

# Trial Law TIPS

Roy D. Wasson's  
TIP #46

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## Move All Exhibits Into Evidence Before You Rest —And What to Do If You Forget

### Introduction

The need for this “TIP” was best shown by a death case in which two experts for each side used the decedent’s hospital charts during their trial testimony. The “key to the case” in this action, which involved failure to diagnose the decedent’s heart attack, was whether or not EKG tracking charts contained in the hospital charts showed the condition which the Defendant should have seen. When the Plaintiff’s attorney showed the hospital records to the first doctor, the defense attorney said: “I have no objection, Your Honor, assuming they are complete.” That chart, which the Plaintiff’s experts said showed malpractice, was published to the jury repeatedly. The

key EKG records were passed from juror-to-juror as the experts explained them.

During deliberations, the jury asked for the hospital chart. The defense objected on the sole ground that the chart was not formally moved into evidence. That the objection was sustained! The judge looked at the clerk's exhibit list and ruled that the records had not been given an exhibit number "in evidence." Believe it or not, a defense verdict based on that unfair ruling was affirmed on appeal.

One reason we forget or fail to move something into evidence is because there does not seem to be any doubt that the exhibit is already in evidence; so it seems to be a useless formality. Sometimes the opposite is true. In the case I am relating, it made the difference between winning and losing.

### **Add This Step To Your Trial Checklist**

Here's a simple but important addition to your trial checklist. When the judge asks whether the Plaintiff rests, say "First Plaintiff moves into evidence every document and other exhibit identified by any witness which has not already been admitted." Take a look at the clerk's exhibit list to make sure that the appropriate box has been checked next to each exhibit which you believe was offered and admitted, to make sure that the clerk agrees that the important stuff is "in evidence" and not simply marked "for identification."

If there are some items which you thought were in evidence which were not so marked, by making this motion before you rest, you will get an agreement from the opposing party, a ruling from the judge, or other action to prevent the nightmare which occurred in the case involving the hospital chart.

Another reason for moving all exhibits into evidence just before you rest (in addition to placing in evidence those you forgot to offer) is to re-move exhibits initially excluded.

Sometimes evidence is correctly excluded the first time it is offered, because the necessary foundation may have been laid. By re-moving everything into evidence, you may convince the trial judge that the exhibit now should come in.

### **What To Do If You Forget**

How should you handle things in the event that you should forget to add this step to your trial checklist? If you should announce “the Plaintiff rests” as soon as the trial judge asks that question, and you discover your error while the Defendant is putting on its case, what then?

The first thing you should do is to move to re-open your case at the earliest possible convenience. Ask for a sidebar or take advantage of a natural pause in the proceedings, to ask the judge (casually, like it is no big deal) to re-open your case to formally place into evidence the exhibit or exhibits which were inadvertently omitted. Often, the defense attorney will indicate that there is no objection to re-opening, either immediately or after the defense case-in-chief is over. Be sure to get such a stipulation on the record with the court reporter.

I also have seen occasions in which the defense attorney will state that it is unnecessary to allow the Plaintiff to re-open the evidence, because the Defendant intends to offer the very exhibit in evidence himself. Either way, you will have gotten what you wanted with the document before the jury. (Don’t forget to renew your motion to re-open if the defense rests without introducing that exhibit.)

If the Defendant does not agree to allow you to re-open or agree to offer the exhibit in the Defense case, you need to get a ruling from the trial judge on the issue. While the decision whether to allow you to re-open is one subject to the “abuse of discretion” standard of review, the appellate courts are not shy about finding an abuse of discretion where a party has inadvertently failed to formally move an exhibit into evidence, but thinks about the omission before the end of trial.

*See Camena Investments & Property Management Corp. v. Cross*, 791 So. 2d 595 (Fla. 3d DCA 2002). One court has said that “when the request is timely made and the jury is deprived of evidence that could significantly impact an important issue, it is an abuse of discretion to deny the motion to reopen.” *Govan v. State*, 813 So. 2d 276, 277 (Fla. 2d DCA 2001).

Don’t be the kind of trial lawyer who thinks you can just buffalo the clerk into sending back to the jury some documents which were published and shown to witnesses, but which were not formally admitted with an exhibit number. It is not worth the risk to avoid the potential embarrassment of telling the trial court that you simply forgot to check off this blank on your trial checklist.

### **Conclusion**

If an important exhibit—like that hospital chart—is admitted this way, you could win a trial you otherwise are going to lose. If the judge refuses to let something go to the jury, you have preserved the issue for appeal. You can lose nothing by asking and could gain a victory, so always move all items in before you rest. Failing that, move to re-open the evidence as soon as you think about it.

As always, if at first you don’t succeed, just . . .

***Keep Tryin!***

***Roy***