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ERROR PRESERVATION IN CIVIL LITIGATION: A PRIMER FOR THE IOWA PRACTITIONER

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I. Introduction

Trial courts must be afforded the opportunity to avoid or correct error in judicial proceedings. Similarly, appellate courts must be provided with an adequate record in reviewing errors purportedly committed during trial. This perforce requires that counsel make timely and sufficient motions or objections upon which trial judges may rule. Absent such actions, an appellate court has nothing to review. Simply stated, counsel must take necessary measures to construct a record in order to preserve error for appellate review.

Error preservation principles are strictly applied in the Iowa appellate courts not only in the context of evidentiary rulings, but also in connection with matters generally considered to be non-evidentiary in nature. Although the necessity of preserving error as a condition for appellate consideration is generally recognized by counsel, nonetheless difficulties persist in the application of the specific rules governing error preservation. These difficulties are evidenced by the significant number of reported decisions each year in

which the Iowa appellate courts have declined to consider particular issues because error was either not preserved or not adequately preserved. The purpose of this article is to review and analyze the principles of error preservation developed by and utilized in the Iowa courts in civil litigation.[1] The general principles of error preservation, and the policies underlying those principles, are examined initially. Thereafter, the prerequisites for preserving error with respect to evidentiary matters are discussed, followed by an examination of related waiver doctrines. Finally, the requirements for preservation of error in connection with a number of non-evidentiary matters, including instructions, are reviewed. It is hoped that this material will not only reacquaint counsel with the prerequisites of error preservation in civil proceedings, but will also serve as a reference for particular problems and questions.[2]

II. General Principles of Error Preservation

As developed in the Iowa courts, the concepts of error preservation essentially encompass two related concerns. The prevalent theme of the various rules is that potentially reversible error must be brought to the attention of the trial court before the error can be considered on appeal; if the trial court is not alerted in a timely and sufficiently specific fashion, the error will not be reviewed by the appellate court. This aspect of error preservation obligates counsel to make certain motions or objections in the pretrial, trial or post-trial phases of a proceeding.[3] Secondly, preservation of error also contemplates the construction of an appropriate and sufficiently detailed record upon which the reviewing court can base its decision. In this sense, offers of proof or the utilization of procedural devices to secure a record of otherwise unreported matters become necessary prerequisites to appellate review.[4]

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1. While the scope of this article concerns only error preservation in the context of civil litigation, a significant portion of the discussion applies to criminal proceedings as well. Indeed, a number of the applicable principles have been developed in the criminal context. Nonetheless, the prosecution or defense of criminal cases raises a multitude of considerations and problems peculiar to criminal practice and procedure. These concerns, although noted, are not fully developed in this article. For a discussion of error preservation principles in criminal proceedings, see generally Sullins, *Preservation of Error: Providing Basis For Appellate Review*, 22 Drake L. Rev. 435 (1973).

2. For an excellent discussion of general trial principles, including preserving error in the context of admitting or excluding evidence, see Fagg, *A Judge's View of Trial Practice*, 28 Drake L. Rev. 1 (1979).

3. *See, e.g.*, Iowa R. Evid. 103(a) (precluding review of erroneous ruling admitting or excluding evidence in absence of timely objection, motion to strike or offer of proof); Iowa R. Civ. P. 175(a) (motion for change of venue in civil action required prior to answer).

4. *See, e.g.*, Iowa R. Evid. 103(a)(2) (offer of proof); Elkin v. Johnson, 260 Iowa 46, 49, 148 N.W.2d 442, 444 (1967) (construction of record with respect to unreported matters); *cf.* Harper v. Cedar Rapids Television Co., 244 N.W.2d 782, 786 (Iowa 1976) (necessity of obtaining ruling by trial court).

These related concerns — alerting the trial court to potential error and constructing an adequate record for appellate review — compose the essential elements of error preservation. The doctrine itself is grounded upon considerations of judicial economy and reliance on the adversary system of dispute resolution. The litigation process involves a substantial commitment of judicial time and resources. This is particularly true in today's increasingly litigious society, with growing numbers of litigants competing for scarce judicial resources and imposing an even greater burden on the court system. In these circumstances, concerns of judicial economy certainly justify the reluctance of appellate courts to set aside trial results on the basis of errors never called to the attention of the trial court.

Perhaps the primary rationale for the error preservation doctrine, however, is societal belief in the efficacy of the adversary system. Traditional error preservation principles are "closely linked to the adversary nature of a lawsuit."[5] In essence, the adversarial model of dispute resolution places the burden of presenting evidence and enforcing evidentiary and procedural rules upon counsel for the parties.[6] Where this responsibility is not fulfilled, reliance upon the adversary system compels acceptance of the result reached at trial. This belief in the efficacy of the adversarial method of dispute resolution also underlies the central premise of error preservation, which requires that the trial court must be alerted to the alleged error before it will be considered by the appellate court.[7]

As indicated, the Iowa appellate courts have for the most part strictly enforced error preservation principles, and have repeatedly refused to consider issues not adequately raised before the trial court. Stringent observance of these requirements is the general rule in both civil and criminal

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5. Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d 838, 841 (Iowa 1979).

6. *Cf.* State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974) ("An objection is not simply a device to preserve error for appeal. It is, in the first instance, a means of involving a rule of evidence by which admission of proof is regulated . . . . The burden of establishing a reason for exclusion of evidence is on the objector.").

7. *See, e.g.*, United States v. Sisto, 534 F.2d 616 (5th Cir. 1976):

> The structure of our criminal trial system is founded in large part on a belief in the efficacy of the adversary system, and considerations of judicial economy weigh more heavily in our decisions when counsel for the complaining party has failed to bring a potentially reversible error to the attention of the trial court.

Id. at 624. *Cf.* Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d at 841 (linking error preservation principles to adversarial nature of litigation).

A related justification for the traditional error preservation principles concerns the deliberate refusal of counsel to interpose necessary objections or motions. 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, e.g.*, United States v. Sisto, 534 F.2d at 624 n.9.

litigation.[8] While the policy underpinnings of error preservation arguably support the strict posture taken by the courts in the context of actual litigation, they are not as compelling in other contexts. Thus, for example, in *Committee on Professional Ethics & Conduct v. Behnke*,[9] the Iowa Supreme Court concluded that the "traditional concepts of error preservation" are not invariably controlling in attorney disciplinary proceedings.[10] The court's analysis in reaching this conclusion is instructive. Automatic application of error preservation principles, given their interrelationship with the adversary system, would effectively result in the characterization of attorney disciplinary proceedings as nothing more than "unusual lawsuits," overlooking the fact that these actions are special civil matters subject to de novo review by the supreme court.[11] In such circumstances, stringent application of error preservation principles could lead to abdication of the court's "ultimate responsibility" to determine the particular attorney's fitness to practice law. For these reasons, the court concluded that the error preservation principles need not always be imposed in attorney disciplinary proceedings. "Where it is apparent that raising the legal issue before the Commission would not have changed the record made there, nor the course of the proceeding before that body," error preservation requirements would not be strictly applied.[12] Because the challenges first raised on appeal in *Behnke* concerned matters which could not be acted upon by the Grievance Commission, the failure to present these issues before the Commission did not preclude appellate review.[13]

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8. *See supra* note 1.

9. Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d at 841.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Behnke's vagueness challenge could properly be considered by the court for the first time on appeal. As noted by the court, constitutional issues, as a general matter, are to be exclusively considered by the judicial branch. The Grievance Commission, a non-judicial entity, was not a proper forum for raising a substantive constitutional challenge to an ethics provision. *See, e.g.*, Salsbury Laboratories, Inc. v. Department of Environmental Quality, 276 N.W.2d 830, 836 (Iowa 1979). The other issue raised in *Behnke* related to the timeliness of the Grievance Commission's findings and conclusions; as the court noted, this issue did not arise until after the hearing before the Commission was concluded, and could not be corrected by the Commission. Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d at 841. Thus, the failure to raise these alleged defects did not implicate concerns of economy or reliance on the adversary system. Committee on Professional Ethics & Conduct v. Durham, 279 N.W.2d 280, 283 (Iowa 1979) (vagueness challenge to ethics provision allowed although first raised on appeal to supreme court). *But cf.* Committee on Professional Ethics & Conduct v. Roberts, 246 N.W.2d 259, 260 (Iowa 1976) (issue of untimely notice of hearing before Grievance Commission not considered on appeal "because it was not urged before the commission;" alleged defect could have been corrected had it been raised before the Commission); Committee on Professional Ethics & Conduct v. Randall, 285 N.W.2d 161, 164-65 (Iowa 1979) (challenge to disciplinary proceedings as violative of right to due process waived when not presented to commission or included in brief submitted to court).

The special nature of the attorney disciplinary process, coupled with the supreme court's obligation to review the record de novo and act as final arbiter of the subject attorney's fitness to practice law, readily explain the court's deviation from traditional error preservation principles in that context. Moreover, the court's decision to relax error preservation standards in such cases is consistent with the policies underlying general error preservation principles. Where the alleged defect or error is of a type that cannot be corrected by the decision-making body involved, the failure to raise that error before that body does not result in any loss of time or resources.

A related doctrine exists in the context of pure administrative agencies. Because such agencies are powerless to rule upon substantive constitutional challenges to their enabling legislation or procedures, the failure to raise such challenges before them does not preclude the presentation of such challenges upon judicial review.[14] Similarly, reliance upon the adversary system as a means of enforcing evidentiary and procedural rules is not implicated where the raising of alleged errors would be futile.[15]

In short, the less stringent approach approved in *Behnke* will undoubtedly be limited to situations where the failure to raise allegations of error until appeal does not implicate considerations of judicial economy or the adversary method of dispute resolution. As such, the character of the body whose decision is being reviewed and the nature of the alleged error will necessarily be determinative. Because the special circumstances present in *Behnke* and similar cases will rarely exist in general civil and criminal litigation, it is unlikely that the traditional concepts of error preservation will be relaxed in those matters.

III. Evidentiary Matters.

The principles of error preservation are perhaps best understood, and most frequently applied, with respect to evidentiary matters. In order to preserve error for appellate review, counsel must comply with several requirements which govern the means by which rulings admitting or excluding evidence may be challenged. Error preservation considerations in the context of evidentiary matters include not only timely challenges to the admission or exclusion of individual items of evidence, but also must encompass the various motions by which the sufficiency of evidence adduced at trial is challenged.

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14. Salsbury Laboratories, Inc. v. Department of Environmental Quality, 276 N.W.2d at 836.

15. Of course, counsel must raise challenges of this nature at the first available time. Failure to do so will probably result in waiver of the issue. *See* Committee on Professional Ethics & Conduct v. Randall, 285 N.W.2d at 164-65 (failure to raise constitutional challenge in briefs before Iowa Supreme Court waived alleged defect).

A. Evidentiary Objections.

At common law, the preservation of errors in the admission or exclusion of evidence required the making of timely[16] and specific objections.[17] Where the requisite timeliness and specificity were lacking, alleged errors, even those raising constitutional issues, could not be asserted on appeal.[18] Iowa Rule of Evidence 103 now codifies these common law principles. The rule provides:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
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> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
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> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
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> (b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
>
> (c) Hearing of Jury. In jury cases, proceedings shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being submitted to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.[19]

Incorporating the common law requirements, rule 103 provides a framework for the preservation of alleged errors in the admission or exclusion of evidence.

1. *Rulings Admitting Evidence*

Rule 103 provides that certain prerequisites must be satisfied before error may be predicated upon a ruling admitting evidence. Specifically, the rule requires that (1) a timely objection or motion to strike, (2) stating the specific ground of the objection, (3) appear of record.[20] In addition, the al-

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16. *E.g.*, State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977).
17. *E.g.*, State v. Pardock, 215 N.W.2d 344, 348 (Iowa 1974).
18. *E.g.*, State v. Paulsen, 293 N.W.2d 244, 247 (Iowa 1980). Contrast the raising of substantive constitutional challenges in the context of administrative agencies. *See, e.g.*, Salsbury Laboratories v. Department of Environmental Quality, *supra* note 13.
19. IOWA R. EVID. 103.
20. IOWA R. EVID. 103(a)(1).

leged error must affect a substantial right of the party before it will serve as the basis for corrective action by the appellate court.[21]

a. *Timeliness.* The requirement that objections to the introduction of evidence must be timely requires that they be raised at the earliest time the error becomes apparent.[22] Failure to object at the earliest opportunity will generally result in waiver of the alleged error.[23]

Ordinarily, an objection to testimony must precede the answer given by the witness. The failure to object prior to the witness's response is not necessarily fatal, however, so long as appropriate steps are taken. When an objection is interposed after the answer to a question has already been given, "in order for the objection to be adequate a motion to strike must be made, application must be made to have the objection precede the answer, or an excuse offered for the delay in objecting to the evidence."[24] In short, where a response to an objectionable question has been given, counsel must immediately interpose an objection and request that the answer be stricken, specifying the legal grounds for the objection and motion to strike. Additionally, a request that the objection precede the witness's response, coupled with an excuse for counsel's delay, must also be stated.[25]

Like an evidentiary objection, a motion to strike must itself be made in a timely fashion; as a general rule, it must be interposed at the earliest opportunity after the ground for objection becomes apparent.[26] Ordinarily, the motion is applicable only to the latest answer given.[27] A ruling sustaining an objection which is made after an answer has been given does not have the effect of striking that testimony.[28] Testimony that has not been stricken will remain in the record and may be properly considered as evidence.

The motion to strike is typically employed where counsel did not have an opportunity to object before the witness's answer was given. It may also be utilized to challenge the admissibility of prior testimony when subsequent evidence or examination demonstrates that the previously admitted evidence was not in fact admissible.[29] Similarly, where evidence to "connect up" conditionally admitted evidence has not been introduced, a motion to strike that evidence should be interposed.

Tardiness is not the only difficulty associated with the timeliness requirement. Although less common, problems are also created when an objec-

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21. Iowa R. Evid. 103(a).
22. *E.g.*, State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977).
23. *E.g.*, State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978).
24. State v. Reese, 259 N.W.2d at 775.
25. *E.g.*, State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978); State v. Reese, 259 N.W.2d at 775.
26. *E.g.*, Kleve v. General Motors Corp., 210 N.W.2d 568, 574 (Iowa 1973).
27. *E.g.*, State v. Smith, 248 Iowa 603, 610, 81 N.W.2d 657, 661 (1957).
28. *See, e.g.*, Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974); State *ex rel.* Fulton v. Scheetz, 166 N.W.2d 874, 882 (Iowa 1969).
29. *E.g.*, Coonley v. Lowden, 234 Iowa 731, 746, 12 N.W.2d 870, 879 (1944).

tion is made prematurely. A premature objection is generally not sufficient to preserve error.[30] This situation typically arises where an objection is interposed to a preliminary question such as whether the witness has an opinion or is able to provide certain information. Inquiries of this nature only call for a "yes" or "no" response and, as such, generally are not themselves objectionable. If an objection is made prematurely, it must be repeated at the proper time or the objection to the error in admitting the testimony will be waived. If the witness should answer substantively after the premature objection has been overruled, counsel must lodge his objection and move to strike the response.[31]

b. *Specificity.* The party seeking to exclude evidence must also state the specific grounds for objection. This requirement is designed to both alert the court to the issue raised and to provide opposing counsel with the opportunity to correct the error, if possible.[32] General objections, such as "irrelevant and immaterial," "the witness is incompetent," or "calls for an opinion and conclusion," when overruled, ordinarily will not be sufficiently specific to preserve error.[33] Where an objection is sustained, however, any ground may be heard on appeal in support of the ruling, even though not specifically stated in the objection.[34]

As a general rule, when a timely and proper objection has been overruled, further objections are not required to preserve error when subsequent questions are asked raising the same issue.[35] Thus, is not necessary to make repeated objections to the same class of evidence. This rule does not apply, however, to competency objections concerning successive witnesses. Timely and appropriate objections with respect to competency must be repeated for each witness whose competence is questioned.[36]

The rule concerning objections to a class of evidence is also inapplicable where an objection is sustained. In such circumstances, it is necessary to again interpose a proper objection when similar evidence is introduced.[37]

Standing objections (i.e., objections which are not repeated throughout the trial but are expected to remain in effect) present related concerns. Such

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30. *See* Carradus v. Lange, 203 N.W.2d 565, 567-68 (Iowa 1973); Harrison v. Ulicki, 193 N.W.2d 533, 537 (Iowa 1972); State *ex rel.* Fulton v. Scheetz, 166 N.W.2d 874, 882 (Iowa 1969).

31. *See* Carradus v. Lange, 203 N.W.2d at 567; Harrison v. Ulicki, 193 N.W.2d at 537; State *ex rel.* Fulton v. Scheetz, 166 N.W.2d at 882.

32. *E.g.*, State v. Pardock, 215 N.W.2d 344, 348 (Iowa 1974); *see also* State v. Buckner, 214 N.W.2d 164, 167-68 (Iowa 1974) (discussing the purpose of an objection).

33. *See* State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975); Ferris v. Riley, 251 Iowa 400, 409-11, 101 N.W.2d 176, 181-82 (1960).

34. *E.g.*, State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974).

35. *E.g.*, State v. Padgett, 300 N.W.2d 145, 146 (Iowa 1981); State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976).

36. Solbrack v. Fosselman, 204 N.W.2d 891, 894 (Iowa 1973).

37. *See* Ladd, *Common Mistakes In the Technique of Trial*, 22 IOWA L. REV. 609, 614-16 (1937).

objections are not ordinarily recommended, given the difficulties that are created for appellate review when used. Recognizing these difficulties as well as the uncertainties resulting to the litigants themselves, the Iowa Supreme Court has disapproved the use of standing objections.[38]

As noted, motions to strike are also subject to the specificity requirement. The motion must indicate the specific grounds upon which the exclusion of evidence is urged. Any grounds not specified are waived.[39] Similarly, a blanket motion to strike testimony which is only partially inadmissible should ordinarily be overruled by the trial court.[40]

c. *Objections and Equitable Proceedings.* Objections to testimony in equity cases are ordinarily not ruled upon. Rather, the evidence is received subject to the objections of counsel. This procedure preserves a complete record for the trial court, and for de novo review by an appellate court, leaving to each the decision to reject inadmissible evidence.[41]

d. *Requests for Rulings.* If an objection or motion is never decided or ruled on by the court in the trial of non-equity matters, an appellate court has nothing to review. Thus, where the trial court reserves ruling, the moving or objecting party must subsequently obtain a direct ruling in order to preserve the matter for review on appeal.[42] The party desiring a ruling has the burden of demanding it from the trial court.[43] Failure to request a ruling on an objection or motion constitutes waiver and will not be excused absent the trial court's refusal or failure to rule after a request has been made.[44]

2. *Rulings Excluding Evidence*

Iowa Rule of Evidence 103 also delineates the framework for preserving

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38. Prestype, Inc. v. Carr, 248 N.W.2d 111, 117 (Iowa 1976); State v. Jeffs, 246 N.W.2d 913, 917 (Iowa 1976). Given the uncertainties concerning adequate error preservation where objections to a class of evidence are involved, as well as the court's disapproval of standing objections, counsel should exercise caution when confronted with this problem. For example, it may be wise to specifically state all grounds for objection to a particular class of evidence or line of questioning and thereafter repeat for the record that the "same objection" is being made or that "counsel objects for all the reasons last stated."

39. *See* Harrison v. Ulicki, 193 N.W.2d at 537.

40. Kleve v. General Motors Corp., 210 N.W.2d at 574.

41. Local Board of Health, Boone County v. Wood, 243 N.W.2d 862, 868 (Iowa 1976); *In re* Scarlett, 231 N.W.2d 8, 10 (Iowa 1975); *In re* Marriage of Erickson, 228 N.W.2d 57, 59 (Iowa 1975).

42. *E.g.*, Blunt, Ellis & Loewi, Inc. v. Igram, 319 N.W.2d at 195; Harper v. Cedar Rapids Television Co., 244 N.W.2d at 786.

43. *E.g.*, Blunt, Ellis & Loewi, Inc. v. Igram, 319 N.W.2d at 195; Harper v. Cedar Rapids Television Co., 244 N.W.2d at 786. *See also In re* Estate of Coleman, 238 Iowa 768, 770, 28 N.W.2d 500, 502 (1947).

44. Blunt, Ellis & Loewi, Inc. v. Igram, 319 N.W.2d at 195. The court has suggested that on appeal, a party failing to request a ruling on an issue could seek a limited remand under Iowa Rule of Appellate Procedure 121(g) for the specific purpose of obtaining a ruling from the trial court. *Id.*

error where profferred evidence is excluded by the trial court. In addition to the general prerequisite that a substantial right of the party be affected, the rule simply requires that the substance of the proffered evidence must have been made known to the court by offer of proof or that it was apparent from the context within which the evidence was offered.[45] This rule is also consistent with prior Iowa decisions.

As a general rule, offers of proof are necessary to secure appellate review of trial court rulings excluding evidence. The function of an offer of proof is to afford the trial court "a more adequate basis for its evidentiary ruling and to make a meaningful record for appellate review since a reviewing court cannot predicate error upon speculation as to answers which would have been given to questions had objections thereto not been sustained."[46] The burden of making an offer of proof is on the party who believes that the evidence has been incorrectly excluded.

Failure to make an offer when an objection has been sustained ordinarily leaves nothing for review.[47] An exception to this rule exists, however, where the evidence sought to be admitted is apparent from the entire record.[48] This exception is now codified in the text of rule 103.[49] An offer of proof is also unnecessary where the alleged error concerns the propriety of a court-imposed limitation on cross-examination.[50] When some portions of an offer of proof are inadmissible, the entire offer may be excluded.[51] Similarly, when parts of a unit of evidence are inadmissible, the failure to offer specific portions which are admissible is fatal.[52]

Iowa Rule of Evidence 103(d) relates to the form in which an offer of proof is made and received. The rule essentially provides that the trial court has broad discretion concerning the form of the offer. While the offer will generally be sufficient if counsel makes the court aware of the substance of the witness's anticipated testimony,[53] the trial court may permit or direct the attorney to present the offer of proof in question and answer form. In terms of effectiveness, offers of proof in this form are more desirable; they

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45. Iowa R. Evid. 103(a)(2).

46. Parrish v. Denato, 262 N.W.2d 281, 286 (Iowa 1978) (quoting State v. Richardson, 223 N.W.2d 207, 212-13 (Iowa 1974)).

47. *See* Truscheff v. Abell-Howe Co., 239 N.W.2d 116, 122 (Iowa 1976); Cole v. Laucamp, 213 N.W.2d 532, 534 (Iowa 1973).

48. Truscheff v. Abell-Howe Co., 239 N.W.2d at 122.

49. Iowa R. Evid. 103(a)(2).

50. State v. Cornell, 266 N.W.2d 15, 21 (Iowa), *cert. denied*, 439 U.S. 947 (1978).

51. Bill v. Farm Bureau Life Ins. Co., 254 Iowa 1215, 1223, 119 N.W.2d 768, 773 (1963).

52. Eickelberg v. Deere & Co., 276 N.W.2d 442, 445 (Iowa 1979); Englund v. Younker Bros., 259 Iowa 48, 57-58, 142 N.W.2d 530, 535 (1966).

53. An exception to this general rule may lie in cases where some question is raised concerning the attorney's actual ability to produce the witness or concerning whether the witness would testify as represented. In such circumstances, the court may compel production of the witness. *See, e.g.*, Scotland County v. Hill, 112 U.S. 183, 186 (1884); United States v. Kartman, 417 F.2d 893, 897 (9th Cir. 1969).

leave no doubt as to the content of the profferred testimony. This is also consistent with the primary purpose of the offer of proof, which is to provide the appellate court with a sufficient record of the evidence that was excluded so that it may properly determine whether the trial court's ruling was correct. As a general matter, offers of proof may be made orally or in writing.

Rule 103(d) also permits the trial court, in its discretion, to add any statements which demonstrate the character of evidence, the form in which the evidence was offered, the objection that was made and the ruling the court made on the objection.[54] This is also consistent with the purpose of the offer, and provides not only an adequate record concerning the proffered evidence and the court's ruling, but also enables the trial court to make a record which fully reflects what has transpired.

3. *Rule 103(c)*

Iowa Rule of Evidence 103(c) provides that "[i]n jury cases, proceedings shall be conducted to the extent practicable, so as to prevent inadmissable evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."[55] The purpose of the rule is obvious: to prevent objectionable evidence from reaching the jury by any means. Pursuant to this rule, every effort should be made to prevent the jury from being exposed to such evidence. As an obvious example, offers of proof should ordinarily be made outside the presence of a jury.[56]

B. *Motions in Limine*

Present-day trial practice often involves the use of motions in limine in connection with questions concerning the admissibility of evidence. Recent years have seen a distinct trend favoring such motions as a means of resolving evidentiary issues prior to trial. Because the pretrial adjudication of these issues minimizes the impact of potentially prejudicial evidence, the advantages associated with the use of limine motions are apparent. Additionally, the planning and use of these motions may aid in the orderly presentation of the case.

The function of a motion in limine is to alert the trial court to an evidentiary problem which may arise during trial and to obtain a ruling on the problem in advance. Frequently, the purpose of the moving party is to avert the disclosure of inadmissible or unduly prejudicial matters to the jury by either a reference of counsel or through the offer of evidence. The motion should seek to exclude not only the item of evidence, but also all references

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54. Iowa R. Evid. 103(c).
55. *Id.*
56. *E.g.*, State v. Walton, 247 N.W.2d 736, 739-40 (Iowa 1976).

to it during voir dire examination, opening statements and closing arguments and during trial. The limine motion may also be employed by the proponent of evidence to obtain an advance ruling concerning its admissibility.

The motion in limine should specifically identify the evidence at issue as well as the legal grounds favoring or opposing its admissibility. When the ruling on a motion in limine is adverse to a movant seeking to exclude evidence, the moving party must ordinarily object again when the evidence is offered at trial in order to preserve error.[57] An exception to this general rule has been created, however, where the motion is resolved in such a manner that it is beyond question that the challenged evidence will be admitted at trial.[58] In such circumstances, there is no reason to again object during trial. Nonetheless, the more prudent course for counsel presented with an adverse ruling on a motion in limine will be to object to the challenged evidence at trial in order to guarantee that no error preservation problems will be presented.

Where a limine motion seeking to exclude evidence is granted, the proponent of the evidence must make a proper offer of proof during trial. The offer should be made outside the jury's presence. This procedure not only permits the construction of an adequate record for appellate review, but also provides the trial court with an opportunity to appraise the challenged evidence in light of the trial record that has been developed and to change its ruling if it then determines the evidence should be admitted. Failure to make an offer of proof, however, will normally result in waiver of the alleged error in excluding the evidence.[59]

C. *Substantial Right Affected*

Iowa Rule of Evidence 103 also provides that error may not be predicated upon a ruling admitting or excluding evidence "unless a substantial right of the party is affected."[60] The rule incorporates a long-standing requirement in Iowa that erroneous evidentiary rulings will not serve as the basis for reversal on appeal in the absence of a demonstration of prejudice.[61] This rule obtains not only with respect to alleged evidentiary errors, but also

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57. *E.g.*, Yeager v. Durflinger, 280 N.W.2d 1, 5 (Iowa 1979); State v. Johnson, 244 N.W.2d 809, 812 (Iowa 1976).

58. *E.g.*, State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982); State v. Miller, 229 N.W.2d 762, 768 (Iowa 1975); *see also* State v. Langley, 265 N.W.2d 718, 720-21 (Iowa 1978).

59. Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974).

60. IOWA R. EVID. 103(a).

61. *E.g.*, Neyens v. Gehl, 235 Iowa 115, 124, 15 N.W.2d 888, 892 (1944); Mortimer v. Farmers' Mut. Fire & Lightning Ins. Ass'n, 217 Iowa 1246, 1252, 249 N.W. 405, 407 (1933). *See* IOWA CODE § 619.16 (1985) (immaterial errors disregarded); IOWA CODE § 624.15 (1985) (effect of ruling must be prejudicial).

with respect to other purported trial court errors.[62]

The "substantial right" language utilized in rule 103 is identical to Federal Rule of Evidence 103. The few federal cases addressing the meaning of this phrase indicate that in order to affect a substantial right, error must have had a "material effect" on the jury or must have "substantially swayed" its deliberations.[63] In practice, the determination of whether an erroneous ruling was prejudicial or affected a substantial right will often depend upon the quality and quantity of other evidence bearing upon the same issue[64] or, where the ruling improperly excluded evidence, the relevance and probative value of the evidence in question.[65] In the absence of a showing of prejudice, error will be considered harmless and the appellate court will not change the result reached at the trial level.

D. *Plain Error*

Unlike Iowa Rule of Evidence 103, Federal Rule 103 specifically includes a provision allowing appellate courts to review "plain error" even where such error was not raised during trial.[66] The rule states: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."[67]

The committee comment to Iowa Rule of Evidence 103 recommended that a similar provision not be adopted in Iowa because the plain error exception is contrary to the Iowa Supreme Court's strict application of error preservation requirements.[68] Thus, at present, no plain error rule exists in Iowa.

E. *Related Waiver Principles: The Doctrine of Curative Admissibility*

The failure to interpose an appropriate objection or move to strike is not the only circumstance in which error relating to the admission of evidence may be waived. The Iowa Supreme Court has also recognized that waiver of the right to challenge the admission of evidence may occur where a party has by his own conduct "opened the door" with respect to the evidence in question.[69]

Often termed the doctrine of curative admissibility, this principle provides that when a party introduces inadmissible evidence, the opposing

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62. *E.g.*, Beeck v. Aquaslide 'n' Dive Corp., 350 N.W.2d 149, 170 (Iowa 1984).

63. Holloway v. Arkansas, 435 U.S. 475, 490 (1978); Kotteakos v. United States, 328 U.S. 750, 756 (1946).

64. *See* Miller v. Boenar, 337 N.W.2d 523, 528 (Iowa 1983) (hearsay which came in was harmless since facts sought to be shown were proven by other testimony).

65. *See id.*

66. FED. R. EVID. 103(d).

67. *Id.*

68. IOWA R. EVID. 103 advisory committee comment.

69. *See infra* notes 70-71.

party may be entitled to rebut that evidence with proof that may also be inadmissible.[70] In such circumstances, the party who first introduced the inadmissible evidence cannot subsequently object to the admission of rebuttal evidence despite the fact that it is inadmissible. "The rule in Iowa is that when one party introduces inadmissible evidence, with or without objection, the trial court has discretion to allow the adversary to offer otherwise inadmissible evidence on the same subject when it is fairly responsive."[71] The doctrine is grounded in considerations of fairness — a party who has successfully introduced inadmissible evidence ordinarily should not be heard to complain when his adversary introduces similar evidence, albeit inadmissible, which fairly responds to the same subject.

F. *Motions Challenging Sufficiency of Evidence*

1. *Directed Verdict Motion*

The motion for directed verdict is the primary vehicle used to test the sufficiency of the evidence presented by the opposing party at trial. It can be granted only where there is either no dispute as to the material issues involved or no uncertainties in the reasonable inferences which can be drawn from the evidence adduced. In considering the propriety of a motion for directed verdict in civil cases, the evidence is viewed in the light most favorable to the party against whom the motion is made.[72]

The reason supporting each ground of the motion for directed verdict should be stated with specificity. The trial court must rule specifically on each ground contained in the motion.[73] A motion for directed verdict will not be sustained on appeal upon a ground not asserted at the trial level.[74] On appeal, however, the party may rely upon any ground urged in support of a motion for directed verdict in the trial court, even though the motion was not sustained on that ground.[75] Thus, the motion should specifically include all possible grounds on which it could be sustained.

A motion for directed verdict is generally made by defense counsel at the close of the plaintiff's evidence. If at the close of the plaintiff's case the motion is overruled or the ruling reserved, the motion must be renewed at the close of all the evidence or it will be considered waived.[76] The making of

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70. *E.g.*, Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 864 (Iowa 1974).

71. State v. Padgett, 300 N.W.2d 145, 147 (Iowa 1981) (quoting State v. Pepples, 250 N.W.2d 390, 394 (Iowa 1977)).

72. Iowa R. App. P. 14(f)(2). A similar device, termed a motion for judgment of acquittal, is provided in criminal cases. Iowa R. Crim. P. 18(10).

73. *See* Iowa R. Civ. P. 118.

74. Stover v. Hindman, 159 N.W.2d 422, 424 (Iowa 1968); Bartels v. Cair-Dem, Inc., 255 Iowa 834, 845, 124 N.W.2d 514, 521 (1963).

75. Stover v. Hindman, 159 N.W.2d at 424.

76. *E.g.*, Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 535 (Iowa 1973).

a timely motion for directed verdict is a necessary prerequisite for a judgment notwithstanding the verdict.[77] Thus, any grounds on which a judgment notwithstanding the verdict is urged must have initially been raised in a motion for directed verdict.[78] It should be noted, however, that requesting or consenting to jury instructions does not waive error in overruling a motion for directed verdict.[79]

2. *Motion to Withdraw Issues from the Consideration of the Jury*

A motion to withdraw issues from the consideration of the jury provides another method of constructing a record for appellate review and challenging the sufficiency of evidence adduced at trial.[80] The motion should encompass issues raised by the opposing party which are not substantially supported by the evidence, and may be interposed following a motion for directed verdict if that motion has been overruled. As a practical matter, this motion is of limited use. For example, in cases where multiple issues exist, some of which are supported by substantial evidence and some of which are not, the motion to withdraw issues may be a useful and appropriate supplement to the motion for directed verdict.

3. *Judgment Notwithstanding the Verdict*

In civil litigation, the party against whom an adverse verdict has been returned may move for judgment in his favor on grounds contained in Iowa Rule of Civil Procedure 243.[81] The usual purpose of this motion is to show that the moving party was entitled to have had a verdict directed for him at the close of all the evidence. The motion cannot be sustained on any ground not asserted in the moving party's earlier motion for directed verdict.[82] Likewise, review by an appellate court is limited to those same previously raised grounds.[83] The motion for judgement notwithstanding the verdict must be filed within ten days after the verdict or decision of the court is filed, unless that court, for good cause shown and not ex parte, grants additional time not exceeding thirty days.[84]

IV. Constructing a Record of Unreported Events

A record must always be made of any off-record events which may later

77. *See* Iowa R. Civ. P. 243(b); Miller v. Young, 168 N.W.2d 45, 50 (Iowa 1969).

78. Watson v. Lewis, 272 N.W.2d 459, 461 (Iowa 1978); Meeker v. City of Clinton, 259 N.W.2d 822, 827 (Iowa 1977).

79. *See, e.g.*, Hartman v. Norman, 253 Iowa 694, 697, 112 N.W.2d 374, 376 (1961).

80. *See* Rosenstein v. Smith, 218 Iowa 1381, 1385, 257 N.W. 397, 399 (1934).

81. Iowa R. Civ. P. 243.

82. *E.g.*, Watson v. Lewis, 272 N.W.2d 459, 461 (Iowa 1978).

83. *Id.*

84. Iowa R. Civ. P. 247. *See* Schmitt v. Clayton County, 284 N.W.2d 186, 187 (Iowa 1979).

serve as the basis for an assertion of error. This problem ordinarily arises where error occurs in unreported voir dire proceedings, opening statements, closing arguments, or other stages of trial proceedings. Before an appellate court can review the alleged impropriety, a record of the occurrence must be constructed. The proper method of making a record with respect to unreported conduct or occurrences is by a bill of exceptions or trial court finding which settles the dispute concerning the facts underlying the charge.[85] The trial court should be afforded an opportunity to take corrective measures with respect to improper remarks or conduct of counsel or others by means of a timely objection, motion to strike or motion for mistrial.[86] While the need for a bill of exceptions is not commonplace, its use can be critical when called for.

Bills of exceptions are provided for by both civil and criminal rules of procedure.[87] When a bill of exceptions is needed, the record must be promptly constructed and the bill promptly filed. The bill should specifically set forth the unreported occurrence and the circumstances in which it took place. Up to five affidavits in support may be filed with the bill; the opposing party may also submit up to five controverting affidavits within seven days after filing of the bill.[88] The procedure contemplates that the proposed bill will be presented to the trial judge, who "shall sign it if it fairly presents the facts."[89] If the trial judge refuses to sign the proposed bill, counsel must certify that the refusal has occurred, and file the certified bill along with the written statements of two bystanders attesting that the exceptions included in the bill are correctly stated.[90] After filing, the certified and attested bill becomes part of the record.[91]

Iowa Rule of Appellate Procedure 10 provides another procedure for constructing a record of unreported matters when an appeal has been taken. The rule provides:

> If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be filed with the clerk of the trial court and served on appellee within twenty days after the filing of the notice of appeal. Appellee may file with the clerk of the trial court and serve on appellant objections or proposed amendments to the statement within ten days after service of appellant's statement. Thereupon

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85. *See* Elkin v. Johnson, 260 Iowa 46, 49, 148 N.W.2d 442, 444 (1967).

86. *See* State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); *see also* State v. Larmond, 244 N.W.2d 233, 236-37 (Iowa 1976) (objection supported by bill of exceptions one method of preserving error with respect to alleged misconduct by trial judge).

87. IOWA R. CIV. P. 241; IOWA R. CRIM. P. 23.1.

88. IOWA R. CIV. P. 241(b).

89. IOWA R. CIV. P. 241(c).

90. *Id.*

91. *Id.*

> the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and as settled and approved shall be included in the record on appeal.[92]

The critical importance of constructing a record of unreported events on which error is predicated cannot be overstated. A failure to provide a constructed record will leave the appellate court without an adequate basis to evaluate the alleged error despite the fact that there may be no dispute that a timely objection or motion was made. Finally, the reconstructed record should also be specific and supported when possible.

V. Non-Evidentiary Matters

As indicated previously, while the vast majority of error preservation problems occur in the context of evidentiary matters, there are a number of steps that must be taken in order to sufficiently preserve error with respect to matters that can only be characterized as non-evidentiary in nature. These matters primarily concern procedural challenges or motions which must be made at a particular stage of the proceeding, and challenges to jury instructions.

A. *Personal Jurisdiction*

Civil jurisdiction over the person must be challenged by written special appearance, stating the applicable grounds, before doing any act that could constitute a general appearance.[93] Thus, for example, no extension of time may be obtained prior to the filing of a special appearance. Unless personal jurisdiction is challenged by written special appearance, any question relating to such jurisdiction is waived.[94]

B. *Combined Motions*

Iowa Rule of Civil Procedure 111 provides that "motions to strike, for a more specific statement, and to dismiss shall be contained in a single motion."[95] Only one such motion assailing the same pleading will be permitted, unless the pleading is subsequently amended.[96] Motions attacking a pleading must be served before responding to the pleading.[97]

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92. Iowa R. Civ. P. 10(c).

93. Iowa R. Civ. P. 66, 104(a). *See also* Lonning v. Lonning, 199 N.W.2d 60, 62 (Iowa 1972).

94. Compare challenges to subject matter jurisdiction, which may be raised at any time and cannot be conferred by waiver, estoppel or consent. *See* Steffens v. Proehl, 171 N.W.2d 297, 300 (Iowa 1969).

95. Iowa R. Civ. P. 111.

96. *Id.*

97. Iowa R. Civ. P. 85.

C. *Venue*

A motion for change of civil venue must be made before answer.[98] The grounds for a change of venue are included in Iowa Rule of Civil Procedure 167, and the places for bringing types of action are legislatively prescribed in Iowa Code Chapter 617. In the absence of a motion for change of venue prior to answer, any question of proper venue will be waived.[99]

D. *Discovery Matters*

Discovery presents a multitude of its own peculiar considerations and problems. Because the discovery process is to a large extent carried on voluntarily by the parties, certain procedural steps must be taken in order to secure intervention by the trial court and, ultimately, an appellate court.

One area in which difficulties may arise concerns the adequacy of discovery responses. Where an attorney is dissatisfied with a response provided by opposing counsel, he must initially make some informal attempt to resolve the matter.[100] In the event the dispute is not resolved, judicial intervention may be secured through the filing of a motion to compel discovery.[101]

A related concern involves improper requests propounded in the discovery process. In the event an attorney receives discovery requests which are not proper, he must interpose an objection to that request within the time allowed for response or the objection will be waived.[102] An alternative to objection is provided by Iowa Rule of Civil Procedure 123, which allows for the issuance of protective orders by the court upon motion by the party or person from whom the improper discovery is sought.[103] Regardless of whether discovery disputes relate to a protective order or to sanctions for failure to make discovery, appellate review is limited to determining whether the trial court abused its broad discretion.[104] In these cirumstances, it is incumbent upon counsel to state with precision the grounds upon which relief is sought and to marshall, with specificity, the supporting evidence in the motion, objection or resistance. The greater the precision and specificity presented, the greater the opportunity for the appellate court to understand and appreciate the issue involved.

Depositions may also raise potential error preservation problems. The necessity for objections during depositions is dependent upon the type of

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98. Iowa R. Civ. P. 175(a).
99. *Id. See* Thornburg v. Mershon, 216 Iowa 455, 457, 249 N.W. 202, 202-03 (1933).
100. Iowa R. Civ. P. 122(e).
101. Iowa R. Civ. P. 134(a).
102. Iowa R. Civ. P. 126(a), 134(a).
103. Iowa R. Civ. P. 123.
104. *See, e.g.*, Eickelberg v. Deere & Co., 276 N.W.2d 442, 446 (Iowa 1979); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 13-14 (Iowa 1977).

error alleged. Certain objections, such as defective notice, must be interposed prior to the taking of the deposition.[105] Grounds for objection which could be corrected during the taking of the deposition must also be interposed prior to or during the deposition.[106] Thus, for example, objections to the form of the question or answer, or to the taking of the deposition, which could be corrected, must ordinarily be made at the time of the taking of the deposition.[107] Objections based upon errors or irregularities in the completion and return of the deposition should also be made as soon as the grounds for them become apparent. Such objections will normally be made by motions.[108] All other objections are reserved until the time of trial.[109]

Finally, it must be noted that a party who has responded to a request for discovery has a duty to supplement that response with respect to certain information pertaining to persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at trial.[110] Failure to seasonably supplement such responses may result in the exclusion of certain testimony or witnesses not included in the responses where the aggrieved party requests such exclusion.[111] A request of this nature should be made in writing and should be as specific as possible to not only assist the trial court but also to provide as complete a record as possible in the event appellate review becomes necessary. The same concerns apply with respect to resistances filed by the opposing party.

E. *Motion for Continuance*

A motion for continuance must be filed without delay after the grounds for the motion become known.[112] Cause for continuance and the means of supporting such motions where the ground is an absence of evidence are dealt with in particular procedural rules.[113] Trial courts are afforded broad discretion in their rulings on motions for continuance and, absent clearly shown abuse, that discretion will not be interfered with by the appellate court.[114] Consequently, the grounds for a continuance must be clearly and specifically delineated in the motion and supported wherever possible.

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105. Iowa R. Civ. P. 158(a).
106. Iowa R. Civ. P. 158(d).
107. *Id.*
108. Iowa R. Civ. P. 158(f).
109. Iowa R. Civ. P. 158(e).
110. Iowa R. Civ. P. 125(a).
111. *See, e.g.*, Sullivan v. Chicago Northwestern Transp. Co., 326 N.W.2d 320 (Iowa 1982).
112. Iowa R. Civ. P. 182.
113. Iowa R. Civ. P. 183(a), (b).
114. *See, e.g.*, Michael v. Harrison County Rural Elec. Co-op, 292 N.W.2d 417, 419 (Iowa 1980).

F. *Challenges to Jury Panel*

The selection and empaneling of the jury constitutes the initial stage of trial.[115] In general, two basic types of challenges are involved in connection with jury selections: (1) challenges to the panel itself; and (2) challenges to individual jurors.

Iowa Rule of Civil Procedure 187(d) governs challenges to a jury panel. The challenge must be in writing, must be founded upon "a material departure from the statutory requirements for drawing or returning the jury" and must distinctly specify its grounds.[116] A challenge to the jury panel must concern the validity of the entire array of jurors and not merely an individual jury member.[117] The challenge must be made before any juror is sworn or it will be waived.[118]

Challenges to individual jurors are generally for cause or preemptory. These challenges may be and generally are made orally. Unless prejudice is demonstrated, a challenge for cause must be made prior to the time the jury is sworn where the grounds for the objection are known or could have readily been ascertained.[119] Because challenges for cause are statutory, the specific reasons underlying the challenge must be stated in order to make a proper record and the reasons must be stated with particularity.[120] When a specific ground for challenge has been urged, no other ground for challenge will be considered on appeal, even though other grounds may appear in the record.[121] If the voir dire is not reported and a challenge is overruled, it will be necessary to file a bill of exceptions.[122] As a general principle, "if a disqualified juror is left on the jury in the face of a proper challenge for cause," so that either a preemptory challenge must be used or the juror allowed to remain, and all preemptory challenges are utilized, prejudice will be presumed.[123]

Iowa Rule of Civil Procedure 187(g) governs preemptory challenges to jurors. Like challenges for cause, preemptory challenges must also be exercised prior to the swearing of the jury.[124] In addition to challenges for cause

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115. Iowa Code Chapter 609 (1985) generally governs the jury selection process; the procedure for selection is delineated in Iowa Rule of Civil Procedure 187. Rules for jury selection are for the most part identical in both civil and criminal contexts. *See* IOWA R. CRIM. P. 17(3), (5).

116. IOWA R. CIV. P. 187(d).

117. *E.g.*, State v. Sallis, 262 N.W.2d 240, 245 (Iowa 1978).

118. IOWA R. CIV. P. 187(d).

119. Sieren v. Hildreth, 254 Iowa 1010, 1014, 118 N.W.2d 575, 577 (1962). The grounds on which challenges for cause may be predicated are delineated in Iowa Rule of Civil Procedure 187(f).

120. *See* State v. Anderson, 239 Iowa 1118, 1121-25, 33 N.W.2d 1, 3-5 (1948).

121. Mitchell v. Swanwood Coal Co., 182 Iowa 1001, 1009, 166 N.W. 391, 394 (1918).

122. *See* Elkin v. Johnson, 260 Iowa 46, 49, 148 N.W.2d 442, 444 (1967).

123. State v. Beckwith, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951).

124. IOWA R. CIV. P. 187.

and preemptory challenges, other jury-related problems may arise during the course of trial in connection with juror conduct and deliberation. These circumstances will generally require an immediate objection or motion in order to preserve error where the party is aware or could have readily ascertained the grounds for objection.[125]

G. *Non-Evidentiary Objections*

While trial objections normally concern the admissibility of evidence, non-evidentiary occurrences also give rise to objection. Typical non-evidentiary matters which may lead to objections include questioning by the trial court, inquiries by the jury, voir dire questioning, opening statements, closing arguments and other misconduct during trial. The general rules of timeliness and specificity are equally applicable with respect to non-evidentiary objections.[126] In addition, because objectionable occurrences not related to evidentiary matters will often take place during trial phases that are often not reported, counsel must always be prepared to take steps to construct an adequate record.[127]

H. *Instructions*

The necessity for timely and specific objections to allegedly erroneous instructions must not be overlooked by trial counsel. Iowa Rule of Civil Procedure 196 provides the framework for giving and excepting to instructions. The rule states that at the close of the evidence, or at such prior time as the trial court may reasonably fix, any party may file a written request for instructions to the jury. Before closing argument, the court must submit to counsel preliminary instructions, which are not part of the record. The court must also provide counsel with a copy of its proposed instructions and allow a reasonable time for objections, which must be made and ruled on prior to closing argument to the jury.[128] All objections to instructions that will be given and, likewise to the court's failure to give a requested instruction, must be made within this time.[129] The objections must be made in writing or dictated into the record and must specify the instruction to which the objection is made and the grounds for the objection.[130] General objections, such as "the court erred in refusing a request for instruction" or "the instruction is not a correct statement of the law" will not be sufficient to preserve

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125. *See, e.g.*, State v. Coffee, 182 N.W.2d 390, 394-96 (Iowa 1970); State v. Wallace, 261 Iowa 104, 106-07, 152 N.W.2d 266, 268 (1967).

126. *See, e.g.*, State v. Cuevas, 288 N.W.2d 525, 531 (Iowa 1980) (failure to object to allegedly impermissable interference by trial court).

127. *See supra* notes 85-92.

128. IOWA R. CIV. P. 196.

129. *See, e.g.*, State v. Brandt, 182 N.W.2d 916, 917-18 (Iowa 1971).

130. *See* State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978).

error.[131]

Only the specific grounds of objection made at the time the final draft of instructions were submitted to counsel will be considered by the appellate court. No additional grounds or objections may be subsequently asserted or considered on appeal.[132] The specificity requirement has been explained as follows:

> The purpose of requiring clarity of objections is not to gratify any possible whim of the trial judge, but to afford the trial judge an opportunity to catch exactly what is in counsel's mind and thereby determine whether the objection possesses merit to an extent the instruction should be recast. In short, a party, upon objecting, must make known to the trial judge the specific objection which he may wish to urge upon appeal.[133]

If no proper objection is made to an instruction, it will stand as the law of the case.[134] If, however, the trial court after submitting instructions to counsel revises or adds to the instructions, similar specific objections to the revisions or additions may be made in a motion for new trial. If not made in this fashion, they will be waived.[135] Counsel cannot, however, amplify previously asserted exceptions to instructions in a motion for new trial.[136]

Where error is predicated upon the trial court's refusal to give a requested instruction, an objection must be interposed. A party may not rely upon the refusal alone to preserve error.[137] Moreover, a general exception to a refusal to give requested instructions will generally be insufficient to preserve error.[138] While this requirement of specificity will be applied in the ordinary case, there may be instances in which requested instructions may be sufficient "to alert the trial court to the point of law" upon which the requesting party desired that the instruction be given, and therefore preserve error.[139] As noted above, where the alleged error concerns the propriety of the court's instruction, error is preserved by making a specific objection to that instruction. "Exceptions or objections to the preliminary draft of instructions will not support an assignment of error on appeal."[140] "Where an instruction consists of several distinct and separate propositions, an objection to the entire instruction is not well taken where one of such

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131. *See* IOWA R. CIV. P. 196.

132. IOWA R. CIV. P. 196; *see, e.g.*, Porter v. Iowa Power & Light Co., 217 N.W.2d 221, 237 (Iowa 1974) (failure to make timely exception to instructions waives right to later assert error).

133. State v. Baskin, 220 N.W.2d 882, 886 (Iowa 1974).

134. *See, e.g.*, Champlin v. Walker, 249 N.W.2d 839, 842 (Iowa 1977).

135. IOWA R. CIV. P. 196.

136. State v. Buchanan, 207 N.W.2d 784, 787 (Iowa 1973).

137. *See, e.g.*, State v. Brandt, 182 N.W.2d 916, 917 (Iowa 1971); State v. Gilmore, 181 N.W.2d 145, 147 (Iowa 1970).

138. State v. Gilmore, 181 N.W.2d at 147.

139. *See* State v. Freeman, 267 N.W.2d 69, 70 (Iowa 1978).

140. *E.g.*, State v. Clark, 187 N.W.2d 717, 719 (Iowa 1971).

propositions is correctly stated."[141]

A timely and specific exception to a trial court's failure to instruct on a particular issue is ordinarily sufficient to preserve error. "When the issue is not integral to the case or when an instruction on an integral issue" is not "as explicit as the party desires," however, error will not be "preserved unless the party requests an additional instruction" prior to the jury being charged.[142]

It should also be noted that the rules relating to jury instructions in civil cases are also applicable to trials in criminal matters.[143] Iowa Rule of Civil Procedure 196, including its requirement of timely error preservation, is fully applicable to all criminal trials.[144]

I. *Motion for Mistrial*

When a litigant believes that prejudice has resulted from the occurrence of a fundamental error which cannot be cured by instruction or admonition from the trial court, a motion for mistrial should be advanced immediately. The motion should be made in the absence of the jury. Where the alleged impropriety involves the conduct or remarks of counsel during closing argument, a motion for mistrial is considered timely made prior to the submission of the case to the jury, when closing arguments are reported, certified and made part of the record.[145] There may be circumstances, however, in which the impropriety is so flagrant and the prejudice so evident that the matter would be considered a ground for a new trial even where no exception is taken at the time it occurred.[146]

J. *Rule 179(b) Motion*

Iowa Rule of Civil Procedure 179(b) "authorizes motions to enlarge and amend findings and conclusions and to modify the judgment or substitute a different one."[147] The motion must be filed within the time allowed for a motion for new trial.[148] The motion can be joined with a motion for new trial.[149] "Rule 179(b) applies only when the court is 'trying an issue of fact

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141. Pose v. Roosevelt Hotel Co., 208 N.W.2d 19, 24 (Iowa 1973).

142. State v. Templeton, 258 N.W.2d 380, 382 (Iowa 1977).

143. IOWA R. CRIM. P. 18(f)(7).

144. State v. Rouse, 290 N.W.2d 911, 914-15 (Iowa 1980).

145. *E.g.*, State v. Nelson, 234 N.W.2d 368, 371 (Iowa 1975); Andrews v. Struble, 178 N.W.2d 391, 401-02 (Iowa 1970).

146. *See* Shover v. Iowa Lutheran Hosp., 252 Iowa 706, 717, 107 N.W.2d 85, 91 (1961).

147. *See* Kagin's Numismatic Auctions, Inc. v. Criswell, 284 N.W.2d 224, 226 (Iowa 1979).

148. IOWA R. CIV. P. 179(b); *see* IOWA R. CIV. P. 247 (new trial motion must be filed within ten days of verdict or decision unless, for good cause shown, and not ex parte, trial court grants additional time not exceeding thirty days). *See also* Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 471 (Iowa 1978).

149. IOWA R. CIV. P. 179(b).

without a jury.' "[150] It has been held applicable, however, to issues of fact decisive to a special appearance ruling.[151]

Use of the 179(b) motion is not essential to preserve error for appellate review. The rule declares that a party on appeal may challenge the sufficiency of the evidence to sustain any finding without having exercised his right to present the motion.[152] When invoked, however, the motion can aid an appellate court in determining whether the trial court considered improper matter in making its findings and conclusions.[153] Also, in the absence such a motion, the reviewing court will not assume the trial court erroneously considered or ignored any evidence, claim or defense in reaching its judgment.[154]

K. *Motion for New Trial*

A new trial is defined by Iowa Rule of Civil Procedure 242 as the reexamination in the same court of any issue of fact or part thereof, after a verdict, master's report or decision of the court. The grounds for a motion for new trial are enumerated by rule.[155] A motion for new trial must be filed

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150. Kagin's Numismatic Auctions, Inc. v. Criswell, 284 N.W.2d at 226 (quoting Budde v. City Dev. Bd., 276 N.W.2d 846, 851 (Iowa 1979)); *cf.* Budde v. City Dev. Bd., 276 N.W.2d 846, 851 (Iowa 1979) (rule 179(b) inapplicable in judicial review hearing); City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 640 (Iowa 1978) (rule not applicable to summary judgment proceeding).

151. Kagin's Numismatic Auctions, Inc. v. Criswell, 284 N.W.2d at 226.

152. IOWA R. CIV. P. 179(b).

153. *See* Sauerman v. Stan Moore Motors, Inc., 203 N.W.2d 191, 194 (Iowa 1972).

154. *See* Fort Dodge Country Club v. Iowa-Illinois Gas & Elec. Co., 231 N.W.2d 595, 597 (Iowa 1975); Sauerman v. Stan Moore Motors, Inc., 203 N.W.2d at 194.

155. IOWA R. CIV. P. 244(a)-(i). The rule provides:

> The aggrieved party may, on motion, have an adverse verdict, decision or report or some portion thereof vacated and a new trial granted, for any of the following causes, but only if they materially affected his substantial rights:
>
> (a) Irregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial;
>
> (b) Misconduct of the jury or prevailing party;
>
> (c) Accident or surprise which ordinary prudence could not have guarded against;
>
> (d) Excessive or inadequate damages appearing to have been influenced by passion or prejudice;
>
> (e) Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for injury to or detention of property;
>
> (f) That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law;
>
> (g) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial;
>
> (h) Errors of law occurring in the proceedings, or mistakes of fact by the court;
>
> (i) On any ground stated in R.C.P. 243, the motion specifying the defect or cause giving rise thereto.

Id.

within ten days of the verdict or decision unless, for good cause shown and not ex parte, the trial court grants additional time not exceeding 30 days.[156]

VI. Conclusion

The strict manner in which error preservation principles are applied by the Iowa appellate courts mandates that trial counsel be familiar with those principles as well as the policies underlying them. This Article is an attempt to reacquaint counsel with the prerequisites for error preservation in civil litigation. By taking the appropriate steps at the trial level, counsel can ensure that potentially reversible error will be reviewed by the appellate court.

156. Iowa R. Civ. P. 247; *see* Schmitt v. Clayton County, 284 N.W.2d 186, 187 (Iowa 1979) (interpreting rule 247 as allowing ten-day period plus an additional time not to exceed thirty days).