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Exhibiting behavior

Nuts, bolts, and strategic considerations for trial exhibits


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The lawyer looked at the butcher block*, counting up the incidents he and the witness had discussed. "I'm sorry – that's, let's see – one, two, three, four, five collisions involving your truck driver in the 18 months before he runs over a pedestrian in a crosswalk?" The jury glowered at the witness. The butcher block exhibit was having its effect.

An exhibit list, binders, and the dance

Exhibit lists are typically exchanged well before trial. Simplify this by building it during the case. Use a running exhibit list from the case's beginning. For more on this and what exhibits to include, see October 2015's Back Story [https://plaintiffmagazine.com/recent-issues/item/the-exhibit-s-the-thing/ https://www.coopers.law/the-exhibits-the-thing/]. With a clerk's format list (a table with the exhibit number, exhibit description, and blanks for date identified, date admitted, and date withdrawn), one is closer to getting exhibits admitted. Next comes copy confirmation. Five binder sets typically do the trick. One for opposing counsel (more if there are multiple defendants or subrogation counsel), the judge, the witness stand, and the most important set, the clerk's. The clerk's contains the materials that get marked.

Next comes the identification/admission dance. It is like a floss. When a kid flosses, it looks simple. You try it? You whack your knees. Practicing exhibit-handling prevents missteps in front of the jury. Start with: "I'd like to mark Exhibit 17 for identification." Pro tip: Determine the clerk's preferred processes before identifying the first exhibit. Some clerks want exhibits culled and stacked during a break before use with a witness so the clerk can stamp or tag, then date, the exhibits. This method maintains momentum rather than getting bogged down in administrative tasks while the jury stares at you. Also consider letting opposing counsel know during the break what exhibits you plan to use and ask if there are any objections to any of them. Frequently there aren't, and this keeps the flow going.

Next, ask the witness to turn to Exhibit 17 in the binder at the witness stand. Wait for the judge and opposing counsel to catch up. "Is Exhibit 17 a photograph that you took at the collision, and does it accurately depict the incident?" Yes, that's compound and leading, yet likely won't draw an objection. Photographs tend to be easy to admit. Presuming the witness says yes: "We request Exhibit 17 be admitted." Barring a sustained objection one can then display the exhibit, whether that be via a projector, a blow up, or passing out 12 copies.

It is not enough to rely on the clerk to track exhibit status. Maintain one master exhibit list in the front of your witness examination binder. Note the date for when the exhibit is identified and if it is admitted. Presuming one has co-counsel, they should also note it on their own exhibit list. Compare lists toward the end of trial, move in any outstanding exhibits the jury will need, and clear up any ambiguities with the judge. At the case's conclusion, review the exhibit pile before the bailiff takes them into the jury room. Everyone, including clerks, makes mistakes. But it's the client who faces the motion for mistrial if the jury receives inadmissible evidence.

Demonstratives and exhibit formats

While exhibits usually need to be admitted for a jury to see them, that's not true for demonstratives. Medical anatomy and collision animations are two examples. One identifies the exhibit and requests the exhibit be displayed to the jury for demonstrative purposes. Make sure the jury understands they won't have the demonstratives during deliberations. Demonstratives also include items written on butcher block during examinations. Building a timeline or emphasizing points, like the number of prior collisions, with a witness builds factual credibility for later. Mark the butcher block for identification. Then use the same sheet during closing argument, reminding the jury how it came into creation.

While we've moved into a digital world with amazing trial presentation software, there's tremendous value in other formats. A digital image is displayed for a time, then replaced. A blow-up of a brutal crash is always there, emphasizing the brutality, no matter how many times opposing counsel gets up and turns it around during questioning. That blow-up makes an outsized impression in the jury room. Anatomical models or exemplar artificial joints are tangible in ways digital images are not. If an animation gets admitted, one must recognize most jury deliberation rooms don't have the equipment needed to watch the animation. Adjust accordingly. One way to think about juries is to think of them as captives in a classroom. What do teachers do to capture attention, make them say, "Wow!" and stay interested? Put yourself in their shoes, then exercise exhibit creativity.

Outro

Back to our lawyer and the butcher block (*large sheets of sturdy paper placed on an easel and usually written on with a marker). In closing, the lawyer used the prior collisions sheet to emphasize how many chances the trucking company had to correct its driver's behavior or take the driver off the road. The jury used those points during deliberations to give the lawyer the verdict requested.

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