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The Persuader's Real Rules of Exhibits

Most lawyers don't know how to use exhibits effectively to persuade the jury. So this week we start a series of the practical rules of using your exhibits. You might call them The Persuader's Real Rules of Exhibits.

Rule No. 1: You can show the exhibit to the jury anytime after it has been received into evidence.

It's against the rules of evidence to show a jury something that has not been placed into evidence. But --- the reverse rule is the Persuader's Rule — you can show the exhibit to the jury anytime after it has been received into evidence. The Persuader's Rule means you can show the jury your exhibit during your opening statement, if you handle it right.

Get ahead in the race to a favorable decision. Put your major exhibits in front of the jury as soon as possible, together with your explanation of what it shows, and why they should pay attention to it. Whether you are on the plaintiff's side or the defense side, the Persuader's Real Rule of Evidence is to start showing the jury a couple of your major exhibits during your opening statement. During your opening statement you can talk about your exhibit in an uninterrupted, persuasive, flow. Here, before any testimony, you can show the jury how and why "the physical evidence" demonstrates you are right.

If you want to show the jury an exhibit during your opening statement — all that needs to be done is to have the judge receive your exhibit into evidence before your opening statement.

Rule No. 2: You can use a motion in limine (offer of evidence in limine) to get your exhibit admitted.

"Motion in Limine" simply means a request for the court to do something before the trial starts.¹ Although legions of lawyers and judges have never thought of affirmative motions in limine, you are not restricted to only using prohibitory motions to keep something out of evidence. You can offer an item into evidence at any time you are before the judge. During a motion hearing on any motion (related to not), or during a pre-trial conference, or during a chambers chat before the trial starts, anytime at all, you can say "Judge, I offer Exhibit XYZ into evidence for the trial."

Tip: Some judges ask that a list of exhibits be presented before trial, for an offer that they be admitted into evidence at a pre-trial hearing. Whether or not the judge asks for it, I always present a list of my proposed exhibits to the adversary attorney for agreement that they be received into evidence, and then make a formal motion before trial that my exhibits be received into evidence. Such a formal motion gets mechanics out of the way of a smooth presentation of testimony in court. (You don't need to stop a terrific flow of testimony to go through a foundation unless it is to your persuasive advantage to do so.) Such a formal motion flushes out the adverse party's objections, giving you some time before the trial starts to shore up a foundation and then re-offer the exhibit.)

Rule No. 3: Respect the judge's peculiarities.

As soon as something is in evidence, there is, in theory, no legal reason for you to make a request to the judge to show it to the jury. However, there are some judges that want to demonstrate they are in control at all times and dislike an attorney presuming what they will allow in the courtroom. These judges don't like surprises during opening statements, and they want to be asked if you can show the exhibit to the jury. So after your exhibit has been received into evidence, tell the judge you "might" decide to show the exhibit to the jury during your opening statement. (In the Eastern states, the legal jargon to show the judge your level of experience is to say you may decide to "publish the exhibit to the jury"). Then ask the judge politely if you may do so. The judge, in the exercise of their powers to provide for an orderly flow of trial, can forbid the show of actual exhibits at that time during the trial. But such judicial prohibition is rare, your

¹ Many forgotten ideas about motions are contained in this author's article at Bucklin, Forgotten Ideas About Motions, 46 N.D. Law Rev.189 - 201.

request is granted, and you can maximize your persuasion during your opening statement..

Of course, before any trial, check with the judge's courtroom clerk or bailiff, and find out if the court wants exhibits handed or shown to a jury only in a specific way. Some want everything possible shown on an electronic monitor, or allows you to hold something up before the jury but wants nothing handed by an attorney to a juror, but only the bailiff handing an exhibit to the jury.

Rule No. 4: You can show an exhibit to a judge anytime.

You can show a judge anything, at any time, whether or not it is an exhibit and whether or not it has been placed into evidence. The legal theory is that the trial judge is smart enough to not use a physical exhibit item in making a decision until after it has been received into evidence. The theory, of course, is not true. Judges are human, and their brains and decision process starts processing information as soon as their eyes and ears receive the information. Even with a bench trial, show the judge the important exhibits during an opening statement to the court.



Look for more of The Persuader's Real Rules of Exhibits in coming weeks.

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