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Offering exhibits in direct examination

By: F. Dennis Saylor IV and Daniel I. Small June 1, 2017

Offering an exhibit should be part of a careful, thoughtful and well-planned process. That process includes the following steps:

1) Selection

2) Research

3) Timing

4) Logistics

5) Publishing

6) Explaining

Selection. It is an often-observed irony that as we become a more "paperless" society, litigation has become overwhelmed with documents. Every communication, every rough draft, and every thought or rumination is preserved electronically and becomes a document in discovery. Those documents not only tend to overwhelm the lawyers, they also tend to cloud their judgment as to what is actually necessary. Just because you have a document — and just because it took a lot of trouble and expense to find it, read it and think about it — doesn't mean you need it at trial. Prune your exhibits carefully, or your exhibits will become obstacles, not aids, in your presentation.

Research. For every single exhibit you propose to offer, think through why it is admissible. Anticipate what objections it is likely to draw, and consider how you will respond. Your conclusions should be available to you at your fingertips, in your trial notebook. Maybe all you need is a citation to the rule. Maybe you need copies of a case handy, to give the judge (and your opponent). If the exhibit is important and the potential challenge more substantial, you need to have a brief memorandum ready for the judge or you need to file a motion in limine in advance. On your feet, in court, is not exactly an ideal place to be considering these issues for the first time.

Timing. Which witness is the best one to introduce and explain the exhibit? And how and when in that person's testimony should you bring it up? Too often lawyers are in a hurry to get to the exhibit. Slow down. Most trials are about the testimony, not the documents. Don't be in such a hurry to jump to the document that you don't fully develop the testimony first. Many (maybe most) exhibits are best used to confirm or corroborate the substance of testimony, not to provide it in the first instance.

Logistics. You have the exhibit in your hand, you're standing next to the document camera, but the witness is all the way across the room. How do you introduce and use the document quickly and smoothly in the sometimes-awkward geography of the courtroom? Dan likes to use the acronym MOPS to describe the different stages of the process:

Mark **—** With rare exceptions, the exhibits should be pre-marked. You should know long in advance what system your judge uses for marking (letters, numbers, etc.), and you should use it to mark the exhibit for identification. Then refer to it that way to avoid confusion. Keep pronouns (like "this" or "that") to a minimum.

Opposing counsel **—** If you haven't agreed on admissibility beforehand, show the exhibit to opposing counsel. Dan views this as an important courtesy and ritual that will comfort both judge and opponent and make you look polite and respectful. Judge Saylor, however, views it as a ritual that is almost always unnecessary (your opponent knows, or ought to know, what Exhibit 17 is) and that impedes presentations and bleeds time off the trial day without accomplishing much.

Permission **—** Dan believes you should always ask the judge for permission to approach the witness unless he or she specifically tells you otherwise. Yes, it's a trivial matter, but better safe than sorry. The judge controls the courtroom, and different judges exercise that control differently. Besides, why not ask? In most courts, you know that judge will allow it, and if you ask several times, the judge may just say something like, *"That's OK, attorney Jones, you can approach without asking."* Judge Saylor allows the lawyer to approach without asking permission, as long as the lawyer acknowledges the authority of the court (*"With your honor's permission, I am showing you …"*). He dislikes the fact that it brings the proceeding to a halt, even if momentarily. He agrees, though, that if you're not sure, you should ask permission to approach. It's the easy and respectful thing to do.

Show **—** Show the document to the witness and get the witness to authenticate and describe it, or whatever else is required for admission. Then offer it.

Publishing. Once the document is in, show it to the jury. If it matters enough to be an exhibit at the trial, you need to let jurors see it, almost without exception. And don't just flash the document in front of the witness and move on. Few things are more frustrating to jurors than a lawyer waving exhibits around in front of a witness, and then moving on without showing them to the jury. Pass the exhibit around, blow it up, put it on a screen if there is one — whatever works best for that exhibit in that courtroom. But show it.

Explaining. The witness has talked about the exhibit, you've shown it to the witness and had it admitted, and you've shown it to the jury. Now link it to your case, orally and visually, by summarizing and explaining. Where and how does it fit in a timeline, a workflow, a financial chart, or other summary graphics and demonstrative tools? You worked hard to get the exhibit admitted, now do something with it.

Every case is different. But the careful planning process for using an exhibit is pretty similar in all cases. Exhibits can be powerful tools to help your case, but an exhibit that's just thrown into the record is a lost opportunity — and a poor reflection on you as a trial lawyer.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.

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