Off the Record

Smooth Courtroom Moves: The "Exhibit Dance"

by Maureen A. Howard

Current court rules often require parties to identify proposed exhibits in advance of trial, as well as objections to the other side's evidence, so the judge can make pretrial rulings on admissibility issues (e.g., FRCP 26). This practice saves precious trial time, minimizes the time that jurors are banished during sidebar discussions between judge and counsel, eliminates in large measure surprises about how the evidence will shape up at trial, and arguably promotes settlement. It also allows the exhibits to be pre-marked for identification, further streamlining the trial process.

Nonetheless, trial lawyers still need to be able to lay hands extemporaneously on a document not previously thought to be needed and smoothly walk through the necessary steps to get it admitted into evidence. Mastering this "old school" skill will reduce an advocate's anxiety, help her present a polished presentation to the jury, and further convince the court of her competence.

The following steps comprise the basic procedure for offering exhibits at trial. But, as with all trial protocols, the trial judge has broad discretion to dictate practice in his or her courtroom — so it is best to know what is expected.

1. Talk about the exhibit first. Before jumping right into offering an exhibit into evidence, ask the witness about everything that is vital about the exhibit, as if the exhibit didn't exist. This accomplishes three things. First, it ensures that the foundational element of relevance has been met. Although the bar for overcoming a relevance objection is extremely low (i.e., does the evidence have any tendency to make any consequential fact more or less probable?), it still must be met. Second, talking about the exhibit — and creating a visual picture in the minds of the jurors — bolsters witness credibility. When the jury is finally allowed to see the exhibit, they will realize that the witness's description — whether of a diagram, a piece of real evidence, or a photograph — is an exact match. Third, talking about the exhibit in advance allows you to do what you otherwise could not — talk about it twice: once, when asking the witness "preview" questions about the exhibit, and again when questioning him more specifically about the exhibit after it is admitted.

2. Mark the exhibit. Approach the lower bench and have the clerk, bailiff, court reporter, or even the judge (in some jurisdictions) mark the exhibit "for identification." There is little to say by way of a request, as the clerk understands that the only reason a lawyer is approaching the lower bench with a document in the middle of direct examination is to have an exhibit marked. I also recommend not asking for the exhibit to be marked with a particular number. It is embarrassing to ask for an exhibit to be marked "Exhibit 13" and have the clerk correct you by announcing "Exhibit No. 14 for identification" after marking it.

3. Show the exhibit to opposing counsel. You need not say anything while doing this, but you may say something like, "I'm showing Exhibit No. 14 for identification to plaintiff's counsel." This step is merely a courtesy, but one that is well advised. Although there is no reported case reversing a trial court's finding because an attorney didn't show opposing counsel a proposed exhibit, it is embarrassing to hear your adversary call out indignantly, "Your Honor, I haven't seen what counsel is showing to the witness!" The judge will require you to backtrack and it may look to the jury like you aren't playing fair. It is also acceptable to verbally direct opposing counsel to the exhibit if it is easily identifiable and counsel already has a copy, such as "Counsel, the 2009 insurance contract."

4. Ask permission to approach the witness. Ask the judge for permission to approach the witness by saying simply, "Your Honor, may I approach?" In state court, many judges will direct you to "approach freely" without having to ask permission each time. Until you are so invited, however, it is prudent and respectful to ask.

5. Hand the exhibit to the witness. When you hand the exhibit to the witness, verbally describe what you are doing by saying, "Mr. Witness, I am handing you what has been marked for identification as Exhibit No. 14," or, "I am handing you Exhibit No. 14 for identification." After being marked, and until it is accepted into evidence, its official name is "Exhibit X for identification," and you should use this name each time you refer to the item. I recommend using the "real life" name of the exhibit as well as the identification number. For example, "I am handing you a diagram marked Exhibit No. 14 for identification," or, "I am handing you what's been marked for identification as Exhibit No. 14, a photograph." Although the evidence rules allow leading questions on foundational matters, you do not want to be too specific in your description of the exhibit, as that will undercut your persuasive foundation, in that the jury may think that you are coaching the witness. Rather, use a broad, general category, such as diagram, object, photograph, or document.

6. Lay the necessary foundation. At a minimum, you need to have the witness identify what the exhibit is, establishing authenticity and relevance. The foundational questioning may be as brief as two questions: 1) "Do you recognize it?" and 2) "What is it?" There is technically a middle step in this basic foundation that establishes the witness's personal knowledge, but it is rarely demanded by opposing counsel and it can produce an awkward exchange between you and the witness, so I recommend skipping it. Be prepared to go back and take this additional step, if challenged with a foundation objection. In fact, write it in your notes as a reminder. Otherwise, you may be confused when you draw the objection, thinking, "Wait a second. I'm not laying any particular foundation right now, like the business records exception. What is he objecting to?"

The missing step is to establish personal knowledge by asking, "How do you recognize it?" This assures that the witness is not parroting what someone else told him about the exhibit but has first-hand knowledge as to what it is. The reason most

trial lawyers dispense with this question is that it can make the testimony somewhat awkward-sounding. For example — Question: "How do you recognize it?" Answer: "I recognize it because it is my purse that was stolen." Question: "What is it?" Answer: "It is my purse that was stolen."

After laying the basic foundation, you will also need to lay any additional foundation called for by the exhibit, such as specialized foundation for audio recordings, or foundation for establishing the business-records exception to the hearsay rule.

7. Offer the exhibit into evidence. In most jurisdictions, this step is an offer, not a motion. Make a clean offer, such as, "Your Honor, plaintiff offers Exhibit No. 14 for identification into evidence." Once admitted, the "for identification" qualifier drops from the official name of the exhibit.

8. Use the exhibit. After the exhibit has been admitted into evidence, confirm with the judge that you may show it to the jury. You need not use the antiquated phrase, "May I publish the exhibit?" Simply ask if you can show the exhibit to the jury, or if the witness could use the exhibit as you continue your examination. Too often, lawyers are successful in getting evidence admitted but then fail to work with the exhibit to maximize its impact on the jury. Plan a strategy to further the jury's understanding of how this evidence fits into your case and advances your theory. The possibilities for effectively working with exhibits are limited only by an advocate's imagination (and the judge's patience): enlargements, PowerPoint presentations, demonstrations, or questioning the witness about the exhibit can all be persuasive. The key is to craft a presentation that is understandable and interesting, which is easier said than done. I will revisit this topic in a future column, as it deserves more attention than a line or two here. (See David Gross's piece in this issue of *De Novo* for another perspective on using visual evidence to enhance your case.)

9. Practical tips. Remember that unless and until the exhibit has been accepted into evidence, you cannot let the jury view it or allow the witness to share the contents of the exhibit by reading from it. If you would like to use an enlargement, a practical way to lay the foundation with a witness without inadvertently showing the enlargement to the jury is to mark both a smaller (8 inches x 10 inches) exhibit and the enlargement at the same time. The lower bench may number these sequentially, or refer to them as subparts of a single exhibit number (e.g., Exhibit 14-A and Exhibit 14-B). Lay the foundation with the smaller exhibit, and after it is offered and admitted, ask, "Your Honor, I have a duplicate enlargement of Exhibit 14, pre-marked for identification as Exhibit 15. I have previously provided plaintiff's counsel an opportunity to inspect the enlarged duplicate. May I use it with the witness at this time?" Once admitted into evidence, the exhibit now belongs to the court and cannot be altered. This rule is sometimes overlooked, with witnesses being directed by counsel to mark on admitted exhibits during their testimony. If this occurs, raise a timely objection by saying, "Your Honor, we'd object to any alteration of Exhibit No. 14 now that it has been received into evidence."

If you are working with a witness and you want him to write on an exhibit, you will not be able to do this before it is admitted, because the jury cannot yet view it. Instead, have a duplicate prepared and marked for identification. After the exhibit is admitted, ask the court for permission to use the duplicate with the witness during his testimony. After the witness marks the duplicate exhibit, you can offer it into evidence. In the absence of an objection, it will likely be admitted for all purposes. If you draw a "cumulative" objection, offer it for illustrative purposes only. Also, be prepared in the event you want a witness to write on an admitted exhibit during your cross-examination by bringing large (3 feet x 5 feet) transparency sheets, similar to those used on overhead projectors. You can have a blank sheet marked for identification, clip it over the exhibit you want the witness to mark on, have him mark the transparency, and then offer it into evidence. Again, you may not succeed, but it is worth a try. You can always use it in your closing argument! ◊

~~"Off the Record" is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be reached at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directory/Profile.aspx?ID=110.~~

Openings for WYLD Board of Trustees

Join the WYLD BOT to connect with new lawyers in your area and across the state, and help build young lawyer programming and perspective within the WSBA. The WYLD seeks candidates for the following leadership positions, to serve from October 1, 2011, through September 30, 2014:

- **President-elect***
- **King County District Trustee – serving King County**
- **Greater Olympia District Trustee – serving Lewis and Thurston counties**
- **North Central District Trustee – serving Chelan, Douglas, Ferry, Grant, and Okanogan counties**
- **Northwest Washington District Trustee – serving Island, San Juan, Skagit, and Whatcom counties**
- **Southeast Washington District Trustee – serving Adams, Asotin, Benton, Columbia, Franklin, Garfield, Walla Walla, and Whitman counties**

The application deadline is May 2, 2011. District trustees are selected by vote of all WYLD members in such district. The president-elect is selected by the current WYLD Board of Trustees.

For more qualifications and application details, visit www.wsba.org/lawyers/groups/wyld or contact WYLD Liaison Brian Halcomb at 206-727-8205 or brianh@wsba.org.

*President-elect is a one year term which immediately succeeds to the position of president for the 2012–2013 Bar year. This year's president-elect cannot work and reside in King County.