plus $100 per month for the support of a minor son, was changed in the wife's favor on appeal.[25] The court ordered that she be awarded in addition $60 per month periodic alimony payments, to be increased to $100 when the child support payments cease. The court felt that some provision and protection of plaintiff's future should be provided. The lump sum granted her was not sufficient to retire the mortgage on the family home, which she was also awarded, and the investment return on the money was insufficient to meet the monthly mortgage payments.

The husband in that case was left with about $8,700 remaining in a bank account, a lot he had purchased with another woman, three cars, one of which was given to that other woman, and a diamond ring, also given to the other woman. Almost all of the property awarded him was encumbered. The conduct of the guilty party may have been an important criterion in establishing the rights and obligations here, since the court noted that the $18,700 bank account, divided between the parties, was all that remained of the husband's inheritance, which he spent maintaining a high standard of living for his family, and financing "extensive and expensive extramarital activities."

CIVIL PROCEDURE

M. Gene Blackburn†

There is a saying in the sports world that the best defense against a trick play is for every man to play his own position. Interpolated to the language of the trial practitioner the phrase could well be "the best defense in litigation is for every lawyer to protect his record." The trial record in its broadest context contemplates at least three dimensions; a story understandably told in a systematic and chronological order,[1] sufficiently audible and properly recorded and certified by the reporter,[2] which preserves the procedural requisites to show prejudicial error in the event of an appeal.[3] Failure of some practitioners at the Iowa trial bar to heed some rather basic rules of trial practice precipitated comment by the Iowa supreme court on at least 38 occasions during the period covered by this collection of cases.[4]

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[25] Danley v. Danley, 163 N.W.2d 71 (Iowa 1968).

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[1] There are many considerations for this aspect of litigation, such as opening and closing with a strong witness; proper chronological order of events; presenting evidence in language that all jurors can understand. However, these discussions are not within the scope of this collection of cases.

[2] *See Making the Record*, National Shorthand Reporters Association, Los Angeles, California.

[3] It should be common knowledge among lawyers that only prejudicial error will result in reversal.

[4] This survey is generally limited to the cases on civil practice. However, record problems were noted also in the following criminal cases: State v. Little, 164 N.W.2d 81 (Iowa 1969) (on motion for new trial claiming that the jury was influenced by an un-

The matter is really a rephrasal of an old problem which has not been cured by the passage of time. In 1937, Dean Mason Ladd wrote: "Both the experienced lawyer and the novice are likely to be embarrassed when they examine the reporter's transcript of a trial, to find real issues of evidence which have not been brought out in such a way as to be the subject of a proper assignment of errors."[5]

The gravamen of the problem is illustrated by the contemplation of the possibility that a case which might have been won on the facts was possibly lost on the record.[6] A classification of the collected cases would indicate that there are some where no attempt is made to preserve the record during trial;[7] others where an inadequate attempt is made to preserve the record;[8] a third classification where a good faith attempt was made by experienced trial counsel to preserve a proper record, but where the appellate court required more for the preservation of prejudicial error,[9] for procedural[10] or substantive reasons.[11] This collection of cases will serve to point out some current and critical areas.

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authorized view, held, the record (affidavits) showed that the jury discussed the matter, but no record was made of the substance of the conversation); State v. Kaster, 160 N.W.2d 856 (Iowa 1968) (failure to object to instruction); State v. Miskell, 161 N.W.2d 732 (Iowa 1968) (failure to object); State v. Thomas, 162 N.W.2d 724 (Iowa 1968) (defendant requested instruction on impeachment testimony. Held, defendant did not lay foundation for this method of impeachment by giving the witness the opportunity to admit or deny prior inconsistent statement); State v. Sage, 162 N.W.2d 502 (Iowa 1968) (failure to object to improper closing argument or to move for mistrial); Kenney v. Haugh, 163 N.W.2d 428 (Iowa 1968) (habeas corpus, failure of court appointed attorney to file timely motion to suppress evidence claimed unlawfully seized); State v. Johnson, 162 N.W.2d 453 (Iowa 1968) (failure to object to state's failure to lay proper foundation); State v. Medina, 165 N.W.2d 777 (Iowa 1969) (failure to renew motion to direct at close of all the evidence); State v. Carey, 165 N.W.2d 27 (Iowa 1969) (dissent of Mason, J., failure to preserve asserted error as to instructions); State v. Moreloch, 164 N.W.2d 819 (Iowa 1969) (record to properly impeach the verdict of the jury); State v. Weitzel, 163 N.W.2d 903 (upon application for permission to withdraw guilty plea, no record made as to the fact that the defendant was not guilty); State v. Heisdorfer, 164 N.W.2d 173 (Iowa 1969) (no objection made on constitutional grounds as to statements made after defendant had asked for and not been granted an opportunity to see an attorney).

[5] Ladd, *Common Mistakes in the Technique of Trial*, 22 IOWA L. REV. 609 (1937).

[6] *See, e.g.*, Insurance Co. of North America v. Sperry & Hutchinson Co., 168 N.W.2d 753 (Iowa 1969).

[7] *See, e.g.*, Volkswagen Iowa City, Inc., v. Scott's Inc., 165 N.W.2d 789 (Iowa 1969). *See also* Boyer v. Broadwater, 168 N.W.2d 799 (Iowa 1969) (no objection made to a belated affidavit of counsel or to counsel's oral testimony of proof of service when long arm statute required that the affidavit of filing be made by "plaintiff or his attorney"); Holland v. Holland, 161 N.W.2d 744 (Iowa 1968) (held there was consent to try an issue by failing to object to evidence offered to a matter not pleaded).

[8] *See* Hawkeye Specialty Co. v. Bendix Corp., 160 N.W.2d 341 (Iowa 1968) (must point out with specificity where the offered evidence is inadmissible); Schall v. Lorenzen, 166 N.W.2d 795 (Iowa 1969) (must alert trial court to the *real* theory of plaintiff's objection).

[9] Hedges v. Conder, 166 N.W.2d 844 (Iowa 1969); Bauer v. Stern Finance Co., 169 N.W.2d 850 (Iowa 1969).

[10] *See* Schroedl v. McTague, 169 N.W.2d 860 (Iowa 1969) (failure to properly certify a proposed bill of exceptions).

[11] *See, e.g.*, Spies v. Prybil, 160 N.W.2d 505 (Iowa 1968) (action in partition. Defendant contended that the property in question, which was bequeathed to plaintiff and defendant, should be partitioned in kind, rather than by sale and distribution. The procedural problem involved the failure of the defendant to make any record with regard to whether or not the partition in kind would be practicable and equitable. The court

THE NATURE OF APPELLATE REVIEW

O'Keefe v. O'Keefe,[12] a divorce case, and *Sitzler v. Peck*,[13] a mechanic's lien foreclosure, are examples of the dangers encountered when defendant moves for dismissal at the close of the plaintiff's evidence in a case where the appellate review is de novo. The crux of the question here is not the inadequacy of the trial record in a procedural sense but is based upon the nature of appellate review. The supreme court is a court for the correction of errors at law[14] and its scope of review in equity cases is de novo.[15] By moving for dismissal the defendant gambles against the improbability that the plaintiff has not established facts entitling him to equitable relief. Some rules are so axiomatic that they are now embodied in the Rules of Civil Procedure. For example, the appellate court, in considering the propriety of a motion for a directed verdict, views the evidence in the light most favorable to the party against whom the motion was made.[16] In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court; but is not bound by them.[17] The effect of de novo review in such a case is illustrated by the following language in which the court reiterated the caveat:

> This result affords an illustration of the hazard incurred in moving for judgment at the close of a plaintiff's case in an action triable de novo on appeal. The appellees, by so doing, rested their rights upon the evidence of their adversary, and lost the only opportunity available to them to prove affirmatively any defense they might have had; and we are required to determine the merits of the case de novo upon the record so made.[18]

The real danger, even for the most tactical advocate, lies in the case where the scope of review is uncertain. *In re Guardianship of Gau*[19] is illustrative, but does not fully reach the point. Here the action was ostensibly upon an application for the removal of a guardian. Had the matter been tried as in probate, the court would likely have been bound by prior decisions which would have given the trial court's findings the effect of a special verdict.[20] However, the court elected to determine the matter as one of custody because that was, in effect, the ultimate result. The appeal was then de novo and the court exercised the opportunity to view the evidence in the light of the best interests of the minor. The problem, however, was that neither of the parties considered nor

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commented that the failure might have been the result of the defendant's failure to properly recognize that the burden of proof was on him as provided by the IOWA R. CIV. P. since their adoption in 1943.); Lemke v. Mueller, 166 N.W.2d 860 (Iowa 1969).

12 162 N.W.2d 477 (Iowa 1968).

13 162 N.W.2d 449 (Iowa 1968).

14 IOWA CONST. art. V, § 4; IOWA R. CIV. P. 334.

15 IOWA R. CIV. P. 334.

16 *Id.* at 344(f)(2).

17 *Id.* at 344(f)(7).

18 Sitzler v. Peck, 162 N.W.2d 449, 452 (Iowa 1968) *citing* Brewster v. Brewster, 194 Iowa 803, 188 N.W. 672 (1922).

19 161 N.W.2d 788 (Iowa 1968).

20 *See In re* Guardianship of Husmann, 245 Iowa 830, 64 N.W.2d 252 (1954); IOWA R. CIV. P. 334.

aided the court in determining the scope of review. Although the case is not descriptive of the problem, it points out the possible danger of waiting until the appellate stage is reached to determine the manner and scope of review. The trial courts, in order to protect themselves from reversal, may be well advised to summarily overrule all motions to dismiss in a case where the appeal is de novo.

Phrasing Objections to Evidence—How Specific Must a Specific Objection Be?

One of the continuing problems of the trial attorney in the courtroom is how to gain ample time to think in order to phrase an objection sufficiently specific to cover, for the record, all the possible matters raised by an objectionable question. This problem is aggravated by the fact that he may now be forced to consider his opponent's improper phraseology or inadequate question.

Counsel's dilemma is illustrated by the facts in *Hedges v. Conder*, where the plaintiff had called an expert witness for the purpose of establishing speed by reference to certain physical facts. After preliminary questions, plaintiff's counsel asked for an opinion answer as follows:

> "Based upon these facts and these facts alone, do you have an opinion as to the speed of the automobile, and answer that yes or no." After answering he had such opinion, [the expert] was asked to state it, at which point defendant objected "for the reason that it [the question] calls for an opinion and conclusion of the witness on a matter which is not the proper subject of expert testimony, and further because no proper foundation has been laid in this record for the expression of an opinion by this witness on this subject matter, he not having shown himself competent to express this opinion or to base any such opinion on any reasonable scientific basis."[21]

Upon appeal the defendant contended that there were certain facts omitted from the hypothetical question which precluded the answer upon objection. The court held that the objection was too general for the reason that the defendant, in phrasing the objection, did not point out factual omissions which gave rise to the objection and that such factual matters were essential to apprise the court of the basis for the objection and to give the other party the opportunity to correct it.

By comparison this would appear to be an extension of the requirement noted in *State v. Entsminger*[22] which the court cited in favor of its holding, and in *Bengford v. Carlem Corporation.*[23] In *Entsminger*, the objection to the question was merely that there was no proper foundation laid coupled with no showing that the evidence was legally obtained. In *Bengford*, the extent of the objection was that it called for an opinion and conclusion of the witness and

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[21] 166 N.W.2d 844, 855 (Iowa 1969).
[22] 160 N.W.2d 480 (Iowa 1968).
[23] 156 N.W.2d 855 (Iowa 1968); *see also* Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (1969).

invaded the province of the jury.

No one can doubt that *Hedges* is in keeping with the philosophy of the modern trial and that specific objections should apprise the court and the parties of the basis of the objection. The difficulty with the requirement noted in *Hedges*, from the trial practitioner's viewpoint, is that counsel, in the heat of the controversy, and without advance knowledge of the nature or extent of the opinion testimony, undoubtedly thought he was covering the record. In addition, one defense counsel has confided to the writer that, even though counsel attempts to and honestly believes he has covered the record, supreme court comment is personally embarrassing because insurance company claims managers read the opinions also. At any rate, if *Hedges* is to be considered the touchstone for future objections to opinion evidence, and if those objections are to have any meaning, objecting counsel must be prepared to anticipate and analyze the defects in the foundation testimony and to phrase those factual omissions in his objection to the hypothetical question.

Timeliness of Objections and Motions to Strike Testimony After Objection Sustained

The expert opinion testimony of a psychiatrist provides the scene for the example that an objection to testimony must be made in a timely fashion to preserve a proper record for appeal. In *State ex rel. Fulton v. Scheetz*,[24] after the foundation facts had been testified to, the psychiatrist was asked if he had an opinion as to whether or not the defendant was a sexual psycopath. At this point an objection was phrased challenging the adequacy of the foundation facts and the qualification of the witness to testify as to the ultimate fact. After the objection was overruled the following proceedings transpired:

> "Q. Doctor, do you recall the question? A. Yes, sir.
>
> . . . .
>
> "Q. And do you have an opinion assuming all of these facts in the hypothetical question as being true, as to whether . . . the defendant, is a sexual psychopath? A. I have an opinion.
>
> "Q. Can you tell us what that opinion is, Doctor? A. Based on the facts as you have presented them it seems they met all of the criteria as established by the Code of Iowa and that he would have to be determined a criminal sexual psychopath."[25]

The defendant predicated error upon the court's ruling on the objection. The Iowa supreme court held that the objection operated in a vacuum as it was made either too soon or too late. If the objection was made to the question of whether or not the doctor had an opinion, the objection did not operate by itself to strike the affirmative answer where the answer was made before counsel had a chance to object. On the other hand, if it was made in response to a question yet to come, i.e., "what is that opinion?" it was made too early as

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[24] 166 N.W.2d 874 (Iowa 1969).
[25] *Id.* at 882.

there was no such question then pending. The importance of the proper objection at the proper time is suggested by the court when it said, "[c]onceding for the purpose of discussion the expert witness, in so answering, volunteered a combined statement of law and fact and went beyond the scope of the question, no motion was made to strike or exclude it."[26]

Of like import, for the purpose of the appellate record, is the failure to move to strike an answer where the answer is given ahead of a valid objection. In *Crane v. Cedar Rapids and Iowa City Railway Co.*,[27] plaintiff's counsel asked:

> "Q. You had not seen that? A. No, sir.
> "Q. Had you heard of them doing that? A. Yes, sir.
> ". . . [Counsel]: Objected to as calling for hearsay and immaterial. The Court: Sustained."

The court held that the plaintiff could not claim prejudicial error because the answer he sought was in before objection was made by the defendant and the defendant did not move to strike it, and therefore plaintiff could not claim prejudice on that error.

Stating the Limited Purpose of an Offer— "Telling It Like It Is"

Trial courts, as well as trial lawyers, are sometimes unnecessarily required to "shoot from the hip" in recognizing and formulating issues and ruling upon objections and offers of proof. In order that the court may be relieved of some of the uncertainties in this respect, it would appear that the proper record may require the statement of the limited purpose of an offer of proof where one interpretation of the offer may be susceptible of obvious irrelevancy and where another interpretation may have proper relation to the issues. The proposition is exemplified in *Lemke v. Mueller*,[28] where the question centered around the state of mind of a driver who approached an intersection of an abandoned primary road and a secondary county road. The principal question turned on the matter of the directional right-of-way as opposed to the favored road. Plaintiff's counsel attempted to show that it was custom and usage in the community to treat the former primary road as a favored through highway. Proof of custom and usage depended upon how the county engineer and board of supervisors treated the road, since the stop signs had been left in place. This interpretation was probably irrelevant. A witness driver was asked what his state of mind was as he approached the intersection. An objection of irrelevant and immaterial was sustained. Plaintiff then made an offer of proof covering the same subject matter, but did not show in the record that the offer was for the alternative and relevant purpose of showing the driver's state of mind as the same related to his obligation to exercise due care as to lookout and control. A holding that the trial court committed no reversible error in excluding the offer

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[26] *Id.*
[27] 160 N.W.2d 838, 845 (Iowa 1968).
[28] 166 N.W.2d 860 (Iowa 1969).

of proof is tantamount to saying that the record was insufficient on appeal.

Three reasons are given by the Iowa supreme court for requiring the completed record: to apprise the trial court of the limited purpose of the offer in plain language, to permit it to properly rule; to advise the opponent so that proper objection can be made; and to permit the opponent to request an instruction on the limited nature of the evidence offered.

Objecting and Excepting to Instructions

Rule 196 of the Iowa Rules of Civil Procedure provides generally that the court shall furnish a preliminary draft of the proposed instructions before final summation is commenced. The court is also obligated to furnish a final draft of the instructions to counsel before reading them to the jury. Within this time all objections to the giving of or failing to give a requested instruction must be filed in writing or dictated into the record. In *Reeder v. Iowa State Highway Commission*,[29] the plaintiff requested an instruction in writing as provided by the rule. However, he failed to except or object to the final instructions. Upon appeal it was held that the written request, standing alone, was not sufficient to give the plaintiff standing to assert error on the failure to give the requested instruction.

Defendant's dilemma is noted in a case involving the transition period relating to the change in the Iowa rule of pleading contributory negligence. In *Knudsen v. Merle Hay Plaza, Inc.*,[30] plaintiff pled his negligence action in two divisions, one of which alleged his freedom from contributory negligence while the other did not. Defendant responded by denying plaintiff's allegation in the first division and alleging affirmatively in the second that plaintiff was contributorily negligent. On appeal it was alleged that the trial court erred in failing to instruct the jury on its stated specifications of contributory negligence. The court held that the defendant's record was not available to him; that he could not, on the one hand, force the issue of proof of contributory negligence on the plaintiff, then complain because the court failed to instruct on the question of its assumption of the burden. In addition, the court commented that the record did not indicate that the defendant had requested an instruction on the matter, nor did it make timely objection to the instruction as given.

Of similar import is a case where the plaintiff's objection to an instruction was based upon the claim that a plaintiff-passenger had no duty to exercise reasonable care in an intersection collision. She did not point out to the court in her exceptions to the instructons that there was no evidence of her failure to exercise care for her own safety. Thus, in *Schall v. Lorenzen*[31] it was held that if plaintiff was urging that issue on appeal (that there was no evidence of her failure to exercise reasonable care and there was a failure of defendant's

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[29] 166 N.W.2d 839 (Iowa 1969).
[30] 160 N.W.2d 279 (Iowa 1968).
[31] 166 N.W.2d 795 (Iowa 1969).

proof on that subject as an affirmative defense) it was plaintiff's obligation to make that issue clear to the trial court.

Sufficiency of Supporting Affidavits

Four civil appeals and one criminal appeal are illustrative of the importance of the matter of attendance to factual and substantive matters in supporting affidavits. In *Insurance Company of North America v. Sperry & Hutchinson Co.*,[32] the plaintiff, after it had paid a claim to its insured under a fire insurance policy, brought an action as subrogee against the defendant. Service of process was made through the resident agent for service. No appearance was made within twenty days and default was taken. Defendant filed a motion to set aside the default, to which was attached the required affidavit. The affidavit did not allege any facts indicating a meritorious defense, that allegation being made by conclusion only. The lower court, upon this showing, set the default judgment aside. Upon appeal, the supreme court reversed, holding that the motion, the affidavit, and the testimony of the affiant did not show sufficient facts which would indicate that the defendant had a meritorious defense. Strangely enough, the lower court in deciding the matter apparently gave consideration to facts alleged in the movant's memorandum brief, but which were not included in the affidavit. The higher court held that those statements were not part of the record and could not be considered as proof of what was said therein.

In *In re Estate of Cory*,[33] the issue involving the record was of a more substantive nature. The ultimate fact for the jury to decide was whether or not the testator had been unduly influenced in the execution of her will. Here, upon submission of the case, one juror took to the deliberation room dictionary definitions of the words "undue" and "undue influence" and discussed them with other jurors. The court held that the bill of exceptions did not show that the dictionary definition of "undue influence" was any different from the juror's commonly accepted knowledge of the term. A dissent by Justice Becker would suggest that in such a case the record need not show prejudice and that the Iowa rule is that the court does not inquire whether the claimed misconduct did, in fact, influence the jury.

Bauer v. Stern Finance Company[34] involved the sufficiency of a counter affidavit which was filed in resistance to a motion for summary judgment under Rule 237 of the Iowa Rules of Civil Procedure. The plaintiff, in his counter affidavit, alleged matters which might be considered mere allegations and not factual statements. Upon hearing, it was the plaintiff's contention that to swear further would be in violation of his fifth amendment right against self-incrimination. Thus, the crux of the case settled upon the requirements of the rule to avoid the entry of summary judgment as opposed to the affiant's rights guar-

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[32] 168 N.W.2d 753 (Iowa 1969).
[33] 169 N.W.2d 837 (Iowa 1969).
[34] 169 N.W.2d 850 (Iowa 1969).

anteed him by the United States Constitution. The majority of the court held the affidavit insufficient, declaring that the only question to be considered was whether or not there was a genuine issue of fact remaining for the trial, and that, if defendant elected to exercise his consitutional rights and remain silent, procedurally there is nothing upon which the court should proceed and the summary judgment provisions of the rules should apply. Justice Rawlings, in his dissent, approached the question of whether or not the requirement of alleging sufficient facts in response to affidavit in support of the motion for summary judgment was penal in nature. Rawlings opined that where the plaintiff is forced to give up a valuable right, in this instance the right to proceed with litigation, in order to protect his rights against self incrimination, the constitutional protection should prevail.

Conclusion

If anything can be drawn from these widely divergent cases, it is the conclusion that too often trial lawyers think of advocacy only in the sense that it is artful. Artful it is, but then only to the extent that it is persuasive. Before persuasion can prevail, persuasive facts must exist and the proper presentation of those facts relate to the finite rules of procedure which put those facts into operation. The court has simply required strict application of those rules of providing proof.

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