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Headline: Getting the Picture: Using Exhibits Throughout a Trial
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Demonstrative exhibits have become commonplace at trial. If used properly, these exhibits have the potential to resonate throughout the entire trial from opening statements forward.

Too often, however, trial lawyers use the exhibits only in the one part of the trial during which the exhibit is offered -- usually direct examination. Although a strong point can be made during direct, with a good amount of planning and a little bit of creativity, that exhibit can serve to bolster your point throughout the entire trial and, more importantly, serve as your surrogate during the one part of the trial when you are not present -- jury deliberations.

Use During Opening Statements

Most lawyers do not even try to use an exhibit during their opening statement. To these lawyers the use of an exhibit at this time is off limits.

The reason often suggested for this position is that no one has testified. Therefore, no one has laid an appropriate foundation for the admissibility of the exhibit and since proof is not offered during an opening statement, it is simply too soon to work with an exhibit.

If, however, the trial lawyer has carefully planned for the use of the exhibit during discovery, its use during the trial will be a foregone conclusion, and thus, no rational basis to exclude it from openings exists.

Take, for example, a photograph of an accident scene. The photograph taken one week after the accident depicts the scene of the accident involving a car and a pedestrian. The photograph was properly served during discovery and, more importantly, it was used during the deposition of the defendant driver. The following questions were asked during the defendant's deposition:

Q: I show you what we have just marked as plaintiff's exhibit 1 for identification and I ask you do you recognize this?

A: Yes.

Q: What do you recognize this to be?

A: That's the intersection where the accident took place.

Q: Is plaintiff's 1 for identification a fair and accurate representation of the accident location at the time of the accident?

A: Yes.

Q: Is plaintiff's 1 for identification a fair and accurate depiction of the general layout of the roadway at the time of the accident?

A: Yes.

Here, the foundation for the admissibility of the photograph has been properly laid during deposition. Since the plaintiff's attorney has the ability, pursuant to CPLR 3117(a)(2), to read in the deposition testimony of the defendant, he would also have the ability to offer the exhibit in evidence at the time it is read to the jury.

Clearly, the exhibit is going to be used during the plaintiff's direct case. But what about its use during the opening statement?

In this instance, the plaintiff's attorney has two ways to seek the use of the exhibit during opening. The first is to alert your adversary prior to opening that you wish to use the exhibit during the opening statement itself. By calling for a stipulation, both sides would have the ability to use the exhibits during the opening. If your adversary refuses, your next tact should be to make an application to the court for its use during opening. That application should include the following: that the exhibit is relevant; that the exhibit was properly served during discovery; that it was used during the deposition; that an appropriate foundation for its admissibility was already laid during deposition; that there is no prejudice to the defendant; and that you are merely seeking to clarify issues through the use of the exhibit.

The worst that can happen is that the court denies your application. The best that can happen is that you might actually avoid the perennial confusion brought out by speaking in terms of North, South, East and West and the various combinations of these directions.

Moreover, with trial judges in state court increasingly opting for federal court-style pretrial orders, or at least demanding that the parties submit lists of witnesses and exhibits prior to trial, the chances that a trial judge will entertain an application to use an exhibit during the opening would appear to be increasing. It seems clear that most judges would rather deal with disputes regarding the authenticity or admissibility of an exhibit prior to trial, and will wait for testimony only where there is a legitimate question regarding the exhibit that needs to be resolved from the witness box.

Additionally, other exhibits should also be considered for use during the opening. In a damages trial or medical case, anatomical models are unquestionably going to be used during the medical proof. By representing to the court that your medical expert will lay the appropriate foundation for the admissibility of the model, its use during opening would serve two purposes. First, it allows for clarification of the issues. Second, it makes better use of court time by lessening the need to explain completely unfamiliar terms to the jurors. If a trial is truly a search for the truth, and the fundamental requirements for the admissibility of the exhibit will be satisfied, the notion that an exhibit cannot be used during opening because 'that's the way it's been done in the past' is an antiquated notion that needs to be rethought.

Use During Direct Examination

Recently, trial support stores and services have sought to entice the trial lawyer with the creation of trial exhibits the likes of which were unheard of only a decade ago. PowerPoint presentations, computer-generated graphics and smart boards have become common at trial. A good exhibit, however, does not need to be flashy. It needs to simplify the issues and make the point in a clear and concise manner. The basic trial techniques for working with the exhibit during direct examination, regardless of the type, should never be overlooked. The fundamental requirements must be met or the exhibit will never be admitted in evidence.

Take, for example, a scale diagram created by an accident reconstructionist in the pedestrian-car accident discussed above. Before ever showing the exhibit to the accident reconstructionist, you must present the exhibit to a witness with knowledge of the scene as it existed at the time of the accident. Although you will not offer the exhibit through this witness, you are taking appropriate steps to authenticate the exhibits through their connection to the case at a relevant time:

Q: I show you what has been marked as plaintiff's Exhibit 2 for identification. Do you recognize this?

Q: What do you recognize this to be?

A: That's a diagram of the scene of the accident. It shows the roadway and intersection.

Q: Is that a fair and accurate diagram of the general layout of the roadway and intersection as it existed at the time of the accident?

A: Yes.

By not offering the exhibit at this time you are effectively preventing your adversary from conducting a voir dire examination designed to challenge the admissibility of the exhibit. The clever defense attorney will, however, cross-examine this witness anyway by pointing out, among other things: that the lay witness never took measurements of the roadway; never took measurements of the lane markings and crosswalk; never took measurements of the skid marks or the traffic control devices, and cannot state whether the diagram is to scale.

It is through the accident recontructionist that the answers to all of these questions can be brought out. It is only at this time that the exhibit should be offered in evidence.

The most common errors committed by attorneys working with exhibits on direct include the failure to let them reflect what is being said by the witness and the failure to properly mark the exhibit. Too often trial lawyers have let the following type of answer stand without seeking clarification:

The driver was over here. He then turned this way, went that way, then struck the girl here and finally stopped in this area.

Without clarification, the exhibit has done little to advance your cause at trial. Moreover, if you are lucky enough to get a favorable verdict at trial you will be hard-pressed to explain on appeal what that answer meant. The proper way to work with an exhibit is to put appropriate markings right on the exhibit at the time the answer is given:

Q: Directing your attention to Exhibit 1, the enlarged photo of the accident scene. Where did you first see the driver?

A: Here.

Q: Put a D1, for driver one, right on the exhibit where you first saw the driver.

Q: When you say the driver turned 'this way' show us how he turned. Now put an arrow right on the exhibit reflecting that turn.

Q: Show us where the driver struck the girl by pointing to it on the exhibit. Put an 'X' right at the point of impact.

By having the witness point to the exhibit before marking it, you can make sure that the witness has it right before permanently marking an exhibit with erroneous information.

A more advanced approach for working with an exhibit on direct is to use the 'double-direct' technique. Here, the goal is to have the witness describe in detail the most important points in your case first and then reinforce those points through the use of the exhibit.

While your adversary might try to object on 'asked and answered' grounds, the objection is misplaced because you have never asked the question with the use of an exhibit.

Use During Cross-Exam

The exhibits offered and used during direct can be used with equal force on cross-examination. While many lawyers try to use the exhibits offered during the liability phase of a trial to attack an adverse liability position, these very exhibits can be used to strengthen the damages aspect of the case.

Often causation is a major issue during a personal injury trial. Consider the same facts as above and assume that the injured girl suffered a herniated disc.

Enlarged photos of the defendant's car depicting a smashed windshield have already been offered in evidence. Needless to say, during the defendant's direct case, the defendant's examining neurologist gave an opinion that the girl did not suffer a herniated disc. During the cross of the defendant's examining neurologist, the following questions can be asked:

Q: Doctor, you believe you fairly and fully evaluated the facts before rendering your opinion, true?

Q: Doctor, I want you to assume that (the girl) was a pedestrian crossing the street. Further assume that

the defendant driver struck the girl. In fact on plaintiff's Exhibit 1, this exhibit, we have a photographic enlargement of the accident scene. As it shows right here the defendant made a left turn and struck my client. The 'X' represents the point of impact. You do agree that being struck by a car can cause a herniated disc, true?

A: Yes. But the impact wasn't severe enough.

Q: At the time you examined my client and rendered your opinion you didn't have photos of the car, true?

Q: At the time you rendered your opinion, you didn't even know these photos existed, true?

Q: You never asked for photos before offering your opinion, did you?

Q: Doctor, I want you to assume that my client was struck and thrown with sufficient force to crack the windshield of the defendant's car. Please take a look with us at Exhibit 4, which shows the cracked windshield following impact. You never saw this photo, did you doctor?

Q: You're not an engineer, are you doctor?

Q: You have no idea how much force it would take to crack this specific type of windshield, true?

Q: You have never done any crashworthiness studies on windshields, true?

Q: In fact, nowhere in your report did you state that the girl was thrown with sufficient force to crack the windshield, true?

Q: Without knowing these facts doctor, that's how you reached your full and fair opinion, true?

Use During Summation

The statement 'a picture is worth a thousand words' is no more true than when working with an exhibit on summation.

Putting an exhibit in front of the jury at this time will draw the jurors right into your argument. When working with a photograph such as the one discussed above of the scene of the auto accident, which has been marked by the witnesses during trial, the exhibit will literally tell the story.

As you speak to the jury in summation, you can assume the role of narrator, using the exhibit and its markings to demonstrate the relative positions of movements of the pedestrian and the vehicle, all apparent to the jury as it looks at the marked photo. Indeed, this is the best technique at your disposal

to 'put the jury' at the scene of the accident, and have them deliberate about the case as if they had, in fact, actually witnessed the occurrence.

Similarly, an exhibit in a medical malpractice case which reflects not just the anatomy, but also the sequence of events that caused the plaintiff's injuries and, just as importantly, a sequence of events that should have occurred but did not due to the defendants' malpractice, provides a clear road map for a verdict in your favor.

Conclusion

With the emergence of television, and then the Internet, today's typical juror is far more used to seeing a story than hearing one. Accordingly, your ability as a trial lawyer to show them, not just explain to them, that your case is a winner has never been more vital. Displaying that story through the use of courtroom exhibits, during all phases of the trial, stands as a crucial part of your ability to get successful results.