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5 Preserving the Record During Trial

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I. INTRODUCTION

A. [5.1] Scope of Chapter

Failing to preserve claimed error in the record for appeal is one of the most frequent mistakes committed by both experienced and inexperienced trial counsel. This chapter discusses the basic steps necessary to protect the record for appeal in order to avoid waiving claims of error. It addresses both (1) making a comprehensible record for purposes of appeal (§§5.3 – 5.20 below), and (2) the proper techniques for preserving issues for appeal (§§5.21 – 5.47 below).

B. [5.2] Preserving Claimed Error — Do Not Rely on the Plain-Error Doctrine

The general rule is that an error at trial must be "preserved," most often by stating an objection, if it is to be properly raised on appeal. If no objection is made, the issue is usually deemed waived. The purpose of this rule is to disclose the nature of the objection, inform the trial court of the problem, and enable the opposing party to confront the objection. *See Bafia v. City International Trucks, Inc.,* 258 Ill.App.3d 4, 629 N.E.2d 666, 670, 196 Ill.Dec. 121 (1st Dist. 1994).

Nevertheless, many lawyers argue that reviewing courts should not be bound by such technical restrictions in their review of appealed cases. Rather, they contend that reviewing courts should consider any prejudicial error that occurred at trial in order to determine whether "justice was done." In some situations, a "plain error" that affects the substantial rights of a party may be considered on appeal even though it was not preserved in the trial court. The so-called plain-error doctrine "finds greater application in criminal cases" than in civil ones. *Gillespie v. Chrysler Motors Corp.,* 135 Ill.2d 363, 553 N.E.2d 291, 297, 142 Ill.Dec. 777 (1990). Indeed, in criminal cases, both federal and Illinois appellate courts have rules that specifically address plain error. Federal Rule of Criminal Procedure 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); Illinois Supreme Court Rule 615(a) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.").

In Illinois, the plain-error rule may be invoked in criminal cases in two circumstances: (1) "where the evidence is closely balanced, a reviewing court may consider a claimed error which was not properly preserved, so as to preclude argument that an innocent person may have been wrongly convicted;" and (2) where the errors "are of such magnitude that there is a substantial risk that the accused was denied a fair and impartial trial, and remedying the errors is necessary to preserve the integrity of the judicial process." *People v. Vargas,* 174 Ill.2d 355, 673 N.E.2d 1037, 1041, 220 Ill.Dec. 616 (1996); *People v. Stack,* 261 Ill.App.3d 191, 633 N.E.2d 42, 46, 198 Ill.Dec. 580 (4th Dist. 1994). For example, in *Vargas, supra,* 673 N.E.2d at 1041 – 1042, the Illinois Supreme Court applied the plain-error doctrine in holding that the absence of the trial judge during a portion of the trial constituted per se reversible error despite the defendant's failure to object.

Although it sometimes can successfully be invoked, the plain-error doctrine is a narrow exception to the general rule that objections must be made to preserve trial errors for appeal. *People v. Szabo,* 113 Ill.2d 83, 497 N.E.2d 995, 999, 100 Ill.Dec. 726 (1986); *Stack, supra,* 633 N.E.2d at 46. Accordingly, it is not a doctrine on which one should ever rely.

On occasion, the Illinois Supreme Court has applied the plain-error doctrine to civil cases. For example, in *Belfield v. Coop,* 8 Ill.2d 293, 134 N.E.2d 249, 259 (1956), the court stated:

> **If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon.**

As with criminal cases, civil cases demonstrate that counsel should not rely on the plain-error doctrine to preserve all mistakes for appeal. For example, in *Gillespie, supra,* 553 N.E.2d at 297 – 298, the Illinois Supreme Court held that references at trial to a nurse's note containing a prior inconsistent statement of a personal injury plaintiff, without calling the nurse as a witness to prove the inconsistent statement, did not rise to the level of plain error under the *Belfield* test.

The *Gillespie* court noted that "[t]he cases where we applied the *Belfield* standard and awarded a new trial involved blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice." 553 N.E.2d at 298. *Mundell v. La Pata,* 263 Ill.App.3d 28, 635 N.E.2d 933, 941, 200 Ill.Dec. 594 (1st Dist. 1994) (plaintiff waived claim of error in impeachment of expert witness by failing both to object and to file motion to strike testimony).

Counsel must not rely on the plain-error doctrine in the hope that the reviewing court will overlook a failure to make a proper objection and preserve the record during the trial. To the contrary, parties repeatedly lose appeals because their counsel failed to preserve a valid claim for a mistrial, neglected to make offers of proof, or overlooked other important steps to protecting the record. Moreover, a lawyer's failure to preserve the record is generally the result of negligence that could have been avoided with a little care and preparation.

In addition, if a lawyer demonstrates to the trial judge by the manner in which the lawyer makes objections, motions for mistrial, and offers of proof that the lawyer knows how to preserve error for appeal, the judge is likely to give more careful rulings. Likewise, this same approach may cause opposing counsel to be more conservative in presenting evidence and objecting due to a concern that any error will haunt him or her on appeal.

See also Michael H. Graham, CLEARY AND GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §103.10 (9th ed. 2009); Allan D. Vestal, *Sua Sponte Consideration in Appellate Review,* 27 Fordham L.Rev. 477 (1958); Allan D. Vestal, Note, *Raising New Issues on Appeal,* 64 Harv.L.Rev. 652 (1951). For further discussion of the plain-error doctrine, see §5.24 below.

II. MAKING THE RECORD

A. [5.3] Verify That All Pretrial Motions Have Been Decided and the Case Is at Issue

Long before the trial begins, counsel should be certain that the case is at issue. The court file should contain a complaint, answer, and, if necessary, a reply. These pleadings should delineate

the questions of fact to be resolved by the trial judge or jury. Cases sometimes reach the trial stage without an answer on file, usually because a previously filed motion to dismiss has not been called up for hearing by either party.

If you are the plaintiff in a case where the defendant failed to file an answer, you should seek a default judgment. As either plaintiff or defendant, if the opposing party has replied to your pleading in some, but not all, respects, you can move to have the admissions (by failure to deny) made a part of the record and read to the jury (if applicable). *See, e.g., Mooney v. Underwriters at Lloyd's, London,* 33 Ill. 2d 566, 213 N.E.2d 283, 286 (1966).

If the plaintiff proceeds to trial without objection and permits the defendant to introduce defense testimony, however, the plaintiff has waived the defendant's failure to file an answer for purposes of appeal. *Larson v. R.W. Borrowdale Co.,* 53 Ill.App.2d 104, 203 N.E.2d 77, 79 – 80 (1st Dist. 1964), states:

> **Ordinarily an answer is required to be filed in order to bring the case to issue. However, there also is a rule that where the defendant goes to trial without filing [**an answer and introduces evidence to prove**] his affirmative defense without plaintiff calling the attention of the trial court to the fact that no answer to the complaint had been filed by defendant, plaintiff waives his right to object to the failure of the defendant to file an answer.**

Naturally, the same rule applies when the defendant fails to file an answer to an amended complaint. *In re Marriage of Peoples,* 96 Ill.App.3d 94, 420 N.E.2d 1072, 1075, 51 Ill.Dec. 514 (5th Dist. 1981).

Likewise, if a plaintiff fails to file a reply to an affirmative defense but introduces evidence that "replies" to the affirmative defense without objection by the defendant, the defendant waives the right to object. *County of Winnebago v. Willsey,* 122 Ill.App.2d 149, 258 N.E.2d 138, 141 (2d Dist. 1970); *Sottiaux v. Bean,* 408 Ill. 25, 95 N.E.2d 899, 901 (1950), quoting *Cienki v. Rusnak,* 398 Ill. 77, 75 N.E.2d 372, 378 (1947). Similarly, when a defendant proceeds to trial on the merits without objection, the defendants waives the plaintiff's failure to reply to the defendant's affirmative defenses. *Rosen v. DePorter-Butterworth Tours, Inc.,* 62 Ill.App.3d 762, 379 N.E.2d 407, 409 – 410, 19 Ill.Dec. 743 (3d Dist. 1978).

Many other preliminary matters may remain unresolved as trial draws near. Examples include motions (1) for physical or mental examination, (2) for summary judgment, (3) to strike a portion of pleadings, (4) to strike objections to interrogatories, or (5) to strike requests for admission of facts. If these matters are not decided before the trial concludes, the points to which they are addressed will not be considered on appeal. *See Federal Savings & Loan Insurance Corp. v. Quinn,* 81 Ill.App.2d 299, 225 N.E.2d 693, 694 – 695 (1st Dist. 1967) (refusing to consider motion to strike not ruled on by trial court); *Rowe v. Vrooman Carpet Co.,* 326 Ill.App. 467, 62 N.E.2d 38 (1st Dist. 1945) (abst.).

To avoid waiving any such issues, well prior to the scheduled trial date, counsel should conduct a systematic review of the file to ensure that all preliminary matters have been presented to the trial court and resolved. Counsel should also think about the entire trial, from the opening

statement to the closing arguments. This includes considering each witness, the testimony, documentary and demonstrative evidence that is likely to be presented, and the potential challenges that may be made to that evidence. Anticipating problems is an important part of thorough pretrial preparation that will make it easier for counsel to prevent trial errors and, when they occur, to identify and react to them appropriately.

B. The Importance of a Court Reporter

1. [5.4] Use a Court Reporter

To present a claimed trial error to a reviewing court, the appellant must file a transcript or report of proceedings. S.Ct. Rule 323(a) specifies what *may* be included in the report of proceedings and what *must* be included:

> **Contents; Preparation. A report of proceedings *may* include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal. The report of proceedings *shall* include all the evidence pertinent to the issues on appeal. [**Emphasis added.**]**

If the claimed error relates to an evidentiary ruling or other trial procedure as opposed to a pure question of law, such as a dismissal of a complaint for failure to state a cause of action, the appellate court will automatically affirm if no report of proceedings is timely filed. *Bishop v. Sullivan,* 61 Ill.App.2d 150, 208 N.E.2d 904, 905 (5th Dist. 1965); *Leading Jewelry Manufacturing Co. v. Yorkshire Watch Co.,* 350 Ill.App. 319, 113 N.E.2d 71 (1st Dist. 1953) (abst.).

In many courts throughout the state, each courtroom is supplied with an official court reporter from which counsel may obtain a trial transcript or report of proceedings. However, in most civil courtrooms in Cook County, there is no official court reporter, and counsel must arrange for a private court reporter to attend the trial. Providing a court reporter is a substantial expense.

When faced with the choice, should counsel try the case with or without a reporter? A trial transcript or report of proceedings may be created without a court reporter through the use of a "bystander's report." S.Ct. Rule 323(c) incorporates the common-law procedure whereby losing counsel tenders to the court and his or her adversary a summary of the trial evidence, objections, and rulings to which winning counsel can propose amendments or an alternative summary. The trial judge is the ultimate settler of such a record.

The defects in this type of record are often numerous, particularly if the trial is the least bit complicated. It should be employed only when there is no other alternative. Indeed, if a matter is worth being tried, a court reporter should almost always be used for two reasons: (a) a reporter's attendance causes the trial judge and the lawyers to be much more careful in what they do and say; and (b) if needed, a true trial transcript provides a clear and unequivocal record of what occurred, avoids disagreements about what happened, and saves time.

When there is no official court reporter, circumstances vary as to the selection of the court reporter, the payment of the reporter, and the number of reporters in attendance, depending on the particular lawyers, the nature of the case, and the judge. For example, some lawyers will rely only on a reporter they have personally hired. Thus, two or three private reporters may attend a trial of a lengthy or complex matter.

In many instances, only one counsel will engage and pay a reporter. In such cases, opposing counsel may obtain a copy of the transcript if he or she pays the reporter's charges for courtroom attendance and transcription of the proceedings. *Tansor v. Checker Taxi Co.,* 27 Ill.2d 250, 188 N.E.2d 659, 662 – 663 (1963); Fred Posner, *Who "Owns" a Court Reporter?,* 7 Trial Law. Guide 96 (1963).

In most cases, the parties hire a court reporter jointly and share the expense of the court reporter's attendance at the trial. If only one party wants a transcript of the trial or a portion of it, that party simply orders the transcript from the reporter and pays the reporter's charges.

2. [5.5] Know Your Court Reporter

Just as counsel should do his or her best to "know" the judge and opponent, it is beneficial to be aware of the idiosyncrasies of the court reporter who will attend the trial. Court reporters vary in style, ability, and approach. Some hear and see better than others. Some are more intelligent or can transcribe more rapidly.

In the middle of a trial, lawyers occasionally become visibly upset or irritated upon learning of some negative aspect of the reporter's personality or skill. Prior knowledge will help to avoid any such encounters or soften their effect when the traits manifest themselves. In those courtrooms in which counsel must supply his or her own reporter, it is better to engage the same reporter or reporting service as often as possible so that counsel and the reporter become familiar with each other's style.

3. [5.6] Help Your Court Reporter

The reporter should be provided with a pleading that has an accurate case caption and the names of trial counsel, who should be physically identified for the reporter, especially if there are more than two attorneys. Counsel should help the court reporter understand the nature of the case and testimony as the case progresses. This will result in a more accurate record.

When many technical terms will be used, as in a patent or complicated personal injury case, the reporter should be given a written list of the anticipated terms and the books, texts, or copies of pertinent portions thereof that are referenced during testimony or argument. This procedure also should be followed generally whenever many legal authorities are cited or quoted.

While interrogating a witness, counsel should stand in a position that will not block the reporter's view of the witness, the trial judge, or opposing counsel. While a reporter is marking an exhibit for identification or striking the identification symbol from an admitted exhibit, counsel should not speak or interrogate the witness. A reporter obviously cannot simultaneously perform this function and record testimony.

The method of examining witnesses has a definite effect on the accuracy and reliability of the record made by the court reporter. It is extremely difficult (usually impossible) for the reporter to take down accurately simultaneous utterances by two or three persons. Therefore, counsel asking a question should wait until the witness has completed his or her answer before asking the next question. Witnesses should be cautioned not to speak too rapidly despite the reporter's apparent competence.

Counsel must also exercise care to indicate clearly to the reporter when he or she wants to go "off the record." Otherwise, undesirable conversation may be recorded. Perhaps more important, counsel should clearly indicate to the reporter when to return to the record. Unless the reporter is notified, important stipulations, rulings, and other proceedings may not be recorded.

C. Avoiding Mistakes or Ambiguity in the Testimony

1. [5.7] Names, Addresses, Numbers, Dates, and Pronouns

To ensure proper transcription of testimony by the court reporter, names and addresses should be clearly stated. Counsel should request that a witness spell names and unusual places so that the report is accurate. It is much better for counsel to make this a standard practice rather than attempt to resolve the reporter's questions during breaks or after the trial has concluded.

Trial counsel should keep in mind that, though testimony may be easily understood by the trial judge and jury, it may be incomprehensible or ambiguous to a reviewing court or appellate lawyer who reads only the "cold" record. A common cause of record ambiguity is a witness' use of pronouns such as "he," "it," and "they" without further explanation. The witness should be asked to state and, when appropriate, to restate the names of persons to whom he or she refers.

For these same reasons, counsel should ask the witness to refer to dates, days of the week, the number of persons present during conversations, and other similar matters when they become pertinent during testimony. In this way, the lawyer handling the appeal will be able to understand and state the facts of the case in a logical and comprehensible manner for the reviewing court.

2. [5.8] Gestures, Distances, and References to Exhibits by Witnesses

Witnesses sometimes use a nonverbal act or an ambiguous phrase during the course of testimony. This behavior should be translated into a more comprehensible statement in order for the appellate record to be meaningful to persons not present at the trial. For example, in describing the distance of a car from the intersection when he or she first saw it, the witness may say "from here to the end of the courtroom."

If a witness describes a distance in such terms, it is often helpful for the attorney to ask for an explanation in terms of locations in the courtroom. Then, for example, it can be stated that "for the record, the distance between the witness box and the location in the courtroom is approximately 50 feet." Agreement on this figure usually can be reached by asking opposing counsel for an estimate of the distance. Also, the trial judge may be familiar with the dimensions of the courtroom.

Witnesses occasionally refer to people in the courtroom or parts of their bodies by gesturing or pointing. The record should describe the nature of the gesture:

Let the record reflect that the witness is pointing at the defendant, John Jones.

[or]

For the record, the witness is pointing to his left shoulder.

If the witness does not know the person's name and that person is otherwise unknown, counsel should ask to have that person rise and state his or her name for the record.

If the witness refers to "the picture" or "the letter," counsel should state what exhibit is being described:

The witness is referring to the photograph previously identified and admitted into evidence as Plaintiff's Exhibit 6.

If the witness is describing an event by pointing to an exhibit, such as a photograph of an intersection, the witness should place an "X" with his or her initials at the point where the vehicle collision or other event occurred. If the court refuses to permit the exhibit to be so marked (a rare occurrence), the record should carefully describe where the witness indicated.

If the trial involves exhibits that, because of their size or nature, cannot be transmitted to the appellate court, they should be accurately described in a narrative statement in the trial record. Better still, photographs of the exhibits should be made and placed in the record. The same procedure should be followed if the jury is taken to "view" the premises, particularly if an objection is raised as to the use or accuracy of the view.

3. [5.9] Gestures, Asides, and Disruptions by Counsel or the Court

On occasion, opposing counsel may grimace, shake his or her head, rustle papers, or cause other disruptions that distract or prejudice a jury. Intentional or not, these occurrences are, at best, difficult to handle in terms of trial technique. If the distractions persist and are apparently prejudicial, they must be preserved in the record for appeal.

At the onset of such conduct, counsel should ask the judge to excuse the jury so the matter can be discussed, to direct counsel to stop the distractions, and to have the conduct, if verbal, stricken from the record. The court should instruct the jury to disregard it. A description of the conduct should be made for the record.

If the trial judge honors the request, counsel will usually stop these tactics. However, if counsel persists, the record must be continuously preserved in the same manner. If the trial judge does not support the objection and counsel persists, the record still must be preserved, but caution should be exercised because the jury may be prejudiced if continual objections are made to alleged misconduct of the opposing counsel and the court overrules the objections.

On occasion, a judge will suggest to the jury by the nature of a question to a witness, vocal intonation, or a general remark that the judge has formed a certain opinion about the witness' testimony or about a factual issue. Counsel, using discretion and caution, must make a record if such conduct is believed harmful, following the same method as described for prejudicial conduct by an attorney.

If the court persists in such prejudicial conduct, objections must be made on the record with appropriate description of such conduct. See Leslie L. Conner, *The Trial Judge, His Facial Expressions, Gestures and General Demeanor — Their Effect on the Administration of Justice,* 6 Am.Crim.L.Q. 175 (1968). In order to be sure the record is preserved for misconduct by opposing counsel or the trial judge, it may be necessary to move for a mistrial. See §5.27 below.

D. [5.10] Evidence Must Be Introduced in Order To Be Part of the Trial Record

Evidence must be introduced at the trial in order to become part of the trial record. Occasionally, the trial judge will indicate in chambers, "off the record" or otherwise, that certain evidence will not be admitted if it is offered. If the evidence is not offered during the regular course of the trial, the reviewing court generally will not consider its "exclusion" as error on appeal.

> **There can be no refusal to admit that which has not been offered, and counsel cannot, by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error.** *Chicago City Ry. v. Carroll,* 206 Ill. 318, 68 N.E. 1087, 1091 (1903).

See also Balstad v. Solem Machine Co., 26 Ill.App.2d 419, 168 N.E.2d 732, 736 (2d Dist. 1960), quoting *Ragen v. Bennigsen,* 10 Ill.App.2d 356, 135 N.E.2d 128, 131 (1st Dist. 1956).

Similarly, depositions, answers to written interrogatories, and responses to requests for admissions of fact, when pertinent, should be read into the record as part of the regular proof. Otherwise, these matters may be given no weight on appeal. *Flewellen v. Atkins,* 99 Ill.App.2d 409, 241 N.E.2d 667, 672 (1st Dist. 1968); *Driscoll v. C. Rasmussen Corp.,* 57 Ill.App.2d 349, 206 N.E.2d 746, 750 (1st Dist. 1965), *rev'd on other grounds,* 35 Ill.2d 74 (1966); Owen Rall and Philip W. Tone, *Some Practical Pointers on the Mechanics of an Appeal,* 50 Ill.B.J. 362, and 50 Ill.B.J. 522 (1962) (two parts).

E. Handling Exhibits

1. [5.11] Marking Exhibits

Trial counsel often confuse the trial record by being careless in handling exhibits. Frequently, the record fails to reflect the nature and number of exhibits or whether they were admitted or refused. Exhibits are sometimes lost or misplaced during trial and cannot be found when an appeal is taken later. A reviewing court ordinarily will not give weight to an exhibit that has been omitted from the appellate record. *Spencer v. Community Hospital of Evanston,* 87 Ill.App.3d 214, 408 N.E.2d 981, 985, 42 Ill.Dec. 272 (1st Dist. 1980); *Marchal v. Davis,* 107 Ill.App. 629, 630 (1st Dist.), *aff'd,* 206 Ill. 231 (1903).

The first step in the introduction of an exhibit is to mark it for identification, usually during the testimony of a witness. Practice in marking exhibits varies throughout the state with the particular lawyers and judges and with the nature of the case. Some attorneys write the identification on the document, *e.g.,* "Plaintiff's Exhibit 1 for identification." The preferred procedure, which avoids subsequent disputes with opposing counsel, is for the court reporter to place the appropriate identification on an exhibit. Some reporters mark exhibits in longhand; most, especially in the federal courts, use preprinted stickers for plaintiffs' and defendants' exhibits. After affixing the sticker to the exhibit, the reporter writes the number of the exhibit or the document in the blank space following the word "Exhibit." Sometimes counsel provides his or her own stickers.

Although exhibits are usually marked during a witness' testimony, it is wise to mark exhibits during a recess or before court convenes if many exhibits are to be identified by the same witness. This procedure avoids boring delays. The court reporter will usually help with this procedure. If the reporter does mark an exhibit during trial, counsel should not address the court or interrogate the witness while the reporter is marking the exhibit as the reporter cannot record the proceedings and mark at the same time.

Consecutive numbers should be used for exhibit identification, whenever feasible, and a separate record kept of exhibits that have been identified so that an error is not made in the numbering of the exhibits. Exhibits should not be identified by date because this makes it necessary to start anew numerically at the next session of the trial so that there is "Exhibit 1 as of April 2, 2009" and "Exhibit 1 as of April 3, 2009." This practice is confusing both at the trial and in the appellate courts. If care is not taken, exhibits may be numbered the same, or numbers may be skipped, and the reviewing court may think some exhibits have been omitted from the record. In addition, if an important document consists of more than one page, counsel should clearly identify the page to which he or she is referring on the record.

Sometimes a witness is shown a document simply to refresh his or her memory. On these occasions, counsel often does not mark the exhibit because he or she does not see any benefit to it becoming part of the record. However, the exhibit should be marked during the witness' testimony if counsel wants it to become part of the record.

To mark exhibits such as X-rays, models, and diagrams that cannot be written on, labels, tags, and white pencils can be used, as the exhibit requires. Although some court reporters have these materials with them as part of their regular equipment, some do not. When these types of exhibits are going to be offered, counsel should check with the reporter ahead of time and bring appropriate materials to court if the reporter does not have them. This preparation will save trial time and ensure that nondocumentary exhibits are adequately marked.

Virtually every judge allows an attorney to keep the exhibits he or she has marked during and after the trial. Opposing counsel should request copies of all identified exhibits so that he or she has a separate set in case the originals are lost. Even counsel who has the originals should make copies of important documents, particularly when he or she intends to ask leave to withdraw the originals. See §5.17 below.

Counsel may find it helpful to prepare, in advance of trial, a chart such as the one shown below, listing each document he or she expects to introduce into evidence.

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As each exhibit is marked for identification and admitted or excluded, counsel can place the appropriate information in the columns opposite the exhibit. This practice permits counsel to easily see the status of each exhibit and helps prevent any exhibits from being overlooked. If a daily transcript is being obtained, it is beneficial to indicate on your chart the page of the record on which the exhibit was identified or offered.

In complex cases involving numerous exhibits, it has become commonplace for counsel to prepare, in advance of trial, a three-ring binder containing all of his or her exhibits. Copies of this binder, containing a numbered tab for each exhibit, should be prepared for one's self, the court, and opposing counsel and for use on the witness stand by witnesses as necessary. In certain cases, copies may also be desired for each member of the jury. Counsel's own copy can include a copy of the chart above for purposes of recording when each exhibit was offered and whether each exhibit was admitted.

It is also recommended that, before resting, counsel reoffer or reintroduce all exhibits to ensure against forgetting to have one or more exhibits received into evidence. See §5.16 below. Careful retention and record-keeping not only help at the trial but also are indispensable aids in compiling the appellate record.

2. [5.12] Referring to Exhibits After They Have Been Marked

After an exhibit has been marked, it generally is shown to the witness for identification. The witness is then asked questions to establish a foundation so that the exhibit can be admitted into evidence. For example, if the exhibit is a letter, the witness is asked whether he or she knows what it is, whether he or she sent it on the date it bears, and so forth. Likewise, if it is a picture, the witness is asked what it portrays and whether it truly and accurately portrays the scene as of a certain date.

During the examination, the exhibit should be referred to by number, so that the record will reflect which exhibit is the subject of interrogation. For example, counsel can state:

I am showing you Plaintiff's Exhibit 1 for identification. Is that your signature that appears on it?

If possible, the exhibit should be described more fully so the record will be even clearer:

I am showing you Plaintiff's Exhibit 1 for identification, being a letter dated April 20, 2009. Is that your signature that appears on it?

Some judges refuse this type of description on the ground that it states the content of a document not in evidence, but this is rare.

3. [5.13] Offering Exhibits into Evidence

Generally, an exhibit should be offered into evidence as the witness is testifying about it. This can add to the persuasiveness of the witness' testimony, place the exhibit in a proper context, and help to keep matters organized. In addition, if there is an objection to the exhibit that the witness can cure through further testimony, the best time to do that is when the witness is on the stand and the exhibit is fresh in the witness' memory.

In any event, the record should show that the exhibit has, in fact, been offered into evidence. No error can be claimed in the reviewing court for refusal to admit evidence that the record does not show was offered. As stated earlier, it is not enough that the trial judge, in chambers or otherwise, indicated that he or she would not admit certain evidence if it were offered. *See Chicago City Ry. v. Carroll,* 206 Ill. 318, 68 N.E. 1087, 1091 (1903); *Frame v. Grecivich,* 30 Ill.App.2d 271, 175 N.E.2d 415 (3d Dist. 1961) (abst.); §5.10 above.

Typically, the offer should be made as follows:

Your Honor, at this time, I offer Plaintiff's Exhibit 1, being a two-page letter dated April 20, 2009, from John Jones to James Smith, in evidence as Plaintiff's Exhibit 1.

In this way, the record positively shows the nature of the exhibit that was offered.

4. [5.14] Making Certain the Record and Exhibits Reflect Admission

Both the record and the exhibit should reflect when an exhibit is admitted in evidence. Typically, after hearing argument on objections, the judge will simply state:

The objection is overruled. Plaintiff's Exhibit 1 is admitted in evidence as Plaintiff's Exhibit 1.

The essential point is that the record contains a statement of this nature.

When a record is subsequently written up by the reporter, an additional statement is oftentimes added to the record, by the reporting service, following the court's ruling:

Whereupon this diagram, previously marked Plaintiff's Exhibit 1 for identification, was received in evidence over defendant's objection as Plaintiff's Exhibit 1, and is as follows. . . .

When admission of a key exhibit has been strongly disputed, both counsel should be sure the transcript correctly reflects all steps leading to its admission or exclusion. See Owen Rall and Philip W. Tone, *Some Practical Pointers on the Mechanics of an Appeal,* 50 Ill.B.J. 362, 370 – 374, and 50 Ill.B.J. 522 (1962) (two parts) (discussing technical aspects of exhibits and the record); Thomas A. Mauet, TRIAL TECHNIQUES §6.2 (7th ed. 2007).

5. [5.15] Making Certain the Record Reflects Exclusions

As with the admission of exhibits, and basically for the same reasons discussed in §5.14 above, counsel for both sides must have the record show the exclusion of offered exhibits. If an exhibit is refused admission, the fact of exclusion is usually recorded by the judge's ruling to that effect. However, counsel offering the exhibit should then make an offer of proof to preserve the point for appeal. See §5.38 below. This is an extremely important aspect of preserving an issue for appeal.

6. [5.16] Obtaining a Ruling on the Admission of Exhibits

As indicated in §§5.14 and 5.15 above, the record must reflect the court's rulings on the admission and exclusion of evidence so the reviewing court will know what happened at the trial. Equally important, a ruling must be obtained in order to preserve claimed error for appeal. Objections and all evidentiary rulings fall under this requirement. See §§5.34 – 5.36 below.

On occasion, particularly when ruling that an exhibit is admitted, the trial judge simply states "Objection overruled," or the judge may gesture or nod to the effect that the exhibit is admitted without specifically stating that it is admitted. At this point, counsel should tactfully confirm that the exhibit is admitted so that the record shows a positive ruling by the court.

To avoid any inadvertent failure to offer an exhibit into evidence and obtain a ruling, some attorneys have adopted the practice of reoffering all of their exhibits prior to resting and candidly stating that the reoffer is a precautionary move:

At this time, if the court pleases, in order to make sure that the record shows all of the exhibits as received into evidence, I wish to reoffer all of the plaintiff's exhibits, numbers 1 through 16 inclusive, and ask that they be received in evidence as Plaintiff's Exhibits 1 through 16 inclusive.

This is an excellent technique for avoiding an oversight when handling numerous exhibits.

7. [5.17] Withdrawing Exhibits

Counsel ordinarily keeps possession of the exhibits that he or she offered into evidence at the trial. However, when the court reporter transcribes the record, the original exhibits sometimes need to be incorporated into the transcript. In these situations, counsel would need to contact the reporter prior to the filing of the final transcript with the court.

S.Ct. Rule 321 states:

> **The record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, unless the parties stipulate for, or the trial court, after notice and hearing, or the reviewing court, orders less.**

In some instances, during the trial, counsel will use photocopies of exhibits for all purposes for which the originals could have been used. Often, nonparty witnesses produce records that

need to be returned as soon as possible, *e.g.,* public records, police and fire department records, hospital records, and employment records. After such exhibits have been admitted into evidence, move the court for leave to withdraw the original and substitute photocopies for all purposes. Usually, opposing counsel will stipulate to this arrangement. The copies should immediately be given the same exhibit markings as the originals they replace.

When many exhibits are to be used, it is often helpful to stipulate with opposing counsel before the trial begins as to the use of photocopies of exhibits to be shown to witnesses, particularly when the originals are important documents, the loss of which could be harmful.

F. [5.18] Demonstrations and Experiments by Witnesses or Counsel

If a witness or counsel is permitted by the court to make a demonstration or experiment to illustrate a point, appellate courts generally will not review claimed error if the record does not disclose the nature of the demonstration or experiment. To object, opposing counsel must follow essentially the same procedure as suggested for gestures made by a witness, counsel, or the trial judge. See §5.9 above. Counsel should object and describe in the record the conduct that counsel wishes to challenge.

If any apparatus is used by the witness or counsel as an adjunct to the demonstration or experiment, the apparatus or a photograph of it should be made part of the record if possible. For example, in *People v. Fisher,* 340 Ill. 216, 172 N.E. 743, 754 (1930), a ballistics expert explained his testimony through demonstrations on a blackboard. The court held that a photograph of the "markings on the blackboard" was properly entered in the report of proceedings. *Id.* At the very least, the apparatus should be described for the record.

The party offering the demonstration or experiment may also want to make a record of the procedure to illustrate more fully to the reviewing court that evidence was properly admitted.

G. [5.19] Making the Record on Demonstrative Evidence

Any type of demonstrative evidence (*e.g.,* machinery, clothing, a model, or a firearm) must be made part of the record in some manner in order for the reviewing court to consider whether its admission or rejection was error. If the actual exhibit cannot be transmitted to the appellate court because of its size or nature, counsel should introduce pictures of it into the trial record. Only as a last resort should counsel use a narrative description of the exhibit for the record. See 3 Francis X. Busch, LAW AND TACTICS IN JURY TRIALS, pp. 272 – 274 (Encyclopedia ed. 1959 – 1963) (identifying varying legal decisions regarding narrative descriptions).

In the closing argument, attorneys occasionally use blackboards, charts, and diagrams, often filling them in as the argument proceeds. If claimed error is to be preserved when these devices are used or if the appellee desires to show the argument was proper, the materials must immediately be preserved or photographed and made part of the record. In *Caley v. Manicke,* 24 Ill.2d 390, 182 N.E.2d 206, 209 (1962), the Illinois Supreme Court noted:

> [P]**laintiff's counsel, over repeated objections, was permitted to make up a chart as his closing argument progressed, whereon he listed each element of claimed**

> **damage and placed adjacent thereto the specific sums, actual in some instances and suggested in others, for which he was arguing. The chart, as such, did not go to the jury room. Although it was not a part of the evidence, it was properly made a part of the record for our review.**

See also Grimming v. Alton & Southern Ry., 204 Ill.App.3d 961, 562 N.E.2d 1086, 1096 – 1098, 150 Ill.Dec. 283 (5th Dist. 1990).

Because these materials are often discarded when the case is concluded, objecting counsel should ask the trial judge to make them a part of the record as soon as the argument ends.

H. [5.20] The Limited Offer — Evidence Admissible Only for Certain Purposes

Evidence may be objectionable for certain reasons and admissible for others. Counsel offering such evidence should state the limited purpose for which it is offered, particularly when opposing counsel makes a proper specific objection.

A common example is that certain evidence may be admissible to impeach a witness but not as substantive proof of a fact at issue. If the attorney seeking admission of the evidence fails to state it was offered for the limited purpose of impeachment and the evidence is excluded for another reason that is valid, the offering attorney's argument is waived on appeal. See §5.32 below.

III. PRESERVING THE RECORD

A. Objections

1. [5.21] Purpose

Objections have at least two purposes. First, they keep from the record evidence that might prejudice the jury, the trial judge, or an appellate tribunal. Second, they preserve for review on appeal a contention that evidence was erroneously admitted if the case is lost at the trial level.

2. [5.22] Effect of Failure To Object

As a general rule, failing to object to the admission of evidence results in the waiver of the objection. *People v. Carlson,* 79 Ill.2d 564, 404 N.E.2d 233, 239, 38 Ill.Dec. 809 (1980); *Chicago Hansom Cab Co. v. Havelick,* 131 Ill. 179, 22 N.E. 797 (1889); *Wanland v. Beavers,* 130 Ill.App.3d 731, 474 N.E.2d 1327, 1330, 86 Ill.Dec. 130 (1st Dist. 1985); *Turney v. Ford Motor Co.,* 94 Ill.App.3d 678, 418 N.E.2d 1079, 1085, 50 Ill.Dec. 85 (1st Dist. 1981).

3. [5.23] Exceptions to Waiving Objections by Failing To Timely Object

There are cases that have not applied the rule that a failure to object waives the objection in certain circumstances. Such circumstances have involved (a) plain error, (b) a party with special

needs, (c) situations in which objecting would be a "useless act," (d) judicial misconduct, and (e) when jury instructions are given in criminal cases. These circumstances are discussed in more detail in §§5.24 – 5.28 below.

a. [5.24] Plain-Error Doctrine

Ordinarily, claimed error in the admission of evidence will not be reviewed on appeal if the appealing party failed to object when the disputed evidence was offered. By remaining silent, a party generally waives his or her objections and cannot revive them later. Nevertheless, as discussed in §5.2 above, courts have recognized exceptions to this general rule when there is plain error. In the criminal context, a court will review an argument for plain error even though no objection was made at trial when the substantial rights of the defendant are affected or when the evidence is closely balanced. *People v. Vargas,* 174 Ill.2d 355, 673 N.E.2d 1037, 1041, 220 Ill.Dec. 616 (1996); *People v. Stack,* 261 Ill.App.3d 191, 633 N.E.2d 42, 46, 198 Ill.Dec. 580 (4th Dist. 1994). In the civil context, a court will review an argument for plain error even though no objection was made at trial when the arguments were so prejudicial that a party could not receive a fair trial. *Belfield v. Coop,* 8 Ill.2d 293, 134 N.E.2d 249, 259 (1956). Counsel, however, should not rely on the plain-error doctrine to preserve all errors for appeal as there are many situations in which it will not apply. *See Gillespie v. Chrysler Motors Corp.,* 135 Ill.2d 363, 553 N.E.2d 291, 298, 142 Ill.Dec. 777 (1990); *Department of Business & Economic Development v. Schoppe,* 1 Ill.App.3d 313, 272 N.E.2d 696, 699 (2d Dist. 1971) (distinguishing *Belfield* because, unlike in *Belfield*, plaintiff's counsel did not use remarks to inflame passion and prejudices of jury).

b. [5.25] Parties with Special Needs

Courts have been known to review errors to which there was no objection in cases in which there is a party with special needs. For example, when no objection was made during the trial of a six-year-old plaintiff in *Muscarello v. Peterson,* 20 Ill.2d 548, 170 N.E.2d 564, 569 (1960), the court agreed to review points not raised by trial objections, stating:

> **The court has a duty to see that the rights of an infant are adequately protected, and is bound to notice substantial irregularities even though objections are not properly presented on its behalf.**

See also Leonard v. Pitstick Dairy Lake & Park, Inc., 202 Ill.App.3d 817, 560 N.E.2d 467, 473, 148 Ill.Dec. 165 (3d Dist. 1990) (same).

Muscarello was extended to a proceeding under the Mental Health and Developmental Disabilities Code, 405 ILCS 5/1-100, *et seq.,* seeking an order authorizing the involuntary administration of psychotropic medication to a mental patient. In *In re Timothy H.,* 301 Ill.App.3d 1008, 704 N.E.2d 943, 947 – 948, 235 Ill.Dec. 370 (2d Dist. 1998), the court held that the failure of the trial court to provide the jury with an instruction defining the applicable burden of proof was reviewable as plain error despite the failure of the state or the respondent to offer an instruction. The court noted:

> [T]**o ensure a fair trial in the context of a proceeding to involuntarily administer psychotropic medication, we determine that a trial court is required to offer an instruction *sua sponte* if it relates to the elements ultimately authorizing the**

> **administration of psychotropic medication, the question of the burden of proof, and a definition or description of the applicable burden of proof as provided in the Illinois Pattern Jury Instructions.** 704 N.E.2d at 948.

Consistent therewith, the appellate court reversed the trial court despite defense counsel's failure to object.

c. [5.26] Useless Act Objections Not Required

Courts have also considered purported error when the record shows that an objection would have been a useless act or would only have intensified prejudicial conduct in the minds of the jurors. In *Burger v. Van Severen,* 39 Ill.App.2d 205, 188 N.E.2d 373, 378 (2d Dist. 1963), when the trial judge erroneously admitted evidence of a covenant not to sue over the plaintiff's objection, an alleged error in the counsel's reference to the covenant in closing argument was considered preserved although the plaintiff did not then object.

> **[I]t would have been useless for plaintiff to make further objections and such objections would only have magnified the admission of the covenant not to sue into evidence.** *Id.*

See also Schoolfield v. Witkowski, 54 Ill.App.2d 111, 203 N.E.2d 460, 467 (1st Dist. 1964). Nevertheless, trial counsel should attempt to have the record reflect appropriate and timely objections and not rely on the beneficence of the reviewing court.

d. [5.27] Judicial Misconduct

The Supreme Court also has reviewed the alleged misconduct of the trial judge to which no objection was made because of the obvious practical difficulties in challenging the judge in the jury's presence. Judicial misconduct is often viewed in close connection with plain error. Indeed, Illinois courts have noted that in applying the plain-error test, "a less rigid application of the waiver rule must prevail where misconduct of the trial judge is concerned." *People v. Berry,* 244 Ill.App.3d 14, 613 N.E.2d 1126, 1135, 184 Ill.Dec. 534 (1st Dist. 1991). For example, in *People v. Sprinkle,* 27 Ill.2d 398, 189 N.E.2d 295, 297 (1963), and *People v. Kelley,* 113 Ill.App.3d 761, 447 N.E.2d 973, 977 – 978, 69 Ill.Dec. 538 (1st Dist. 1983), the reviewing court reversed, notwithstanding the defense counsel's failure to object. Both cases involved misconduct by the trial judge that tended to show a belief by the judge that the defendant was guilty.

In *People v. Eckert,* 194 Ill.App.3d 667, 551 N.E.2d 820, 824 – 825, 141 Ill.Dec. 633 (5th Dist. 1990), the appellate court held that the trial court's antagonistic attitude toward the defense counsel, which suggested to the jury that the trial court felt that the defense counsel was not doing his job properly and was wasting the court's time, denied the defendant a fair and impartial trial despite the apparent lack of explicit objection to the trial court's conduct.

Likewise, in *People v. Brown,* 200 Ill.App.3d 566, 558 N.E.2d 309, 314 – 316, 146 Ill.Dec. 346 (1st Dist. 1990), the appellate court held that the trial court's examination of a defense witness was improper and warranted a new trial, despite the absence of objection, as the examination suggested that the witness lacked credibility and suggested prior bad acts involving

the defendant. However, in *People v. Rivers,* 294 Ill.App.3d 601, 690 N.E.2d 628, 631, 228 Ill.Dec. 869 (1st Dist. 1998), the appellate court held that the trial court's criticism of defense counsel and comments to a potential juror were not so prejudicial as to require reversal of the conviction, the court noting that "a trial court's improper comments are reversible error only if the defendant can establish that the comments were a material factor in his or her conviction or had a probable effect on the jury's verdict."

In *People v. Woolley,* 205 Ill.2d 296, 793 N.E.2d 519, 275 Ill.Dec. 748 (2002), the trial judge informed the jury during a capital sentencing hearing that the defendant had previously been sentenced to death but that the death sentence had been vacated by the Supreme Court and the case remanded for a new sentence. Despite defense counsel's failure to object, the Illinois Supreme Court held the alleged error was not waived on appeal. The Supreme Court noted that "the waiver rule is not rigidly applied where the basis for the objection is the conduct of the trial judge." 793 N.E.2d at 522. *See also People v. Zapata,* 347 Ill.App.3d 956, 808 N.E.2d 1064, 1071, 283 Ill.Dec. 776 (1st Dist. 2004) (sentence vacated and cause remanded for sentencing when trial judge improperly relied on personal disdain for gang violence when there was no evidence of such, even though defendant failed to raise issue before court); *People v. Taylor,* 357 Ill.App.3d 642, 829 N.E.2d 890, 894, 293 Ill.Dec. 965 (1st Dist. 2005) (although defendant failed to object to presiding judge's conduct in postconviction hearing, issue nevertheless found reviewable because trial court's conduct was at issue).

As a general rule, a verdict will not be disturbed unless the court's remarks constitute a material factor in the conviction or unless prejudice to the defendant appears to be the probable result. *People v. Sanchez,* 163 Ill.App.3d 186, 516 N.E.2d 556, 560, 114 Ill.Dec. 401 (1st Dist. 1987); *People v. Sims,* 192 Ill.2d 592, 736 N.E.2d 1048, 1071, 249 Ill.Dec. 610 (2000) (trial judge's expression of condolence to grandmother of victim at sentencing hearing reviewable despite lack of objection, but court found that no basis to overturn sentence).

The problem of challenging the judge in the jury's presence may sometimes be handled by making record objections after requesting that the jury be excused. In *People v. Westpfahl,* 295 Ill.App.3d 327, 692 N.E.2d 831, 834, 229 Ill.Dec. 842 (3d Dist. 1998), the appellate court held that the defendant's objection to the trial court's sua sponte competency examination of the victim in the presence of the jury did not have to be immediate to preserve review. Because the trial judge's conduct was the issue, it was permissible for the defendant to object to the trial judge's conduct outside the presence of the jury after completion of the examination and before the introduction of further evidence.

e. [5.28] Jury Instructions in Criminal Cases

S.Ct. Rule 451(c) provides:

> **Except as otherwise provided in these rules,** [jury] **instructions in criminal cases shall be tendered, settled, and given in accordance with section 2-1107 of the Code of Civil Procedure, but substantial defects are not waived by failure to make timely objections thereto if the interests of justice require.**

In *People v. Ogunsola,* 87 Ill.2d 216, 429 N.E.2d 861, 865, 57 Ill.Dec 744 (1981), the Illinois Supreme Court reversed a defendant's conviction because an omitted jury instruction "removed from the jury's consideration a disputed issue essential to the determination of defendant's guilt or innocence" even though the defendant did not object at trial.

In *People v. Durr,* 215 Ill.2d 283, 830 N.E.2d 527, 537 – 538, 294 Ill.Dec. 115 (2005), however, the Illinois Supreme Court held that the trial court's failure to give the defendant's tendered jury instruction was error, but the issue was not preserved for review because of the defendant's failure to include it in his posttrial motion. Nevertheless, the Supreme Court reviewed the issue under plain-error analysis and found that the error was de minimis and did not so affect the defendant's trial to rise to the level of plain error. In so doing, the court noted that the "plain-error analyses under Supreme Court Rules 451(c) and 615(a) are construed identically." *Durr, supra,* 830 N.E.2d at 534.

4. [5.29] Sufficiency of Objection — General Objections, Specific Objections, and Incorrect Specific Objections

In order to preserve claimed error for review, counsel must make an objection and state the precise grounds in support of the objection. An illustrative specific objection is, "Your Honor, I object to the question on the grounds that it is leading and argumentative." Stating a general objection, *i.e.,* "I object," without giving grounds in support of the objection, only preserves the issue of relevancy for review.

The primary test is whether the objection urged for the first time on appeal raises matters that opposing counsel could have corrected had the objection been made at trial. The rule is essentially one of fairness and was stated in *Johnson v. Bennett,* 395 Ill. 389, 69 N.E.2d 899, 903 – 904 (1946):

> **Specific objection to evidence must be made in all instances where the objection, if specifically pointed out, might be obviated or remedied. Such objection must be specific so as to afford the adverse party an opportunity to make correction. . . . However, a specific objection to the admission of evidence is unnecessary where it is manifest that the offered proof has no probative value whatever. The general objection raises the question of relevancy and materiality, only. [**Citation omitted.**]**

In other words, stating "I object" is the equivalent, for purposes of appellate review, to stating, "I object based upon lack of relevance."

In *Bradfield v. Illinois Central Gulf R.R.,* 115 Ill.2d 471, 505 N.E.2d 331, 333 – 334, 106 Ill.Dec. 25 (1987), the Illinois Supreme Court specifically held that a relevancy objection did not preserve for appeal other objections relating to evidence of a habit of the railroad of not blowing a whistle. On appeal, the railroad maintained that this habit evidence was inadmissible because plaintiff had not established that the railroad had such a habit. The Illinois Supreme Court refused to consider this argument because at trial the railroad had objected only on relevancy grounds.

The reviewing courts have consistently refused to consider specific objections that, though valid, were not made at trial. For example, in *People ex rel. Blackmon v. Brent,* 97 Ill.App.2d 438, 240 N.E.2d 255, 257 (1st Dist. 1968), the appellate court would not consider defendant's objection to the lack of foundation for the admission of a polygraph test when at trial the defendant made no foundation objection and only objected to the test because a copy was admitted instead of the original.

There are numerous cases holding likewise, including *Clifford-Jacobs Forging Co. v. Industrial Commission,* 19 Ill.2d 236, 166 N.E.2d 582, 586 – 587 (1960) (refusing to consider objection to form of hypothetical question to expert witness); *Johns-Manville Products Corp. v. Industrial Commission,* 78 Ill.2d 171, 399 N.E.2d 606, 610 – 611, 35 Ill.Dec. 540 (1979) (same); *Johnson v. Jackson,* 43 Ill.App.2d 251, 193 N.E.2d 485, 487 – 488 (1st Dist. 1963) (hearsay); *Central Steel & Wire Co. v. Coating Research Corp.,* 53 Ill.App.3d 943, 369 N.E.2d 140, 142 – 143, 11 Ill.Dec. 686 (1st Dist. 1977) (objection to lack of foundation to allow impeachment). *But see Alvarado v. Goepp,* 278 Ill.App.3d 494, 663 N.E.2d 63, 65, 215 Ill.Dec. 313 (1st Dist. 1996) (defendant's objection to habit testimony, phrased as "Objection, Judge. Relevancy, no foundation as to this particular case," was deemed sufficient to preserve the foundation issue).

Counsel must raise, at the trial, all specific grounds in support of his or her objection in order to preserve those grounds for appeal. Otherwise, counsel is precluded from urging on appeal any specific ground not stated at the trial. For instance, when no objection was made at trial about lack of testimony concerning the lighting conditions when photographs were taken, the objection could not be raised on appeal, even though counsel objected to admission of photographs on the grounds that carpeting had been changed. The straightforward rule is that "An objection to evidence on a specific ground constitutes a waiver of the right to object to the evidence on other grounds." *Bear v. Holiday Inns of America, Inc.,* 1 Ill.App.3d 786, 275 N.E.2d 457, 458 (2d Dist. 1971), quoting *Blackmon, supra,* 240 N.E.2d at 257.

An objection based on several grounds or involving several facts or a witness' testimony, one or more of which is untenable, may be overruled because the court is not bound to separate those parts of the objection that are untenable and those that are not. *First National Bank of Hayward, Wisconsin v. Gerry,* 195 Ill.App. 513, 520 (1st Dist. 1915).

On occasion, the trial attorney may feel that an entire subject of inquiry is objectionable but does not want to keep objecting to every question. Once an objection has been made and a ruling obtained, it is not always necessary to repeat the same objection to preserve the point for review when similar matters are repeated. *See Bruske v. Arnold,* 44 Ill.2d 132, 254 N.E.2d 453, 456 (1969). For example, in *O'Keefe v. Fitzpatrick,* 153 Ill.App.3d 384, 505 N.E.2d 1355, 1358, 106 Ill.Dec. 564 (2d Dist. 1987), the appellate court held that two objections to comments during closing argument suggesting provocation as a defense in a negligence action and renewal of the objections in a posttrial motion preserved the issue for appeal, despite the plaintiff's failure to object to two other references to provocation made during closing argument.

The safer practice, however, is to either stipulate with opposing counsel that the same objection will stand as to all similar testimony and argument or to obtain a statement from the court that it will not be necessary to renew the objection. Then, at the conclusion of that witness'

testimony, the objection should be renewed with a motion to strike all such testimony and instruct the jury to disregard it. If the testimony admitted over objection is sufficiently prejudicial, a motion for mistrial should be made. See §5.38 below.

Once a party's objection to evidence is sustained, he or she need not state every other valid objection to preserve them. In *Bafia v. City International Trucks, Inc.,* 258 Ill.App.3d 4, 629 N.E.2d 666, 670, 196 Ill.Dec. 121 (1st Dist. 1994), the trial court sustained a defendant's hearsay objection. On appeal, the defendant contended that the statement was properly excluded, not only because it was hearsay but also because the plaintiff had not established a sufficient foundation for the statement. However, the defendant had made no foundation objection at trial. The appellate court, nonetheless, stated that the defendant had not waived the foundation objection, noting that because the hearsay objection was sustained, the defendant "had no reason to continue to object or to add additional grounds for precluding the objectionable testimony." *Id.*

There is no waiver of an objection to testimony when, after the objection has been overruled, the objecting party introduces controverting evidence. *Fullerton v. Robson,* 61 Ill.App.3d 93, 377 N.E.2d 1044, 1049, 18 Ill.Dec. 408 (1st Dist. 1978). Indeed, once a court overrules an objection to the admission of evidence, counsel has the right to try the case in the manner the court decided was correct without waiving the objection asserting that the court was wrong. *Id.*

5. [5.30] The Timeliness of Objections and Moving To Strike Testimony

Counsel should object to a question he or she considers improper as soon as it is asked. Speculation on the nature of the answer is not permitted, and the failure to make a timely objection typically results in a waiver of the point for an appeal even if an objection is made later at the trial. *Sinclair v. Berlin,* 325 Ill.App.3d 458, 758 N.E.2d 442, 450, 259 Ill.Dec. 319 (1st Dist. 2001); *Goldberg v. Capitol Freight Lines, Ltd.,* 382 Ill. 283, 47 N.E.2d 67, 71 (1943).

If an overzealous witness answers before an opportunity is afforded for objection, the objection should be accompanied with a motion to strike the answer and an explanation that the answer was given before an objection to the question could be uttered. *See Bosel v. Marriott Corp.,* 65 Ill.App.3d 649, 382 N.E.2d 587, 591, 22 Ill.Dec. 267 (1st Dist. 1978); *McGraw v. Gavin,* 27 Ill.App.2d 62, 169 N.E.2d 171 (2d Dist. 1960) (abst.); *Quincy Gas & Electric Co. v. Baumann,* 203 Ill. 295, 67 N.E. 807, 809 (1903).

In some instances, the basis for an objection does not become apparent until the answer is given or until later in the testimony. Objection may then be made in the form of a motion to strike the testimony, and the issue is preserved for appeal if the motion is denied. In *Chicago, P. & St. L. Ry. v. Blume,* 137 Ill. 448, 27 N.E. 601 (1891), the court held that counsel should have moved to strike an improper answer to a proper question. *See also People v. Carson,* 341 Ill. 11, 173 N.E. 97, 99 (1930).

In *Louis F. Weinzelbaum, Inc. v. Abbell,* 49 Ill.App.2d 442, 200 N.E.2d 43 (1st Dist. 1964), on direct examination, a witness gave testimony regarding a conversation that appeared to be based on firsthand knowledge. During cross-examination, it became clear that the original testimony was based on inadmissible hearsay. The reviewing court ruled that the denial of the cross-examiner's motion to strike constituted reversible error, stating:

> **The fact of inadmissibility may not come to light until after or during crossexamination, or at a later stage of the case. In such circumstance a motion to strike will lie.** 200 N.E.2d at 47, citing *Sanitary District of Chicago v. McGuirl,* 86 Ill.App. 392 (1899).

The motion to strike must be made when the character of the objectionable testimony is apparent or as soon as it becomes apparent. Indeed, in *People v. Bean,* 17 Ill.App.3d 377, 308 N.E.2d 334, 337 – 338 (1st Dist. 1974), the trial court committed reversible error in granting a motion to strike long after the objectionable character of the testimony became apparent. *See also Levin v. Welsh Brothers Motor Service, Inc.,* 164 Ill.App.3d 640, 518 N.E.2d 205, 217, 115 Ill.Dec. 680 (1st Dist. 1987) (motion to strike expert's testimony as speculative and beyond his expertise made after both sides had rested held untimely).

A motion to strike should particularize the testimony to be stricken if the testimony contains some admissible material. Otherwise, the denial of the motion will be affirmed on appeal. *Sherman v. City of Springfield, Illinois,* 77 Ill.App.2d 195, 222 N.E.2d 62, 71 (4th Dist. 1966), quoting *Balfour v. Dohrn Transfer Co.,* 328 Ill.App. 163, 65 N.E.2d 624, 625 (3d Dist. 1946). Timely objections must also be made to all other matters in order to preserve claimed error, such as improper statements by opposing counsel in voir dire, opening statement, and closing argument.

6. [5.31] Motions To Strike Testimony and Instructing the Jury To Disregard

At the time it becomes apparent that previously admitted testimony should not have been admitted, the burden is on counsel to promptly object to the testimony, to move that it be stricken, and to move that the jury be instructed to disregard it. In the medical malpractice case *Netto v. Goldenberg,* 266 Ill.App.3d 174, 640 N.E.2d 948, 203 Ill.Dec. 798 (2d Dist. 1994), the defendant filed affirmative defenses of contributory negligence, contending that various members of the decedent's family were negligent in failing to seek second medical opinions and/or asking for a change of physician. The plaintiff's pretrial motion to strike the defenses was denied by the trial court, and evidence was presented throughout the trial pertinent to the defenses.

At the jury instruction conference, the trial court granted the plaintiff's motion for a directed verdict on the affirmative defenses, but the plaintiff failed to move to strike the irrelevant testimony or have a curative instruction read to the jury. On appeal, the court held that the plaintiff waived his objection to the testimony pertinent to the affirmative defenses, noting:

> **It became apparent that testimony concerning possible contributory negligence was irrelevant the moment the trial court granted plaintiff's motion for a directed verdict. Immediately following the court's ruling, the plaintiff should have moved to strike the previously admitted testimony. Having failed to do so, the plaintiff waived the alleged error and cannot now complain.** 640 N.E.2d at 952.

Thus, the plaintiff's counsel's failure to timely move for the striking of the adverse testimony the jury had already heard was a costly error.

7. [5.32] Evidence Admissible for Certain Purposes — Limiting Instructions

Certain evidence may be proffered and admissible for some purposes but otherwise objectionable. If the trial court indicates it will admit such evidence over objection, objecting counsel must immediately request that the court instruct the jury about the limited purpose for which the evidence may be considered. If the instruction is refused, error is thereby preserved for appeal.

In *Eizerman v. Behn,* 9 Ill.App.2d 263, 132 N.E.2d 788, 795 – 796 (1st Dist. 1956), the plaintiff offered impeaching evidence through a nonparty witness. The defense counsel objected, arguing that the evidence might also be construed as substantive evidence of the defendant's negligence, a purpose for which this type of impeaching testimony may not be used. The evidence was nevertheless admitted. On appeal, the defendant was held to have waived the point because he failed to request a limiting instruction, and the evidence was admissible for impeachment purposes:

> **It is a well-settled rule of law that evidence which is competent for one purpose does not become incompetent because the jury might improperly consider it in some other capacity for which it could not properly be admitted. The opponent of the evidence may, if he so wishes, ask for an instruction confining the evidence to its legitimate sphere; and if he fails to so act, he is deemed to have waived any objection he may have.** 132 N.E.2d at 796.

In *People ex rel. Schacht v. Main Insurance Co.,* 122 Ill.App.3d 826, 462 N.E.2d 670, 676, 78 Ill.Dec. 551 (1st Dist. 1984), an insurer failed to attempt to limit the trial court's consideration of evidence concerning the insurer's estimates of current consumers' claims reserve requirements. It was held that this constituted a waiver of any objection to the use of those estimates as general evidence. *See also Bofman v. Material Service Corp.,* 125 Ill.App.3d 1053, 466 N.E.2d 1064, 1071, 81 Ill.Dec. 262 (1st Dist. 1984) (limiting instruction waived due to failure to request one).

In *People v. Edwards,* 144 Ill.2d 108, 579 N.E.2d 336, 161 Ill.Dec. 788 (1991), *subsequent appeal sub nom. Edwards v. United States Department of Justice,* 43 F.3d 312 (7th Cir. 1994), the Illinois Supreme Court held that the defendant's failure to ask for a limiting instruction with respect to the State's use of a recorded conversation waived any objection to the use of the evidence. The court noted: "If the opponent of the evidence fails to ask for an instruction confining the evidence to its legitimate sphere, he is deemed to have waived any objection he may have." 579 N.E.2d at 361.

B. [5.33] Motions for Mistrial

There is another issue that faces counsel who successfully objects to evidence after the jury has heard or seen it. Counsel must decide whether to move that the court declare a mistrial on the grounds that his or her client's case has been so prejudiced that the client cannot receive a fair trial despite the court's favorable ruling on the objection and the court's instruction to disregard to the jury, if one was requested and given.

Many cases hold that by failing to move for a mistrial after receiving a favorable ruling on an objection, counsel waives the point for appeal. In *Schoolfield v. Witkowski,* 54 Ill.App.2d 111, 203 N.E.2d 460 (1st Dist. 1964), the trial judge sustained the appellant's objections to opposing counsel's remarks in closing argument. The reviewing court refused to consider the issue further, stating:

> **If the plaintiff was not satisfied with the trial court's ruling on her objections her proper course was to ask for a mistrial.** 203 N.E.2d at 465.

See also Andres v. Green, 7 Ill.App.2d 375, 129 N.E.2d 430, 434 (3d Dist. 1955) (plaintiffs' acceptance of remittiturs barred their right to argue on appeal that judgment should have been entered on original verdicts).

Generally, the only time an appellate court will review matters when objections were sustained but no motion for a mistrial was made is when a party was clearly deprived of a fair trial. *See Bale v. Chicago Junction Ry.,* 259 Ill. 476, 102 N.E. 808, 809 (1913); *Beery v. Breed,* 311 Ill.App. 469, 36 N.E.2d 591, 595 – 596 (2d Dist. 1941); *Khatib v. McDonald,* 87 Ill.App.3d 1087, 410 N.E.2d 266, 275, 43 Ill.Dec. 266 (1st Dist. 1980). See also §5.22 above.

Counsel should follow the same procedure in making a motion for a mistrial as for making objections. Essentially, the record must reflect that the motion was made and that the trial court ruled on the motion. Of course, in deciding whether to move for a mistrial, counsel must balance the need to preserve the error for review against the expense, delay, and other concerns that may result if a motion for a mistrial is granted.

C. Rulings on Objections

1. [5.34] Necessity for Rulings on Objections

When counsel objects, he or she must obtain a ruling from the court to preserve the point for appeal. In *Department of Public Works & Buildings v. Anastoplo,* 14 Ill.2d 216, 151 N.E.2d 337, 341 (1958), the court stated:

> [O]**bjection was interposed to certain of the remarks of counsel in his closing argument, but there was no ruling obtained from the court and the absence of such a ruling precludes review in this court.**

See also Feldscher v. E & B, Inc., 95 Ill.2d 360, 447 N.E.2d 1331, 1334, 69 Ill.Dec. 644 (1983) (plaintiff's objection to certain affidavits and unsworn statements waived because plaintiff had failed to obtain ruling on objection).

Likewise, in *In re Marriage of Kocher,* 282 Ill.App.3d 655, 668 N.E.2d 651, 655, 218 Ill.Dec. 167 (4th Dist. 1996), the defendant waived his objection to the trial court's consideration of his former wife's financial statement by failing to obtain the court's ruling on his objection. In short, if the judge ignores counsel's objection and it is an important one, counsel should respectfully insist on a ruling.

Moreover, the court may disregard objections that are made in an undertone or in such a low voice that they are inaudible to the court and the opposing counsel. *Quincy Gas & Electric Co. v. Baumann,* 203 Ill. 295, 67 N.E. 807, 809 (1903), *aff'g* 104 Ill.App. 600 (3d Dist. 1902). The burden is on the objecting party to make sure his or her objection is heard by the court and ruled upon.

2. [5.35] Reasons for Rulings on Objections

Counsel sometimes encounters the perplexing situation of a trial court that sustains an adversary's general objection to proffered testimony without giving any reasons for the ruling. The questioner, in such instances, is entitled to a statement by the court of its reason for the ruling, particularly if the objection relates to a point that could be corrected.

In *Wright v. Smith,* 82 Ill. 527 (1876), the plaintiff sought to recover certain property to which the defendants claimed an interest by virtue of a chattel mortgage. The court sustained a general objection to secondary proof of the mortgage that had been destroyed in a fire. The only apparent defect in proof was a failure to show that the mortgage had been acknowledged as provided by statute, but this was not mentioned by counsel in his objection or by the trial court in its ruling. On appeal, the Supreme Court held that it was reversible error to exclude this proof:

> **The record fails to show that any objection was taken in the court below to the mortgage on that ground, and the court, upon its ruling, stated no reason whatever for its exclusion of the testimony. Had the objection been in any way raised in the court below, either by the opposite party or intimation of the court, that there was a want of proof that the mortgage was acknowledged before the proper justice of the peace, the defect might have been readily supplied by further evidence.** 82 Ill. at 528.

See also Adelmann v. Elk River Lumber Co., 242 Minn. 388, 65 N.W.2d 661, 666 – 667 (1954); 88 C.J.S. *Trial* §244 (2001).

Counsel who does not comprehend the basis for an objection should tactfully request the court to explain its ruling. Counsel also should not overlook the "right" to a specific objection to his or her question. When the objection to the question is sustained, counsel should request that the objection be made specific. The following method is recommended:

If the court pleases, it is my understanding that counsel is required to make a specific objection so that I may have an opportunity to correct any error.

The purpose of the rule requiring objections to be reasonably specific is to enable the trial court to rule intelligently on the objections and to afford opposing counsel the opportunity to correct any defects in the question if possible.

3. [5.36] Reserved or Conditional Rulings on Objections and Moving To Strike Previously "Admitted" Evidence

In certain instances, the court, over the objection of counsel, will admit evidence conditionally on its being "connected up" later in the trial or will reserve ruling on an objection.

If no connecting evidence is subsequently introduced, counsel should move to strike the initial testimony and move for a mistrial, if appropriate. If and when the postponed evidence is presented, counsel should renew his or her objection and obtain a ruling if it appears that the connection is insufficient or the evidence inadmissible. Counsel should also move to strike the inadmissible evidence that the jury has heard and ask that the jury be instructed to disregard it. Be certain to obtain a ruling on all questions on which the judge has reserved ruling. See §5.16 above.

In *Village of Palatine v. Dahle,* 385 Ill. 621, 53 N.E.2d 608 (1944), the court permitted a witness to testify who the plaintiff contended was incompetent under the Dead-Man's Act, 735 ILCS 5/8-201. The court reserved ruling on the objection. In affirming a judgment for the defendant, the Supreme Court stated:

> **The court admitted the testimony subject to a subsequent determination of the question, but the objection was not renewed nor was any motion made to strike it. It must be now considered as properly in the record.** 53 N.E.2d at 610.

Thus, counsel must remember to obtain a ruling on all objections on which the court has reserved decision.

In *Isenhart v. Seibert,* 6 Ill.App.2d 220, 127 N.E.2d 469, 472 (4th Dist. 1955), the plaintiff promised to supply evidence to support a hypothetical question posed to an expert. He failed to do so, but the defendant did not move to strike the expert's answer to the hypothetical question. The point was considered waived by the reviewing court. *See also Gillespie v. Chrysler Motors Corp.,* 135 Ill.2d 363, 553 N.E.2d 291, 296, 142 Ill.Dec. 777 (1990) (holding that plaintiff waived any claim of error because he failed to renew his objection by timely motion to strike); *People v. Lamerson,* 190 Ill.App.3d 52, 545 N.E.2d 1025, 1030, 137 Ill.Dec. 264 (1st Dist. 1989) (defendant's failure to renew objection by moving to strike testimony regarding prior threat constituted waiver of objection).

In *Snelson v. Kamm,* 204 Ill.2d 1, 787 N.E.2d 796, 813 – 814, 272 Ill.Dec. 610 (2003), a medical malpractice action, counsel for the defendant physician contended that the trial court erroneously admitted into evidence a summary of the plaintiff's medical bills. Counsel for the physician had objected to only two bills contained within the summary. The trial court admitted the entire summary, indicating that the court and the parties would "work out the details of what gets back to [the jury] later." 787 N.E.2d at 814. The issue was not thereafter addressed, and the proffered exhibit was admitted in its entirety. The reviewing court held that any objections as to the medical bills were waived by counsel's failure to make "specific contemporary objections at trial so that any defect could have been cured." *Id.*

In *Sullivan-Coughlin v. Palos Country Club, Inc.,* 349 Ill.App.3d 553, 812 N.E.2d 496, 503 – 504, 285 Ill.Dec. 676 (1st Dist. 2004), a patron struck by a golf ball brought a personal injury action against the owner of a golf course. The trial court granted the plaintiff's motion in limine to exclude evidence of the plaintiff's blood alcohol level but indicated that it would "revisit" the issue at trial on a showing that the defendant could show intoxication. The reviewing court affirmed the exclusion of the blood alcohol evidence, indicating that "[t]he trial court here made

the interlocutory nature of its order to exclude blood-alcohol evidence known to defendant and invited defendant to revisit the issue at trial. Defendant failed to raise the issue again at trial by offering the evidence or requesting to make an offer of proof. The issue is waived." 812 N.E.2d at 504.

Counsel should keep a careful record of reserved and conditional evidentiary rulings. At the appropriate time, counsel must renew objections, move to strike, move for instructions that the jury disregard, and even move for a mistrial as the circumstances may require to preserve the record on appeal.

D. Effects of Rulings on Objections

1. [5.37] Overruled Objections

If an objection to a question is overruled and the witness answers, the record has been preserved for purposes of appeal or a new trial, assuming that the objection was proper in the first instance. Contrary to the practice of many senior attorneys, there is no need to make an "exception" if the objection is overruled. S.Ct. Rule 301.

Ordinarily, counsel objecting to a question must continuously restate the objection if questions subsequent to the overruled objection are of the same nature. However, frequently the trial court will accept counsel's statement that he or she has a "continuing objection to this line of testimony." Likewise, the appellate court may consider the propriety of subsequent questions even though no objection is made if it is apparent from the record that the trial judge, having once overruled the objection, would have persisted in ruling with regard to subsequent questions of the same nature. *See Fullerton v. Robson,* 61 Ill.App.3d 93, 377 N.E.2d 1044, 1048, 18 Ill.Dec. 408 (1st Dist. 1978).

In *Nave v. Rainbo Tire Service, Inc.,* 123 Ill.App.3d 585, 462 N.E.2d 620, 623 – 624, 78 Ill.Dec. 501 (2d Dist. 1984), the appellate court held that the plaintiff did not waive her objection even though she did not continue to object in the course of the trial when she had filed a motion in limine to exclude and had objected to the defense counsel's remarks during opening statement. *Nave* has been interpreted by one court to require at least one objection at the time the evidence is first referenced or the objection is waived, even if a motion in limine was previously presented. *Carlson v. City Construction Co.,* 239 Ill.App.3d 211, 606 N.E.2d 400, 418, 179 Ill.Dec. 568 (1st Dist. 1992). Similarly, in *O'Keefe v. Fitzpatrick,* 153 Ill.App.3d 384, 505 N.E.2d 1355, 1358, 106 Ill.Dec. 564 (2d Dist. 1987), the appellate court held that the plaintiff's two objections to two improper comments in closing argument and renewal of the objections in a posttrial motion sufficed to preserve the issue for review despite counsel's failure to object to two later improper comments in the closing argument. *See also Elliott v. Koch,* 200 Ill.App.3d 1, 558 N.E.2d 493, 506, 146 Ill.Dec. 530 (3d Dist. 1990) (finding plaintiff's motion in limine, which was denied, preserved issue for appellate consideration).

In *Jarke v. Jackson Products, Inc.,* 282 Ill.App.3d 292, 668 N.E.2d 46, 47 – 48, 217 Ill.Dec. 861 (1st Dist. 1996), the defendant's pretrial motion in limine to exclude certain expert testimony was denied, and the expert thereafter testified at trial as to the opinions sought to be barred. No objection was made to the expert's opinion when it was offered at trial. The defendant offered

what was described as a "belated objection" during trial, after the expert had concluded his testimony. The appellate court, nevertheless, held that the defendant's pretrial motion in limine and his objection were sufficient to preserve the issue for review, the court noting a conflict in decisional authority "regarding whether a party's failure to make an objection contemporaneously with the admission of testimony which had been the subject of a denied motion *in limine*, precludes him from appealing the denial of his motion." *Jarke, supra,* 668 N.E.2d at 48. Nevertheless, the only safe practice is to make a contemporaneous objection at the time the evidence is offered.

2. Sustained Objections

a. [5.38] Offer of Proof Required

If an objection to a question is sustained, interrogating counsel should make an "offer of proof" of the testimony the witness would have given had the witness been permitted to answer the question. The purpose of the offer of proof is to disclose the nature of the excluded testimony. See generally Jon R. Waltz, *The Offer of Proof,* 53 Chi.B.Rec. 299 (1972). In the absence of such a showing, the record ordinarily will not permit a reviewing court to determine whether the exclusion was improper and, if so, whether prejudicial error occurred.

In *People ex rel. Fahner v. Hedrich,* 108 Ill.App.3d 83, 438 N.E.2d 924, 930, 63 Ill.Dec. 782 (2d Dist. 1982), the appellate court affirmed the trial court's sustaining of the Attorney General's objection to a line of questioning in a consumer fraud case because the defendant had failed to make an adequate offer of proof. In *Piano v. Davison,* 157 Ill.App.3d 649, 510 N.E.2d 1066, 1079 – 1080, 110 Ill.Dec. 35 (1st Dist. 1987), the reviewing court approved the trial court's refusal, in a medical malpractice case, to permit the plaintiffs' experts to use medical treatises as substantive evidence because an inadequate offer of proof was made about the authoritativeness of proffered materials and about the actual expert testimony on the treatise. The court in *Miller v. Chicago Transit Authority,* 78 Ill.App.2d 375, 223 N.E.2d 323, 327 (1st Dist. 1966), held:

> **Just as the objection is the key to saving for review any error in admitting evidence, the offer of proof is the key to saving error in excluding evidence.** Quoting CLEARY AND GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §7.7 (2d ed. 1963).

See also Snelson v. Kamm, 204 Ill.2d 1, 787 N.E.2d 796, 808, 272 Ill.Dec. 610 (2003) (trial court's granting of plaintiff's motion in limine barring defendant from cross-examining plaintiff's expert regarding his relationship with professional witness referral agency waived absent adequate offer of proof).

As a consequence, unless special circumstances exist that excuse an offer of proof, the reviewing court will refuse to consider any claimed error arising from the exclusion of testimony if no offer of proof has been made. *Chicago City Ry. v. Carroll,* 206 Ill. 318, 68 N.E. 1087, 1091 (1903); *Ryan v. Ryan,* 321 Ill.App. 467, 53 N.E.2d 283, 285 (1st Dist. 1944); *Central Illinois Public Service Corp. v. Molinarolo,* 223 Ill.App.3d 471, 585 N.E.2d 199, 204, 165 Ill.Dec. 803 (5th Dist. 1992) (defendant made no offer of proof of parol evidence regarding his capacity as signatory to agreement and was deemed to have waived issue on review).

An offer of proof is unnecessary when the trial judge understands the character of the evidence and the nature of the objection to it. *Lindley v. St. Mary's Hospital,* 85 Ill.App.3d 559, 406 N.E.2d 952, 958, 40 Ill.Dec. 749 (5th Dist. 1980); *Allen & Korkowski & Associates v. Pettit,* 108 Ill.App.3d 384, 439 N.E.2d 102, 106, 64 Ill.Dec. 173 (4th Dist. 1982); *Scaggs v. Horton,* 85 Ill.App.3d 541, 411 N.E.2d 870, 874, 44 Ill.Dec. 504 (5th Dist. 1980). In *Wehde v. Regional Transportation Authority,* 237 Ill.App.3d 664, 604 N.E.2d 446, 460, 178 Ill.Dec. 190 (2d Dist. 1992), the absence of an offer of proof regarding the testimony of an expert disclosed less than 60 days prior to trial was held not to preclude review of the exclusion of his opinion testimony when the trial judge knew the character of the evidence and the nature of the objection.

In *In re Marriage of Suriano,* 324 Ill.App.3d 839, 756 N.E.2d 382, 391 – 392, 258 Ill.Dec. 400 (1st Dist. 2001), the appellate court held that the trial court was not required to accept a husband's offer of proof of his wife's repudiation of the parties' settlement agreement because the nature of the evidence was obvious. Even when an offer of proof is not necessary to preserve an issue for appeal, however, it may be needed to persuade the appellate court that an error was prejudicial. *Smith v. Black & Decker (U.S.), Inc.,* 272 Ill.App.3d 451, 650 N.E.2d 1108, 1114, 209 Ill.Dec. 135 (3d Dist. 1995) ("While an offer of proof may not be required in order to preserve the issue for review in this case, absent such an offer of proof we are not able to conclude that plaintiff was prejudiced by the trial court's ruling.").

This same rule applies to documentary evidence. If the trial court refuses to admit a document in evidence, counsel should describe the excluded document in detail for the record or ask that it be incorporated into the record. *Federal Mutual Insurance Co. v. Pense,* 84 Ill.App.3d 313, 405 N.E.2d 368, 372 – 373, 39 Ill.Dec. 615 (5th Dist. 1980); *Baldridge v. Department of Registration & Education,* 52 Ill.App.3d 568, 367 N.E.2d 95, 100, 9 Ill.Dec. 661 (1st Dist. 1977).

When an attorney wishes to elicit evidence that the court has already ruled is inadmissible, the attorney should advise the court of the fact that he or she wishes to elicit from the witness. See 5 Francis X. Busch, LAW AND TACTICS IN JURY TRIALS, p. 330 (Encyclopedia ed. 1959 – 1963). Generally, the trial judge is required to permit counsel to make such an offer of proof. "[I]t is error for the trial court to refuse an opportunity to counsel to state what he proposes to prove by the evidence offered." *Blazina v. Blazina,* 42 Ill.App.3d 159, 356 N.E.2d 164, 170, 1 Ill.Dec. 164 (2d Dist. 1976). A lawyer has a right to have the record show what occurred before the court. *In re Estate of Undziakiewicz,* 54 Ill.App.2d 382, 203 N.E.2d 434, 436 (1st Dist. 1964). However, there are exceptions to this rule as well. *People v. Richmond,* 201 Ill.App.3d 130, 559 N.E.2d 302, 307, 147 Ill.Dec. 302 (4th Dist. 1990) (refusal of offer of proof is not error if suggested testimony is not relevant).

Often, an offer of proof is impossible when cross-examining a witness since "[t]he cross-examination of a witness is necessarily exploratory and the attorney often cannot know in advance what facts may be elicited on cross-examination." *People v. Kellas,* 72 Ill.App.3d 445, 389 N.E.2d 1382, 1390, 28 Ill.Dec. 9 (1st Dist. 1979). Thus, "an offer of proof is not required when a witness is being cross-examined and the cross-examination is erroneously proscribed." *Id.* Out of an abundance of caution, an attorney should make an offer of proof even when cross-examining a witness if the attorney knows the facts that will be elicited on cross-examination (*e.g.,* when the witness has been previously deposed and asked a similar question).

b. [5.39] When an Offer of Proof Should Be Made

An offer of proof should be made only after the court has sustained an objection to a question to a witness or to a proffered exhibit. Counsel should not commence an offer of proof before an objection is sustained because of preliminary or in camera remarks by which the court has indicated it will refuse certain testimony. The Illinois Supreme Court stated in *Chicago City Ry. v. Carroll,* 206 Ill. 318, 68 N.E. 1087, 1091 (1903):

> [Counsel] **should have at least put a witness upon the stand, and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question, and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked.**

See also Harman v. Indian Grave Drainage District, 217 Ill.App. 502, 509 – 510 (3d Dist. 1920). In other words, counsel must present as much evidence as the trial court will allow and, when prevented from going further, make his or her offer of proof.

c. [5.40] Presence of Jury for an Offer of Proof

If the case is being tried without a jury, counsel may make an offer of proof on the record as part of the regular proceedings. However, if the case is being tried with a jury, opposing counsel should insist that the offer of proof be made out of the jury's presence so that the matters sought to be excluded will not "waft into the jury box." Although it has been held that reversible error did not occur when the court permitted an offer in the jury's presence, the preferred practice is clearly to the contrary. *See Henrietta Coal Co. v. Campbell,* 211 Ill. 216, 71 N.E. 863, 867 – 868 (1904); *Crystal Lake Park District v. Consumers Co.,* 313 Ill. 395, 145 N.E. 215, 219 (1924).

Actual practice varies on this procedure. Some judges will excuse the jury so that the offer can be made in the courtroom, others will retire to chambers for the offer to be made there, and some will require counsel to approach the bench so the offer will be made out of the jury's hearing, an unsatisfactory and awkward procedure. If the jury is to be excluded, the court will sometimes have the offer made after the witness' testimony has otherwise been concluded.

Whenever the offer of proof is made, counsel making the offer should be certain that the offer is made in the presence of the court reporter and on the record. The failure to do so will likely prove disastrous if an appeal depends on the offer.

d. [5.41] The Proper Form of the Offer of Proof

Once the objection to a question or an exhibit has been sustained, the form of the offer of proof should be considered. The offer could be made by having the witness answer the disputed question, or counsel could give a narrative statement of what the witness would say if permitted to answer. The Federal Rules of Evidence explicitly state that the trial judge may direct the making of an offer of proof in a question-and-answer form. Fed.R.Evid. 103(c).

In *Miller v. Chicago Transit Authority,* 78 Ill.App.2d 375, 223 N.E.2d 323, 325 n.1. (1st Dist. 1966), the First District stated a preference for a formal offer of proof, *i.e.,* through examination of witnesses (outside the jury's presence, if there is a jury):

> **Too frequently a lawyer may, though in good faith, misstate or overstate what the testimony of his witnesses would be when actually sworn and submitted to specific questioning and cross-examination. From the point of view of a reviewing court, it would seem that the true purpose of an offer of proof is accomplished far better when the offer is presented formally.**

However, some trial judges resist this procedure in an effort to move proceedings forward more quickly.

In *Hession v. Liberty Asphalt Products, Inc.,* 93 Ill.App.2d 65, 235 N.E.2d 17, 20 – 21 (2d Dist. 1968), the court stated:

> **To some extent, the requisite formality of an offer of proof will depend upon the circumstances of the particular case. Where it is obvious that the witness is competent to testify to a fact, and it is obvious what his testimony will be if he is permitted to give it, a brief statement by counsel may suffice.**

In *State Farm General Insurance Co. v. Best in West Foods, Inc.,* 282 Ill.App.3d 470, 667 N.E.2d 1340, 1348 – 1349, 217 Ill.Dec. 764 (1st Dist. 1996), a statement by counsel of what the defendant store manager would have testified to as to the value of store inventory was deemed to be a sufficiently specific offer of proof.

In *People v. Peeples,* 155 Ill.2d 422, 616 N.E.2d 294, 310, 186 Ill.Dec. 341 (1993), the Illinois Supreme Court offered the following guidelines regarding the requisite specificity for an offer of proof:

> **Where it is not clear what a witness would say, or what his basis would be for saying it, the offer of proof must be considerably detailed and specific. A reviewing court can thereby know what was excluded and determine whether the exclusion was proper. . . .**
>
> **However, an offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced, or where the question itself and the circumstances surrounding it show the purpose and materiality of the evidence. [**Citations omitted.**]**

See also Dillon v. Evanston Hospital, 199 Ill.2d 483, 771 N.E.2d 357, 365, 264 Ill.Dec. 653 (2002) (when trial court understood that defendant's expert would testify to standard of care, offer of proof held not necessary to preserve issue on review).

In *Doe v. Lutz,* 281 Ill.App.3d 630, 668 N.E.2d 564, 570, 218 Ill.Dec. 80 (1st Dist. 1996), an offer of proof was made by the plaintiffs who alleged abuse of their son by a school principal and priest. The offer was of newly discovered rebuttal testimony regarding one defendant's poor

reputation for truthfulness and abusiveness to children. The appellate court found the offer to be insufficient and too vague to enable the court to determine whether the evidence sought to be admitted was inadmissible hearsay or admissible evidence of reputation. Thus, the issue was deemed waived.

The court in *Austin Liquor Mart, Inc. v. Department of Revenue,* 18 Ill.App.3d 894, 310 N.E.2d 719, 728 (1st Dist. 1974), held that an offer of proof that consisted of counsel's narrative summarizing the testimony of witnesses was totally improper as to form and would not be considered on appeal. *See also Hession, supra; Scaggs v. Horton,* 85 Ill.App.3d 541, 411 N.E.2d 870, 874, 44 Ill.Dec. 504 (5th Dist. 1980); *Yamada v. Hilton Hotel Corp.,* 60 Ill.App.3d 101, 376 N.E.2d 227, 235, 17 Ill.Dec. 228 (1st Dist. 1977); *In re Marriage of Miller,* 359 Ill.App.3d 659, 834 N.E.2d 578, 581 – 582, 296 Ill.Dec. 21 (4th Dist. 2005), *vacated, remanded sub nom. Miller v. Miller,* 217 Ill.2d 564, 838 N.E.2d 4, 297 Ill.Dec. 517 (2005) (discussing possibility of informal offer of proof).

In any event, opposing counsel should request that the offer of proof be made by examination of the witness. See 5 Francis X. Busch, LAW AND TACTICS IN JURY TRIALS, p. 332 (Encyclopedia ed. 1959 – 1963). Counsel should similarly request the right to cross-examine the witness on the offer if counsel believes that the thrust of the offer can be weakened. If the reviewing court believes the proffered testimony should have been permitted, it still may hold that reversible or prejudicial error did not occur.

If an offer of proof contains inadmissible as well as admissible evidence, the whole offer may be rejected. In *Harman v. Indian Grave Drainage District,* 217 Ill.App. 502, 509 (3d Dist. 1920), counsel offered to prove "that after the plaintiffs had furnished the complete plans and profiles that they were accepted by the defendant and paid for and that the various monthly payments amounted in the aggregate to $4,969.90." The trial judge rejected the offer. *Id.* The appellate court affirmed the trial court, holding that while that portion of the offer concerning payments was proper, reference to "accepted" was an inadmissible conclusion. The appellate court stated: "When an offer of proof embraces evidence, a part of which is inadmissible, the whole offer may be rejected." 217 Ill.App. at 510. *See also People v. Robinson,* 56 Ill.App.3d 832, 371 N.E.2d 1170, 1174, 14 Ill.Dec. 117 (5th Dist. 1977).

After an objection to testimony has been sustained, counsel should consider stating, "I now offer to prove by the witness, John Doe, presently on the witness stand. . . ." Next, counsel should have the witness state one specific fact and request the court to rule on the offer to prove that fact. Counsel should make a similar offer as to each of the other facts intended to be proved by that witness. Likewise, if the trial court will not allow the witness to testify, counsel should make a representation as to each fact and seek a ruling on each fact independently.

Counsel making the offer should always state all purposes for which the offer is being made. If the reasons for the offer in the trial court do not justify admission, the reviewing court generally will not consider additional reasons on appeal even if they are correct. *Hairgrove v. City of Jacksonville,* 366 Ill. 163, 8 N.E.2d 187, 196 (1937), *superseded on other grounds by rule as stated in Dowsett v. City of East Moline,* 8 Ill.2d 560, 134 N.E.2d 793, 797 (1956). *See also Waechter v. Carson Pirie Scott & Co.,* 170 Ill.App.3d 370, 523 N.E. 2d 1348, 1351, 120 Ill.Dec. 437 (2d Dist. 1988).

Counsel should also state for the record when the offer of proof begins and when it is concluded, particularly if made before a witness' testimony ends, so that the record will show the resumption of regular evidence. Some commentators believe the procedure of having the witness answer the questions counsel would ask, if the evidence were admissible, is too strict and time-consuming a procedure. CLEARY AND GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §103.7. However, in light of the strict rulings of many cases, it is the only safe procedure available to counsel.

e. [5.42] Sufficiency of the Offer of Proof

An offer of proof must demonstrate that the excluded testimony represents admissible, relevant evidence. One court has stated that an offer of proof must show what the expected testimony will be, by whom or how it will be made, and what its purpose will be. *Simon v. Plotkin,* 50 Ill.App.3d 603, 365 N.E.2d 1022, 1025, 8 Ill.Dec. 636 (1st Dist. 1977). The trial judge can properly reject any offer that is conclusory in nature or not sufficiently particular. These defects often arise when counsel makes the offer through a narrative statement of the witness' anticipated testimony.

In *Martin v. Hertz,* 224 Ill. 84, 79 N.E. 558, 559 (1906), the Illinois Supreme Court disapproved, as conclusory, an offer to prove "by the witness that the firm of Janes Bros. & Co. was insolvent." The court held:

> [T]**he offer to prove insolvency is an offer to prove a mere conclusion. . . . The offer should be to prove facts tending to show insolvency, that the court may see whether or not the facts offered in proof have any relevancy to the question.** *Id.*

In *Lucas v. Beebe,* 88 Ill. 427, 430 (1878), the court also disapproved an offer to prove "there was no consideration for the bond," stating:

> **The offer was general, not specifying what the witness would state, or the specific facts he could prove by the witness. In such a case, the offer should be, to prove facts that would show a want of, or a total or partial failure of, consideration — not as the offer was made here, to prove a mere conclusion of law.**

Counsel may avoid this problem by making an offer through actual questioning of the witness, as described, as counsel will be required to ask questions and elicit answers that are factual and detailed rather than conclusory. *See Hession v. Liberty Asphalt Products, Inc.,* 93 Ill.App.2d 65, 235 N.E.2d 17, 21 (2d Dist. 1968).

f. [5.43] Objections to the Offer of Proof

Opposing counsel should state his or her objections to the offer of proof. The trial judge may have second thoughts regarding exclusion of evidence or testimony after hearing the nature of the offer of proof. Therefore, opposing counsel's forceful restatement of objections may impel the judge to persevere in his or her initial ruling. *See Miller v. Chicago Transit Authority,* 78 Ill.App.2d 375, 223 N.E.2d 323, 326 (1st Dist. 1966).

The party who successfully objects to an offer of proof cannot, as appellee, urge objections not raised in the trial court if they relate to matters that could have been corrected or obviated at the trial. *Moren v. Samuel M. Langston Co.,* 96 Ill.App.2d 133, 237 N.E.2d 759, 766 (1st Dist. 1968). This means counsel should state all grounds for objecting at the time the offer of proof is to be made.

E. [5.44] The Necessity of a Posttrial Motion

Counsel should be certain to bring a posttrial motion addressing any errors made by the trial court, particularly in jury cases. In *Johnson v. Transport International Pool, Inc.,* 345 Ill.App.3d 471, 802 N.E.2d 1225, 1226, 280 Ill.Dec. 704 (1st Dist. 2003), the reviewing court held that when a party fails to file a posttrial motion following entry of judgment on a jury verdict, the party forfeits appellate review of all waivable issues. See 735 ILCS 5/2-1202; S.Ct. Rules 366(b)(2)(iii), 366(b)(3)(ii).

Although the *Johnson* court found that it was not precluded from considering the appeal, it nevertheless held that "[t]he alleged errors in rulings on evidence and instructions do not implicate concerns for potential deterioration of the integrity and reputation of the judicial process . . . [and] [t]he interests of justice do not demand full analysis of the procedurally defaulted issues." [Citations omitted.] 802 N.E.2d at 1228. Accordingly, it is at the very least perilous for an attorney to fail to bring a posttrial motion prior to pursuing an appeal.

See also People v. Enoch, 122 Ill.2d 176, 522 N.E.2d 1124, 1129 – 1132, 119 Ill.Dec. 265 (1988) (failure to raise issue at trial and in posttrial motion constitutes waiver of issue absent plain error); *Doe v. Lutz,* 281 Ill.App.3d 630, 668 N.E.2d 564, 571, 218 Ill.Dec. 80 (1st Dist. 1996) ("plaintiffs have waived review by failing to include [the] alleged error in their post-trial motion").

F. Tactical Considerations

1. [5.45] When To Object or Move for a Mistrial

Although technical rules require that objections be made in certain ways at certain times, experienced trial counsel try cases in vastly different but effective manners. Some lawyers who are exceedingly technical make elaborate and detailed presentations and attempt to hold their opponents to the same standards by constantly objecting and moving for mistrials. Others take a more relaxed approach and make the presentation only as detailed and technical as the trial judge requires and object infrequently. Deciding when to object and how to object is often a tactical decision.

Experienced trial attorneys often argue that (a) a jury is interested in hearing the evidence, (b) objections interfere with the jury's ability to clearly hear the evidence, and (c) objections often confuse the jury. Consistent therewith, they contend that repeated objections of a technical and immaterial nature will serve only to prejudice the jury, and even the trial judge, against the objecting counsel. Worse yet, the argument often goes, if opposing counsel is competent, he or she will overcome the effect of these objections, especially when they relate to foundation for

conversations and documents and to the form of questions. Therefore, counsel should object only when the matter involved affects the substantial rights of the client or will have a direct bearing on the evidentiary course of the trial.

Some attorneys believe counsel's approach should be conservative when his or her opponent is inexperienced or "stumbling." They fear a jury will often side with the inexperienced lawyer if it feels that the objecting counsel is taking advantage of an opponent with hyper-technical and repeated objections. Others argue that in such a situation key evidence may be kept out, and holding one's opponent to the black letter rules is therefore appropriate. Of course, counsel must exercise discretion in these situations, particularly if an opponent is seeking to curry the jury's favor with feigned inexperience and inability.

Conversely, other lawyers maintain that counsel should not hesitate to object when the situation demands, even if counsel must object continuously in order to preserve error. Indeed, it is argued that a jury will sometimes side with counsel whose objections are overruled if counsel makes the reasons for the position clear and it appears the judge is being unfair. Still, this is the minority view among veteran trial attorneys.

Deciding when to move for a mistrial can also be difficult. If the motion is denied, counsel has clearly preserved his or her record. However, if the motion is granted, his or her client must invest the time, effort, and expense necessary to begin anew. Thus, if a trial seems to be going well, trial attorneys often will not move for a mistrial if they think the motion might be granted. Such tactical decisions are matters of judgment for which there are no hard-and-fast rules. See also §5.32 above.

2. [5.46] Manner of Objecting

Counsel should make the reasons for objections understandable to the jury and the trial judge. This approach will "soften" the effect of the objections on the jury and often will help impress the jury with counsel's theory of the case. This result will be attained if counsel particularizes the grounds for objections as the law requires. See §5.23 above.

However, counsel may not go as far as to use argument in support of his or her objections as a means to bring inadmissible or prejudicial matters to the jury's attention. If opposing counsel engages in such conduct, one should ask that the jury be excused and move that the court direct opposing counsel to stop engaging in such conduct.

Objections should also be made in a forthright and clear manner. The jury may well conclude that objections made in a weak or incomprehensible way reflect counsel's own disbelief in the cause and that counsel is objecting merely "to hide the truth." Stating objections with confidence will often have a positive effect on both the jury and the court.

Finally, if counsel, after having had an objection overruled in the jury's presence, sincerely believes the judge would rule otherwise if more authority was presented, counsel should, in the jury's absence, restate his or her position to the court. In this way, if the court again overrules the objection, counsel's position will not be further weakened in front of the jury.

3. [5.47] Objections During Opening Statements and Closing Arguments

Opening statements consist of statements by counsel of his or her expectations for “what the evidence will show.” The most common misconduct by counsel in opening statements is to “argue” the case. The court will usually sustain objections if counsel persists in “argument.” However, because opposing statements are the jury’s first real opportunity to learn about the case, it will usually resent continuous objections, and counsel must be cautious in making these types of objections.

If opposing counsel argues evidence that is inadmissible or otherwise exceeds what is appropriate, counsel should object to protect his or her record on appeal. Common objections in opening statements include (a) argumentative (because arguing in opening statements is improper), (b) referring to inadmissible evidence, (c) giving personal opinions, and (d) discussing the opposition’s evidence. See Thomas A. Mauet, TRIAL TECHNIQUES §10.6 (7th ed. 2007).

Counsel is traditionally given very wide latitude in the closing argument, and trial judges are not inclined to sustain objections. However, if counsel’s argument is based on blatant appeals to sympathy or prejudice or is repeatedly not based on evidence or inferences fairly drawn from it, opposing counsel must take a firm stand with proper objections to protect the client’s cause and preserve the point for appeal. *Id.*

The temptation is to refrain from making objections during opening statements or closing arguments because they are unlikely to be sustained, and, attorneys fear, juries will think ill of counsel for making objections the court overrules. These concerns must be balanced against the fact that opposing counsel can do tremendous damage in both an opening and a closing if allowed to cross the bounds of proper advocacy. Accordingly, counsel must be prepared to object if the situation requires it.