Except in the most unusual of cases, a separation of powers constitutional argument must be raised in the district court in order to be preserved on appeal. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

9. Failure to Assign AND Argue Errors on Appeal
Neb. Ct. R. App. P. § 2-109(D)(1): The brief of appellant, or plaintiff in an original action, shall contain the following sections, under appropriate headings, and in the order indicated:

> . . .
> (e) A separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed. The court may, at its option, notice a plain error not assigned
> . . .

An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014).

Errors argued but not assigned will not be considered on appeal. *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).