

## Use of and Using Exhibits

1. Exhibits should be a focus of your trial. They cannot be cross-examined, they are not biased, and the members get hold them during deliberations. Exhibits win and lose cases (A modern post script. Wasn't the bloody glove the centerpiece of the prosecution of O.J. Simpson? Wasn't destroying the effect of the glove the centerpiece of the O.J. Simpson defense? I am sure you can think of many other examples.)

2. Let's start with a clarification of what, exactly, is "demonstrative evidence?" It is often defined as that apart from the actual testimony of the witness. If you accept that definition without more, that means almost any physical object which explains the witness' testimony is within the definition to include THE gun linked to THE bullet in THE victim's chest. That view is too broad, I think.

3. It has been too long to remember where I learned it, but demonstrative evidence does NOT include "actual evidence" such as THE gun because those items do not demonstrate the testimony or the evidence, it IS evidence. The best example of demonstrative evidence is a witness' describing a barracks fight in which he describes a now-lost bunk adapter as the weapon. The witness is shown a bunk adapter which is "just like the one the accused hit me with." Another example are beer mug assault cases common in Germany. I have seen both sides offer what they submitted the now broken and lost beer mug looked like (one heavy/one light) and the jury sorts it out. The bunk adapter and the beer mug is not offered as actual evidence, it is offered to *demonstrate* what the witness said when she said "the bunk adapter was a metal pipe" or "it was a large glass mug with ....."

4. About the marking and receiving of charts. Since the MJs have seen a lot of counsel use charts in argument recently, let's look at that first. Please remember these principles.

a. What is given to a witness that is, will be, hopes to be, or may become EVIDENCE is marked as a prosecution/defense exhibit for ID. In most trials, a witness would not handle an appellate exhibit. Even a statement used solely to refresh a witness' memory is still a PE/DE because the witness used it in court even if no one intends to offer the statement.

b. Exhibits whose purpose is to complete the record are marked as appellate exhibits. Briefs by counsel, questions by members, findings/sentencing worksheets, and the like. These items are not evidence; they are included only for the sake of completeness and appeal.

c. Argument of counsel is not evidence and therefore, charts counsel made for, and used in, argument to outline counsel's view, cannot be "demonstrative evidence." And, since the chart is not IN evidence, the chart should be an appellate exhibit. But, be careful. Some judges might want to say that since the members saw a chart that counsel made for the purposes of argument, the chart should be a PE or DE. Well, true, but it still isn't evidence. Ask the judge what she prefers. All this is to be distinguished from a chart received in evidence that counsel uses during argument. That would be a prosecution or defense exhibit.

5. A chart used by counsel during argument that has not been received into evidence should never go to the members. Again, it isn't evidence. An interesting question is what happens if the

members request to take back a chart made and used by counsel in argument? The answer should be NO. It isn't evidence, it usually has some "law" written on it (and that's the MJ's job), and we wouldn't allow the members to take back a copy of counsel's argument - why then the chart?

6. As to evidence such as a diagram of a scene, blow ups of fingerprint evidence, or the like, can one side mark on an opponent's exhibit? On this, judges will differ, and I think the law supports this discretion is within the judge's discretion. I personally am receptive to allowing one side to have their witness' mark an opponent's chart with the following principles in mind:

a. It is clear who marked what. (See discussion to RCM 913(c)(2)).

b. The opponent doesn't destroy, block out, or confuse the exhibit. So, if there is a question of where Jones was standing when the fight took place, I would permit the opponent to put another mark clearly identified as the testimony of the opponent's witness. I would not permit the opponent to have the witness x-out the markings made by another witness. This is a matter of efficiency and allowing the members to have a clear picture of the evidence. Why have two charts when one will do? Why stop and have another witness redraw an entire chart?

c. It is fair. If one side comes in with a high speed diagram and the opponent wants to make it lose its clarity or effect, I would tend to disallow an opponent's markings.

7. Okay, so now the judge says, "I will not permit you to mark the opponent's exhibit." What do you do?

a. You should have been prepared for that eventuality. Bring out your own chart, preferably on a separate stand next to your opponent's, and go at it.

b. Have the witness point to the chart and hope the members remember. Not usually a good solution. (Remind the MJ of the discussion to RCM 913(c)(2)).

c. Like an infantryman, use an overlay. Bring in that plastic stuff, place it over the opponent's diagram, and use the permanent, overlay marking pens like field soldiers. (Learn from a field soldier how to orient an overlay to the chart.) Your overlay is marked as an exhibit and both the diagram and the overlay go to the deliberation room when received into evidence. If your opponent wants to get tricky and withdraw or not offer his diagram into evidence, see what happens if you have HIS diagram marked as YOUR exhibit, have your witness mark on it, and then YOU offer the diagram. Can't tell you what the MJ do, but there is no law that would prevent this process.

8. Do charts that are received into evidence go to members? Of course. Everything that has been received into evidence goes to them. RCM 921(b). Do exhibits just marked for ID and not offered or not received, or charts marked as an AE, go to the members? Never. NO EXHIBIT, unless received, ever goes to the members.

9. Marking and offering prosecution and defense exhibits.

a. Most judges like for you and the reporter to mark exhibits in advance. Most judges require the reporter to mark exhibits. Check local rules of court. Don't talk if the reporter is marking exhibits on the record; the reporter cannot mark exhibits and operate equipment at the same time.

b. Have your exhibits marked as [Prosecution Exhibit 1 for identification] [Defense Exhibit A for identification.]

c. You should have a list of your exhibits to keep track of what has been offered and received. (At the close of your case, confirm with the MJ on the record which of your exhibits have been received.)

d. Show the marked exhibit to opposing counsel. Most judges would like you to say, "I am showing PE 1 for ID to the defense counsel."

e. Lay a foundation.

f. Say, "The government offers Prosecution Exhibit 1 for identification."

g. Have you heard about judges that require you to say: "The government offers what has been marked as prosecution exhibit 1 for identification into evidence as prosecution exhibit 1." Let's look at the wasted words:

(1). "what has been marked as." No kidding. You can't offer exhibits that have not been marked.

(2). "into evidence." Why else would you offer it?

(3). "as prosecution exhibit 1." Of course. If received, it will have no other number. Do remember that if PE 1, 2, 3, 4, and 5 have been offered, and only 1, 2, 3, and 5 received, you will be missing PE 4. PE 5 for ID, when received, is PE 5.

h. "Review."

If the exhibit has not been previously marked, say "TC: I request the reporter to mark this as the next prosecution exhibit in order."

RPTR: Marked as PE 3 for ID.

TC: I am handing you prosecution exhibit 3 for identification. Do you recognize it?

Wit: Yes, I do.

TC: What do you recognize it to be?

Wit: That is a shell casing I retrieved from the back seat of the defendant's car.

TC: How do you recognize this exhibit?

Wit: At the time I retrieved the exhibit, I (describes marking or describes how the evidence was bagged and tagged.)

TC: Is this exhibit in the same (or substantially the same) condition as it was at the time you seized it.

Wit: yes, it is.

TC: The government offers prosecution exhibit 3 for identification.

MJ: Objection?

DC: No, Your Honor.

MJ: PE 3 for ID is received.

i. Only your judge can tell you what the magic words are that you must speak in his court when offering an exhibit. Ask to be sure and to avoid being corrected on the record.

Just my view.