

Appellate Tips for Trial Lawyers

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Trial: ARM Yourself with Exhibits

Exhibits are major weapons in a litigator's arsenal. But it's easy for things to go awry at trial, with devastating consequences for the verdict and subsequent appellate proceedings. That's why you have to "arm" your self with three fundamental concepts in working with exhibits—admit, record, and maintain.

Admit the Exhibit

Bitter experience teaches how easy it can be for a critical exhibit to fall by the wayside during trial. It may have been marked for identification, discussed by numerous witnesses, and even invoked in closing argument, but somehow never formally received in evidence. That places it off limits to the jury and to the appellate court.

You need a systematic way of reminding yourself to offer your exhibits in evidence. There are many ways to do this. Find one that suits your style, and then use it religiously.

Record the Exhibit

As important as it is to get your exhibits admitted, it's only half the battle. You need to ensure that the record accurately reflects the exhibits' admission. It happens in several ways: The judge says the magic word "received;" the court reporter records that remark and the clerk adds an appropriate stamp or sticker to the exhibit and notes its admission in a minute order. You must have a system for keeping track of each admission as it happens, but in addition you should check with the clerk at a recess or at least at the end of each day, ideally in cooperation with opposing counsel. That way, any omissions can be cured and any misunderstandings cleared up. Remember that if there is no record of an exhibit's admission, from an appellate perspective it's as if the exhibit never existed.

Maintain the Exhibits

Your job doesn't end with the verdict. If at all possible, be sure before you leave the court that the clerk has a complete set of exhibits, all accurately recorded as to admission. If the court returns the exhibits to counsel (now an almost universal practice), try to make sure that both your and opposing counsel's sets are complete—and then, find a safe and reliable way to maintain at least yours. Not only may you need them for posttrial motions, but the Rules of Court impose an affirmative duty on each party to retain and, upon request, produce exhibits in the event of an appeal. (See Cal. Rules of Court, rules 8.124(c), 8.224(b)(2).) And you certainly don't want your appellate lawyer to tell you that an issue can't be argued because key exhibits have vanished.

Unusual exhibits, such as blow-ups and audiovisual or digital materials, present special problems. They can all too easily be separated from the main case files. Moreover, don't forget that without appropriate labeling, CDs, videotapes or flash drives all look alike. Make sure your records are accurate about what you have and where to find it.

Finally, prepare your exhibits with the appellate record in mind. For documentary exhibits and any electronic material that can be printed, try to be sure the record

contains letter-size copies that can easily become part of a clerk's transcript or appendix. That way, the appellate court will have ready access to the material and won't have to wait for a blowup photo to arrive from the trial court, or use a computer to understand what a brief is talking about.

Keep these three principles in mind—admit, record, and maintain—before, during and after trial. They will allow you to get the most out of your exhibits and could make the difference between winning or losing your case.



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