What Are (And What Are Not) Exhibits
and
What Goes (And Does Not Go) to the Jury Room

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Some things are marked as exhibits, but not *received* into evidence. Just because something is marked as an exhibit does not mean it has to be *admitted*. It does not even mean it has to be *offered*.

The purpose of labeling exhibits is to have a clear record on appeal, so even if an exhibit was not received/admitted, it still can be identified by a label or number, and will be available for later review by an appellate court.

An obvious example is an exhibit offered, but not received, because an objection to its admission was sustained. Counsel can generally mark anything as an exhibit in this state, without prior permission of the trial judge. This is done with the clerk (judicial assistant). It may later be decided not to offer the marked exhibit into evidence.

There are items that can be marked as exhibits for purposes of the record yet not offered, such as:

• Pleadings that contain admissions: complaint, answer, counterclaims, etc. (For you neophytes, the jury does *not* get the "pleadings" file of the court.) Sometimes these are offered and received, usually only read to the jury, but remember that pleadings– unless they contain admissions-- are hearsay and subject to admission only upon proof of relevance and a hearsay exception.[1]

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[1]*See, e.g.*, *Kranendonk v Gregory & Swapp, 2014 UT App 36, ___ P.3d ___* (statements in answer to complaint were judicial admissions, not subject to the hearsay rule) and *Baldwin v. Vantage*

• Other "papers" in the court's file, such a, affidavits, or interrogatory answers. (Again, if they are relevant, but subject to a hearsay exception.)

• Authoritative literature is a special case. Utah Rule of Evidence 803(18) says that "If admitted, the statements may be read into evidence but may not be received as exhibits."[2]

Confusingly, both the rule and some appellate opinions make no distinction between *marking* something as an exhibit and *receiving* it into evidence. In order for a clear record on appeal, my view is that the literature *should* be marked, though I suppose reading it into the record would suffice in many cases. But the hard copy definitely does not go to the jury, and should not be *admitted/received.*

• Deposition transcripts rarely, if ever*,* go to the jury, although the jurors will often ask for them. The fear is a legitimate one– that the jurors will give more weight to "written" testimony than oral testimony from other witnesses.[3] *State v Solomon*[4] made the point more than 70 years ago:

> *A written instrument, made an exhibit in the cause but not consisting of testimony of a witness in the case, may of course be taken to the jury room the same as maps, diagrams, and other exhibits. But the testimony of a witness is in a different category. Such is the provision of the statutes and the common law always excluded depositions and written testimony from being carried from the bar by the jury. We can see no reason why the court should depart from the well established rule. It may often happen that the testimony on one side is oral from witnesses produced before the jury, while the testimony for the*

Corp., 676 P.2d 413, 415 (Utah 1984) *(*an admission in a pleading is not generally viewed merely as the attorney's retelling of the client's out-of-court statement; rather, it is "a judicial admission" that is "normally conclusive on the party making it").

[2]*Butler v Naylor*, 947 P.2d 44, 1999 UT 85, held that giving the jury medical literature was error, but harmless.

[3]*See Shoreline Dev. Inc. v. Utah County*, 835 P.2d 207, 210 (Ut. Ct. App. 1992).

[4]96 Utah 500, 87 P.2d 807 (Utah 1939).

other side on essential matters is in the form of depositions or in the transcript from testimony at a previous hearing. If the hearing lasts for any length of time and the jury takes the depositions or transcript to be read and discussed while the oral evidence contra has in a measure faded from the memory of the jurors, it is obvious that the side sustained by written evidence is given an undue advantage. The law does not permit depositions or witnesses to go to the jury room. Why should a witness be permitted to go there in the form of written testimony?[5]

The former Utah Rule of Civil Procedure Rule 47 expressly provided for exclusion of deposition transcripts, but that provision has now been removed. The rule now provides:

(*n) Exhibits taken by jury; notes. Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits which have been received as evidence in the cause, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.*

The Advisory Committee Note makes this point:

The committee recommends amending [the rule] *to establish the right of jurors to take notes and to have those notes with them during deliberations. The committee recommends removing depositions from the paragraph not in order to permit the jurors to have depositions but to recognize that depositions are not evidence. Depositions read into evidence will be treated as any other oral testimony. These amendments and similar amendments to the Rules of Criminal Procedure will make the two provisions identical*.[6]

• Interrogatory answers may be read to the jury, but the usual practice is that, even if marked, they do *not* go to the jury. As *Buckley v. Evans*[7] explains:

While testimony by a party at her deposition, in affidavit form, in written statements, and

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[5]87 P.2d at 811.

[6]*See also* 57 A.L.R.2d 1011, *Propriety and Effect of Jury in Civil Case Taking Depositions to Jury Room,* and 75B Am.Jur.2d Trial § 1432.

[7]2007 WL 2900173, n. 19, 74 Fed. R. Evid. Serv. 1052 (E.D. Cal. 2007).

in answers she gives to interrogatories may be admissible as "admissions," the preferable practice is not to send the written transcripts, statements or interrogatories to the jury room but to have the moving party read them into the record. This avoids emphasizing such "testimony" at the expense of oral testimony for which the jury would not have a transcript. It also enables the court to limit the introduced evidence to that which is relevant avoiding extraneous materials.[8]

• Expert reports are hearsay and inadmissible, except sometimes for impeachment on cross examination. They are not business records because they were prepared in anticipation of litigation. They may be marked but should not be offered. Many lawyers don't understand this and are surprised when one objects. The jury should hear the testimony in court, and not have "reports" or "summaries" of any witnesses' testimony. Generally these should not go to the jury, although they can be used under the hearsay exception of prior inconsistent statement on cross examination. (That does not mean the entire report, or any portion of it for that matter, necessarily needs to be admitted.)

Demonstrative or illustrative exhibits are usually marked, offered, and admitted, and they usually go to the jury room. For example, medical illustrations. When using an anatomical model, for example a knee model, I normally let the jury have it during deliberations. With the stipulation of counsel, however, I substitute a digital photograph of it and mark that as the exhibit that will stay with the court file. Otherwise, you may "lose" the exhibit for the pendency of the appeal. (This is also the way to go for bulky or unwieldy items, such as a saddle stand I once had to use.)

A gray area is "summaries" prepared by witnesses on the stand using a flip chart, or blow-ups prepared in advance by counsel and then "filled in" by an expert, such as an economist.

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[8]*See also*, *Rogers v. Buck*, 1984 WL 320956 (Pa. Com. Pl.).

These rarely pose a problem when they are simple diagrams, such as a witnesses' drawing of the accident scene. They normally are admitted and go to the jury.

It gets more difficult when you have experts preparing flip-chart summaries of their testimony and then opposing counsel wants to offer it and have it received. This is generally *inadmissible* as nothing more than a summary of testimony. Why shouldn't all the witnesses be allowed to summarize their testimony on a flip chart and give it to the jury? The same idea should exclude blow-ups. They can be marked as exhibits, but they should not be received as evidence.

A tactic occasionally seen is for counsel to write the "key points" of a witnesses' testimony and attempt to offer it. This is absurd; it is nothing more than argument of counsel and should be saved for closing. The jury does not get counsel's flip chart "summaries" of what witnesses say– indeed, some judges rightly bar counsel from making such "open notes" during examination. Nor does the jury get counsels' flip chart notes made during opening statement or closing argument, or blowups (unless they've been admitted), and the like.

- Day-in-the-Life Videos. In personal injury cases, "day-in-the-life" videotapes are often held to be admissible, if they are not overly contrived or contain inadmissible statements.[9]

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[9] *See* JANE A. KALINSKI, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?*, 27 SUFFOLK U. L. REV. 789, 790 n. 10 (1993).