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# The Basics of Using Exhibits at Trial

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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 to leave and never return to St. Joseph's Church until I properly learned my prayers.

The first time 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. So here are the basic steps for admitting any exhibit:

1. Clerk (judicial assistant) marks the exhibit.
2. Show the exhibit to opposing counsel.
3. Lay the necessary foundation.
4. Offer the exhibit.
5. Get a ruling on admissibility.

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[1]Revised and updated from *Trial Basics: Using Exhibits*, by F..J. Carney, 18 VOIR DIRE (Winter 1996).

6. Use the exhibit.

7. Publish the exhibit to the jury, if necessary.[2]

Here's how it works in practice. You've pre-marked the exhibit at the break (or before), 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 after the crash*?"

Witness: "*Yes, it does*."

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[2]Courts in other places sometimes follow far more stilted procedures, like this:

*Lawyer: "Your honor, may the clerk mark this blown-up photograph as "E" for identification purposes only?*
*Court: "Yes, the clerk will so mark the photograph."*
*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."*
*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?"*
*Court: "It will."*
*Lawyer: "Your honor, may I approach the witness?"*
*Court: "You may."*
*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 look of my car the day after the accident. "*
*Lawyer: "And does Exhibit 8 for identification purposes only accurately depict the condition of your automobile on that occasion?"*
*Mr. Witness: "Yes, it does."*
*Lawyer: "Your honor, the defendant offers what has been marked as Exhibit 8 for identification as Exhibit 8."*
*Court: "Any objection?"*
*Opposing 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 hyper-technical mumbo jumbo is unnecessary and a waste of time. In Utah, you don't usually need to ask the judge in order to mark an exhibit. Skip the incantations, and get to the point.

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.

**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 can't also agree on pre-marking all proposed exhibits and exchanging copies. Many judges will require this. 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. (Please see my paper, *Using the Rules to Eliminate the Need for Exhibit Foundations*, elsewhere in the materials. You may be unwittingly be waiving foundational objections.)

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. Or that a hearsay exception applies and does not need to be proven. 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 as to the possible relevance, and I would not stipulate to *admissibility*.

4. **Do** understand Rule 104. This all-important rule provides that preliminary

questions on 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. So, don't be buffaloed 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 admitted. 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 blowups 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 blowups 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. You would be amazed to know how often this happens, and it’s very irritating to judges. 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 judicial assistant 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 old 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, and it constitutes “pure impeachment” under the disclosure rules.)

8. **Don't** "move to admit" exhibits into evidence. To many judges and to experienced practitioners, this is like fingernails on the blackboard. Exhibits are *offered* and *received* or *admitted.* A "motion to admit” an exhibit is awkward and incorrect. Just say, "I offer Exhibit 5," not "I move to admit Exhibit 5 into evidence."

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 more work by an appellate

judge who is 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 or judicial assistant. (Not by the reporter--in the unusual event that there is one-- 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 something.

11. **Do** review your exhibits before closing your case. When you've finished with your last witness, ask for a break. Get the judicial assistant 's exhibit list. Review all the exhibits you meant to offer, and make sure that you did. Review all the exhibits you did offer, 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, somehow 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:

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

• 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.

• Make a separate copy of the exhibit for each juror, and hand them out while the witness is testifying. (If the judge allows this.) 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.

• Make a blowup 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 blowups. Bring your own portable stand for them (or familiarize yourself with the court's own equipment), and learn how to set it up before you try it in court.

• Use a computer. This is probably the most effective way to show large numbers of documents, such as medical records, especially with someone competent running the projection software. But try it out first in the courtroom before trial– don't show up the morning of trial fumbling around and annoying the bailiff with your cords and equipment.

A mix of blow-ups and the computer may be best. The blow-up is a physical object that

doesn’t disappear when the power is off, it’s easy to find on short notice, and the jury will often be allowed to have the exhibit blowups with them in deliberations.

13. **Don't** allow any exhibit into the jury room without your inspection. Review the exhibits alter 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 doesn’t mean it goes into the jury room. For example, the jury does not get to see depositions or trial transcripts, although they will often ask for them.[3] They don't get counsel's chart scribbles made during argument. They don't get medical literature or learned treatises, they certainly don't get the pleadings, nor do they see anything else that has not been offered and received.

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[3]See Utah Rule of Civil Procedure 47(n) and the Advisory Committee note; *Shoreline Development, Inc. v. Utah County*, 835 P.2d 207, 210 (Utah Ct. App. 1992); and my paper *What Are (And What Are Not) Exhibits*, elsewhere in the materials.