PRESERVATION OF ERROR AND MAKING THE RECORD IN THE IOWA CRIMINAL TRIAL AND APPELLATE PROCESSES†

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I. General Overview

A. *General Rule*

This article examines the dual requirements of adequacy and timeliness in raising matters pertaining to error throughout the various stages of the Iowa criminal trial process.[1] Counsel has the burden to make a proper record on the trial level in order to preserve error on appeal,[2] or the error is deemed waived,[3] since appellate review is on assigned error only.[4] Issues not

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1. Preservation of error in the civil area was the subject of a thorough discussion recently in Allbee & Kincaid, *Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner*, 35 Drake L. Rev. 1 (1985) [hereinafter Allbee & Kincaid]. Because of the similarity of the general principles of preservation of error in the criminal and civil areas, the Allbee & Kincaid article should be consulted as a complement to this article.

Other articles concerning Iowa law include: Fagg, *A Judge's View of Trial Practice*, 28 Drake L. Rev. 1 (1979) and Sullins, *Preservation of Error: Providing Basis for Appellate Review*, 22 Drake L. Rev. 435 (1973) (pre-Criminal Code). *See generally* J. Roehrick, Iowa Evidence (1985) and I. Webber, Making Objections and Laying Foundations in Iowa (1981) [hereinafter Webber].

2. State v. Smith, 228 N.W.2d 111, 112 (Iowa 1975).

3. State v. Delay, 320 N.W.2d 831, 835 (Iowa 1982).

adequately and timely raised in the trial court thus cannot ordinarily be effectively asserted for the first time on appeal, since the Iowa appellate courts generally are courts of review only,[5] as opposed to trial courts of original jurisdiction or first impression. This general rule of waiver is similar in criminal and civil cases.[6] Moreover, there is no general exception for constitutional questions, as there is no plain error rule for "clear constitutional error" under Iowa law.[7] Adequate remedies exist at trial and should be used.[8] Although a new pronouncement of a federal constitutional right may be made to operate retrospectively, state procedural requirements for timely raising issues at the trial level nonetheless strictly apply to prior and pending cases, and thus it is necessary to properly preserve the issue at the trial level in order to ultimately take advantage of the change in the law.[9]

Another requisite of appellate review is that the issue must have been not only presented to but also decided by the trial court. Thus, a party cannot predicate error on the trial court's failure to rule when he has made no request or demand for a ruling.[10]

B. *Trial Court's Sua Sponte Duties*

The affirmative duty of the trial court to order an acquittal on its own motion does not relieve a party from the responsibility of preserving error.[11] For example, in a case involving accomplice testimony, it was held that in order to preserve error for appeal the defendant had to challenge sufficiency of the evidence in general, or sufficiency of the evidence to corroborate an accomplice's testimony.[12]

C. *Appellate Review Standard*

1. *Scope*

Among the first matters to be considered when preparing an appeal (and among the first considered by an appellate court) is whether the scope of review is at law or de novo. The difference is primarily a matter of the amount of deference given by the reviewing court to a trial court's findings

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4. State v. Phams, 342 N.W.2d 792 (Iowa 1983).
5. State v. Hansen, 286 N.W.2d 163, 165-66 (Iowa 1979).
6. *See generally* Allbee & Kincaid, *supra* note 1.
7. State v. Hutchinson, 341 N.W.2d 33, 38 (Iowa 1983).
8. *Id.*
9. State v. Holbrook, 261 N.W.2d 480, 482-84 (Iowa 1978) (although constitutional holding of *State v. Monroe*, 236 N.W.2d 24 (Iowa 1975) operates retrospectively, preservation of error rule prevents defendant from raising issue for first time on appeal).
10. State v. Pelelo, 247 N.W.2d 221, 226 (Iowa 1976).
11. State v. Heidebrink, 334 N.W.2d 344, 346 (Iowa Ct. App. 1983).
12. *Id.*

of fact. Review at law means that the trial court's findings of fact are binding on the appellate court if supported by substantial evidence.[13] In de novo review, however, the reviewing court is not bound by prior findings of fact, although it gives weight to them.[14] De novo review is confined largely to equity cases[15] and constitutional issues.[16]

The scope of review on appeal has little bearing on matters of error preservation at trial. Whether review is at law or de novo, the same general principles of error preservation apply. One practical consideration has to do with rulings on objections to evidence. In trials at law, when the court reserves a ruling, the objecting party must demand a ruling on the objection before submission of the case to the jury or the objection will be deemed waived. In equity, however, it is standard practice for the court to receive evidence subject to objections without ruling upon them.[17] Rulings need not be obtained in this situation to preserve error.[18]

2. *Alternative Basis for Ruling Below*

The basis of the trial court's ruling is not controlling on appeal. The general rule is that an appellate court will not reverse a lower court ruling if that ruling can be upheld on any basis appearing in the record, even if that basis was not urged below.[19] Thus, when a trial court overruled a hearsay objection on the ground that the testimony in question was admissible as an excited utterance, the Iowa Supreme Court upheld the ruling on the ground that the testimony was admissible as a rebuttal of an implied charge of recent fabrication by the testifying witness.[20] The court found it unnecessary to decide whether the testimony qualified as an excited utterance in view of the alternative basis for admissibility.[21]

It has been said that the rule permitting affirmance of a trial court's ruling on alternative grounds appearing in the record is subject to an exception in cases where the alternative ground of objection, if stated, could have been obviated at trial.[22] But upon closer examination, this exception seems to be inherent in the rule and not a true exception at all. It simply says that when the alternative ground of objection is untenable, it will not be used to support the trial court's ruling, a principle that would seem self-evident.

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13. Iowa R. App. P. 14(f)(1).
14. Iowa R. App. P. 14(f)(7).
15. Iowa R. App. P. 4.
16. *See* State v. Oliver, 341 N.W.2d 25, 28 (Iowa 1983).
17. *See generally* Allbee & Kincaid, *supra* note 1, at 10.
18. *Id.*
19. State v. Jespersen, 360 N.W.2d 804, 806-07 (Iowa 1985).
20. *Id.*
21. *Id.*
22. *See* State v. Blackford, 335 N.W.2d 173, 176 (Iowa 1983) (trial court excluded evidence on ground of marital privilege; conviction affirmed on ground that evidence would have constituted impeachment on collateral matter).

II. Alternative Ways of Making the Trial Record

A. *Permissible Ways*

Three permissible and frequently employed ways of developing or re-creating the trial record for purposes of preserving error for appellate review are: (1) making an offer of proof; (2) filing a bill of exceptions (or, in the alternative, a bill of bystanders); and, (3) filing a statement of the evidence or proceedings under Iowa Appellate Rule 10. All three of these, however, merely are devices for making asserted error appear in the trial record where the objectionable matter was not transcribed by the court reporter (in the case of a bill of exceptions, a bill of bystanders, or a statement of the evidence or proceedings), or was not permitted by the trial judge to reach the fact-finder (in the case of an offer of proof). In other words, counsel still must have timely and adequately objected to the occurrence or omission. The bill of exceptions (or bill of bystanders) or an offer of proof then follows (and is limited by) the objection — but does not substitute after the fact for the objection.

1. *Offers of Proof*

a. Function. Iowa Rule of Evidence 103(a)(2) requires an offer of proof to preserve error after proffered evidence has been excluded by a trial court ruling.[23] 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."[24]

b. Burden. The burden of making an offer of proof in order to preserve error is upon the party who believes that evidence has been incorrectly excluded.[25] Thus, the offering party has the duty to alert the trial court as to its theory of admissibility.

c. Waiver. Failure to make an offer of proof, when an objection has been sustained and evidence excluded, ordinarily leaves nothing for appellate review.[26] An exception to this rule exists, however, where what is sought to be proven is apparent from the entire record.[27] An offer of proof has also been held to be unnecessary to preserve a question concerning the propriety of a limitation on cross-examination.[28]

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

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

25. State v. Gartin, 271 N.W.2d 902 (Iowa 1978).

26. State v. Hahn, 259 N.W.2d 753 (Iowa 1977).

27. *See* Trushcheff v. Abell-Howe Co., 239 N.W.2d 116, 122 (Iowa 1976) (citing Nizzi v. Laverty Sprayers, Inc., 259 Iowa 112, 119, 143 N.W.2d 312, 316 (1966)).

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

d. Manner of Making. An offer of proof should ordinarily be made outside the presence of the jury.[29] An offer of proof may be made in various ways. The offering attorney may, for example, dictate into the record, in the jury's absence, that the witness is present in the courtroom and that if he were asked a specified question, he would give a specified answer. Another method for making the offer is actual examination of the witness under oath by individual questions, again in the jury's absence. Still another way would be for the parties to have already entered into a stipulation as to this testimony, thus eliminating the need for the witness to be present in the courtroom.[30]

e. Court's Refusal to Permit Offer of Proof. A trial court's refusal to permit an offer of proof is generally error.[31] Error will not be found, however, where there is no record of a request to make an offer of proof and denial of that request. The Iowa Supreme Court has held that where the record showed only that defense counsel was granted permission to approach the bench, where an off-the-record discussion was held, and was subsequently denied permission on another occasion to approach or to go into chambers, the record was inadequate to show error on the basis of denial of permission to make an offer of proof.[32]

The Iowa Supreme Court has stated that an offer of proof "should never be absolutely prohibited."[33] If endless or frivolous proffers become too disrupting, however, a record invitation may be extended to counsel to make the proffer at an appropriate recess.[34]

Although a trial court's refusal to permit the making of an offer of proof is usually error, there is no reversible error in not allowing the proffer to be made when it is apparent from the record what evidence the profferor would have presented and that the evidence was properly excludable.[35]

Any error by the trial court in failing to include disputed material in the record is irrelevant where the defendant fails to establish that the trial court committed error by refusing the defendant access to the omitted materials in the discovery stage of the case or at trial.[36]

f. Record of Making Request. It is presumed that the trial court did not err where the defendant did not show by a bill of exceptions or other record

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29. State v. Walton, 247 N.W.2d 736, 739-40 (Iowa 1976) (evidentiary hearing on admissibility of confession must be held outside hearing of jury); Lessenhop v. Norton, 261 Iowa 44, 53, 153 N.W.2d 107, 113 (1967) (compelling attorney to make objection in jury's presence may be reversible error). *See generally* Annotation, 89 A.L.R.2d 2379, 2382 (1963).

30. *See generally* WEBBER, *supra* note 1, at § 1000 *et seq.*

31. State v. Cook, 330 N.W.2d 306, 313 (Iowa 1983).

32. *Id.* The court suggested that a bill of exceptions might have been used to supplement the record. *Id.*

33. State v. Harrington, 349 N.W.2d 758, 760 (Iowa 1984).

34. *Id.*

35. *Id.*

36. State v. Groscost, 355 N.W.2d 32, 36-37 (Iowa 1984).

that he requested at trial to make an offer of proof and was denied the opportunity.[37]

2. *Bill of Exceptions*

a. Purpose. A bill of exceptions may be filed by either the state or the defendant, for the purpose of making a record for appeal of those matters which do not appear in the official record.[38] Thus, it is appropriate only when either party wishes to have otherwise unrecorded oral evidence made part of the record.

b. Subjects Included. The grounds for a bill of exceptions are listed in Iowa Rule of Criminal Procedure 23.1(3).[39] If none of the specified grounds is applicable to a particular situation, the rule also provides for the bill of exceptions' all-purpose function of making proceedings or evidence appear of record which involve "any action or decision of the court which affects any other material or substantive right of either party . . . ."[40]

Examples of proper uses of bills or exceptions include: (1) prejudicial prosecutorial comment during voir dire;[41] (2) prejudicial prosecutorial comment during closing arguments;[42] (3) actions by the court not susceptible to being recorded[43] (*e.g.*, shaking head, grunts, expressions of disapproval); (4) polling of the jury;[44] and, (5) any matter not reported for any reason, such as loss of the court reporter's notes.[45]

c. Effect. A bill of exceptions serves only to create a record, and is not an after-the-fact curative measure substituting for an objection. It generally does not preserve error in the absence of a timely and adequate objection at trial.[46]

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37. State v. Cook, 330 N.W.2d 306, 313 (Iowa 1983).
38. IOWA R. CRIM. P. 23.1(1); State v. McKee, 223 N.W.2d 204, 206 (Iowa 1974).
39. IOWA R. CRIM. P. 23.1(3) states:

> Grounds for exceptions on the trial of an indictable offense, exceptions may be taken by the state or by the defendant to any decision of the court upon matters of law, in any of the following cases:
>
> a. In disallowing a challenge to an individual juror.
>
> b. In admitting or rejecting witnesses or evidence on the trial of any challenges to an individual juror.
>
> c. In admitting or rejecting witnesses or evidence.
>
> d. In deciding any matter of law, not purely discretionary on the trial of the issue.

IOWA R. CRIM. P. 23.1(3).
40. *Id.*
41. State v. Lamar, 260 Iowa 957, 965-70, 151 N.W.2d 496, 501-03 (1967) (error not preserved due to appellant's failure to make bill of exceptions or bill of bystanders).
42. State v. Vickroy, 205 N.W.2d 748, 749 (Iowa 1973).
43. State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976).
44. State v. Morelock, 164 N.W.2d 819, 823 (Iowa 1969).
45. State v. McKee, 223 N.W.2d 204, 206 (Iowa 1974).
46. State v. Horsey, 180 N.W.2d 459, 460 (Iowa 1970).

There are exceptions, however. No objection is necessary when by its nature the matter could not have been known to counsel.[47] In a case where the trial judge had several out-of-court conversations with a juror, the Iowa Supreme Court held that because the record did not indicate that the defense counsel was aware of the conversations until after the trial, no objection during trial was necessary.[48] Further, it has been held that failure to object to overbearing, unrecorded judicial conduct by inexperienced counsel is excusable.[49]

d. Affidavits Inadequate. Affidavits by counsel attached to a motion for a new trial do not constitute a bill of exceptions, and do not become part of the record to be considered on appeal.[50] Nor do affidavits by the official court reporter who transcribed the rest of the case constitute a bill of exceptions.[51]

e. Timing. Exceptions may be taken "at any stage in the proceedings."[52] If possible, the bill of exceptions should be prepared at the time of taking the exception.[53] Counsel must be given time to prepare the bill.[54]

f. Judge's Signature. The signature of the presiding judge is required on a bill of exceptions. If the judge believes the proposed bill of exceptions reflects the truth, he must sign it.[55]

g. Bill of Bystanders. If the judge does not sign the bill of exceptions, counsel must secure the signature of two attorneys or other officers of the court or of two disinterested spectators. The bill then becomes a bill of bystanders,[56] and has the same effect as a bill of exceptions. It is not clear whether the objecting attorney may be one of the signatories, but it is clear that the objecting attorney's signature alone on a bill of exceptions is insufficient.[57] Prudence would seem to dictate that an attorney not sign his or her own bill of bystanders unless the necessary two signatures cannot be obtained in any other way.

h. Review. The fact that no valid bill of exceptions (or bill of bystanders) has been filed will not preclude review of unrecorded matters unless the opposing party raises this as a ground for preclusion.[58]

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47. State v. Hahn, 259 N.W.2d 753, 756-57 (Iowa 1977).

48. *Id.* The court found error even though the bill of exceptions describing the error was unsigned. *Id.*

49. State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976).

50. State v. Lamar, 260 Iowa 957, 966, 151 N.W.2d 496, 501 (1967).

51. State v. Hemrick, 62 Iowa 414, 415, 17 N.W. 594 (1883).

52. IOWA R. CRIM. P. 23.1(4).

53. IOWA R. CRIM. P. 23.1(8).

54. *Id.*

55. IOWA R. CRIM. P. 23.1(4).

56. *Id.*

57. State v. Lamar, 260 Iowa 957, 967, 151 N.W.2d 496, 502 (1967); IOWA R. CRIM. P. 23.1(5).

58. State v. Limerick, 169 N.W.2d 538, 540-41 (Iowa 1969).

i. Affidavits. Affidavits submitted to the Iowa Supreme Court are insufficient to make a record on appeal.[59] That is, affidavits cannot be used as a substitute for a bill of exceptions or a bill of bystanders. For example, the supreme court has refused to consider as error the contention of a defendant that he was under the influence of a drug during plea proceedings, when that contention was made for the first time on appeal in an affidavit by the defendant to the supreme court.[60]

j. Lost Transcript Notes. Unavailability of the court reporter's transcript does not entitle the defendant to reversal if a fair substitute is available and the state is not guilty of chicanery.[61] A bill of exceptions, or a bill of bystanders, is an adequate substitute.[62] The appellate rules provide for another method to construct a trial record, whenever the matter was not reported or the transcript is unavailable.[63] Appellant may prepare a statement of the evidence or proceedings "from the best available means, including his recollection."[64] This statement must be filed and served within twenty days after the filing of the notice of appeal.[65] Appellee then has ten days to file and serve objections or proposed amendments to the statement.[66] The statement and any objections or proposed amendments must be submitted to the trial court for approval and settlement, and the approved statement becomes part of the record.[67] Because this statement requires the trial court's approval, counsel should rely on this method only as a last resort, electing when possible to use a bill of exceptions, or a bill of bystanders, where appropriate.

B. *Impermissible Ways of Making a Record*

1. *Motion for New Trial*

The Iowa Supreme Court has stated that a motion for new trial "ordinarily is not sufficient to preserve error where proper objections were not made at trial."[68] Indeed, it is doubtful that a motion for new trial could ever serve this function, except possibly in the unusual circumstance where *new* counsel in his or her motion for a new trial poses the issue of ineffective assistance of counsel because of the original trial attorney's failure to object.

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59. State v. Rand, 268 N.W.2d 642, 650 (Iowa 1978).
60. *Id.*
61. State v. McKee, 223 N.W.2d 204, 206 (Iowa 1974).
62. *Id.*
63. *See* IOWA R. APP. P. 10.
64. IOWA R. APP. P. 10(c).
65. *Id.*
66. *Id.*
67. *Id.*
68. State v. Steltzer, 288 N.W.2d 557, 559 (Iowa 1980) (defendant failed to preserve alleged error with regard to mental competency of the victim to testify by failing to make an objection when the alleged error first became apparent at trial).

Nor can an objection reserved by the court be the basis for a motion for new trial.[69] If the court reserves ruling on an objection, in order to preserve error a ruling must be obtained before the case is submitted to the trier of fact.[70]

2. *Motion in Arrest of Judgment*

The motion in arrest of judgment, a post-verdict motion, cannot be used to raise issues which must be raised in pretrial motions.[71] Nor can it substitute for a mid-trial motion for judgment of acquittal to challenge the sufficiency of evidence.[72] A challenge to the applicability of an underlying statute setting forth the charged offense may, however, be raised through a motion in arrest of judgment.[73]

3. *Memorandum Brief*

Error is not preserved for appellate review if the objectionable matter is mentioned in the trial court only in a memorandum brief. This has been held "not a part of the record for purposes of error preservation."[74]

4. *Affidavits*

Affidavits by counsel attached to a motion for a new trial do not constitute a bill of exceptions, and do not become part of the record to be considered on appeal.[75] Nor do affidavits by the official court reporter who transcribed the rest of the case constitute a bill of exceptions.[76]

5. *Postconviction Relief*

The postconviction relief procedure in Iowa Code chapter 663A is expressly not a substitute for any remedy in the original trial proceedings.[77] This has been interpreted as meaning that an appropriate objection still must have been made at the trial level.[78]

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69. State v. Ryder, 315 N.W.2d 786, 789 (Iowa 1982).
70. Bahnsen v. Rabe, 276 N.W.2d 413, 415-16 (Iowa 1979).
71. State v. Bading, 236 Iowa 468, 472, 17 N.W.2d 804, 807 (1945).
72. State v. Oldfather, 306 N.W.2d 760, 762 (Iowa 1981).
73. *Id.*
74. State v. Higginbotham, 351 N.W.2d 513 (Iowa 1984) (vagueness challenge not addressed by supreme court because issue raised at trial level only in memorandum brief).
75. State v. Lamar, 260 Iowa 957, 151 N.W.2d 496 (1967).
76. State v. Hemrick, 62 Iowa 414, 17 N.W. 594 (1883).
77. Iowa Code § 663A.2 (1985).
78. *See* Fryer v. State, 325 N.W.2d 400, 405 (Iowa 1982).

III. Pretrial Matters

A. *Time Limits for Motions, Defenses, and Objections and Notices of Certain Defenses*

In criminal cases, a number of defenses and objections may be waived if not raised in pretrial motions either within forty days after the arraignment or prior to the empaneling of the jury, whichever event occurs earlier.[79] Included within the scope of the rule are: (1) defenses and objections based on defects in the institution of the prosecution;[80] (2) defenses and objections based on defects in the indictment or the trial information;[81] (3) motions to suppress evidence on the ground that it was illegally obtained;[82] (4) requests for discovery;[83] (5) requests for severance of charges or severance of defendants;[84] (6) motions for a change of venue,[85] or a change of judge;[86] and, (7) notices of defenses of alibi, diminished responsibility, entrapment, insanity, intoxication, and self-defense.[87]

On the other hand, a motion for a bill of particulars must be filed within only ten days after the arraignment.[88] Motions in limine must be filed at least nine days before trial,[89] but as a practical matter usually are permitted immediately prior to trial (and even midtrial in unusual circumstances).

B. *Pretrial Motion Practice Generally*

1. *Overview*

The general pleading requisites for pretrial motions are set out in Rule 28 of the Iowa Rules of Criminal Procedure.[90] All motions are to be in writing unless the trial court permits them to be made orally on the record.[91] The grounds for motions must be stated therein.[92] The specific relief or order sought must also be stated therein, and may be supported by affidavit.[93] Service and filing of pretrial motions shall be in the manner provided in civil

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79. *See* Iowa R. Crim. P. 10(2)-(4).
80. Iowa R. Crim. P. 10(2)(a).
81. Iowa R. Crim. P. 10(2)(b).
82. Iowa R. Crim. P. 10(2)(c); *see* Iowa R. Crim. P. 11.
83. Iowa R. Crim. P. 10(2)(d).
84. Iowa R. Crim. P. 10(2)(e).
85. Iowa R. Crim. P. 10(2)(f).
86. *Id.*
87. Iowa R. Crim. P. 10(11).
88. Iowa R. Crim. P. 10(5).
89. Iowa R. Crim. P. 10(4).
90. Iowa R. Crim. P. 28.
91. *Id.*
92. *Id.*
93. *Id.*

actions.[94]

2. *Waiver*

Failure to timely file a motion constitutes waiver of the accompanying claim for relief unless the trial court, for good cause shown, in its discretion grants relief anyway.[95] When a motion is not ready for timely filing, defense counsel should file a request for extension of time within the forty-day general time limit for filing pretrial motions, and set out the grounds for delay (*e.g.*, incomplete discovery, ongoing plea negotiations, probable guilty plea). This helps substantiate that a late filing was not merely through oversight.[96]

3. *Recordation of Hearing Proceedings*

There is no express requirement in the Iowa Rules of Criminal Procedure for recordation of pretrial motion hearings. The only related reference is in the Rule 10(8) procedure for ruling on motions, *viz.* "Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."[97] Contrastingly, reporting of the *trial* proceedings is required under Rule 18(4), as are a guilty plea colloquy under Rule 8(3) and the proceedings at a preliminary hearing under Rule 2(4)(g).

4. *Demand for Pretrial Ruling on Motion*

Failure by defense counsel to request the trial court's ruling on a motion to dismiss prior to trial leaves nothing for review.[98] Pretrial rulings should be requested on all defense motions, since the party desiring a ruling has the burden of demanding it. In instances where the trial court reserves ruling, the record will at least be preserved for appeal, although a defense attorney should object to that procedure and demand a pretrial ruling.

5. *Finding—Failure to Make*

When the trial court fails to make specific findings of fact in ruling on a pretrial motion, there is a presumption that the trial court "decided the facts necessary to support its decision . . . ."[99] This principle makes it advisable for counsel to request in a motion for reconsideration that the trial court make specific findings of fact.

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94. *Id.*

95. IOWA R. CRIM. P. 10(4); State v. Hobson, 284 N.W.2d 239 (Iowa 1979) (waiver applied to motion filed one day late).

96. *See* P. BERGER & K. DUNAHOO, IOWA LEGAL FORMS: CRIMINAL LAW 98 & 109 (1986).

97. IOWA R. CRIM. P. 10(8).

98. State v. Watts, 244 N.W.2d 586 (Iowa 1976).

99. State v. Boelman, 330 N.W.2d 794, 795 (Iowa 1983).

C. *Motion for a Bill of Particulars*

Pursuant to Iowa Rule of Criminal Procedure 10(5), a motion for a bill of particulars is available to the defense when the indictment or the trial information charges an offense but fails to specify the particulars of the offense sufficiently to fairly enable the defendant to prepare a defense.[100] A motion for a bill of particulars is not a substitute for or an additional means of discovery, however.[101]

This motion can be filed any time prior to the defendant's arraignment or within ten days after arraignment, but the time limits can be extended by the trial court for good cause shown. Supplemental bills may be ordered by the trial court or voluntarily furnished by the prosecutor.[102]

D. *Motion for a Change of Venue*

A motion for a change of venue because of prejudice in the county must be made prior to trial.[103] When a change of venue motion based upon prejudice is overruled, counsel would be well advised to have the voir dire examination of the jury reported,[104] as this affords an appellate court the opportunity to examine the transcript and make an independent evaluation of prejudice in the community.[105]

The statutory test under Iowa Rule of Criminal Procedure 10(10)(b) for a motion for a change of venue is whether "such degree of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county."[106] The rule, as amended in 1983, provides alternatively for transfer of a jury from another county instead of transferring the trial to another county.[107]

The time limits that govern the filing of the motion are found in Iowa Rule of Criminal Procedure 10(4), which requires that all pretrial motions be filed within forty days after arraignment.[108] This time limit should apply, provided that the grounds for the motion arose during that time period.

Mere conclusions in an affidavit will not support a change of venue; rather, the grounds must be stated with definiteness and certainty.[109] The fact that the state files no affidavits in resistance does not convert the de-

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100. IOWA R. CRIM. P. 10(5).
101. State v. Lass, 228 N.W.2d 758, 765 (Iowa 1975).
102. *See* IOWA R. CRIM. P. 10(5).
103. IOWA R. CRIM. P. 10(2)(f); *see* IOWA R. CRIM. P. 10(9)(a) (form of motion) and 10(9)(b) (determination to be made).
104. *See* State v. Davis, 196 N.W.2d 885, 889 (Iowa 1972).
105. State v. Cuevas, 288 N.W.2d 525, 528 (Iowa 1980).
106. IOWA R. CRIM. P. 10(10)(b).
107. *Id.*
108. IOWA R. CRIM. P. 10(4).
109. State v. Dague, 206 N.W.2d 93, 94 (Iowa 1973).

fendant's motion and affidavits from a prima facie to a conclusive showing.[110] Additionally, the absence of resistance does not rob the trial court of its discretion to determine whether the movant has met the burden of showing entitlement to a change of venue, that is, that there is "reasonable likelihood defendant could not receive a fair trial" in the original county.[111]

The affidavit must demonstrate more that just exposure to news accounts.[112] It must support a finding by the trial court that there will be a "substantial likelihood of prejudice."[113]

E. *Motion for a Change of Judge*

In a related matter, these same rule provisions essentially all pertain to motions for a change of judge.[114] The motion for a change of judge under Iowa Rule of Criminal Procedure 10(9)(b) appears to be a codification of the common law motion for recusal, using Canon 3(C)(1)(a) of the Iowa Code of Judicial Conduct as a general guideline for trial courts and as an objective standard for appellate review.[115]

The pleading should stress factual allegations (instead of conclusions or assertions) of personal bias or prejudice (instead of judicial predilection). Prejudice sufficient to constitute cause for recusal must stem from an extrajudicial source. That is to say, evidence presented in a prior trial, or legal opinions held by a particular judge, are not grounds for a change of judge.[116]

F. *Motion for Continuance*

1. *Applicable Rules*

A new general provision on continuances was added to the Iowa Rules of Criminal Procedure in 1982. Rule 8.1(2) now reads: "The date assigned for trial shall be considered firm. Motions for continuance are discouraged. A motion for continuance shall not be granted except upon a showing of good and compelling cause."[117]

Specific provisions relating to continuances include Iowa Rule of Criminal Procedure 4(8)(d) and 5(5) governing continuances following amendment of the indictment or trial information; Rule 10(10)(d) governing continuances because of the defendant's failure to comply with pretrial notice requirements concerning certain defenses; and Rule 18(3) governing contin-

110. *Id.*
111. *Id.*
112. *See* State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983).
113. *Id.*
114. IOWA R. CRIM. P. 10(2)(f); *see* IOWA R. CRIM. P. 10(9)(c) (determination to be made).
115. *See* State v. Smith, 242 N.W.2d 320, 323-24 (Iowa 1976).
116. *Id.* at 324.
117. IOWA R. CRIM. P. 8.1(2).

uances for the prosecutor's failure to give notice of all prosecution witnesses except for rebuttal witnesses at least ten days before trial.

2. *Affidavits*

Iowa Rule of Civil Procedure 183(b) has been held to apply to motions for continuances in criminal cases based on absence of evidence.[118] Accordingly, the defendant must accompany the motion for continuance with affidavits of prior diligent efforts and the specific evidence sought or a reasonable basis for believing that this evidence could be procured.[119] This motion must contain the factual allegations required under Iowa Rule of Civil Procedure 183(b),[120] or it may be overruled on that ground.[121]

3. *Trial Court's Discretion*

The trial court's broad discretion in granting or denying a motion for continuance will be reversed only on a dual showing of clear abuse of that discretion and prejudice to the defendant.[122] This makes specificity in pleading essential.

G. *Motion in Limine*

1. *Function*

A motion in limine is available to both the state and the defendant to obtain a pretrial (or midtrial) court order to prohibit disclosure of questionable evidence during trial until the court, in the jury's absence, has been presented an offer of the evidence and an objection to it, thus helping to prevent a mistrial.[123] This motion advises the trial court and opposing counsel of a party's position on a particular matter and undercuts any assertion by the offending party that the challenged prejudicial evidence came in by inadvertence,[124] which can be instrumental in obtaining (or preventing) a

118. State v. Wright, 274 N.W.2d 307, 310 (Iowa 1979).
119. State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978).
120. Iowa R. Civ. P. 183(b) states:
All such motions based on absence of evidence must be supported by affidavit of party, his agent or attorney, and must show: (1) the name and residence of the absent witness, or, if unknown, that affiant has used diligence to ascertain them; (2) what efforts, constituting due diligence, have been made to obtain such witness or his testimony, and facts showing reasonable grounds to believe the testimony will be procured by a certain, specified date; (3) what particular facts, distinct from legal conclusions, affiant believes the witness will prove, and that he believes them to be true and knows of no other witness by whom they can be fully proved. . . .
121. State v. Cowman, 212 N.W.2d 420, 423 (Iowa 1973).
122. State v. Johnson, 219 N.W.2d 690 (Iowa 1974).
123. State v. Johnson, 183 N.W.2d 194, 197 (Iowa 1971).
124. State v. Johnson, 222 N.W.2d 483, 487 (Iowa 1974) (state couldn't assert county at-

mistrial. It is axiomatic that the grounds for an order in limine must be stated with sufficient specificity to alert the trial court and the other party as to exactly what would be excluded.[125]

The Iowa Supreme Court has on several occasions disapproved the overbroad use of a motion in limine to completely preclude admission of evidence, stating: "It should not, except on a clear showing, be used to reject evidence."[126] The motion in limine merely alerts the court of an evidentiary issue and sets the stage for a determination later by the court, outside the presence of the jury, of the admissibility of the evidence that is the subject of the motion.[127]

2. *Timing*

Motions in limine are now governed by Iowa Rule of Criminal Procedure 10(4) and must be filed no later than nine days before trial.[128] Trial courts, however, should be liberal in finding good cause for late filing (including midtrial filings) in light of the nature and purpose of this motion, which is to avoid mistrial by preventing disclosure of prejudicial evidence to the jury.

3. *Denial of Motion*

Denial of this motion does not constitute reversible error, inasmuch as the evidence in question has not yet been (and may never be) presented to the jury.[129] Objection must be made during trial when the objectionable evidence is offered.[130] An exception to this rule has been recognized, however, where the motion is resolved in such a manner that it is beyond question that the challenged evidence will be admitted on trial. In such a case, there is no reason to voice the objection during trial.[131] Prudent counsel nevertheless should object anyway, thus not leaving to an appellate determination whether the matter was "beyond question."

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torney's interrogation was inadvertent).

125. A motion in limine seeking to exclude evidence of prior crimes on the grounds that it "is incompetent, irrelevant and immaterial and is prohibited in general as proof of other criminal offenses" has been held to preserve error because "it requested and ultimately produced a ruling as to what was admissible and what was not." State v. Cuevas, 282 N.W.2d 74, 79 (Iowa 1979).

126. State v. Johnson, 183 N.W.2d 194, 197 (Iowa 1971).

127. *Id.*; *see also* State v. Langley, 265 N.W.2d 718, 721 (Iowa 1978); Lewis v. Buena Vista Mut. Ins. Ass'n, 183 N.W.2d 198, 200-01 (Iowa 1971).

128. IOWA R. CRIM. P. 10(4).

129. State v. Garrett, 183 N.W.2d 652, 655 (Iowa 1971).

130. *Id.*; *see also* State v. Hinsey, 200 N.W.2d 810, 817 (Iowa 1972).

131. *See* State v. Miller, 229 N.W.2d 762, 768 (Iowa 1975). *See also* State v. Cuevas, 282 N.W.2d 74, 79 (Iowa 1979); State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979).

4. *Granting of Motion*

Granting of a pretrial motion in limine will preserve error. An offer of proof concerning the evidence in question thus is not required at trial.[132]

If a motion in limine is granted but subsequently violated at trial, the party in whose favor the motion was granted must take action in the form of an objection, motion for mistrial, or other appropriate device in order to preserve error. The Iowa Supreme Court has defended this rule on the ground that the contrary course would allow a litigant to gamble on a favorable verdict, holding the claimed error in reserve in case of an unfavorable outcome.[133]

H. *Motion for Severance*

Iowa Rule of Criminal Procedure 6(1) allows charging of multiple offenses when they "arose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan."[134] This rule, as amended, is more consistent with the approach taken in Federal Rule of Criminal Procedure 8.[135]

I. *Motion to Suppress*

1. *Objection at Trial*

The overruling of a pretrial motion to suppress evidence serves as a sufficient predicate for assignment of error on appeal, even absent objection to such evidence in the course of trial.[136]

2. *Renewal of Motion*

Objections to evidence sought to be suppressed, of course, may be renewed at trial, and the trial court retains the option to reconsider and change its original ruling.[137] Reconsideration is especially appropriate when a different judge is assigned for the trial.

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132. State v. Hinsey, 200 N.W.2d 810, 818 (Iowa 1972) (citing State v. Garrett, 183 N.W.2d 652, 654-55 (Iowa 1971)). The hearing on the motion must be evidentiary in nature. *Compare* Gustafson v. Iowa Power & Light Co., 183 N.W.2d 212, 214 (Iowa 1971) *with* State v. Langley, 265 N.W.2d 718, 721 (Iowa 1978).

133. State v. Latham, 366 N.W.2d 181, 183 (Iowa 1985).

134. IOWA R. CRIM. P. 6(1).

135. *See, e.g.*, State v. Bair, 362 N.W.2d 509, 512 (Iowa 1985) (interrelated events that do not constitute a "same transaction or occurrence" may qualify as a "common scheme or plan").

136. State v. Untiedt, 224 N.W.2d 1, 3 (Iowa 1974).

137. State v. Richards, 229 N.W.2d 229, 232-33 (Iowa 1975).

3. *Specificity of Pleading*

To preserve error, a motion to suppress must specify its grounds.[138] This may mean not only specifying the constitutional provision or statute the litigant is relying upon, but also the theory of suppression under that provision or statute. In a 1977 burglary case,[139] the defense counsel made a pretrial motion to suppress statements made by the defendant to detectives concerning the burglary.[140] The motion asserted that the statements were made in violation of the defendant's rights under the fourth, fifth, sixth, and fourteenth amendments to the federal constitution and article I, section 8 of the Iowa constitution.[141] At the hearing on the motion the trial court, apparently assuming that the motion was based on violation of the defendant's *Miranda* rights, found that no waiver of *Miranda* rights had been shown by the part of the prosecution.[142] This prevented use of the statements as part of the prosecution's case in chief, but not for impeachment purposes.[143]

At trial, the defendant took the stand and testified to his noninvolvement in the burglary.[144] In rebuttal, the state offered testimony as to the defendant's statements by one of the detectives to whom they were made.[145] The defense objected in a timely manner, and was overruled.[146] On appeal, the Iowa Supreme Court held that evidence of the defendant's statements could be used for impeachment inasmuch as the trial court had not found that the statements were involuntary and defense counsel had not specified involuntariness as a ground for suppression.[147]

4. *Findings and Conclusions*

The trial court, in support of its ruling, should render findings of fact and conclusions of law on a motion to suppress.[148] When the trial court fails to make specific findings of fact in ruling on a pretrial motion, however, there is a presumption that the trial court "decided the facts necessary to support its decision . . . ."[149] On appellate review, the trial court's findings of fact on questions of credibility of witnesses are given "considerable

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138. State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977), *cert. denied*, 435 U.S. 1008 (1978).
139. *Id.*
140. *Id.* at 894.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 894-95.
147. *Id.* at 895-96.
148. State v. Ege, 274 N.W.2d 350, 352 (Iowa 1979).
149. State v. Boelman, 330 N.W.2d 794, 795 (Iowa 1983).

deference."[150]

J. *Constitutional Challenges to Validity of Substantive Statute*

A defendant does not preserve error for appeal if he waits to attack the facial validity of a statute in his motion for judgment of acquittal at the conclusion of all of the evidence.[151] The proper procedure for challenging the constitutionality of a statute as applied to the particular defendant is to file a pretrial motion to dismiss.[152] The court should hold an evidentiary hearing at some stage before deciding the issue.[153]

K. *Depositions*

1. *Motion to Extend Time*

Express provision is made in Iowa Rule of Criminal Procedure 12(6) for the trial court to extend the deadline for taking depositions, on good cause shown.[154] Counsel should scrupulously plead good cause in the motion and should file the motion before the thirty-day deadline.

2. *Good Cause Not Shown*

The length of time an attorney has been in the case is just one of several factors the trial court should weigh in determining whether good cause has been shown for extending the time limit for taking depositions. Other factors which may properly be considered include "the rights of both parties to a fair and speedy trial and the court's legitimate concern for sound judicial administration."[155] It has been held, for example, that a trial court did not abuse its broad discretion in denying the defendant's motion to take depositions after the time limit, where the defendant had been represented throughout the proceedings by the same court-appointed counsel who waited to file the motion to take depositions until the day before the trial.[156] The Iowa Supreme Court pointed out that granting the motion would have required another trial date, calling off of the jury, and the disruption of the trial court's schedule.[157]

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150. State v. Hatter, 342 N.W.2d 851, 854 (Iowa 1983).

151. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981) (vagueness of statute; error preserved only because trial court overlooked untimeliness of defendant's action).

152. *Id.*; IOWA R. CRIM. P. 10(2). Moreover, a void-for-vagueness challenge must specify the manner in which the statute is alleged to be vague. State v. Allen, 304 N.W.2d at 206.

153. State v. Moorhead, 308 N.W.2d 60 (Iowa 1981).

154. IOWA R. CRIM. P. 12(6).

155. State v. Grimme, 338 N.W.2d 142, 145 (Iowa 1983).

156. *Id.*

157. *Id.*

L. *Double Jeopardy Challenges*

Iowa Code section 816.4 provides a procedure for determination of the double jeopardy issue when it is the only defense.[158] The supreme court has stated that the statute contemplates raising the issue by pretrial motion.[159] Failure to do so would probably be deemed a waiver of the claim.

In *Menna v. New York*,[160] the United States Supreme Court held that a plea of guilty, even when made with benefit of counsel, is not in itself a waiver of double jeopardy defense.[161] This case should not be understood as holding that a defendant may plead guilty and subsequently claim double jeopardy for the first time on appeal. The *Menna* Court held only that a plea of guilty simply removes from the case the issue of the defendant's factual guilt of the offense charged.[162] It does not preclude review of a double jeopardy claim, which has nothing to do with whether or not he is guilty of the offense, but rather is concerned with prior judicial proceedings related to that offense. The defendant in *Menna*, however, had raised the issue of double jeopardy in the trial court and presumably preserved it adequately for review.[163] *Menna* appears to offer no solace for an Iowa defendant who foregoes the statutory procedure for raising the issue.

M. *Guilty Plea Challenges*

The Iowa Supreme Court has held that any challenges to a guilty plea based on alleged defects in the plea proceedings must be raised in a motion in arrest of judgment. "[F]ailure to so raise such challenges shall preclude the right to assert them on appeal."[164] The supreme court has relied on Iowa Rules of Criminal Procedure 8(2)(d) and 23(3)(a) to uphold the dismissal of a postconviction relief proceeding based on alleged defects in the guilty plea proceeding where no motion in arrest of judgment was filed.[165] Failure to file the motion has also precluded an appeal based on a claim that the trial court should have held a competency hearing before taking a guilty plea.[166]

N. *Indictment/Information Challenges*

Objections to the indictment (or the trial information) relating to matters of substance and form which might be raised by demurrer (now motion

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158. Iowa Code § 816.4 (1985).
159. State v. Tobin, 333 N.W.2d 842, 844-45 (Iowa 1983).
160. 423 U.S. 61 (1975).
161. *Id.* at 62.
162. *Id.* at 63 n.2.
163. *Id.* at 62.
164. Iowa R. Crim. P. 8(2)(d).
165. Wenman v. State, 327 N.W.2d 216, 217-18 (Iowa 1982).
166. State v. Lucas, 323 N.W.2d 228, 230-31 (Iowa 1982).

to dismiss) are deemed waived if not raised before the jury is sworn.[167] This rule has been applied where an information accused the defendant of "attempted rape," instead of the true name of the offense, "assault with intent to commit rape."[168] It was also cited where a defendant claimed as a defect in an information for larceny that it did not assert that the property alleged to be stolen belonged to anyone other than the defendant.[169]

O. *Speedy Indictment Claims—Appellate Review*

Appellate review of the trial court's ruling is at law on a pretrial motion to dismiss for violation of the statutory right to speedy indictment.[170] The decision will not be reversed where it is supported by substantial evidence.[171] The appellant is entitled to prevail only if the appellant's evidence was so strong that the trial court was compelled to rule for the appellant as a matter of law.[172]

P. *Speedy Trial Claims—Appellate Review*

Appellate review of the trial court's determination of good cause for denial of speedy trial is not de novo. The trial court's findings of fact upon conflicting evidence "are binding upon [the appellate court] if supported by substantial evidence."[173] In many cases of this sort, there will be no dispute as to the facts surrounding the denial of speedy trial, and the reviewing court's job will be to determine, as a matter of law, whether the facts of the case constitute good cause for delay. The supreme court owes no deference to a trial court's conclusions of law.[174]

Q. *Venue/Place of Offense Challenges*

Criminal actions are to be tried in the "county in which the crime was committed, except as otherwise provided by law."[175] Venue is no longer an element of the crime to be proved beyond a reasonable doubt, however. If the defendant objects to the venue in a pretrial motion under Iowa Code section 803.2, the burden of proving proper venue in that county by a preponderance of the evidence lies with the state.[176] The defendant waives the

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167. *See* IOWA R. CRIM. P. 10(2)(b); State v. Glenn, 234 N.W.2d 396, 399 (Iowa 1975) (prior law).
168. State v. Grady, 231 N.W.2d 869, 873-74 (Iowa 1975).
169. State v. Grindle, 215 N.W.2d 268, 269 (Iowa 1974).
170. State v. Boelman, 330 N.W.2d 794 (Iowa 1983).
171. *Id.* at 795.
172. *Id.*
173. State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983).
174. Menzel v. Morse, 362 N.W.2d 465, 470 (Iowa 1985).
175. IOWA CODE § 803.2(1) (1985).
176. State v. Allen, 293 N.W.2d 16, 19-20 (Iowa 1982).

issue of improper venue unless he timely files this motion *and* secures a ruling thereon by the trial court, following an evidentiary hearing, *before* trial.[177] Failure of State to carry its burden is fatal to a subsequent conviction.[178]

IV. Trial Matters

A. *Jury Selection*

The initial stages of a trial generally involve selecting and empaneling a jury. Jury selection is governed by Iowa Code chapter 609. The process of empaneling the jury is delineated in Iowa Rule of Civil Procedure 187. The rules are identical in both civil and criminal trials. In general, two basic types of challenges are involved in this context: (1) challenges to the panel; and, (2) challenges to individual jurors.[179]

1. *Challenge to the Panel*

Challenges to the panel are governed by Iowa Rule of Civil Procedure 187(d). The procedure in criminal cases is the same as in civil cases.[180] 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.[181] A challenge to the jury panel must concern the validity of the entire array of jurors, and not merely an individual jury member.[182] The challenge must be made before any juror is sworn, or it will be waived.[183]

2. *Challenge to Individual Jurors*

Challenges to individual jurors in criminal cases are only for cause, since peremptory challenges have been eliminated. In civil cases, the grounds upon which challenges for cause may be predicated are delineated in the Iowa Rules of Civil Procedure.[184] The same grounds, with certain exceptions, are applicable in criminal trials.[185] Unless prejudice is demonstrated, a challenge for cause must be made prior to the time the jury is sworn if the grounds for the objection are known or could have been readily

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177. *Id.* at 18.
178. *Id.* at 22.
179. *See generally* Allbee & Kincaid, *supra* note 1, at 21.
180. *Compare* Iowa R. Crim. P. 17(3) *with* Iowa R. Civ. P. 187(d).
181. Iowa R. Civ. P. 187(d).
182. *E.g.*, State v. Sallis, 262 N.W.2d 240, 245 (Iowa 1978) (quoting State v. Staker, 220 N.W.2d 613, 615-16 (Iowa 1974)).
183. Iowa R. Civ. P. 187(d).
184. Iowa R. Civ. P. 187(f).
185. *See* Iowa R. Crim. P. 17(5).

ascertained.[186]

Because challenges for cause are statutory, the specific reasons underlying the challenge must be stated with particularity in order to make a proper record.[187] Thus, defense counsel's mere statement "we would challenge for cause" has been held not sufficiently specific to preserve error where the challenge was denied.[188] When a specific ground for challenge has been urged and denied by the trial court, no other ground for challenge will be considered on appeal, even though other grounds may appear in the record.[189]

3. *Voir Dire*

If the voir dire is not reported and a challenge is overruled, it is necessary to file a bill of exceptions.[190] Alternatively, jury questionnaires and jurors' affidavits should be made part of the trial record in a hearing on a motion for new trial alleging juror misconduct based upon a venireman's giving misinformation during voir dire.[191]

4. *Mid-Trial Jury Problems*

In addition to the challenges discussed above, other jury-related problems may arise during the course of trial in connection with juror conduct and deliberation. These circumstances will generally require immediate objection or motion in order to preserve error where the party is aware of or could readily have ascertained the grounds for objection. The Iowa Supreme Court has held that where defense counsel knew of a racially biased statement made by a juror during the course of the trial, but waited until a guilty verdict was returned to complain of it, any error based on the statement was waived.[192]

B. *Objections*

1. *Necessity*

a. *Failure to Object.* Failure to object operates as a waiver of improprieties in testimony.[193] Without proper objection, the issue is not properly

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186. Sieren v. Hildreth, 254 Iowa 1010, 1012, 118 N.W.2d 575, 576 (1963).
187. *See* State v. Anderson, 239 Iowa 1118, 1122, 33 N.W.2d 1, 4 (1948).
188. State v. Williams, 285 N.W.2d 248, 267 (Iowa 1979).
189. Mitchell v. Swanwood Coal Co., 182 Iowa 1001, 1009, 166 N.W. 391, 394 (1918).
190. *See* Elkin v. Johnson, 260 Iowa 46, 49, 148 N.W.2d 442, 444 (1967).
191. *See* State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983).
192. State v. Coffee, 182 N.W.2d 390, 394-96 (Iowa 1970); *see also* State v. Wallace, 261 Iowa 104, 106-07, 152 N.W.2d 266, 268 (1967) (failure to give jury statutory admonition before recess in trial).
193. State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978).

before the appellate court.[194]

b. *Inadequate Objection.* Error may not ordinarily be predicated on an order overruling inadequate objection.[195] The inadequacy of an objection is, of course, a question of law ultimately to be decided on appeal. As an example, the Iowa Supreme Court has ruled that objection to a question put to an expert witness, on the ground that it called for an opinion on "the ultimate issue for the jury to decide" was adequate, although the approved form was to object to the question as calling for an opinion that was not a proper subject of expert testimony.[196]

2. *Specific Objections (Effect)*

When the trial court overrules a specific objection, the objecting party is limited on appeal to reliance on that same ground.[197] If the trial court's decision overruling a specific objection is proper on any ground shown by the record, it will be upheld on appeal.[198]

3. *Specific Objections (Form)*

a. Speculation, Opinion and Conclusion. A question is not objectionable simply because it calls for an opinion or conclusion from a witness. More specificity is required to justify its exclusion. The Iowa Supreme Court has stated that the "opinion and conclusion" objection leaves nothing for review.[199] The same has been held with respect to objection to evidence on the ground that it is "speculative."[200]

b. Invades Province of Jury. An objection that an expert's opinion invades the province of the jury is insufficient to preserve error for appellate review. Error is preserved by an objection that the opinion was on a subject within common knowledge and was not a proper subject of expert testimony.[201]

c. Incompetent Witness. An objection that a witness is incompetent to testify is not sufficient.[202] The objection must state the reason the witness is not competent, *e.g.*, lack of personal knowledge or lack of mental capacity.[203]

d. Incompetent Evidence. A general objection that evidence is "incom-

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194. *Id.*
195. State v. Nimmo, 247 N.W.2d 228, 231 (Iowa 1976).
196. *Id.*
197. State v. Pepples, 250 N.W.2d 390, 393 (Iowa 1977). *See also* State v. LeGear, 346 N.W.2d 21, 24 (Iowa 1984).
198. State v. Pepples, 250 N.W.2d 390, 393 (Iowa 1977); *see also* State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976).
199. State v. Glenn, 234 N.W.2d 396, 402 (Iowa 1975).
200. State v. Hubbs, 268 N.W.2d 188, 189 (Iowa 1978).
201. State v. Johnson, 224 N.W.2d 617, 622 (Iowa 1974).
202. Ferris v. Riley, 251 Iowa 400, 408, 101 N.W.2d 176, 182 (1960).
203. *Id.*

petent" is not sufficiently specific.[204] The objection must state the reason the witness is not competent, *e.g.*, violation of privileged communication, evidence of other crimes, or an improper conclusion by a witness.[205]

e. Irrelevant. Although it is always proper to explain why the proffered evidence is irrelevant, a general objection of irrelevancy is sufficient in itself to preserve error on that ground.[206] When a general objection, such as irrelevancy, is sustained, the party against whom it is sustained has a right to an explanation from the court of the particular basis on which the objection was sustained.[207] Such an explanation should be requested to clarify matters on a subsequent appeal.

f. Immaterial. The objection on the basis of immateriality is no longer proper. Iowa evidence rules incorporate materiality into the definition of relevant evidence.[208]

g. Foundation. An objection that no proper foundation has been laid for proffered evidence will not preserve error unless counsel also states in what way the foundation is deficient.[209] The purpose of this requirement, like most other specificity requirements, is not only to alert the court to the precise objection being made but also to allow the opposing party to cure the defect if this is possible.[210]

h. Exclude Testimony. Objection, in an elementary midtrial motion to suppress, that testimony should "be excluded" is not sufficient to preserve error concerning the testimony of a witness about inculpatory statements made by the defendant.[211] No ground was specified for the objection/motion, and the court was not otherwise alerted to the attack being on voluntariness grounds under the fourteenth amendment.[212]

4. *Timeliness of Objection*

It is axiomatic that objection must ordinarily be made "at the earliest opportunity after the ground for objection becomes apparent."[213] If an ob-

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204. State v. Johnson, 243 N.W.2d 598, 605 (Iowa 1976); State v. Clay, 213 N.W.2d 473, 476-77 (Iowa 1973).

205. State v. Johnson, 243 N.W.2d at 605.

206. State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973). *But see* State v. LeGear, 346 N.W.2d 21, 24 (Iowa 1984) (defense counsel objected to question as "immaterial and irrelevant" and contended on appeal that testimony elicited by the question was unfairly prejudicial; held, issue of unfair prejudice was not preserved for review by objection made at trial).

207. State v. Buckner, 214 N.W.2d 164, 168 (Iowa 1974).

208. IOWA R. EVID. 401.

209. *See* State v. Janssen, 247 N.W.2d 260, 262 (Iowa 1976).

210. *Id.*

211. State v. Hrbek, 336 N.W.2d 431, 435 (Iowa 1983).

212. *See id.*

213. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984). *Accord* State v. Winquist, 247 N.W.2d 256, 259 (Iowa 1976) (blood test results); State v. Ivory, 247 N.W.2d 198, 203 (Iowa 1976) (objection after answer); State v. Pelelo, 247 N.W.2d 221, 225 (Iowa 1976) (constitutional-

jection to a question asked of a witness is late and follows the answer, the objecting party must make a motion to strike coupled with an application to have the objection precede the answer or an excuse for tardiness in objecting.[214] The Iowa Supreme Court has held that a mere motion to strike is not sufficient in these circumstances, and that counsel's failure to couple his motion to strike with a request that his objection precede the answer did not preserve error and left the objectionable answer in the record.[215]

5. *Repeated Objections*

If proper objection is made and overruled, the objector is not required to make further objections when a subsequent question raises the same issue. Repeated objections need not be made to the same class of evidence.[216]

6. *Affirmatively Consenting to Admission of Evidence After Objecting to its Admissibility*

Counsel may waive error in the admission of evidence through "some affirmative act amounting to express or implied assent to the reception of the evidence."[217] Although it is clear that a defendant need not object repeatedly to the same class of evidence, it is also clear that there is a difference between remaining silent and relying on a previous objection, and affirmatively consenting to admission of evidence after previously objecting to it. In a 1981 case[218] involving operating a motor vehicle while under the influence, the defendant attempted both before and during trial to exclude breath test results and a videotape of his interrogation, claiming that this evidence had been obtained in violation of his right to counsel.[219] His objections were overruled.[220] When the test results and videotape were offered, defense counsel stated that he had no objection to their introduction into evidence.[221] The Iowa Supreme Court distinguished this conduct from silence, and held that the defendant's prior objections had been waived.[222]

7. *Constitutional Objections*

Objections predicated upon constitutional grounds are subject to the

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ity of statute).

214. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984); State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978).

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

216. State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976).

217. State v. Schmidt, 312 N.W.2d 517, 518 (Iowa 1981) (quoting C.J.S. *Trial* § 661 (1955)).

218. State v. Schmidt, 312 N.W.2d 517 (Iowa 1981).

219. *Id.* at 518.

220. *Id.*

221. *Id.*

222. *Id.*

general rules regarding evidentiary objections.[223] Thus, constitutional issues must be timely and specifically raised in the trial court in order to be preserved for appellate review.[224]

8. *Standing Objections*

Standing objections are ordinarily not to be recommended in trials at law.[225] These objections are disapproved due to the difficulties they create for appellate review and the uncertainty which results for litigants.[226]

9. *Objections to a Class of Evidence*

As a general rule, when a timely and proper objection has been made and overruled, further objections are not required to preserve error when subsequent questions are asked raising the same issue.[227] It is not necessary to make repeated objections to the same class of evidence.[228] This rule does not apply, however, to competency objections concerning successive witnesses.[229] Thus, timely and appropriate objections with respect to competency should be repeated for every witness considered questionable.[230]

C. *Cross-Examination*

The scope of permissible cross-examination lies within the sound discretion of the trial court.[231] It is limited to: (1) matters inquired into on direct examination; or (2) matters pertaining to the witness's credibility, bias, ill will, hostility, or interest in the case.[232] A party objecting to the scope of cross-examination should specify why the questioning is improper. An objection such as "improper cross-examination" would probably be too general, and would fail to preserve error unless the impropriety were apparent on the record itself.

D. *Motion to Strike*

A motion to strike evidence is often used in conjunction with objections. Like an evidentiary objection, a motion to strike must be made in a timely

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223. *See, e.g.*, State v. Holderness, 301 N.W.2d 733, 737-38 (Iowa 1981) (and cases cited therein).
224. *Id.*
225. State v. Jeffs, 246 N.W.2d 913, 916 (Iowa 1976).
226. *Id.*
227. State v. Padgett, 300 N.W.2d 145, 146 (Iowa 1981) (quoting State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976)).
228. State v. Padgett, 300 N.W.2d at 145.
229. Solbrack v. Fosselman, 204 N.W.2d 891, 894 (Iowa 1973).
230. *Id.*
231. State v. Cuevas, 288 N.W.2d 525, 530 (Iowa 1980).
232. *Id.*

fashion. As a general rule, it must be interposed at the earliest opportunity after the ground for objection becomes apparent.[233] Ordinarily, the motion is only applicable to the latest answer given.[234]

A motion to strike is also subject to the requirement of specificity. It must indicate the specific grounds upon which exclusion is urged; any grounds not specified are waived.[235]

Similarly, a blanket motion to strike testimony which is only partially inadmissible should ordinarily be overruled.[236] Thus, it is incumbent upon counsel to narrowly confine the motion to inadmissible or objectionable matters rather than using a shotgun approach.

When an objection is interposed after the answer has been given, a motion to strike must be made, joined with a request that the objection precede the answer and an excuse for the delay.[237] Typical excuses for timely failure to object are "an unresponsive answer" or "lack of time to object."

The trial judge has discretion in ruling on an excuse based on lack of time. If a motion premised upon such an excuse is overruled, the movant should request the reason in order to pinpoint for the record whether the ruling is based on lack of time or on the urged exclusionary grounds.[238]

A ruling sustaining an objection which is made after an answer has been given does not have the effect of striking that testimony.[239] Instead, counsel must also properly make a motion to strike. Otherwise, the objectionable matter remains part of the trial record and any error is waived.

Where the ground for a motion to strike is unresponsiveness, use of the motion is ordinarily limited to the examining party. The other party, however, can use unresponsiveness as an excuse for tardiness in objecting, incidental to making a motion to strike an inadmissible answer with an adequate objection.[240]

When evidence is admitted over an objection on some condition (for instance, that it be connected up later), and that condition is not subsequently met, error is not preserved unless counsel moves to strike the evidence at the conclusion of the offering party's case.[241]

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233. Kleve v. General Motors Corp., 210 N.W.2d 568, 574 (Iowa 1973).

234. State v. Smith, 248 Iowa 603, 610, 81 N.W.2d 657, 661 (1957).

235. Harrison v. Ulicki, 193 N.W.2d 533, 537 (Iowa 1972).

236. Kleve v. General Motors Corp., 210 N.W.2d 568, 574 (Iowa 1973). *See* Ferris v. Riley, 251 Iowa 400, 407, 101 N.W.2d 176, 180 (1960).

237. *E.g.*, State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978); State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977).

238. Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL L. REV. 543, 557-58 (1958).

239. *See, e.g.*, Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974).

240. State v. Reese, 259 N.W.2d 771, 775-76 (Iowa 1977).

241. State v. Christianson, 193 Iowa 56, 60, 186 N.W. 462, 464 (1922).

E. *Motion for Mistrial*

1. *Failure to Move for Mistrial*

Failure to move for mistrial after objections to evidence are sustained leaves the defendant without a proper record for appeal.[242] There are a few reported cases in Iowa in which the supreme court saw fit to declare a mistrial on appeal, even in the absence of any motion therefor.[243] These cases, however, have generally involved flagrantly improper statements or conduct by counsel when arguing to a jury.[244] Moreover, the Iowa Supreme Court has recently cast some doubt as to whether these cases (most of which are rather old) will continue to have validity.[245] Obviously, the prudent course for counsel is to move for mistrial immediately when opposing counsel engages in any misconduct arguably severe enough to justify this remedy, and not trust in a reviewing court to find the misconduct so egregious as to justify mistrial in the absence of a motion therefor.

2. *Timeliness of Motion for Mistrial*

A motion for mistrial must be made when the grounds therefor first become apparent.[246] A defendant who bases a motion for mistrial on a prosecutor's allegedly prejudicial question must move for mistrial when the allegedly prejudicial question is asked in order to preserve error.[247] This is true even if the question was successfully objected to when it was asked. In a 1980 theft case,[248] defense counsel successfully objected to a prosecutor's question on direct examination about events occurring prior to the offense charged.[249] Defense counsel cross-examined the witness, however, and allowed the state to call another witness and examine him before moving for mistrial at the close of the state's case.[250] The Iowa Supreme Court held the motion untimely.[251]

When the alleged impropriety involves the conduct or remarks of counsel during closing argument, the motion for mistrial is considered timely if made prior to submission of the case to the jury.[252] There may be some circumstances, however, in which the impropriety is so flagrant, and the prejudice is so evident, that the matter would be considered as a ground for

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242. State v. Storrs, 351 N.W.2d 520, 522 (Iowa 1984).
243. *See* State v. McIntyre, 203 Iowa 451, 456, 212 N.W. 757, 759 (1927); State v. Pierce, 178 Iowa 417, 440-44, 159 N.W. 1050, 1059-61 (1916).
244. *See supra* notes 242-43.
245. *See* State v. Hutchinson, 341 N.W.2d 33, 39 (Iowa 1983).
246. State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973) (and cases cited therein).
247. State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980).
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *E.g.*, State v. Nelson, 234 N.W.2d 368, 371 (Iowa 1975).

a new trial even where no exception was taken at the time it occurred.[253]

3. *Motion to Strike/Curative Instruction*

a. General Rule. Prejudice from improper questioning or testimony may ordinarily be avoided by striking the question or testimony from the record and admonishing the jury to disregard it. This procedure is generally viewed by a reviewing court as sufficient to cure any error.[254] Only in extreme circumstances, when it is evident that the prejudice created by the stricken evidence cannot be removed by this procedure, will a mistrial be granted.[255]

b. Sua Sponte. The court may, on its own motion, strike evidence it deems erroneously admitted.[256] Such action lies within the sound discretion of the court and will not be reversed unless an abuse of discretion is shown. *Sua sponte* striking of evidence has been upheld even when a prior objection of counsel to the evidence had been previously overruled.[257]

c. Timeliness. A motion to strike evidence is not timely if it comes without prior objection, and if the grounds of the motion should have been apparent before it was made.[258] It is usually fatal to allow any other evidence to be presented before moving to strike the evidence in question.[259]

F. *Motion for Judgment of Acquittal*

1. *Reserved Ruling*

If a motion for judgment of acquittal is made at the close of all the evidence, the trial court may reserve its decision on the motion, submit the case to the jury, and rule on the motion before or after the jury returns its verdict.[260] This, in effect, introduces the equivalent of a civil "judgment notwithstanding the verdict" motion into the criminal law.

Prior Iowa case law held that where a motion for a directed verdict (now a motion for judgment of acquittal) was overruled at the close of the state's evidence, the defendant could not assign the ruling as error on appeal unless he presented no evidence.[261] This rule has been specifically changed by Iowa Rule of Criminal Procedure 18(8)(a).

2. *Standard for Granting*

Iowa law directs that the motion for judgment of acquittal shall be

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253. *See supra* note 243 (cases cited therein).
254. State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971).
255. *Id.*
256. State v. Shimon, 182 N.W.2d 113, 115 (Iowa 1970).
257. *Id.*
258. State v. Houston, 206 N.W.2d 687, 691 (Iowa 1973) (and cases cited therein).
259. *Id.*
260. IOWA R. CRIM. P. 18 (8)(b). *See, e.g.*, State v. Campbell, 217 N.W.2d 251 (Iowa 1974).
261. *See* State v. Allison, 206 N.W.2d 893, 894 (Iowa 1973).

granted "if the evidence is insufficient to sustain a conviction" for the charged offense.[262] The standard for "sufficient evidence" has been described by the Iowa Supreme Court as "substantial evidence reasonably supporting the charge . . . ."[263] In ruling on the motion, the reviewing court views the evidence in the light most favorable to the prosecution and will draw any reasonable inferences therefrom necessary to support the conviction.[264] The evidence "must be sufficient to raise a fair inference of guilt—more than suspicion, speculation, or conjecture."[265]

3. *Scope—Constitutional Challenge*

The Iowa Supreme Court has limited a motion for judgment of acquittal to use as a challenge of the sufficiency of the evidence to sustain a conviction.[266] This motion thus cannot be used to attack the facial validity of a statute, for example, which must be done by a pretrial motion to dismiss.[267]

4. *Preservation of Error for Appeal*

A defendant may not initially challenge the sufficiency of the evidence on appeal.[268] Despite a generalized affirmative duty of the trial court to order an acquittal on its own motion, if the court fails to act *sua sponte*, the defendant must challenge the sufficiency of the evidence in order to preserve error for appeal.[269]

Under Iowa Rule of Criminal Procedure 18(8)(a), a defendant who moves for a judgment of acquittal at the close of the state's evidence is not required to renew his motion at the close of all evidence.[270] The unrenewed motion may be a basis for post-trial motions and a subsequent appeal.[271] In reviewing the trial court's ruling on such a motion, the Iowa Supreme Court will consider not only the evidence that had been presented at the time the motion was made, but also the defendant's evidence as well.[272]

G. *Final Arguments*

Error in the final arguments must be preserved in order to secure appellate review.[273] Iowa Rule of Criminal Procedure 18(4) provides that final ar-

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262. Iowa R. Crim. P. 18(8)(a).
263. State v. White, 223 N.W.2d 163, 165 (Iowa 1974).
264. *Id.*
265. State v. Davis, 229 N.W.2d 249, 251 (Iowa 1975).
266. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).
267. *Id.*
268. State v. Dickerson, 313 N.W.2d 526, 529 (Iowa 1981).
269. State v. Heidebrink, 334 N.W.2d 344, 346 (Iowa Ct. App. 1983).
270. Iowa R. Crim. P. 18(8)(a).
271. State v. Holderness, 293 N.W.2d 226, 230 (Iowa 1980)
272. *Id.*
273. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978).

guments shall be reported upon the request of any party to a criminal trial.[274] If the final arguments are not reported, however, counsel may make a record of any improprieties through the use of a bill of exceptions, or by making a record of the argument by a supplemental statement of the proceedings under Iowa Rule of Appellate Procedure 10(c).[275] A bill of exceptions is not required, however, where the trial court has erroneously refused to grant the defendant's request that final arguments be reported.[276]

If an aggrieved party fails to object to statements at trial, and fails to move for a mistrial either at the time of or before submission of the case to the jury, such conduct is usually deemed a waiver of the statements in question. Flagrant and prejudicial comments, however, can constitute an exception to this rule.[277]

H. *Jury Instructions*

1. *Generally*

The rules relating to jury instructions in civil cases are made applicable to trials of criminal prosecutions by Iowa Rule of Criminal Procedure 18(5)(f).[278] The Iowa Supreme Court has determined that Iowa Rule of Civil Procedure 196, including its requirement of timely error preservation, is fully applicable to all criminal trials.[279]

A trial court has the *sua sponte* duty to instruct the jury fully and fairly, even without a request for instructions.[280] The burden nevertheless is on counsel to make a proper record to preserve error for appellate review.[281] Objections must be made in writing, or dictated into the record outside the presence of the jury.[282]

Although failure to object to instructions will preclude appeal on the ground of defective instructions, the failure to object, if sufficiently egregious, can constitute ineffective assistance of counsel and thereby entitle the defendant to a new trial.[283]

2. *Objection at Trial Necessary*

Notwithstanding Iowa Rule of Criminal Procedure 6(3), a defendant must object in a timely manner on the trial record to the jury instructions,

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274. Iowa R. Crim. P. 18(4).
275. *Cf.* State v. Washington, 308 N.W.2d 422 (Iowa 1981).
276. State v. Newman, 326 N.W.2d 796, 800 (Iowa 1982).
277. State v. Phillips, 226 N.W.2d 16, 18-19 (Iowa 1975).
278. Iowa R. Crim. P. 18(5)(f).
279. State v. Rouse, 290 N.W.2d 911, 914-15 (Iowa 1980).
280. Iowa R. Crim. P. 6(3).
281. State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978).
282. Iowa R. Crim. P. 18(5)(f); Iowa R. Civ. P. 196.
283. *See* State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983).

or to the trial court's failure to give requested instructions in order to preserve any error for appellate review.[284] Objections to instructions, or lack thereof, may not be raised for the first time on appeal. Unexcused failure to make a record on an instruction is not a mere technical error or defect to be disregarded on appellate review.[285]

3. *Motion for New Trial*

Reversing a long-standing policy under the prior law, the Iowa Supreme Court has interpreted Iowa Rule of Criminal Procedure 18(7)(f) as requiring that all objections to instructions be made *prior to jury arguments,* unless the instructions are later modified.[286] Thus, as in civil cases, it is no longer permissible to wait until a motion for new trial to raise objections to jury instructions. Nor can a party use any post-verdict motion to amplify exceptions or add new exceptions to jury instructions.[287]The only exception to this rule appears to be when jury instructions are revised or augmented after jury deliberations begin.[288]

4. *Judgment of Acquittal*

Error in the submission of jury instructions is not preserved merely by the defendant's making a motion for judgment of acquittal at the close of the state's evidence or, for that matter, at the close of all evidence.[289] The problem is one of timeliness, as the issue of correctness of expected jury instructions is not ripe yet. Rather, the requirements of Iowa Rule of Civil Procedure 196 must be complied with.[290]

5. *Sufficiency of Objection*

Whether an objection to jury instructions is sufficient to preserve error may depend on its specificity or the relationship of the challenged instruction to the case. Ordinarily a timely and specific objection will preserve error.[291] The test to determine the sufficiency of an objection is whether the objection alerted the trial court to the nature of the error urged on appeal.[292] It has been held that an objection to the wording of an instruction will not

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284. State v. Burkett, 357 N.W.2d 632, 634 (Iowa 1984).
285. State v. Wellington, 264 N.W.2d 739, 742 (Iowa 1978).
286. State v. Rouse, 290 N.W.2d 911, 915 (Iowa 1980) (IOWA R. CIV. P. 196 is applicable to criminal trials).
287. State v. Henderson, 268 N.W.2d 173, 181 (Iowa 1978).
288. State v. Beeman, 315 N.W.2d 770, 776 n.7 (Iowa 1982).
289. *Id.*
290. *Id.*
291. State v. Templeton, 258 N.W.2d 380, 382 (Iowa 1977).
292. State v. Chadwick, 328 N.W.2d 913 (Iowa 1983); State v. Lewis, 242 N.W.2d 711, 716 (Iowa 1976).

preserve error on the issue of whether it should have been given to the jury at all.[293]

More than a mere objection may be necessary to preserve error on some instructional issues. If an instruction is correct in its proposed form, but not as explicit as the objecting party desires, then that party must request an instruction acceptable to him in order to preserve error.[294] The same is also required if the issue presented by the instruction is not integral to the cases, or when an instruction on an integral issue is not as explicit as a party desires.[295] Error will not be preserved in these circumstances unless counsel requests an additional instruction prior to the jury's being charged.

6. *Preliminary Form*

Error is preserved only by making a specific objection to jury instructions in their final form. Exceptions or objections to the preliminary draft of instructions will not support an assignment of error on appeal, in the absence of objection at the time of submission of the instructions in their final form.[296]

7. *Contradictory Instructions*

If the jury is given two contradictory instructions, a reviewing court will not attempt to determine which one the jury followed. The principle is that "where two contradictory rules are laid down for the guidance of the jury, it is impossible to say which one the jury followed[.]"[297] In such a case a new trial will be granted.[298]

8. *Marshalling Instruction*

It is necessary to object to the trial court's omission of an essential element from the marshalling instruction in order to preserve that issue for appellate review.[299] In a 1983 sexual abuse appeal,[300] the defendant claimed that because the marshalling instruction did not include a requirement that the jury make a finding of general criminal intent to find him guilty of sex-

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293. State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985) (defendant's objection to the wording in a cautionary instruction concerning defendant's election not to testify does not preserve error on the question of whether the instruction should have ever been submitted). *See also* State v. Fisher, 279 N.W.2d 265, 267 (Iowa 1979) (objection that instructions do not accurately state the law insufficiently specific to preserve error).

294. State v. Brown, 172 N.W.2d 152, 156-60 (Iowa 1969).

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

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

297. State v. Winders, 359 N.W.2d 417, 420 (Iowa 1984).

298. *Id.*

299. State v. Blackford, 335 N.W.2d 173, 176-77 (Iowa 1983).

300. *Id.*

ual abuse in the third degree, his conviction was defective.[301] The Iowa Supreme Court held that his failure to make a timely objection made the claim unreviewable.[302] A separate instruction concerning general criminal intent had been given to the jury.[303] The court noted this and then cited a prior case,[304] providing *a fortiori* support for its instant ruling, in which failure to object to omission of an element of a crime in a marshalling instruction had precluded review of the omission, even though the omitted element had not been included anywhere else in the instructions.[305]

I. *Bench Trials*

1. *Insufficient Findings of Fact—Motion for New Trial*

Where the defendant does not challenge the sufficiency of findings of fact by a motion for new trial, the sufficiency of the findings may not be challenged on appeal.[306] The appellate court will presume the finding of any facts necessary to support the judgment which are supported by the record.[307]

The standard of appellate review of the sufficiency of the evidence in bench trials (as distinguished from the sufficiency of findings of fact) is the same as for jury trials.[308] Iowa Rule of Criminal Procedure 16(2), governing bench trials, has been interpreted as not departing from the established principle "in other court-tried law cases that findings of fact, if supported by substantial evidence, have the same effect as a special jury verdict."[309]

2. *Appellate Review—Alternative Legal Theory*

When the trial is to the court and specific findings of fact are made, the reviewing court is not restricted to the particular legal theory that the trial court used when reviewing the sufficiency of the evidence to support the defendant's conviction.[310] The Iowa Court of Appeals affirmed a burglary conviction in a case where the trial court found the defendant guilty on a theory of joint criminal conduct.[311] The court agreed with the defendant that he was not guilty of joint criminal conduct on the record made at trial, but upheld his conviction on the ground that the same record showed his

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301. *Id.* at 177-78.
302. *Id.* at 177.
303. *Id.* at 176-77.
304. State v. Ware, 271 N.W.2d 485, 486 (Iowa 1977).
305. State v. Blackford, 335 N.W.2d at 176-77.
306. State v. Miles, 346 N.W.2d 517, 519 (Iowa 1984).
307. *Id.*
308. *Id.*
309. State v. Hall, 287 N.W.2d 564, 565 (Iowa 1980).
310. State v. Irvin, 334 N.W.2d 312, 315-16 (Iowa Ct. App. 1983).
311. *Id.*

guilt as an aider and abetter of burglary.[312]

V. Post-Trial Matters

A. *Judgment Notwithstanding the Verdict*

The Iowa Rules of Criminal Procedure make no provision for a motion for judgment notwithstanding the verdict.[313] Iowa Rule of Criminal Procedure 18(10)(b), however, provides that if (and only if) a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve its ruling on the motion until after the jury returns a verdict.[314] If such a motion were sustained after the jury had returned a guilty verdict, the effect would be similar to that of a motion for judgment notwithstanding the verdict in civil practice.

B. *Motion for New Trial*

Iowa Rule of Criminal Procedure 23(2) deals with motions for new trial. Rule 23(2)(a) specifies the procedure for the motion,[315] and Rule 23(2)(b) lists the grounds upon which the motion may be made.[316]

Rule 23(2)(c) treats motions for new trial in cases tried without a jury.[317] It provides that in lieu of granting a new trial, the trial court may vacate any judgment entered, take additional testimony, amend or make anew its findings of fact and conclusions of law, and enter a new judgment.[318]

1. *Timing*

Except where based on newly discovered evidence, a motion for a new trial must be made before final judgment, unless this time limit is extended by the trial court.[319] If the motion is based on newly discovered evidence, it must be made within two years of the final judgment, unless the trial court extends the filing deadline on a showing of good cause.[320] Note that newly discovered evidence is also a ground for postconviction relief,[321] which has a time limit of three years after either the final conviction or issuance of the writ of procedendo (in the event of an appeal).[322]

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312. *Id.*
313. *See* State v. Oldfather, 306 N.W.2d 760, 763 n.2 (Iowa 1981).
314. *See* State v. Marti, 290 N.W.2d 570, 582 (Iowa 1980).
315. Iowa R. Crim. P. 23(2)(a).
316. Iowa R. Crim. P. 23(2)(b).
317. Iowa R. Crim. P. 23(2)(c).
318. *Id.*
319. *See* Iowa R. Crim. P. 23(2)(a).
320. *See* Iowa R. Crim. P. 23(2)(b)(8).
321. Iowa Code § 663A.2(4) (1985).
322. Iowa Code § 663A.3 (1985).

The grounds for a new trial are set out in Iowa Rule of Criminal Procedure 23(2)(b)(1). This rule changes the prior law by not permitting the defendant to wait until a motion for new trial to challenge jury instructions.[323]

2. *Factual Basis*

The record must contain some factual basis for a motion for new trial if such motion is to be sustained on appeal.[324] A defendant convicted of sexual abuse who appealed on the basis of misconduct of a juror in not disclosing on voir dire or a jury questionnaire her son had been a victim of sexual abuse was denied relief because the record did not show that the juror had ever been asked any question on voir dire, or that the questionnaire would have brought that information out.[325] Similarly, in an appeal from a robbery conviction, the defendant claimed that the trial court's communication with the jury in the defendant's absence constituted reversible error.[326] The court, although also finding the error harmless, ruled that because the defendant had not made any record showing that the communication had been made out of his presence, no error had been preserved.[327]

3. *Appellate Review Standard*

Appellate review of the trial court's refusal to grant a new trial is limited in scope, with the defendant having to overcome a presumption in favor of the trial court's ruling. To do so, the defendant must disclose and prove facts which would have been sufficient to sustain the trial court's actions had the motion for new trial been granted.[328]

To obtain an appellate reversal, the defendant must demonstrate that the trial court abused its discretion.[329] If the motion for new trial is grounded on a disputed factual assertion, the trial court's decision on conflicting evidence is binding on a reviewing court if there is a sufficient factual basis for it.[330] In a 1950 murder appeal,[331] the defendant based a motion for new trial on jury misconduct.[332] The trial court held an evidentiary hearing and concluded there had been no misconduct.[333] On appeal the Iowa Supreme Court deferred to the trial court's finding on the disputed question

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323. State v. Rouse, 290 N.W.2d 911, 914-15 (Iowa 1980).
324. *See* State v. Christianson, 337 N.W.2d 502, 504-05 (Iowa 1983).
325. *Id.*
326. State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983).
327. *Id.*
328. *See* State v. Lindsey, 302 N.W.2d 98, 101 (Iowa 1981); State v. Olson, 260 Iowa 311, 316-17, 149 N.W.2d 132, 135 (1967).
329. *Id.*
330. *See* State v. Ebelsheiser, 242 Iowa 49, 60, 243 N.W.2d 706, 713 (1950).
331. *Id.* at 49, 43 N.W.2d at 706.
332. *Id.* at 60, 43 N.W.2d at 713.
333. *Id.*

of fact.[334]

If the motion for new trial is based on erroneous legal rulings by the trial court, the appellant must show that the rulings were not only erroneous, but were so prejudicial as to deprive him of a fair trial.[335] As with any other motion for new trial, considerable deference will be given to the trial court's rulings on factual matters, and they will not be disturbed unless the reviewing court finds them to be clearly erroneous.[336] The Iowa Supreme Court subscribes to this principle, even if it disagrees with the trial court on close questions, so long as the lower court's ruling is not clearly erroneous.

By contrast, no deference is accorded a trial court's ruling on a motion for new trial when the sole issue presented by the motion is a legal question. This is because a legal question does not involve an exercise of discretion.[337] The Iowa Supreme Court has relied several times on this principle in ruling on motions for new trial based on jury instructions.[338]

A motion for new trial must be based only on objections or exceptions taken at trial. In a post-verdict motion a party cannot amplify previous objections or offer new ones as a basis for relief.[339]

C. *Motion in Arrest of Judgment*

This motion is provided for by Iowa Rule of Criminal Procedure 23(3).[340] It is an application by the defendant that no judgment be rendered on a finding, plea, or verdict.[341] The grounds upon which the motion may be made are set forth in Rule 23(3)(a),[342] and the times for making it are contained in Rule 23(3)(b).[343]

The defendant's failure to challenge the adequacy of a guilty plea by a motion in arrest of judgment precludes any such challenge on appeal.[344] The Iowa Supreme Court has held however, that this rule is conditioned upon the trial court's informing the defendant, pursuant to Iowa Rule of Criminal Procedure 8(2)(d), that failure to attack the plea by a motion in arrest of judgment precludes any attack of the plea on appeal.[345]

At one time Iowa law specifically provided that a motion for arrest of judgment could be based upon any ground proper as a ground for demurrer

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334. *Id.*
335. State v. Compiano, 261 Iowa 509, 521, 154 N.W.2d 845, 852 (1967).
336. *Id.*
337. *See* State v. Lindsey, 302 N.W.2d 98, 101-02 (Iowa 1981) (and cases cited therein).
338. *Id.*
339. State v. Droste, 232 N.W.2d 483, 488 (Iowa 1975).
340. IOWA R. CRIM. P. 23(3)(a).
341. *Id.*
342. *Id.*
343. IOWA R. CRIM. P. 23(3)(b) (within 45 days of a guilty plea or verdict and not less than five days before entry of judgment).
344. IOWA R. CRIM. P. 23(3)(a).
345. State v. Worley, 297 N.W. 2d 368, 370 (Iowa 1980).

(now a motion to dismiss).[346] Since the removal of this provision from the Iowa Code, however, the Iowa Supreme Court has refused to consider motions for new trial based on grounds suitable for a motion to dismiss.[347]

The Iowa Supreme Court has said that a challenge to the applicability of a criminal statute may be raised through a motion in arrest of judgment.[348] This is because the applicability of the underlying statute "lies outside the scope of the recorded proceedings, but is nonetheless a part of the 'whole record', for purposes of arresting judgment."[349]

The Iowa Supreme Court has stated in *dicta* that an improper conviction for a crime that is not a lesser included offense of the crime prosecuted can be challenged by a motion in arrest of judgment.[350] A defendant convicted of indecent exposure appealed on the ground that he had been erroneously convicted of that offense as a lesser included offense of sexual abuse.[351] The state conceded the erroneous nature of the conviction, but argued error had not been preserved because the matter had not been raised until the sentencing.[352] The supreme court noted that better practice would have been to raise the issue by "post-trial motion," but reached the merits nonetheless.[353]

A motion in arrest of judgment may not be used to challenge the sufficiency of evidence.[354] This conclusion is not obvious from the language of Iowa Rule of Criminal Procedure 23(3)(a), which states that the motion shall be granted "when upon the whole record no legal judgment can be pronounced."[355] The weight of authority on this matter, however, is that in this context the evidence is not part of the record proper.[356] Under Iowa Rule of Criminal Procedure 23, "[t]he effect of an order arresting judgment on any ground other than a defect in a guilty plea places the defendant in the same position" as "immediately before the indictment was found or the information filed."[357] Thus, the defendant apparently must be formally recharged in order for there to be a new trial. That is, this order operates "to discharge the defendant from further prosecution in the pending

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346. *See* IOWA CODE § 5426(1) (1897); State v. Stennett, 220 Iowa 388, 395, 260 N.W. 732, 736 (1935) (dictum).

347. *See e.g.*, State v. Bading, 236 Iowa 468, 472, 17 N.W.2d 804, 807 (1945).

348. State v. Oldfather, 306 N.W.2d 760, 762-63 (Iowa 1981).

349. *Id.* at 763.

350. State v. Allen, 304 N.W.2d 203, 208 (Iowa 1981).

351. *Id.*

352. *Id.*

353. *Id.* at 209.

354. State v. Oldfather, 306 N.W.2d 760, 762 (Iowa 1981); State v. Young, 153 Iowa 4, 6, 132 N.W. 813, 814 (1911).

355. IOWA R. CRIM. P. 23(3)(a).

356. *See* State v. Oldfather, 306 N.W.2d 760, 762 (Iowa 1981); State v. Young, 153 Iowa 4, 6, 132 N.W. 813, 814 (1911). *See also* 21 AM. JUR. 2d *Criminal Law* § 522 (1965); 24 C.J.S. *Criminal Law* § 1526 (1961).

357. IOWA R. CRIM. P. 23(3)(d).

case."[358] It does not operate as an acquittal, however, and a trial court's entry of a judgment of acquittal on a motion in arrest of judgment has been reversed by the Iowa Supreme Court.[359]

Under Iowa Rule of Criminal Procedure 23, "[t]he effect of an order arresting judgment on the ground the guilty plea proceeding was defective is to place the defendant in the same situation in which he or she was immediately after the indictment was found or the information filed . . . ."[360] When the guilty plea is found to be defective only because of a failure to establish a factual basis for the charge, however, the court "shall afford the state an opportunity to establish an adequate factual basis before ruling on the motion in arrest of judgment."[361]

D. *Motion for Correction of Sentence*

A motion for correction of sentence is provided for in Iowa Rule of Criminal Procedure 23(5). It is limited to correction of illegal sentences and cannot be used to obtain reconsideration of a legal sentence pursuant to Iowa Code sections 902.4 and 903.2.[362]

Illegal sentences are void, and as such, not subject to ordinary concepts of waiver due to failure to seek review or preserve error.[363] Thus, an illegal sentence may be corrected at any time, and a district court's failure to correct it upon motion is reviewable even though the sentence was not appealed in a timely manner.[364] It would appear that correction of a sentence could be sought even after the allegedly illegal sentence had been served.[365] Presumably, any court with jurisdiction of the offense can correct an illegal sentence. There is no reason to believe that a motion for correction of sentence should be treated differently than a motion for reconsideration of sentence which does not have to be heard only by the original sentencing judge.[366]

A motion for correction of sentence is not limited only to correction of sentences that are illegal in the sense of not being permitted by statute. The motion might also be used where a sentence is inconsistent with guidelines for selecting sentencing options[367] or where the court failed to state on the record its reasons for imposing the sentence,[368] although the latter issue may

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358. State v. Alverson, 105 Iowa 152, 156, 74 N.W. 770, 771 (1898) (applying common law).

359. State v. Deets, 195 N.W.2d 118, 123-25 (Iowa 1972) (applying common law).

360. IOWA R. CRIM. P. 23(3)(d).

361. IOWA R. CRIM. P. 23(3)(d).

362. IOWA R. CRIM. P. 23 (5).

363. State v. Ohnmacht, 342 N.W.2d 838, 843 (Iowa 1983).

364. *Id.*

365. State v. Howell, 290 N.W.2d 355 (Iowa 1980).

366. *See* State v. Wrage, 279 N.W.2d 4, 5-7 (Iowa 1979) (motion for reconsideration of sentence).

367. *See* IOWA CODE § 901.5 (1985).

368. *See* State v. Ohnmacht, 342 N.W.2d 838, 840 (Iowa 1983).

also be raised on direct appeal.[369]

A clerical error in a sentencing order may be corrected pursuant to Iowa Rule of Criminal Procedure 22(3)(g) by entry of an order *nunc pro tunc*.[370] It may be unclear whether a sentence order actually constitutes an illegal sentence, or merely contains a clerical error; if in such a case a motion to correct sentence is filed, the district court must hold a hearing on this question in order to decide whether to proceed under Iowa Rule of Criminal Procedure 23(5)(a) or Rule 22(3)(g).[371]

Iowa Rule of Criminal Procedure 25(3)(b) states that a defendant's presence is not required at a "reduction of sentence under Rule 23."[372] This presumably refers to a correction of sentence under Rule 23(5)(b) which involves a reduction of the sentence.[373] By implication, it appears that absent waiver, a defendant's presence would be required at any proceedings by which the state sought to increase a sentence.

Although correction of an illegal sentence is ordinarily sought by motion under Iowa Rule of Criminal Procedure, Rule 23, the Iowa Supreme Court has held that an illegally sentenced defendant may raise the issue on direct appeal (at least when such appeal is timely), without having ever filed a motion for correction under Rule 23.[374]

E. *Motion for Reconsideration of Sentence*

Iowa Code section 902.4 allows the defendant to make application for reconsideration of sentence.[375] The application can be made *before* the start of confinement and need not be heard by the original sentencing judge.[376]

A reconsideration of sentence is an entirely discretionary proceeding. The district court has unlimited discretion to decide whether to grant a reconsideration hearing.[377]

1. *Reconsideration of a Felony Sentence*

The trial court loses its authority under Iowa Code section 902.4 to reconsider a felon's sentence unless it enters an order within ninety days of the start of the defendant's confinement that the defendant is to be returned to the trial court for resentencing. Neither the hearing itself nor any resentencing order need occur within this ninety-day period, however.[378]

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369. *See* State v. Marti, 290 N.W.2d 570, 589 (Iowa 1980).
370. State v. Suchanek, 326 N.W.2d 263, 265 (Iowa 1982).
371. *Id.* at 266.
372. IOWA R. CRIM. P. 25(3)(b).
373. IOWA R. CRIM. P. 23(5)(b).
374. State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).
375. State v. Wrage, 279 N.W.2d 4, 5 (Iowa 1979).
376. *Id.* at 5-7.
377. Ridinger v. State, 341 N.W.2d 734, 737 (Iowa 1983).
378. State v. Sullivan, 326 N.W.2d 361, 364 (Iowa 1982).

The ninety-day period a trial court has in which to reconsider a sentence commences immediately after a person is convicted of a felony and begins to serve a sentence of confinement.[379] The Iowa Supreme Court has opined that the definition of "sentence of confinement" is not limited to confinement under the same sentence for which reconsideration is sought, but means *any* sentence of confinement.[380] This pronouncement, however, is probably best regarded as *dictum*. The holding involved a case in which a defendant was convicted (in Iowa district court) of three counts of theft.[381] The trial court imposed three ten-year terms of imprisonment to be served concurrently with each other, and with an unexpired federal sentence previously imposed on the defendant.[382] Upon his release from federal custody some twenty months later, the defendant sought reconsideration of his theft sentence.[383] The Iowa Supreme Court held that the ninety-day period for reconsideration had passed, and stated: "[T]he commencement of any sentence of confinement, whether under the same judgment by the same court, or a different judgment of a different court, triggers the ninety-day period . . . ."[384]

The Iowa Supreme Court apparently overlooked the fact that the district court had ordered the theft sentences to run concurrently with the unexpired federal sentence.[385] Thus, the period of confinement on the theft sentence began over a year before the defendant sought reconsideration of it. The ninety-day period had certainly run by the time the motion was made, and so the supreme court's holding must be deemed suspect.

2. *Reconsideration of a Misdemeanor Sentence*

Reconsideration of misdemeanor sentences is governed by two overlapping and inconsistent provisions. Iowa Code section 903.2 gives a trial court jurisdiction to reconsider sentences imposed in all three classes of misdemeanors within thirty days after mittimus has issued.[386] On the other hand, Iowa Rule of Criminal Procedure 56, relating only to simple misdemeanors, states that a magistrate may reduce a sentence within: (1) ten days of its imposition; (2) ten days after receipt of a judgment of affirmance or dismissal by an appellate court; or, (3) ten days after a judgment by an appellate court denying review.[387]

Because of the overlapping of these two provisions relating to simple

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379. Iowa Code § 902.4 (1985).
380. State *ex rel.* Johnston v. District Court, 362 N.W.2d 205, 207-08 (Iowa 1985).
381. *Id.* at 206.
382. *Id.*
383. *Id.* at 206-07.
384. *Id.* at 207-08.
385. *Id.* at 206.
386. Iowa Code § 903.2 (1985).
387. Iowa R. Crim. P. 56.

misdemeanors, it would be advisable to proceed under the specific provision of Iowa Rule of Criminal Procedure 56 on simple misdemeanors, and under the general provision of Iowa Code section 903.2 on serious and aggravated misdemeanors.

VI. Preservation of Error on Appeal

Counsel's task is not finished even when he has both avoided waiver and preserved error in the trial court. He or she still must file a timely notice of appeal, and diligently and effectively prosecute the appeal throughout the appellate process.

Certain deadlines for filing notices of appeal and related proceedings were changed in 1985. Effective July 1, 1985, the same thirty-day deadline[388] applies for appeals of indictable offenses,[389] *certiorari*,[390] discretionary review,[391] and appeals involving postconviction proceedings.[392]

There has been no change in the time limits for filing appeals involving simple misdemeanors. The initial appeal from magistrate's court to district court must be filed within ten days of the final judgment, pursuant to Iowa Rules of Criminal Procedure 54(1).[393] Review of the district court's decision on appeal is through application for discretionary review by the supreme court, the application for which must be filed within thirty days of the district court decision, pursuant to Iowa Rules of Criminal Procedure 54(7).[394]

The timely filing of a postjudgment motion for new trial based on newly discovered evidence does not toll the deadline for filing of a notice of appeal within thirty days of the final judgment.[395] A suggested procedure would be to file the notice of appeal and request the supreme court to make a limited remand to the district court for a ruling on such post-judgment motions.

Prosecuting the appeal, of course, is another vital stage. It is axiomatic that the assignment of errors on appeal is controlling. That is, a ground for error raised at trial but not on appeal is abandoned.[396] Moreover, all issues to be reviewed on appeal must be raised in a timely manner, that is, in the designation of issues or at least in the appellant's brief. A new assignment of error initially raised in the reply brief is too late and will not be reviewed.[397] Assignments of error not supported by authority need not be reviewed and

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388. *See* Iowa R. App. P. 101.
389. Iowa R. App. P. 5, 31.
390. Iowa R. App. P. 301.
391. Iowa R. App. P. 201.
392. Iowa Code § 663A.9 (1985) (amended by H.F. 550, 1985 Iowa Acts 297).
393. Iowa R. Crim. P. 54(1).
394. Iowa R. Crim. P. 54(7).
395. State v. Anderson, 308 N.W.2d 42, 45 (Iowa 1981).
396. State v. Rosewall, 239 N.W.2d 171, 173 (Iowa 1976).
397. State v. Schultz, 245 N.W.2d 316, 318-319 (Iowa 1976).

can be deemed waived in the discretion of the appellate court.[398]

Error can be waived on appeal if the appellant does not provide a suitable record affirmatively disclosing the error relied upon.[399] Assignments of error raised in the appellant's brief are not waived merely because they are not all covered in oral argument.[400]

This brings us finally to the most drastic waiver of all—dismissal of an appeal for lack of timely prosecution. The appellate rules provide for dismissal as a potential remedy for failure to timely: (1) docket the appeal;[401] (2) file the appellant's brief;[402] and, (3) request transmission of the remaining record.[403]

VII. Conclusion

Particularly in these days of proliferating ineffective-assistance-of-counsel claims, familiarity with the dual principles and practice of waiver avoidance and error preservation should be deemed hardly less important to a criminal lawyer than a knowledge of the substantive law itself. This article has attempted to provide a basic grounding in, or review of, methods and techniques of error preservation. Correction of error in the criminal trial process benefits not only the litigant against whom the error was made, but also the entire criminal justice system and the society it serves. By combining the information obtained form sources such as this article with practical experience, the criminal bar can ensure that error, when committed, can be reviewed and corrected and substantial justice achieved.

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398. State v. Potts, 240 N.W.2d 654, 656 (Iowa 1976).
399. State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983).
400. Iowa R. App. P. 21(d).
401. Iowa R. App. P. 12(c).
402. Iowa R. App. P. 13(f).
403. Iowa R. App. P. 12(d).