



2018

## §1.5 Offers of Proof

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### Recommended Citation

Mueller, Christopher B. and Kirkpatrick, Laird C. and Richter, Liesa, §1.5 Offers of Proof (2018). C. Mueller, L. Kirkpatrick, & L. Richter, Evidence §1.05 (6th ed. Wolters Kluwer 2018) ; GWU Law School Public Law Research Paper No. 2018-50; GWU Legal Studies Research Paper No. 2018-50. Available at SSRN: <https://ssrn.com/abstract=3275006>

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## **§1.5 Offers of Proof**

In order to preserve for appeal arguments that the trial court erred in excluding evidence, it is necessary under FRE 103 to make an adequate offer of proof unless one of several exceptions applies. Excluding evidence where no offer of proof was made is unlikely to be plain error because the absence of the offer usually produces a record that does not disclose the error.

### **Reasons to require offers**

The reasons to require offers of proof are to let the trial judge “reevaluate his decision in light of the actual evidence to be offered” and help the reviewing court decide whether “the error affects the substantial rights” of the offering party.<sup>1</sup> Reviewing courts often comment that without an offer of proof they cannot evaluate claims of error, that the mere possibility of error in excluding evidence is not ground for reversal, and that assessing error in such cases is difficult or impossible. Clearly the burden rests with the appellant to show that -excluding evidence affected a substantial right (meaning it likely affected the judgment), and this burden cannot easily be carried if no offer of proof was made.<sup>2</sup>

### **Offer by one of several parties**

Just as one party should be allowed to seek relief on the basis of an objection to evidence made by another where the objection applies similarly to both, so too it seems that one party should be permitted to argue for relief on the basis of an offer of proof by another if the evidence applies similarly to his case or claim.<sup>3</sup> The purpose of requiring offers of proof, which include providing a chance for the trial judge to reevaluate his decision and permitting the reviewing court to determine whether exclusion affects substantial rights, is adequately served even if the party seeking relief did not join in the proffer.

### **Substance apparent**

An offer of proof is not required if the substance of the evidence is apparent from the context. This condition is satisfied if questions, in light of any answers given and the setting and other evidence in the case, make clear not only the general subject of the expected response, but its tenor or

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**§1.5** 1. The quoted phrases are from *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir. 1972), *cert. denied*, 409 U.S. 1038. *See also* *Kasper v. Saint Mary of Nazareth Hosp.*, 135 F.3d 1170, 1176 (7th Cir. 1998) (give trial judge a fair chance to avoid error); *Christinson v. Big Stone County Co-Op*, 13 F.3d 1178, 1180-1181 (8th Cir. 1994) (inform court and counsel so they can take action; make record).

2. *Palmer v. Hoffman*, 318 U.S. 109 (1943) (witness statement was not marked or made part of record, so court could not decide whether it might impeach or was prejudicial; appellant did not carry burden of showing prejudice).

3. *See Rockwood Ins. Co. v. Clark Equip. Co.*, 713 F.2d 577, 578-579 (10th Cir. 1983).

substance.<sup>4</sup> In this situation the purposes normally served by the offer of proof have been achieved without one. But open-ended questions, and others to which the witness might reasonably reply in any of several different ways, do not fit this exception, and here an offer remains necessary.<sup>5</sup>

The offer-of-proof requirement is not so strictly enforced when a party who wants to develop a point is cross-examining a witness. Since cross-examination usually proceeds by leading questions, the substance of the expected testimony is often apparent and the requirement is excused for that reason. There are other reasons to be generous with the litigant in this setting. For one thing, cross often seeks to test, probe, and limit the effect of the direct, and this process is ill-suited to the kind of explaining that an offer of proof typically involves. And while the essence of cross from the lawyer's perspective is to control the witness and ask questions he can answer in only one (anticipated) way, still the cross-examiner cannot always know how the witness will answer and cannot always control him. Hence questioning during cross is legitimately exploratory, and the cross-examiner should have leeway to persist in some blind questioning without being able to say what will develop. Finally, the right to cross-examine is fundamental to a fair trial, and insisting on offers of proof in this setting would pose a serious threat to this ideal.<sup>6</sup> It is clear, however, that the court can require an offer of proof during direct examination of adverse witnesses, and on cross-examination of the opponent's witnesses where counsel apparently has a good idea of the substance of the testimony he seeks to elicit.<sup>7</sup>

### **Indicate nature, relevance**

To serve its intended purposes, an offer of proof should indicate the nature or content of the evidence and describe its purpose and why it is relevant (at least if there is room for doubt).<sup>8</sup> If the

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4. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988) (in wrongful death suit against maker of Air Force plane, defense cross-examined plaintiff on passages in his letter on cause of accident; on redirect, court erred in preventing counsel from asking about additional passages; nature of testimony was "apparent from the very question" and issue was preserved).

5. *Henderson v. Commonwealth*, 438 S.W.3d 335, 342-343 (Ky. 2014) (in felon-in-possession trial, proffer was inadequate; counsel asked defendant "about any previous incidents with [the alleged victim] Harris," and he said Harris "ran up behind" him two weeks earlier; this exchange did not make known the substance of the testimony, which court excluded; proffer must not be "too vague or general," and specificity is needed for both trial and reviewing court).

6. *Alford v. United States*, 282 U.S. 687 (1931) (often counsel cannot know what facts will come out on cross, which is "necessarily exploratory," and rule requiring examiner to indicate purpose does not generally apply; cross-examiner must have "reasonable latitude" even if he cannot say what might develop; requiring proffer would deny substantial right and withdraw safeguard essential to fair trial).

7. FRE 103 does not create an exception to the offer-of-proof requirement during cross. *See United States v. Lopez*, 944 F.2d 33, 41 (1st Cir. 1991) (offer on cross).

8. *United States v. Thompson*, 279 F.3d 1043, 1047-1048 (D.C. Cir. 2002) (must alert court to substance; defense did not indicate expected response from witness or describe evidence or purpose for which it was offered); *Porter-Cooper v. Dalkon Shield Claimants Trust*, 49 F.3d 1285, 1287 (8th Cir. 1995) (proffer must state substance of

evidence is the only proof on point, the proponent may have to show (argue persuasively) that it is sufficient to prove that point, either alone or with other proof the proponent expects later in the case.<sup>9</sup> Finally, the proponent should show the evidence is competent, at least if there is room for doubt.<sup>10</sup>

An offer is insufficient if it is too vague or general to enable the court to understand or evaluate it.<sup>11</sup> Thus, for example, offers to prove a statement or conversation without stating its substance and offers couched in conclusory terms are likely to be insufficient.<sup>12</sup>

On appeal, if it is urged that the trial judge erred in refusing an offer of proof, the sufficiency of the offer is judged only in the light of the ground of admissibility and the purpose stated at trial, and not by reference to a ground or purpose advanced for the first time on appeal.<sup>13</sup> If the offer is accepted and the evidence comes in, however, and the objecting party urges that the theory on which the court relied does not support the result, the court may still be sustained if the evidence was admissible on some other theory.<sup>14</sup>

### **Methods of making offer**

For testimony, the most thorough method of making the offer is to put the witness on the stand,

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testimony, and show it is not cumulative); *United States v. Willie*, 941 F.2d 1384, 1392-1393 (10th Cir. 1991) (excluding where defense did not indicate purpose of documents).

9. *Idaho & Oregon Land Improv. Co. v. Bradbury*, 132 U.S. 509 (1889) (proponent offered to show plaintiffs were told *C* lacked authority to change contract terms, not that he actually lacked such authority).

10. *Phillips v. Hillcrest Medical Center*, 244 F.3d 790, 802 (10th Cir. 2001) (proponent must explain what he expects evidence to show and ground on which it is admissible); *United States v. Burnett*, 890 F.2d 1233, 1240-1241 (D.C. Cir. 1989) (sustaining objection where witness said he lacked knowledge).

11. *United States v. Kelly*, 510 F.3d 433, 438-439 (4th Cir. 2007) (defense did not explain that prior conviction, offered to impeach under FRE 609(a)(2), required proof that witness knew she had insufficient funds when she wrote check; defense proffered no evidence and “simply cited the Florida statute” without disclosing text or making “textual” argument he now makes) (claim of error waived); *Polys v. Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1409 (10th Cir. 1991) (proffer of expert testimony was inadequate where counsel did not explain “substance or purpose”).

12. *United States v. West*, 898 F.2d 1493, 1498 (11th Cir. 1990); *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979).

13. *United States v. Powell*, 894 F.2d 895, 901 n.5 (7th Cir. 1990); *United States v. Cruz*, 894 F.2d 41, 43-44 (2d Cir. 1990).

14. *United States v. Brothers Constr. Co. of Ohio*, 219 F.3d 300, 310 (4th Cir. 2000); *United States v. Cruz*, 797 F.2d 90, 97 n.2 (2d Cir. 1986).

ask questions, and put his answers in the record.<sup>15</sup> But this approach is cumbersome and time-consuming, and the court typically lets counsel offer testimony without calling the witness to the stand<sup>16</sup> unless the judge doubts the good faith of the offer.<sup>17</sup> Where a proffer is a physical object of a common sort like a document, the proponent should mark it as an exhibit and lodge it with the clerk to make it part of the record, in addition to making clear to the judge that he is seeking to offer the document or thing in evidence.<sup>18</sup> The proffer should be made on the record, and the judge may augment the offer by making a further statement on the form or character of the evidence, the objection, and ruling.

Where one party offers an out-of-court statement and another raises a hearsay objection (showing the statement is offered to prove what it asserts), the proponent bears the burden of showing it fits an exception.<sup>19</sup> The proponent should identify the exception so the trial judge can apply it.<sup>20</sup>

### **Outside jury's hearing**

Proffers should be made out of the hearing of the jury whenever doing so may be important to prevent exposing the jury to inadmissible evidence.<sup>21</sup> The importance of shielding the jury in this way varies widely with the situation and nature of the proof.

Holding hearings on proffers outside the jury's hearing has other benefits. It gives the judge a chance to assess the evidence in relatively relaxed circumstances and it helps her to exercise her option to reserve ruling on the evidence until more of the case has unfolded—in other words to

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15. *See* FRE 103(c) (court “may direct the making of an offer in question-and-answer form”); *United States v. Adams*, 271 F.3d 1236, 1241 (10th Cir. 2001) (most desirable, from all standpoints except cost, is proffer that includes examining witness on record, which necessitates excusing jury unless done in pretrial hearing; other side may also cross-examine on matters relating to proffer) (other methods include oral or written statements by counsel and written summaries prepared by witness).

16. *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *Fox v. Dannenberg*, 906 F.2d 1253, 1255 (8th Cir. 1990).

17. *Scotland County v. Hill*, 112 U.S. 183 (1884) (can require production of witness if court doubts good faith); *United States v. Kartman*, 417 F.2d 893, 896 n.7 (9th Cir. 1969) (record suggests offer may not have been well-founded, so proponent may be required to call and question witness).

18. *Palmer v. Hoffman*, 318 U.S. 109 (1943) (since document was not marked for identification or included in record, court did not know contents and defense did not show prejudice).

19. *See* §1.12, *infra*.

20. *Maddox v. Patterson*, 905 F.2d 1178, 1181 nn.2 & 3 (8th Cir. 1990) (plaintiff did not offer medical history as business record or adoptive admission, so these points were not preserved).

21. *See* §1.12, *infra*.

require the proponent to put on other proof first. When conducted outside the jury's presence, a hearing on a proffer can be far less formal than a trial. The factfinder is not affected and the court may resolve issues of admissibility without worrying about being bound by the Rules of Evidence.<sup>22</sup> Both sides may call and examine witnesses, if necessary, and it might well be necessary to do so in order to resolve factual issues that arise in applying the Rules: The business records exception, for instance, applies only if the record is routinely kept, and the proponent and the objecting party should be allowed to explore and develop this point if any serious question is raised. But an elaborate proceeding is often unnecessary, and either side might prefer not to make serious contest on the preliminary points, accepting whatever ruling the trial judge makes on the evidence issues and reserving any response and rebuttal for trial.

### **Repeating offer unnecessary**

Where repeating an offer of proof would be a useless gesture because the trial judge has said the evidence would not be admitted, no further offers are necessary,<sup>23</sup> at least so long as the proponent adheres to his position that the evidence should be admitted and does not expressly acquiesce in the court's ruling.<sup>24</sup> An offer is similarly unnecessary as a useless gesture where the trial court excludes in advance a whole class of evidence, or accomplishes the same end by narrowing the issues to be tried.<sup>25</sup>

Underlying the idea that there are limits in the persistence required of the offering party is the reality that offers of proof may disrupt the trial and lead to friction and tension between counsel and judge, and the notion that a trial judge who rules on an offer should not have to reconsider the question time and again. Litigants also stand to gain because counsel cannot be expected to focus continually on past strategic gambits and should be allowed to readjust thinking and strategies to the realities of an ongoing trial. (These notions and others underlie the "law of the case" doctrine.) It is also noteworthy that renewed offers of proof, if made after a ruling and in the presence of the jury, can be viewed as improper attempts to influence the jury, which is itself potentially a form of misconduct and ground for new trial or reversal.<sup>26</sup> If the trial judge postpones ruling on a

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22. See FRE 104(a) (court not bound by Rules apart from privileges in deciding preliminary matters); *also* §1.12, *infra*.

23. See FRE 103(a), as amended in December 2001 (after "definitive" ruling excluding evidence, proponent need not "renew" proffer); *Heyne v. Caruso*, 69 F.3d 1475, 1481-1482 (9th Cir. 1995) (reversible error to exclude other instances despite failure to offer proof; in pretrial ruling, court "excluded all evidence of sexual harassment" not directly related to claim).

24. *United States v. Weiss*, 930 F.2d 185, 198-199 (2d Cir. 1991); *United States v. Rogers*, 918 F.2d 207, 211-212 (D.C. Cir. 1990).

25. *Garner v. Santoro*, 865 F.2d 629, 636 (5th Cir. 1989) (court barred government contractor defense, so defendant needed not make offer of proof on this defense); *Greatbreaks v. United States*, 211 F.2d 674, 676 (9th Cir. 1954) (specific offer not needed where "entire class of evidence" is declared inadmissible in advance; ruling relates forward to other offers of such evidence).

26. *Greatbreaks v. United States*, 211 F.2d 674, 676 (9th Cir. 1954) (after ruling excludes class of evidence,

question, or otherwise indicates that an offer of proof may later be accepted, the proponent must renew the offer at an appropriate time.<sup>27</sup>

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persistence repeating offers may be improper attempts to get effect of evidence to jury).

27. *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 688-689 (9th Cir. 2001) (defense moved in limine to exclude evidence of sexual harassment before 1994, and judge granted motion but said plaintiffs could renew request, outside presence of jury; failure to make later proffer means plaintiffs cannot challenge exclusion of evidence on appeal).