These are various articles I've written over the years for *Trial Tips Newsletter* about successfully making and meeting objections. There might be bit of overlap, but the tips will help you get exhibits into evidence (and keep your opponent's exhibits out of evidence). For more free trial advocacy tips to help you persuade jurors and win jury trials, don't forget to sign up for your FREE subscription to *Trial Tips Newsletter* at [http://www.TrialTheater.com](http://www.TrialTheater.com)

Best wishes for success in your next trial!

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**The Three R’s of Evidence Admissibility**

Nope, not readin’, ‘ritin’, and ‘rithmetic. Here are the three “R’s” you should consider when analyzing the introduction of evidence. Is the evidence **Relevant?** Is it **Reliable?** And is it **Right** to admit the evidence?

1. **Is it RELEVANT?** Federal Rule of Evidence 401 defines relevant evidence as any evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 402 says that “All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.”

How much more broadly could they have defined what’s “relevant”!!!? Basically, everything “relevant” should be admissible, unless specifically prohibited by law. What is the material fact that you are trying to prove? If you can show any reason why your proposed evidence proves or disproves a material fact in the case, your evidence should be admissible.

2. **Is it RELIABLE?** The most common reason why evidence won’t be admissible is because it’s not reliable. Jurors should be able to make their decision based on the most reliable information available. Why is hearsay evidence generally excluded? Because it’s secondhand information. It’s not as reliable as firsthand information. You can’t cross-examine the person who actually observed the event, only the person he relayed it to. The rules of evidence say, “Hold on a second… That’s not fair.”

For those same reasons, evidence which has not been authenticated shouldn’t be admissible. If you have an analysis of the alcohol content in someone’s breath, it wouldn’t be proper to admit that evidence if the testing instrument was unreliable, or if it had been tampered with. Jurors shouldn’t have to rely upon the opinion of someone who doesn’t have the credentials to give them an opinion, or who doesn’t have a sufficient basis of information to render a proper opinion. If no one can prove the authenticity of a document, the jurors shouldn’t be allowed to read it.

On the other hand, some things are so reliable, that courts can take judicial notice of them. June 7th, 2006 was a Wednesday. Anyone and everyone can confirm that. There’s no need for a party to invest resources proving that June 7th was a Wednesday, because there’s no room for debate.

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Reliability is going to serve as the basis for the bulk of your evidentiary objections, and that’s why we invest so much time forming all of those predicate questions.

3. **Is it RIGHT to admit the evidence?** Finally, Federal Rule of Evidence 403 states that relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” What does that mean? It means that even though the evidence is relevant and reliable, it may still be excluded if it’s not right to admit it. Here are some examples.

- **Gruesome photos.** The photos tend to prove a material disputed fact – that the victim is dead. They’re reliable – your medical examiner will testify that these are the photos she took during the autopsy. But it may not be right to admit them. They may be so gruesome that the jurors would have a visceral, emotional reaction to them, and the photo alone would grossly affect the verdict. Well, that wouldn’t be fair, would it? To fix the problem, the court may allow the photos if they’re black and white, limited in size, or perhaps limited in quantity.

- **Character.** Is it unfair to discuss a person’s bad character? When a defendant has 6 prior convictions for DUI, it’s probably safe to assume that he was driving drunk this time, too. But the jurors would jump to a conclusion and shortcut the deliberation process – that’s not right.

- **Privileges.** Anything a patient tells their psychiatrist is probably privileged. Society thinks that people should be able to talk freely in that situation, in hopes that they will be cured or find a solution to their problems. So, what they say in confidence will be privileged. What a witness tells his attorney, psychiatrist, priest, doctor, accountant or wife may be very relevant and reliable, but it doesn’t mean it should be admissible. Society creates these privileges to improve our daily life.

- **The Fruit of the Poisonous Tree.** Evidence that is otherwise relevant and reliable may be kept from the jury if it was obtained pursuant to an improper search and seizure.

This simple three point analysis (Relevant? Reliable? Right?) is a good starting point for analyzing whether your evidence should admissible or not, and also helps you decide whether to object to your opponent’s evidence.
You Can Object… But Should You?

One of the major skills you developed during law school was how to spot issues. You remember the FIRAC (Facts - Issue - Rule - Application - Conclusion) method of case briefing from law school, don’t you? Back in law school, your issue spotting skills determined how well you would perform on the final exam. The more issues you spotted, the better your chances of passing the exam.

However, in trial, superlative issue spotting skills can sometimes become a detriment to your case. The reason they can actually harm your case is because many trial lawyers are tempted to act like they’re still in law school. You’ve seen them in trial -- as soon as they spot an issue, they announce it to the world. ("Objection! That’s a leading question"  “Objection! That asks for hearsay!”  “Objection! That calls for speculation!”)

Technically, they’re right, because the issues that they spot in trial can be objected to. But to become a skilled advocate, you need to move beyond mere issue spotting skills. To become a top-tier trial lawyer, you must be able to analyze the admissibility of every piece of evidence and every word of testimony, and then answer the following three questions:

“Can I object?”
“Should I object?”
“When should I object?”

And, most importantly, you need to conduct that entire analysis in a split-second. You can’t unring a bell and you can’t stuff toothpaste back in a tube -- if you don’t object in time, the jury will hear the objectionable material, and it will be too late to fix the damage. (That’s why trials can be so tiring, because you’re expected to have your brain redlining at 9000 rpm throughout the entire trial, spotting every issue and deciding whether or not to object.)

QUESTION #1: “Can I Object?”

Every trial lawyer should know the answer to this question. This question draws upon your issue spotting skills and your knowledge of the evidence code. The stronger your knowledge of the evidence code, the stronger your trial skills will be. Every time your opponent or a witness is about to say or do something objectionable, you must immediately recognize the issue and identify why it’s objectionable. You need to develop this skill before you get to trial. By the time you get to the courtroom, it’s too late to start reading through the evidence code. You won’t have time to look up the proper objection or review an evidentiary predicate. That information must be committed to memory and available for instant access.

QUESTION #2: “Should I Object?”

If you know the answer to this question, then you’re one of the better trial lawyers in your courthouse. Just because the evidence is objectionable doesn’t mean you should object. Not every issue really matters. For example, in a single witness examination, you may spot 23 leading questions. Technically, they’re all objectionable. But before you object, you ask yourself, “Does that evidence hurt my case?” If not, maybe you shouldn’t object.
Too often, attorneys object to evidence that doesn’t hurt their case, and end up shooting themselves in the foot. For example, a while ago, a friend of mine was in trial, prosecuting a misdemeanor case against a relatively inexperienced defense attorney. Partway through his cross-examination of her only witness, this new attorney tried to introduce a photo into evidence. My friend immediately recognized three reasons why the photo should not be admissible, and said, “Objection!” The judge agreed, and didn’t allow the photo into evidence.

It sounds like she did the right thing, doesn’t it? Something was objectionable, and she kept it out of evidence. But, before you make a final decision, you need to know about a rule of criminal procedure that applied to her trial: If a defendant didn’t introduce any evidence, he was entitled to both the first and last closing arguments (“the sandwich.”) By objecting, she prevented the defense from introducing the photo. But the photo didn’t really hurt her case. If the defendant had entered the photo into evidence, he would have lost the “sandwich” and she could have had the benefit of first and final closing arguments.

**QUESTION #3: “When Should I Object?”**

If you’ve decided that you should object, you should next determine when to object. Usually, you’ll object as soon as you realize you “can” and “should.” For example, if your opponent tries to ask the witness, “What did you hear Mort Anderson say to Mike Brown about who started the fight?” you’ll probably object by the 7th word in his question.

But deciding when to object isn’t always as clear-cut as that. If your opponent is asking leading questions, but you’ve decided they don’t hurt your case, maybe you won’t object at all. Or maybe you let it go for 7-8 questions, and then tell the judge, “I haven’t objected up until this point, but, Objection! -- Counsel is asking only leading questions.”

Many times, your objection needs to be heard before trial. You’re afraid that if the jury gets even a whiff of the evidence, it will ruin your case. Examples include confessions from your client, previous bad acts, improperly seized evidence, evidence of remedial repairs, etc. If your objection falls into this category, you need to file a motion to suppress or a motion in limine before trial to preclude the admission of the evidence.

Or maybe you don’t “object” until closing argument, when you tell the jury, “I could have objected to his questions, because they were all leading questions... The witness wasn’t telling you the story, her attorney was. But the reason I didn’t object was because I wanted you to see how Mr. Shyster had to spoonfeed the testimony to her. The witness didn’t know anything about the case, and you should disregard what she said... or, pardon me, what she didn’t say.”

During most trials, you probably shouldn’t object as often as you could object. Intellectually, jurors may understand that you’re going to object during trial because your opponent is trying to admit improper evidence. But emotionally, many of them may feel that you’re objecting because you’re trying to prevent them from hearing the truth or because you know the evidence hurts your case. Consider all the ramifications before you say, “Objection,” and then ask yourself, “Can I object? Should I object? And if so, when should I object?”
Should You Object?
(Don’t force jurors to pay more attention to bad evidence)

Q: “Tell us, Mrs. Bear -- What did you HEAR Bebe Behr SAY?”

A: “I HEARD him SAY that someone had slept in his bed and eaten his porridge.”

Even if your legal education consists exclusively of watching People's Court re-runs, you probably know the proper objection to that question. If you’re like most lawyers, you want to leap out of your chair and yell, “OBJECTION! Hearsay!” before the witness has a chance to answer.

Technically, you’d be correct. The question does ask the witness to relay an out-of-court statement. Presumably, the attorney wants the jury to believe the statement is true. If you object, you’d be right - - the statement meets the classic definition of hearsay. If this was an Evidence test, you’d get an A+.

But should you object?

When you successfully object and prevent the jurors from hearing information, it’s only natural for them to be curious about what they didn’t hear. Don’t believe me? Well, let me illustrate by telling you a story about something that happened to me last week.

My friend’s office is downtown, and his personal assistant is a woman named Susie. Susie is a tall brunette with a commanding presence. She speaks with just a hint of an accent, but I can never quite place its origin. Not quite Russian and not quite Romanian, she somehow manages to sound both seductive and dangerous at the same time. I learned that she worked with the C.I.A. for several years, but “I can’t talk about it” is all she ever says about her previous job. Anyway, last Thursday I was over at my friend’s office for a planning meeting. The meeting finished around 7 o’clock, and I left. I met up with some other friends for a bite to eat, but just as I was about to head for home, I realized that I’d left my briefcase up in the boardroom.

I thought his office would probably be closed, but I really needed some stuff in my briefcase for a court hearing the next morning, so I went back to his office. When I stepped off the elevator, I could see that the front door of his office was slightly open. From the hallway, I could hear Susie talking on the phone. I didn’t understand what she was saying, because she was speaking Russian or something, but she was speaking quickly and it sounded like she was giving orders to someone. As I entered the office, her back was to me, and she was looking at some type of banking website on her computer screen. In front of her were 3 or 4 passports spread out across the desk, and next to the passports was a small syringe filled with a brown liquid. She must not have heard me enter, because when I said, “Pardon me,” she appeared startled. She quickly stood up, blocking my view of the computer screen, at the same time deftly sliding the passports and syringe into a desk drawer. She quickly said something in Russian to the guy on the phone, and then, in English, she said...

ATTORNEY: “OBJECTION! HEARSAY!!!”

JUDGE: “Objection SUSTAINED. The jury will not speculate as to what the witness may have said if the witness had been allowed to answer.”
Dang -- I guess I can’t tell you the rest of the story. But that’s okay. The judge ruled that you can’t guess about what she might have said, so I’m sure you aren’t going to think about it anymore. Since the judge ordered you not to think about it anymore, your curiosity is completely eliminated, right?

No? You say you still want to know what she said? Really? Huh... That’s interesting, because the judge ordered you not to guess what she might have said if I’d been allowed to continue.

Let me ask you something. Later today, if you find out what it was that she told me, do you think you will pay more attention to it, or less attention? Do you think you'll attach more significance to what she said, or less significance?

The same thing is true with your jurors. If you object to something and keep it out of evidence, you better make sure it stays out of evidence. If it gets into evidence through some other means, the jurors may actually pay more attention to it than if you hadn’t objected.

Take a look at our first example, and Bebe Behr’s statement. Should you object to this obvious hearsay statement? Maybe not. Once you prevent Mrs. Bear from talking about Bebe Behr’s statement, the jurors are going to be a little curious about what Bebe Behr said. They might even think, “I bet that whatever Bebe Behr said probably hurts that attorney’s case. Otherwise, why object to it?”

And here’s the danger: What’s going to happen when Bebe Behr testifies in this trial? When he gets the chance to tell the jurors what he said to Mrs. Bear, the jurors will hear what he said. They will hear about the bed that was slept in. They will hear about the porridge that was eaten. And those jurors who thought Bebe’s statement would hurt your client are going to pay more attention to it and attach more significance to it.

Here’s the bottom line: Don’t object just because you can. Object because you should. If the evidence is going to be admitted anyway, through some other means, ask yourself if you should object. Ask yourself what’s going to happen if you keep the evidence out, but only temporarily. Don’t evaluate your objections exclusively from a legal perspective -- evaluate your objections from a tactical perspective and from a common sense perspective. Think about the case from the jury’s perspective, and then ask yourself: “Should I object?”

**Should You Object?**  
(Don’t inspire your opponent to do a better job)

What will happen if your objection is sustained? What will happen if it is overruled? If you object about the form of questions, and the judge sustains the objection, will that force your opponent to create better questions? Will your opponent do a better job of presenting their evidence? Will you win the battle, but lose the war?

Will the evidence ultimately be admitted, regardless of your objection? For example, let’s say your opponent asks, “Mr. Smith, what did you hear Mike Thompson say?” Hopefully, the objection of “Hearsay” jumps into your head. But before you jump from your seat and object, consider whether
the jury might pay more attention to the evidence if it’s admitted after a failed objection. If you saw Mike Thompson out in the hall, and you know that he’s going to testify about what he said, you may not want to object to this question. Ultimately, the jury is going to hear what Mike Thompson said. If you get his statement excluded now, but it gets admitted later, will the jurors place greater weight upon the statement? This is just one of the considerations you need to evaluate before you decide to object.

Unlike law school, where you got points for noticing every possible legal issue, you don’t get points for raising every possible legal objection during trial. Consider how the jury views your objections. Does the objectionable material really hurt your case? If not, the better practice may be to waive the objection.

For example, I was trying a case against an attorney who started yelling and screaming during closing argument. He started pointing at one of the witnesses in the courtroom gallery who had returned to watch closing arguments. The attorney raised his voice so loud that the jurors were leaning back in their seats, trying to avoid him.

Several attorneys from my office were seated behind me, and they kept whispering, “Object! Object! What he’s saying is improper!” They were right. His comments were improper. But I didn’t object. Instead, I told my friends, “Just watch the jurors… They hate him.” Sure enough, after a favorable verdict, one of the jurors returned to the courtroom to watch the follow up proceedings. When I got the chance to ask her why she’d come back afterwards, her response spoke volumes: “I just wanted to see what else the jerk had to say.” If I had objected, I would have prevented him from being a jerk. Is your opponent doing things that are objectionable, but don’t really hurt your case? If so, consider not objecting.

Another consideration you should make when deciding whether or not to object is whether you’re on a run, or whether you’re being run over. When you object 10 times in a row, and the judge says “Sustained” ten times in a row, you appear to be doing the right thing. Object ten times in a row, get overruled ten times in a row, and jurors wonder if you are acting correctly.

Four Tips for Making Timely Objections

**Plaintiff’s attorney:** Mr. Jones, what did you hear Mrs. Thompson say?

**Mr. Jones:** I heard her say that the defendant decided not to fix the safety device because it was too expensive and he didn’t care if anyone got hurt.

**Defense attorney:** Umm, objection? Hearsay? I mean, “Objection! Hearsay!”

It happens in courtrooms every day. Evidence that should have been inadmissible is presented to the jury because opposing counsel failed to object or objected too late.
Once the jury hears the evidence, it’s too late. Objecting afterwards is like closing the barn door after your horse escapes, and curative instructions are about as effective as trying to squeeze toothpaste back into the tube. Objecting after-the-fact doesn’t help your case. You need your objections to be timely. Here are four tips for improving your courtroom objections, so that you can be as fast on the draw as you should be.

1. **Know your evidence code.** If you intend to practice in the courtroom, rather than from behind a desk, you need to master the evidence code. What’s admissible? What’s not? You won’t know if you don’t read the code from cover to cover. I wish there was some shortcut I could give you, but there’s simply no substitute for reading the whole thing. Better yet, you want to read an evidence book that provides commentary and analysis. Here in Florida, for example, almost every lawyer and judge depends upon Prof. Charles Ehrhardt’s *Florida Evidence*. Get the copy that corresponds to your practice area, and invest the time to read through it.

2. **Raise the right objection.** A general “Objection!” isn’t sufficient. Now granted, if the judge sustains your objection, any legitimate reason will be upheld on appeal. But if it’s overruled, “relevance” will be the only objection you preserve. So if the proper objection should be “hearsay” or “insufficient predicate,” when the judge overrules your objection, it will be properly overruled, even though there’s another valid basis for sustaining the objection.

3. **Know how to object.** Once you’ve mastered the evidence code, you’ll have a much better idea of what’s objectionable and what’s not. The next phase is to determine how to object. Most judges won’t allow you to make speaking objections (ex. “Objection! That evidence shouldn’t be admissible because I can’t cross-examine the person who made the statement, robbing my client of his right to confront his accusers. It’s hearsay!”), and will limit you to a single phrase objection (ex. “Objection! Hearsay!”) Know all of your “buzzword” objections so that you can make the objection quickly and effectively. Here is a quick guide on how to object:

   a. **Say “Objection!”** Get the word out forcefully and as quick as you can, even if you’re still in your seat. Speak out and stop it before it gets worse. The judge may say “sustained” without any further argument, but if not, you’ll at least have some time to think while you rise to your feet and give the proper legal objection.

   b. **Stand up.** You know better than to address the court while seated. Stand up and give the grounds for your objection.

   c. **Wait for the judge to rule.** Make sure you get a ruling, not just a “Move along, counsel!” or “Perhaps you could rephrase that, counselor” admonishment. If there’s no ruling, there’s nothing to appeal.

   d. **If necessary, ask to approach and proffer your argument.** If it’s a serious issue, then of course you handled it pre-trial, but if not, this is the time to create the record of why you’re objecting and why the material shouldn’t be admitted.

4. **Practice.** How can you practice if you’re not in the courtroom every day? Easy - watch other people in court. There are two ways to do this. First, you can go to the courthouse and watch other lawyers try cases. This is always a valuable investment of your time. If they’re better than you are, you’ll learn a new technique or presentation tip. If they’re worse than you are, you can remind...
How to Successfully Make and Meet Objections

You yourself, “Don’t do that - look at how the jury’s ignoring him!” As you watch the case, quietly object to any improper material. Do you object faster than the real lawyer? Or do you miss important objections? By having your mind “in the moment” you’ll grow accustomed to the objecting process.

Second, watch lawyers try cases on TV. You can either watch the real lawyers on CourtTV or the fake lawyers on every other network. The fake lawyers don’t have to abide by the rules of evidence, so you’ll probably have more reasons to object to them. Watch, and object whenever you think it’s appropriate.

The best thing you can do is to quickly make the right decision. The second best thing you can do is to quickly make the wrong decision. The worst thing you can do is not make any decision. The more you practice, the faster and more accurate you’ll become. Your goal is to sort through the entire process (“Is it objectionable? If it’s objectionable, does it matter? If it matters, object!”) in an instant. Invest the effort in practicing, and before long, you’ll become a quick draw artist, ready to challenge anyone in town to a duel.

**How to Respond to Your Opponent’s Objections**

Here’s a four step process you can follow when your opponent says “Objection!”

1. **Pause.** Take a breath. This isn’t the end of the world. Some more experienced trial lawyers will object simply to rattle the cage of newer attorneys. Don’t let them get to you.

2. **Think.** Why is your evidence relevant, reliable, and right?

3. **Rephrase if obviously necessary.** But not automatically. Too many times lawyers don’t wait for the judge to rule. [Examples of when you should automatically rephrase: the police officer who wants to discuss suppressed statements; the witness who was about to mention insurance or improper character evidence] When you rephrase, give the witness guidance to help him avoid mentioning the objectionable material. “Don’t tell us what Logan said, but did the two of you have a conversation?”

4. **Respond.** Tell the judge why it’s relevant, reliable, and right.

**What to Do if Your Opponent’s Objection is Overruled**

If the judge overrules your opponent’s objection, don’t just tell the witness, “You may answer the question.” Instead, repeat the entire question for the witness, to eliminate any potential misunderstandings.

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What to Do if Your Opponent’s Objection is Sustained

Here’s the five step process you should follow if your opponent’s objection is sustained.

1. Pause for a moment.
2. Rephrase if possible, giving the witness guidance to avoid the objectionable material. “Without telling us what Mrs. Jones said, tell us how you reacted to her statement.”
3. Think if there’s another way you can make the evidence admissible.
4. Make an offer of proof if necessary, and present caselaw for important evidentiary rulings. (Hopefully you handled the important evidentiary issues before trial).
5. Smoothly transition to another section of testimony if you can’t rephrase the question.

Breaking and Entering Made Easy

Working in the criminal court system, I’ve gotten the chance to learn all sorts of “interesting” things. Over the years, I’ve discovered things that most people will never get the chance to learn. For example, I know the best place to hide cocaine from the police (it’s called “crack” for a reason), I know what an autopsy smells like (think “wet garbage”), and I know three ways to avoid a D.U.I. (the best one? Call a cab.)

But one of the most useful things I’ve learned is how to break into houses.

Ideally, if you’re a house burglar, you want homeowners to leave the front door unlocked, so you can walk straight inside and take what you want. All things considered, this is the absolute best way to break into a house, because you can do it without arousing too much suspicion. But what happens when homeowners don’t cooperate by leaving the front door unlocked? Does that mean the burglar can’t break into the house? (“Dangit, the door’s locked! I guess I’ll have to go get an honest job.”)

While some burglars might be dissuaded by a locked front door, good burglars know that there are lots of ways to get inside. If the front door is locked, they’ll try to get inside through the back door, through a side door, through the garage, through a window... Some burglars have even climbed down chimneys!

The important lesson you need to remember is this: It doesn’t matter to the burglars how they get inside the home -- it only matters that they get inside.

You’re probably thinking, “Ok, that’s great, but how does that help me win my next trial?”

Here’s how that lesson helps you: The next time you attempt to admit exhibits into evidence, you need to think like a burglar.

“No, nothing like that. Thinking like a burglar means that it doesn’t matter how you get your exhibit admitted into evidence -- it only matters that it gets admitted.
Recently I was helping a friend who needed to get a store surveillance tape admitted into evidence. Unfortunately, there was a problem locating the convenience store clerk, and without her testimony, it looked like he wouldn't be able to lay a proper predicate for the tape's admissibility.

But just because the front door was locked didn't mean there wasn't another way to break into the house...

After a little bit of brainstorming, he came up with two additional ways to get the video admitted. The first idea was to call the convenience store manager as a records custodian (because every single sales transaction was contemporaneously captured on tape) and introduce the video as a business record. The second idea, which worked successfully, was to authenticate the tape through another witness, a woman who had walked out of the store before any of the events took place. Although she hadn't ever watched the videotape or physically handled the tape, she was able to identify herself walking into the store and successfully authenticated the video.

How many different ways can you admit your evidence? Do you have a backup plan in case the judge excludes your evidence on one evidentiary ground? Let's say that you're trying to admit a witness's oral statement into evidence. First, you try to argue that it fits into one of these hearsay exceptions:

1. A spontaneous statement;
2. An excited utterance;
3. A statement describing a then existing mental, emotional, or physical condition;
4. A statement for the purposes of medical diagnosis or treatment;
5. A statement against interest; or
6. A statement under belief of impending death.

If the judge doesn't agree with any of those arguments, does that mean the jury won't ever hear the statement? Maybe, maybe not. Think creatively, and you still might be able to get this statement before the jury.

Maybe the statement is independently admissible as the language of a contract? Maybe the statement was relied upon by an expert in developing her opinion? If your client heard the witness's statement and acted accordingly, could you argue that the statement isn't hearsay? (“Judge, the witness's statement isn't being offered for the truth of the matter asserted. It doesn't matter whether or not the witness's statement is true -- it's being offered to put my client's actions in context and show why he did what he did.”) Or maybe you could argue that the statement be admitted for a limited purpose.

But let's say that after all of your efforts, the judge still decides, “That statement is inadmissible.” Does that mean that the jury will never hear the statement? Not necessarily. If the witness testifies, maybe you could impeach the witness with the statement during cross-examination. You could argue that the statement is a prior inconsistent statement, or that it shows bias or prejudice.

The most important thing to remember is, it doesn't matter why the jury gets to hear the statement, so long as they get to hear it. As Winston Churchill said, “Never give in. Never give in. Never, never, never, never -- in nothing, great or small, large or petty -- never give in, except to convictions of honor and good sense. Never yield to force. Never yield to the apparently overwhelming might of the enemy.” Think creatively, and list every possible method you could use to make your exhibit admissible.

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Most of the time, you probably won’t need to rely on more than a single argument to get your exhibit admitted. But for those rare occasions when you need to go through the back door, through a window, or even down a chimney to get your exhibit admitted, you’ll be glad that you were so tenacious.

Should You Stipulate?

The case was serious. The charge? Attempted Murder with a Firearm. The defendant was accused of shooting the victim in the head, and he was facing a potential sentence of life in prison. You would think that because its seriousness, my opponent and I would be fighting over every single issue in the case. But nothing could be further from the truth.

Instead, we were standing in the hallway behind the courtroom, talking with the judge and telling him that we were stipulating to nearly every material fact in the case, that we were streamlining the introduction of exhibits, and that we’d agreed to significantly reduce the number of witnesses who would testify.

Why would we do that? Why would two experienced attorneys (each hoping for a completely different outcome) agree to almost all of the issues in a case? We did it because we knew the strengths and weaknesses of our cases and were able to identify the true issues in the case. In short, we knew what mattered and what didn’t matter.

Many attorneys don’t like to stipulate. They’re afraid that if they agree about anything with their opponent, they’ll seem weak. So instead, they argue about every issue with their opponent. Typically, the attorneys who are most afraid of stipulating are also the ones who either don’t understand their cases very well or don’t know how to try cases. But in my experience, the attorneys who stipulate are usually the best attorneys in the courthouse. They understand their cases inside and out, and know where to pick their battles. They streamline their cases, identifying the important issues, and agreeing to everything else.

If you’re thinking about joining their ranks and stipulating to parts of your case, here’s a quick list of some things you might consider agreeing to:

- Witness credentials
- Authenticity of business records
- Evidentiary foundations
- Distances
- Demonstrative exhibits
- Accuracy of transcripts
- Identities of parties
- Venue
- Minimum or maximum damage amounts
- Liability (when damages are the only issue)
- Damages (when liability is the only issue)
- Allowing witnesses to testify by telephone or video
- Admissibility of exhibits
• Permitting opposing counsel to ask leading questions to expedite testimony
• Permitting witnesses to give narrative responses so they can “tell their story”
• Introducing depositions or sworn statements in lieu of live testimony

This list is just the tip of the iceberg. The better you understand your case, the more issues and items you’ll want to agree to. But, if you’re going to use stipulations during trial, you’ll want to make sure the jury actually pays attention to them. Here are three tips for maximizing the impact of your stipulations:

1. **Don’t call them “stipulations.”** Are you confident that each of your jurors knows what “stipulation” means? Don’t risk any confusion. Rather than titling the document “Stipulations,” consider titling the document, “Agreed Upon Facts,” “Agreement Between the Parties,” or “Facts No Longer in Dispute.” Also, consider writing an introductory paragraph like this: “Both sides have agreed to the following facts. There’s no need for any further proof of these facts -- they are no longer in dispute, and you may accept them as true.”

2. **Get everyone to sign the document.** Not just the lawyers -- have all of the parties sign the document. That way, none of the jurors will get the mistaken impression that only the lawyers agreed to the stipulations. To really add some extra “oomph” to the agreement, ask the judge to formalize the agreement by signing off on the document.

3. **Introduce stipulations at the most effective time.** Many lawyers fall into the trap of waiting until the end of their case before publishing all of their stipulations. The judge says, “Call your next witness, counselor,” and the lawyer responds, “No more witnesses your honor -- but I do have 40 minutes worth of stipulations to read into the record.” If that’s how you introduce your stipulations, “the record” will be the only one in the room paying any attention to them. The jurors will fall asleep before you finish reading the third page of the stipulations, and they’ll ignore your carefully crafted agreements. (Even worse? Those attorneys who don’t even read the stipulations into evidence. They just introduce the agreements into evidence and then expect the jurors to read them in the deliberation room.)

To maximize the impact of your stipulations, you want to publish them at the most effective time. For example, let’s say that you and your opponent have both agreed that a firearm recovered from the house was loaded and operational. Rather than waiting until the end of your case to read that stipulation into evidence, you should publish it to the jury when the gun becomes important. After the witness testifies, “I saw a gun next to the baby’s crib,” you can read the stipulation to the jury: “Both parties have agreed that the firearm was loaded and fully operational.” Doesn’t it make more sense to publish it then, rather than waiting until the end of the trial when the jurors have forgotten about the gun?

Consider making stipulations an integral part of your trial practice. The sooner you understand why to stipulate to issues in your case, the faster you will develop your trial skills. The better you understand your case, the more you’ll stipulate to. The more you stipulate to, the more focused your case will become. The more focused your case becomes, the better you’ll try your case. Keep it up, and before long, you’ll be one of the best trial lawyers in your courthouse!