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HEADLINE: **Trial Advocacy, Introduction of Exhibits in Civil Cases**

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BODY:

A crucial, but often overlooked, part of trial advocacy is knowledge of the rules that govern the introduction of exhibits.

For an attorney with a firm grasp of evidentiary foundations, an exhibit's introduction can be quite simple. As a general rule, the potential exhibit must be relevant and authentic; relevant to an issue in the proceeding; authentic in that the exhibit is what it purports to be. In addition, the witness through whom the exhibit is being offered must be competent, that is, she must have knowledge of the underlying facts relating to the exhibit.

Once the trial attorney becomes familiar with the proper procedures for admitting exhibits admitted into evidence, the rest is easy: Ask for the exhibit to be marked for identification, show it to your adversary, ask the court's permission to approach the witness, show the exhibit to the witness, lay the foundation for the exhibit, offer it into evidence and show it to the jury.

Introduction of Photographs

In a case involving an automobile accident, counsel will certainly want to introduce photographs of the scene. To lay the proper foundation, counsel will need someone familiar with the accident scene to establish that the exhibit is a fair and accurate representation of the scene as it existed on the day, time and place at issue in the case.

Before even showing the photographs, however, counsel should proceed with his direct examination, having the witness describe the scene in detail, so in addition to laying a proper foundation, when the jury members finally see the photograph, they will be impressed with the witness' knowledge and credibility. Ideally, you should have enlargements made of photographs to assist the trier of fact in following the testimony:

Q: Your honor, may I have this photograph marked as plaintiff's exhibit one for identification?

Q: May I approach the witness?

Q: I show you what has been marked as plaintiff's exhibit one for identification, and I ask you, do you recognize this?

Q: What do you recognize it to be?

Q: Is this a fair and accurate representation of the scene of the incident at the time of the incident?

Q: Your honor, I offer this in evidence.

If the trial attorney has more than one photograph of the scene he would like to introduce, he should establish the foundation for each of them, individually, and withhold the offer until all of the foundations are completed. This will prevent multiple voir dires after each offer, which will destroy the flow of a good direct examination.

Offer for a Limited Purpose

Under certain circumstances the trial attorney will be forced to offer photographs that are not perfectly accurate in depicting the scene of an accident. These photographs still may be admissible for 'a limited purpose.' For example, if the photographs were taken during daylight, but the accident happened when it was dark during the

evening rush, the photographs can still be admitted for the limited purpose of showing the layout of the street:

Q: Do you recognize this?

Q: What do you recognize it to be?

Q: Aside from the lighting conditions and traffic conditions, is that a fair and accurate representation of the layout of the roadway at the time of the accident?

Photographs in snow and ice cases still can be admitted even if the photographer failed to show up until after the spring thaw:

Q: Do you recognize this photograph, Mr. Witness?

Q: How do you recognize it?

Q: Aside from the fact there is neither snow nor ice on the ground, is that a fair and accurate depiction of the parking lot on Jan. 21 at 4:00 in the afternoon?

Q: I offer that photograph in evidence, Your Honor, for the limited purpose of showing the area where the accident happened without regard to the specific weather conditions at the time.

The Court: Any objection counselor?

Defense Counsel: Not with the proviso that it is being offered for the limited purpose of showing the general area of the parking lot, Judge.

The Court: The photograph is in evidence.

Once photograph is in evidence, use it to your advantage. Publish it to the jury. Have your witness demonstrate to the jury where and how the accident happened as well as where the specific defect was located.

Q: Your honor may I show plaintiff's exhibit 2 in evidence to the jury?

Q: May I have the witness step down to show the jury where specifically the accident happened?

Q: Mr. Witness, I show you what has been marked in evidence as Plaintiff's 2. Using the photograph show us where you fell by first pointing to the area in the (enlarged) photograph.

Q: Using this marker please put your initials over the area where you fell.

Q: What if anything caused you to fall?

Q: Could you describe the condition that caused you to fall?

A: It was ice that had formed from an eight-foot mound of melted snow that had been created by a snow plow.

Q: Please point to the area where that mound of snow existed and then write 'snow' on the exhibit.

Q: Please point to the area where the ice existed and then write 'ice' right on the exhibit.

Introduction: X-Rays, MRIs

Introducing diagnostic tests such as MRIs, CT scans, EMG studies and X-rays has become particularly easy thanks to the Legislature. Pursuant to Civil Practice Law and Rules (CPLR) Rule 4532-a, a party has two options for proffering a pictorial medical exhibit at trial. The first method is to show that the potential exhibit has been

previously received or examined by the adverse party and contains the identifying information as is customarily inscribed by the medical practitioner or medical facility. The alternative way to achieve admissibility is through a 10-day notice procedure. Once counsel serves a notice of intention to offer the diagnostic test in evidence at least 10 days before trial, the specific films are admissible. However, the notice of intention must be accompanied by an affirmation of a physician identifying the radiological study, attesting to the identifying information inscribed on it, stating that the identifying information is customarily provided at the specific facility, and that if called as a witness at trial, that witness would so testify. If all of these conditions are met, the study is admissible.

In any event, the foundation for admissibility can still be laid to orient the jury and set up the foundation for the expert's analysis:

Q: Did there come a time that you reviewed an MRI of the plaintiff's lumbosacral spine?

Q: Your honor, may I have the following studies marked as plaintiff's exhibit 3 for identification?

Q: Dr. Smith, do you recognize these studies?

Q: What do you recognize them to be?

A: The MRI studies of (the plaintiff).

Q: How do you know that?

A: It has the name of your client, the date that the study was performed, the time of the study and the name of the medical facility at which it was taken.

Of course, with an inexperienced witness, it would be appropriate to lead the witness through the foundation by mirroring the language of 4532-a:

Q: Dr. Smith, I show you what has been previously marked as plaintiff's 3 for identification involving four sheets of MRI studies. Do you recognize these?

Q: Does it have certain inscriptions identifying who the study is of?

Q: Does it have the name of (the plaintiff), the injured party in this case?

Q: Does it have the date when the MRI was taken?

Q: Does it have other information inscribed thereon customarily inscribed by a medical facility?

Q: What is that information?

Q: Your honor, I offer plaintiff's 3 in evidence.

As long as the studies had been previously exchanged with the opposing party, the films are now admissible.

Offering the MRIs for evaluation by the expert are worthless without properly publishing them to the jury, having the witness explain the relevant anatomy and findings, and actually demonstrating to the jury with proper enlargement of the films where the specific pathology is found. Toward that end, it is mandatory that the trial attorney have a means of showing the jury enlarged versions of the radiological studies. Putting it on a large screen through a computer presentation is helpful for demonstrative purposes, but not good enough to use throughout the trial. Counsel needs something more permanent so that he can have the witness mark and then use with other medical witnesses or more importantly, for cross of opposing medical witnesses. Here is how to do it:

Q: Your honor we have enlargements of some of the cuts of the MRIs already in evidence which, with your

permission, I'd like to show the witness. May I have these three enlargements marked as plaintiff's exhibits 4, 5 and 6 for identification?

Q: May I approach the witness?

Q: Dr. Smith, I show you plaintiff's 4, 5 and 6 which have just been marked for identification. Do you recognize these?

Q: What do you recognize them to be?

A: They are enlargements of the films taken of (the plaintiff) that have already been marked into evidence.

Q: Are they fair and accurate enlargements and representations of certain cuts of the films already in evidence?

Q: Would these enlargements help us to understand and help you to explain the anatomy and injuries involved with (the plaintiff's) injuries, care and treatment?

Q: Your Honor, I offer exhibits 4, 5 and 6 into evidence.

Now have the witness demonstrate the pathology he found on the studies.

A Physician's Office Records

The records of a treating physician are admissible with a simple certification as a business record pursuant to CPLR 3122-a (certification of business records) coupled with the service of a notice of intention, at least 30 days before the trial, giving the adverse parties notice of your intention to offer these records and specifying the place at which they may be inspected.

Even if counsel fails to avail himself of the simplified procedure outlined in the CPLR, the trial attorney can always have a qualified person from the medical office lay the appropriate foundation. Here is an example:

Q: You are the office manager at Dr. Smith's office?

Q: Your Honor, may I have these marked as plaintiff's exhibit 5 for identification?

Q: May I approach the witness?

Q: I show you what has been marked as plaintiff's 5 for identification and I ask you if you recognize these?

Q: Are they Dr. Smith's office records reflecting the care and treatment of the plaintiff?

Q: Were they made in the regular course of Dr. Smith's practice as a medical office?

Q: Was it in the course of Dr. Smith's medical practice to make those records?

Q: Was it made by someone with knowledge of the events described therein (or the medical treatment)?

Q: Were these records made at or around the time of the events described therein (or the medical treatment)?

Q: Your honor, I offer Dr. Smith's records in evidence.

Offering medical records in the absence of the physician responsible for them can be used to great advantage. If the record is a good one, the findings may go undisputed and the doctor unchallenged with respect to credibility or competence. Thus, the unchallenged doctor's findings may be incorporated into hypothetical questions with the plaintiff's other experts, or on cross-examination of the opposition expert.

The defense has the same advantage. For example, counsel could subpoena certified records of a physician who treated the plaintiff in a prior accident and use them as the basis for hypothetical questions regarding the lack of causation of injury when questioning his 'independent medical expert.'

Q: The plaintiff told you he had never hurt his back before, true?

Q: That was part of what you would call history, correct?

Q: And you would agree that history is an important element of proper diagnosis, right?

Q: And in telling us that the plaintiff's back injury was causally related to this accident of May 2, 2003, you had to rely at least partially on the history, correct?

Q: You took the plaintiff at his word that he had never injured his back before, true?

Q: You relied on his honesty?

Q: If he had sustained a prior back injury and had a history of medical treatment for it, that could change your opinion, true?

Q: Your Honor, I offer the certified office record of Dr. Jones into evidence that came to court with the appropriate affidavit pursuant to my subpoena duces tecum and notice of intention.

The Court: It's in evidence as defense exhibit A.

Q: Take a look at the first page. Am I reading this correctly? 'History: Patient states that in 1999 he herniated three discs while shoveling snow in front of his house. He has been to physical therapy for those injuries for the last three weeks with no improvement.'

Q: Mr. (Plaintiff) didn't tell you about that, did he?

Q: That's something you would want to know as his treating physician for a back injury, right?

Q: Obviously, that certified medical record might change your opinion on causation, correct doctor?

Conclusion

The proper handling and introduction of exhibits can earn you the respect of the judge and jury. Proper utilization of photographs, MRIs and office records can be very persuasive. Once they are in evidence, maximize their use. Proper testimony can be compelling, but a picture can be worth a million words.