

PRACTICE POINTERS

Trial Basics: Using Exhibits

by Francis J. Carney

Getting exhibits into evidence without embarrassing yourself is a rite of passage for the trial lawyer. The naturally timid ones, like me, had nightmares of being chased out of court by a hooting jury, just as I was chased out of my first confession by mean old Father Boland. At seven years old, and meeting the forbidding priest for the first time, I nervously and unwisely forgot my well-memorized prayers in the Catholic darkness of the confessional, and was sternly bade by him to leave and never return until I properly learned my prayers.

The first time that you stand before court and jury, and those ritual incantations effortlessly flow from your mouth, is the moment you think, "Hey, I can do this. This is easy. Maybe I didn't make a horrible mistake in going to law school after all."

There's really no great mystery to it. It's a simple mechanical skill that's intimidating for some of us only because we weren't taught how to do it in law school, and we haven't had enough chances to practice since then. Here are the basic steps for admitting any exhibit:¹

1. Clerk marks the exhibit.
2. Show the exhibit to opposing counsel.
3. Lay the foundation.
4. Offer the exhibit.

Mr. Carney is a Director of the Salt Lake City law firm Suitter, Axland & Hanson.

5. Get a ruling on admissibility.
6. Use the exhibit.
7. Publish the exhibit to the jury, if necessary.

Here's how it works in practice. You've pre-marked the exhibit at the break, given copies to opposing counsel and to the judge, and now approach the witness:

You: "Mr. Witness, I show you Exhibit 8 and ask if you've seen it before."

Witness: "Yes. This is a blow-up of the photograph that I took of my car."

You: "And does Exhibit 8 fairly and accurately depict your car on the day of the crash?"

Witness: "Yes, it does."

You: "We offer Exhibit 8."

Court: "Any objection?"

Other lawyer: "No."

Court: "Exhibit 8 is received."

You got the exhibit into evidence and now you can use it. No more fussing about is needed.² Some judges take offense if a lawyer approaches a witness without asking for permission. Some find it annoying for a lawyer to continually bother them with asking. Despite what you've seen on T.V., few judges will allow a lawyer to hover over a witness during examination. But the level of formality varies in every court. If you haven't tried a case before this judge, ask in advance

what the rules are from the bailiff and the court clerk. They'll be happy to fill you in.

Dos and Don'ts on Exhibits

1. Do pre-mark exhibits.

Judges hate having court time wasted on lawyers who fumble around getting exhibits marked while the witness and the jury are waiting. Ideally, counsel will identify all exhibits before trial. There's no reason you cannot also agree on pre-marking all proposed exhibits and exchanging copies. Even if you can't mark an exhibit before trial, get it marked by the clerk during a break. You don't need the judge's permission or the consent of opposing counsel; just do it.

2. Do reach stipulations on exhibits before trial.

No one should make an opponent call a records custodian to establish the authenticity of records, unless there is a legitimate issue about it. The judge and everyone else will resent this unprofessional waste of time. Laying foundations for exhibits can be time-consuming and it bores the jury. Get stipulations on foundations before trial.

Some stock pretrial orders provide that all objections to "foundation" are waived unless made before trial. If this is not the case, ask for a stipulation on foundation for exhibits. There are a few lawyers too inexperienced or obstinate to stipulate to foundation before trial, and with those your best bet is to raise the issue at the pretrial conference.

Court: "Yes, the clerk will so mark the photograph."

Defense lawyer: "Your honor, may the record reflect that the clerk has marked this photograph as Exhibit 8 for identification purposes only?"

Court: "Yes, it may."

Defense lawyer: "Your honor, may the record reflect that I am showing the photograph marked as Exhibit 8 for identification purposes only to Plaintiff's counsel?"

¹One usually clear-thinking author suggests a mnemonic: "MOASTE," for "Mark-Opponent-Approach-Witness-Show-Testimony-Evidence." Keith Evans, THE COMMON SENSE RULES OF TRIAL ADVOCACY 121 (1994). "CSLOGUP" works just as well.

²Courts in other places sometimes follow more stilted procedures:

Defense lawyer: "Your honor, may the clerk mark this blown-up photograph as Exhibit 8 for identification purposes only?"

3. **Don't stipulate on exhibits without understanding what you're stipulating to.**

Stipulations are marvelous, but know what you're agreeing to. There's a dramatic difference in stipulating to the *authenticity* of an exhibit, stipulating to its *foundation*, and stipulating to its *admissibility*.

Suppose plaintiff was admitted to the Wasatch Mental Health Center for treatment of depression, and the defense wants to get those records before the jury. To plaintiff's counsel, that treatment is irrelevant.

You're plaintiff's attorney, and are asked to stipulate to the "foundation" on the mental health records. You ought to know that stipulating to "foundation" means different things to different people.

To some, it means that you are stipulating to the *authenticity* of the medical records; that is, that the records really are the official records from the Wasatch Mental Health Center, and the records custodian does not need to come in to testify to that fact.

To others, it means you are also stipulating to *relevancy*; that is, that the records tend to prove or disprove a fact of consequence to the action. Don't be afraid of appearing stupid: ask what "foundation" is taken to mean. Most of the time you'll find the other side doesn't understand it either.

On the other hand, stipulating to the *admissibility* of the medical records means that the records will be admitted without any foundation and may be used for all appropriate purposes in trial. That is, counsel can use them in direct examination, cross examination, argument, and they will go into the jury room.

If I were the plaintiff's attorney, I would stipulate on *authenticity*, I wouldn't stipulate on *foundation* without further explanation, and I would never stipulate to *admissibility*.

4. **Do understand Rule 104.**

Rule 104 of the Utah and the federal evidence rules provides that preliminary questions of admissibility are determined by the court, and in making that determination the court is not bound by the rules of evidence, except as to those regarding privileges. Therefore, you can and *should* lead the witness when laying the foundation for an exhibit. Don't be buffaloes by "leading the witness" objections on any foundational matter, either as to an exhibit or as to the qualifications of a witness.

5. **Don't show the jury exhibits, or refer to them before they have been received.**

You can and should lead the witness when laying the foundation for an exhibit.

It's improper to display any exhibit in view of the jury before it has been admitted. Keep your eyes open, and insist that your adversary keep all exhibits, especially blow-ups and models, out of the jury's sight until then. You will find amateurs and not-so-amateurs out there who insist on being cute in this fashion. Put a stop to it.

It's also a common error to ask a witness about the substance of a document before it's been admitted. That's objectionable, and a sloppy practice. Get the document admitted *before* getting into its contents.

Attorneys want to keep their own blow-ups in view of the jury, even after their side is finished. Don't allow it. When it's your turn to speak, make the stage your own. Erase the blackboard. Turn those blow-ups away from the jury. Flip over the big pad. Then, and only then, speak.

If you're going to use an exhibit in your opening statement, clear it with opposing counsel. If she objects, raise it with the judge. It normally will be allowed,

unless there's a question on the exhibit's ultimate admissibility.

6. **Do give the judge a copy of all exhibits.**

Don't make a judge ask to see an exhibit before ruling on its admissibility. The judge, as a courtesy, should have a copy of whatever documents the witness and the lawyers have.

Ideally, the court and opposing counsel have identical exhibit binders containing all of your pre-marked exhibits. (By the way, exhibits don't need to be marked in order, and you can always add an unexpected one in the middle of trial, even though it will be out of order.) This isn't always possible. When it's not, hand a copy to the clerk to pass up to the judge on your way to the witness chair.

7. **Do make copies of all exhibits for other counsel.**

Counsel is entitled to see the exhibit before you examine the witness on it. Don't be embarrassed at the start of your examination by the court's ordering you to bring the exhibit back from the witness stand to show opposing counsel. Do it right the first time.

The usual way is to hand it to counsel in open court. Which means that you stand and wait while opposing counsel takes his time to examine the document. The better way is to hand him his own copy and use another for the witness. And the best way is to have all exhibits pre-marked in a binder, with a copy provided before trial to the court and to opposing counsel. (Unless, of course, there's a surprise value in the exhibit that you don't want to give up.)

8. **Don't "move to admit" exhibits into evidence.**

To many judges, this is like fingernails on the blackboard. Exhibits are *offered* and *received*. A "motion to admit" an exhibit is wrong and confusing. Just say, "I offer Exhibit 5," not "I move to admit Exhibit 5 into evidence."

Court: "Yes, it may."

Defense lawyer: "Your honor, may I approach the witness?"

Defense lawyer: "Mr. Witness, I am showing you what has been marked as Exhibit 8 for identification purposes only. Have you seen this before?"

Mr. Witness: "Yes, this is a blow-up of the photograph that I took of my car the day after the accident."

Defense lawyer: "And does Exhibit 8 for identification purposes only accurately depict the condition of your automobile on that occasion?"

Mr. Witness: "Yes, it does."

Defense lawyer: "Your honor, the defendant offers Exhibit 8 for identification purposes only into evidence as defendant's Exhibit 8 and requests that the clerk strike the designation of Exhibit 8 for identification purposes only and designate it as Defendant's Exhibit 8."

Court: "Any objection?"

Plaintiff's lawyer: "No."

Court: "Exhibit 8 for identification purposes only is received as Defendant's Exhibit 8. The clerk shall redesignate the exhibit accordingly."

This sort of hypertechnical mumbo jumbo is unnecessary. Skip the obsequiousness and the incantations, and get to the point.

9. **Do speak for the record.**

Refer to exhibits by their proper identification numbers or letters. Don't say, "this contract," or "that photograph." It makes for work by an appellate judge attempting to understand the transcript. Say instead, "the photograph marked as Exhibit 7," or simply "Exhibit 7."

When a witness makes a vague reference to an exhibit, clarify it for the record. "When you said 'this letter' you were referring to Exhibit 7, and when you said 'this photograph' you were referring to Exhibit 8, correct?" Similarly, when a witness refers to a part of an exhibit, clarify the reference for the record: "When you say 'right here in the contract,' you are referring to the second paragraph on page 2 of Exhibit 8, correct?"

10. **Do keep your own exhibit list.**

Exhibits are marked and tracked by the court clerk. (Not by the reporter, contrary to deposition practice.) The clerk keeps a list of all marked exhibits, as well as physical custody of those that have been offered. Keep your own list as you go along: exhibit number, description, offered, received, and comments. Occasionally, compare the clerk's list with your own to make certain that you aren't missing anything.

11. **Do review your exhibits before closing your case.**

When you've finished with your last witness, ask for a break. Get the clerk's exhibit list. Review all the exhibits you meant to offer, and make sure that you did. Review all the exhibits you offered, and make sure you received a ruling. Then rest your case. Finding an exhibit after you've closed that wasn't received isn't pleasant.

Some lawyers try to cover this by making a statement before resting like, "We offer all of the exhibits and specifically offer any exhibits that weren't received," to which most judges will rightly respond, "Huh?"

12. **Do "publish" the exhibits to the jury.**

Being lawyers, we can't say "show" as everyone else would. But that's what it means to "publish" an exhibit. Whatever you want to call it, show the jury the exhibit. Anything the jury can't see is likely to be ignored or misunderstood. So don't just tell them—always show them. These are your alternatives:

♦
[An exhibit] the jury can't see
is likely to be ignored or
misunderstood.
♦

a. Do nothing. Examine the witness on the document and don't show it to the jury. A confused and bored jury is the likely result.

b. After the witness testifies about the document, ask the court if you may "publish the exhibit" to the jury, and then hand it to the closest juror. One by one, they will each review the exhibit while you, the witness, counsel, and the court wait. You've lost control over your stage, and wasted everyone's time.

c. Make a separate copy of the exhibit for each juror, and hand them out while the witness is testifying. This is better, but the problem is that whatever you give them to read, they will. And while you're trying to focus on paragraph 4 of the contract, one juror is reading paragraph 8, another is reading paragraph 2, and a third is studying the signatures. You've again lost control of the action.

d. Make a blow-up readable at ten feet. (You might be surprised at the number of "blow-ups" that are unreadable to someone sitting five feet away.) The downside to this is the cost of commercial blow-ups.³ Be restrained on the number of blow-ups you use, as they can get overwhelming. Bring your own portable stand for them, and learn how to set it up before you try it in court.

e. Use an overhead projector. This is probably the most effective way to show large numbers of documents, such as medical records, although some hold for the looseleaf binder approach. The technology is simple. The downside is dimming the lights and finding a place for the screen—always a problem in the round courtrooms of the Third District. You'll need a laser pointer for yourself and for the witness, as it is next to impossible to point things out clearly with your finger. And, please, learn how to use the overhead before you step into court.

f. There are many new high-tech computer projection devices coming onto the market. One provides simultaneous projection of any exhibit on monitors for the lawyers, the witness, and the jury, via a laptop computer. In Utah, it's unlikely that level of technology will ever receive widespread use unless the clients happen to pay for it.⁴

13. **Don't allow any exhibit into the jury room without your inspection.**

Review the exhibits after closing argument is finished and the jury is sent out, to make sure that the jury gets only what it's supposed to get. There will be a pile of documents, poster boards, photographs, models, and other exhibits. It may be late, and you will be exhausted. The temptation is to delegate this task to a paralegal. Don't. You need to take the time to carefully review what goes into the jury room from that pile.

Just because something is marked as an exhibit does *not* mean it goes into the jury room. For example, the jury does not get to see depositions or trial transcripts, although they will ask for them. See *UTAH R. CIV. P. 47(m); Shoreline Dev., Inc. v. Utah County*, 835 P.2d 207, 210 (Ut. Ct. App. 1992). They don't get counsel's chart scribbles made during argument. They don't get medical literature or learned treatises, *UTAH R. EVID. 803 (18)*, they certainly don't get the pleadings, nor do they see anything else that has not been offered and received. ■

³About the best thousand dollars I ever spent was for a blow-up copier. All you do is insert the page, and a 4' x 5' blow-up comes out, which is then mounted on posterboard. Quick, easy, and cheap.

⁴Excessive technology, especially if it's expensive, has a potential for leaving the wrong impression with the jury, just as swarms of associates and other helpers

might. On the other hand, most jurors who've actually been exposed to these computer toys claim to have positive impressions. One sure thing is that a lawyer's fumbling with unfamiliar equipment will be remembered.

Update to "Trial Basics: Using Exhibits" (1996)

September 24, 2000

1. Rule 26(a)(4), *Utah Rules of Civil Procedure*, now requires the identification of exhibits at least thirty days before trial, except for impeachment exhibits. Within 14 days thereafter, the opponent must object to any exhibit so identified or waive objections to its *admissibility*, except as to objections based on relevance under Rule 402 or under Rule 403.
2. The new Rule 26(a)(4) makes it necessary to "predict" that an opponent will be able to lay the necessary foundation at trial, not only as to *authenticity*, but also as to hearsay objections. In other words, hearsay objections are waived if not made in writing no later than 14 days of the opponent's exhibit list. The foundation for a hearsay objection may or not be made by a witness at trial; therefore, careful lawyering demands an objection based on hearsay (and any other non-relevance foundational objection) be filed.
3. Butler v. Naylor, 377 UAR 9 (Utah 1999) reemphasized that authoritative medical literature does **not** go to the jury, whether it is denominated "substantive," "illustrative," or anything else.
4. The rise of PowerPoint® and other courtroom projection technologies is rapidly changing the way documentary and other exhibits are presented to a jury. My comments from 1996 remain valid and I also refer the reader to a more recent presentation on the issue: *Some Words of Caution About Computer Presentations* (July 2000).