

“Refreshing Recollection; Admitting Exhibits; Proper Impeachment”

Ursula Henninger, Todd Davis, Larry Smith, Sherry Knutson

Admitting Exhibits

1. [SLIDE 2] What is an exhibit?
 - a. Anything other than testimony that can be presented at trial.
 - b. Exhibits include written documents, tangible objects (e.g., Premerge Dinitro can that Wilson purchased), photos or maps (Hertz), and demonstrative evidence (slides, animations in Wilson, writing on Elmo during trial).
 - c. Extremely important because studies show learning and retention are significantly improved if information is communicated visually.
 - d. Exhibits often become the center of the jury’s attention!
2. [SLIDE 3] What does “laying foundation” for an exhibit mean?
 - a. Foundation establishes the exhibit is relevant and reliable – and therefore admissible.
 - b. Party must prove the exhibit is an authentic document and actually be what it purports to be (in the cartoon, the flyswatter).
 - i. For example, pictures, maps and diagrams of an accident scene in Hertz case must be proved to actually be a true representation of that scene.
 - ii. Some exhibits are self-authenticated through certification, e.g., medical records.
 - iii. Often authenticity will be stipulated before trial, e.g., company produced documents.

3. [SLIDE 4] What rules or procedures govern “laying foundation” for an exhibit?
 - a. Process is at the discretion of the court. FRE 611(a): judge shall “control the mode and order of presenting evidence.”
 - b. Specific foundation procedures largely based on case law and local practice.
 - i. Be sure to know the local practice before trial begins.
 - ii. Some courts relax the procedures I am going to describe.
 - c. Purpose of foundation procedures: create clear record, establish proper foundation for each exhibit, give opposing parties fair opportunity to challenge admissibility.
 - d. [SLIDE 5] Let’s talk a bit about challenges to admissibility:
 - i. You may see some objections made during the course of the faculty problem, and the judge will rule on those objections.
 - ii. But some of the faculty lawyers worked out admissibility in advance, which happens in real life. The parties exchange exhibit lists and objections to exhibits. Some courts require advance statements of admissibility for every objected-to exhibit. And then sometimes courts make rulings before trial starts. But judges often leave rulings on exhibits to trial, because they don’t want to waste time making rulings on exhibits that will never be offered at trial.
 - iii. With a large exhibit list, the parties may reach agreements to try to narrow the issues for the court. This can include a smaller “will use” exhibit list. Or an agreement to give the other side notice 24 hours in advance of direct as to what exhibits will be used in direct, so that the parties can try to resolve objections and, if not, seek a court ruling before the court day starts.

- iv. Sometimes parties stipulate to admissibility of certain exhibits and the court will “pre-admit” such exhibits. The parties may do so for comfort in showing such exhibits to the jury during opening or having certainty as to what will be admitted at trial. Also, sometimes the court will do this on request of one party. With pre-admission before trial starts, the party does not need to go through the formality of moving the exhibit into evidence during trial.
 - e. For written documents: exhibit must be shown to be non-hearsay or to fall within a hearsay exception (FRE 803-807, and FRE 1006)
 - i. Quick note on FRE 1006 – permits admission of “chart, summary, or calculation” of “the content of voluminous writings, records or photographs that cannot be conveniently examined in court”. Must make underlying documents and records available for examination before trial; underlying documents and records also must be admissible. E.g., we use these when summarizing multitude of clinical studies.
 - f. For demonstratives, the formal evidentiary rules of admissibility do not apply because demonstratives are not considered evidence. A demonstrative makes visual what the witness or lawyer is saying (e.g., opening/closing slides, timeline, expert slides). As long as the lawyer or witness can properly say it, they can supplement their presentation with a demonstrative.
4. What party offers exhibits? Generally, exhibits are offered into evidence by the party currently presenting evidence. In other words, plaintiff introduces exhibits in plaintiff’s case-in-chief, and defendant introduces exhibits in defendant’s case-in-chief.
- a. While the opposing party may use exhibits during cross examination, the cross exhibits generally are not moved into evidence. But this is at the court’s discretion pursuant to FRE 611(a).

- b. There can be exceptions. For instance, for ease of presentation of evidence, sometimes defense affirmatives/counter deposition designations will be played in plaintiff's case if plaintiff is affirmatively calling the witness by video. In that instance, it may be that defendant offers certain exhibits into evidence during plaintiff's case in chief.
5. [SLIDE 6] What is the typical courtroom procedure for laying foundation? Let's demystify it! It's done through asking a simple set of questions that we are going to discuss and we will demonstrate using the faculty fact patterns.
 - a. Exhibit is marked with a number (usually premarked; court may have preferred numbering system)
 - b. Show exhibit to opposing lawyer
 - c. Ask judge permission to show exhibit to witness
 - d. Give exhibit to witness
 - e. [SLIDE 7] Establish proper foundation for exhibit
 - f. Offer exhibit into evidence
 - g. Ask permission to show publish or show exhibit to jury (display on screen or Elmo, or sometimes pass around – e.g., smaller photo)
 - i. Be aware of local differences. In IL, can only publish admitted evidence, and IL still treats learned treatises as hearsay, so cannot display medical literature it to jury. [IL doesn't follow FRE 803(18)]
6. [SLIDE 8] **Demonstration:** Page 53 of Faculty materials, Reply to Letter of October 28, 1980, marked as DX 53. Mr. O. H. Hammer is on the stand. [Bryant to play Mr. Hammer; Larry to play judge; Ursula to play plaintiff's counsel]
 - a. For the record, I am showing plaintiff's counsel a copy of Ex. 53.

- b. Your honor, may I approach the witness?
- c. Mr. Hammer, I am handing you what's been marked as Exhibit 53?
- d. Do you recognize Ex 53?
- e. Please tell the jury what Ex 53 is? [*letter he received from the United States Department of Agriculture in response to his letter of October 28, 1980, informing them of a change in formulation for Premerge Dinitro*]
- f. Did you receive a copy of Ex 53 in the normal course of your business at Roe Chemical?
- g. Is Ex 53 a true and correct copy of the letter you received from the United States Department of Agriculture in response to your letter of October 28, 1980, informing them of a change in formulation for Premerge Dinitro?
- h. Did you keep Ex 53 in the course of Roe's regularly conducted activity?
- i. Your honor, Defense offers DX 53 into evidence.
- j. [Judge asks plaintiff if any objection. Admits DX 53.]
- k. Your honor, may I publish? [Bobby to turn off slides and bring up Ex. 53]
- l. Mr. Hammer, what did the Department of Agriculture tell you in response to your October 28, 1980 notification that Roe was changing the formulation of Dinitro? [*answer to include reading last part: "except that a reasonable time may be permitted to dispose of properly labeled stock or old products"*]
- m. Can you please tell the jury whether or not Ex. 53 had any bearing on Roe's decision to change the Premerge Dinitro label in March 2012? [*based on guidance from the Department of Agriculture, we knew we could continue to sell the Dinitro with the old label for a reasonable time, so we did not plan to ship*]

product with the new label until July 1, 2012 – which we considered a reasonable time to use up the old stock]

7. [SLIDE 9] The process is similar for other forms of evidence.
 - a. Photographs (like in Hertz)
 - i. Is the witness familiar with scene in photographs?
 - ii. Is the witness familiar with scene on that date?
 - iii. Does the photograph truly and accurately display the scene as it appeared on the relevant date?
 - b. Object (Dinitro can)
 - i. Does the witness recognize the exhibit?
 - ii. Does the witness know what the exhibit looked like on the relevant date?
 - iii. Does the exhibit appear in the same or substantially same condition as when the witness saw it on the relevant date?
 - iv. *May need to establish chain of custody:* Was the Dinitro can in your possession since the accident?
 - c. Diagrams/map:
 - i. Is the witness familiar with the scene presented by the diagram?
 - ii. Is the diagram similar to the scene on the relevant date?
 - iii. Is the diagram helpful to a witness in explaining information to the jury?
 - iv. Is the diagram accurate?
8. [SLIDE 10] What are recurring problems that lawyers face?
 - a. Don't forget to move the exhibit into evidence. It may seem like a no-brainer, but it's relatively easy to forget in the heat of trial. Most judges allow clean-up if you realize after a witness

leaves the stand that you need to move in an exhibit used with that witness. You want all exhibits admitted into evidence before closing. So make sure it is cleaned up before you rest your case (although I've heard of a judge who allowed plaintiff to clean it up after closing – but you can't count on that!).

- b. Anticipate objections and prepare your responses. If possible, raise anticipated evidentiary issues before trial (MILs, objections to exhibit list). Jurors hate when their time is spent on these issues.
- c. Don't forget to lay foundation. A lawyer can look unprepared if they get a foundation objection that is sustained. Don't give the other side that opportunity.
- d. Make a clear record. For example, when a witness is testifying about a picture or map, saying something is "right there" doesn't tell mean anything to anyone who is later reading the transcript. You need to ask a clarifying question: are you pointing at the corner of main and Elm?
- e. [SLIDE 11] Focus on the 10-20 exhibits that are key. Simplicity and clarity is important to convince jurors.
- f. For an object (consumer product like the Dinitro can): you need to think about authentication through a chain of custody through: (1) continuous and exclusive possession by one or more person; and (2) steps taken to prevent possibility of substitution or alteration.
- g. For your visuals: have an overall strategy to tell your story that you've planned in advance. Make sure your demonstratives send a clear message in a few seconds – don't clutter them with too much information. And for pictures or maps, use a blow-up that is big enough to see clearly from the jury box.

9. [SLIDE 12] Any questions?

Good resource: Mauet, Trial Techniques & Trials