Introducing Exhibits at Trial: A Review of the Basics

by Ann Groninger

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There is only one strategy that guarantees successful introduction of exhibits at trial: plan ahead and be prepared. A lawyer may have in her hands a beautiful and expensively prepared accident reconstruction video that will convince the jury that the accident was the defendant's fault; she may have the "smoking gun" love letter from the sexually-harassing boss; but none of these persuasive pieces of evidence will help the lawyer's case if she cannot (1) get them before the jury, and (2) present them in a way that allows the jury to recognize their value.

Exhibits are wonderful. They break up the monotony of testimony and they allow the jurors to visualize the case in a way that verbal testimony does not. They help transport jurors to the scene of the crime or the accident, where they can see the evidence for themselves, instead of having to take a witness' word for it. All of us have, at some time or another, read a book and later seen the movie. Often we are surprised at how differently the producers have portrayed the characters and the scenes than the images we had in our minds. Exhibits help jurors to see the scene, the characters, the injuries, and the mangled car as they really were. Documentary exhibits help them visualize and therefore remember often-complex contractual or medical terms.

There are often different ways in which to introduce a particular document into evidence. The best way to do so depends on the circumstances of the case and the courtroom. Because of this, it is important to be flexible, and the only way to be flexible is to know your case and to be prepared.

Make a List and Check it Twice

First, before trial, list each document, photograph, deposition, diagram of the product, or anything else that you want the jury to see. Then, decide through which witnesses' testimonies that exhibit can be introduced into evidence. There may be more than one witness who can do the job. If so, choose the best one and have the other ones as back up. There is always the possibility that, despite your best effort at preparation, the witness will not say what he needs to say to get the exhibit introduced. It is always best to have alternatives available.

Why Is the Exhibit Being Used?

Next, determine the purpose for which the exhibit will be used. If the exhibit itself contains information that proves a fact at issue in the case and will be introduced for *substantive purposes*, then the lawyer needs to think about evidentiary matters such as *relevance*, *authenticity*, and *hearsay*. For example, a lawyer who wants to introduce medical records or business accounting records should be intimately familiar with evidentiary rule 803(6), which provides for the introduction of records of regularly conducted activity.[1] Have the precise questions you will use to lay the foundation for this exception written out, with a few alternatives, in the event of an objection. (See Figure 1.)

Figure 1
Example—How to admit a business' billing record under Rule 803(6):

- The witness must be the record custodian or other qualified witness, and must have identified the document.

Questions

1. Was the record of the bill made at the time the item was shipped?
2. Was the record made or transmitted by someone who knew the item was shipped?
3. Is it the regular practice of your business to keep this type of record?

A common problem during trial occurs when a question that the lawyer believes is basic and unassailable draws an objection, and the objection is sustained. Often, the lawyer is stuck like a deer in the headlights—so shocked that the judge has sustained an objection to her unobjectionable question that she is simply unable to think of any way to rephrase it on short notice. Having a backup question or two helps restart the mental juices flowing and prevents a major crash.

A subcategory of substantive evidence is *real evidence*—the defective product or the accident victim's torn and bloody clothing—which is always relevant, because it is part of the case. The witness must say, however, that the item is the same one involved in the incident and that it is in the same condition, or that any changes are not significant to the case. Any uncertainty usually goes to the probative value of the exhibit, as opposed to its admissibility.[2]

If the exhibit is a photograph, diagram, or other exhibit that is necessary only to help the witness explain his testimony, the lawyer will only introduce it for *illustrative purposes*, and the introduction is fairly simple. Illustrative exhibits are used to explain substantive evidence that has already been introduced, so any questions about relevance and other evidentiary matters will already have been addressed. All the witness has to say is that the photograph or diagram looks like the car right after the accident or the store where the robbery occurred, and the document can come into evidence.

Be aware that although the law does not require it, some judges still look for the magic words: "The (exhibit) is a fair and accurate representation of the object or scene as it existed on (relevant date)" and "The (exhibit) will assist the witness with his testimony." If possible, avoid this language, because it bores the jury. Do make sure, however, that the witness relates the appearance of the exhibit to the appropriate time period (e.g., immediately after the accident occurred) or the illustration may not be relevant.

Anticipate Objections

Being prepared to introduce an exhibit means *anticipating the objections* opposing counsel will make and knowing how to address them. If you know that opposing counsel will object to an exhibit, prepare a *motion in limine* to address the objection so that the jury does not have to waste its time in the jury room in the middle of trial while the attorneys duke it out on an evidentiary issue.

In a recent case my firm tried, there had been a prior decision from an administrative hearing involving some of the same factual issues at trial. We prepared a *motion in limine* arguing why, according to Rule 803(8) of the Federal Rules of Evidence, the jury should be able to hear the factual findings of the administrative law judge. Filing the motion allowed us to avoid wasting the jury's time, ensure the judge had a quick and complete reference to the law, and preserve our arguments for appeal (we lost the motion but won the trial).

If you are not sure whether opposing counsel will object, have an outline of the law and your arguments handy just in case. If the issue is complex and important enough, prepare a memorandum of law to hand up if the objection is raised (make sure to have a copy for opposing counsel, as well). (see Figure 2.)

Along those lines, dealing with matters beforehand can eliminate much of the tedium of introducing exhibits. This advice is unnecessary for federal court, as exchanging exhibits and listing objections before trial is mandatory.[5] In state court, parties may not be willing to state objections before trial, giving opposing counsel the opportunity to research. Often, however, the parties can stipulate to the admissibility of exhibits prior to trial.

Figure 2
Regardless of the type, when it is time to introduce an exhibit at trial, follow these steps:[3]

- Mark the exhibit.
- Ask to approach the witness.
- Show the exhibit to opposing counsel (most common omission in this sequence).
- Show the exhibit to the judge or ask her if she wishes to see the exhibit.
- Show the exhibit to the witness and lay the foundation (insert the questions you prepared when you determined how the exhibit would come into evidence).
- Offer the exhibit into evidence (this is the point at which you will have to address the objections you anticipated).[4]
- Ask the judge for permission to publish the exhibit to the jury.

Keep in mind that usually there are different ways to introduce the same piece of evidence. For example, two lawyers in our firm were trying a sexual harassment case in which the date on which a battery occurred was at issue. None of the witnesses could recall the date, but the lawyers had a handwritten statement, signed by their client, that contained the date. They tried using the document to refresh their client's recollection, but to no avail. Fortunately, the lawyers recalled that opposing counsel had referred to the statement during their opening, claiming that the union to which the client belonged had crafted the statement in order to make the company look bad. The plaintiff's lawyers successfully argued that the statement could come into evidence so the jury could determine whether the statement had been crafted or whether it reflected what actually occurred.

What Do You Want the Jury to See?

Once you are sure your exhibit will come into evidence, think about how you want the jury to see it. If the exhibit is a document, do you want each juror to have a copy with which to follow along while the witness is testifying? Probably. Wake County's Chief Superior Court Judge, Don Stephens, says one of the most common mistakes lawyers make when introducing documents is only having one copy. This is particularly egregious in cases such as contract disputes where the lawyer and the witness are looking at the contract while the witness is testifying about it, and the jury is left to their own devices to try to follow along. If you have a number of documents to introduce, the best way to do so may be to provide each juror with a binder, empty except for numbered dividers, and hand the jurors the exhibits (or have the bailiff hand them, if required) as they are introduced, so they can follow along with the witness. When introducing photographs, charts, diagrams or other similar exhibits, an enlargement is best so all of the jurors can view the exhibit

at the same time, instead of passing it down the line.

Think Ahead

Finally, give some thought to possible repercussions and how best to prevent them. For example, it is fairly common for criminal defense attorneys to offer no evidence if the state has not proven its case beyond a reasonable doubt. One advantage to not offering evidence is that the defense gets to argue last. However, less experienced defense attorneys often make the mistake of introducing an exhibit during the state's case in chief, usually without any objection from the state, thereby foregoing their opportunity to argue last.[6] Sometimes this cannot be prevented. However, the attorney should ask whether it is more advantageous for the jury to see the exhibit or hear the defense argue last. Can the exhibit be shown to the witness and identified, but not formally introduced into evidence? These are questions the attorney should answer prior to trial.

Another mistake attorneys often make is leaving an exhibit in front of the jury so that the other side can use it. Sometimes this happens with diagrams or charts that the opposing counsel finds helpful in arguing her case. Once in a cocaine drug trafficking trial, a very bright defense attorney brought an empty can of Coke before the jury and explained how the State's case was like the can – thin on the outside and hollow on the inside. Unfortunately, he left the can near the jury box. At the beginning of his argument, the prosecutor picked up the can and readily agreed that the case did have a lot in common with the can – and he placed his finger over the word "cola," leaving the word, "coca." It was more of a prop than an exhibit, but it illustrates the point.

The number of possible scenarios and types of exhibits that can be introduced is infinite. It helps to have an imagination, both when deciding what types of exhibits to introduce and how to get them into evidence. The right amount of foresight and preparation will make a lawyer's presentation appear effortless and make using your exhibits a pleasure. Failure to prepare and anticipate problems can make them a nightmare. The choice is easy. ■

[1] Hospital medical records can be subpoenaed to the court file according to the procedure set forth in N.C. R. Civ. Pro. 45(c).

[2] *See* State v. Joyner, 301 N.C. 18, 25 (1980)(witness' uncertain identification of a screwdriver went to the weight of the exhibit). My research showed that this problem does not seem to arise as often in civil cases, perhaps because these issues are more frequently addressed prior to trial.

[3] There are numerous treatises and trial manuals setting forth these steps. I took them, and much other information, from CAROL ANDERSON, NORTH CAROLINA TRIAL PRACTICE, § 10-6 (1996). It is always helpful to have one of these books handy throughout your trial. This one is the personal favorite of most of the lawyers in my firm.

[4] This can be done at a later time. However, if you decide to delay introduction of the exhibit, make a note to yourself so you do not forget to introduce it later.

[5] Fed. R. Civ. Pro. 26(a)(3); U.S. District Court, Eastern District of North Carolina, Local Rule 24.03(c); U.S. District Court, Middle District of North Carolina, LR 40.1(c). The Federal Court for the Western District of North Carolina has nothing similar, but Fed. R. Civ. Pro. 26(a)(3) would apply.

[6] *See* State v. Macon, 346 N.C. 109 (1997). In *Macon*, the court held that, because the defense counsel had the state's witness read another police officer's notes on cross-examination, the defendant had offered evidence, even though he did not formally introduce the exhibit. On the other hand, in *State v. Hall*, 57 N.C. App. 561 (1982), the defendant did not offer evidence simply by marking a sweatshirt as an exhibit and questioning the state's witness on cross-examination about whether he recognized it.