

N. OFFER OF PROOF

OVERVIEW:

During the course of the hearing the ALJ makes rulings on evidentiary matters. Such rulings may be erroneous because evidence which should have been admitted was excluded. [Fed. R. Evid. 103](#) addresses this matter.

OBJECTIVE:

To provide guidance concerning how to preserve the record in the event that an ALJ makes an erroneous evidentiary ruling in excluding evidence.

1. FED R. EVID. 103:

Rulings on Evidence

- (a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
 - (1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
 - (2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

- (b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

2. PRACTICE AND PROCEDURE:

- a. *When to make an offer of proof:*

When the ALJ sustains an objection to a question or line of questioning and the witness is prevented from answering the question and from testifying on that particular matter.

- b. *How to preserve issue for appeal--making an offer of proof:*

- The customary way of making an offer of proof is for the Trial Attorney to state on the record what the witness would say if the ALJ permitted the witness to answer the question and what the Trial Attorney expects to prove by the answer to the question, and
- An offer of proof must be specific and contain the particulars of the witness' testimony. An offer of proof based on conclusions, as opposed to facts, is objectionable.

EXAMPLE

Setting: The ALJ sustains an objection and excludes evidence that GC believes is relevant and material. The evidence concerns a conversation.

Trial Attorney: Your Honor, the General Counsel makes the following offer of proof:

"If allowed to testify, GC witness Smith would testify that on March 1, 1995, she had a conversation with

supervisor Jones in Jones' office. During the conversation Jones told Smith,
'you better watch out
...'

Q [Part 2, Chapter Z](#) concerning Objections.

RESERVED