IADC PROGRAM: PUTTING ON THE GREATEST SHOW ON EARTH (WITHOUT LOOKING LIKE A CLOWN)

IADC MID-YEAR MEETING – PEBBLE BEACH

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"Putting on the Greatest Show On Earth (Without Looking Like a Clown)"

Program Description: Managing the three-ring circus of evidence at trial is challenging in any circumstance and only gets more difficult when every court handles exhibits differently. Some courts follow the traditional method of laying a foundation, offering the exhibit, and having it admitted; others pre-admit everything; and still others fall somewhere in between. Those variations significantly impact the way you put on your case. How do you adjust to the variety of ways exhibits are handled in different jurisdictions? Learn from experienced trial lawyers on how to adapt to any scenario so you look like the ringmaster and not the clown.

1. Introduction
    a. Presenters and Brief Biographical (Relevant) Information
    b. Topic description and overview of presentation
2. Different jurisdictions/different practices ("Different Strokes for Different Folks")
    a. Prepare well in advance
        i. Talk to the court/law clerk: In every case, whether a jury or court trial, one of the very first things you should do is contact the judge's law clerk or

court clerk to discuss issues of trial logistics, including courtroom layout, available technology, and the court's preferences for dealing with exhibits. Often times you can find judge's preferences on line at the court's website which can provide valuable information about how the court likes to conduct trials and in particular exhibits. Early preparation in this regard is key because you can use it to your advantage in discovery and trial preparation. This knowledge can be used to effectively plan for exhibit presentation and the use and/or creation of demonstrative exhibits.

ii. Talk to others/local counsel: In addition to the general intelligence we all seek about judges once they are assigned to your case, it is advisable to check with others in your firm or in the community about the judge's preferences for the use, introduction, and handling of exhibits. Many courts have online systems showing recent trials judges have conducted – reach out to lawyers who recently tried cases and see if they are willing to share what they've learned about how the court handles exhibits.

iii. Visit the Courtroom: Make a point to visit the courtroom where the trial will take place as soon as possible. If you can schedule the visit around an early motion, that works too, but do not wait until the week before trial to do this important step. This will help you asses the courtroom layout, including the location of the jury relative to the witnesses and displays for exhibits, available technology, and where you want to sit during trial in relation to all of these things. Where is the jury in relation to counsel table? Where do you want to sit in relation to the jury, the judge, and exhibit displays? Can you effectively present with technology given the layout? Will the court or jurors have to move or strain to see exhibits you present? All of these considerations will help you as you develop discovery and trial strategy. The early courtroom visit will also help you to get to know the court staff, which is always helpful – as long as you are pleasant and polite, at all times.

iv. Request an early case management conference to address exhibits. This can be done in conjunction with the courtroom visit. Request an in-person conference to address this issue so you can determine as early as possible what the court expects and prefers. This will help you plan discovery, presentation of exhibits, and use and location of technology if appropriate. You can also address the issue of pre-trial motions in liminie with respect to exhibits so you attempt to streamline presentation of exhibits at trial without interruption and disputes with opposing counsel in front of the jury. This will also help you prepare witnesses in advance of trial as well armed with the knowledge that certain exhibits will either be excluded or allowed.

3. Things you must consider in every jurisdiction

   a. The point of exhibits – don't forget that the point of using exhibits is simple: to prove your case. When used effectively, exhibits can be powerful and persuasive

often times objective evidence that can help you win. But always remember, if you can't tell your story in using a relatively small number of exhibits, you shouldn't be trying the case. Jurors don't want to be overwhelmed with documents and will lose the forest for the trees if you violate this critical axiom of trial presentation.

i. The point you are trying to make: the first consideration you should make with every exhibit is to determine the precise point or points you are trying to make and how the exhibit fits into your overall theme. Often times this will change over the course of discovery and trial preparation, so you need to be flexible and considerate of the dynamic process of trial and trial preparation.

ii. Consideration of your opponent's case and the highlights of your opponent's case: along with consideration of the point of your exhibits and effective use of the same, you must consider your opponents claims, the main points they will try to make and establish through exhibits, and how you can best contest, refute, or explain those exhibits. What exhibits can you use to your opponent's case, and which exhibits are concerning to your claims? Which witnesses do you have to address these? How can you effectively respond to exhibits without violating the "yeah but" rule (each party only gets so many "yeah buts" in response to evidence or exhibits – no more than 2 or 3 – before they lose all credibility with the court/jury)?

b. Juror Consideration

i. What is the case about – consider your theme and how to communicate it effectively to the jury/court without overdoing it. Jurors don't want to be overwhelmed with information.
ii. What is the potential jury pool: think about where you are trying your case and what the jury pool consists of in the way of juror background, etc. Simpler is always better.

c. Demonstrative Exhibits

i. K.I.S.S.: If you choose to use demonstrative exhibits, keep it simple. Remember that any demonstrative you create can and will be used against you.
ii. Use of outside vendors: consider the use of outside vendors to assist in the creation and preparation of exhibits. Lawyers tend to use too many words, numbers, and pictures. A professional can streamline ideas and concepts and help you get to the point with simplicity and style.
iii. Properly vetted and tested: test your demonstratives on co-workers, family members, and anyone else who will listen. Work through your presentation. What do they think? Does it make sense? Is it too flashy? Does it communicate your key points without being disruptive or overcomplicated?

iv. No misstatements/omissions: always be honest with your demonstrative exhibit. Any flaw, exaggeration, or misstatement will be used against you if your opponent is paying attention. Be sure to do the same to her/him if their demonstrative is problematic.

d. Using Depositions Effectively

i. Rule 32, of the Federal Rules of Evidence, governs the use of depositions in court proceedings. For purposes of our discussion, we will focus on the use of depositions in a trial.

ii. In relevant part, Rule 32 states:

(a) USING DEPOSITIONS.

(1) *In General.* At a trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

(5) *Limitations on Use.*

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place—and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) *Using Part of a Deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) *Substituting a Party.* Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action.* A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) OBJECTIONS TO ADMISSIBILITY. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) FORM OF PRESENTATION. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

As a practice pointer, keep in mind that even if a deposition transcript may be admissible under the Federal Rules of Evidence, the actual deposition testimony might not be admissible. As such, the applicable rules of evidence, especially those concerning hearsay, must be considered when preparing to use deposition testimony during a trial.

In order to determine whether use of the deposition, or any portion thereof, is meaningful, you must consider the ultimate impact of the words (or the video clip, if it is a videotaped deposition). For what purpose are you intending to use the

deposition? For impeachment? Because the witness is "unavailable"? Will the deposition testimony be considered cumulative in nature and so the court errs on the side of "less is more"? Obviously, live testimony is preferred (and sometimes required) in lieu of testimony read into the record or played for a jury. It is usually within the trial court's discretion to determine how the deposition testimony is provided to the jury.

e. General Guidelines for Introduction of Exhibits

i. Although there may be nuances to consider from each jurisdiction and court rules, the following is a general outline of the introduction into evidence of an exhibit:

(1) Mark the exhibit for identification, or hopefully it has been pre-marked. In order to pre-mark the exhibit, check with the Clerk of the courtroom to see if he/she can meet with you and opposing counsel in order to facilitate this process. Your judge also should advise whether he/she permits pre-marking of exhibits.
(2) Show the exhibit to Opposing Counsel. Announce for the record that you are doing so.
(3) Request permission from the Court to approach the witness and to hand the witness the exhibit.
(4) Show the exhibit to the witness.
(5) Lay the proper foundation for the exhibit with preliminary predicate questions.
(6) Request the judge to enter the exhibit into evidence.

Always be prepared with citations to the applicable Rule(s) of Evidence, as well as any applicable caselaw, with anticipated objections from the opposing party as to the admissibility of the exhibit. A practice pointer: you can dedicate a manila folder to each exhibit to ensure you have the requisite number of copies of the exhibit, as well as copies of any Rules or case law that you are relying upon to counter any objections from opposing counsel.

Consider whether you are able to pre-mark, identify, and agree on admissibility of exhibits. If possible work with opposing counsel to agree on a joint exhibit list with exhibits that are acceptable to both sides and can be stipulated to for foundation and admissibility.

In addition, you should consider filing a pre-trial motion to determine the admissibility of an exhibit to avoid prolonged litigation during the jury trial. This process streamlines the trial and also allows you to know what exhibits will be admitted and used at trial. This is especially key if you want to use an exhibit during Opening Statements.

f. Do's

i. K.I.S.S.: this axiom always applies, in every case, in every jurisdiction. Keep it simple. Don't overdo it. Less words, less lines, less diagrams, less charts.
ii. Practice practice practice: Practice using and talking about your exhibits. If you're using technology, practice twice as much.
iii. Easily accessible and able to manipulate: If you're using technology, make sure it is easy to use, access, change, and edit, if necessary. Strongly consider using a paralegal or technology assistant if you're using trial director or something similar. You don't want to be fumbling in front of the court, jury, or opposing counsel.

g. Don'ts

i. Not too complicated: The opposite of above. Keep it simple. Lawyers have a tendency to overcomplicate issues. This applies to exhibits, too.
ii. Not too wordy: Keep your exhibits simple. Don't fill the screen or the white board with words or numbers. Everyone will be lost.
iii. Don't use 3 exhibits when 1 will do: You don't need to beat the jurors or judge over the head. Don't repeat, and don't use multiple exhibits when 1 will get your point across.
iv. No fighting with opposing counsel: keep your

h. Use of Physical Evidence: Should you use physical evidence as an exhibit during a trial? If so, how and when? "Some say that the average attention span is down from 12 seconds in the year 2000 to eight seconds now. That is less than the nine-second attention span of your average goldfish." *See* "Myth and Mystery of Shrinking Attention Span" Dr. K. R. Subramanian. The use of physical evidence, which creates an opportunity for jurors to be able to touch the exhibit, for example, is a powerful means to convey a message to a jury. Jurors must be able to recall the exhibits and the use of physical evidence will be a persuasive way to help them remember what you introduced into evidence. Furthermore, there is the possibility of being able to have the physical evidence go back into the jury room with the jurors during deliberations. Keep in mind that there may be chain of custody issues at play so when you are planning your Witness List, you might need to call certain witnesses to establish chain of custody to get the evidence admitted.