


Excluded Evidence: Is Your Proffer Sufficient To Preserve The Error?

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 Just because you know what your excluded evidence would have shown does not mean that the trial court knows and, as importantly for appellate purposes, that the appellate court can glean from the record the substance of the evidence or the basis for the denial of its admission. For example, in *Triesch v. Triesch*, No. 03-15-00102-CV, 2016 WL 1039035 (Tex. App. Mar. 8, 2016), the wife attempted to set aside a mediated settlement agreement by introducing evidence of the husband's allegedly false statements made during the mediation. The trial court excluded the evidence as confidential mediation communications protected by statute. The Texas appellate court affirmed. The court agreed that the communications were inadmissible and also held that the wife had waived any error by failing to make an offer of proof as to the substance of the excluded evidence. In so holding, the court cited to Texas Rule of Evidence 103(a)(2), which is virtually identical to Federal Rule of Evidence 103(a)(2), and provides that to "preserve error concerning the exclusion of evidence, the complaining party must demonstrate the substance of the excluded evidence through an offer of proof or a bill of exception unless the substance of the evidence is apparent from the context." 2016 WL 1039035, at *6. Because the husband objected and the court sustained the objection before any questions about the communications were asked and because the wife had failed to make a proffer, the appellate court could "only surmise" what the evidence "generally concerned." *Id.* As a result, the wife failed to preserve the error. *Id.* **Preservation Issue:** To preserve an issue concerning the erroneous exclusion of evidence, a formal offer of proof is not required. The proponent must ensure, however, that the trial court is aware of what the proponent expects the evidence to show and the grounds for which the proponent believes the evidence to be admissible. A proffer will accomplish this goal and also is needed to create a clear record that an appellate court can review for error. Such a proffer may be made in numerous ways depending on the court's evidentiary rules and the particular circumstances, including the filing of affidavits and briefs, presenting deposition testimony, reading from an excluded document and explaining its relevance, or calling witnesses to the stand. But merely telling the court the general nature of the proposed evidence or stating that the evidence is "to prove my case" is insufficient. **Tip:** Occasionally the

substance of excluded evidence may be apparent from its context, such as when a court is able to ascertain the substance of excluded testimony from the witness's prior testimony and the question asked, negating the need for a proffer of anything other than the transcript of the prior testimony. But even in those instances, it is a better practice to assume that the substance and purpose of the excluded evidence may not be readily apparent and make as specific a proffer as possible to eliminate any doubt. It may be time consuming or distracting to present a proffer at the time evidence is excluded, or, if excluded in limine, before or during the trial. But a timely proffer will allow the trial court to make a fully informed evidentiary decision and also ensure that there is a clear record upon which the appellate court will be able to ascertain the substance and purpose of the excluded evidence, and thereby properly evaluate the trial court's ruling.

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