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# A JUDGE'S VIEW OF TRIAL PRACTICE*

*The Honorable George G. Fagg*†

## I. Introduction

The points discussed in this outline are common matters for many trial lawyers. As to them, this outline may be helpful as a compilation of rules and authorities.

As to the infrequent trial advocate, however, it is the common matters that are often overlooked or misunderstood during the intensity of trial. In many respects, this outline is addressed to them.

Recognizing the briefcase as the lawyer's courtroom office, I hope this outline has sufficient utilitarian value to be included therein.

A mere reading of this outline will not suffice. For maximum benefit, the cited articles and cases must be read.

## II. The Polestar of Trial

A. The trial judge must insure a fair and just trial to each litigant. State v. Johnson, 183 N.W.2d 194, 197 (Iowa 1971).

B. The trial must be conducted in an orderly, dignified and proper manner. Schroedl v. McTague, 169 N.W.2d 860, 867 (Iowa 1969).

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C. The judge must be a fair and impartial arbiter. State v. Browning, 269 N.W.2d 450, 454 (Iowa 1978); State v. Larmond, 244 N.W.2d 233, 236 (Iowa 1976); Wilson v. Ceretti, 210 N.W.2d 643, 645 (Iowa 1973).

D. The trial judge is not an advocate. State v. Glanton, 231 N.W.2d 31, 34-36 (Iowa 1975).

E. Courts exist to serve the public interest. Forsyth v. Forsyth, 210 N.W.2d 430, 432 (Iowa 1973).

F. While the presiding judge must not act arbitrarily, capriciously or abusively, he or she is not a mere referee in a contest between opposing parties or counsel. All matters relating to the management and orderly conduct of the trial which are not regulated by precise statute or rule are committed to the judge's discretion. State v. Harris, 222 N.W.2d 462, 464-65 (Iowa 1974).

## III. Great Expectations of Trial Lawyers—Ethics

Although the trial lawyer is an advocate, his responsibility to the public interest is akin to that of a judge.

A. For recommended reading regarding the role of a trial lawyer, *see* Gaudineer, *Ethics: The Zealous Advocate*, 24 Drake Law Review 79 (1974) (the author discusses ethical considerations at the various stages of the trial).

B. The Iowa Code of Professional Responsibility for Lawyers is a roadmap of behavior for the trial lawyer. It places advocacy in focus and perspective. It has definite and specific application to trial.

C. Some examples:

1. Competency. DR* 6-101(A) (1) (2) (3).

2. Dignified and courteous conduct. Iowa Code § 610.14(1) (1977); DR 7-106(C) (6).

3. Fair and candid with the trial judge. EC** 7-36. Holloway v. Arkansas, 98 S. Ct. 1173 (1978).

(a) From pages 1179-80 of 98 S. Ct. 1173:

> "Finally, attorneys are officers of the court and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' "

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* DR refers to a Disciplinary Rule under the Iowa Code of Professional Responsibility.

** EC refers to an Ethical Consideration under the Iowa Code of Professional Responsibility.

4. Avoid annoying or discourteous behavior to opposing counsel. EC 7-38; Maland v. Tesdall, 232 Iowa 959, 966-67, 5 N.W.2d 327, 331 (1942).

5. Courtesy to opposing witnesses. IOWA CODE § 610.14(5) (1977); EC 7-10; DR 7-106(C) (2); State v. Crawford, 202 N.W.2d 99, 103-04 (Iowa 1972).

6. Compliance with rulings by the trial judge. EC 7-22; DR 7-106(A); Maland v. Tesdall, 232 Iowa 959, 966, 969, 5 N.W.2d 327, 331, 333 (1942).

7. Citation of adverse authorities. EC 7-23; DR 7-106(B) (1).

8. Cannot knowingly make a false statement or develop false evidence. DR 7-102(A) (5) (6).

9. Cannot knowingly permit a client or witness to lie. DR 7-102(A) (4); State v. Whiteside, 272 N.W.2d 468, 470-71 (Iowa 1978); Committee on Professional Ethics v. Crary, 245 N.W.2d 298, 305-07 (Iowa 1976).

10. Cannot bring inadmissible or unprovable matter to the fact-finder's attention by statement, question, form of objection or premature display of exhibits. DR 7-106(C) (1) (2); United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978).

11. No justification to assert frivolous matters. EC 7-4; DR 7-102(A) (1) (2).

12. Cannot assert personal knowledge of a fact in issue, unless testify. DR 7-106(C) (3).

13. Cannot assert personal opinion as to credibility of a witness, justification of cause, or outcome of case. DR 7-106(C) (4); State v. Monroe, 236 N.W.2d 24, 31 (Iowa 1974).

14. Must comply with local customs of courtesy and practice absent notice to the contrary. DR 7-106(C) (5).

15. There is no place for intentional or habitual violation of procedural and evidentiary rules. DR 7-106(C) (7).

16. The ex parte delivery of briefs to the trial judge is a questionable practice. Grieco v. Meachum, 533 F.2d 713, 719 (1st Cir. 1976).

D. The professional code is an important document for the lawyer's briefcase.

From page 769 of In the Matter of Frerichs, 238 N.W.2d 764 (Iowa 1976):

> "The Code of Professional Responsibility for Lawyers was developed, not by judges, but by lawyers so as to mark the proper path for any attorney who senses a conflict between various duties. . . .
>
> "The Iowa Code of Professional Responsibility for Lawyers, binding by our order on all lawyers practicing before this court, is derived from the ABA Code of Professional Responsibility.
>
> "All lawyers practicing before this court are bound by the canons and the provisions of the Iowa Code above set out. *They are not free to view them merely as aspirational. . . .*" (emphasis added).

## IV. Judicial Discretion

The trial lawyer must recognize the elasticity of this doctrine.

Simply stated, judicial discretion means there is judicial leeway. It is exercised in those many situations where there is no precise rule, or the spontaneity of the situation, or the necessity for orderly trial procedure, requires a judge to search for the objectives of justice based upon the dictates of reasonably applied judgment under the circumstances at hand.

In those instances where the trial judge has discretion, it is not enough adamantly and doggedly to advocate for the client's point of view. The lawyer must put himself or herself in the judge's position and assess the situation from all competing points of view, if he or she is effectively to represent the client and meaningfully participate in the decision-making process.

A. Judicial discretion:

1. A definition from page 783 of State v. Warner, 229 N.W.2d 776 (Iowa 1975):

> " 'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. . . .' "

2. An explanation of how it is exercised from page 751 of State v. Vickroy, 205 N.W.2d 748 (Iowa 1973):

> "[Judicial discretion] must be utilized fairly and impartially, not arbitrarily, by application of relevant, legal and equitable principles to all known or readily available facts of a given issue or cause to the end that justice may more nearly be effectuated."

3. A guideline for measuring abuse from page 1025 of Dunahoo, *The Scope of Judicial Discretion in the Iowa Criminal Trial Process*, 58 IOWA LAW REVIEW 1023 (1973).

> "Discretion accordingly has been abused 'only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' This means that, in the absence of injustice, an appellate court will not substitute its discretion for that of the trial court."

B. Importantly, it is *abuse*, not exercise, of discretion that is reviewable. State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976); State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976).

C. Discretionary rulings are presumptively correct and the complaining party has a heavy burden to overcome the presumption of regularity. This rule is recognized at pages 910-11 of State v. Gartin, 271 N.W.2d 902 (Iowa 1978):

> " '[T]he decisions of the trial court are cloaked with "a strong presumption in [their] favor," and "[u]ntil the contrary appears, the presumption is that the discretion of the [trial] court was rightfully exercised." . . . [T]o overcome this presumption of regularity requires an affirmative showing of abuse and the burden of so showing rests upon the party complaining.
>
> " 'This burden is heavy, indeed, for it can only be sustained by showing abuse and prejudice. In the words of a leading treatise on discretion: ". . . The action complained of must have been unreasonable in the light of attendant circumstances—the discretion must have been exercised for reasons clearly *untenable* or to an extent clearly *unreasonable* [and] the action must have resulted *prejudicially* to the rights of the party complaining. Without a union of these conditions, the ruling will stand; and, they concurring, it is seldom that a reversal is refused.' "

D. Ordinarily, abuse is found to exist only where there is no support in the record for the trial judge's determination. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972). A proper record should reflect judicial consideration of the relevant factors. Hyslop v. Maxwell, 223 N.W.2d 516, 519-20 (Wis. 1974).

E. There are other facets to judicial discretion apart from arbitrary abuse:

1. When the trial court has discretion, the judge must recognize and exercise it, and failure to do either is reviewable. State

v. Martin, 217 N.W.2d 536, 544-45 (Iowa 1974); State v. Boston, 233 Iowa 1249, 1256-59, 11 N.W.2d 407, 411-12 (1943); Adney v. Mississippi Lime Co. of Missouri, 241 F.2d 43, 45 (7th Cir. 1957); 5 AM. JUR. 2d, *Appeal and Error*, § 773.

2. A judge cannot delegate the exercise of discretionary power to the parties. People v. Johnson, 270 N.W.2d 734, 735 (Mich. 1978).

3. If a judge bases the exercise of discretion upon an erroneous view of the law, his or her conduct is beyond the limits of discretion. First Wisconsin National Bank of Oshkosh v. KSW Investments, Inc., 238 N.W.2d 123, 126 (Wis. 1976).

F. It is incumbent upon counsel to analyze the cases in their area of concern to ascertain the leeway actually available to the trial judge. Modifiers upon the gradations of discretionary power span the appellate spectrum from stringent limitations in some areas to great liberality in others.

G. Some examples of judicial discretion:

1. The grant or refusal of a motion for continuance. State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978).

2. Latitude of voir dire. State v. Stidolph, 263 N.W.2d 737, 738 (Iowa 1978); Sauer v. Scott, 238 N.W.2d 339, 343-44 (Iowa 1976); Wilson v. Ceretti, 210 N.W.2d 643, 644-45 (Iowa 1973).

3. Sequester the jury. Des Moines Register and Tribune v. Osmundson, 248 N.W.2d 493, 501 (Iowa 1976).

4. Scope of opening statement. United States v. Dinitz, 424 U.S. 600, 612 (1976); United States v. DeRosa, 548 F.2d 464, 470 (3rd Cir. 1971); Schroedl v. McTague, 169 N.W.2d 860, 867-68 (Iowa 1969).

5. Order of trial. Robson v. Barnett, 241 Iowa 1066, 1071, 44 N.W.2d 382, 384 (1950).

6. Segregation of witnesses. State v. Sampson, 220 Iowa 142, 144, 261 N.W. 769, 770 (1935); United States v. Smith, 578 F.2d 1227, 1235 (8th Cir. 1978).

7. Jury notetaking. IOWA R. CRIM. P., Rule 18(5) (e) (found in IOWA CODE § 813.2 (Supp. 1977)). United States v. Anthony, 565 F.2d 533, 535-36 (8th Cir. 1977).

8. Matters of relevancy and materiality. State v. Ball, 262 N.W.2d 278, 279 (Iowa 1978); Wiedenfeld v. C.&N.W. Transportation Co., 252 N.W.2d 691, 699 (Iowa 1977).

9. Balancing relevancy against competing considerations of

prejudice, time, confusion, duplication. State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978); Carson v. Mulnix, 263 N.W.2d 701, 706 (Iowa 1978); State v. Harmon, 238 N.W.2d 139, 144-45 (Iowa 1976); FED. R. EVID. 403.

10. Determining competency of witnesses. State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978).

11. Leading questions. Giltner v. Stark, 219 N.W.2d 700, 713 (Iowa 1974).

12. Sufficiency of hypothetical question. Speed v. State, 240 N.W.2d 901, 910-11 (Iowa 1976).

13. Remoteness. State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974); Harrison v. Ulicki, 193 N.W.2d 533, 536 (Iowa 1972).

14. Imposition of sanctions to enforce discovery rules. White v. Citizens National Bank of Boone, 262 N.W.2d 812, 816 (Iowa 1978); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 13-14 (Iowa 1977).

15. Initiative taken by trial judge to exclude improper evidence in the absence of an objection. State v. Thornburgh, 220 N.W.2d 579, 584 (Iowa 1974).

16. Impartial questions by the trial judge. United States v. Wright, 573 F.2d 681, 684 (1st Cir. 1978).

17. Receipt of opinion testimony. Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 231 (Iowa 1974); McCormick, *Opinion Evidence in Iowa*, 19 DRAKE LAW REVIEW 245, 270-71 (1970). Considerable discretion in admitting expert opinion testimony. Duke v. Clark, 267 N.W.2d 63, 66 (Iowa 1978); State v. Paulsen, 265 N.W.2d 581, 589 (Iowa 1978).

18. Admit testimony subject to foundational connection by subsequent proof. United States v. Reed, 446 F.2d 1226, 1231 (8th Cir. 1971).

19. Entertaining an objection to evidence when similar evidence has already been received without objection. State v. Pardock, 215 N.W.2d 344, 349-50 (Iowa 1974).

20. Allowing adversary to introduce inadmissible evidence that is fairly responsive to inadmissible evidence introduced by the other party and received with or without objection. State v. Pepples, 250 N.W.2d 390, 394 (Iowa 1977).

21. Entertaining belated motion to strike. State v. Whitfield, 212 N.W.2d 402, 410 (Iowa 1973); Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609, 624-25 (1936-37).

22. Refusal to entertain standing objections. State v. Jensen, 216 N.W.2d 369, 375 (Iowa 1974).

23. Admission of spontaneous utterance. State v. Haines, 259 N.W.2d 806, 810 (Iowa 1977).

24. Admission of photographs. State v. Fuhrmann, 257 N.W.2d 619, 624-25 (Iowa 1977).

25. Admission of demonstrative evidence. State v. Fuhrmann, 257 N.W.2d 619, 623 (Iowa 1977).

26. Admission of experimental evidence. Palleson v. Jewell Co-operative Elevator, 219 N.W.2d 8, 15-16 (Iowa 1974); State v. Lunsford, 204 N.W.2d 613, 615 (Iowa 1973).

27. Tests. State v. Wycoff, 255 N.W.2d 116, 118-19 (Iowa 1977). Similar acts and events. Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914, 921 (Iowa 1978).

28. Adequacy of chain-of-custody evidence. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978).

29. Scope of cross examination. Avery v. Harms Implement Co., 270 N.W.2d 646, 649-50 (Iowa 1978); State v. Jackson, 259 N.W.2d 796, 800 (Iowa 1977); State v. Droste, 232 N.W.2d 483, 489-90 (Iowa 1975). Permissible limitations (needless harrassment, annoyance, embarrassment; irrelevant and immaterial matters; protection from threats). State v. Davis, 269 N.W.2d 434, 438 (Iowa 1978); State v. Sheffey, 250 N.W.2d 51, 55 (Iowa 1977).

30. Scope of redirect examination. State v. Osborn, 200 N.W.2d 798, 808 (Iowa 1972).

31. Grant or denial of recross examination. United States v. Hyde, 574 F.2d 856, 872 (5th Cir. 1978).

32. Cumulative evidence. State v. Maxwell, 222 N.W.2d 432, 435 (Iowa 1974).

33. Impeachment by felony conviction. State v. Jones, 271 N.W.2d 761, 766 (Iowa 1978); State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974).

34. Permit witness to correct testimony previously given. State v. Thomas, 162 N.W.2d 724, 727 (Iowa 1968).

35. Recalling a witness. State v. Droste, 232 N.W.2d 483, 488 (Iowa 1975).

36. Use of memoranda to refresh recollection of witness. Carson v. Mulnix, 263 N.W.2d 701, 708-09 (Iowa 1978).

37. The sleeping juror. United States v. Moore, 580 F.2d 360, 364-65 (9th Cir. 1978).

38. Reception of rebuttal testimony. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978).

39. Admit in rebuttal evidence which should have been offered in chief that is not strictly rebuttal. State v. Willey, 171 N.W.2d 301, 302 (Iowa 1969).

40. Reception of surrebuttal evidence. State v. Henderson, 268 N.W.2d 173, 179-80 (Iowa 1978).

41. Reopen. State v. Conner, 241 N.W.2d 447, 461 (Iowa 1976); Anderson v. City of Council Buffs, 195 N.W.2d 373, 378 (Iowa 1972).

42. Use of visual aids not in evidence for illustrative purposes with witnesses and jury. State v. Paulsen, 265 N.W.2d 581, 589 (Iowa 1978); Sauer v. Scott, 238 N.W.2d 339, 344 (Iowa 1976); State v. Blyth, 226 N.W.2d 250, 272 (Iowa 1975).

43. Scope and propriety of final argument. Draper v. Airco, Inc., 580 F.2d 91, 94-97 (3rd Cir. 1978); State v. Reynolds, 250 N.W.2d 434, 438 (Iowa 1977); Rasmussen v. Thilges, 174 N.W.2d 384, 391 (Iowa 1970).

44. Grant or denial of motion for mistrial. State v. Blackwell, 238 N.W.2d 131, 137-38 (Iowa 1976); Adams v. Deur, 173 N.W.2d 100, 110-11 (Iowa 1969).

45. Exhibits to be taken by the jury. State v. Blyth, 226 N.W.2d 250, 272 (Iowa 1975).

46. Reading testimony to the jury. United States v. Peltier, 585 F.2d 314, 334 (8th Cir. 1978); Moose v. Rich, 253 N.W.2d 565, 570 (Iowa 1977).

47. Length of jury deliberations. Rasmussen v. Thilges, 174 N.W.2d 384, 388 (Iowa 1970).

It should be apparent from these examples that judicial discretion has a measurable impact on the trial result. In sum, every time counsel are confronted with a trial situation which lacks definitive rule, or offers alternative solutions to the judge, or requires a form of improvision based upon the fluidity of trial, judicial discretion comes into play. It is a doctrine worthy of study by the trial lawyer.

## V. Trial Technique Review: Objections, Motions, Rulings

A. For recommended reading, see the following articles:

1. The Honorable M. L. Mason, *Objections to the Admissibility*

*of Evidence*, Iowa Academy of Trial Lawyers Seminar, Handbook pages 31-47 (May 1975).

2. Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL LAW QUARTERLY 543 (1958).

3. Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609 (1936-37).

4. The Honorable Arthur A. McGivern, *Objections—Stipulations—Making the Record*, Trial Lawyers of Iowa Seminar, Handbook pages 154-61 (November 1978).

B. The Lawyer has the responsibility to object.

1. The function of an objection. State v. Buckner, 214 N.W.2d 164, 167-68 (Iowa 1974); State v. Miller, 204 N.W.2d 834, 841 (Iowa 1973); Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609, 610 (1936-37).

a. From page 610 of 22 IOWA LAW REVIEW:

> "The function of the objection . . . 'is first to signify that there is an issue of law, and, secondly, to give notice of the terms of the issue. . . .' "

b. From pages 167-168 of State v. Buckner:

> "An objection is not simply a device to preserve error for appeal. It is, in the first instance, a means of invoking a rule of evidence by which admission of proof at trial is regulated. When a general objection is made and its basis is not obvious, neither interrogating counsel nor the court should have to review the entire law of evidence in an effort to determine its specific ground. The burden of establishing a reason for exclusion of evidence is on the objector. His objection must be sufficient to alert the judge and opposing counsel to the question raised so that if it is sustained opposing counsel can attempt to correct the defect."

2. The burden is on the objector to make the grounds of objection known. State v. Pardock, 215 N.W.2d 344, 348 (Iowa 1974); State v. Clay, 213 N.W.2d 473, 476-77 (Iowa 1973); Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL LAW QUARTERLY 543, 551 (1958).

3. Standing objections are not recommended, and use may prove to be hazardous at the appellate level. Prestype, Inc. v. Carr, 248 N.W.2d 111, 117 (Iowa 1976); State v. Jeffs, 246 N.W.2d 913, 916 (Iowa 1976).

4. Failure to make objection at the earliest opportunity—waiver of right to assert the objection or complain of any improprieties in the testimony. State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978); State v. King, 225 N.W.2d 337, 341 (Iowa 1975); State v. Boose, 202 N.W.2d 368, 369 (Iowa 1972).

5. The need to continue a proper objection to similar evidence:

   a. If sustained—yes. Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609, 614-16 (1936-37).

   b. If overruled—no, but competency of witnesses is an exception. State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976); Solbrack v. Fosselman, 204 N.W.2d 891, 894 (Iowa 1973); Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609, 612 (1936-37).

   c. When the question is repeated for the witness after an objection is overruled—it is usually unnecessary to renew the objection before answer is given to the repeated question, the objection having a carry-over effect in this situation. Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 729 (Iowa 1978).

6. The offering party has the burden of establishing admissibility after an objection is made. State v. Arnold, 225 N.W.2d 120, 122 (Iowa 1975); State v. Miller, 204 N.W.2d 834, 839-40 (Iowa 1973); Lemke v. Mueller, 166 N.W.2d 860, 870-71 (Iowa 1969).

   a. The offering party has the same burden at a hearing on preliminary factual questions upon which admissibility depends. State v. Arnold, 225 N.W.2d 120, 121 (Iowa 1975).

7. The function of an offer of proof. Parrish v. Denato, 262 N.W.2d 281, 286 (Iowa 1978); State v. Ritchison, 223 N.W.2d 207, 212-13 (Iowa 1974).

   a. The offer of proof is explained at pages 212-213 of State v. Ritchison:

      > "The purpose of an offer of proof is to give 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."

b. Ordinarily, failure to make an offer when an objection is sustained leaves nothing for review. Cole v. Laucamp, 213 N.W.2d 532, 534 (Iowa 1973); Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609, 620 (1936-37). An offer is not required where it is apparent from the record what is sought to be proven. Trushcheff v. Abell-Howe Co., 239 N.W.2d 116, 122 (Iowa 1976).

c. The peril of an offer in bulk—if part is inadmissible, all may be excluded. Bill v. Farm Bureau Life Insurance Co., 254 Iowa 1215, 1223, 119 N.W.2d 768, 773 (1963).

d. When the offer is partly admissible and inadmissible, and the trial court rejects the entire offer, the offering party must select the admissible part. Englund v. Younker Bros., Inc., 259 Iowa 48, 57-58, 142 N.W.2d 530, 535 (1966); Busch v. Busch Construction, Inc., 262 N.W.2d 377, 389 (Minn. 1977).

e. An offer in question and answer form is recommended. It significantly reduces the possibility that counsel will fail inadvertently to include in the offer a crucial fact upon which the conclusion or inference he or she seeks to establish necessarily depends. It also provides opportunity for objection and ruling on each question and answer of the offer. Bill v. Farm Bureau Life Insurance Co., 254 Iowa 1215, 1221-24, 119 N.W.2d 768, 773 (1963); Milenkovic v. State, 272 N.W.2d 320, 326 (Wis. 1978).

f. Offering party uses the offer of proof to satisfy burden of alerting trial court to the theory of admissibility after an objection is sustained. State v. Gartin, 271 N.W.2d 902, 909-10 (Iowa 1978).

g. The offer must be timely, i.e., immediately after objection to triggering question, or counsel must obtain a reservation of the right subsequently to make the offer. Heth v. Iowa City, 206 N.W.2d 299, 304 (Iowa 1973).

h. An offer of proof is unnecessary to preserve the issue of improper limitation on cross examination. State v. Cornell, 266 N.W.2d 15, 21 (Iowa 1978); State v. Droste, 232 N.W.2d 483, 489-90 (Iowa 1975).

*Cornell* and *Droste* merely hold counsel is not required to demonstrate in advance the answers sought will be beneficial to the client's case. If the cross examiner's questions call for irrelevant information, there is no error in curtailing such cross examination unless counsel

demonstrates the questions are foundation for inquiry in a relevant area. State v. Davis, 269 N.W.2d 434, 439 (Iowa 1978).

i. The offer should be made outside presence of jury. State v. Walton, 247 N.W.2d 736, 739-40 (Iowa 1976); State v. Arnold, 225 N.W.2d 120, 121 (Iowa 1975).

8. Premature and inappropriate objections. State v. Pitlik, 247 N.W.2d 741, 743 (Iowa 1976); Carradus v. Lange, 203 N.W.2d 565, 567-68 (Iowa 1973); Harrison v. Ulicki, 193 N.W.2d 533, 537 (Iowa 1972). This problem usually arises when the objection is made prematurely to a preliminary question calling for nothing more than a yes/no response on whether the witness can give the sought testimony, and the objection is not renewed when the witness is asked to relate the fact or opinion. There is a closely related situation. Frequently, after the premature objection has been overruled, the witness anticipates the examiner and relates the sought fact or opinion unresponsively to the preliminary question. In view of the fact the inappropriate objection has accomplished nothing, this occurrence calls for a motion to strike. Prematurity can also arise when anticipatory objections are made (and overruled) while foundation is being laid for an evidentiary exhibit, and the objections are not renewed at the proper time, to-wit, when the exhibit is offered.

9. Some objections should be made in chambers to avoid prejudice. State v. Miller, 204 N.W.2d 834, 841 (Iowa 1973).

10. No waiver of objection made on direct examination where objecting party cross examines witness or introduces controverting/impeaching evidence. Goodale v. Murray, 227 Iowa 843, 861, 289 N.W. 450, 459 (1940).

C. The motion to strike or withdraw evidence.

1. It is available to the opponent of the examiner only if there is some specific objection to the testimony that has been given. Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL LAW QUARTERLY, 543, 556-57 (1958).

2. It must be made at the earliest opportunity after the ground of objection becomes apparent. Kleve v. G.M.C., 210 N.W.2d 568, 574 (Iowa 1973). It generally applies only to the latest answer. State v. Smith, 248 Iowa 603, 610, 81 N.W.2d 657, 661 (1957).

3. It must indicate the specific exclusionary grounds, and those not urged are waived. State v. Clay, 213 N.W.2d 473, 476-77

(Iowa 1973); Harrison v. Ulicki, 193 N.W.2d 533, 537 (Iowa 1972).

4. A motion to strike evidence which should have been objected to at the time of offer is merely another term for objection and it is governed by the rules as to the time of an objection. State v. Bruno, 204 N.W.2d 879, 887 (Iowa 1973).

   a. Untimely: Inadmissibility apparent at time evidence offered and no objection made. *Id.* Nor is the situation changed when the motion was preceded by an inadequate objection at the time of proffer. State v. Raue, 214 N.W.2d 162, 163-64 (Iowa 1974).

   b. Untimely: Specific ground urged in motion was not urged as a preliminary objection. *Id.* Ferris v. Riley, 251 Iowa 400, 407-08, 101 N.W.2d 176, 180 (1960).

   c. Timely: Ground for objection becomes apparent from answer rather than question. Anderson v. City of Fort Dodge, 213 N.W.2d 527, 529 (Iowa 1973); State v. Knight, 182 Iowa 593, 597-98, 165 N.W. 1039, 1040 (1918).

   d. Timely: Ground for objection becomes apparent during cross examination of witness. Interstate Finance Corp. v. Iowa City, 260 Iowa 270, 274, 149 N.W.2d 308, 311 (1967).

   e. Timely: Adversary fails to connect up evidence. Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL LAW QUARTERLY 543, 558-59 (1958).

5. When objection is made after the answer is given, a motion to strike, coupled with an application to have the objection precede the answer or an excuse for tardiness, must be made. State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978); State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977); Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609, 622-26 (1936-37).

   a. Typical excuses for failure timely to object: Unresponsive answer; lack of time.

   b. The trial judge has discretion in ruling on an excuse based on lack of time. If motion premised upon such an excuse is overruled, the movant should request the reason to pinpoint for the record whether the ruling is based on time or on the urged exclusionary grounds. Ladd, *Objections, Motions and Foundation Testimony*, 43 CORNELL LAW QUARTERLY 543, 557-58 (1958).

6. Objection made and sustained after answer: The ruling does not remove the answer from the record. Davis v. Hansen, 224 N.W.2d 4, 6 (Iowa 1974); Anderson v. City of Fort Dodge, 213 N.W.2d 527, 529 (Iowa 1973); Schneider v. Swaney Motor Car Co., 257 Iowa 1177, 1187, 136 N.W.2d 338, 344 (1965).

7. Situations where a motion to strike should be overruled:

   a. Improper question with admissible answer. Ladd, *Common Mistakes in the Techniques of Trial*, 22 IOWA LAW REVIEW 609, 623 (1936-37).

   b. Proper question with unresponsive answer, but its content is properly admissible. *Id.*

   c. A blanket motion where part of the testimony is properly admissible. Kleve v. G.M.C., 210 N.W.2d 568, 574 (Iowa 1973); State v. Helgerson, 247 Iowa 651, 657, 75 N.W.2d 227, 231 (1956).

   d. The answer is responsive to the question. Reeg v. Shaughnessy, 570 F.2d 309, 316 (10th Cir. 1978).

8. Unresponsiveness of answer:

   a. Only the examiner can use unresponsiveness as the ground of a motion to strike. Giltner v. Stark, 219 N.W.2d 700, 710 (Iowa 1974); State v. Nathoo, 152 Iowa 665, 673, 133 N.W. 129, 132 (1911).

   b. However, the nonexaminer can use unresponsiveness as an excuse for tardiness in objecting incidental to making a motion to strike an inadmissible answer with an adequate objection. State v. Reese, 259 N.W.2d 771, 775-76 (Iowa 1977).

D. Quality of objections.

1. Some objections are of no practical value.

   a. Opinion and conclusion of the witness. State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975); Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 583 (Iowa 1973); Hedges v. Conder, 166 N.W.2d 844, 856 (Iowa 1969).

   b. No proper foundation. State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974).

   c. Invades province of the jury. State v. Sheridan, 247 N.W.2d 232, 235-36 (Iowa 1976), *cert. denied*, 431 U.S. 929 (1977).

   d. Rather than b. or c., where expert testimony is involved, the proper objection is usually that the matter is not a

proper subject for an expert opinion, or the objection challenges the qualifications of the witness. State v. Johnson, 224 N.W.2d 617, 622 (Iowa 1974).

e. The mere fact that evidence is damaging and prejudicial is not in and of itself a cause for objection. State v. Jackson, 259 N.W.2d 796, 799 (Iowa 1977).

f. A question calling for an opinion or conclusion on a question of law is objectionable, and an objection to this effect is sufficient. Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830, 840 (Iowa 1978); Schlichte v. Franklin Troy Trucks, 265 N.W.2d 725, 730 (Iowa 1978); State v. Droste, 232 N.W.2d 483, 488 (Iowa 1975).

2. The general objection "incompetent, irrelevant and immaterial" has limited value. State v. Clay, 213 N.W.2d 473, 477 (Iowa 1973).

a. "Incompetent" does not state an objection. Ferris v. Riley, 251 Iowa 400, 410, 101 N.W.2d 176, 182 (1960).

b. "Irrelevant and immaterial" are sufficiently specific within the legal meaning of these words. Zacek v. Brewer, 241 N.W.2d 41, 53 (Iowa 1976); Trushcheff v. Abell-Howe Co., 239 N.W.2d 116, 125 (Iowa 1976); Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 862 (Iowa 1974) (materiality refers to the pertinency of the offered evidence to the issue in dispute. Relevancy refers to its probative value in relation to the purpose for which it is offered).

c. Where materiality and relevancy are not apparent, the offering party is obliged to state the purpose of the proof. Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 231 (Iowa 1974).

3. The effect of a ruling on the objection:

a. Where the general objection is overruled. State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974); C. McCormick, Law of Evidence, § 52 at 115-16 (2d ed. 1972).

1. From page 167 of State v. Buckner:

> "[I]t is not reversible error for a trial court to *overrule* a general objection. . . . The reason is that unless the grounds for an objection are obvious one seeking to exclude evidence 'has the duty to indicate the specific grounds to the court. . . .'"

b. Where the general objection is sustained. State v. Buckner, 214 N.W.2d 164, 167 (Iowa 1974).

1. From page 167 of State v. Buckner:

> "[w]hen the trial judge *sustains* a general objection so that the record does not disclose a specific ground for ruling, the ruling will be upheld on review if any ground in fact existed for exclusion of the evidence. [Citation] This rule originated in reasoning that, 'It will be assumed, *in the absence of any request by the opposing party or the court to make the objection definite*, that it was understood, and that the ruling was placed upon the right grounds.' "

2. In this instance, however, the questioning attorney is entitled to the precise ground of ruling, and the trial court has a duty to answer such an inquiry. *Id.* at 168.

c. Where the specific objection is overruled. State v. Pepples, 250 N.W.2d 390, 393 (Iowa 1977); State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976).

1. From page 393 of State v. Pepples:

> "When . . . the court overrules a specific objection, the objecting party is limited on appeal to reliance on the same ground. [Citation] Moreover, we will uphold the challenged ruling if the specific objection could properly have been overruled on any theory."

d. Where the specific objection is sustained. Porter v. Iowa Power and Light Co., 217 N.W.2d 221, 231 (Iowa 1974).

1. From page 231 of Porter v. Iowa Power and Light Co.:

> "Another applicable principle is that when an objection is *sustained*, the trial court ruling will be upheld on appeal if the evidence could be held inadmissible on any theory, whether urged in the objection or not. This contrasts with principles that a general objection, if *overruled*, ordinarily cannot avail the objector on appeal and that a specific objection, if *overruled*, cannot avail the objector except as to the ground specified."

4. Error may not ordinarily be predicated upon overruling an inadequate objection. State v. Nimmo, 247 N.W.2d 228, 231 (Iowa 1976). Nor can the objecting party ordinarily amplify an objection on appeal. State v. Fowler, 248 N.W.2d 511, 517 (Iowa 1976).

5. A timely objection is necessary to avoid trial of unpleaded issues by consent. Goss v. Johnson, 243 N.W.2d 590, 594 (Iowa 1976).

6. The trial judge has some latitude to exclude evidence that is objectionable in the absence of an objection, or if there is a proper ground which is not stated. State v. Thornburgh, 220 N.W.2d 579, 584 (Iowa 1974); Bash v. Hade, 245 Iowa 332, 341-42, 62 N.W.2d 180, 186 (1954).

E. Absent timely objection, motion to strike, or motion for mistrial, directed to alleged improper remarks or conduct of counsel or anyone else, during the trial, in order to give the judge an opportunity to take proper corrective action, it is ordinarily too late initially to complain in a motion for new trial or on appeal. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); Pose v. Roosevelt Hotel Co., 208 N.W.2d 19, 31 (Iowa 1973); Andrews v. Struble, 178 N.W.2d 391, 401-02 (Iowa 1970) (this case also discusses the timeliness of a motion for mistrial based on improper jury argument).

F. The burden to obtain a ruling is upon the lawyer, including those situations where rulings are reserved. State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978); Harper v. Cedar Rapids T.V. Co., 244 N.W.2d 782, 786 (Iowa 1976); Arbie Mineral Feed v. Nissen, 179 N.W.2d 593, 595 (Iowa 1970). Failure to do so leaves nothing for review.

G. Questionable rulings should be analyzed by the lawyers during trial for the purpose of seeking a remedial ruling and eliminating error.

1. An error in admitting evidence can ordinarily be cured by withdrawing it from the jury and giving curative instructions. State v. Fuhrmann, 257 N.W.2d 619, 623 (Iowa 1977); Interstate Finance Corp. v. Iowa City, 260 Iowa 270, 277, 149 N.W.2d 308, 313 (1967); State v. Olson, 249 Iowa 536, 554, 86 N.W.2d 214, 225 (1958); United States v. Works, 256 F.2d 940, 946 (5th Cir. 1976). Likewise, timely admonishment and/or cautionary instruction usually repairs the error of an improper remark. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); Team Central, Inc. v. Teamco, Inc., 271 N.W.2d 914, 926 (Iowa 1978); Turner v. Jones, 215 N.W.2d 289, 291 (Iowa 1974); United States v. Newman, 490 F.2d 139, 147 (3d Cir. 1974).

2. If a change of ruling, withdrawal of evidence, admonition and curative instruction will not cure the prejudicial effect of a prior erroneous ruling or remark, there must ordinarily be a timely motion for mistrial to peserve the question for review. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978); State v. Gilmore, 259 N.W.2d 846, 852 (Iowa 1977).

3. The subsequent admission of evidence may negate the error of a earlier ruling excluding the evidence. State v. Billberg, 229 Iowa 1208, 1218, 296 N.W. 396, 401 (1941); Churchill v. Norfolk & W. Ry. Co., 383 N.E.2d 929, 935 (Ill. 1978).

4. If the trial judge specifically disregards erroneously admitted evidence in the findings of fact, the error occasioned by its admission is ordinarily harmless. State v. Monaco, 230 N.W.2d 485, 487 (Iowa 1975).

5. The trial judge should ordinarily reserve rulings on objections in equity cases, with answers received subject to objection to facilitate de novo review. In re Marriage of Ralston, 242 N.W.2d 269, 271 (Iowa 1976).

## VI. Addressing the Complexities of Trial Technique

"The so-called technicalities of the law are not always what they seem. When they establish an orderly process of procedure, they serve a definite purpose and are more than technical; they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done, and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass. We have, and should have, no compunction in following them when they are clear and definite." Cole v. Laucamp, 213 N.W.2d 532, 534 (Iowa 1973).

Trial counsel must make a multitude of quick and important decisions as their case progresses. The lone trial judge is called upon immediately and firmly to rule on questions of magnitude upon which appellate judges may deliberate for days or weeks and then divide. And, notwithstanding diligent preparation, counsel and the judge invariably encounter questions in the rigors of trial that are not anticipated. To the end that substance and merit, rather than etiquette and technique, be the focal point of trial, this outline is submitted.