ERROR PRESERVATION IN CIVIL APPEALS IN IOWA: PERSPECTIVES ON PRESENT PRACTICE

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Some of the material contained herein was initially prepared for Judge Vaitheswaran's presentation to the Iowa Trial Lawyers Association's 2005 Annual Convention. *See* Anuradha Vaitheswaran & Thomas A. Mayes, Giving Yourself A Chance on Appeal: The Latest Word on Error Preservation (Nov. 4, 2005). The views expressed herein are solely those of the authors.

I. INTRODUCTION

"[A] lawyer should begin preparing for appeal as soon as the case comes in the door."[1] In spite of the rule requiring appellate litigants to state in their briefs how error was preserved as to each issue presented on appeal,[2] several recent Iowa Supreme Court opinions on error preservation[3] and writings in law reviews and textbooks on the topic;[4]

1. Ronald A. Krauss, *The Devil and the Trial Lawyer*, FOR THE DEF., Mar. 2002, at 25, 27.

2. IOWA R. APP. P. 6.14(1)(f), (2); *see also* IOWA R. APP. P. 6.151(2)(d) (requiring parties to state how error was preserved in petitions on appeal in certain juvenile cases).

3. *See, e.g.*, Teamsters Local Union No. 421 v. City of Dubuque, 706 N.W.2d 709, 713 (Iowa 2005); Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24, 27–28 (Iowa 2005); DeVoss v. State, 648 N.W.2d 56, 60–63 (Iowa 2002).

4. *See* Robert G. Allbee & Kasey W. Kincaid, *Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner*, 35 DRAKE L. REV. 1 (1985); *see also*

issues concerning preservation of error in trial courts continue to arise. As a general rule, reversal may only be predicated on an "issue presented and decided by the district court."[5] This deceptively simple phrase is pregnant with hidden meaning. This Article explores the roots of the error preservation rule and its present application by Iowa's appellate courts. This Article focuses on both parts of this standard: "presented to" and "decided by."[6] The intent of this Article is to provide updated guidance to litigators on how to properly preserve error in civil cases.[7]

Part II explores the fundamentals of error preservation,[8] including the rationale and source of the rules,[9] the scope of error preservation principles,[10] and presenting the issue of error preservation to appellate courts.[11] Part III discusses how and when an issue is raised in the trial court.[12] Part IV discusses how and when an issue is decided by the trial court, when this matters, and what to do if no decision was made and one is required.[13] Finally, Part V provides an in-depth discussion of error preservation issues that may pose conceptual or practical difficulties for courts and counsel.[14]

IOWA STATE BAR ASS'N, APPELLATE PRACTICE MANUAL 49–59 (1998) [hereinafter IOWA STATE BAR ASS'N]; ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 37–52 (law student and moot court ed. 1985); Mason Ladd, *Assignment of Errors and the New Iowa Supreme Court Rules*, 21 IOWA L. REV. 693 (1936); Note, *Some Aspects of Assignment of Error*, 2 DRAKE L. REV. 9 (1952).

5. *Otterberg*, 696 N.W.2d at 28.

6. *Id.*

7. This discussion is limited to error preservation in the civil context, although this Article does discuss select criminal cases when the rules announced therein are applicable to civil practice. For information on preservation of error in criminal cases, see Kermit L. Dunahoo & Tim A. Thomas, *Preservation of Error and Making the Record in the Iowa Criminal Trial and Appellate Processes*, 36 DRAKE L. REV. 45 (1987). The major difference between error preservation in civil cases and error preservation in criminal cases is that ineffective-assistance-of-counsel analysis is available in criminal cases, including the ability to recast failure of trial counsel to preserve error as the provision of ineffective assistance. *See, e.g.*, IOWA STATE BAR ASS'N, *supra* note 4, at 49.

8. *See infra* Part II.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.C–D.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

II. ERROR PRESERVATION FUNDAMENTALS

A. *Historical Bases and Rationales*

Many litigants may view error preservation rules as traps or technicalities that are used by judges to avoid the necessity of deciding appeals on their merits.[15] This characterization is improper, as it is often as much work (if not more) to determine whether error was preserved than to decide the merits of the appeal.[16]

Even if one conceptualizes error preservation rules as traps or technicalities, they are traps or technicalities that serve good purposes.[17] Important policies underlie error preservation rules. These policies are all grounded in the "societal belief in the efficacy of the adversary system."[18] First, the adverse party should not be surprised by new arguments or issues on appeal.[19] Second, it is unfair to reverse a trial court based on arguments not before it.[20] Third, raising issues for the first time on appeal is not a prudent use of scarce judicial resources.[21] If a potential error were called to the trial court's attention, the trial court, theoretically, would correct the error and eliminate the need for appellate review.[22] Fourth, the error preservation rules serve to deter counsel from strategically declining to raise objections at trial.[23] Finally, "[a]llowing new issues on appeal also may diminish the need to be fully prepared for the trial itself, a result

15. *But see* Smith v. Middle States Utils. Co., 275 N.W. 158, 161 (Iowa 1937) ("The rules of this court were not adopted for the purpose of creating a trap for the unwary nor for the purpose of disposing of appeals on refined technicalities instead of on their merits.").

16. *See, e.g.*, Vlieger v. Farm for Profit, Research & Dev., Inc., No. 04-876, 2005 WL 1963002 (Iowa Ct. App. Aug. 17, 2005) (presenting several complicated error preservation issues).

17. *See, e.g.*, *Smith*, 275 N.W. at 161.

18. Allbee & Kincaid, *supra* note 4, at 4.

19. Patterson v. Stiles, 6 Clarke 54, 56 (Iowa 1858).

20. *See, e.g.*, DeVoss v. State, 648 N.W.2d 56, 60 (Iowa 2002); MARTINEAU, *supra* note 4, § 3.2.

21. Allbee & Kincaid, *supra* note 4, at 4.

22. *See* MARTINEAU, *supra* note 4, § 3.2; *cf.* Ladd, *supra* note 4, at 693 ("[C]orrecting errors on appeal is a poor substitute for trying a case properly in the first instance.").

23. *See DeVoss*, 648 N.W.2d at 60; Allbee & Kincaid, *supra* note 4, at 4 & n.7 ("By declining to review errors not raised at the trial level, the appellate court effectively precludes counsel from consciously concealing error at trial—which could be corrected given an appropriate objection or request—and thereafter seeking reversal on appeal."); *see also* MARTINEAU, *supra* note 4, § 3.2.

contrary to the current concern with the competency of trial attorneys."[24]

Additionally, Iowa's error preservation rules are not recent innovations. They have been part of Iowa law since statehood,[25] and have been the subject of much scholarly commentary.[26] In 1855, the Iowa Supreme Court stated:

> A part of the legal substance is, that parties shall be advised by all motions, demurrers, and pleas, what specific defect is aimed at, and what is the issue made, and not be surprised, even in the appellate court, by having defects pointed out, and issues made, that are not indicated by such motion and pleas; and which defects might have been cured, if the party having the defective pleading, had been advised of the claimed defect by proper specification.[27]

If, during the long experience with error preservation rules, the Iowa Supreme Court had concluded the rules no longer served their purposes, one would assume the court would have softened its stance. The court's continuing adherence to and restatement of error preservation rules[28] suggests these rules still serve their articulated functions.

It is worth remembering that while Iowa's error preservation rules may be court rules, they have constitutional underpinnings.[29] Iowa's constitution provides:

> The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.[30]

The Iowa Code contains a similar provision.[31] Thus, in law-tried

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24. MARTINEAU, *supra* note 4, § 3.2.

25. *See, e.g.*, Danforth, Davis & Co. v. Carter & May, 1 Clarke 546, 552–53 (Iowa 1855).

26. *See, e.g.*, Ladd, *supra* note 4; Note, *supra* note 4.

27. *Danforth, Davis & Co.*, 1 Clarke at 552–53.

28. *See, e.g.*, Bill Grunder's Sons Constr., Inc. v. Ganzer, 686 N.W.2d 193, 197–98 (Iowa 2004).

29. *See, e.g.*, Ladd, *supra* note 4, at 696; Note, *supra* note 4, at 9.

30. IOWA CONST. art. V, § 4.

31. *See* IOWA CODE § 602.4102(1) (2005) (defining the jurisdiction of the

cases, the constitution constrains Iowa's appellate courts "to a consideration of the errors committed in the courts below."[32] If the alleged error was not pointed out to the trial court, it is hard to see how the trial court's failure to rule on an objection that was never made can properly be called an error of law amenable to correction.[33] This constitutional provision marks the boundaries of the appellate courts' ability to hear cases and grant relief and requires parties to preserve error in some manner in law-tried cases.[34]

With regard to equity cases, although review is de novo, there is a plausible argument that error preservation is required by the constitution.[35] The Iowa Supreme Court's constitutional power to consider cases in chancery is limited to "that [jurisdiction] possessed by chancery courts at the time of the adoption of the constitution."[36] The practice in equitable matters was to place "all conceivable objections" on the record, with the trial court reserving ruling or not ruling on the objections at all.[37] According to the Iowa Supreme Court,

> The purpose is to preserve a complete record of the evidence for the trial and the appellate courts, leaving to them the rejection of inadmissible testimony in deciding the issues. In the review de novo the appellate court, if it finds the trial court has erred, may then decide the case on the record made without a remand.[38]

Thus, although appellate review in equitable matters is de novo, it is a de novo review of the record made in the trial court; and this may be a

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Iowa Supreme Court).

32. Note, *supra* note 4, at 9. *Contra* Edson R. Sunderland, *Improvement of Appellate Procedure*, 26 IOWA L. REV. 3, 11–12 (1940) (arguing new questions should be considered in the exercise of the appellate process).

33. *See, e.g.*, MARTINEAU, *supra* note 4, § 3.2.

34. *See generally* Petersen v. N.Y. Life Ins. Co., 280 N.W. 521, 522 (Iowa 1938) (stating "a law case . . . brought upon [a] theory . . . of equitable jurisdiction and so tried without objection . . . will be so treated" by an appellate court); Schulte v. Chi., Minneapolis & St. Paul Ry. Co., 99 N.W. 714, 716 (Iowa 1904) (holding that where no motion for a new trial is presented to the trial court, an appellate court cannot consider "whether the evidence was sufficient to sustain the verdict").

35. Lessenich v. Sellers, 93 N.W. 348, 349 (Iowa 1903).

36. *Id.*

37. O'Dell v. O'Dell, 26 N.W.2d 401, 417 (Iowa 1947).

38. *Id.* The Iowa Supreme Court continues to endorse this practice. *See, e.g.*, Sille v. Shaffer, 297 N.W.2d 379, 380–81 (Iowa 1980); Allbee & Kincaid, *supra* note 4, at 10.

constitutional rule.[39] De novo review, however, is not a constitutionally sound excuse for failure to present arguments to the trial court in equitable cases.[40]

This Article's consideration of the constitutional and statutory underpinnings of error preservation rules is not a mere academic exercise. There is also practical importance. While the primary focus of error preservation may be cases and court rules, the constitution and parallel statutes provide an outer and absolute boundary to the appellate courts' abilities to refashion the law of error preservation. Some of the opinions of the Iowa Supreme Court and the Iowa Court of Appeals may reflect a view that error preservation rules are judge-made and, consequently, subject to judicial modification. While this may be true at the periphery of the rule, the core constitutional principle cannot be altered solely by an opinion or court order.[41] Put another way, the mechanics of error preservation may be subject to a court's revision; however, the requirement that error was in

39. *See supra* notes 29–30 and accompanying text.

40. Some opinions suggest Iowa's appellate courts may reach unpreserved issues in equity cases, especially family law cases. *See, e.g.*, *In re* Marriage of Stafford, 386 N.W.2d 118, 122 (Iowa Ct. App. 1986) ("Although the issue of sole custody has not technically been preserved in this case, our responsibility remains to determine the rights of the parties anew."). These opinions, however, do not consider the potential constitutional nature of the error preservation requirement. To the extent these opinions do not consider the constitutional limitations on reaching unpreserved errors, they are of no assistance in answering this question.

41. While this Article suggests the constitution's error preservation rule would take precedence over conflicting judge-made error preservation maxims, this Article expresses no opinion on the issue of whether the constitution's error preservation rule should take precedence when it collides with another provision of the constitution. In *Metz v. Amoco Oil Co.*, the dissent stated that court-imposed error preservation rules should yield to fundamental fairness. Metz v. Amoco Oil Co., 581 N.W.2d 597, 601 (Iowa 1998) (Lavorato, J., dissenting). If the error preservation rule at issue is judge-made, this is certainly a fair statement. If, however, the error preservation rule is constitutionally required, the statement is subject to further qualification. If the notion of fundamental fairness does not rise to the level of constitutional significance, the constitutionally required error preservation rule should take precedence. If, however, the breach of fundamental fairness rises to constitutional severity such as a violation of the due process clause laid out in Article I, section 9 of the Iowa Constitution, then the appellate court must mediate the two competing constitutional claims. As an example of the latter instance, consider error preservation issues in criminal appeals. In those cases, courts may reach unpreserved issues under an ineffective-assistance-of-counsel analysis. There, the constitutional guarantee of assistance of counsel trumps rules of error preservation. *See, e.g.*, IOWA STATE BAR ASS'N, *supra* note 4, at 49 (advising defense counsel to raise the issue of ineffective-assistance-of -counsel for any error that was not properly preserved at trial).

some way preserved appears to be a constitutional requirement.[42] Fidelity to this core constitutional principle, especially in law-tried cases, should always be a consideration.

B. *Scope of the Error Preservation Rule*

The scope of the error preservation principle encompasses nearly every possible issue in every possible case. With certain narrow exceptions, all issues must be preserved for review.[43] The error preservation rule applies to constitutional claims.[44] It applies to the construction of statutes.[45] It applies to the interpretation of contracts.[46] It applies to proof of foreign law.[47] It applies to contentions that prior rulings are the law of the case.[48]

Parties may not raise new theories after trial,[49] even in equitable matters.[50] This includes seeking new remedies[51] and raising new defenses.[52] The bar against raising new defenses applies to standing,[53] laches,[54] statutes of limitations,[55] and misjoinder of parties.[56]

In actions seeking judicial review of the decision of an administrative body or local board or commission, the alleged error must have been raised before both the administrative agency and the district court, although it

42. *See supra* note 41 and accompanying text.

43. *See* discussion and footnotes *infra* Part II.F.

44. *See* Strand v. Rasmussen, 648 N.W.2d 95, 100–01 (Iowa 2002) (equal protection and due process issues were not preserved).

45. *See* Marshfield Homes, Inc. v. Eichmeier, 176 N.W.2d 850, 853 (Iowa 1970).

46. *See* Jackson v. Farm Bureau Mut. Ins. Co., 528 N.W.2d 516, 517 (Iowa 1995); State Farm Mut. Auto. Ins. Co. v. Pflibsen, 350 N.W.2d 202, 206–07 (Iowa 1984).

47. *See* Rosenberg v. Jackson, 247 N.W.2d 216, 218 (Iowa 1976).

48. *See* Davison v. State, 671 N.W.2d 519, 521 (Iowa Ct. App. 2003).

49. Field v. Palmer, 592 N.W.2d 347, 351 (Iowa 1999). *But see* MARTINEAU, *supra* note 4, § 3.8 (stating, as a general rule, many appellate courts consider affirming on theories not raised in the trial court).

50. Valley Brook Dev., Inc. v. City of Bettendorf, 580 N.W.2d 730, 731 (Iowa 1998); Hyler v. Garner, 548 N.W.2d 864, 870 (Iowa 1996).

51. Tigges v. City of Ames, 356 N.W.2d 503, 507 (Iowa 1984).

52. Chiavetta v. Iowa Bd. of Nursing, 595 N.W.2d 799, 802 (Iowa 1999).

53. Des Moines Metro. Area Solid Waste Agency v. City of Grimes, 495 N.W.2d 746, 750 (Iowa 1993).

54. Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 520 (Iowa 1980).

55. McCleeary v. Wirtz, 222 N.W.2d 409, 416 (Iowa 1974).

56. Salter v. Freight Sales Co., 357 N.W.2d 38, 43 (Iowa Ct. App. 1984).

does not necessarily have to be decided by the district court.[57] Claims of error must be raised before the agency to be preserved for judicial review;[58] however when claims are constitutional, the review is de novo.[59]

Counsel's belief that the trial court will not sustain an objection does not relieve counsel from the error preservation rules.[60] Similarly, counsel's belief that raising an issue and obtaining a ruling will anger, annoy, or upset the trial judge does not create an exception to the error preservation rules.[61]

C. *Briefing the Issue of Error Preservation*

Iowa's court rules require appellants to state in their briefs "how the issue was preserved for review, with references to the places in the record where the issue was raised and decided."[62] Appellees must also address error preservation in their briefs,[63] even if not addressed in the appellant's brief.[64] In addition, petitions on appeal in certain juvenile cases must state "how the issues arose and how they were preserved for appeal."[65] Like a nagging cough that will not clear up, ignoring error preservation problems will not make things better.[66] Even if the litigants do not address error preservation, an appellate court may raise the issue on its own motion.[67]

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57. Dubuque Cmty. Sch. Dist. v. Pub. Employment Relations Bd., 424 N.W.2d 427, 431 (Iowa 1988); Osborne v. Iowa Natural Res. Council, 336 N.W.2d 745, 748 (Iowa 1983).

58. *See, e.g.*, Pruss v. Cedar Rapids/Hiawatha Annexation Special Local Comm., 687 N.W.2d 275, 285 (Iowa 2004).

59. Immaculate Conception Corp. v. Iowa Dep't of Transp., 656 N.W.2d 513, 515 (Iowa 2003).

60. *In re* C.D., 508 N.W.2d 97, 100 (Iowa Ct. App. 1993).

61. *Cf.* Martinez v. Molinar, 953 S.W.2d 399, 404 (Tex. App. 1997) ("If fear of vexing the trial court excuses the failure to preserve error, the rules requiring preservation would be eviscerated.").

62. IOWA R. APP. P. 6.14(1)(f).

63. IOWA R. APP. P. 6.14(2) ("Each division of appellee's argument shall begin with a discussion of whether appellee agrees with appellant's statements regarding the scope of review and preservation of the issue for appellate review.").

64. IOWA STATE BAR ASS'N, *supra* note 4, at 49.

65. IOWA R. APP. P. 6.151(2)(d).

66. *See, e.g.*, IOWA STATE BAR ASS'N, *supra* note 4, at 49 ("Above all, do not ignore error preservation problems, they will not go away."). *But see* Ladd, *supra* note 4, at 709 (stating "in numerous instances where there has been non-compliance with the rules and no complaint made by the appellee, the court has made no mention of the fact, but has considered the appeal in full and rendered a decision upon the merits").

67. Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 471 (Iowa 2000)

Rather than ignoring the problem, it would be better to make the best possible argument for error preservation. In the worst case scenario, counsel who discovers that error was not preserved may be able to argue: (1) error preservation is not necessary for a particular issue;[68] (2) the issue is related to an issue on which error was preserved;[69] or (3) the adverse party's argument actually preserved error.[70]

However error is preserved, it is not preserved by filing a notice of appeal. While this is a common statement in briefs,[71] it is erroneous, for the notice of appeal has nothing to do with error preservation. In fact, the two concepts are mutually exclusive. As a general rule, the error preservation rules require a party to raise an issue in the trial court and obtain a ruling from the trial court.[72] In contrast, filing a notice of appeal actually divests the trial court of jurisdiction.[73] It is a logical impossibility to raise an issue and obtain a decision from a district court by filing a document that divests the district court of jurisdiction. While a timely notice of appeal may be necessary for the appellate courts to acquire jurisdiction, it is not sufficient to preserve error.

D. *Presenting the Record to the Appellate Court*

A record of some form must be available for the appellate court to review.[74] If the proceedings were not reported (e.g., jury selection, jury argument, motion hearings) and the grounds for appeal concern matters presented in the unreported hearing, counsel has two options. First,

("The Coop's failure to raise the error preservation issue when it had the opportunity to do so in the district court does not prevent this court from considering the error preservation issue on appeal.").

68. *See infra* notes 91–97 and accompanying text.

69. *See infra* note 87 and accompanying text.

70. *See infra* note 88 and accompanying text.

71. The *Appellate Practice Manual* apparently embraces this view. IOWA STATE BAR ASS'N, *supra* note 4, at 59. However, the opinion cited by the manual does not state the notice of appeal is sufficient to preserve error. Rather, it states a timely notice of appeal is necessary to confer jurisdiction upon the supreme court. *See In re* Fenchel, 268 N.W.2d 207, 208 (Iowa 1978).

72. *See, e.g.*, Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24, 28 (Iowa 2005).

73. *See, e.g.*, IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 628 (Iowa 2000).

74. *See, e.g.*, Metz v. Amoco Oil Co., 581 N.W.2d 597, 600 (Iowa 1998) ("There is therefore nothing for us to review on this issue."). *See also* MARTINEAU, *supra* note 4, § 3.12; Allbee & Kincaid, *supra* note 4, at 3; Ladd, *supra* note 4, at 696 (stating that "corrections cannot be made unless the court is advised of what it is to examine and correct").

counsel may prepare a bill of exceptions under Iowa Rule of Civil Procedure 1.1001,[75] which typically must be filed within ten days of the "verdict, report, or decision."[76] Alternatively, counsel may: (1) prepare a statement of evidence pursuant to Iowa Rule of Appellate Procedure 6.10(3); and (2) have that "statement and any objections or proposed amendments . . . submitted to the district court for settlement and approval"—as required by that rule.[77] Additionally, in administrative law cases, counsel must ensure the record made before the agency is provided to the court for review.[78]

In certain circumstances, a transcript is not required if the balance of the record discloses the alleged error. For example, no transcript was necessary in an appeal where the dispositive issue was whether the district court erred in granting the appellee's motion to dismiss. [79] As the appeal could be decided based on the pleadings, the Iowa Court of Appeals rejected the appellee's contention that the appellant failed to preserve error by not providing a transcript.[80]

Furnishing a record in small claims cases poses additional challenges. A court reporter's record will not be available unless a party provides for a court reporter at the party's expense.[81] Typically, the record in a small claim case is composed of the judge's notes and perhaps an optional sound recording of the hearing.[82] If, on appeal from the small claims court's decision, the judge concludes that the record is inadequate to decide the appeal, the judge may order the taking of additional evidence.[83] The judge must then take notes of the additional evidence, but the proceedings "shall not be reported by a certified court reporter."[84] As there are no post-trial motions permitted under the small claims procedure,[85] counsel who believe the record of the small claims trial, as well as any additional evidence taken on appeal, inadequately reflect the issues to be raised on discretionary

75. IOWA R. CIV. P. 1.1001. For two brief discussions of the procedure under this rule, see IOWA STATE BAR ASS'N, *supra* note 4, at 59, and Allbee & Kincaid, *supra* note 4, at 17.

76. IOWA R. CIV. P. 1.1007.

77. IOWA R. APP. P. 6.10(3).

78. Alvarez v. IBP, Inc., 696 N.W.2d 1, 2 (Iowa 2005).

79. Bruce v. Sarver, 472 N.W.2d 631, 632 (Iowa Ct. App. 1991).

80. *Id.*

81. IOWA CODE § 631.11(3) (2005).

82. *Id.*

83. *Id.* § 631.13(4)(a).

84. *Id.*

85. *See id.* § 631.7(2).

review[86] should follow the procedure contained in Iowa Rule of Appellate Procedure 6.10(3) because the procedure for filing a bill of exceptions will not be available.

E. *What If Error Was Not Preserved?*

Assuming an exception to the error preservation rules does not apply to the issue that counsel seeks to appeal,[87] and the issue was not raised in or decided by the district court, counsel must show how that issue is "incident to a determination of other issues properly presented[,]"[88] including issues raised in the trial court by the adverse party.[89] It is not, however, entirely clear what "incident to a determination of other issues properly presented"[90] actually means. There is no indication of the strength of the required nexus between the properly preserved issue and the unpreserved issue; counsel should rely on this safety valve only as a last resort.

F. *Two Exceptions to Error Preservation*

There are two well-recognized exceptions to the error preservation rules: subject matter jurisdiction and certain evidentiary issues. First, a challenge to subject matter jurisdiction may be raised for the first time on appeal[91] or the appellate court may raise it sua sponte.[92] Subject matter jurisdiction, which concerns a court's power to hear a certain case, "cannot be given by consent and cannot be waived."[93] For these reasons, it need not be raised in the trial court.[94]

It is important to contrast subject matter jurisdiction, or the authority

86. *See id.* § 631.16; *see also* IOWA R. APP. P. 6.201–.203.

87. *See infra* Part II.F.

88. Presbytery of Se. Iowa v. Harris, 226 N.W.2d 232, 234 (Iowa 1975). This case was last cited for its error preservation holding in 1983, but has not been overruled. *See* Messina v. Iowa Dep't of Job Serv., 341 N.W.2d 52, 61 (Iowa 1983).

89. *See, e.g.*, Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24, 28 (Iowa 2005); State v. Martin, 385 N.W.2d 549, 552 (Iowa 1986).

90. *Presbytery of Se. Iowa*, 226 N.W.2d at 234.

91. DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002); MARTINEAU, *supra* note 4, § 3.5.

92. *See, e.g.*, Osage Conservation Club v. Bd. of Supervisors, 611 N.W.2d 294, 298–99 (Iowa 2000); State *ex rel.* Vega v. Medina, 549 N.W.2d 507, 508 (Iowa 1996). *See generally* Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1958).

93. MARTINEAU, *supra* note 4, § 3.5; *see also* Allbee & Kincaid, *supra* note 4, at 18 n.94.

94. MARTINEAU, *supra* note 4, § 3.5.

to hear a broad class of cases, with jurisdiction of the case—the additional requirements needed in order to confer authority to hear a particular subset of cases. Unlike subject matter jurisdiction,[95] jurisdiction of the case may be conferred by consent, waiver, or estoppel.[96] Although there is apparently no appellate opinion clearly linking jurisdiction of the case and error preservation, it appears that failure to raise lack of such jurisdiction in the district court constitutes waiver and is a bar to presenting the issue on appeal.

Second, appellate courts may affirm a trial court's evidentiary rulings for reasons not urged below, but the court will not reverse based on evidentiary grounds not raised.[97] The Iowa Supreme Court has stated the rationale for this rule: "Perhaps, one reason for the exception is the realization that on retrial the error could easily be corrected."[98]

G. *What About "Plain Error"?*

Some states, as well as the federal appellate courts, will consider issues not asserted in the trial court where the error is "fundamental or plain."[99] "These courts ignore the procedural requirements to avoid affirming a judgment they consider to be erroneous."[100] The "plain error" doctrine has not been adopted in Iowa[101] and enjoys little support in reported Iowa cases.[102]

While the plain error rule has been adopted in the federal courts, in part because of its inclusion in the Federal Rules of Evidence,[103] it is not included in the Iowa Rules of Evidence,[104] and the scope of the plain error rule in the Eighth Circuit, at least in civil cases, appears to be quite narrow. In *Wiser v. Wayne Farms, Inc.*, the Eighth Circuit stated it would only consider unpreserved error when to not do so would "seriously affect the

95. *See supra* notes 91–92.
96. *See, e.g.*, *In re* Estate of Falck, 672 N.W.2d 785, 790 (Iowa 2003).
97. DeVoss v. State, 648 N.W.2d 56, 62 (Iowa 2002).
98. *Id.*
99. MARTINEAU, *supra* note 4, § 3.6 (internal quotation marks omitted).
100. *Id.*
101. *See, e.g.*, IOWA STATE BAR ASS'N, *supra* note 4, at 53–54; Allbee & Kincaid, *supra* note 4, at 14.
102. *See, e.g.*, Metz v. Amoco Oil Co., 581 N.W.2d 597, 601 (Iowa 1998) (Lavorato, J., dissenting).
103. FED. R. EVID. 103(d).
104. *See, e.g.*, Allbee & Kincaid, *supra* note 4, at 14.

fairness, integrity, or public reputation of judicial proceedings."[105]

III. STEP ONE: WAS THE ISSUE RAISED BELOW?

As a general rule, all issues asserted on appeal as a basis for reversal need to first be raised in the district court.[106] Often, but not always, it is obvious whether an issue was presented to the trial court. The two controversies that most frequently arise under this step concern (1) whether the argument in the trial court was sufficient to call the issue to the trial court's attention;[107] and (2) whether the argument was presented to the trial court in a timely fashion.[108]

A. *What Is Sufficient to Raise an Issue?*

Simply stated, an issue must be raised with sufficient specificity to alert the court to the claimed error.[109] If an issue is only raised in the pleadings and has not been made an issue at trial or in pretrial motions, it is not preserved for appellate review.[110] Similarly, motions attacking an adverse party's pleading "must specify how the pleading they attack is claimed to be insufficient."[111] The level of required specificity defies easy explanation and is best understood by examples—most of which arise in the context of evidentiary objections[112] or jury instructions.[113] As a general rule, a statement that an instruction is "not the law of Iowa"[114] is "not sufficiently definite to have alerted the trial court of the error claimed so as to have given the court a chance to correct it."[115] Likewise, where an objection is raised only to the second sentence of a jury instruction, the appellant cannot complain about the first sentence of the instruction on

105. Wiser v. Wayne Farms, 411 F.3d 923, 927 (8th Cir. 2005) (quoting United States v. Olano, 507 U.S. 725, 736 (1993) (internal quotation marks omitted)).

106. DeVoss v. State, 648 N.W.2d 56, 63 (Iowa 2002).

107. *See supra* Part II.A.

108. *See supra* Part II.B.

109. Office of Consumer Advocate v. Iowa State Commerce Comm'n., 465 N.W.2d 280, 283 (Iowa 1991).

110. *See* Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum, and Walker, P.L.C., 599 N.W.2d 677, 682 (Iowa 1999).

111. IOWA R. CIV. P. 1.421(6).

112. *See, e.g.*, IOWA STATE BAR ASS'N, *supra* note 4, at 52; Allbee & Kincaid, *supra* note 4, at 9–10.

113. *See, e.g.*, Estate of Hagedorn v. Peterson, 690 N.W.2d 84, 91 (Iowa 2004).

114. Grefe & Sidney v. Watters, 525 N.W.2d 821, 825 (Iowa 1994).

115. *Id.*

appeal.[116] Similarly, vague evidentiary objections, such as "incompetence" or "calls for an opinion and conclusion," without more detail, are insufficient to preserve error.[117] In an extreme example, the word "objection," without more, was insufficient to preserve error.[118] Motions to strike evidence must also satisfy the specificity requirement.[119]

In contrast, where the objection or issue is sufficiently clear, it is specific enough to preserve error.[120] In *Collister v. City of Council Bluffs*[121] the court stated:

> The city objected to this instruction claiming that "there is no such liability upon the City for failing to warn the traveling public of anything." It cited to Iowa Code section 668.10(1) (1991) and our decision in *Foster v. City of Council Bluffs,* 456 N.W.2d 1 (Iowa 1991), claiming that it was immune from liability for failing to warn. The city requested that the jury be instructed not to assign fault to the city "for failure to warn the Plaintiff of any hazards or dangers, even if the hazards or dangers are created by the City."
>
> Richard contends that the city's objection was not specific enough to preserve error. We disagree. The city claimed at trial that it had absolutely no duty to warn of the disabled vehicle—the same argument it makes on appeal. Therefore, we will address the merits of this argument.[122]

Additionally, an objection of "prejudicial value" has been sufficient to preserve a claim that evidence of a prior conviction for possession with intent to deliver was improper under Iowa Rule of Evidence 5.609.[123] Similarly, an objection to the propriety of punitive damages preserved

116. *Id.* at 824.

117. IOWA STATE BAR ASS'N, *supra* note 4, at 52 (internal quotation marks omitted); Allbee & Kincaid, *supra* note 4, at 9 (internal quotation marks omitted).

118. State v. Thurmond, No. 99-1315, 2000 WL 1675684, at *2 (Iowa Ct. App. Nov. 8, 2000) (internal quotation marks omitted).

119. Allbee & Kincaid, *supra* note 4, at 10.

120. *See* Collister v. City of Council Bluffs, 534 N.W.2d 453, 454–55 (Iowa 1995).

121. Collister v. City of Council Bluffs, 534 N.W.2d 453 (Iowa 1995).

122. *Id.* at 454–55.

123. State v. Martin, 704 N.W.2d 674, 675 (Iowa 2005) (internal quotation marks omitted). *See generally* IOWA R. EVID. 5.609(a)(1) (providing the prior conviction rule of evidence).

error on a claim that the amount awarded was excessive.[124] On this issue, the pivotal consideration seems to be whether counsel sufficiently articulated an argument so that (1) the district court understood the nature of counsel's argument; and (2) the appellate court could review counsel's argument and the district court's decision.

It is not sufficient that the district court understands counsel's argument if the appellate court cannot. In a recent case before the court of appeals, counsel objected to a jury instruction that, in its context, was susceptible to two readings.[125] In attempting to show it preserved error, the party appealing pointed to statements from the district court indicating that the court understood the nature of objections to the instruction.[126] The court of appeals rejected this argument, stating: "We cannot say this helps . . . as the district court did not explain what its understanding was, so we have no way of knowing whether the district court's understanding of the objection was the same as the objection . . . on appeal."[127] In summary, while it is not required to raise an issue with mathematical precision or to cite legal authority for a position,[128] counsel, the trial court, and the reviewing court must be on the same page, not just in the same book or on the same bookshelf.

The Iowa Rules of Evidence provide that counsel need not explicitly state the ground for an objection if this basis was "apparent from the context."[129] Counsel should be wary of assuming that the context in which an objection is raised will be clear to the appellate courts. While the context may be clear to the trial court and the parties, their common understanding may be informed by matters not apparent from the record (e.g., local customs and practice, prior interactions between the court and counsel in different cases, prior proceedings in the present matter). The prudent course of action is to make a specific objection and not to rely on the context to provide content to the objection. Otherwise, counsel runs the risk of making an insufficiently specific objection which fails to

124. *See* Ezzone v. Riccardi, 525 N.W.2d 388, 403–04 (Iowa 1994).

125. Vlieger v. Farm for Profit, Research & Dev., Inc., No. 04-876, 2005 WL 1963002, at *4 (Iowa Ct. App. Aug. 17, 2005).

126. *Id.* at *5.

127. *Id.*

128. *See, e.g.*, Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006) ("Error preservation does not turn, however, on the thoroughness of counsel's research and briefing so long as the nature of the error has been timely brought to the attention of the district court.").

129. IOWA R. EVID. 5.103(a)(1); *see also* IOWA STATE BAR ASS'N, *supra* note 4, at 52.

preserve error.

B. *How and When Does One Raise an Issue?*

In addition to being sufficiently specific, an issue must be brought to the district court in a timely manner, which is generally considered to be a time when the district court could take sufficient corrective or preventative action.[130] Failure to do so may result in non-preservation or waiver of the issue.[131] Similarly, a premature objection may not be sufficient to preserve error.[132] This subpart will provide a rough outline of the typical trial's life cycle, including general rules for error preservation at each stage.

1. *Attacks on Jurisdiction, Venue, and Pleadings*

Although there is some contrary authority from other jurisdictions,[133] any alleged insufficiency of pleadings should be attacked by a pre-answer motion.[134] Additionally, lack of personal jurisdiction, insufficient service of process, or a defect in the original notice must be raised by a single pre-answer motion.[135] Other challenges that must be raised in a single pre-answer motion include a motion to recast or strike,[136] a motion for a more specific statement,[137] and a motion to dismiss for failure to state a claim upon which relief may be granted;[138] failure to do so results in a waiver of most of the listed challenges.[139] Additionally, a claim of "[i]mproper venue . . . must be raised . . . prior to or in" the single motion referred to above,[140]

130. *See, e.g.*, Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000).

131. Mercer v. Pittway Corp., 616 N.W.2d 602, 629 (Iowa 2000).

132. IOWA STATE BAR ASS'N, *supra* note 4, at 52; Allbee & Kincaid, *supra* note 4, at 8–9.

133. MARTINEAU, *supra* note 4, § 3.7 ("Some courts have held that failure to state a claim upon which relief can be granted . . . is a matter tha[t] can be raised at any time . . . .").

134. *See* IOWA R. CIV. P. 1.421(1); Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 909–10 (Iowa Ct. App. 1982) (holding where appellant failed to make a "timely motion to dismiss based upon insufficiency of the pleadings" the appellant waived this right).

135. IOWA R. CIV. P. 1.421(1)(b)–(c), (3); Allbee & Kincaid, *supra* note 4, at 18.

136. IOWA R. CIV. P. 1.421(1)(d); IOWA R. CIV. P. 1.434.

137. IOWA R. CIV. P. 1.421(1)(e); IOWA R. CIV. P. 1.433.

138. IOWA R. CIV. P. 1.421(1)(f).

139. IOWA R. CIV. P. 1.421(4). The two defenses not waived are lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. *Id.*

140. IOWA R. CIV. P. 1.421(2).

and failure to do so constitutes a waiver of the venue challenge.[141] A defense raised in a pleading may be attacked by a motion to strike filed before the responsive pleading is filed.[142]

If a response to a pleading is filed, the motion attacking the pleading must be filed within the time allowed, typically within twenty days.[143] If no responsive pleading is required, a motion attacking a pleading must be filed within twenty days after service.[144] If the motion attacking the pleading is overruled, the party filing the motion is allowed an additional ten days to file the required pleading.[145] If a motion attacking a pleading is overruled by the district court, the party filing the motion does not waive error "by pleading over or proceeding further."[146]

2. *Motions in Limine*

A motion in limine is not a motion to suppress evidence.[147] A motion in limine is a device used "to alert the trial court to" a possible evidentiary controversy,[148] and to "avoid disclosing to the jury prejudicial material which may compel declaring a mistrial."[149] As a general rule, a court's ruling on a motion in limine does not preserve error.[150] As the Iowa Supreme Court observed, "It is one of the facts of court life that a pretrial motion in limine is of limited value unless it is sustained."[151]

If a motion in limine is denied, unless that motion results in an unequivocal holding concerning the admissibility of the evidence at issue,[152]

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141. *See, e.g.*, Allbee & Kincaid, *supra* note 4, at 19 ("A motion for [a] change of civil venue must be made before [an] answer."). For the rules governing change of venue, see IOWA R. CIV. P. 1.801–.808.

142. IOWA R. CIV. P. 1.421(5).

143. IOWA R. CIV. P. 1.441(1)–(2).

144. IOWA R. CIV. P. 1.441(1).

145. IOWA R. CIV. P. 1.441(3).

146. IOWA R. CIV. P. 1.432.

147. *See, e.g.*, Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974) (holding motions in limine are not the same as motions to suppress evidence); State v. Wells, 629 N.W.2d 346, 355 (Iowa 2001) (holding motions in limine are the "favored method of raising admissibility of evidence issues").

148. Allbee & Kincaid, *supra* note 4, at 12.

149. *Twyford*, 220 N.W.2d at 923.

150. *Id.* at 923–24; *see also* Johnson v. Interstate Power Co., 481 N.W.2d 310, 317 (Iowa 1992); IOWA STATE BAR ASS'N, *supra* note 4, at 54; Allbee & Kincaid, *supra* note 4, at 13.

151. State v. Brown, 569 N.W.2d 113, 118 (Iowa 1997).

152. *See, e.g.*, *Wells*, 629 N.W.2d at 355 ("[T]he ruling was definitive and Wells

a party does not preserve error unless the party objects to the admission of the evidence at trial.[153] If the evidence is not offered at trial, nothing is preserved for review.[154]

With regard to what constitutes an unequivocal holding that evidence is admissible, counsel runs a risk by not objecting at trial because a reviewing court may conclude that the unequivocal ruling was in fact equivocal and error was, consequently, not preserved. The line between a ruling protecting against prejudicial references (objection required) and "a definitive ruling admitting evidence" (no objection required)[155] is often unclear. Thus, "the more prudent course" would be to make an objection when adverse counsel offers the evidence at issue.[156] At a minimum, counsel may ask the trial court, during the hearing on the motion in limine, whether counsel may consider the court's ruling an *unequivocal* ruling on the issue.

Conversely, if a motion in limine is granted and objectionable evidence is excluded, the great weight of authority states that the proponent of such evidence must make an offer of proof to preserve error,[157] although some decisions purport to make an exception to this general rule.[158] If a motion in limine has been granted and the adverse party is allowed to introduce the evidence, as opposed to making an offer of proof, and does so without objection, the general rule is that error has not been preserved.[159] In such a case, counsel must object to preserve error.

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was not further required to object at trial."); State v. Frazier, 559 N.W.2d 34, 39 (Iowa Ct. App. 1996) (trial court did not make clear its ruling denying the motion was unequivocal); IOWA STATE BAR ASS'N, *supra* note 4, at 54; Allbee & Kincaid, *supra* note 4, at 13.

153. *See, e.g.*, *Johnson*, 481 N.W.2d at 317; Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 178 (Iowa 1990); *Twyford*, 220 N.W.2d at 923; IOWA STATE BAR ASS'N, *supra* note 4, at 54; Allbee & Kincaid, *supra* note 4, at 13.

154. *Johnson*, 481 N.W.2d at 317.

155. Ray v. Paul, 563 N.W.2d 635, 638 (Iowa Ct. App. 1997).

156. Allbee & Kincaid, *supra* note 4, at 13.

157. *Id.*

158. *See, e.g.*, *Twyford*, 220 N.W.2d at 923–24 (stating there may be situations where the evidence is so prejudicial as to make it illogical to claim it is admissible).

159. *See, e.g.*, State v. Delaney, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994) ("It is generally recognized that a motion in limine does not preserve error since error does not occur until the matter is presented at trial.").

3. *Other Pre-Trial Matters: Continuances and Discovery*

Motions to continue must "be filed without delay after the grounds therefor become known to the party or the party's counsel."[160] There is no bright line rule as far as timeliness of a motion for continuance, and a court's reasoning that a motion to continue was filed too late is likely to focus on either surprise or hardship to the adverse party. Thus, the decision is likely one on the merits, and this is an area where it is often difficult to disentangle considerations of error preservation from the merits of the district court's decision.

The court rules concerning discovery[161] and depositions[162] contain several deadlines for action or objection—compliance with which is essential to preserve error.[163] For example, an objection to the "notice of taking any deposition[] [is] waived unless promptly served in writing upon the party giving the notice."[164]

4. *Challenges to Jury Panels and Individual Jurors*

To challenge the way the jury panel was drawn, one must make the challenge before any individual juror is sworn.[165] The grounds for the challenge must be stated specifically and must "be founded only on a material departure from the statutory requirements for drawing or returning the jury."[166] This challenge is not a vehicle for challenging individual jurors.[167]

Individual jurors may be challenged for cause[168] or removed by exercising a limited number of strikes or peremptory challenges.[169] Challenges for cause must be based on one of the twelve listed causes

160. IOWA R. CIV. P. 1.910(1).

161. IOWA R. CIV. P. 1.501–.517.

162. IOWA R. CIV. P. 1.701–.717.

163. *See* Allbee & Kincaid, *supra* note 4, at 19–20 (discussing potential error preservation problems during discovery).

164. IOWA R. CIV. P. 1.717(1); *see also* Ichelson v. Wolfe Clinic, P.C., 576 N.W.2d 308, 311 (Iowa 1998) (noting that error was not preserved where the court did not rule on appellant's motion to compel discovery and where plaintiffs did not file a 179(b) motion requesting a ruling).

165. IOWA R. CIV. P. 1.915(4); *see also* Suttle v. Batie, 1 Clarke 141, 142 (Iowa 1855); Allbee & Kincaid, *supra* note 4, at 21.

166. IOWA R. CIV. P. 1.915(4).

167. Allbee & Kincaid, *supra* note 4, at 21.

168. IOWA R. CIV. P. 1.915(6).

169. IOWA R. CIV. P. 1.915(7).

found in Iowa Rule of Civil Procedure 1.915(6) and must be specifically stated.[170] No additional grounds will be considered on appeal.[171] With regard to the specificity required in a challenge for cause, there is some authority stating that the nature of the challenge must be expressly stated and cannot be inferred "from the nature of the examination of the juror."[172] If a challenge for cause is known or readily ascertainable[173] at the time the juror was sworn and was not timely made, it is not preserved for review.[174] For example, in *Arnold v. Arnold*[175] the appellant challenged the validity of the jury because they had not taken a required oath.[176] The court would not consider the issue because the appellant did not ask the court to give the jury the required oath.[177]

5. *Admission of Evidence*

Preserving a claim that evidence was erroneously excluded requires an offer of proof,[178] which must alert the court to the specific evidence the proponent seeks to admit.[179] Preserving a claim that evidence was erroneously admitted requires a specific objection to the evidence.[180]

Like evidentiary objections, motions to strike must be timely made.[181] Allbee and Kincaid explain:

> [A]s a general rule, [a motion to strike] must be interposed at the earliest opportunity after the ground for objection becomes apparent. Ordinarily, the motion is applicable only to the latest answer given. A

170. Allbee & Kincaid, *supra* note 4, at 21; *see also* IOWA R. CIV. P. 1.915(6) (listing acceptable grounds for challenges for cause).

171. Allbee & Kincaid, *supra* note 4, at 21.

172. Payne v. Waterloo, Cedar Falls & N. Ry. Co., 133 N.W. 781, 783 (Iowa 1911).

173. *See, e.g.*, Sieren v. Hildreth, 118 N.W.2d 575, 576 (Iowa 1962).

174. Allbee & Kincaid, *supra* note 4, at 22.

175. Arnold v. Arnold, 20 Iowa 273 (1866).

176. *Id.* at 275.

177. *Id.*

178. IOWA R. EVID. 5.103(a)(2); *see also* Strong v. Rothamel, 523 N.W.2d 597, 599 (Iowa Ct. App. 1994).

179. IOWA R. EVID. 5.103(a)(2); *see also* Brooks v. Holtz, 661 N.W.2d 526, 529 (Iowa 2003).

180. *See, e.g.*, Johnson v. State Farm Auto. Ins. Co., 504 N.W.2d 135, 139 (Iowa Ct. App. 1993); Hamilton v. O'Donnell, 367 N.W.2d 293, 295 (Iowa Ct. App. 1985).

181. Milks v. Iowa Oto-Head & Neck Specialists, P.C., 519 N.W.2d 801, 806 (Iowa 1994) (holding the plaintiff's motions to strike were untimely because they were not made immediately following each answer); Allbee & Kincaid, *supra* note 4, at 8.

> ruling sustaining an objection which is made after an answer has been given does not have the effect of striking that testimony. Testimony that has not been stricken will remain in the record and may be properly considered as evidence.[182]

The Iowa Supreme Court has specified the required procedure when an objection follows a question that has already been answered by the witness: "If the objection to a question is late and follows the answer, then a motion to strike, coupled with an application to have the objection precede the answer or an excuse for tardiness, must be made."[183]

Some commentators suggest that error is not preserved concerning evidentiary rulings unless a party shows "a substantial right of the party is affected."[184] This language from Iowa Rule of Evidence 5.103(a) has little relevance, if any, to the error preservation inquiry. While the "substantial right . . . affected" issue is certainly relevant to a consideration regarding the merits of the evidentiary ruling, it has little bearing on whether the evidentiary issue was timely and specifically raised before the district court.[185]

6. *Repetition of Objections*

This appears to be a point of difficulty for many practitioners. The Iowa Supreme Court has stated: "This court has long held the view that 'once a proper objection has been urged and overruled, it is not required that repeated objections be made to questions calling for the same type of evidence.'"[186] At the same time, standing objections remain disfavored,[187] but will be sufficient to preserve error,[188] assuming the standing objection encompasses the theory advanced on appeal. Although the concepts are distinct, there is an obvious tension and frequent overlap between these two rules.

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182. Allbee & Kincaid, *supra* note 4, at 8 (footnotes omitted).

183. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984).

184. IOWA R. EVID. 5.103(a); *see also* IOWA STATE BAR ASS'N, *supra* note 4, at 51; Allbee & Kincaid, *supra* note 4, at 13–14.

185. IOWA R. EVID. 5.103(a). This "substantial right" inquiry, however, may provide a basis for the rule that a district court's evidentiary rulings may be affirmed on grounds not raised in the district court. *See supra* notes 97–98 and accompanying text.

186. Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 181 (Iowa 2004) (quoting Nepple v. Weifenbach, 274 N.W.2d 728, 732 (Iowa 1979).

187. Bornn v. Madagan, 414 N.W.2d 646, 648 (Iowa Ct. App. 1987); Allbee & Kincaid, *supra* note 4, at 9–10.

188. *See* State v. Damme, 522 N.W.2d 321, 323 (Iowa Ct. App. 1994).

The rule stating that repetition of objections is unnecessary, however, does not apply to the competency of successive witnesses. If a court has overruled a party's competency objection to a witness, the objection "must be repeated for each witness whose competency is questioned."[189] Furthermore, this rule does not apply when an objection has been sustained, as opposed to being overruled.[190] In such instances, "[I]t is necessary to again interpose a proper objection when similar evidence is introduced."[191]

Given the problems of review generated by standing objections, the better practice would be to briefly repeat a short objection at each point where similar, purportedly objectionable matter is offered, such as "same objection."[192]

7. *Sufficiency of the Evidence*

The error preservation rule applicable to a particular case, when sufficiency of the evidence is challenged on appeal, depends entirely on whether it was tried to the court or to a jury.

To preserve error on an issue regarding the sufficiency of evidence in a jury-tried case, the issue is typically raised by a motion for directed verdict.[193] "The motion for directed verdict is the primary vehicle used to test the sufficiency of the evidence presented by the opposing party at trial."[194] The motion for directed verdict must be specific,[195] and on appeal, a litigant may only rely on the grounds asserted for a directed verdict.[196] If defense counsel makes a motion for directed verdict at the close of the plaintiff's case and fails to renew the motion at the end of the trial, the motion is waived.[197]

A party may file a motion for a judgment notwithstanding the

189. Allbee & Kincaid, *supra* note 4, at 9.

190. *Id.*

191. Ladd, *supra* note 4, at 614–16.

192. *Id.* at 10 n.38.

193. *See* James *ex rel.* James v. Burlington N., Inc., 587 N.W.2d 462, 464 (Iowa 1998); Ragee v. Archbold Ladder Co., 471 N.W.2d 794, 798 (Iowa 1991).

194. Allbee & Kincaid, *supra* note 4, at 15.

195. *Cf.* Ladd, *supra* note 4, at 699 (describing the detail required by Iowa courts in assigning error).

196. IOWA STATE BAR ASS'N, *supra* note 4, at 55–56; Allbee & Kincaid, *supra* note 4, at 15.

197. IOWA STATE BAR ASS'N, *supra* note 4, at 56; Allbee & Kincaid, *supra* note 4, at 15.

verdict[198] typically within ten days after "the verdict, report or decision" is challenged.[199] This motion is available in two instances: (1) The adverse party's pleadings "fail to allege some material fact necessary to constitute a complete claim or defense";[200] and (2) "If the movant was entitled to a directed verdict at the close of all the evidence, and moved therefor, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant."[201] This second instance is the "usual purpose" of this motion.[202] Raising an issue by a motion for directed verdict is a prerequisite to raising that issue in a motion for judgment notwithstanding the verdict,[203] and the party making this motion may only rely on the grounds previously asserted.[204] When an action is tried to a court without a jury, however, parties may later challenge the sufficiency of the evidence to sustain any finding, even if they did not initially make an objection or otherwise raise the evidentiary issue before the court.[205]

8. *Jury Instructions, Verdict Forms, and Jury Verdicts*

Issues regarding jury instructions—instructions given or proposed instructions not given—must be preserved by a specific objection made prior to either closing arguments or submission of the case to the jury without closing arguments.[206] On appeal, a party may not amplify or change the grounds for objecting to a jury instruction.[207] The Iowa Rules of Civil Procedure provide: "No other grounds or objections shall be asserted

198. IOWA R. CIV. P. 1.1003.

199. IOWA R. CIV. P. 1.1007.

200. IOWA R. CIV. P. 1.1003(1).

201. IOWA R. CIV. P. 1.1003(2).

202. Allbee & Kincaid, *supra* note 4, at 16 (quotation marks omitted).

203. *See, e.g.*, Field v. Palmer, 592 N.W.2d 347, 351 (Iowa 1999); IOWA STATE BAR ASS'N, *supra* note 4, at 56.

204. Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000); Butcher v. White's Iowa Inst., 541 N.W.2d 262, 263 (Iowa Ct. App. 1995); Allbee & Kincaid, *supra* note 4, at 16.

205. IOWA R. CIV. P. 1.904(2); *see also* Sundholm v. City of Bettendorf, 389 N.W.2d 849, 852 (Iowa 1986); *In re* A.R., 316 N.W.2d 887, 888–89 (Iowa 1982).

206. *See, e.g.*, IOWA R. CIV. P. 1.924; Estate of Hagedorn v. Peterson, 690 N.W.2d 84, 90–91 (Iowa 2004); Ostrem v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 544, 547–48 (Iowa 2003). Iowa Rule of Civil Procedure 1.923 provides that "[t]he parties may either submit the case or argue it." As to the required specificity of objections to jury instructions, see Ladd, *supra* note 4, at 700–01; *supra* Part III.A.

207. *See, e.g.*, IOWA R. CIV. P. 1.924; Boham v. City of Sioux City, 567 N.W.2d 431, 438 (Iowa 1997).

thereafter, or considered on appeal."[208] Rule 1.924, however, provides that when a judge later makes additions or alterations to the jury instructions, a complaining party must raise objections to the altered or additional instructions in a motion for new trial.[209] If a party does not make the objection in a motion for new trial, it is "deemed waived."[210] Additionally, parties must raise objections to the verdict form before it is submitted to the jury.[211] Some authorities state a party need not raise objections to jury instructions when those points have already been the subject of a pre-trial ruling.[212]

Challenges to the amount or nature of the jury's verdict may be made by a motion for new trial,[213] which must be filed within ten days of the verdict.[214] When the issue is an inconsistent special verdict, the time by which such inconsistency must be brought to the court's attention has apparently been an open question in Iowa state courts.[215] In the Eighth Circuit, a party must seek resubmission of an alleged inconsistent verdict before the jury is discharged.[216] In *Garcia v. Menard, Inc.*,[217] the court of appeals found no Iowa authority expressly requiring a party to object to an inconsistent special verdict before the jury is discharged; therefore, the court proceeded to consider the merits of the objection.[218] In *Clinton Physical Therapy Services, P.C. v. John Deere Health Care Plan*, the Iowa Supreme Court held a party may still file a motion for a new trial or have the court reconcile an inconsistent sealed verdict even after discharge of the jury; the only course of action waived is the right to seek additional deliberations by the jury.[219] In such cases, however, the most prudent

208. IOWA R. CIV. P. 1.924.

209. *Id.*

210. *Id.*

211. *See, e.g.*, Farm-Fuel Prods. Corp. v. Grain Processing Corp., 429 N.W.2d 153, 160 (Iowa 1988) (ruling that an objection to the verdict form is waived if it is not raised at trial).

212. *See, e.g.*, State v. Matlock, 715 N.W.2d 1, 6 n.2 (Iowa 2006).

213. IOWA R. CIV. P. 1.1004(4)–(5).

214. IOWA R. CIV. P. 1.1007.

215. Clinton Physical Therapy Servs. v. John Deere Health Care, Inc., 714 N.W.2d 603, 610–15 (Iowa 2006).

216. Lockard v. Mo. Pac. Ry. Co., 894 F.2d 299, 304 (8th Cir. 1990).

217. Garcia v. Menard, Inc., No. 03-1127, 2004 WL 1854175 (Iowa Ct. App. July 14, 2004).

218. *Id.* at *2.

219. Clinton Physical Therapy Servs. v. John Deere Health Care, Inc., 714 N.W.2d 603, 610 (Iowa 2006); *see also* Le v. Vaknin, 722 N.W.2d 412, 417–18 (Iowa 2006) (explaining that when a special verdict did not answer an essential question,

course would be to object before discharging the jury. Also, until the question is settled in Iowa, it may be prudent to not use sealed verdicts[220] in instances where the jury is asked to render a special verdict[221] or to answer interrogatories.[222]

9. *Motions for Mistrial and Post-Trial Motions*[223]

In some instances, a party must move for mistrial to preserve error.[224] A motion for mistrial is used following the "occurrence of a fundamental error which cannot be cured by instruction or admonition from the trial court."[225] For instance, a party claiming opposing counsel has committed misconduct,[226] or improperly introduced evidence concerning insurance coverage,[227] that party should move immediately for mistrial.[228] Where an alleged impropriety by counsel occurs during a reported closing argument, a motion for mistrial is timely if made before submission of the case to the jury.[229]

A motion for new trial is often combined with a motion for judgment notwithstanding the verdict.[230] The grounds for a new trial are set forth in rule 1.1004,[231] and the motion must be filed within the time allowed by rule

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counsel could seek an answer from the court pursuant to Iowa Rule of Civil Procedure 1.933).

220. IOWA R. CIV. P. 1.931(3).

221. IOWA R. CIV. P. 1.933.

222. IOWA R. CIV. P. 1.934.

223. There are several other post-trial motions that bear brief mention, in addition to the motions discussed in this text. The first is a motion to set aside a default judgment, which must be filed within sixty days. *See* IOWA R. CIV. P. 1.977. Another such motion is an application for retrial after published notice, which is available in all cases except dissolutions of marriage and which must be filed within six months of the judgment. *See* IOWA R. CIV. P. 1.1011(1). Additionally, a petition to vacate a judgment must be filed within one year after entry. *See* IOWA R. CIV. P. 1.1013(1).

224. Allbee & Kincaid, *supra* note 4, at 24.

225. *Id.*; *see also* State v. Escobedo, 573 N.W.2d 271, 276 (Iowa Ct. App. 1997) (illustrating that a claim of improper substitution of a juror by a district court judge will not be preserved if counsel fails to move for mistrial).

226. Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 121 (Iowa 1984).

227. Carter v. Wiese Corp., 360 N.W.2d 122, 129 (Iowa Ct. App. 1984).

228. Allbee & Kincaid, *supra* note 4, at 24.

229. Rosenberger Enters., Inc. v. Ins. Serv. Corp., 541 N.W.2d 904, 907 (Iowa Ct. App. 1995). If the argument is not reported, the counsel must employ procedures to create a record of those proceedings. *See supra* Part II.D.

230. IOWA STATE BAR ASS'N, *supra* note 4, at 57.

231. IOWA R. CIV. P. 1.1004.

1.1007, which is typically ten days.[232] A motion for new trial is not a vehicle to assert contentions that could have been asserted earlier.[233] The Iowa Supreme Court has stated that "an objection to the admission of evidence which is made for the first time in the motion for a new trial, is made too late, and should for that reason be overruled."[234] If an issue has been raised and ruled on, it should not be necessary to raise it again in a motion for new trial, although it may be advisable to do so. For example, it is not necessary to assert instructional error in a motion for new trial to preserve that issue for appeal,[235] assuming such error was timely raised. A party may argue, via a motion for new trial, that a verdict is against the weight of the evidence, as opposed to not supported by substantial evidence, without filing a motion for directed verdict.[236]

Motions to amend or enlarge under rule 1.904(2) are available in non-jury cases, including petitions for judicial review of an agency's decision in a contested case,[237] and are used "to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal."[238] Rule 1.904(2) motions are not available to challenge conclusions of law that are not dependent on a factual dispute submitted to the court.[239] For error preservation purposes, it is only necessary to file a motion to amend or enlarge when the district court has not ruled on an issue raised by the movant.[240] A motion under this rule is an impermissible

232. IOWA R. CIV. P. 1.1007.

233. Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454, 470 (Iowa 2000); *see also* Omaha Bank for Coops. v. Siouxland Cattle Coop., 305 N.W.2d 458, 461 (Iowa 1981) (juror misconduct); Oakes v. Peter Pan Bakers, Inc., 138 N.W.2d 93, 99 (Iowa 1965); Spry v. Lamont, 132 N.W.2d 446, 451 (Iowa 1965) (objections to instructions); Pansegrau v. Collins, 75 N.W.2d 249, 252 (Iowa 1956) (voir dire and closing argument); Shields v. Guffey, 9 Iowa 322, 323–24 (1859) (jurors taking deposition to jury room).

234. Manning v. Burlington, C.R. & N.R. Co., 20 N.W. 169, 169 (Iowa 1884).

235. Bellach v. IMT Ins. Co., 573 N.W.2d 903, 906 (Iowa 1998).

236. *See, e.g.*, Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 93 (Iowa 1952). For a discussion of the difference between evidentiary weight and evidentiary sufficiency, see State v. Ellis, 578 N.W.2d 655 (Iowa 1998).

237. IOWA R. CIV. P. 1.1603(3).

238. Johnson v. Kaster, 637 N.W.2d 174, 182 (Iowa 2001) (citations omitted) (internal quotation marks omitted).

239. Meier v. Senecaut III, 641 N.W.2d 532, 538 (Iowa 2002) ("This does not mean a rule 179(b) motion is not available to challenge an issue of law, but the legal issue must have been addressed by the court in the context of an issue of fact tried by the court without a jury.").

240. *See* Estate of Grossman v. McCreary, 373 N.W.2d 113, 114 (Iowa 1985); *infra* Part III; *see also In re* Reinders, 138 B.R. 937, 941 (Bankr. N.D. Iowa 1992); IOWA

way to raise matters that should have been raised at an earlier junction.[241] On this point the Iowa Supreme Court stated, "We now hold rule [1.904(2)] is an inappropriate vehicle for reopening the record for additional evidence to correct omissions made in the trial of an issue."[242] A motion to amend or enlarge must be "joined with or filed within the time allowed for a motion for new trial."[243] A timely and proper post-trial motion tolls the thirty-day time in which to file a notice of appeal, and a notice of appeal, in turn, is timely if filed within thirty days of the court's decision on the post-trial motion.[244] An untimely or improper post-trial motion, however, does not toll the thirty-day period for filing a notice of appeal.[245]

10. *Cross-Appeals*

Prevailing parties need not cross-appeal to rely on grounds raised in the district court that were either rejected or ignored,[246] unless affirming on such an alternate ground would affect the rights of the parties established in the judgment.[247] A party not cross-appealing is entitled to no greater relief than was granted by the district court;[248] however, a party may seek appellate attorney fees in a dissolution appeal without filing a cross-appeal.[249]

STATE BAR ASS'N, *supra* note 4, at 58.

241. *See, e.g.*, *Reinders*, 138 B.R. at 941.

242. *In re* Appeal of Elliott, 319 N.W.2d 244, 247 (Iowa 1982).

243. IOWA R. CIV. P. 1.904(2).

244. IOWA R. APP. P. 6.5(1); *see, e.g.*, *In re* Marriage of Okland, 699 N.W.2d 260, 263 (Iowa 2005); Gardner v. Hartford Ins. Accident & Indem. Co., 659 N.W.2d 198, 202 (Iowa 2003) (following a 1.904(2) motion); Peoples Trust & Sav. Bank v. Baird, 346 N.W.2d 1, 2–3 (Iowa 1984) (following a motion for rehearing); Melchiori v. Kooi, 644 N.W.2d 365, 370 (Iowa Ct. App. 2002).

245. *Melchiori*, 644 N.W.2d at 370; *see also In re Marriage of Okland*, 699 N.W.2d at 267 (holding "successive" and "repetitive" post-trial motions do not toll the time for filing an appeal); Barnes Beauty Coll. v. McCoy, 279 N.W.2d 258, 260 (Iowa 1979) (holding that post-trial motions in small claims cases are not authorized and do not toll the time to appeal); Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 471 (Iowa 1978) (ruling on an untimely motion to amend or enlarge does not toll the time for filing an appeal).

246. Venard v. Winter, 524 N.W.2d 163, 165 (Iowa 1994).

247. Meier v. Senecaut III, 641 N.W.2d 532, 540 n.1 (Iowa 2002).

248. Prestype Inc. v. Carr, 248 N.W.2d 111, 121 (Iowa 1976).

249. *See In re* Marriage of Clark, 577 N.W.2d 662, 665 (Iowa Ct. App. 1998).

11. *A Related Issue: Presenting Issues and Arguments on Appeal*

Assuming one has properly preserved an issue at trial, one must properly present the issue on appeal. At a minimum, when making a factual assertion in a brief, one must provide supporting citations to the record and identify where the record is reproduced in the appendix.[250] Further, each issue of law addressed in one's brief must provide a citation to authority supporting the contention.[251] "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."[252]

If a case has been transferred to the court of appeals,[253] a party who disagrees with the court's decision may file an application for further review[254] within twenty days of the filing (ten days in cases involving "a child in need of assistance or termination of parental rights proceeding").[255] The supreme court is not bound by the contents of the application for further review or the opinion of the court of appeals.[256] It may consider any issue properly presented in the initial appeal.[257] Although the supreme court may consider issues not raised in the application for further review,[258] but which were briefed, it has indicated on certain occasions that it will exercise its discretion not to consider fully-briefed issues that were not included in the application for further review.[259] To avoid this exercise of discretion, the prudent course would be to include every issue briefed in the application for further review, even if in a digested or condensed form, giving greatest attention to the most promising claims. At a bare minimum (and if necessary because of page limitations), counsel might consider incorporating the arguments in their briefs by reference in their further review filings.

250. IOWA R. APP. P. 6.14(7).
251. IOWA R. APP. P. 6.14(1)(c).
252. *Id.*
253. *See* IOWA R. APP. P. 6.401(1).
254. *See* IOWA R. APP. P. 6.402.
255. IOWA R. APP. P. 6.402(2).
256. *See In re* R.E.K.F., 698 N.W.2d 147, 148 (Iowa 2005).
257. *Id. But see* Chrysler Fin. Co. v. Bergstrom, 703 N.W.2d 415, 426 n.8 (Iowa 2005) (Streit, J., dissenting) ("Chrysler strategically reframed the issue on further review.").
258. State v. Doggett, 687 N.W.2d 97, 99 (Iowa 2004).
259. *In re* Marriage of Schriner, 695 N.W.2d 493, 501 (Iowa 2005).

IV. STEP TWO: WAS THE ISSUE DECIDED BELOW?

As a general rule, trial courts have a duty to decide issues presented to them.[260] This does not always happen. When the trial court has not decided an issue, how one should respond depends on whether one agrees or disagrees with the court's final judgment. If a party is seeking to affirm the trial court judgment based on an issue not decided by the trial court, that party need not seek a decision from the trial court.[261] If a party disagrees with the trial court and intends to raise an issue not ruled on by the trial court, that party must seek a ruling from the trial court to preserve the issue for review.[262]

A. *When Is an Issue "Decided"?*

Sometimes, parties and reviewing courts have difficulty determining whether an issue was decided. If the district court's decision contains an express resolution of an issue, it clearly has been decided. Difficulty arises when a party asserts that the district court resolved an issue by necessary implication.[263] Some authorities have held that a district court may in fact decide an issue by necessary implication.[264] Recent opinions from the Iowa Supreme Court have cast doubt on the continuing vitality of the "decided by necessary implication" rule.[265] In *Teamsters Local Union 421 v. City of Dubuque*, the court stated: "Gotto argues the district court impliedly decided the municipal restriction was facially valid when it ruled that the policy applied to him.[266] However, our preservation-of-error rule does not

260. *See, e.g.*, IOWA R. CIV. P. 1.451 ("A motion, or other matter involving separate rounds or parts, shall be disposed of by separate ruling on each and not sustained generally."); IOWA R. CIV. P. 1.904(1).

261. *See, e.g.*, Lloyd v. Drake Univ., 686 N.W.2d 225, 228–29 (Iowa 2004).

262. *See infra* Part IV.B.

263. *See, e.g.*, Teamsters Local Union No. 421 v. City of Dubuque, 706 N.W.2d 709, 713 (Iowa 2005) (holding that the rule of necessary implication is inapplicable).

264. *See* City of Fort Dodge v. Civil Serv. Comm'n, 562 N.W.2d 438, 440 (Iowa Ct. App. 1997) ("[W]e will assume as fact an unstated finding necessary to support the trial court's judgment."); *see also* Grebasch v. State, No. 01-1712, 2003 WL 22697266, at *7 (Iowa Ct. App. Nov. 17, 2003) (concluding error was preserved because the trial court implicitly overruled the objection).

265. *See, e.g.*, *Teamsters Local Union 421*, 706 N.W.2d at 713 (holding the rule of necessary implication is inapplicable to the rule requiring error to be preserved); Meier v. Senecaut III, 641 N.W.2d 532, 539 (Iowa 2002) ("[T]his assumption that the district court rejected claims not specifically addressed is not a rule of error preservation, but a rule governing our scope of review . . . .").

266. Teamsters Local Union No. 421 v. City of Dubuque, 706 N.W.2d 709

draw any such assumptions."[267]

In light of *Teamsters Local Union 421*, litigants should not rely on implicit findings. The conservative course of action would be a request, through a rule 1.904(2) motion or otherwise, that the district court expressly state the implicit finding at issue.

B. *What if an Issue Was Not "Decided"?*

If a litigant seeks reversal based on an issue not addressed by the district court, he or she has an obligation to seek a ruling on that issue.[268] For example, when a court has taken an evidentiary objection under advisement, counsel must seek a ruling to preserve error.[269] A written motion under rule 1.904 is one way to do so; however, any act requesting a district court's ruling should be sufficient.[270] For error preservation purposes, such a motion is not necessary where the district court has already ruled on the issue,[271] although the motion may be necessary or desirable for other reasons.[272]

To preserve a favorable judgment, an appellee may rely on a ground that was raised in the district court even though it was not decided by it,[273] so long as "the affirmance on that ground does not alter the rights of the parties established in the judgment."[274] Some litigants have read *DeVoss v. State* to allow the court to affirm on a ground (other than an evidentiary ground) that was not asserted in the trial court.[275] The Iowa Supreme

(Iowa 2005).

267. *Id.* at 713. It is somewhat incongruous to allow for implicitly raising an issue, *see* IOWA R. EVID. 5.103(a)(1), but to not allow for implicit decisions of an issue.

268. Stammeyer v. Div. of Narcotics Enforcement, 721 N.W.2d 541, 548 (Iowa 2006); Lloyd v. Drake Univ., 686 N.W.2d 225, 232–33 n.2 (Iowa 2004); Allbee & Kincaid, *supra* note 4, at 10; *see also* Bill Grunder's Sons Constr., Inc. v. Ganzer, 686 N.W.2d 193, 197–98 (Iowa 2004); Wilson v. Liberty Mut. Group, 666 N.W.2d 163, 167 (Iowa 2003).

269. Allbee & Kincaid, *supra* note 4, at 10.

270. *See Meier*, 641 N.W.2d at 539.

271. Explore Info. Servs. v. Iowa Court Info. Sys., 636 N.W.2d 50, 57 (Iowa 2001).

272. *See, e.g.*, MARTINEAU, *supra* note 4, § 3.10.

273. Otterberg v. Farm Bureau Mut. Ins. Co., 696 N.W.2d 24, 28 (Iowa 2005); *see also* Jensen v. Sattler, 696 N.W.2d 582, 585–86 (Iowa 2005) (holding error was preserved by generally resisting a summary judgment motion that attacked the petition as a whole when the issue being reviewed by the court was contained in the petition).

274. *Meier*, 641 N.W.2d at 540 n.1.

275. DeVoss v. State, 648 N.W.2d 56 (Iowa 2002).

Court has refused to adopt this reading of isolated portions of *DeVoss*, resulting in the interpretation having no continuing vitality.[276] If an issue was raised but not decided, an appellee need not cross-appeal to argue the issue on appeal, as noted above.[277]

If an issue is not decided by the district court, and a decision is required to preserve error, a party may be able to seek a limited remand "for the specific purpose of obtaining a ruling from the trial court."[278] This is certainly no substitute for obtaining a ruling before appeal, but it is certainly better than doing nothing at all.[279] If a request for a limited remand is to be made, it is advisable to make it as soon as possible, preferably before briefing.

C. *What if the Trial Court Refuses to Decide the Issue?*

Consider the following hypothetical. Alice sued Bob and asserted theories *X*, *Y*, and *Z* in support of her recovery. In entering judgment for Bob, the court addressed only *X*. Alice filed a post-trial motion, asking the court to rule on *Y* and *Z*. The court summarily overruled Alice's motion. On Alice's appeal, Bob argues Alice failed to preserve error on issues *Y* and *Z*. Bob, however, is wrong. Alice did preserve error. If the moving party has requested a ruling via a motion under Iowa Rule 1.904(2) or otherwise, and the court refuses to make a ruling, error is preserved.[280]

This is as it should be. No good could come of requiring a litigant to pursue a ruling at all costs. It would not make sense to require Alice to file her motion again. To hold that she did not preserve error would not advance any of the purposes of the error preservation rules.[281]

V. PROBLEMS WITH CURRENT PRACTICE

In this Part, this Article examines the outer margins of the error preservation rules, and what they illustrate about what the rules are and

276. *See, e.g.*, *Jensen*, 696 N.W.2d at 588.

277. *See supra* Part III.B.10.

278. Allbee & Kincaid, *supra* note 4, at 10 n.44.

279. There is some suggestion that this approach may work in the right circumstances. *See In re* Petition of Clark, No. 99-0308, 2000 WL 210255, at *2 (Iowa Ct. App. Feb. 23, 2000).

280. Madden v. City of Eldridge, 661 N.W.2d 134, 138 (Iowa 2003); Metro. Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 535 (Iowa Ct. App. 1982).

281. *See supra* notes 18–24.

how they should be considered. First, this Part considers whether Iowa's appellate courts should pass on a litigant's error preservation problems and decide an issue on its merits.[282] Second, this Part takes up the related matter of error preservation in child custody cases.[283] In conclusion, this Part considers the present status of the error preservation rules, including the extent to which current error preservation rules are advancing the identified rationales for their existence.[284]

A. *Reaching the Merits in Cases with Error Preservation Concerns*

Resolving an issue on error preservation grounds is often a harsh remedy.[285] "Failures of appeal because of the lack of technique on the part of counsel, places a penalty upon the party litigants in the punishment of counsel for failure to abide by the rules."[286] For this reason, courts have historically been willing to discuss the merits in cases where error was not preserved[287] and still do so today.[288]

For the most part, Iowa's courts are more likely to reach unpreserved errors when they would otherwise affirm on the merits. There are many reasons for this. An appellate opinion is primarily written for the litigants and the court being reviewed,[289] and one of the primary purposes of the appellate opinion is to explain a result to the parties or, in the words of one commentator, "mollify the litigants."[290] In instances where courts offer the indication that the failure to preserve error was, in effect, harmless, they explain alternative bases for affirming. For this reason, although the

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282. State v. Taylor, 596 N.W.2d 55, 56 (Iowa 1999). Bypassing error preservation issues in criminal law cases is especially understandable because, unless addressed, the defendant's unpreserved issue will return to life in the form of a claim for ineffective assistance of counsel. *See supra* note 7; *infra* Part V.A.

283. *See infra* Part V.B.

284. *See infra* Part V.C.

285. *See, e.g.*, Sunderland, *supra* note 32, at 11.

286. Ladd, *supra* note 4, at 707.

287. *Id.* at 707 n.39.

288. *See, e.g.*, *In re* A.D.L., 497 N.W.2d 178, 180–81 (Iowa Ct. App. 1992) (stating the Confrontation Clause issue was not preserved for appeal but, in any event, the Confrontation Clause does not apply in child in need of assistance cases); *In re* L.P., No. 05-0664, 2005 WL 2086046, at *1–2 (Iowa Ct. App. Aug. 31, 2005); *In re* E.L.R., No. 05-0929, 2005 WL 1970239, at *1 (Iowa Ct. App. Aug. 17, 2005); *In re* Marriage of Grunder, No. 03-1871, 2004 WL 1843316, at *1 (Iowa Ct. App. July 28, 2004).

289. RUGGERO J. ALDISERT, OPINION WRITING § 2.10 (1990).

290. Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CAL. L. REV. 831, 832 (1961).

practice has been criticized,[291] it may be appropriate to "reason in the alternative" and explain two equally valid but independent reasons why a judgment is affirmed,[292] especially when not doing so would leave the false impression that the judgment would have been reversed if error had been preserved.

This rationale is especially applicable to the Iowa Court of Appeals, as its decisions are subject to further review by the supreme court.[293] In cases transferred to the court of appeals, it may be prudent to explain alternate rationales for arriving at an outcome so that parties know whether to exercise their right to seek further review and what reasons for seeking further review to advance in their application.

A tougher question arises when a court decides to reverse on an issue that was not preserved.[294] In that instance, the court abandons the policies supporting error preservation in pursuit of other purported goals. For example, a court may decide to reach an issue not raised below to (1) correct plain error[295] in order to prevent "blatant injustice,"[296] or (2) make new law.[297] The first is inconsistent with the rejection of plain error in Iowa[298] and is only justifiable to the extent that not reversing would cause injury of constitutional magnitude.[299] *In re S.P.* presented such a situation.[300] In this case, a father in a case involving termination of parental rights contended for the first time on appeal he did not receive constitutionally required notice of the termination proceedings.[301] The State argued that the father was required to raise the issue below, and because he did not, he failed to preserve error.[302] The Iowa Supreme Court

291. Ladd, *supra* note 4, at 708–09 & nn.40–41.

292. For examples of the supreme court's reasoning in the alternative in two instances, although neither involving error preservation, see Fed. Land Bank of Omaha v. Heeren, 398 N.W.2d 839, 844 (Iowa 1987) and Charles Gabus Ford, Inc. v. Iowa State Highway Comm'n, 224 N.W.2d 639, 644 (Iowa 1974).

293. *See supra* notes 251–57.

294. Ladd, *supra* note 4, at 708 ("The real test would come in a reversal.").

295. ALDISERT, *supra* note 289, § 5.3.

296. *Id.*; *see also* Vestal, *supra* note 92, at 509.

297. MARTINEAU, *supra* note 4, § 3.9.

298. *See supra* Part II.G.

299. *Cf. supra* note 41 (discussing constitutional error preservation and judge-made error preservation principles).

300. *In re* S.P., 672 N.W.2d 842 (Iowa 2003).

301. *Id.* at 845.

302. *Id*.

disagreed.[303] The court noted that judgments entered without notice are void[304] and void judgments are "subject to attack at any time[;]"[305] the court concluded that the father "had every right to challenge the termination order even though he filed no posttrial motions and waited until he appealed to do so."[306]

The Iowa Supreme Court's decision and supporting rationale in *In re S.P.* is both a just outcome and a proper balance of error preservation rules in light of other relevant considerations. Appellate courts, however, should only be permitted to reverse on an unpreserved issue when the failure to do so would result in a harm of constitutional significance. Absent such a limitation, there would be no predictable boundary as far as the error preservation rules. When this is considered in light of the rejection of "plain error" in Iowa,[307] allowing appellate courts to reverse on unpreserved error in order to correct perceived injustices resulting from inadequate error preservation, without a showing of an independent harm of constitutional magnitude, amounts to no error preservation rules at all.

That is not to say that courts should reverse any unpreserved constitutional claims.[308] The constitutional injury that should permit an appellate court to reach an unpreserved issue is not the alleged constitutional claim that was not preserved. Rather, it is the rare constitutional injury that occurs when a reviewing court fails to reach the merits of an issue (whether that issue is based on a constitution, statute, regulation, common law, or private contract).[309]

The law-making reason for reversing on unpreserved error may also be problematic. Appellate courts desiring to change judge-made law might wish to use a case where an issue was not previously raised as a vehicle to make the desired change instead of waiting for a case where the question is properly presented.[310] If courts consider taking such a step, they may wish

303. *Id.* at 846.

304. *Id.*

305. *Id.*

306. *Id.*; *cf. In re* Marriage of Ihle, 577 N.W.2d 64, 68–69 (Iowa Ct. App. 1998) (finding the court could not conclude that any substantial rights had been affected when appellant failed to make a specific objection at trial, and as a result the denial of her motion for continuance constituted a denial of due process).

307. *See supra* Part I.G.

308. *See* Strand v. Rasmussen, 648 N.W.2d 95, 100–01 (Iowa 2002).

309. *See, e.g.*, *In re* S.P., 672 N.W.2d 842, 845–46 (Iowa 2003).

310. *See, e.g.*, MARTINEAU, *supra* note 4, § 3.9; Vestal, *supra* note 92, at 509–11.

to consider the following. First, an appeal is, most importantly, about the parties.[311] If the parties did not think enough of an issue to raise it, because it was irrelevant to their needs or otherwise, it is uncertain whether the appellate court should attach greater importance to the issue than the litigants.[312] Second, when reversing on an issue not advanced in district court, it is a given that the record is less developed than if the issue had been advanced at trial.[313] The appellate court deciding a case on a less-than-fully developed factual basis may, as a consequence, not be able to perceive problems with the new rule of law that would have been apparent in a more developed record.[314] Third, reversing on an issue not presented below deprives the reviewing court of the benefit of the trial judge's opinions.[315] If a proposed change in the law were presented first in the district court, problems with interpretation and application may be evident or may have been exposed.[316] Finally, reversing on an unpreserved issue to make or change law dilutes the respect for error preservation rules. Every litigant who wishes to raise an unpreserved issue will frame it as a novel question of law or an instance where the law should be changed.

In contrast to cases where error has clearly not been preserved and the merits are addressed anyway (whether by affirming or reversing), courts frequently encounter cases where it is not clear whether error has been preserved. Did the respondent raise this defense? Did the court rule on the plaintiff's objection? In cases where these issues arise, how does the appellate court get out of the gray area and arrive at a decision? The correct approach may be to look at whether the purposes of the error preservation rules were served.[317] The standard should be adequacy, not perfection.[318] Cases should not be decided based on "hypertechnical"[319] error preservation reasons. If it is apparent that the functions of the error preservation rules have been served by the proceedings in the district court, the appellate court should consider the error preserved. There should be some distinction between tolerable minor errors that relate only

311. *See* Vestal, *supra* note 92, at 487.

312. *Id.* at 489–90.

313. *See id.* at 488 (stating the litigants "establish the record to be considered by an appellate court").

314. *Id.* at 494.

315. *See id.* at 493–95.

316. *See id.*

317. *See supra* Part II.A.

318. *See, e.g.*, Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006).

319. Ezzone v. Riccardi, 525 N.W.2d 388, 403 (Iowa 1994).

to form and major departures that undermine function.[320] Error preservation rules should be a means to improve the quality of justice in Iowa and not the ends in themselves.[321]

On this point, consider *State v. Schutz*,[322] in which a defendant wished to introduce expert testimony on the reliability of eyewitnesses.[323] Prior to trial, the district court, relying on *State v. Galloway*,[324] ruled that the evidence was inadmissible.[325] Schutz did not make an offer of proof of the expert's qualifications or the evidence he wished to present at trial.[326] He raised the issue in a motion for new trial, which the trial court denied, again relying on *Galloway*.[327] On appeal, the State argued error was not preserved because the defendant had not made an offer of proof.[328] The Iowa Supreme Court disagreed, overruled *Galloway*, and reversed the defendant's conviction.[329]

While noting that an offer of proof is normally required when evidence is excluded,[330] the court concluded such an offer was unnecessary in this case.[331] The court stated:

> Underlying this requirement is the premise that in ordinary circumstances in the absence of an offer of proof we lack an adequate record to review the ruling. However, in this case the record adequately demonstrates the issue raised. The trial court understood *Galloway* to be a per se rule of exclusion. Under these special circumstances, an offer of proof as to the proposed testimony would be *frivolous*. Both Judge Blane and Judge Novak understood and

320. Note, *supra* note 4, at 13.

321. *See supra* Part II.A.

322. State v. Shutz, 579 N.W.2d 317 (Iowa 1998).

323. *Id.* at 318.

324. State v. Galloway, 275 N.W.2d 736, 738–39 (Iowa 1979) (explaining the desired expert testimony and holding that such testimony was not admissible).

325. *Id.*

326. *Schutz*, 579 N.W.2d at 318.

327. *Id.* (Shutz argued that *Galloway*'s holding regarding expert witness testimony on the reliability of eyewitnesses should be reversed, but the trial judge believed it was good law and it was the role of the appellate courts to change the law).

328. *Id.* (explaining the State argued an offer of proof was required and without such an offer the issue was waived).

329. *Id.* at 320.

330. *Id.* at 318–19; *see also supra* notes 178–79 and accompanying text.

331. *Schutz*, 579 N.W.2d at 319.

addressed the issue raised.[332]

The standard employed in *Schutz* was one of adequacy.[333] The court recognized the purposes of the error preservation rules had been served.[334] If the standard employed by the *Schutz* court had been perfection, on the other hand, a nonsensical result would have been reached. Although an offer of proof would have avoided this issue, the additional offer of proof would have served no greater purpose and would have become a good in its own right, rather than a mechanism to attain a good. Form would have been exalted over function.

B. *Error Preservation in Family Law and Juvenile Law Appeals*

Contrary to an often-expressed belief, error preservation rules apply in family law and juvenile law cases—even if error preservation is often not the reason for an appellate court's decision on an issue. Review in these cases is de novo, but this is a de novo review of properly preserved issues.[335]

1. *Family Law*

The vast weight of authority applies error preservation rules to family law appeals. For example, where split physical custody was not presented to the trial court, it would not be considered on appeal.[336] Additionally, published cases have refused to reach the following issues for lack of error preservation: The availability of a post-secondary education subsidy,[337] the allocation of tax dependency exemptions,[338] the alleged presentation of evidence while not under oath,[339] the admissibility of a custody evaluator's testimony,[340] and the purported waiver of the right to challenge paternity.[341] Similarly, unpublished opinions demonstrate an unwillingness to reach unpreserved questions involving custody and placement,[342] visitation,[343]

332. *Id.* (emphasis added) (citation omitted).

333. *Id.*

334. *See id.* Justice Carter dissented in *Schutz*, but did not do so based on error preservation grounds. *Id.* at 321 (Carter, J., dissenting).

335. *In re* Marriage of Hitchcock, 265 N.W.2d 599, 606 (Iowa 1978).

336. *In re* Marriage of Mrkvicka, 496 N.W.2d 259, 261 (Iowa Ct. App. 1992).

337. *In re* Marriage of Okland, 699 N.W.2d 260, 271 (Iowa 2005); *In re* Marriage of Maher, 596 N.W.2d 561, 567 (Iowa 1999).

338. *In re* Marriage of Anderson, 509 N.W.2d 138, 144 (Iowa Ct. App. 1993).

339. *In re* Marriage of Okonkwo, 525 N.W.2d 870, 872 (Iowa Ct. App. 1994).

340. *In re* Marriage of Rierson, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

341. *In re* Marriage of Halvorsen, 521 N.W.2d 725, 729 (Iowa 1994).

342. Van Wechel v. Mueller, No. 02-0826, 2003 WL 118614, at *3 (Iowa Ct.

domestic abuse,[344] child support,[345] and property division,[346] as well as evidentiary challenges,[347] constitutional questions,[348] and challenges under Iowa Code Chapter 598B (Uniform Child Custody Jurisdiction and Enforcement Act).[349]

2. *Juvenile Law*

Error preservation rules also apply in juvenile cases.[350] In *In re A.R.*, the Iowa Supreme Court held that a sufficiency of the evidence challenge may be heard on appeal even if it was not raised in the juvenile court.[351]

There is some difference of opinion in cases that involve termination of parental rights about how one preserves error on a claim that the Department of Human Services (DHS) failed to make reasonable efforts or actually provide sufficient services to allow for family reunification. In the 2000 decision *In re C.B.*, the Iowa Supreme Court made several

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App. Jan. 15, 2003).

343. *In re* Marriage of Arndt, No. 00-76, 2001 WL 487348, at *3 (Iowa Ct. App. May 9, 2001).

344. Tilley v. Tilley, No. 03-1177, 2004 WL 2579438, at *1 (Iowa Ct. App. Nov. 15, 2004).

345. *In re* Marriage of Etringer, No. 06-0112, 2006 WL 2267076, at *1 (Iowa Ct. App. Aug. 9, 2006); *In re* Marriage of Hilmo, No. 99-1196, 2000 WL 1587756, at *2 (Iowa Ct. App. Oct. 25, 2000), *aff'd*, 623 N.W.2d 809 (Iowa 2001).

346. *In re* Marriage of Stahl, No. 02-0582, 2003 WL 557376, at *2 (Iowa Ct. App. Feb. 28, 2003); *In re* Marriage of Uhlenhopp, No. 02-1352, 2003 WL 21230606, at *3 (Iowa Ct. App. May 29, 2003).

347. *In re* Marriage of Bode, No. 05-0817, 2005 WL 3116134, at *5 (Iowa Ct. App. Nov. 23, 2005); *In re* Marriage of Cohrs, No. 00-1310, 2001 WL 1578744, at *1 (Iowa Ct. App. Dec. 12, 2001).

348. *In re* Marriage of Hutchinson, No. 05-0329, 2005 WL 3116034, at *1 (Iowa Ct. App. Nov. 23, 2005) (failure to raise due process objections); Lamison v. Arnold, No. 00-1597, 2001 WL 1205284, at *3 (Iowa Ct. App. Oct. 12, 2001) (same); *In re* Marriage of Howe, No. 99-784, 2000 WL 279095, at *2 (Iowa Ct. App. Mar. 15, 2000) (same).

349. Lamison v. Arnold, No. 00-1597, 2001 WL 1205284, at *2 (Iowa Ct. App. Oct. 12, 2001).

350. *See, e.g.*, *In re* K.C., 660 N.W.2d 29, 38 (Iowa 2003); *In re* S.S., No. 02-0561, 2002 WL 1072279, at *1 (Iowa Ct. App. May 31, 2002); *In re* C.M., 652 N.W.2d 204, 207 (Iowa 2002); *In re* M.T., 613 N.W.2d 690, 692 (Iowa Ct. App. 2000); *In re* S.J.K., 560 N.W.2d 39, 42 (Iowa Ct. App. 1996); *In re* A.D.L., 497 N.W.2d 178, 180–81 (Iowa Ct. App. 1992).

351. *In re* A.R., 316 N.W.2d 887, 888–89 (Iowa 1982). This is consistent with the general rule that appellants may challenge the sufficiency of the evidence in bench trials without raising the issue in the trial court. *See supra* Part III.B.7.

statements.[352] First, the court stated that reasonable efforts are an element of several of the statutory grounds for terminating parental rights.[353] The court wrote: "The State must show reasonable efforts as a part of its ultimate proof the child cannot be safely returned to the care of a parent."[354] In reviewing the sufficiency of evidence regarding reasonable efforts, the *In re C.B.* court evaluated the services actually provided, "not [the] services [the parent] now claims the DHS failed to provide."[355] The court clearly drew a distinction between (1) services that were offered by DHS or proposed by the parents and refused by DHS; and (2) services that were never proposed by the parents.[356]

From *In re C.B.* and *In re A.R.*, two applicable rules may be drawn. In order to challenge the failure to provide certain specific services, that failure must be challenged in juvenile court[357] proceedings prior to the termination of parental rights petition.[358] When the issue is the adequacy of the services actually provided and when proof of reasonable efforts is an element of the statutory ground for termination, a parent should be able to challenge the sufficiency of the evidence to sustain a finding of reasonable efforts even if that issue was not challenged in the juvenile court.[359] It does not appear that these distinctions have been recognized in practice. The Iowa Court of Appeals has held that error was not preserved when a parent did not "demand or request . . . other, different, or additional services prior to the termination hearing."[360] It is clear that error is not preserved in the latter case if the specific services are not requested. However, under *In re C.B.* and *In re A.R.*, parents should be able to challenge the sufficiency of the evidence to support a finding that the services actually provided by DHS constituted reasonable efforts, when "reasonable efforts" is a required element of the termination grounds, without first raising the issue in the juvenile court.[361] If, however, the

352. *In re* C.B., 611 N.W.2d 489 (Iowa 2000).

353. *Id.* at 492.

354. *Id.* at 493.

355. *Id.* at 494.

356. *See id.* at 495.

357. *Id.* at 493–94.

358. *See, e.g.*, *In re* S.R., 600 N.W.2d 63, 65 (Iowa Ct. App. 1999).

359. *See, e.g.*, *In re* S.S., No. 02-0561, 2002 WL 1072279, at *2 (Iowa Ct. App. May 31, 2002) (Vaitheswaran, J., concurring in part and dissenting in part).

360. *In re* A.L., No. 05-0250, 2005 WL 1106700, at *2 (Iowa Ct. App. May 11, 2005); *see also In re* L.P., No. 05-0664, 2005 WL 2086046, at *1 (Iowa Ct. App. Aug. 31, 2005); *In re* M.L.C., No. 04-0513, 2004 WL 1396342, at *2 (Iowa Ct. App. June 23, 2004).

361. *In re* S.S., 2002 WL 1072279, at *2 (Vaitheswaran, J., concurring in part

juvenile court did not discuss reasonable efforts in its decision and reasonable efforts is an element of a statutory ground, it seems reasonable to require the parent to ask the juvenile court to address this required finding in order to preserve error,[362] especially in light of the Iowa Supreme Court's recent rejection of the concept of implicit findings.[363]

3. *Exceptions for Child Custody Appeals?*

The common and persistent view that child custody cases are exempt, or should be exempt, from error preservation rules draws its support from cases such as *In re Marriage of Stafford*.[364] In *In re Marriage of Stafford*, the initial dissolution decree placed the children in the joint legal custody of the parties, and in the physical care of their father.[365] The children's mother petitioned for modification requesting that they be placed in her primary physical custody.[366] In his answer, the children's father denied the mother's allegations against him and further asked that the children be placed in his sole custody.[367] The district court awarded sole custody to the father, and the mother appealed.[368]

On appeal, the court modified the modification decree and placed the children in the joint custody of the parties and the primary physical care of their father.[369] In doing so, the court noted it would consider joint custody, even though it was not "technically" preserved because to not do so would penalize the children for their parents' trial tactics and mistakes.[370] *In re Marriage of Stafford* could be read to suggest the best interest of the

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and dissenting in part). In *In re C.B.*, the court noted that Iowa Code Section 232.99(2A) had been amended in 1998 to require juvenile court judges "at the beginning of each dispositional and subsequent hearing [to] . . . 'advise the parties' that the failure to identify a deficiency in services or to request additional services may preclude the party from challenging the sufficiency of the services in a termination proceeding." *In re C.B.*, 611 N.W.2d at 494 n.1. This statute does not create an error preservation requirement; rather, it contains a warning to litigants that error may not be preserved in light of pre-*In re C.B.* authority.

362. *See, e.g.*, *In re* S.S., 2002 WL 1072279, at *1.

363. Teamsters Local Union No. 421 v. City of Dubuque, 706 N.W.2d 709, 713 (Iowa 2005).

364. *In re* Marriage of Stafford, 386 N.W.2d 118 (Iowa Ct. App. 1986).

365. *Id.* at 119.

366. *Id.* at 120.

367. *Id.*

368. *Id.*

369. *Id.* at 122.

370. *Id.*

children should trump error preservation concerns.[371] From reviewing the facts recited in the opinion, however, it appears that error was in fact preserved.[372] The parties both sought a change regarding joint legal custody.[373] Both placed the matter at issue, and the matter was decided by the district court.[374] In addition, by assuming error was not technically preserved, [375] it appears that the functions of the error preservation rules were served.[376] The parties and the district court knew what was at stake and the issues in dispute.[377] Additionally, *In re Marriage of Stafford* runs contrary to the vast weight of authority applying error preservation rules to family law cases.[378] *In re Marriage of Stafford* ought not be viewed as creating a best interest or child custody exception to the error preservation rules.

If error preservation rules should not apply in cases where children are interested in the outcome, for example, then error preservation rules should not apply to child support cases or to cases where parents sue on behalf of their children, such as medical malpractice cases.[379] Moreover, a best interests exception to the error preservation rules is incompatible with the current practice of disposing of many issues in juvenile appeals for failure to preserve error.[380] If "the best interest of the child" is the guiding force in both types of cases,[381] it would be inconsistent to create an error preservation exception for child custody cases without doing so for juvenile cases. Finally, the idea of determining the best interest of the child based on unpreserved issues is inconsistent with the weight given to the decisions of the trial judge in equity cases.[382] If such an exception were created, reviewing courts would weigh district courts' resolutions of properly-presented issues and then be required to also weigh matters the district court never decided. Simultaneously giving weight to a district court's findings of fact and considering issues the district court neither heard nor

371. *See id.*
372. *See id.* at 119–20.
373. *Id.* at 120.
374. *Id.*
375. *Id.* at 122.
376. *See supra* notes 306–19.
377. *See supra* note 311 and accompanying text.
378. *See supra* Part IV.B.1.
379. *See, e.g.*, Ray v. Paul, 563 N.W.2d 635, 638 (Iowa Ct. App. 1997) (finding error preserved in child's malpractice case).
380. *See supra* Part V.B.2.
381. IOWA R. APP. P. 6.14(6)(o).
382. *See* IOWA R. APP. P. 6.14(6)(g).

decided is conceptually problematic.

VI. CONCLUDING THOUGHTS: WHERE ARE WE? WHERE SHOULD WE BE?

From the preceding discussion, this Article now attempts to provide two analytical tools containing important guiding principles: one for practitioners[383] and one for courts deciding future error preservation cases and establishing new error preservation rules.[384]

A. *Guidance for Counsel*

Counsel's first task is to decide whether an issue, regardless of the type of case, was timely and specifically raised. If the issue was not so raised, is the issue one of subject matter jurisdiction, or is counsel asking the appeals court to affirm an evidentiary ruling on grounds not raised at trial? If the issue was not raised with the requisite timeliness and specificity in the trial court and neither exception applies, error was not preserved.

Assuming the issue was one that was required to be raised in the trial court and that was done, counsel must next determine whether the issue was decided. If the issue was not decided, was a decision requested? If the issue was decided or a decision was requested and not made, then error was preserved. If no decision was received or requested as to the issue, the issue was not preserved, if reversal is sought based on that issue. To preserve a favorable judgment, however, counsel may rely on grounds that were raised but not decided by the district court. It is no longer safe to assume an implicit decision will preserve error. If the district court did not decide an issue that was raised, and a decision is required to preserve error, counsel may wish to consider seeking a limited remand as a last resort.

If counsel did not preserve error on an issue, counsel has several options, none of which are attractive but all of which have met with varying degrees of success in Iowa's appellate courts. For example, counsel may argue the issue is necessary to decide a properly-preserved issue. Also, counsel may argue the adverse party preserved error. Finally, and as a last resort, counsel may wish to argue enforcing error preservation rules in a particular case to the client's detriment would result in a harm of constitutional magnitude. Lacking any other option, some counsel ignore

383. *See infra* Part VI.A.
384. *See infra* Part VI.B.

error preservation failures in hopes that the reviewing court will do likewise, which has worked for the occasional litigant in the past. However, this ostrich-like reaction is not likely to succeed, and a better course would be to confront error preservation failings rather than avoid or ignore them.

Counsel should brief the issue of error preservation and present the record to the reviewing court. If the issue of error preservation is a close one, counsel should emphasize the policies underlying the error preservation rules. Counsel seeking to show error was preserved may wish to phrase the issue in terms of adequacy, not perfection. In asserting a lack of error preservation, counsel may wish to avoid focusing on the hypertechnical and instead raise objections that the core purposes of the rules have not been met.

B. *Questions for the Courts*

This Article now offers some final thoughts for Iowa courts to consider when confronting error preservation issues. The starting point for every inquiry should be the constitutional underpinnings and underlying purposes of the error preservation rules. Several commentators speak of the strict nature of error preservation rules,[385] and such strictness is required and proper, but to what extent? While strictness at the core is required, is strictness at the periphery required or even desirable?

In announcing a new error preservation rule or refinement, it is not enough that error preservation purposes and policies be cited; rather, they must actually be advanced. Additional layers of error preservation rules, however, may provide diminishing marginal utility. Additional rules may come at a cost to litigants, but may only slightly improve the quality of justice in Iowa. Is that desirable? Is that required? Regarding error preservation rules, can one do more with less?

Some additional questions are also worth keeping in mind in the development of error preservation rules. To what extent does the error preservation decision made in a particular case hold litigants to an impractically (or impossibly) high standard?[386] To what extent is the error

385. *See, e.g.*, IOWA STATE BAR ASS'N, *supra* note 4, at 50; Allbee & Kincaid, *supra* note 4, at 26.

386. *See, e.g.*, Metz III v. Amoco Oil Co., 581 N.W.2d 597, 601 (Iowa 1998) (Lavorato, J., dissenting) (arguing the district court had no authority to give the plaintiffs "the duty to obtain counsel as a condition for proceeding with their case").

preservation decision in a particular case "hypertechnical"?[387] To what extent are the rules applied or created in a way to elevate form over substance? To what extent are the litigants required to serve the rules, instead of the rules serving the litigants? To what extent do the rules relate to the esteem with which the appellate courts are held by the legal community and the general population? To what extent do Iowa's error preservation rules advance the quality and availability of justice in Iowa? To what extent can they be made better? If Iowa courts continuously focus on these questions, the error preservation rules in Iowa will be sustained and improved and will remain aligned with the policies behind their creation.

387. Ezzone v. Riccardi, 525 N.W.2d 388, 403 (Iowa 1994).