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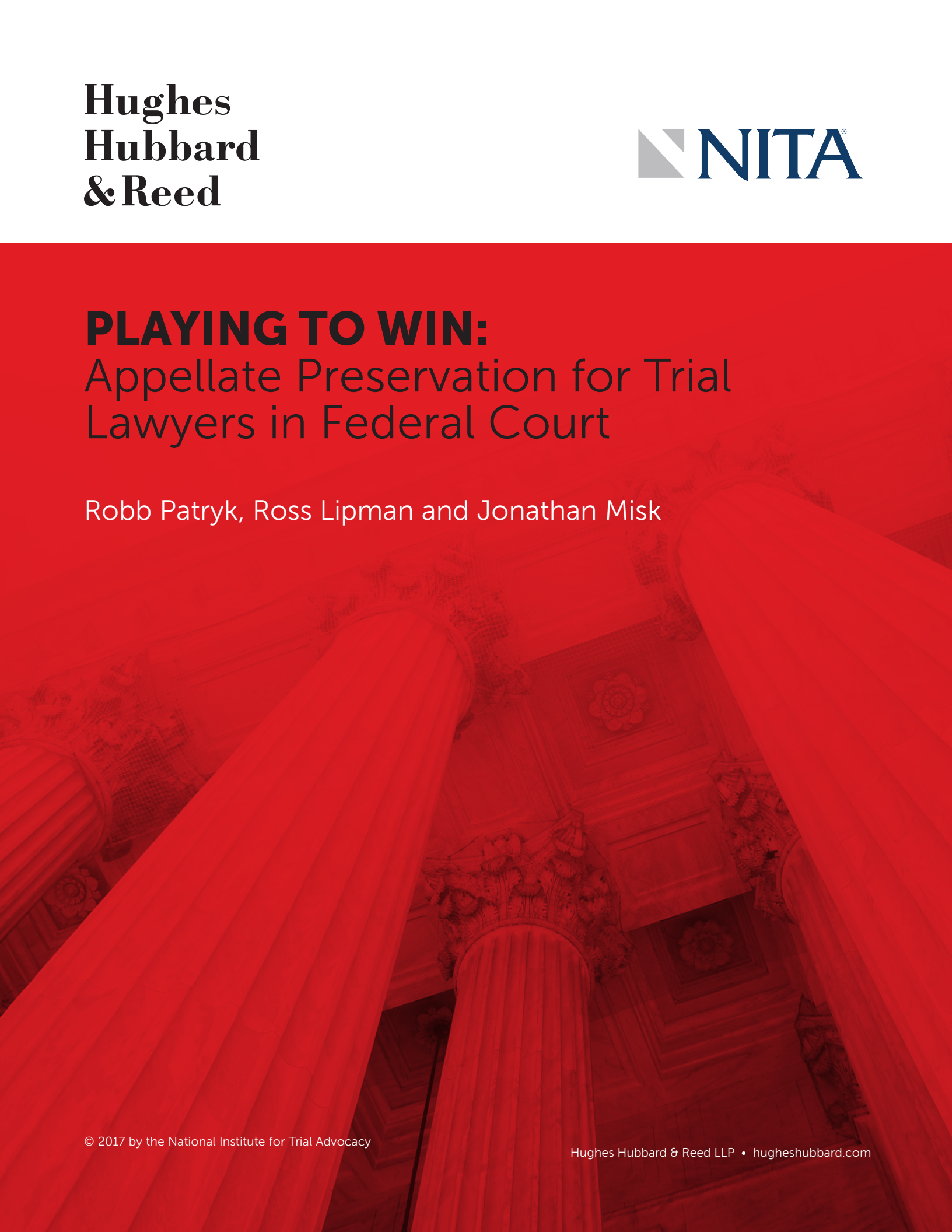
PLAYING TO WIN:
Appellate Preservation for Trial Lawyers in Federal Court

Robb Patryk, Ross Lipman and Jonathan Misk



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PLAYING TO WIN

APPELLATE PRESERVATION FOR TRIAL LAWYERS IN FEDERAL COURT

Trial lawyers of course play to win. But trials are inherently subject to many variables outside the control of counsel—including, among others, the judge and her evidentiary rulings, the composition of the jury, and witnesses' delivery in the courtroom. Predicting the outcome of any trial, therefore, is generally a fool's errand. Recognizing that even under the best of circumstances there is never a guarantee of success, trial lawyers representing either plaintiffs or defendants must do more than just present what they regard as their best, winning case. From opening statements through closing arguments, they must also have one eye on the possible need for an appeal and try the case with a strategic view to placing themselves in the best possible position for seeking reversal of an adverse verdict.

Imagine that after spending years in discovery and pretrial motion practice to develop the facts fully, after preparing meticulously for a jury trial, after making in limine motions to obtain rulings on important evidentiary issues in advance of trial, after intensively scrutinizing the prospective jurors during voir dire, after putting on a case that you are confident was the optimal presentation of the evidence, and having succeeded in avoiding any major surprises during the trial, the jury nevertheless returns an unfavorable verdict. Imagine further that after spending months to prepare motions for judgment as a matter of law and for a new trial, the trial court denies the motions and enters judgment on the adverse verdict. Finally, imagine that after perfecting an appeal, preparing appellate briefs, and presenting oral argument to the panel of judges, the appellate court upholds the lower court judgment—not because it found the appellee's arguments more persuasive, but because it never reached the merits of the appellant's case. The reason: because points of error during trial—including, for example, rulings on evidentiary objections, and improper arguments by opposing counsel—were not correctly preserved for appeal.

As even a cursory review of appellate court decisions will reveal, this outcome is far from uncommon. Unless a point of error has been properly preserved, it will not be considered by an appellate court. As trial lawyers who know all too well the delicate balance between playing to win and protecting the record for appeal, we appreciate the tactical considerations that sometimes stop lawyers from interposing timely objections. But we believe strongly that every trial lawyer should be prepared to protect the record for appeal and to make such tactical decisions with full appreciation of the likely appellate consequences. Accordingly, in this article we first address the fundamental principle of preservation: that an appellate court will not consider an issue, argument, or objection that was not first raised in the trial court. Second, we address the corollary requirements for presenting points of error in the trial court, including the need to make contemporaneous and specific objections, create a written record of the objections, get clear and definitive rulings on objections, and avoid invited error. Third, we discuss the procedural mechanisms for satisfying these requirements in the different phases of jury trials—jury selection and voir dire, opening statements, presentation of evidence, and closing arguments.

General Rules of Preservation

It is a uniform principle of American law that with rare exceptions, appellate courts will not review points of error unless trial counsel first raised them before the trial judge.

> It requires no citation of authority to say that, except when we invoke the "plain error doctrine," which rarely applies in civil cases, we do not consider arguments raised for the first time on appeal. A mere recitation of the underlying facts, furthermore, is insufficient to preserve an argument; the argument itself must have been made below.[1]

The reason is that the lower court must be given an opportunity to avoid or correct a ruling or other action alleged to be in error and thereby (at least potentially) avoid the need for reversal and retrial.[2]

Not only is raising a point of error or objection before the trial judge a prerequisite to appellate consideration of that point, several corollary requirements govern how errors and objections must be presented in the trial court. Failure by trial counsel to comply with these requirements can be just as fatal to appellate consideration as failing to raise the error or objection in the first place. There are seven principal requirements.

First, timeliness is the most important consideration in assignment of error: the complaining party must object *at the time the error occurs*. Federal Rule of Civil Procedure 46 states the general principle that "[w]hen the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection." As explained in greater detail below, the correct procedures regarding contemporaneous objections depend on the phase of trial in which a party elects to assign error.

Second, objections must also be specific. Trial judges cannot rule intelligently on an objection—and a judge's ruling cannot be meaningfully reviewed by an appellate court—unless trial counsel states the exact basis of the objection. For this reason, the objecting party must state with specificity both the legal basis for the objection and the target of the objection.

Third, the basis for the objection raised at trial must be identical to the issue presented on appeal: even if an objection is timely and specific, it does not preserve appeal of the assigned error on any and all possible legal grounds. Rather, the legal bases for an objection that may be

1. *Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011); *see also, e.g.*, *Slater v. Energy Serv. Grp. Int'l Inc.*, 634 F.3d 1326, 1332 (11th Cir. 2011) ("Appellate courts generally will not consider a legal issue that was not presented to the trial court.").

2. *See, e.g.*, *Oxford Furniture Co. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118, 1128–29 (11th Cir. 1993) ("Requiring timely objection prohibits counsel from 'sandbagging' the court by remaining silent and then, if the result is unsatisfactory, claiming error.") (citation omitted).

considered by an appellate court are limited to those raised at trial.[3] Likewise, if there are multiple grounds for objection, each one must be specifically recited to the trial judge.[4]

Fourth, any assignment of error must appear in the record of the proceedings so that it can be reviewed on appeal.[5] Likewise, the ruling of the trial court must be reflected in the record. This consideration comes into play when the judge makes a ruling in chambers outside the presence of a court reporter—which sometimes occurs during voir dire. It is essential that trial counsel make every effort to ensure that each argument, objection, offer of proof, proposed jury instruction, proposed verdict form, and ruling by the judge, is captured in the transcribed record.

Fifth, the record must include a definitive ruling by the trial judge: appellate courts will not review an objection absent a clear indication of whether and how the lower court resolved the issue.[6] The objecting party has the obligation to insist on a ruling.[7] It is the objecting party's responsibility to request the judge to state for the record his ruling in a clear and definitive manner.

Sixth, in multi-party cases, an objection by one party generally does not preserve the issue for appeal by other similarly aligned parties.[8] However, it is within the authority of trial judges to accept an objection by one party as an objection by all similarly aligned parties, thereby obviating the need to repeat the same objection.[9] It is often advisable to seek such a stipulation from opposing counsel, and approval by the trial judge, at the outset of the trial. Even then, in some instances there may be a question whether co-parties should make separate objections—for

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3. *See, e.g.*, *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997) (objection to admission of documents on relevance grounds did not preserve for appeal an objection based on lack of trustworthiness); *Judd v. Rodman*, 105 F.3d 1339, 1342 (11th Cir. 1997) (objection of evidence regarding plaintiff's breast augmentation on grounds of relevance did not preserve for appeal an objection that the evidence was inadmissible as prior sexual history).

4. *Formby v. Farmers & Merchants Bank*, 904 F.2d 627, 633 n.10 (11th Cir. 1990) ("Under Rule 51, a party must explicitly state each ground for his objection—the fact that a party may object to the sufficiency of the evidence supporting a particular claim does not preserve other objections concerning the determination of that claim.").

5. *See, e.g.*, FED. R. CIV. P. 51(c)(1) ("A party who objects to an instruction or the failure to give an instruction must do so on the record."); FED. R. EVID. 103(a) (a party preserves a claim of error to a ruling admitting evidence if the party timely objects "on the record").

6. *See Duke v. Allen*, 641 F.3d 1289, 1293 (11th Cir. 2011) (oral motion by defense counsel, asserting that prosecutor improperly pointed at defendant during closing, did not preserve point for appeal when the judge neither commented nor ruled on the motion).

7. *U.S. v. Jackson*, 485 F.2d 300, 302–03 (7th Cir. 1973) (where defense counsel requested that witness on cross-examination be instructed not to assert that the defendant was being charged with a crime, but the focus of colloquy between the judge and defense counsel was whether such testimony could be excluded on redirect examination, there was no definitive ruling for appellate review).

8. *See, e.g.*, *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1533 (11th Cir. 1987) ("One may not rely on the objections made by co-parties to the action, but, rather must expressly adopt a co-party's objection as his own.").

9. *See, e.g.*, *U.S. v. Gonzales*, 940 F.2d 1413, 1420 n.13 (11th Cir. 1991) ("[T]he record shows that . . . the rule at trial in this case was that any objection by one defendant was presumed to be joined in by all defendants unless they specifically exempted themselves from that objection. [Thus,] [t]here was no requirement that each defendant make his own objection.").

example, when one defendant's objection is relevant to that defendant alone. In such cases, a court may consider the objection as applicable only to that defendant.[10]

Finally, an appellate court will not review a claim of error by the trial judge if the complaining party "invited" the error.[11] For example, a party requesting a particular jury instruction may not later contend on appeal that it was error for the judge to give that instruction.[12]

10. *See U.S. v. Allen*, 274 F. App'x 811, 820 n.3 (11th Cir. 2008) (stating, but not deciding the issue, that notwithstanding agreement that an objection by one defendant would be considered an objection by all, it is "arguable" whether an objection made by one criminal defendant to testimony regarding that defendant's prior wrongs would apply to testimony by the same witness regarding a co-defendant's prior wrongs).

11. *See Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1213 (11th Cir. 2011) ("The invited error doctrine stands for the common sense proposition that someone who invites the court down the primrose path to error should not be heard to complain that the court accepted its invitation and went down that path."); *Foster Poultry Farms and Mohawk Packing Co. v. Liquid Air Corp. (In re Carbon Dioxide Indus. Antitrust Litigation)*, 229 F.3d 1321, 1327 (11th Cir. 2000) ("It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party.").

12. *See Wood v. President and Trustees of Spring Hill Coll.*, 978 F.2d 1214, 1223 (11th Cir. 1992) ("Federal courts generally will not find that a particular instruction constitutes plain error if the objecting party invited the alleged error by requesting the substance of the instruction given.").

JURY SELECTION AND VOIR DIRE

Juror Challenges

In federal courts, jurors may be challenged on three grounds: 1) "for-cause," i.e., failure to meet the statutory qualifications as set forth in the Jury Selection and Service Act ("JSSA"); 2) "for-favor" challenge based on juror partiality;[13] and 3) through a peremptory challenge. JSSA provides that "all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."[14] Furthermore, "[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status."[15] JSSA deems all persons to be qualified to serve as jurors, unless the person is 1) not a U.S. citizen eighteen years or older who has resided in the judicial district for one year; 2) unable to read, write, and understand the English language with a degree of proficiency to fill out satisfactorily the juror questionnaire; 3) unable to speak English; 4) incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or 5) has a charge pending against him for the commission of, or has been convicted of, a crime punishable by imprisonment by more than one year and his civil rights have not been restored.[16]

JSSA requires district courts to devise plans for random selection and summoning of jury panels. It also contains provisions that specify the procedures for challenging compliance with the selection process: "in civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therfor, *whichever is earlier*, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury."[17] Moreover, this statutory procedure is the "exclusive" remedy for violations of JSSA.[18] The Eleventh Circuit, for example, strictly enforces the time limitations set forth in § 1867(c).[19]

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13. In contemporary legal practice, the term "for-cause" is used to cover both 1) "for-cause" and 2) "for-favor" objections, even though the terminological distinction between the two objections persists in federal statutes. *See* 28 U.S.C. § 1870 ("All challenges *for cause or favor*, whether to the array or panel or to individual jurors, shall be determined by the court.") (emphasis added); *see also* 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2483. Given the specificity requirement for preservation of appeals, trial counsel challenging a juror should make clear whether a juror is being challenged on the basis of statutory qualifications or partiality.
14. 28 U.S.C. § 1861.
15. *Id.* § 1862.
16. *Id.* § 1865.
17. *Id.* § 1867(c) (emphasis added).
18. *Id.* 1867(e).
19. *See Morro v. City of Birmingham*, 117 F.3d 508, 518-19 (11th Cir. 1997) (defendant's objection to the selection of an all-white "holdover jury," made after the completion of voir dire examination, was not timely and would not be entertained on appeal). The strict time limitations of Section 1867(c) apply only to challenges based on an alleged violation of JSSA; they do not apply to constitutional challenges to discriminatory jury selection. *See* 28 U.S.C. § 1867(e) ("Nothing in this section shall preclude any person . . . from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for service on grand or petit juries.").

As noted *supra*, a "for-cause" challenge may encompass a challenge to a prospective juror on the grounds that the juror fails to meet the statutory qualifications set forth in the JSSA or on the grounds that the juror is biased. In either case, the trial court decides the challenge and the challenging party has the burden of showing cause.[20]

To ensure preservation for appeal, for-cause objections must be raised as soon as trial counsel has reason to believe that a member of the venire may be improperly biased or otherwise unqualified. For example, where plaintiff's counsel asked no questions about a juror's business relationships with the opposing party during voir dire, but moved for reversal of an adverse verdict after the trial, it was held that "the right to challenge a juror is waived by failure to object at the time the jury is impaneled if the basis for objection might have been discovered during voir dire."[21] In another case, the Fifth Circuit affirmed the trial court's ruling that failure to object to the composition of the jury before the trial commenced constituted waiver. The court explained:

> If a civil litigant is permitted to go to trial and ascertain the verdict of the jury, and if the verdict be adverse to his position, then for the first time raise some question concerning the manner in which the jury lists in the Court are composed, and if it should be determined that there was some imperfection in the jury lists, this would mean that the litigant by deliberately failing to make timely objection had had two opportunities to have his case presented to a jury.[22]

If the court erroneously denies a for-cause challenge, then trial counsel should consider using a peremptory challenge to strike the juror. This scenario raises the following questions: 1) Must trial counsel use a peremptory strike to preserve for appeal the erroneous denial of the for-cause objection? 2) When trial counsel exercises a peremptory strike to exclude a juror whom the judge should have excluded for cause, is the fact that counsel had to use a peremptory strike to remove the juror reversible error? These questions have not been definitively answered for federal civil cases.[23]

In *U.S. v. Martinez-Salazar*, the Supreme Court held that although the defendant had used a peremptory strike to remove a biased juror who should have been removed for cause, the trial court's erroneous ruling did not deprive the defendant of his statutory right to peremptory challenges. The Court reasoned that the purpose of peremptory challenges is to select an impartial jury, and that was how the challenge was used in this case.[24] The trial court's ruling did not "force" the defendant to use his peremptory strike, but rather gave him the strategic option of either using

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20. 28 U.S.C. § 1870.
21. *Robinson v. Monsanto Co.*, 758 F.2d 331, 335 (8th Cir. 1985).
22. *Stewart v. Banks*, 397 F.2d 798 (5th Cir. 1968).
23. In the criminal context, the Supreme Court held that a defendant need not exercise his peremptory strike to preserve the claim that the for-cause ruling impaired the defendant's right to a fair trial. *U.S. v. Martinez-Salazar*, 528 U.S. 304, 314–15 (2000); *see also U.S. v. Mobley*, 656 F.2d 988 (5th Cir. 1981) (defendant is not "required to forego his right to a full complement of genuinely peremptory challenges in order to exercise his right to have jurors [excluded for cause].").
24. *Matinez-Salazar*, 528 U.S. at 315–16.

it or allowing the challenged juror to be seated and appealing later.[25] The courts have not addressed this issue in a case where the defendant argued that even after using a peremptory challenge to strike one biased juror, there remained a biased juror that the court refused to dismiss for cause.

The circuits are split on whether an erroneous denial of a for-cause challenge in a civil case that leads the aggrieved party to exercise a peremptory challenge is reversible error. The First, Second, and Third Circuits have held that an indirect impairment of the right to peremptory challenges in a civil case is reversible error.[26] The Seventh, Eighth, Ninth, and Tenth Circuits have adopted the opposite view.[27] However, the decisions of the First, Second and Third Circuits predate *Martinez-Salazar*. The Supreme Court's decision strongly suggests that the latter position is correct, at least to the extent that an impartial jury is empaneled after the peremptory strike is used. More recent cases from these circuits that acknowledge *Martinez-Salazar* reinforce this conclusion, although these circuits have yet to hold affirmatively that *Martinez-Salazar* applies in civil cases.[28] To the extent that *Martinez-Salazar* applies in civil cases, it appears that trial counsel may preserve the right to appeal an erroneous denial of a for-cause objection without excluding the juror via a peremptory strike. But for obvious reasons, this approach is risky: the biased juror will be seated, and the only chance of ultimately prevailing may be on appeal. On the other hand, if counsel elects to use a peremptory challenge to strike the juror without making clear that the peremptory challenge is being exercised because of the denial of the for-cause challenge, the appeal record may be lost. In the latter case, counsel should take steps to ensure that the record reflects that the reason for using the peremptory strike is the court's erroneous denial of the for-cause challenge.

Keeping in mind that trial counsel must assert each ground for objection to preserve the point for appeal, we suggest the following strategy to preserve for-cause challenges: first, counsel must raise a for-cause challenge to the juror as soon as it becomes apparent that the potential juror may be unqualified under JSSA or for bias; second, if the challenge is overruled, counsel should make

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25. *Id.* at 315–16; *see also U.S. v. Smith*, No. 3:06-CR-92989-J-33MCR, 2008 WL 2694106, at * 4 (M.D. Fla. 2008) (holding that statutory right to exercise peremptory challenge was not impaired by erroneous denial of for-cause objection and noting that defendant failed to argue that the resulting jury in his trial was not impartial).

26. *See United States v. Cambara*, 902 F.2d 144, 147–48 (1st Cir. 1990), *abrogated by U.S. v. Martinez-Salazar*, 528 U.S. 304 (2000); *Carr v. Watts*, 597 F.2d 830, 833 (2d Cir. 1979)*; Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 157 (3rd Cir. 1995).

27. *See Warfield v. City of Chicago*, 679 F. Supp. 2d 876, 883–84 (N.D. Ill. 2010); *Walzer v. St. Joseph State Hosp.*, 231 F.3d 1108, 1112 (8th Cir. 2000); *Siripongs v. Calderon*, 35 F.3d 1308, 1322 (9th Cir. 1994); *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122 (10th Cir. 1995) (in absence of an allegation that jury as seated was not impartial, erroneous denial of for-cause objection was harmless error where the juror was excluded using a peremptory strike). *See generally*, Moore's Federal Practice § 47.21.

28. *Cruz v. Jordan*, 357 F.3d 269, 271–72 (2d Cir. 2004) ("Although the applicability of *Martinez–Salazar* to civil cases has not been settled in this Circuit . . . we see no reason why *Martinez–Salazar* would not apply to Cruz's civil claim, but because there exists an independent ground for dismissal in this case, we leave ultimate resolution of this issue to another day."); *United States v. Gonzalez-Melendez*, 594 F.3d 28, 33 (1st Cir. 2010) (holding that impairment of use of peremptory challenges in criminal case did not require automatic reversal and was harmless error); *United States v. Jimenez*, 513 F.3d 62, 72 (3d Cir. 2008) (stating that even if juror in criminal trial should have been stricken for cause, the peremptory strike of that juror cured the rule or due process violation).

two additional arguments: 1) if a peremptory strike is used to exclude the juror, counsel should argue that her client has been deprived of its statutory right to peremptory challenges (and request an additional peremptory strike); 2) counsel should argue—provided there is a basis for doing so—that the resulting jury is not fair and impartial.

The primary purpose of peremptory challenges is to permit counsel to remove jurors he believes have an unconscious or unacknowledged bias.[29] The court must allow a party to exercise three peremptory challenges.[30] While the district court is given broad discretion in directing the method of using peremptory challenges, it is reversible error for the court to deny a party the peremptory challenges to which it is entitled.[31] If counsel believes he is entitled to additional peremptory challenges, he must first exercise all the peremptory challenges provided to preserve this issue for appeal.[32]

Peremptory challenges may be exercised on essentially any ground, except race and gender.[33] A so-called "*Batson* challenge" to opposing counsel's exercise of a peremptory strike involves three steps. First, the challenging party must establish a prima facie case of discrimination. Second, the burden shifts to the striking party to articulate a nondiscriminatory explanation for the strike. Third, the court must determine whether the challenging party has met the burden of proving purposeful discrimination.[34] To preserve a *Batson* error for appeal, the challenging party must object to the discriminatory use of the peremptory challenge and make a prima facie case for improper discrimination.[35] Trial counsel's objection to the discriminatory exercise of the challenge must satisfy the specificity requirement.[36] Moreover, the objection must be timely.[37] The Second Circuit has held that a timely objection must be made "*before* the completion of jury selection, in

29. *Central Ala. Fair Housing Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 638 (11th Cir. 2000) ("Peremptory challenges allow parties to remove jurors who are perceived as having some potential of being partial.").
30. FED. R. CIV. P. 47; 28 U.S.C. § 1870.
31. *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990) ("It is reversible error to deny a party to a jury trial the peremptory challenges to which the rules of procedure entitle him, although it will rarely if ever be possible to show that the trial would have come out differently.").
32. *See Mills v. GAF Corp.*, 20 F.3d 678, 679 n.2 (6th Cir. 1994) ("One who does not exercise all of his peremptory challenges cannot assign as error the court's refusal to allow a greater number.").
33. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (while prosecutor may ordinarily exercise peremptory challenge for any reason, challenge based on race violates Equal Protection); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991) (extending *Batson* to civil cases); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (extending *Batson* to exclusion based on gender).
34. *Batson*, 476 U.S. at 96–98; *see also Central Ala. Fair Housing*, 236 F.3d at 636 (11th Cir. 2000).
35. *See, e.g.*, *Central Ala. Fair Housing*, 236 F.3d at 636 ("[T]he threshold task in considering a *Batson* challenge, for a district court as well as this Court, is to determine whether a *prima facie* case was established. If the answer is no, then the inquiry ceases, and the challenge should be denied.").
36. *See, e.g.*, *U.S. v. Dorvilus*, 357 F. App'x 239, 242 (11th Cir. 2009) (*Batson* challenge not preserved for appeal where party properly objected to first peremptory strike against a black juror, but later merely noted that three more black jurors had been excluded without explicitly formulating an objection to the exclusion of the three jurors and insisting that the judge rule on the objection).
37. *Clark v. Newport News Shipbuilding and Dry Dock Co.*, 937 F.2d 934, 939–40 (4th Cir. 1991) (challenge to discriminatory use of peremptory strikes first raised on appeal is untimely and therefore waived).

part so that the court can (i) contemporaneously assess the adversary's conduct; and (ii) remedy any improper conduct without having to repeat the jury selection process."[38]

Voir Dire

The federal rules permit the presiding judge to exercise considerable discretion in the conduct of voir dire.[39] The trial judge may conduct voir dire, but it must be done "so competently, completely, and thoroughly that the prospective jurors' histories and personal prejudices are revealed."[40] To prove the inadequacy of voir dire, a party "need not prove actual juror bias. Instead, what must be shown is that the trial court did not use a voir dire procedure likely to result in an impartial jury, i.e., whether the voir dire process gave reasonable assurance that prejudice would be discovered."[41] To properly preserve the issue for appeal, counsel should make objections to the adequacy of the process to the district court as soon as those inadequacies become apparent.[42]

Counsel must be vigilant during voir dire to ensure that biases are actually uncovered: if the basis for challenging a juror for cause could have been discovered during voir dire, failing to challenge the juror at that time waives the issue for appeal. In *Robinson v. Monsanto Co.*, 758 F.2d 331 (8th Cir. 1985), an employment discrimination action, a juror disclosed on voir dire that she worked as an agent in the same real estate office as plaintiff. The plaintiff learned after trial that the juror had received property listings from the defendant. Because this fact could have been discovered during voir dire, the objection was waived.[43] Moreover, the court will not grant a mistrial for a juror's failure to answer a question that was never asked.

If, after voir dire, it becomes apparent that a juror answered a question untruthfully, trial counsel should immediately move for a mistrial and petition the court for a post-trial hearing on juror misconduct. To prevail, counsel must show that: 1) the juror failed to answer honestly a material question on voir dire, and 2) a correct response would have provided a valid basis for a challenge for cause.[44] To satisfy the latter requirement, the Eleventh Circuit requires a showing of actual bias.[45] To secure a post-trial hearing on juror misconduct, the challenging party must show "clear, strong, substantial and incontrovertible evidence . . . that a specific nonspeculative impropriety has occurred."[46]

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38. *U.S. v. Franklyn*, 157 F.3d 90, 97 (2d Cir. 1988).
39. *See* FED. R. CIV. P. 47 ("The court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself ask any of their additional questions it considers proper.").
40. *Lips v. City of Hollywood*, 350 F. App'x 328, 338 (11th Cir. 2009).
41. *Kaplan v. DaimlerChrysler, A.G.*, No. 02-13223, 2003 WL 22023315 at *2 (11th Cir. Aug. 1, 2003) (citation and quotation omitted).
42. *See id.* at *1.
43. *Robinson v. Monsanto Co.*, 758 F.2d 331, 335 (8th Cir. 1985).
44. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) ("The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."). *BankAtlantic v. Blyth Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1473 (11th Cir. 1992).
45. Actual bias may be shown "either by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *U.S. v. Capra*, 271 F.3d 962, 967 (11th Cir. 2001).
46. *U.S. v. Valencia-Trujillo*, 380 F. App'x 936, 938 (11th Cir. 2010) (citations omitted).

OPENING STATEMENTS

The same requirements of timeliness, specificity, and inclusion in the record govern preservation of error during opening statements. Objections during opening can appear particularly disruptive to jurors, and counsel rightly should be concerned that frequent objections may unintentionally signal fear of her opponent's case; before openings, consequently, counsel is strongly advised to raise with the court any objectionable arguments that she anticipates and seek a definitive ruling in advance. If the judge refuses to rule before openings, then, unfortunately, preserving the point for appeal requires counsel to make a contemporaneous objection during opening. That said, counsel at that time can request a standing objection to the same objectionable comments to avoid the need for repeatedly interrupting her adversary's opening.

For the same reason, counsel should ordinarily make every effort to insist—before opening statements begin—on exchanging slides and any other demonstrative aids that either party anticipates using during openings. Doing so will facilitate making objections—and obtaining rulings—in advance. Again, if the court declines to enter definitive rulings before opposing counsel elects to use the demonstrative aids, then to preserve the error, counsel has no alternative other than interrupting the opening to place objections on the record.

Although a complete inventory of objectionable topics is not possible, among those to which trial counsel should be attuned—and prepared to object immediately—are:

- references to the size and wealth of corporate parties, suggesting either that a plaintiff is not in need or deserving of a monetary recovery or that a defendant has the financial wherewithal to sustain a very large adverse verdict;
- attacks by defense counsel on a plaintiff's election to commence litigation and seek vindication of legal rights in a court of law;
- attacks by plaintiff's counsel on the defense of the case, such as the defendant's election to defend itself against claims, the refusal to acknowledge liability, and the refusal to apologize to the plaintiff(s);
- ad hominem attacks and other comments generally disparaging an adverse party or its counsel; and
- in cases involving claims for punitive damages, introducing evidence of harm to others that is inadmissible under *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), and conduct that lacks a causal nexus to the plaintiff's specific alleged injury that is inadmissible under *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421–22 (2003).

In addition to generally objectionable matters that opposing counsel may attempt to inject into openings, trial counsel must be keenly alert to case-specific topics that should not be raised before the jurors. At the top of the list are matters that violate the court's rulings on motions in limine. If the court has granted a motion in limine to bar evidence or argument on a collateral

matter that may nevertheless be unfairly prejudicial to one side, then, on penalty of waiver, an immediate objection is necessary as soon as the issue is brought up before the jury.

When the court sustains an objection to prejudicial or inflammatory comments by opposing counsel, the next decision is whether to move for mistrial. While it is rare for judges to grant a motion at this stage, there is a benefit to educating the court about the egregiousness of the objectionable remarks and building a solid record both for the trial judge (as support for a possible later motion for mistrial) and for the appellate court. Once trial counsel has presented the objection, a motion for mistrial can be made at a sidebar conference or during the next recess (again, to avoid the risk of antagonizing the jurors through repeated interruptions of an adversary's opening statement).

Generally speaking, trial counsel should also object if insufficient or unequal time is permitted for openings.

PRESENTATION OF EVIDENCE

Federal Rule of Evidence 103(a)(1)(B) provides in part that:

> **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context; or
>
> (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
>
> **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
>
> **(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.[47]

Objections to the Admission of Evidence

Objections to the admission of evidence must be timely—often characterized as "contemporaneous." Generally, an objection is timely if it is made "as soon as the ground of it is known, or reasonably should have been known to the objector."[48] When the objection is apparent from the question asked of a trial witness, counsel should make the objection as soon as opposing counsel asks the question—and before the witness answers.[49] Counsel should make an objection to the introduction into evidence of documents or other tangible items as soon as the item is offered by the opposing party and before it is admitted into evidence.[50]

The variety of procedures followed by different trial judges—particularly with regard to examination of witnesses—makes it impossible to formulate a universal rule governing timeliness and specificity. Customarily, counsel will stand at the time an objectionable question is asked and state, for example, "Objection, your Honor: calls for hearsay." Some judges, however do not allow

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47. Rule 103(a) preservation rules apply equally to lay and expert witnesses. *See Christopher v. Cutter Labs.*, 53 F.3d 1184, 1191–92 (11th Cir. 1995).

48. *Hutchison v. Groskin*, 927 F.2d 722, 725 (2d Cir. 1991).

49. An objection immediately after the witness answers may not be considered untimely. *Id.*; *see also* 21 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 5307.7 ("The commentators all agree that failure to timely object is excused and a delayed objection is proper when the witness 'jumps the gun' and answers 'so rapidly that no objection can be interposed' before the answer is out.").

50. *U.S. v. Benavente Gomez*, 921 F.2D 378, 385 (1st Cir. 1990) (party's failure to object to court's sua sponte admission of documents into evidence at the time the court admitted them resulted in waiver of right to appeal admission).

even a plain statement of the basis for an objection in open court.[51] Likewise, many judges discourage "speaking objections," so that when the basis of an objection requires explanation beyond a one-word statement—or where there are multiple bases for an objection—stating the objection may not be feasible in open court. For purposes of preserving the objection for appeal, it is then incumbent upon the objecting party to request a sidebar conference (with the court reporter present) to explain the specific basis (or bases). If the request for a sidebar conference is denied, counsel must raise the issue at the next opportunity—whether at a later sidebar or during a recess when the jurors have been excused.

The ground for an objection may not be immediately apparent from an opposing counsel's question, meaning that it is not always possible to object before an answer is given. For example, a nonobjectionable question may elicit an objectionable, nonresponsive answer. In these cases, trial counsel should immediately object and move to strike on the basis of nonresponsiveness; counsel should further assert all other grounds for the objection (e.g., that the statement is unfairly prejudicial).[52]

In other cases, the grounds for objection may not become apparent until later in the trial. For example, in *Benjamin v. Peter's Farm Condo. Owners Assoc.*, 820 F.2d 640 (3rd Cir. 1987), plaintiff's expert testified on direct examination about plaintiff's diminished earning capacity; after cross-examination, when plaintiff rested his case, the defendant objected to the expert's testimony as lacking a sufficient foundation. The court found the objection to be timely because the fact that the expert's opinion was based primarily on personal feeling was not apparent until after cross-examination.[53]

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51. *See, e.g.*, Judge Laura Taylor Swain (S.D.N.Y.), General Rules for Trial Counsel at 2, *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1047 ("If counsel finds it necessary to interpose an objection while the jury is present, counsel should stand, state the word "Objection," and then *communicate the substance of the objection to the questioner out of the hearing of the jury* in an effort to resolve the objection . . . . If the objection cannot be resolved in this fashion and the objector does not believe the matter can be held for the next recess, counsel may request a sidebar conference.") (emphasis in original) (last visited April 13, 2017).

52. *See U.S. v. Vesich*, 724 F.2d 451, 462–63 (5th Cir. 1984) (criminal defendant failed to object to nonresponsive answer and thus lost right to appeal).

53. *Benjamin v. Peter's Farm Condo. Owners Assoc.*, 820 F.2d 640, 642 n.5 (3rd Cir. 1987). Similarly, a judge may admit evidence under Federal Rule of Evidence 104(b) on the condition that the proponent subsequently proves a fact establishing the relevance of or proper foundation for the evidence. If the proponent of the evidence fails to satisfy the condition, then an objection under Rule 103 is timely if made at the conclusion of the proponent's case. *U.S. v. Dougherty*, 895 F.2d 399, 403 (7th Cir. 1990) ("If a condition attached to the admission of evidence is not satisfied by the offering party, the burden properly rests with the objecting party to renew the objection. . . . [It] becomes apparent when the offering party completes the particular stage of his case in which the evidence was offered, and . . . when he 'rests' without making the missing proof, the adversary should move to strike, failing which, he cannot later claim as of right to invoke the condition.") (citation omitted); *see also Huddleston v. U.S.*, 485 U.S. 681, 690 n.7 (1988) (when evidence is admitted pursuant to Rule 104(b), it is "not the responsibility of the judge sua sponte to insure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of trial the offeror has failed to satisfy the condition.") (citations omitted).

An apparently nonobjectionable line of questioning may become objectionable as the questions proceed.[54] Trial counsel must object to the testimony as soon as the ground for the objection becomes apparent: a motion to strike once the testimony is complete is untimely.[55]

A continuing objection to early instances of the same error may be considered timely under Rule 103.[56] Given the less than encouraging endorsement of continuing objections by the *Marcantoni* court, we urge caution in using this device. Moreover, as noted *supra*, an objection must identify each specific ground, and an objection on one ground will not preserve the right to appeal on other grounds.[57]

Rule 103 requires that an objecting party "state[] the specific ground, unless it was apparent from the context." What is "apparent" can be subject to widely differing views, and trial counsel should never assume that the ground for any objection will be obvious. This requirement is applied strictly: appellate judges do not make a point of going out of their way to save trial lawyers from their own carelessness.[58] There are few cases applying the exception, and they offer little guidance.[59]

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54. *See U.S. v. Meserve*, 271 F.3d 314, 323–24 (1st Cir. 2001) (objection to a line of questioning is timely if made once it becomes apparent that the questions seek inadmissible testimony).

55. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1408 (10th Cir. 1994) ("If the ground for objection becomes apparent while the witness is testifying, a subsequent motion to strike the testimony after the witness finishes does not preserve the issue for appeal."). When the objection is made after the testimony has been presented, the question arises as to whether the challenging party must move to strike the testimony in addition to objecting to it. Although at least one court has held that a motion to strike is not necessary if the party has objected in a timely fashion,[55] commentators on Rule 103 tend to support the position that *both* an objection *and* a motion to strike are necessary to preserve appeal. *See* 21 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 5037.7 ("The delayed objection alone does not suffice to preserve an error for appeal under Rule 103; the objector must also move to strike the evidence from the record."). Because there is scant case law on this issue, we recommend that trial counsel object *and* move to strike any testimony that may have entered the record prior to the objection. This rule makes sense, because without a motion to strike, the jurors will still have access to the objectionable evidence.

56. *See U.S. v. Marcantoni*, 590 F.2d 1324, 1328 n.3 (5th Cir. 1979) ("Without commenting on the propriety or desirability of utilizing the continuing objection device as a means of preserving a claim of error, especially when . . . the state of the evidence undergo[es] substantial change as the trial progresses, we treat the [defendants'] objections, as framed at pretrial, as having been preserved for appellate purposes.").

57. The specificity requirement, however, can be problematic with continuing objections. As noted in *Marcantoni*, the focus of evidence may undergo a substantial change as the trial develops. The grounds for relevance objections may thus likewise change as new evidence is introduced. *See, e.g.*, *U.S. v. McVeigh*, 153 F.3d 1166, 1200 (holding that it would be unfair to not allow defendant to rely on continuing objection to preserve appeal where trial court explicitly permitted the use of the device, but noting that "continuing objections generally are considered inappropriate for preserving error on appeal under Rule 403."), *in part overruled on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). In such cases, relying on a generic continuing objection may lead trial counsel to improperly state the specific basis. In sum, if trial counsel wishes to rely on a continuing objection to avoid needlessly repeating objections, trial counsel should explicitly seek permission from the court and assume the narrowest scope of application.

58. *See, e.g.*, *U.S. v. Greenfield*, 554 F.2d 179, 186 (5th Cir. 1977) (in trial of physician for unlawful distribution of drug products, an objection to questions concerning the physician's relations with other patients, framed as an objection to "going through a complete repertoire of patients," did not preserve an objection on grounds that the testimony was inadmissible evidence of other crimes or bad acts).

59. *Compare U.S. v. Sallins*, 993 F.2d 344, 345 n. 1 (3d Cir. 1993) (objection at a second trial of criminal defendant did not state ground, but "the ground was apparent because the same trial judge had sustained a specific hearsay

General objections ("Your Honor, I object") are insufficient for preservation.[60] The degree of specificity required by Rule 103 depends on the facts of the case. There is no "one size fits all rule" that tells us which objections are unacceptably general. Trial counsel should err on the side of caution and state each objection or motion to strike with as much specificity as possible. Similarly, an objection on one ground does not preserve for appeal an objection on another ground.[61]

Particularly in situations where it may be not immediately clear to the judge what evidence counsel wants to exclude, trial counsel should state with specificity the target of the objection. For example, if counsel objects to the admission of evidence at the close of the adversary's case-in-chief on the grounds of failure to prove a fact as required by Rule 104(b), then she should alert the court to the particular testimony or document being challenged and the specific fact or facts that the adversary failed to prove; she should also state the legal grounds for exclusion.[62]

The challenging party carries the burden of making a record of the objection and of the court's erroneous ruling. The Federal Rules of Appellate Procedure define the "record" for appeal as: "(1) the original papers and exhibits filed in the district court; (2) the transcript of the proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk."[63] As long as counsel makes an objection to the admission of evidence during the court proceedings, the objection should be preserved on the verbatim transcript. Problems emerge when evidentiary issues are decided in chambers without the court reporter present. Appellate courts generally disapprove of this practice.[64] As a best practice, counsel should insist on the presence of a court reporter when evidentiary objections are presented, argued, and decided. If a reporter is not present, counsel should make every effort to cure the record by ensuring that it reflects the objection and the ruling.[65] One way to ensure an adequate record in this situation is to submit for entry by the trial judge a proposed written order—this order should be sufficiently detailed to apprise the appellate court of the grounds for the objection and the trial court's ruling.

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objection to the same testimony at the first trial") *with Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1404–05 (7th Cir. 1991) (judge's rule that all exhibits to be used at trial must be identified in pretrial conference was not a ground of objection that was "apparent from context" when party challenged the admission of documents). At the same time, many courts expressly disallow "speaking objections" that suggest how a witness should answer a question or that become legal argument in the presence of the jurors. *See* Judge Swain, *supra* note 51.

60. *See, e.g.*, *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997) (objection to admission of a document that does not include the ground for the objection does not preserve objection for appeal, even if the objecting party earlier presented the objection through a motion in limine).

61. *Id.* (objection to admission of document as irrelevant did not preserve hearsay objection).

62. *See generally U.S. v. Barker*, 27 F.3d 1287, 1292 (7th Cir. 1994) (counsel's statement "Objection. Foundation" failed to preserve appeal that handgun should not have been admitted because the prosecutor failed to prove a chain of custody; "objection solely on the ground of a lack of foundation [was] not specific and did not preserve allegation of error on appeal.") (citation omitted).

63. FED. R. APP. P. 10.

64. *See, e.g.*, *U.S. v. Johnson*, 542 F.2d 230, 234 n. 8 (5th Cir. 1976).

65. *See, e.g.*, *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1411 n. 10 (10th Cir. 1994) (although an appellate court ordinarily will not consider evidence not specifically reported in the record, such a consideration is appropriate where the record is clear that an in-chambers meeting on the admissibility of evidence occurred and that the judge found the evidence to be admissible).

Objections to the Exclusion of Evidence

When trial counsel seeks to introduce evidence and the court erroneously excludes it, Rule 103(a)(2) provides that the error is preserved for appeal if the "party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." An offer of proof serves two purposes: 1) it allows the trial court to make an informed decision about the proposed evidence, and 2) it creates a clear record for the court of appeals to determine whether the trial court erred.[66] An offer of proof must inform the trial court and the court of appeals of the substance of the proposed evidence and identify the grounds for its admissibility.[67] Although not explicitly mentioned in the rule, an offer of proof, like an objection to evidence, must also be specific, timely, and on the record to preserve appeal.

Elements of Offers of Proof

Substance

An offer of proof must inform the trial court of the substance or nature of the proffered evidence.[68] A brief summary of the substance of proposed testimony may be sufficient to preserve appeal.[69] But merely rephrasing a question after an objection, without informing the court of the intended response to the question, is insufficient.[70] In addition, general statements about the nature of the testimony to be admitted do not satisfy the requirements of Rule 103.[71]

Theory of Admissibility

"In order to qualify as an adequate offer of proof, the proponent must, first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence."[72] Moreover, the grounds for admissibility argued to the court of appeals must have been previously presented to the trial court.[73] For this reason, trial counsel should endeavor to present all possible grounds for the admission of the evidence with the offer of proof.

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66. *U.S. v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001); *Murphy v. City of Flagler Beach*, 761 F.2d 622, 626 (11th Cir. 1985).
67. *Adams*, 271 F.3d at 1241.
68. *U.S. v. West*, 898 F.2d 1493, 1498 (11th Cir. 1990) (criminal defendant seeking to testify about declarant's comments to show effect on his state of mind did not preserve appeal because he failed to explain the nature of the comments made by the declarant during the conversation).
69. *U.S. v. Peak*, 856 F.2d 825, 833 (7th Cir. 1988).
70. *U.S. v. Thompson*, 279 F.3d 1043, 1048 (D.C. Cir. 2002).
71. *James v. Bell Helicopter Co.*, 715 F.2d 166, 175 (5th Cir. 1983) (district court excluded tests performed after helicopter accident as inadmissible evidence of remedial measures, while proponent argued that the tests were performed in the ordinary course of defendant's business; the issue was not preserved for appeal because the documents were not described by proponent with any particularity and proponent's statement concerning documents were "so general as to be meaningless").
72. *U.S. v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001).
73. *Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005) (in civil rights case, proponent's argument that hearsay evidence was admissible to show other incidents of racial discrimination did not preserve appeal on the grounds that the statement was an admissible statement against interest).

Purpose

The offer should also explain the purpose of the proposed testimony, especially where the evidence might be admissible for one reason and inadmissible for another. For example, where a trial memorandum from a previous bankruptcy proceeding was entered into evidence to show that a union had previously taken a position inconsistent with that taken at trial, the union asked the plaintiff's witness questions about the bankruptcy proceedings on cross-examination. The trial court ruled that this line of questioning was irrelevant and excluded it. On appeal, the defendant argued that the purpose of the question was to show that the bankruptcy court had compelled the union to change its position. Because this purpose was not explained to the trial court, the issue was not preserved for appeal.[74]

Preliminary Facts

To the extent that the admissibility of the proposed evidence depends on proof of other facts, the offer should state that the proponent is prepared to prove any preliminary facts that would provide a foundation for admission of the evidence.[75]

Rule 103(a)(2) does not explicitly require a timely offer of proof. Wright and Miller suggest that timeliness is required, but that it is less important for an offer of proof than for an objection.[76] The Eleventh Circuit found an offer of proof to be timely, even though the proponent failed to make the offer when the court sustained an objection to the proposed evidence.[77] Trial counsel should make an offer of proof as early as possible—and certainly where there is still an opportunity to present the evidence to the jurors if the court changes its mind. As explained *infra*, motions in limine may be an ideal opportunity for an offer of proof, even when it is necessary to offer the proof again at trial when circumstances change.

As noted above, a general statement about the nature of the proffered evidence does not satisfy the requirements of Rule 103.[78] Specificity is required because the purpose of an offer of proof is

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74. *Ramey v. District 141, Int'l Ass'n of Machinists and Aerospace Workers*, 378 F.3d 269, 281 (2d Cir. 2004).

75. *U.S. v. Lussier*, 929 F.2d 25, 31 (1st Cir. 1991) (to preserve appeal, proponent of evidence must provide a foundation establishing why proposed exhibits would be relevant); *see also U.S. v. Burnett*, 890 F.2d 1233, 1240 (D.C. Cir. 1989) (proponent of proposed testimony must show that the witness had firsthand knowledge of events he would testify about).

76. 21 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 5040.2 ("In the first place, the timing of an objection affects its specificity in ways that the timing of an offer of proof does not. Second, objectors get multiple chances to object and thus can 'second guess' an earlier decision not to object . . . [O]ne can make several different objections to the same bit of evidence, but that evidence can only be proffered once.").

77. *Murphy v. City of Flagler Beach*, 761 F.2d 622, 626 (11th Cir. 1985). In *Murphy*, trial counsel made a subsequent offer of proof at a conference on evidentiary questions. The court held that the subsequent offer satisfied the requirements of Rule 103 because it gave the trial judge an opportunity to correct errors that might otherwise require a new trial. *Id.* It is important to note that while the *Murphy* court did not strictly apply the contemporaneousness rule, the court did not reject the contention that offers of proof must be timely. Indeed, the court's analysis presupposes that the timeliness requirement of Rule 103(a)(1) also applies to offers of proof.

78. *James v. Bell Helicopter Co.*, 715 F.2d 166, 175 (5th Cir. 1983) (appeal not preserved where proponent's statement concerning documents to be admitted into evidence was "so general as to be meaningless.").

to provide the trial court an opportunity to make an informed decision regarding the evidence and to permit meaningful appellate review.[79]

For proposed oral testimony, "the offer must express precisely the substance of the excluded evidence, which counsel accomplishes by stating with specificity what he or she anticipates will be the witness' testimony or by putting the witness on the stand."[80] While there is no uniform rule about the degree of specificity required, the offer of proof must at a minimum inform the court of the substance of the testimony that the witness would provide and the basis for its admissibility.[81]

Although Rule 103(a)(2) does not explicitly require that an offer of proof be on the record, it is a practical necessity for preservation. The rule is equally silent about the method for making an offer and having it entered on the record. The issue is primarily left to the discretion of the trial court, although some cases provide guidance on acceptable methods for making the record.

In the case of documents, the evidence can be marked for identification. The record should also reflect that the item was tendered for admission and excluded.[82]

For oral testimony, courts have identified at least four ways in which an offer of proof can be made.[83]

1. The proponent may examine the witness before the court and record the testimony on the record. This method is the preferred method of the appellate court, but it is more costly as it necessitates excusing the jury.[84] (It is also the least likely to be permitted by trial judges.)

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79. When the offer of proof concerns lengthy or multiple documents, counsel should 1) specify the portions of the document that are admissible if the document also contains inadmissible evidence and 2) should specify relevant portions of the documents pertaining to admissibility. *See In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385–86 (9th Cir. 2010); *United Fire and Cas. Co. v. Historic Preservation Trust*, 265 F.3d 722, 727–28 (8th Cir. 2001) (district court excluded 600-page deposition transcript and videotape, but afforded counsel the opportunity to introduce appropriate portions of the transcript into evidence; counsel failed to preserve appeal by not offering selections of the transcript).

80. *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285, 1287 (8th Cir. 1995) (offer of proof stating that expert would testify about cause and effect was inadequate where plaintiff also sought expert to testify on damages) (citation and quotation omitted).

81. *See, e.g.*, *U.S. v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979) (offer of proof stating that witness would testify as to "his version of a conversation" is not sufficient because it did not state the substance of the witness's version of the conversation). Rule 103(a)(2) provides that trial counsel need not inform the court of the substance of the proposed evidence if "the substance was apparent from the context." *See, e.g.*, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (where the nature and the purpose of the proposed testimony is apparent from the question asked and the context, no offer of proof is necessary). As with objections to evidence, trial counsel should not rely on this exception to the offer of proof requirement.

82. 21 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 5040.3. Even if a document is not filed with the court, the point is preserved for appeal if the proponent makes the substance of the document known to the court. *See, e.g.*, *Collins v. Wayne Corp.,* 621 F.2d 777, 781 (5th Cir. 1980), *superseded by Rule on other grounds as stated in Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002). Nevertheless trial counsel should err on the side of caution and have documents marked for identification.

83. *U.S. v. Adams*, 271 F.3d 1236, 1241–42 (10th Cir. 2001).

84. *Id.*

2. Counsel may provide a statement about what the testimony would be. According to the *Adams* court, this method is least favored because it lacks the specificity and detail of the former method.[85]

3. Examining counsel may provide a written statement about the anticipated testimony.[86]

4. The proponent may introduce a written statement signed by the witness. [87]

For the third and fourth methods, the proponent should mark the writing as an exhibit and enter it into the record to preserve the point for appeal.[88]

Finally, we note that in our experience, some judges will resist ever "ruling" on written offers of proof or otherwise indicating whether, having seen or heard the offer, they are now persuaded to let the jurors hear the contested evidence. We suggest orally renewing the request to admit the proffered material in evidence and pushing for a ruling to avoid any argument of waiver at the appellate level.

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*

MOTIONS IN LIMINE AND DEFINITIVE RULINGS

Rule 103(b) provides that "[o]nce the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[89] The Advisory Committee notes clarify that the rule "applies to all rulings on evidence whether they occur at or before trial, including so called '*in limine*' rulings."[90] The purpose of the rule is to clarify whether "a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal."[91] As the plain language of the rule suggests, it is unnecessary to renew an objection once the court has issued a "definitive ruling."[92]

If there is any doubt about whether a ruling is definitive, counsel must clarify the nature of the ruling and ensure that it appears on the record.[93] Getting the ruling on the record can be problematic where conferences on evidentiary issues are held in chambers. While an appellate court may consider indirect evidence, reflected on the record, of an evidentiary decision made in chambers, in general, "off-the-record arguments and evidentiary hearings [are] . . . strongly discouraged."[94]

Even when the ruling appears on the record, counsel must also determine whether the ruling on the pretrial motion is definitive. One recurring problem with pretrial rulings is that subsequent events at trial may require the trial judge to revisit the admissibility of evidence. For this reason, an important factor in determining the definitiveness of a ruling is whether the "issue [is] of a type that can be finally decided prior to trial."[95] For example, where a court has already barred a defense on the ground that the defendant failed to plead that affirmative defense in its answer, a court's subsequent exclusion of evidence that is relevant only to the affirmative defense is a definitive ruling.[96]

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89. FED. R. EVID. § 103(b).

90. FED. R. EVID. § 103 advisory committee's note to 2000 amendment. *See also U.S. v. Isley*, 369 F. App'x 80, 92 (11th Cir. 2010) (where district court ruled definitively prior to trial that evidence would be admissible, the ruling is reviewed for abuse of discretion).

91. FED. R. EVID. § 103 advisory committee's note to 2000 amendment.

92. *See, e.g.*, *Spencer v. Young*, 495 F.3d 945, 950 (8th Cir. 2007) ("The denial of a motion in limine does not generally preserve error for appellate review. But there is an exception if the court made a definitive ruling on a fully briefed and argued motion which affected the entire course of the trial.").

93. FED. R. EVID. 103 advisory committee's note to 2000 amendment.

94. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1411 n.10 (10th Cir. 1994) (although an appellate court ordinarily will not consider evidence not that is specifically reported in the record, such a consideration is appropriate where the record is clear that an in-chambers meeting on the admissibility of evidence occurred and that the judge found the evidence to be admissible).

95. *Nat'l Env't Serv. Co. v. Ronan Eng'g Co.*, 256 F.3d 995, 1001–02 (10th Cir. 2001).

96. *Proctor v. Fluor Enter., Inc.*, 494 F.3d 1337, 1349–50 (11th Cir. 2007). *See also Pandit v. Honda Motor Co.*, 82 F.3d 376, 380 (10th Cir. 1996) (not necessary to renew objection to admission of evidence where parties "argued the question in their trial briefs, before appellees' opening, and again before appellees' cross-examination; as presented by appellant, the question involved a general legal issue which was capable of decision prior to trial; and the court addressed the issue definitively and in detail").

Even if the trial court makes a definitive ruling on a motion in limine, it may be necessary to renew an objection at trial. If at trial a party violates the court's order, then counsel must renew the objection.[97] Moreover, "[e]ven where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered."[98] If the court sustains an objection in a motion in limine, but changes its initial ruling at trial, then trial counsel must renew its objection when the evidence is offered to preserve the claim of error. Indeed, if the court does not explicitly change its initial ruling, but the "relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike."[99] Lastly, if the trial court's advance ruling is contingent on further developments at trial—e.g., establishing a foundation—and the proponent fails to satisfy the condition, the challenging party must renew the objection.[100]

The right to appeal the admission of evidence is waived if a party's own counsel is responsible for the admission.[101] The doctrine of "curative admissibility" or "opening the door" provides that "when a party offers inadmissible evidence before a jury, the court may in its discretion allow the opposing party to offer otherwise inadmissible evidence on the same matter to rebut any unfair prejudice created. . . . Consequently, the extent to which otherwise inadmissible evidence is permitted must correspond to the unfair prejudice created."[102]

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97. *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1285–86 (11th Cir. 2000) ("Generally, a party must object to preserve error in the admission of testimony, even when a party or a court violates an in limine ruling.").
98. FED. R. EVID. § 103 advisory committee's notes to 2000 amendment.
99. *Id.*
100. *Huddleston v. United States*, 485 U.S. 681, 690, n.7 (1988).
101. *Wilson v. Attaway*, 757 F.2d 1227, 1243 (11th Cir. 1985) (plaintiffs in civil rights action who raised the matter of communist participation on several occasions could not appeal trial court's decision to permit defense counsel to question witness on same topic).
102. *Bearint ex rel Bearint v. Dorel Juvenile Group, Inc.*, 389 F.3d 1339, 1349 (11th Cir. 2004). The doctrine does not apply when a party elicits evidence that is sufficiently distinct from the inadmissible testimony. *Id.* at 1349 (in products liability action, question concerning an expert report recreating a crash involving a non-Arriva-brand car seat did not open the door to excluded report recreating a crash with the Arriva brand car seat). Although *Bearint* offers some comfort, trial counsel should use caution when questioning witnesses about an issue if he or she wants to exclude the adversary's evidence on the same issue.

CLOSING ARGUMENT, MOTIONS FOR MISTRIAL, AND CURATIVE INSTRUCTIONS

For the most part, the preceding sections assume that the trial judge has overruled the objections of defense counsel. A different problem occurs if the judge sustains the objection. In some instances, the judge may declare a mistrial or take steps to remedy the problem, including issuing curative instructions to the jury. As explained below, counsel must move for a mistrial if warranted; she must also raise any objections that she may have to curative instructions given by the judge.

The federal rules allow a motion for a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court."[103] Traditionally, such grounds include: "that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the moving party; and [the motion] may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."[104] Legal principles relating to motion practice under Rule 59 also apply to motions for a mistrial raised during the trial; denial of both motions is reviewed for abuse of discretion.[105] In this section, we address motions for mistrial and requests for curative instructions made during the course of trial, with an emphasis on events at trial that would render the trial unfair.

When the opposing party introduces improper testimony or makes improper arguments or comments, the aggrieved party must object and move to strike contemporaneously to preserve the issue for appeal.[106] For example, the Eleventh Circuit found waiver where defense counsel failed to object to misleading comments in plaintiff's closing arguments that suggested that the defense was "hiding" evidence, when in fact the defense had properly objected to the evidence.[107] Similarly, where opening statements refer to inadmissible evidence and opposing counsel fails to object to the remarks, the right to appeal the error in referring to the inadmissible evidence is waived.[108] It is absolutely critical that trial counsel be cognizant of the fact that a tactical trial decision not to interpose contemporaneous objections to inappropriate comments may well result in waiver of the right to raise the issue on appeal.

When the judge overrules an objection, the error is preserved for appeal. On the other hand, if the judge sustains the objection, then counsel should also move to strike the comment and request a mistrial, if warranted.[109] In *Bank of the South v. Fort Lauderdale Technical Coll.*, 48

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103. FED. R. CIV. P. 59(a)(1)(A).
104. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).
105. *See, e.g., Dix v. United Parcel Serv.*, 279 F. App'x 816 (11th Cir. 2008).
106. *See Oxford Furniture Companies, Inc. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118, 1128 (11th Cir. 1993) ("Our general rule is that a timely objection is necessary to bring to the district court's attention errors in counsel's arguments."); *see also, e.g.*, *Allstate Ins. Co. v. James*, 845 F.2d 315, 319 (11th Cir. 1988).
107. *See Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1517 (11th Cir. 1993).
108. *State Auto Prop. and Cas. Co. v. Matty*, 438 F. App'x 820, 821 (11th Cir. 2011).
109. When prejudicial information or comments are improperly submitted to a jury, a mistrial is warranted if the error "affects the substantial rights of the parties within the meaning of Fed. R. Civ. P. 61 [Harmless Error]." *O'Rear*

F.R.D. 136 (E.D. La. 1969), the court offered the plaintiff an opportunity to request a mistrial where the defendant was seen flirting with a juror. The plaintiff elected not to do so at that time, then moved for a new trial after a defense verdict. The court denied the motion, noting that "[t]he moving party's own contemporaneous estimate of the prejudicial value of courtroom conduct is a significant factor in the court's subsequent appraisal of the degree to which the overall proceedings may have departed from the strictest standards of justice."[110] On appeal, the Fifth Circuit affirmed.[111]

Instead of granting a mistrial, the court may issue a curative instruction. If counsel believes that the instruction is inadequate to cure the prejudice and that only a mistrial is sufficient, counsel must object to the failure to declare a mistrial.[112] In addition to objecting to the failure to declare a mistrial, counsel should also object to the curative steps actually taken by the court to address the error. This rule applies even if counsel thinks that curative steps could theoretically remedy the error, but that the actual steps taken by the court are insufficient.[113]

From the foregoing discussion, the following precautionary rules can be gleaned:

- If counsel believes that the statement or argument is egregious enough to justify a mistrial, he or she should immediately move for a mistrial.
- If the court denies the motion for a mistrial, counsel should seek a curative instruction *in the alternative*. Counsel should ensure that the record clearly reflects that only a mistrial is sufficient to cure the error and that the curative instruction is requested only because the judge has denied the motion for mistrial.
- If the trial court issues a curative instruction and counsel believes that the instruction does not adequately address the prejudice, then counsel should object immediately to the curative instruction and the failure to grant a mistrial or seek further curative action.

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v. Fruehauf Corp., 554 F.2d 1304, 1308 (5th Cir. 1977). As further explained by the court, "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Id.*

110. *Bank of the South v. Fort Lauderdale Technical Coll.*, 48 F.R.D. 136, 137 (E.D. La. 1969)

111. *Bank of the South v. Fort Lauderdale Technical Coll.*, 425 F.2d 1374 (5th Cir. 1970).

112. *Cf. O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1308 (5th Cir. 1977) (holding that in light of counsel's repeated prejudicial comments and arguments and the judge's refusal to allow opposing counsel to rebut the prejudicial comments, a limiting instruction was insufficient; "There must be a line drawn in any trial where, after repeated exposure of a jury to prejudicial information, a judge realizes that cautionary instructions will have little, if any, effect in eliminating the prejudicial harm. It is at this point that a motion for a mistrial should be granted."); *Bernstein v. Sephora*, 182 F. Supp. 2d 1214, 1225 (S.D. Fla. 2002) (denying Rule 59(a) motion for a new trial on the basis of allegedly prejudicial comments made by plaintiff's counsel where, after court issued curative instructions, "Sephora never moved for a mistrial.").

113. *See U.S. v. Taylor*, 514 F.3d at 1092, 1096 (a contemporaneous objection to the curative instruction "would have given the district court the information necessary to evaluate the need for further curative steps, [and] would have properly preserved the claim of error for appeal. Instead, for all the district court knew, it had addressed Mr. Taylor's complaint to his satisfaction.").

JUROR BIAS OR MISCONDUCT

Undisclosed juror bias, juror misconduct, or other prejudicial events affecting the jury may warrant a mistrial. Proper preservation of error begins with a timely objection or request that the judge question the jurors. It is not enough to merely object or request that the judge question potentially affected jurors. Counsel must also move for a mistrial and/or request a curative instruction or other curative action. If counsel finds the curative steps taken by the court to be inadequate, then she must object to those steps.[114] Thus, if counsel learns of juror misconduct or other facts bearing on the impartiality or conduct of the jurors or the regularity of the proceedings, counsel should immediately bring this to the attention of the judge and request that the judge take action (e.g., investigate or question the jurors). In addition, counsel should move for a mistrial if counsel believes that a mistrial is necessary to cure the error.[115] If the court denies the motion for mistrial, counsel may request a curative instruction, but the record should clearly reflect that the curative instruction or other action is requested in the alternative and that only a mistrial is sufficient to address the issue. Assuming the judge provides a curative instruction, counsel may believe that a better instruction could have been provided, yet maintain that only a mistrial is adequate to address the problem. In this case, counsel should object to 1) giving of a curative instruction, instead of granting a mistrial; and 2) the specific form or content of the instruction.

114. *See Williams v. Marriott Corp.*, 864 F. Supp. 1168, 1173 (M.D. Fla. 1994) ("Absent exceptional circumstances which call into question the integrity of a trial, a party waives any objection to a court's response to juror misconduct unless it makes a timely objection.").

115. *See Bank of the South v. Fort Lauderdale Technical Coll.*, 48 F.R.D. 136, 137 (E.D. La. 1969) (failure to move for mistrial at time error occurs waives right to new trial).

Conclusion

As the foregoing illustrates, the basic principles governing preservation of issues for appellate review apply in all contexts: challenging parties must object to errors contemporaneously, with specificity, on the record and ensure that the court's ruling is on the record. As applied to the various stages of a trial, the rules are more detailed and there are nuances that counsel must be aware of, lest the right to appeal error be waived. Knowledge of these rules should enable trial counsel to play to win at both the trial and appellate levels.