

Appellate Tips for Trial Lawyers

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[Calendar of Events](#)

Offers of Proof: Avoid Waiving the Right to a New Trial or to an Appeal

To avoid waiving your right to appeal on erroneous exclusion of evidence, you must ensure the record sufficiently discloses the substance, purpose, and relevance of the excluded evidence.

Substance, Purpose, Relevance

When a trial court excludes evidence, the party who offered the evidence must make an "offer of proof" to avoid waiving the right to a new trial or an appeal based on the erroneous exclusion of that evidence ([Evid. Code §354 \(a\)](#)). An offer of proof is a statement that explains the "substance, purpose, and relevance" of the excluded evidence (*Id.*). If your case ends up on appeal, the court of appeal may need the offer to determine not just whether error occurred but also whether any error was prejudicial.

You must make the offer outside the jury's presence, and it can be oral or in writing. But whatever its form, it must be *on the record*, *specific*, and based on *admissible evidence*. You must identify the actual evidence to be produced. Merely stating the facts to be proved or the issues to be addressed is insufficient: "The substance of evidence to be set forth in a valid offer of proof means the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be introduced to prove the existence or nonexistence of a fact in issue" (*United Sav. & Loan Ass'n. v. Reeder Dev. Corp.* (1976) [57 Cal.App.3d 282, 294](#)). Do not skimp on the details. Specifically identify any relevant witnesses and what they would say. Identify the content of relevant writings, and include the documents with your offer. Conclusory statements, such as "the witness will testify as to causation," are insufficient. Remember to address all three requirements—substance, purpose, and relevance.

Be Prepared

Do not leave offers of proof to the last second. They are too important. Plan ahead. If you know an exclusion issue will likely arise, prepare a written offer of proof in advance and attach any relevant documents, such as deposition excerpts or intended exhibits. Not only will a detailed offer of proof protect your client's appeal rights, it could convince the trial court to change its mind and allow the materials into evidence.

Exceptions

In a few situations, the absence of an offer of proof will not waive an erroneous exclusion of evidence. An offer of proof is unnecessary when:

- Prior colloquy between the court and counsel, or prior proceedings such as pre-trial or in limine hearings, already sufficiently disclose the substance, purpose and relevance of the excluded evidence. But those prior events will only help avoid a waiver claim if they were transcribed or based upon documents that were filed in the trial court, and therefore can be made part of the appellate record.
- The excluded evidence "was sought by questions asked during cross-

examination or recross-examination” ([Evid. Code, §354 \(c\)](#)). That is because cross-examination questions are “often exploratory and it would be unreasonable to require an offer of proof under such circumstances” because the attorney may not know what the answers will be (*Lawless v. Calaway* (1944) [24 Cal.2d 81, 91](#)). However, counsel may need to explain the general theory behind its cross-examination questions if the trial court indicates that it believes the entire line of questioning is improper (*People v. Allen* (1986) [42 Cal.3d 1222, 1270](#)). Also, if the evidence sought to be elicited falls outside the scope of the direct examination, an offer of proof is necessary to preserve the issue for appellate review (*Nienhouse v. Superior Court* (1996) [42 Cal. App.4th 83, 93](#)).

- The trial court's prior rulings would make an offer “futile” ([Evid. Code, §354 subd.\(b\)](#)), such as when “an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue” (*Beneficial etc. Ins. Co. v. Kurt Hitke & Co.* (1956) [46 Cal.2d 517, 522](#); see, e.g., *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage etc. Co.* (1968) [69 Cal.2d 33, 36, fn. 1](#) (offer of proof regarding extrinsic evidence to interpret a contract not required where court repeatedly ruled that it would not admit any extrinsic evidence to interpret the contract)).

Although these exceptions exist, do not assume they will apply to your case. Always make an offer of proof. The risks of not doing so—losing your client's right to a new trial and to an appeal based on the erroneous exclusion of evidence—are too great.



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