Evidence Rule 103(a) would not require a subsequent objection or offer of proof.

Nothing in the amendment is intended to affect the rule set forth in *Luce v. United States*, 469 U.S. 38 (1984), and its progeny. The amendment provides that an objection or offer of proof need not be renewed to preserve a claim of error with respect to a definitive pretrial ruling. *Luce* answers affirmatively a separate question: whether a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. The *Luce* principle has been extended by many lower courts to other situations. *See United States v. DiMatteo*, 759 F.2d 831 (11th Cir. 1985) (applying *Luce* where the defendant's witness would be impeached with evidence offered under Rule 608). *See also United States v. Goldman*, 41 F.3d 785, 788 (1st Cir. 1994) (''Although *Luce* involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case.''); *Palmieri v. DeFaria*, 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the *in limine* ruling would not be reviewed on appeal); *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error on appeal); *United States v. Bond*, 87 F.3d 695 (5th Cir. 1996) (where the trial court rules *in limine* that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal).

The amendment does not purport to answer whether a party who objects to evidence that the court finds admissible in a definitive ruling, and who then offers the evidence to ''remove the sting'' of its anticipated prejudicial effect, thereby waives the right to appeal the trial court's ruling. *See, e.g., United States v. Fisher*, 106 F.3d 622 (5th Cir. 1997) (where the trial judge ruled *in limine* that the government could use a prior conviction to impeach the defendant if he testified, the defendant did not waive his right to appeal by introducing the conviction on direct examination); *Judd v. Rodman*, 105 F.3d 1339 (11th Cir. 1997) (an objection made *in limine* is sufficient to preserve a claim of error when the movant, as a matter of trial strategy, presents the objectionable evidence herself on direct examination to minimize its prejudicial effect); *Gill v. Thomas*, 83 F.3d 537, 540 (1st Cir. 1996) (''by offering the misdemeanor evidence himself, Gill waived his opportunity to object and thus did not preserve the issue for appeal''); *United States v. Williams*, 939 F.2d 721 (9th Cir. 1991) (objection to impeachment evidence was waived where the defendant was impeached on direct examination).

GAP Report—Proposed Amendment to Rule 103(a). The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 103(a):

1. A minor stylistic change was made in the text, in accordance with the suggestion of the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

2. The second sentence of the amended portion of the published draft was deleted, and the Committee Note was amended to reflect the fact that nothing in the amendment is intended to affect the rule of *Luce v. United States*.

3. The Committee Note was updated to include cases decided after the proposed amendment was issued for public comment.

4. The Committee Note was amended to include a reference to a Civil Rule and a statute requiring objections to certain Magistrate Judge rulings to be made to the District Court.

5. The Committee Note was revised to clarify that an advance ruling does not encompass subsequent developments at trial that might be the subject of an appeal.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 104. Preliminary Questions

(a) IN GENERAL. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) RELEVANCE THAT DEPENDS ON A FACT. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) CONDUCTING A HEARING SO THAT THE JURY CANNOT HEAR IT. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) CROSS-EXAMINING A DEFENDANT IN A CRIMINAL CASE. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) EVIDENCE RELEVANT TO WEIGHT AND CREDIBILITY. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF THE ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick §53; Morgan, Basic Problems of Evidence 45–50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term ''questions,'' without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for ''conditional relevancy'' in subdivision (b) and those for confessions in subdivision (d).

If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue.

The rule provides that the rules of evidence in general do not apply to this process. McCormick §53, p. 123, n. 8, points out that the authorities are ''scattered and inconclusive,'' and observes:

''Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.''

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency. Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant ''so far as appears [has] had an opportunity to observe the fact declared.'' McCormick, §10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. Rule 47 of the Federal Rules of Criminal Procedure provides:

''An application to the court for an order shall be by motion * * * It may be supported by affidavit.''

The Rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

''When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.''

Rule 4(g) provides for proof of service by affidavit. Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b).

The study made for the California Law Revision Commission recommended an amendment to Uniform Rule 2 as follows:

''In the determination of the issue aforesaid [preliminary determination], exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege.'' Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII, Hearsay), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 470 (1962). The proposal was not adopted in the California Evidence Code. The Uniform Rules are likewise silent on the subject. However, New Jersey Evidence Rule 8(1), dealing with preliminary inquiry by the judge, provides:

''In his determination the rules of evidence shall not apply except for Rule 4 [exclusion on grounds of confusion, etc.] or a valid claim of privilege.''

Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled ''conditional relevancy.'' Morgan, Basic Problems of Evidence 45–46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g. evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, *supra*; California Evidence Code §403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

The order of proof here, as generally, is subject to the control of the judge.

Subdivision (c). Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require.

Subdivision (d). The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See *Walder v. United States*, 347 U.S. 62 (1954): *Simmons v. United States*, 390 U.S. 377 (1968): *Harris v. New York*, 401 U.S. 222 (1971)

Subdivision (e). For similar provisions see Uniform Rule 8; California Evidence Code §406; Kansas Code of Civil Procedure §60–408; New Jersey Evidence Rule 8(1).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 104(c) as submitted to the Congress provided that hearings on the admissibility of confessions shall be conducted outside the presence of the jury and hearings on all other preliminary matters should be so conducted when the interests of justice require. The Committee amended the Rule to provide that where an accused is a witness as to a preliminary matter, he has the right, upon his request, to be heard outside the jury's presence. Although recognizing that in some cases duplication of evidence would occur and that the procedure could be subject to abuse, the Committee believed that a proper regard for the right of an accused not to testify generally in the case dictates that he be given an option to testify out of the presence of the jury on preliminary matters.

The Committee construes the second sentence of subdivision (c) as applying to civil actions and proceedings as well as to criminal cases, and on this assumption has left the sentence unamended.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93–1277

Under rule 104(c) the hearing on a preliminary matter may at times be conducted in front of the jury. Should an accused testify in such a hearing, waiving his privilege against self-incrimination as to the preliminary issue, rule 104(d) provides that he will not generally be subject to cross-examination as to any other issue. This rule is not, however, intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing. If he could not be cross-examined about any issues gratuitously raised by him beyond the scope

of the preliminary matters, injustice result. Accordingly, in order to prevent any such unjust result, the committee intends the rule to be construed to provide that the accused may subject himself to cross-examination as to issues raised by his own testimony upon a preliminary matter before a jury.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

A close relationship exists between this rule and Rule 403 which requires exclusion when ''probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'' The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

Similar provisions are found in Uniform Rule 6; California Evidence Code §355; Kansas Code of Civil Procedure §60–406; New Jersey Evidence Rule 6. The wording of the present rule differs, however, in repelling any implication that limiting or curative instructions are sufficient in all situations.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93–650

Rule 106 as submitted by the Supreme Court (now Rule 105 in the bill) dealt with the subject of evidence which is admissible as to one party or for one purpose but is not admissible against another party or for another purpose. The Committee adopted this Rule without change on the understanding that it does not affect the authority of a court to order a severance in a multi-defendant case.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule is an expression of the rule of completeness. McCormick §56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick §56; California Evidence Code §356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial Notice of Adjudicative Facts

(a) SCOPE. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) KINDS OF FACTS THAT MAY BE JUDICIALLY NOTICED. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) TAKING NOTICE. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) TIMING. The court may take judicial notice at any stage of the proceeding.

(e) OPPORTUNITY TO BE HEARD. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) INSTRUCTING THE JURY. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the