

# **YOU NEED THIS EVIDENCE, ADMIT IT!**

**CONTINUING LEGAL EDUCATION COURSE**

**OFFICE OF THE ARIZONA ATTORNEY GENERAL**

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## **I. What is Evidence?**

Though it would be easy if attorneys were allowed to simply tell the jury or judge the facts they need to decide each case, the rules of procedure and rules of evidence that apply in most judicial or administrative forums require instead that the facts be established through evidence, not argument or advocacy. A simple definition of “evidence” says it is any form or source of information that the court accepts as appropriate for use in deciding what the facts relevant to deciding the case are.

Evidence can take many forms.

- Testimonial evidence comes from statements of witnesses, and can be further subdivided into testimony of percipient witnesses (observers or relevant facts) and opinion witnesses. Opinion witness testimony can further divide into lay opinions and expert testimony.
- A second common form of evidence is documentary evidence. By definition, such evidence conveys relevant information through the words or data recorded on the document. Examples include a police report, architectural blueprints, credit card receipts, or a will.
- Finally, non-documentary objects can also supply relevant evidence by transmitting pertinent information. Examples can include a photograph of a crime scene, a murder weapon, pieces of a destroyed tire in a tire defect case, and a soil sample from a contaminated well site.
- Though not technically evidence, demonstrative exhibits can also be used as a proxy to summarize or render complex or multi-factor evidence more easily understood.

## **II. Testimonial Evidence Issues.**

Whether your evidence takes the form of physical records or materials or just testimony, admissibility issues abound. Testimony must be preceded by the establishment of legal foundation and potentially prerequisites to overcome potential objections.

### **A. Establishing Legal Foundation and Relevance.**

Though authentication is not an issue in testimony, establishing legal foundation for the testimony is. This means that the attorney eliciting the testimony should provide foundational testimony showing the trier of fact why the witness's testimony on a particular topic is material to disputed issues in the case. For instance, assume a case alleging sexual harassment of an employee in which the employer contends its managers had no notice of the alleged unwelcome advances by one of their employees. The employer's attorney may wish to call the plaintiff's immediate supervisor to testify that they had no notice of the offensive conduct. They may precede that testimony with the foregoing:

Q. And what were your responsibilities at the office?

A. I was to monitor and supervise my team and report any management problems to my superiors.

Q. What about implementing the company's harassment policies?

A. I had training in the policies and it was my job to make sure my team understood them and obeyed them.

Q. And what were your work hours compared to the plaintiff's?

A. We worked the very same shifts every week.

Q. And where was your work area compared to the plaintiff's?

A. My whole team, the plaintiff included, worked in a small room about 20 by 20 feet with no interior walls, just work benches.

Q. And what opportunities did you have to observe the interaction at work between the plaintiff and Mr. Jones?

A. Except when I was taking a break for some reason I was right in amongst the both of them all day, every day; probably about six hours a day over two years, I'd say.

This type of testimony establishes that the witness had an opportunity and responsibility to observe precisely the type of events the plaintiff is contending happened. Therefore, the trier can comprehend that what the witness saw, or did not see, is relevant to the question of whether the harassment occurred as alleged. It has direct relevance to questions in dispute.

## **B. Establishing Competence.**

As a general matter, counsel must establish through testimony that each witness is competent to testify about the matters on which they are called to provide facts. In the case of percipient witnesses – those whose personal observations of the facts relay material information – this requires counsel to first establish through testimony that the witness was in fact in a position to observe the relevant facts. This may mean that the witness was in the proper physical location to see an event or hear a conversation. It may mean that the witness had responsibility to make particular observations, or it may mean that the witness’s ability to sense particular facts was not obstructed by some internal or external source, like physical impairment (think poor eyesight or alcohol abuse) or environmental factors (think distracting noises or focus on alternative events).

Competence may also involve a test of whether the witness has the skills and experience needed to accurately perceive the facts they are being asked to testify about. For instance, someone with no construction experience may be a poor witness to what steps a framing crew took in erecting a building. Or, a non-lab worker may not have known what to look for in assessing how a forensic examination of broken equipment transpired. Competence may also invoke questions of age, mental capacity or infirmity, illness, or even education. In sum, counsel should attempt to establish at the outset the competence of their witness to perceive and accurately convey the facts they will testify about.

## **C. Fending Off Objections.**

Witness testimony is subject to most of the same types of objections that may be lodged against use of evidentiary exhibits. Rule 403 concerns often impact witness testimony, and hearsay is always a lurking problem with live testimony. Recognizing that such objections may spoil the flow and completeness of witness testimony, counsel should estimate the varying objections that a particular witness’s testimony might elicit and draw out testimony that will help either stave off such objections or undermine them effectively when made. An example follows.

Imagine a trial in which the plaintiff seeks compensation from the Richflour Bread Kneading Co. for injuries he sustained in an accident in which one of the company’s trucks was involved. Plaintiff’s counsel wants to question a police officer who responded to the scene who can testify that the breach company’s driver, who died from injuries sustained in the accident, confessed to the officer at the scene that “I shoulda’ listened to the boss and got those brakes fixed – they just gave out totally!” Plaintiff’s counsel, anticipating that the defendant will lodge a hearsay objection to this testimony paves the way by asking the officer the following questions:

Q. And when you arrived at the scene what condition was the bread truck driver in?

A. He was a real mess. I checked his pulse, which was still beating, though very slowly. His eyes were closed, like he was unconscious, and he had lots of blood still flowing from his head.

- Q. Then what happened?
- A. Well, I tried to render first aid with direct pressure to his wounds, and after about ten minutes he woke up and kinda pushed himself up on his side.
- Q. And what did he do next?
- A. Well, he saw all that blood, and then he collapsed back down and grabbed his throat like he was having trouble breathing.
- Q. Did ask for any help?
- A. Yeah. He said, in whisper pretty much, that he knew he was in a really bad way and he was wondering if it was hopeless.
- Q. And what did you say to him about that?
- A. Well, I couldn't lie to a guy in that state, so I say, well, you've lost a lot of blood, but we are gonna do are best with you, but you'll need to fight, to really hang in there.

So far, the questions about what the officer and the truck driver said do not constitute hearsay, as they go to the truck driver's state of mind – whether he realized he was in danger of dying – and are not offered to prove the truth of the matters stated. They also, however, supply the prerequisites for a potential dying declaration exception to the hearsay rule. And, as a side benefit, they highly increase the drama and tension that will invite special, rapt attention to the driver's statements if they are allowed in. This is the kind of proactive evidentiary road-leveling that can help counsel push through objections effectively, and sometimes express their futility to opposing counsel, motivating them to never launch the objection in the first place.

#### **D. Opinion and Expert Witness Issues.**

With any form of opinion testimony, particularly expert witness testimony, comes a bundle of prerequisites unique to this type of witness. First and foremost, counsel must meet the requirements of the 700-series of rules under the Federal or Arizona Rules of Evidence for admission of opinion testimony. Counsel must be familiar with and able to adeptly apply these rules.

##### **1. Lay Opinion Testimony.**

Per Rule 701, Ariz.R.Evid., counsel may offer opinion testimony from a lay (non-expert) witness, so long as it is (1) rationally based on the witness's own perceptions of facts; (2) helpful to the trier of fact's clearly understanding the witness's testimony or determining a fact in issue; and (3) not based on scientific, technical or other specialized knowledge which would require the witness to qualify as an expert.

## **2. Expert Opinion Testimony.**

The factors that influence admissibility of an expert's testimony are often complex, may be different depending on the forum (state versus federal) in play, and may be determined by shifting scientific judgments that are subject to vigorous debate. In short, however, counsel must first be prepared to establish the competence of the witness to even offer experienced and reliable opinions about the questions at issue. This will often involve exploration of their education, experience, prior specific experience in the field, and prior experience as a testifying expert.

Though a witness may be highly qualified to testify, the substance of their testimony may not be admissible at all. It is subject to independent tests verifying, in general, if it is sufficiently reliable to allow a non-percipient witness to nevertheless offer conclusions the trier of fact may rely on to help decide contested factual issues.

### **III. Physical Evidence: Why, and When, Is Physical Evidence Effective?**

Effective trial advocacy depends on a lawyer's ability to effectively and efficiently tell their client's story in a way that creates a clear dilemma that can only be resolved by ruling in favor of that client. That, in turn, means providing evidence that supports the story you want to tell (and that you want the trier of fact to believe). It also means offering the type of evidence that is not easily disregarded as unpersuasive, re-interpreted, or disbelieved for lack of credibility. It also means offering evidence that leads the trier to reach helpful conclusions all on their own, without having to be force fed conclusions.

Because the persuasive force of testimony often relies on the witness's skills to communicate their point, and requires the jury to engage their imagination to place the testimony in the context of a story, exclusive reliance on witness testimony offers risks. More instance, while a juror may reflexively envision a small Pekinese whenever they hear the word "dog", your dog bite case may require they understand the terror inflicted on the plaintiff by a 120-pound Rottweiler. A photo or video of the dog can easily overcome the juror's pre-programmed conceptions.

Often, then, the most persuasive forms of evidence are those that engage the senses of the trier beyond mere hearing and allow the facts to be physically observed and felt in an objective way that precludes misinterpretation. For instance, while a witness might verbally describe the unexpected cracking of ski that resulted in terrible injuries, having the jury hold the mangled ski in their hands and observe the way it split evenly through seven layers of material can convince the jury that the ski collapse was unforeseeable to the plaintiff and will suggest that a design flaw was to blame in ways that verbal testimony never could. Also, showing post-surgery x-ray images of the plaintiff's shattered femur with long metal rods extending through the bone will surely explain the extent of the plaintiff's injury more effectively than having her treating physician just describe the procedures she employed to set the broken leg.

In addition to the potency visual confirmation gives to evidence, physical evidence can speed up presentation of the case. Compare, for example, that an assault lasting only one minute could inflict a tremendous number of blows causing extensive injury. Consider how long it might take a victim witness to describe the circumstances and events involved in the assault with the time it would take a jury to review a surveillance video that caught the one minute assault. The jury could probably watch the assault ten to fifteen times (or more) before the victim's testimony was complete.

Witness control or communication style problems can also make physical evidence a necessity. No matter how credible a witness is, they may not be interesting or engaging to the listener. Using physical evidence to augment, or even replace, testimony helps avoid the distraction problems that accompany witnesses who are too soft-spoken, long-winded, or have difficulty making a concise point.

Moreover, even testimony from the best, most engaging and most credible evidence could be enhanced by complementary and corroborating physical evidence. Most testimony will be rebutted by counter-testimony or exhibits. Solid exhibits that corroborate or lend support to a witness's testimony can serve as a "tiebreaker" between equally credible, but conflicting, witness testimony. As an example, imagine a jury is faced with two witnesses to the formation of a contract. One claims the parties signed the final page of a ten page document, whereas the second asserts there were only three pages to the agreement she signed. If she is able to produce a three page agreement form, each of which bears the initials of the other witness, and the other witness is unable to produce a similarly corroborative document, the latter witness's testimony suddenly becomes the more credible of the two.

#### **IV. Exhibit Categories.**

##### **A. Real evidence.**

"Real" evidence or exhibits are items that, by themselves, provide facts that are relevant to the trier of fact. This means that the evidence itself establishes or creates a fact or facts relevant to the dispute. Consider, for example, a copy of a lease that shows the defendant agreed to lease the property for 1 full year. The lease language itself provides the fact that the defendant agreed to a 1 year lease.

During evidentiary proceedings, real evidence is admitted into evidence by the court or other presiding decision maker, often after hearing objections to admission of the evidence. Therefore, they may be used and relied upon by the trier to determine disputed facts in the case. Real evidence can be further subdivided into the following three major sub-categories.

##### **1. Tangible Exhibits.**

Tangible exhibits include materials or physical objects that were part of the operative events and constitute physical, non-documentary exhibits. Most importantly, the trier of fact can experience this type of exhibit through the various human senses –touch, smell, hearing, taste, etc. Examples of tangible exhibits or evidence can include such things as weapons or

instruments used in committing a crime, defective components or parts used in a negligence case, samples of proprietary equipment relevant to a trade secrets claim, or even the large broken tree limb that a plaintiff claims a neighbor cut down on top of the plaintiff's car.

## **2. Documentary Exhibits.**

Most often we think of documentary evidence as traditional paper records, like a contract, a deed, medical records or a police incident report. We now realize that almost all such records may have been recorded in an electronic format, like a PDF copy, a word processing file or spreadsheet, or an e-mail or text message file. The most significant impact of documentary evidence comes from the fact that decision makers tend to believe what was written down previously over current recollections about events. There is thus enhanced credibility in documentary evidence. Imagine, for example, the competing believability of a four-year-old diary entry that exposes something publicly humiliating about a witness and the witness's current recollection that no such event occurred.

## **3. Recordings.**

The media in which events or facts can be recorded is ever-evolving. Recorded evidence can include a digital photograph, a digital audio recording, or a video or video/audio recording that itself conveys relevant and material information. It may include digital imaging used in medical diagnosis like a PET scan image or an ultrasound recording. The key to such evidence is that it captures sensory data (visual, audible) that conveys facts, and often offers a "real-time" capture of the facts as they actually unfolded.

### **B. Demonstrative or Illustrative Exhibits.**

Demonstrative or illustrative exhibits include forms of exhibits depicting or explaining facts that are introduced through testimony or other real evidence exhibits. They do not independently convey relevant facts. Thus, the trier of fact cannot decide that a certain fact exists merely because it appears on a demonstrative or illustrative exhibit.

Instead, demonstrative exhibits are used to help a witness or counsel explain relevant facts, making testimony or other real evidence easier to understand. For example, imagine that a dispute arises among a manufacturer and their component supplier over allegedly defective components. The real evidence includes the following: a) four hundred "item rejection" reports from each day of manufacturing for the entire month of June, 2011, for a total of 8,000 reports in which a component from the supplier was rejected as containing some defect; b) manufacturing final inspection reports showing the manufacturer actually completed 16,000 products that incorporated components supplied by the supplier in June, 2011; c) the manufacturer's "item rejection" reports from June of the prior year during which it used a different supplier for the same components and rejected only 3,000 of the components; d) the manufacturer's final inspection reports from June of the prior year showing it completed 18,000 products that incorporated the other supplier's components. Rather than forcing the manufacturer's witness to plod through each of the relevant reports for the jurors, counsel may instead have the witness prepared to testify enough to get the reports admitted, and then testify that they have completed a

simply chart that compares the rejection rates using the new and the old components. It might look something like this:

<b>Month</b>	<b>Total Products Produced</b>	<b>Total Components Rejected</b>	<b>Ratio of Good to Bad Components</b>
June, 2010	18,000	3,000	3,000/15,000 or <b>20% failure rate</b>
June, 2011	16,000	8,000	8,000/16,000 or <b>50% failure rate</b>

Demonstrative or illustrative exhibits might also be presented as graphs or maps. Alternatively, they may take the form of mock-ups of vehicles, machinery, or buildings, animations of processes, or even video recreations of key events. Demonstrative or illustrative exhibits are not generally admitted as evidence. While a party can have a witness use them to support, enhance or better explain their testimony, and they may be used or to support argument by counsel, the trier of fact is not allowed access to the material once they are charged with making a decision in the case.

The requirements for authentication of demonstrative exhibits are different than for real evidence exhibits. Rather than providing proof that the exhibit is what it purports to be, the authentication requirement for demonstrative exhibits is often met by testimony that explains what the demonstrative exhibit is, how the trier can be confident it includes accurate information taken from admissible evidence, and how it will help the witness explain otherwise relevant testimony or exhibits. For instance, the introductory testimony for the hypothetical chart above might include the following exchange:

Q. Mr. Jones, are you familiar with the number of components from XYZ Corp. your employer rejected as defective in June, 2011?

A. Yes, I am.

Q. And are you familiar with the number of components from ABC You're your employer rejected during June the previous year, 2010?

A. Yes, I know that too.

Q. And how did you learn these numbers?

- A. Well, I have studied the company's manufacturing records.
- Q. Can you tell the jury what those are?
- A. We keep two records that can tell us the number of good components we were able to use in a month versus the number we had to reject for defects. Those are our Item Rejection Reports and our Final Inspection Reports. Every time we reject a component we issue an Item Rejection Report and every time we complete a product with a non-defective component we issue a Final Inspection Report.
- Q. And how many of those type of reports were issued in June of 2012, if you know?
- A. It was thousands.
- Q. Does the same go for June of 2011?
- A. It sure does.
- Q. Can you tell the jury what the documents are in the two binders I have just handed you?
- A. These are the Items Rejected Reports for June of 2012 and June of 2011.
- Q. And can you tell the jury what is in these next five binders I am handing you?
- A. Yes, those are the Final Inspection Reports for June of 2012 and 2011.
- Q. And can you tell the jurors what those reports tell you about the ratios of rejected components you experienced with your old component supplier versus XYZ Corp.?
- A. Well, I have added up the reports and can give you the ratios if I can see my chart.
- Q. I am showing you a document containing a table entitled "Ration of Defects" – is this what you are referring to as your chart?
- A. Yes, I created this.
- Q. And how would this help you answer my questions?
- A. Well, I created this from the actual inspection and rejection reports for June of 2011 and June of 2012, and I double checked them for accuracy, so I know they are correct. And they will allow me to give you the total numbers of rejected and used components each month, which then allows me to calculate a ratio of rejected to accepted components, all without having to separately count up each

of them from the report documents in these binders. Adding all those up separately could take me an hour or so.

## **V. Admission of Exhibits.**

Exhibits can be used to succinctly present a large spectrum of information, to help to support an individual point, or to rebut or impeach the other sides' evidence. Such powerful tools, however, become sources of distraction that dilute counsel's effectiveness when they draw arguments over their admission. Also, despite the fact that a good exhibit often proves the cliché that "a picture is worth a thousand words," some exhibits can prove hard to understand, repetitive of other evidence, or downright uninteresting. In short, just because something is admissible does not mean that it should ever get admitted. Trial counsel must instead engage in careful advance planning to decide precisely which exhibits to deploy and when to do so in the course of their case presentation.

### **A. Picking the Right Exhibits**

The process of exhibit selection actually starts with selection of the case theme. Many of the factors that determine which exhibits should be selected require that counsel first understand exactly what story they are trying to tell with their evidence. Consider, for example, an attorney in a will contest case who wants to tell the story of an unsophisticated, barely literate client whose sophisticated kin are trying to take advantage of his ignorance. Copies of e-mails sent by the lawyer's client inquiring after his share of the inheritance in halting, incomplete sentences with awkward word choice and atrocious spelling may quite convincingly paint the right picture, particularly when contrasted with his competing relatives' sophisticated e-mails amongst themselves plotting how to assure the greatest take under the estate is theirs. On the other hand, if the theme emphasizes the testator's "simple mistake," then letters from the testator to the client assuring the client he had been "well provided for in my will" might prove most helpful. Thus, the careful practitioner starts their evidence selection by selecting a concise, believable, and easily understood story that places their client in a position of need for the type of help the trier of fact can provide.

Once the theme is selected, and the potential trove of relevant evidence is identified, focus switches to picking the right evidence. Factors that should be considered will include:

- 1. The Exhibit's Centrality to the Story.** Viewing the trial theme as a story that must be told quickly, concisely and clearly, counsel should consider just how each exhibit might impact those objectives. For example, exhibits that unnecessarily or overly complicate the story, that introduce collateral stories or sub-plots, or that contradict the story in material details should be avoided unless absolutely necessary to supply a material fact. Effective trial presentations tell a compelling and easily understood story. Counsel will want to avoid exhibits that overly complicate the story, lead the trier of fact off on distracting collateral stories or sub-plots, or that contradict the client's story. Before selecting any exhibit counsel should ask, "can I tell the story I need to tell without this exhibit?" If the answer is "no", then the selection decision is clear. If, instead, the answer is "yes" the next logical question to ask is: "Will my client's story be more believable if I use this exhibit?" If the answer to that question is "yes",

you will probably still want to use the exhibit. If, however, the answer is only “maybe” or “probably not”, the objectives of telling a concise, efficient story with little opportunity for distractions counsel in favor of not using the exhibit.

**2. Avoiding Complexity.** While some cases and issues require substantial complexity in evidence, avoiding all unnecessary complexity should be a paramount goal of effective trial counsel. Exhibits should be selected to reduce, not compound, complexity. This means that no matter how well you understand the case nuances, during exhibit selection you must assume the more objective perspective of someone with little foreknowledge of the facts and little interest in delving into the complex interplay of partially relevant facts. Imagine, for instance, the case of a medical patient injured when a foreign object was left in their body during surgery. One relevant exhibit is the x-ray showing a surgical clamp amid their internal organs. A second exhibit is a series of inventory charts used by the hospital logistics department to forecast needs to purchase new surgical packs based on records counting number of instrument sterilizations performed in the hospital’s operating suites over the past week. The instrument counts, if compared over a number of weeks, indicate one surgical clamp may be missing. Obviously, explaining the significance of the various sterilization charts and logistics forecasting reports will add substantial complexity to the storytelling – complexity that is perhaps unnecessary given the availability of the x-ray evidence.

**3. Forecasting Admissibility Challenges.** Opponents will always attempt to identify objections they might make to adverse evidence. While sometimes heavy objection practice has the unintended consequence of highlighting for the trier just how important a particular piece of evidence is, repetitive fights over admissibility can also distract from the force of trial presentation. Threat of admissibility battles should not deter counsel from selecting helpful exhibits. However, by anticipating challenges to admission of the exhibits available to them, may allow counsel to select from among multiple exhibits supporting virtually the same points to remove the more vulnerable exhibits. It also helps counsel identify just how such exhibits should be offered and what foundational exhibits or testimony may need to come first to create an unassailable argument for admission.

**4. How to Handle Exhibits You Would Rather Not Have to Introduce.** Sometimes the evidence selection process identifies exhibits that have conflicting positive and negative impacts on your client’s story. For example, photographs of a store floor taken immediately after a slip-and-fall accident may show the floor was completely dry in contradiction of the plaintiff’s claim. On the other hand, they may also show that the tile in the area of the fall was uneven, cracked or broken, expressing a general attitude of disrepair. Or, the usefulness of particular exhibits may be at risk of being overcome by its collateral nature, or by the risks of useless distraction it offers to the trier. In either case, counsel should determine whether they can establish the same facts that might be established through the exhibit in other ways. Testimony will obviously be one alternative, as will other exhibits.

Imagine, for instance, the defense attorney faced with the photograph example noted above. She might be able to offer testimony from the store manager confirming that the floors are cleaned at 10 p.m. in the evening, that they are inspected to ensure they are dry before the manager closes the store at 11 p.m., and that the slip-and-fall at issue had occurred just ten

minutes after the store had opened and before a single employee or customer had walked down the relevant aisle that day. The manager may also be able to testify that they were on the scene before the plaintiff got up off the ground and observed that the area where the customer fell was absolutely dry. In that case, counsel may decide to forego the photograph which could lead jurors to question whether the general disrepair of the floor led to the fall and left the plaintiff assuming reasonably that they slipped because the floor was wet.

## **VI. Planning for Admissibility Issues.**

To be used in a trial or other evidentiary proceeding, exhibits must meet the tests for admissibility under the relevant rules of evidence. Even if counsel has decided that they should use particular exhibits to tell part of the case story, they should also do the following:

- Be aware of and plan for any difficulties in getting the exhibits admitted.
  - Question if the exhibit is subject to challenge as lacking authenticity or as not legally relevant to the disputed issues being tried. It will take a witness with knowledge of the creation and/or contents of the exhibit to overcome such issues.
  - Question if the exhibit creates any hearsay issues that will require you to first lay foundation for a hearsay exception.
  - Question if the exhibit carries with it any other objection risks. Examples include risks that an opponent will claim unfair prejudice or other factors under Rule 403, Ariz.R.Evid. (*see also* Rule 403, Fed.R.Evid.) justify exclusion of the exhibit. These can include objections that the evidence is unduly duplicative of other evidence or risks confusing the jury.
  - If the exhibit is to be used in connection with expert testimony, question if it satisfies standards for admission of expert testimony under the relevant evidentiary rules.
  - Always figure out who will be used to get the evidence admitted. For instance, counsel may obtain a stipulation from their opponent to admission of the evidence. On the other hand, admission may require one or perhaps more than one witness to authenticate the evidence and lay foundation for its authenticity, its legal relevance, or to overcome other evidentiary objections.
- Plan out exactly how and when each exhibit will be introduced at trial. This should include an outline of counsel's analysis of how each exhibit meets the standards for authentication, legal foundation, and relevance. It should also include an outline of how counsel will respond to the most anticipated objections for each exhibit.

- Identify a back-up source of alternative exhibits or testimony to supply the same facts in case admissibility becomes a problem. Remember, not all evidentiary rulings at trial are correct. Counsel whose case hinges on admission of a particular exhibit can find themselves in real trouble if that exhibit is rejected as inadmissible. Your objective is to win the trial proceeding, not just to create a great record of error for appeal. Back-up evidence can be critical.

## **B. Planning When to Introduce Each Exhibit.**

Counsel will normally have considerable latitude in when they can introduce each exhibit in an evidentiary proceeding. For example, for story-telling purposes, a plaintiff's counsel may want to organize exhibits in a chronological order. In contrast, the desire for dramatic effect may encourage counsel to introduce the most compelling exhibits (i.e., the bloody knife) first.

Defense counsel may pursue other strategies. For example, they will be initially just cross-examining witnesses, and may wish to organize their exhibits into groups applicable to each adverse witness, hoping to use the exhibits to exploit credibility problems with such witnesses. On the other hand, defense counsel may also reserve some, or maybe even all, exhibits for their own case in chief, electing to present the exhibits in an order that best illustrates and supports their client's story, rather than in the more broken-up fashion that use in cross-examination might require.

## **C. Planning Who Introduces Each Exhibit.**

Counsel should be mindful of the fact that except for exhibits whose admission has been stipulated, most exhibits will require a sponsoring witness to lay foundational testimony. Because witnesses sometimes become unavailable, have inconvenient memory lapses, or are precluded by judicial rulings from testifying on particular subjects, counsel should always consider identifying back-up witnesses for introduction of their important exhibits.

As a general matter, the sponsoring witness should have personal knowledge of the exhibit, preferably having been involved in its creation if it is documentary evidence, and should be able to lay as much as possible of the foundational facts needed to overcome any objections to the exhibit.

## **D. The Process for Introducing and Admitting Exhibits.**

### **1. Establishing Legal Foundation.**

The first step in introducing an exhibit is laying legal foundation. Laying the legal foundation for an exhibit is, essentially, authenticating the exhibit as in fact being what it purports to be and establishing its relevance to the issues in dispute. Establishing that the exhibit is in fact what it purports to be sounds like a somewhat circular exercise. However, imagine a criminal prosecution in which the prosecutor wishes to introduce a gun purportedly used in a bank hold-up. The fact that the prosecution has a weapon in court and can show it to the

witnesses and trier of fact does nothing to prove that the weapon had anything to do with the crime charged. It could simply be an extra weapon that has been sitting the police evidence locker for the past 20 years. The rules demand more – that the offering party establish reasons for the trier to believe that the weapon being offered into evidence is in fact a weapon used in the crime with which the defendant is charged and not an unrelated object.

Establishing the relevance of the exhibit to the issues in dispute is another aspect of establishing legal foundation. Imagine the hypothetical above in which the prosecutor has available a weapon found on the criminal defendant when he was arrested. The prosecutor can establish through testimony of the arresting officer and perhaps a chain of custody witness that the weapon is in fact what the prosecutor purports it to be – a weapon found in the possession of the defendant. However, assume the defendant is being charged with arson only, not any crime requiring proof of possession or use of a firearm. The prosecution would have trouble establishing through any witness why introduction of the weapon is relevant to any disputed fact question the trier must decide.

Because the elements of legal foundation/authentication require personal familiarity with the exhibit, counsel must find a sponsoring witness with sufficient familiarity to establish both sides of the legal foundation equation. They must be able to say on personal authority that this exhibit is in fact what the offering party says it is, and should, if possible be able to establish that the exhibit plays a relevant role in deciding the issues in dispute. In particular circumstances, counsel may need multiple witnesses to supply these prerequisites. For example, it may take testimony from a police detective who removed swatch of fabric from a murder victim's clothing and from a forensics lab worker who can confirm the defendant's DNA was found on the swatch to authenticate and establish the legal relevance of a DNA test report.

One key to laying legal foundation is first establishing through testimony that the witness providing the legal foundation is competent to testify to the issues involved in the legal foundation. Thus, counsel should have the witness provide testimony that shows they are familiar with the operative facts that the exhibit is relevant to, and that they were or are in a position to be able to confirm that the exhibit is in fact what it purports to be. (“I was the arresting officer of defendant Jones and I took a baggie containing prescription pills from his front pants pocket;” or “I am a marketing specialist with XYZ Corporation and was in charge of creating the ad copy for our spring line of clothes; I can confirm that the advertisements issued by our competitor for their spring line used exactly the ad copy we had drafted.”)

Counsel should keep in mind that laying legal foundation is not a rote process. It offers counsel an opportunity to create interest in and credibility for the evidence. For instance, imagine the evidence at issue is a photograph of a fire-blackened vehicle at issue in a product defect case. Having a first-responder firefighter testify to the accuracy of the photographic depiction while describing the horrendous flames that preceded the photo and his heroic battle to extract the vehicle driver can increase both the importance and the credibility of the exhibit.

## **2. Establishing the Relevance of an Exhibit.**

Per the requirements of Rule 401, Fed.R.Evid. (Rule 401, Ariz.R.Evid.), relevance is always in issue, and admission of an exhibit with limited or no relevance to the matters in dispute in the proceeding is objectionable. Thus, counsel must attempt to provide testimony for each real evidence exhibit showing it is in fact relevant per Rule 401 standards– meaning that the exhibit helps make a fact in issue more or less probable.

An example could involve the introduction of a fetid can of beans in the claim by a plaintiff that a local restaurant gave her food poisoning. Assume that a disgruntled former employee of the restaurant who supplied the plaintiff with the can is testifying. The exchange with counsel who wishes to introduce the can of beans could be as follows:

Q. And did you see Mr. Greene at the restaurant on that Tuesday night?

A. Yes, he was there with his wife and two kids.

Q. Do you recall what he ordered to eat that night?

A. I remember he ordered the chili special.

Q. How is it that you can remember that detail?

A. ‘Cause we were all out of the chili special at that point, which I told him. But he insisted that he had come in specifically to get the chili special and that was what he wanted, so I went to the chef, who was in a foul mood, and told him that is what Mr. Greene wanted. Chef was really mad.

Q. How do you know he was mad?

A. He started screamin’ and cussin’ and throwing pots and pans around. He said, “damn it if I’m gonna make another pot of chili for some Johnny-come-lately.”

Q. And what did he do next?

A. Well, then he kinda got a smile on his face and said “I know what we’ll do.” Then he ran back into the back room, where we keep the out of date food – we used to deliver it to a pig farm out on the edge of town – and he brought back this big can of beans that was all dented and had leaked some stuff out through a puncture hole. I saw him open the can and ladle some of it into a pot and mix in some meat. It smelled pretty bad, but he gave it to me to serve Mr. Greene.

Q. Is that what you did?

A. No, I refused. But another waiter, Stan, thought it was funny and he served Mr. Greene the concoction.

Q. And, what did you do?

A. I was kinda grossed out, and I was angry, 'cause this was probably the fourth or fifth time I saw the chef pull this kinda thing. So, I grabbed the can of beans and hid it in my backpack. Then, the next day I quit my job and called Mr. Greene. His wife said he was really sick – in the hospital. So, I arranged to meet her and give her the can of beans.

Q. And do you recognize the item I've placed in front of you here?

A. Sure, that's the can I gave Ms. Greene. I had put my initials on the side in permanent marker – see, here they are. And this is looking just like it looked the day I gave it to Mrs. Greene, only the kinda spider-webby mold stuff is pretty much gone now.

When this questioning is finished, the trier of fact knows that the bean can is relevant because it is the alleged source of the food poisoning, and knows that this witness has personal identifying knowledge of the can because he actually took it and gave it to the plaintiff's wife.

### **3. Managing Credibility Issues.**

As discussed above, introductory questions about an exhibit can help establish its credibility and persuasiveness before it is even admitted into evidence. Setting credibility expectations high may help offering counsel to more effectively ward off objections to the evidence as unduly prejudicial, duplicative, etc. Consider the following example of questioning that might help establish the credibility of a drawing the witness made of an accident scene for investigating law enforcement officers shortly after the accident.

Q. I am handing you what has been marked as Defendant's Exhibit No. 2. What is that?

A. That is a drawing I did of the dock area where the accident happened. You know, where the boat hit the dock and crushed it.

Q. Are you familiar with the area?

A. I pass that area every day on my way to work. I have been passing through there five days a week for ten years now.

Q. And on December 3, 2007, did you pass through that area?

A. I sure did, and that's when I saw the accident happen.

Q. I'm going to ask you about what you saw in just a minute. Can you tell me when you made the drawing at Exhibit 2?

- A. Within about an hour of seeing the accident. The police asked me to draw things out for them, so I did.
- Q. What did you do to make sure the drawing was accurate?
- A. I actually paced off some of the distances and then used a ruler to scale the drawing as best as I could.
- Q. Did you do anything else to make sure you were being accurate?
- A. Sure, I asked my friend Sal who was with me and saw the accident also to put in any details I might have missed. He added a few objects that were on the deck of the boat that ran into the dock. I remembered them when he brought them to my attention. It made the drawing very accurate on all the details.
- Q. Is the only reason you made the drawing because the police asked you to?
- A. No, definitely not. I mean I realized when I saw that the boat had killed those people on the dock that there was bound to be some sort of legal action. Like maybe someone would be prosecuted or there would be a lawsuit or something, and I knew I would be a key witness. I wanted to make sure I had some record for myself of exactly what I had seen so I did not have to rely on my memory later on.
- Q. Have you compared your drawing to any photos or other records of the accident scene?
- A. Well, I kept a copy of it for myself, and the next day I compared it to the photo in the paper of the accident scene. I was really impressed with how accurate my drawing was. And, since then I've made several trips back to the dock to make sure I got the scale right and the positioning of the dock and the other slips correct. Again, I am happy that my work is very accurate.

Note that the drawing has not yet been admitted, but already the trier has lots of reasons to believe, if the trier chooses to, that the drawing offers accurate information about how the accident occurred. When the trier sees the drawing for the first time it will not be viewed with near the skepticism such a document might be considered with if it were presented "cold".

## **B. Steps for Introducing an Exhibit.**

Introducing and admitting most exhibits can be done following a standard formula or process. The general process is:

- 1. Mark the exhibit for identification.** This is usually done beforehand, pursuant to court rules, and the exhibits are then left in the possession of the court clerk. When the evidence is used at trial, counsel should announce the number of

the exhibit he or she is offering to the witness. For instance: “Mr. Jones, I am now handing you what has been marked as Defendants’ Exhibit 4.”

**2. Show the exhibit to opposing counsel.** Counsel should have an extra copy to provide to opposing counsel before presenting the exhibit to the witness. Again, most court rules require that you have provided opposing counsel a copy of any exhibits prior to the trial or hearing. Still, to avoid confusion and delay, you may want to offer a copy to opposing counsel again as you approach the witness. If the exhibit is some sort of physical evidence that cannot be copied (i.e., the murder weapon, a faulty machine part, etc.) you should at least give the opposing counsel the opportunity to inspect it to assure it is the same physical item produced or made available for inspection during discovery.

**3. Give the exhibit to the witness** – (again, announcing the number of the exhibit.)

**4. Ask the questions needed to authenticate the exhibit.** Authentication may be the most complicated part of the exhibit admission process. Keep in mind the rules on authentication provided at Rules 901-902, Fed.R.Evid. and Rules 901-902, Ariz.R.Evid. Some documents are self-authenticating, such as domestic public documents issued under an official seal (an example might be a marriage license or birth certificate), as well as a relatively large variety of other types of documents. Counsel will still need to ask the questions needed to establish the prerequisites to self-authentication, however. For instance, “what government agency issued that document?” and “why was it issued to you?”

To properly authenticate an exhibit, counsel should consider first asking the questions needed to confirm what the exhibit is, and that it is what it purports to be. For example:

Q. Have you seen that document before?

A. Yes.

Q. What is it?

A. It is a copy of blueprints I prepared for the Scenemart Building project in Seneca Falls in 2012.

Or:

Q. Are you familiar with that exhibit?

A. Yes.

Q. Please tell the court what it is.

A. This is a videotape that I made on my cell phone while I was protesting with the Occupy Eloy group.

This is also the point where counsel will ask questions that will confirm the credibility of the witness's testimony about what the evidence is and confirm that the exhibit is actually what the witness says it is. For example:

Q. How do you know this is the same lease you signed in 2005?

A. Well, first, I gave you this document which I had taken from my wall safe where it has been since 2005. Also, I can see it has my signature and my wife's signature on it, and this one has a couple of extra staple holes in the middle of the top of the page. When I got this it had been stapled in the middle. I can't stand that so I pulled the staple and re-stapled it on the left-hand corner.

Or:

Q. How do you know that is exactly the same toothbrush the defendant used to poke your dog in the eye?

A. Well, 'cause it's the same colors and it has a bunch of teeth marks here on the upper handle where my dog bit the brush while he was at first trying to defend himself.

Next, counsel should ask questions that get the witness to confirm that the exhibit has not been altered or modified from what it purports to be. Examples are:

Q. Is that bill of lading in the very same condition as it was on September 4<sup>th</sup> when you signed it and placed it in the delivery pouch?

Next, counsel should ask the questions that will confirm the relevance of the exhibit to the issues in dispute. This could be done in the following manner:

Q. How does this exhibit relate to your claim of self defense?

A. This is the shirt I was wearing on the night I got arrested. And you can tell from the damage to this shirt I was getting attacked first.

Q. How can we tell that?

A. There is a big rip under the arm with a ring of blood around it. That's where Mr. Smith stabbed me after he first lunged at me. That's why I had to defend myself.

During this process, counsel will also want to ask any other questions that will help establish the credibility and trustworthiness of the information contained or established by the exhibit. For example, an attorney offering a written handwriting analysis to prove a forgery might ask: “And how many similar forgery analyses have you made in your professional career?” and “How many times have you determined that you were looking at a forgery?”

**(a). Special Steps for Introducing Photo or Video Recordings.** If the exhibit at issue is a photo or video recording, counsel should also ask: “Does this photograph [video] fairly and accurately show [whatever the relevant event or condition is] at [the time in question]?” For example, one might ask: “Does this photograph fairly and accurately show the undergrowth the defendant had let grow on his land up to the day before the brush fire started?”

**(b). Special Steps for Introducing Physical Evidence or Documentary Evidence.** In the case of physical evidence or documentary evidence, it is likely the sponsoring witness has not seen the evidence for some time. It is always possible that the evidence has been altered, deteriorated, or changed in some material way so that the information it conveys is not a totally accurate depiction of the relevant facts. For instance, imagine a contract whose recital page has been torn off, or a photograph that has been digitally “enhanced”. It is important, then, for authentication and legal foundation purposes to have the sponsoring witness confirm that such modifications have not happened, or, if they have, to confirm what they are so that the authenticity and relevance of the evidence can be tested. To do this, counsel should ask: “And is Exhibit X in the same or substantially the same condition as it was when you last saw it?”

Moreover, if the exhibit is documentary and is only a copy of an original, counsel should ask: “Is that a true and accurate copy of the document?” Counsel may ask further similar questions to bolster the issue, i.e., “has it undergone any changes that you are aware of?”, “is it different at all from the document you remember creating?”

**5. Elicit Testimony that Anticipates Objections.** Careful counsel will elicit whatever additional foundation testimony is needed to overcome potential objections to the admission of an exhibit. The most common objections to written communications may be hearsay-based objections. Therefore, when planning for introduction of an exhibit counsel should identify any hearsay issues in their written documents, and, if any exist, identify the relevant exceptions to the hearsay rules that will allow admission of each exhibit. Then, counsel may wish to ask all the questions needed to establish the applicable exception(s). For

instance, an attorney trying to establish a public records exception would have the witness testify that the exhibit is something used or made in the normal course of the business of a public agency, that it is kept or maintained as part of their normal record keeping activities, and that it accurately contains the type of information regularly recorded as part of the agency's public activities.

**6. Offer the Exhibit.** Counsel will actually offer the exhibit into evidence by stating, "I ask [or move] that Defendants' Exhibit 4 be admitted into evidence."

**7. Allow for objections and voir dire of the witness.** Once counsel moves admission of an exhibit, the court or hearing officer should allow the opposing counsel to make any objections. And, if opposing counsel can identify a valid basis for cross-examining the witness on some of the elements of admissibility for the exhibit, they should be entitled to do so. Laying foundational information out thoroughly through direct examination is one of the best ways to deter such time-consuming and distracting conduct.

**8. Wait for the ruling.** If the ruling is adverse, counsel may wish to make an offer of proof, establishing for the record what counsel contends the exhibit would have been and would have proven. Particularly for critical exhibits, counsel should always make sure they are part of the appellate record if they are not admitted at trial.

**9. Publish the exhibit to the jury.** Once the court admits the exhibit, counsel may let the jury have it. This can be done by handing out copies of paper documents, placing the exhibit on the courtroom projector, passing physical evidence for the jury to handle, or playing a video through the Court's video system.

**10. Use the exhibit.** Once the court or hearing officer has granted admission of the exhibit into evidence, counsel must also now use the exhibit to establish material facts. This is most often done through further questioning that highlights important facts displayed by the exhibit. As examples, counsel in a contract dispute may have the witness read aloud payment clauses that detailed when payment was due and in what amounts under the contract, or, counsel in an intentional interference claim may have the witness read e-mail messages he received from the defendant encouraging him to stop doing business with the plaintiff.

## **VII. Use of Non-Admitted Exhibits.**

Often, counsel will find themselves using many non-admissible, or at least non-admitted, exhibits. Examples of such exhibits include: 1) exhibits used to refresh a witness's recollection; and 2) demonstrative or illustrative exhibits.

### **A. Using Exhibits to Refresh Recollection.**

Rule 612, Fed.R.Evid. (Rule 612, Ariz.R.Evid.) allows use of certain evidence to refresh recollection. Counsel is allowed in limited circumstances to show a witness at trial an otherwise inadmissible exhibit, or one counsel elects not to admit, for purposes of refreshing a witness's recollection of events or information they previously knew.

The process for refreshing a recollection is different than the process for introducing an exhibit for admission. First, counsel must establish through questioning that the witness had at one time a recollection of information that is relevant to the case, but that the witness is unable to recall that information at the time of their testimony. Then, counsel must establish that there exists evidence that might refresh the witness's recollection. Counsel then approaches the witness with such material, asks the witness to review the material, *retrieves the material from the witness*, then asks if the witness's memory of the relevant facts have been refreshed. If the witness testifies affirmatively, he or she may be asked what they now recall. They may not testify from the exhibit, however, only from their own refreshed recollection. The exhibit they are shown will not be shown to the trier of fact, is not introduced into evidence, and other questions are not asked about the contents of the written exhibit itself.

### **B. Demonstrative Evidence.**

As addressed above, one of the prerequisites to using demonstrative or illustrative exhibits is proving to the court first that the use of the exhibits will help the witness explain their testimony or make it easier for the trier of fact to understand the testimony. Demonstrative evidence may still draw objections under Rules 401 and 403, particularly if the demonstrative evidence is particularly powerful, misleading, or prejudicial. Demonstrative evidence is most easily justified, then, when it relies for its source on other admissible evidence. Examples of such routinely allowed demonstrative evidence might be a pie chart summarizing declining sales data since an allegedly defamatory expose was published about the plaintiff company, or a map on which counsel has superimposed the actual location of a mining operation in relation to the local water source along with location (much further from the water source) that the mining company had represented in its mining permit applications.