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## Offers of Proof in Nebraska

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## OFFERS OF PROOF IN NEBRASKA

## I. INTRODUCTION

## A. REASONS FOR AN OFFER OF PROOF

An attorney questions a witness on direct examination.<sup>1</sup> An objection to the question is sustained by the trial court.<sup>2</sup> At this point, the proponent of the witness must elucidate the testimony that was expected to be given in response to the question.<sup>3</sup> This offer of proof must be made for three basic reasons. First, the trial court should be shown that the testimony would be admissible and proper.<sup>4</sup> Second, the offer of proof is necessary in order that preju-

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<sup>1</sup>The considerable differences between the requirements of an offer of proof on cross-examination, as opposed to direct examination, are discussed at IV(A) of text.

<sup>2</sup>An objection made in the very broadest and vaguest terms (*e.g.*, "incompetent, irrelevant, and immaterial"), if sustained by the judge, will place the burden of making an adequate offer of proof upon the proponent of the evidence. McCORMICK, EVIDENCE 118-19, n.27-35 (1954).

<sup>3</sup>The offer of proof will generally be discussed here in terms of an offer after an objection to an oral question to a witness, since this is the situation most commonly occurring, and the one most discussed by the courts. This situation, however, is not comprehensive. An offer of proof is also necessary where written evidence is to be introduced. *In re Estate of Woodward*, 147 Neb. 270, 23 N.W.2d 75 (1946); *Central City Bank v. Rice*, 44 Neb. 594, 63 N.W. 60 (1895). See also McCORMICK, EVIDENCE 112 (1954): "In the case of tangible things, such as writings, depositions, photographs, bullets, articles of clothing or the like, the counsel for the introducing party (after having produced witnesses to identify or authenticate the writing or other object) submits it to opposing counsel for inspection, and when this has been done, presents it to the judge, with the statement, 'We offer this (document or object, describing it) in evidence.' In a jury trial it is customary then in case of a writing for counsel to read it to the jury." The rules regarding offers of proof are generally applicable to criminal as well as to civil trials. *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957); *Dean v. State*, 128 Neb. 466, 259 N.W. 175 (1935); *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901). In the *Savary* case, the court said: "As no offer was made as to what the witness would testify in answer to the question, we are unable to say there was prejudicial error in the ruling complained of. The rule is, and it is applicable alike to criminal and civil trials, that when to a question in direct examination objection is interposed by the adverse party and sustained, in order to present the ruling to this court for review, there must be an offer of proof of the facts sought to be put in evidence by the question to which the answer was excluded." *Id.* at 168, 87 N.W. at 35.

<sup>4</sup>*Gormley v. Peoples Cab, Inc.*, 142 Neb. 346, 6 N.W.2d 78 (1942); *Mathews v. State*, 19 Neb. 330, 27 N.W. 234 (1886).

dice may be shown in the exclusion of the testimony,<sup>5</sup> in line with the general rule of law that no issue is appealable unless the appellant's case has been weakened by the exclusion below.<sup>6</sup> Third, the offer allows the opponent to learn the nature of the testimony and to reconsider the objection. These purposes must be kept in mind throughout this consideration of the merits and requirements of the rules applicable to offers of proof.

The courts have generally made little analysis of the above purposes of the offer of proof. Indeed, the rule itself is usually stated with a cursory remark such as, "it has long been the rule in this state that . . ." with virtually no consideration as to why offers of proof have long been held necessary, or whether the rule should be strictly applied in the particular case. Perhaps for this reason, the courts have said little that is of any practical value in assisting the attorney to make an offer of proof which will be satisfactory to serve the purposes of the rule.

#### B. STANDARDS FOR AN OFFER OF PROOF

Unquestionably, the trial court may not misconstrue an offer of proof in such a way as to make it ineffective. In fact, the trial court seems to have a duty to construe the offer in favor of the proponent if it is "fairly susceptible of a construction rendering the evidence proffered admissible . . ."<sup>8</sup>

Granting this duty of the court to so construe an offer of proof, it is still not certain just how clearly admissible the evidence must be shown to be. It has been said that the offer or question "must clearly indicate the materiality of the answers sought,"<sup>9</sup> and that "if proffered evidence is prima facie admissible, it is the duty of the court to receive it; otherwise it should be rejected."<sup>10</sup> Other cases,

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<sup>5</sup> *Barr v. City of Omaha*, 42 Neb. 341, 60 N.W. 591 (1894).

<sup>6</sup> See, e.g., *Tongue v. Perrigo*, 130 Neb. 564, 572, 265 N.W. 737, 741 (1936): "Certain other exhibits were excluded from evidence. Some holiday and other greeting cards, photographs and telegrams, which at most could only be cumulative as showing the unusually friendly relation between defendant and Elizabeth [the deceased girl with whom the defendant was accused of having had intercourse]. Even if they were admissible (we think they were not), it was error without prejudice, because they do not tend to establish any fact, unless it was the friendly relation mentioned above, which is abundantly established without them."

<sup>7</sup> *Olmsted v. Noll*, 82 Neb. 147, 150, 117 N.W. 102, 104 (1908).

<sup>8</sup> *Horbach v. Boyd*, 64 Neb. 129, 131, 89 N.W. 644, 645 (1902).

<sup>9</sup> *Gormley v. Peoples Cab, Inc.*, 142 Neb. 346, 349, 6 N.W.2d 78, 80 (1942).

<sup>10</sup> *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 631, 78 N.W. 300, 302 (1899).

however, have held offers of proof invalid even though the purpose of the questioning was "evident" to the upper court.<sup>11</sup> Perhaps it would be impossible to establish any clear standard for offers of proof applicable to all cases. The lack of any definite standard makes it incumbent upon the proponent to make his offer of proof indisputably definite and clear.

The problems regarding the adequacy of an offer of proof may truly be serious. The failure to make an adequate offer may defeat the attempt to admit the evidence and prevent an appeal on the issue of the exclusion of such evidence.

As in the case of other rules which may cause the exclusion of valuable evidence, the requirement of an offer of proof is a necessary, and generally proper, protection for the rights and interests of the parties to the trial. The requirement is, however, technical and severe in some cases. The application of the rule should be considered, not merely as an infallible formula, but as a useful tool to be used carefully in specific circumstances to obtain the objectives of the rule. The analysis here, then, is made with the intention of determining the method of making an offer of proof and of considering the value of the rules governing the making of such offers.

## II. THE NATURE OF AN OFFER OF PROOF

### A. RESPONSIVENESS TO THE QUESTION

The first requirement in the making of an effective offer of proof is that it be in response to the court's rejection of proffered evidence.<sup>12</sup> In other words, a statement by the proponent as to his purposes in calling a witness, made before any question has been asked of the witness, is not itself an adequate offer of proof.<sup>13</sup> The reason for the requirement of a specific question preceding the

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<sup>11</sup> Brennan-Love Co. v. McIntosh, 62 Neb. 522, 87 N.W. 327 (1901).

<sup>12</sup> Farmers & Merchants Ins. Co. v. Dobney, 62 Neb. 213, 86 N.W. 1070 (1901).

<sup>13</sup> Pike v. Hauptman, 83 Neb. 172, 174, 119 N.W. 231, 232, (1909): "The rule appears to be that, unless there is pending a question to which the offer made is responsive, and objection to the question has been sustained by the court, that an offer of proof should not be entertained by the court, and that sustaining an objection to such offer is not prejudicial error. In other words, an offer to prove facts wholly disconnected with any matter concerning which the witness has been questioned is not proper, and presents no question for review by the district court." (Citations omitted.)

offer is apparently to allow the trial court a better opportunity to weigh the evidence in relation to the question. It is doubtful, however, that an offer to prove made before, rather than after, the question, really serves the purposes of the offer of proof any less effectively.<sup>14</sup>

#### B. ESTABLISHMENT OF ADMISSIBILITY

The basic purpose of requiring an offer of proof is to show the admissibility of the testimony. With this purpose in mind, it is almost unnecessary to say that an offer of proof, considered with evidence already given or offered in the case, must show all the facts which are requisite to the materiality and competency of the testimony.<sup>15</sup> In *Howarter v. Olson*,<sup>16</sup> a suit involving an automobile accident in Wyoming, it was held not to be error to exclude evidence of a Wyoming statute establishing brake standards, where there was no offer to prove that the defendant had violated the statute. Here, it cannot be said with any reasonableness that the nature of the evidence was itself uncertain. Only the relevance of the evidence was not disclosed.<sup>17</sup> The judge must be shown the relation of the proffered question to the rest of the evidence at the trial, and the burden is upon the proponent to show the materiality and relevancy of the question.

*Olmsted v. Noll*<sup>18</sup> involved a suit by a wife against two liquor companies on grounds that because they sold liquor to her husband (an alcoholic), he could not provide support for her and the children. On redirect examination, the defendant's witness, a baker, was questioned: "Q. And he would buy goods of you, would he, necessaries for the family? A. Yes, sir. Q. And pay for them? A. Yes sir . . . Q. Could you tell us for what amount he would pay to you for necessaries?"<sup>19</sup> An objection to the question was sustained, and the appeal was denied on the issue of the sustained objection because there was no offer of proof of the proffered

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<sup>14</sup>Such an offer might help to make the record and question together show the admissibility of the testimony for purposes of excusing the absence of an offer of proof. See generally, part IV of text.

<sup>15</sup>*Blondel v. Bolander*, 80 Neb. 531, 114 N.W. 574 (1908).

<sup>16</sup>145 Neb. 507, 17 N.W.2d 483 (1945).

<sup>17</sup>"As we view this record, the condition of the brakes on plaintiff's unit not being a proximate cause of, nor contributing to the cause of, the accident, error, if any, in the ruling was not prejudicial." *Id.* at 516, 17 N.W.2d at 488.

<sup>18</sup>82 Neb. 147, 117 N.W. 102 (1908).

<sup>19</sup>*Id.* at 150, 117 N.W. at 103.

evidence. The objection seems to have been that there was no showing that the baker knew that the goods bought by the husband were to be used by the husband for family purposes. In other words, there was no indication that the witness was competent to testify that the husband was providing food for his family. The evidence must not only be material and relevant, but the witness must be competent to answer the question.<sup>20</sup> Further, there was no showing as to the amount of goods purchased by the husband. If the goods purchased were negligible in quantity, exclusion of the evidence could hardly be injurious to the defendant-profferor. Thus, the offer should state that the witness will show that the evidence could not be excluded without prejudice. It may, in certain cases, even be advisable to give the exact answer expected from the witness.<sup>21</sup>

*Masters v. Marsh*<sup>22</sup> points out the reasons for an offer of proof, and illustrates the type of facts which must be included in such offer. In *Marsh*, the defendant in a bastardy action was attempting to show the possible paternity of one other than the defendant, and to attack the plaintiff's chastity. Defendant's counsel asked a witness on direct examination if he had seen a young man other than the defendant go into an unoccupied house at night with the plaintiff. An objection to the question was sustained, but no offer of proof was made. The court said that the sustaining of the objection could not be questioned on appeal since the defendant had not offered to prove that the events happened at a time consistent with the period of gestation, or that the parties were alone in the house for any considerable period of time.

*Masters v. Marsh*<sup>23</sup> is the type of case which makes an offer of proof a necessary legal device. It is extremely important that the testimony not reach the jury unless it is admissible. The testimony is of such an inflammatory nature that it might well arouse the jury against the plaintiff if improperly admitted. Still, the de-

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<sup>20</sup> See also *Mordhorst v. Nebraska Tel. Co.*, 28 Neb. 610, 44 N.W. 469 (1890).

<sup>21</sup> *Olmsted v. Noll*, 82 Neb. 147, 117 N.W. 102 (1908). See also *Mathews v. State*, 19 Neb. 330, 338, 27 N.W. 234, 237 (1886): "[T]he evidence which the party proposes to offer must be presented to the court, as well as the questions to which objection is made; the court will then be able to determine whether or not the evidence is pertinent."

<sup>22</sup> 19 Neb. 458, 27 N.W. 438 (1886).

<sup>23</sup> *Ibid.*

fendant should be given every opportunity to show that the evidence should be admitted. Thus, an offer of proof is required.<sup>24</sup>

### C. RESPONSIVENESS TO THE PLEADINGS

A further requirement of a valid offer of proof is that it must assert that the proffered testimony will tend to establish facts or a theory of the case which has been well pleaded. *Todd v. City of Crete*<sup>25</sup> involved a railroad brakeman who was injured by the defendant's negligently strung electric wires. The defendant asked a witness on direct examination whether the plaintiff had contributed to a relief fund from which he had been paid for his injuries upon releasing the railroad from liability. The court upheld an objection to the question. It went on to say that the defendant apparently wanted to prove that his employer was a joint tort-feasor. This defense, however, is affirmative and must be pleaded. Therefore, even if there had been an offer of proof, it would have been ineffective because of not being within the pleadings.<sup>26</sup> The initiation of a proper offer of proof arises from the first pleadings.

Thus, the following requirements seem necessary in the making of an offer of proof:

1. The offer must be made in response to the court's sustaining of an objection to a specific attempt to introduce evidence, by a question to a present witness, or by available documents or other tangible evidence.
2. It must allege facts necessary to show that the proposed testimony will materially relate to the questions in issue.
3. The offer must show that the evidence would be competent

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<sup>24</sup> See *Mathews v. State*, 19 Neb. 330, 27 N.W. 234 (1886), where the defendant in a rape case attempted, on cross-examination of the prosecutrix, to ask her questions challenging her chastity. It was held that there was no error in the exclusion of the answers since there was no offer to prove the facts solicited. Where the facts are of a highly sensitive nature, the need for a showing of relevancy seems to be especially high.

<sup>25</sup> 79 Neb. 671, 113 N.W. 172 (1907).

<sup>26</sup> See also *Hamilton v. Ross*, 23 Neb. 630, 37 N.W. 467 (1888). This was an action for conversion brought by a wife who claimed the defendant sheriff had converted her property under an execution of a judgment against her husband. Defendant asked the husband various questions, apparently to show fraud between the husband and the wife. Objections to the questions were sustained. No offers of proof were made. Even had offers been made, there would have been no appeal from the exclusion of the evidence because the defendant had not pleaded fraud.

and that the witness would be competent and have the knowledge to answer the question if permitted to do so.

4. The offer must assert that the answer, when given by the witness, would be such as to make its exclusion prejudicial. In some cases, the proponent should specifically state the answer which would be given by the witness.

5. The offer must not assert facts which go beyond the pleadings of the case.

#### D. NONPREJUDICIAL MAKING OF THE OFFER

Although no special form of making an offer of proof is required, the offer must be made in such a way that the proffered evidence does not reach the jury. The purpose of the objection and offer of proof is to prevent jury consideration of improper evidence. Therefore, an offer improperly presenting objectionable evidence may be grounds for reversal if prejudicial to the interests of the opponent. This holds true even if the offer is made in good faith.<sup>27</sup>

#### E. RELEVANCE WHERE ONLY COMPETENCE IS CHALLENGED

The above discussion involved cases wherein the objection was primarily to the materiality and relevancy of the question. The discussion also applies, however, to situations where the objection is principally to the competence of evidence to be admitted. In *Cook v. Ketchmark*,<sup>28</sup> a will case, the proponent attempted, on rebuttal, to ask a question in regard to a conversation between the deceased and the witness (who was the attorney of the deceased). An objection was made on grounds that this was a privileged communication. On appeal it was said that the conversation had not involved a privileged communication because persons other than the deceased and the witness had been present, but there was no error in the exclusion of the testimony since the proponent had made no offer to prove the evidence the attorney would have given.

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<sup>27</sup> *Scripps v. Reilly*, 38 Mich. 10, 16 (1878): "Where the offer is likely to be of such a character that it would have a tendency to prejudice or influence the jury, the correct practice would be to present the article, if in writing, to the court and counsel for examination, without stating either the purport or substance of it. . . . That counsel acted in entire good faith in offering these articles in the manner in which he did we are willing to concede, but in the ardor of his zeal he went farther than the law would protect him in doing." Of course, the trial court may, in its discretion, require offers of evidence to be made out of the hearing of the jury. *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55 N.W. 211 (1893).

<sup>28</sup> 174 Neb. 222, 117 N.W.2d 375 (1962).



When the court rules that evidence will not be allowed because it is incompetent, the attorney's job is not finished. It is still necessary to offer to prove the evidence which would be given by the witness.<sup>29</sup>

### III. THE EXTENT OF AN OFFER OF PROOF

#### A. THE DILEMMA

There would be little problem if the only instances which gave rise to the necessity of an offer to prove were limited to isolated questions needing merely a showing of materiality and competency. Where an objection to only one question is at issue, it may be possible to restate the question, or the desired testimony might later be elicited after a proper foundation has been laid. When a series of questions is intended, however, and the judge's sustaining of the opponent's objections indicates that that particular line of questioning will not be allowed, the proponent is faced with a serious dilemma. An extended series of questions, if rejected by the court, is usually difficult to interject at a later point in the examination. Omitting the testimony may critically injure the proponent's case.

The proponent has three possible alternatives, each of which may or may not be effective. He may ask his series of questions, expecting objections to them to be sustained, and then make individual offers of proof on the denial of each question. He may make a narrative offer to prove a whole series of questions, the offer being made either before any questions have been asked, or after the first objection is sustained. Or he may decide to abandon the line of questioning.

#### B. RESPONSIVENESS

It is sometimes said to be a general rule of evidence that an answer should be responsive to the question.<sup>30</sup> This rule is perhaps

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<sup>29</sup> See also *Bland v. Fox*, 172 Neb. 662, 111 N.W.2d 537 (1961), where an expert witness' requested opinions on skid marks, discolorations of the road, etc., were objected to on the grounds that he was not competent to give such opinions. It was held that where there was no offer to prove the facts expected in the testimony, there is no error in excluding the testimony. The case cites *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957). *But see Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956).

<sup>30</sup> Even this statement has been challenged as not being a true statement of the law: 3 WIGMORE, EVIDENCE § 785 at 160 (1940), quoting *Underwood v. Cray*, 94 Vt. 58, 60, 108 Atl. 513, 514 (1920): "It is not every ir-

beneficial in expediting the process of the trial and in preventing irrelevant or improper evidence from being admitted. The courts, however, have grafted this rule onto the rule requiring the making of an offer of proof.<sup>31</sup> Thus, various cases have held defective any offer of proof which offered facts beyond the limits of the question.<sup>32</sup> The reasonableness of this combination of rules is subject to doubt.

*Hans v. American Transfer Co.*<sup>33</sup> involved an action for negligence against the plaintiff's employer for injuries incurred when

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responsive answer given by a party that will support an exception. Not only must such an answer be *improper in substance*, but it must be apparent that the party intends to go beyond the question and to gain an advantage." (Emphasis added by Prof. Wigmore.)

<sup>31</sup> *Dunphy v. Bartenbach*, 40 Neb. 143, 149, 58 N.W. 856, 858, (1894): "While an offer to prove is necessary to illustrate the purpose for which the question has been asked, we do not understand that by a mere offer to prove certain facts the materiality, relevancy, or competency of testimony, which by no possible means could be responsive to the question propounded, is presented for determination. The objection sustained in each instance under consideration was to an offer to prove made by the attorney, not upon objection to a question in response to which no answer had yet been given. After the question had been answered in each case without objection, it was of doubtful propriety to object to the answer; still more was that propriety strained by subsequently offering to prove certain facts entirely foreign to the scope of the question which had last been asked and answered. We are of the opinion that the objections made and sustained cannot now be reviewed on account of the facts to which attention has just been directed."

<sup>32</sup> *State v. Eggers*, 175 Neb. 79, 120 N.W.2d 541 (1963); *Webber v. City of Scottsbluff*, 150 Neb. 446, 35 N.W.2d 110 (1948); *Exchange Elevator Co. v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946); *Barr v. Post*, 56 Neb. 698, 77 N.W. 123 (1898); *Davis v. Getchell*, 32 Neb. 792, 49 N.W. 776 (1891). In *Barr v. Post*, *supra*, which was an action for damages resulting from the defendant's alleged assault and battery, defendant's counsel asked medical witnesses: "I will ask you to state what conclusion was reached by the physicians there as to the nature of the ailment of the difficulty that necessitated that operation [on the plaintiff]." *Id.* at 704, 77 N.W. at 125. The offer to prove for this question asserted that the witness's testimony would show that the ailment necessitating the operation could not have been caused by the defendant's battery. The court held that "this offer was not within the limits of the question which the court refused to permit the witness to answer. If counsel desired to have his witness testify that the condition of [the plaintiff] could not have been the result of an assault and battery upon her, he should have asked the witness that question, and then, had the court refused to permit it to be answered, made his offer of proof." *Id.* at 705, 77 N.W. at 125-26.

<sup>33</sup> 90 Neb. 834, 134 N.W. 943 (1912).

plaintiff fell off the defendant's manure wagon. In attempting to prove damages, plaintiff claimed that he had previously earned over 100 dollars per month while working for the Union Pacific Railway. Defendant called the assistant pay clerk of Union Pacific and asked him, "Do you know the reason why Hans left the services of the Union Pacific?"<sup>34</sup> The offer of proof was that the witness knew that Hans' habits were those of intoxication, so that he was unable to perform his duties. The court held that "error cannot be predicated on a rejected offer of proof not within the limits of the question asked."<sup>35</sup> Thus, when defendant's counsel later declared, "You may state why Hans was let out of the services of the Union Pacific,"<sup>36</sup> the court held that the question was inadmissible because it assumed that Hans had been discharged by the Union Pacific, a fact not proved. "Questions propounded to a witness must not assume the existence of a fact not proven in the cause."<sup>37</sup> The double actions of the rules involved prevented the admission of potentially admissible testimony. Apparently, the proponent should have, in support of the first question, offered to prove that the witness would have answered, "Yes," then asked "What was the reason for Hans' leaving the services of the Union Pacific?" The offer to prove then would have been that the witness would answer that Hans was dismissed from the Union Pacific. The third question, as to the reason for Hans' dismissal, would then have had proper foundation. In the light of the avowed purposes behind the requirements of offers of proof, the result reached by the court in this case seems severe. There is no real uncertainty in the purpose of the questions or the nature of the expected testimony. The court's requirement that the offer of proof not go beyond the limits of the question does not really act to assure the introduction of only material and competent evidence in cases of this type. After all, how far beyond a question, "Do you know the reason?" is an offer that, in effect, says, "The reason was . . . .?"

### C. FOUNDATIONAL QUESTIONS

The first problem with the rule that an offer of proof must be responsive to, and within the limits of, the question, is that, as in *Hans v. American Transfer Co.*,<sup>38</sup> a defective offer of proof is

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<sup>34</sup> *Id.* at 836, 134 N.W. at 944.

<sup>35</sup> *Id.* at 836-37, 134 N.W. at 944. (Citations omitted.)

<sup>36</sup> *Id.* at 837, 134 N.W. at 944.

<sup>37</sup> *Id.* at 837, 134 N.W. at 944. (Citations omitted.)

<sup>38</sup> 90 Neb. 834, 134 N.W. 943 (1912).

not sufficient to support a later question. Further, in *Brennan-Love v. McIntosh*,<sup>39</sup> a defective offer of proof was held to be insufficient to support a later question because the proponent failed to obtain a ruling on the prior offer.

#### D. THE NARRATIVE OFFER OF PROOF

The second objection to the requirement that an offer be responsive is that the narrative offer of proof of a whole line of questioning is placed in serious jeopardy.<sup>40</sup> Assume a line of questioning requiring twenty questions. The opponent objects to the first question, and the court sustains the objection in such manner as to indicate that the whole series will be considered objectionable. If the offer of proof is made in such a manner as to be, in effect, an offer of the whole line of questioning, the offer may be too broad to be effective. The whole line of questioning is thus difficult to establish. The offer of proof for such a foundation question, however, if limited to the question itself, may not be sufficient to show prejudice in the exclusion of the evidence.<sup>41</sup>

An alternative method of making the offer of proof is to go through the whole series of twenty questions, receive objections, and make an offer of proof for each question separately. This method would apparently insure the validity of the offer of proof, but it has various practical objections. The first difficulty is that, as in *Hans*, the proponent may easily confuse the questions and previous offers of proof, so that he bases a later question upon a previously invalid offer of proof. Secondly, the question-and-answer method of offering proof often forces the proponent into a position whereby he appears to the judge and jury to be asking unnecessary, ineffectual questions which everyone knows will never be answered. Rather than to risk irritating the judge and

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<sup>39</sup> 62 Neb. 522, 87 N.W.2d 327 (1901).

<sup>40</sup> *State v. Eggers*, 175 Neb. 79, 120 N.W.2d 541 (1963).

<sup>41</sup> It should be interjected, however, that a foundation question carries a lesser burden of proof than does a major question. *Johnson v. Winston*, 68 Neb. 425, 428, 94 N.W.2d 607, 608 (1903): "The inquiry . . . was merely preliminary, intended to show the knowledge of the witness, and to afford a basis, as the offer subsequently disclosed, for a question as to the proper remedy. Where the question is one of this character, more latitude should be allowed in its form. An attorney may not always know exactly what his witness will testify to, and where he is merely laying the foundation leading up to other evidence, it would often result in great injustice to confine the question to the same limits as if the examination had proceeded well into the subject." Compare *State v. Eggers*, 175 Neb. 79, 120 N.W.2d 541 (1963).

jury, the proponent might well be forced to abandon the line of questioning.

It would seem that the narrative method of making an offer of proof for a series of questions would have the double advantage of showing the purpose and admissibility of a series of questions, and of making the process of the trial faster and more efficient.

To place the problem of offering proof in its proper perspective, it must be realized that the series of questions which the proponent is offering to prove may well be the whole of the evidence upon a particular theory of the case as found in the pleadings. If the facts that might be alleged in the offer of proof have already been properly pleaded, should not such allegations in the pleadings be considered with the offer of proof to show the admissibility of the evidence? Certainly the converse is true. If an offer of proof asserts facts which were not within the pleadings, then the offer of proof is necessarily ineffective.<sup>42</sup> Where the offer is made to prove a series of questions that in effect will establish a theory of the case well-pleaded, requirement of a full question-and-answer type of offer of proof is extreme. Although the pleadings alone would not necessarily constitute an offer of proof in themselves, they should act, with the rest of the record, to excuse the absence of an offer of proof of the question-and-answer type.

#### IV. SITUATIONS EXCUSING AN OFFER OF PROOF

It must be clearly understood that an offer of proof should always be made where feasible. Failure to make an offer carries with it the strong possibility that appeal from the exclusion of the testimony will be barred by the absence of any offer of proof. There are, however, a few cases which have tended to mitigate the rules requiring an offer of proof. Perhaps there would be more such cases but for the essential nature of the offer of proof. The proponent often ignores the necessity for an offer of proof, either deeming it undesirable or neglecting to make one. He, therefore, on appeal, argues the issues of the exclusion of the evidence, again failing to argue that an offer of proof was unnecessary below. The opponent-appellee, then, argues that the issues regarding the admissibility of evidence cannot be heard on appeal because of the absence of any offer of proof. This one-sided argument on the issues of the offer of proof undoubtedly contributes to the harshness of the rules requiring such offers to be made.

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<sup>42</sup> See note 28 *supra*.

### A. CROSS-EXAMINATION

The principal instance in which an offer of proof is excused is that of the question asked on cross-examination. In *Rice v. American Protective Health & Accident Co.*,<sup>43</sup> an action for recovery on a health and accident insurance policy, defendant's counsel asked the plaintiff how many days he had been confined to his home. An objection was sustained on grounds that the question was immaterial and not proper cross-examination, and no offer of proof was made. On appeal, the court held that the question was material and found proper cross-examination, saying:<sup>44</sup>

[The rule requiring offers of proof] is a valid one as applied to the proponent of a witness but it has no application where the question is on cross-examination and comes within the purview of the material subjects inquired into on direct examination.

Unquestionably the cross-examining counsel is in a different position from the counsel on direct examination. Although he may expect to gain valuable and admissible evidence, he is in no position to be sure as to the answers that will be given by the opponent's witness. Cross-examination questions might well provide no testimony favorable to the proponent of the questions. Thus, the cross-examiner often could not show prejudice in the exclusion of the testimony. Some cases have applied the direct examination rules to the cross-examination situation without recognizing that there is a very fundamental difference between the two.<sup>45</sup>

In *Re Estate of Johnson*,<sup>46</sup> the court stated:

This rule [requiring the making of offers of proof] is sometimes, though rarely, enforced in cross-examination. When the condition of the record and the form of the question itself shows that it is relevant and competent, no offer of proof is necessary. The many decisions of this court in regard to requiring an offer of proof should be so understood.

In *Re Estate of Johnson*, the court dealt with the problem of the necessity of an offer of proof on cross-examination. The case has since been cited, however, in cases applying the rules and standards in *Johnson* to excuse the absence of an offer to prove a question on direct examination.<sup>47</sup>

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<sup>43</sup> 157 Neb. 256, 59 N.W.2d 378 (1953).

<sup>44</sup> *Id.* at 274-75, 59 N.W.2d at 383.

<sup>45</sup> *Webber v. City of Scottsbluff*, 150 Neb. 446, 35 N.W.2d 110 (1948); *Cox v. Kee*, 107 Neb. 587, 186 N.W. 974 (1922); *Gillam v. Mann*, 85 Neb. 765, 124 N.W. 143 (1910).

<sup>46</sup> 100 Neb. 791, 797-98, 161 N.W. 429, 431 (1903).

<sup>47</sup> *Johnson v. Griepenstroh*, 150 Neb. 126, 135-36, 33 N.W.2d 549, 555 (1948).

## B. DIRECT EXAMINATION

In some cases, an offer to prove a direct examination question has been excused, quite independently of any reliance on the cross-examination rules. In *Williams v. Fuller*,<sup>48</sup> an action for libel, certain evidence was excluded which would have tended to establish the truth, good motives, and justifiable ends of the allegedly libelous newspaper article. Thoroughly criticizing the rule requiring the making of an offer of proof,<sup>49</sup> the court allowed the appeal from the exclusion of the evidence, since the record and the question itself indicated the nature of the evidence to be introduced. Considering the purposes of the offer of proof, the court suggests that the rule requiring an offer be limited to those situations wherein the rule truly has merit. A trial is merely a means to an end—the discovery of truth in order to dispense justice in the light of the truth—not a mere game of wits between counsel.

It is incumbent upon the counsel to prepare the record for evidence to be admitted, especially where crucial objections are expected to be received to a major part of the case. Then, if objection is made and it is not feasible to make an offer of proof, there will be a possibility of having the offer held unnecessary. The Supreme Court of Nebraska has not stated exactly what the record must show for the absence of an offer to be excused. Apparently, it

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<sup>48</sup> 68 Neb. 354, 94 N.W. 118 (1903).

<sup>49</sup> The court said, *Id.* at 361, 94 N.W. at 120: "But it is urged by the plaintiff that the record shows no offer to prove such facts [which would have established the truth, good motives, and justifiable ends of certain allegedly libelous newspaper statements]. The rule requiring a formal offer to prove, in order to obtain a review in the appellate court of a ruling by which evidence is excluded, is of doubtful value at best; it is a matter of grave doubt whether its application does not more frequently defeat than promote justice, and retard, rather than expedite, its administration. The reason generally assigned for it is that such offer challenges the attention of the trial court to the nature and character of the evidence sought to be introduced, and enables it to rule on the objection interposed advisedly. We are not disposed to extend the rule beyond the reason underlying it. In this case, the questions propounded clearly indicate what the defendants expected to establish by the answers thereto. Under such circumstances, it would have savored of an insult to the intelligence of the court to make an offer showing what the defendants expected to prove by the witnesses. To enforce the rule, under such circumstances, would be absurd. We think the evidence was improperly excluded, and that the defendants were thereby deprived of a constitutional and statutory right. Constitution, art. 1, sec. 5. . . ." (Other citations omitted.) See also *Thamann v. Merritt*, 111 Neb. 639, 197 N.W. 413 (1924). *Id.* at 361, 94 N.W. at 120.

would not be necessary that the record and question show exactly the evidence intended, since this would, in effect, make the evidence merely cumulative. If it were merely cumulative, its exclusion would not be error, even if otherwise admissible.<sup>50</sup> It is necessary only that the record suggest the testimony to be received in response to the question, and show the facts necessary to make such suggested evidence relevant and competent. Thus, the courts have shown at least a tendency to infer admissibility and prejudice when circumstances warrant.

### CONCLUSION

The offer of proof requirement is, at best, a stop-gap procedure. It serves the purpose of showing the opposing counsel, the trial court, and the appellate court, that proffered testimony, excluded by the trial court, is indeed admissible, and that the exclusion of it is error. The guiding consideration should always be that of making clear exactly what evidence should be admitted. Though this may seem superficially easy, it must be recognized that the vantage point of the proponent is more favorable to understanding the proposed testimony than that of the other persons. This difference in vantage points may tend to cause the proponent to underestimate the proof necessary to make the evidence admissible. Thus, the proponent should always attempt to see the offer of proof in the light of the record and the question, as others will see the offer.

Although somewhat greater flexibility in the rules regarding the making of offers of proof might be desired, the requirements are probably not too restrictive. In certain cases, it would be desirable to allow narrative offers of proof and other offers beyond the propounded question, rather than force upon the proponent the burdensome task of making an extended question-and-answer type of offer. Similarly, greater recognition should be given to the proposition that in many cases an offer of proof is a needless and time-consuming procedure. Considering the necessity of preventing the admission of incompetent and irrelevant evidence, however, the burden of challenging or establishing the competence or relevance of the evidence must be placed upon one of the parties at the trial. This burden is rationally placed upon the proponent, since he is in greater command of the facts regarding the admissibility of the evidence.

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<sup>50</sup> *Klinginsmith v. Allen*, 155 Neb. 674, 53 N.W.2d 77 (1952).