The Offer of Proof

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Dominic Marrone died at the hands of a Veteran's Administration Hospital in Connecticut. His widow's lawsuit died at the hands of her trial counsel. One might have been unavoidable, but the other was eminently preventable.

At the trial on the action for medical negligence, Ms. Marrone's counsel asked the treating doctors as adverse witnesses about the surgical standard of care, but his opponent's objection to this line of questioning was sustained. The case was then dismissed for lack of any evidence on breach of the standard of care.

The United States Court of Appeals for the Second Circuit affirmed. Although the trial judge was probably wrong in preventing counsel from examining the treating doctors as adverse witnesses on the standard of care, counsel's failure to make an offer of proof was fatal to the appeal. *See Marrone v. United States*, 355 F.2d 238 (2d. Cir. 1966).

There are dozens of decisions like *Marrone*. To lose at trial is bad enough. To lose an appeal because of counsel's trial oversight is worse. Nobody wants to be on the receiving end of a *Marrone* decision, and there's no reason to be, if you pay attention to offers of proof at trial.

Why Make an Offer of Proof?

The Rules of Evidence, state and federal, provide that error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right is affected and a timely and specific objection made. If the ruling is one excluding evidence, it is also required that "a party

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informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Utah R. Evid. 103(a)(2).

The purpose of the offer of proof (or "proffer") is to advise both the trial and the appellate courts what was expected to be proved by the evidence excluded. This makes for a record detailed enough for the appellate court to determine if there was reversible error in the exclusion of the evidence. Equally important, it gives the trial judge the benefit of hearing the excluded evidence, and perhaps reconsidering the ruling.

How to Make an Offer of Proof

The jury should not, of course, hear the proffer. Rule 103(d) makes explicit this nugget of common sense. Judges are understandably reluctant to excuse a jury in the middle of a session, so the usual procedure is to defer proffers until the next break, after the jury has left the courtroom, or do it immediately, by sidebar conference.

When an objection to your examination is sustained, and the point is one worth preserving, inform the judge of your need to make a proffer and find out if the court wants the proffer made then, or later.

Proffers are made either at sidebar conference or in open court (with the jury absent) and either by counsel's narration or by questioning of the witness. Rule 103(c) gives the judge either option. The question-and-answer method is just that. Simply ask the witness the questions you originally intended to ask.

Sidebar conferences are awkward, annoy the jury, disrupt the flow of the trial, and are generally a tepid substitute for a question-and-answer proffer. On the other hand, they are contemporaneous with the ruling, and often you'll have no other option.

Watch your record with sidebar proffers. In courtrooms that still use court reporters, sidebars may be off the record because of the implausibility of squeezing the court reporter and all counsel into the well in front of the bench. Where audio recording is used, make sure the microphone and recording system at the bench are on. The court will sometimes allow you to make your proffer on the record when the jury is next excused from the courtroom, but only if you remember to ask.

Rule 103(c) says that the court may direct the making of a proffer in question and answer form, but there is no requirement that it do so. Question-and answer proffers in court with the jury absent are preferable for making a complete record and are more persuasive if you think the judge's decision is wrong and want to change it. But they are more time-consuming and keep the jury waiting, so save your requests for “full” proffers for the important points.

In bench trials, proffers are made at the time of the court's ruling. Nothing about a non-jury trial changes the requirement for proffers, although on occasion you may encounter a judge who thinks so and wants you to move on and dispense with detailed proffers. Stick with it. Part of your job as a trial lawyer is to make your record, with or without judicial cooperation. A small comfort will be your knowledge that a judge's refusal to allow counsel's reasonable attempts to preserve the record may be reversible error.

What Should the Proffer Include?

Proffers are part testimony and part argument. The testimony part should detail the excluded evidence specifically enough to show its admissibility. In the words of the Utah Supreme Court, a proffer must be "certain, sufficient, and intelligible and must definitely state the facts to be proved. It must show the materiality, competency, and relevancy of the evidence

offered." *Dansak v. Deluke*, 366 P.2d 67, 70 (1961). Put another way, an offer of proof should show what the evidence would have been, why that evidence was relevant and admissible, and how the evidence would have been significant to the case. *United States v. Peak*, 856 F.2d 825, 832 (7th Cir. 1988), *cert. denied*, 488 U.S. 969 (1988).

Generalized and conclusory proffers aren't good enough, just as indefinite and conclusory testimony isn't good enough. For example, in *United States v. Winkle*, 587 F.2d 705 (5th Cir. 1979), the trial court wouldn't allow the defendant in a fraud case to testify about his conversations with prosecution witnesses. Defense counsel, making what he thought was an offer of proof, stated for the record that Mr. Winkle would testify "as to his version of the conversations that he had with [the prosecution witnesses]." *Id*. at 710. Unfortunately for his client, counsel failed to make any record of what exactly was Mr. Winkle's "version" of the conversations. The Fifth Circuit, while noting that the testimony might well have been admissible as impeachment, nevertheless refused to consider it because of the superficial proffer.

The argument part of the proffer should identify all of the grounds under which the evidence is potentially admissible. Any ground not stated in your proffer won't be considered on appeal. For example, proffering a police report as an admissible business record under Rule 803(6) won't preserve your option of arguing on appeal that it was also admissible as a public record under 803(8), or that it wasn't hearsay at all. *See*, *United States v. Sims*, 617 F.2d 1371, 1376-77 (9th Cir. 1980). Make it clear, make it specific, and include every plausible ground for admission.

Is the Witness Excluded During the Proffer?

Sometimes it's appropriate to have the witness excluded during a narrative proffer. Here's an example: you've been prevented from inquiring into a fruitful area on examination of an unfriendly witness. Why let the witness know exactly where you intend to go if you're successful changing the court's ruling by your proffer? Ask that the witness be excluded from the courtroom during your proffer.

On an opponent's examination of a friendly witness, objecting counsel might also want the witness excluded, on the ground that hearing the proffer would influence the witness to alter his testimony to make it consistent with the proffer. There's nothing in Rules 103 or 615 on this sort of witness exclusion, but you've nothing to lose by asking.

When Do You Need to Make a Proffer?

Offers of proof aren't limited to testimonial evidence. If an objection is sustained to the admission of a document, it has (one hopes) already been marked, offered, and thus made part of the record. That's the easy part.

Trickier are the exhibits that weren't admitted and were never offered. Two years later on appeal, it won't work to argue that you "offered" them, in a sense, in chambers, without a record, but were turned down, and therefore didn't bother to do it formally on the record. Or to argue that sustaining the objection to one document dispensed with the need to offer and proffer different but similar documents. Why gamble? No matter how predictable the trial court's ruling, mark the exhibits, offer them into evidence, get a ruling on the record, make your argument for admission, and complete your proffer.

It's a traditional opinion that proffers are unnecessary on cross examination, the thought being that the examiner doesn't know what the answers will be. But Rule 103 makes no such exception, and a careful advocate wouldn't rely on it. In addition to the *Marrone* decision, take a look at *United States v. Martinez*, 776 F.2d 1481, 1485-86 (10th Cir. 1985) and *State v. Rammel*, 721 P.2d 498, 499 (Utah 1986) both of which imply that proffers may be necessary on cross examination.[2]

What About Pretrial Rulings?

A continued area of concern is always pretrial rulings. For example, if the trial judge grants your opponent's motion *in limine* excluding some part of your evidence*,* don't assume that you've preserved the point for appeal. If the court makes it clear in definitive terms that the evidence is never coming in, then you're probably safe in assuming that you need not re-raise the point at trial. But if the ruling is any way tentative or conditional, wise practice is to raise the point again at trial, and make a proffer.[3]

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[2]For more discussion on this point, *see* 1 MCCORMICK ON EVID. § 51, *Offers of Proof* (6th ed.) at n.14: "On cross-examination, the examining counsel is ordinarily assumed not to have had an advance opportunity to learn how the witness will answer, and the requirement of an offer will not usually be applied . . . [e]ven on cross examination the court in its discretion may require counsel to hint her purpose far enough to show the materiality of the answer hoped for, or enough to make it appear that error has occurred. If an objection is sustained, and the cross-examiner believes the matter is of sufficient importance in making a record or persuading the judge to change the ruling, the cross-examiner should not take the risk of continuing the cross-examination without making an offer of proof or indicating the general purpose of the questioning."

[3]*Compare State v. Mitchell,* 779 P.2d 1116, 1119 n.4 (Utah 1989) (a pretrial motion to suppress adequately preserves an issue for appeal, if the trial judge is the same judge who ruled on the motion and a hearing was held on the motion), *with State v. Hansen,* 2002 UT 114, ¶¶ 12-21, 61 P.3d 1062 (where an issue has been raised but the court defers ruling on it and plainly instructs the objecting party to re-raise the issue at trial, failure to re-raise the issue waives it for appeal); *Erickson v. Wasatch Manor, Inc.,* 802 P.2d 1323, 1325-26 (Utah Ct. App. 1990) (the trial court did not err in admitting evidence precluded by its earlier ruling on a motion in limine where that ruling was conditional). (Thanks to Paul Simmons for identifying these cases.)

Evidence Rule 103(b) addresses the problem of the need to renew pretrial objections to the admission of evidence:

> (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.[4]

Note that the amended rule requires a *definitive* ruling from the trial court *on the record* that admits or excludes evidence.[5] So ask for a *definitive* ruling; that is, make sure the specific evidence is addressed and the judge states that her ruling is final. Then confirm it in a written order. If that's not possible, you must renew your objection and, if needed, make an offer of proof at trial.

"Oops- I Forgot to Make My Proffer"

Not all is necessarily lost. There are limited exceptions. The favorite is that a proffer isn't necessary if "the substance of the evidence was apparent from the context" under Rule 103(a)(2). See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988).

Another exception is that a proffer would have been "futile;" that is, that the judge was too opinionated or too cranky to listen to it anyway. *See United States v. Barash*, 365 F.2d 395, 40001 (2d. Cir. 1966) (trial judge wrongly and repeatedly cut short cross examination).

A third exception may be pretrial "case management decisions" made by the court under the rules of procedure but not under the rules of evidence. *Berrett v. Denver and Rio Grande*, 830

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[4]*See State v. Dominguez*, 72 P.3d 127, 2003 Utah Ct.App. 158 (under Rule 103, a party was not required to object during trial to evidence offered in accordance with the court's pretrial ruling); *State v. Saunders*, 992 P.2d 951, 1999 UT 59 (because defendant objected to court's pretrial ruling, he wasn't required to make a further objection at trial to preserve issue for appeal).

[5]*See*, *Clayton v Ford Motor Co*., 214 P.3d 865, 876, 009 UT App 154.

P. 2d 291 (Utah Ct. App. 1992) (preclusion of late-designated experts; no proffer of testimony necessary, but the witness was not excluded for evidentiary reasons).

And then there's always the final resort of the "plain error" doctrine, now codified in Rule 103(e). This allows an appellate court to fix egregious errors, no matter how lax the trial counsel, if it feels inclined to do so.

No one would intentionally rely on these exceptions. The lack of a proffer is rarely the result of any decision by trial counsel. Sometimes it's the child of sloppy practice. More commonly it's the product of the stress and fatigue of any long trial. Make it second nature and it's less apt to be forgotten.

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