ADMISSION AND EXCLUSION OF EVIDENCE

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I. THE GOAL: *UNDERSTAND – RETAIN – ACT*

As trial lawyers, our livelihoods depend first on effectively communicating information to triers of fact, and secondly on advocating action. We orchestrate the presentation of this information – testimonial, documentary, real, circumstantial and demonstrative evidence – throughout trial, culminating in closing argument when the jury is fully and finally armed with knowledge and motivated by persuasive oratory. Successful trial lawyers know that the triers of fact must first ***understand*** the case, then ***retain*** the information in a meaningful way through deliberation, and lastly be motivated by the information and argument to ***act*** in favor of our clients.

II. ENGAGING EYES AND EARS

Like all people, jurors lean towards being either "eye learners" (they take in most information through what they see) or "ear learners" (they take in most information through what they hear), yet trial lawyers have insufficient time in *voir dire* to fully learn these preferences. Thus, we are more likely to appeal to the various sensory preferences of the jurors (*e.g.*, auditory, visual, tactile) when using a combination of spoken testimony with tangible evidence. Effective trial lawyers show and tell, tell and show.

Research confirms that we retain information longer and better when oral statements (telling) are combined with visual cues (showing). One study found that an audience receiving only verbal information retained 70% of that information after 3 hours and only 10% after 72 hours. However, when the information was presented verbally and visually, the percentages of information retained jumped to 85% after 3 hours and 65% after 72 hours.[1]

Gathering persuasive evidence and knowing how to get it admitted are key skills that all trial lawyers must master. Likewise, advocates should learn to anticipate evidentiary obstacles and have a plan for responding to objections, and develop an "ear for the record" in order to protect the case from evidentiary attack on appeal.

III. GOOD HABITS LEAD TO GOOD EVIDENCE

Encourage and develop good habits for locating, assembling and presenting your evidence and the process becomes second nature in future cases. Instill these habits in your associates, paralegals, investigators and staff.

Planning and Budgeting

Early on, think about an order of proof and trial outline, and analyze what kind of real evidence exists or what demonstrative evidence can be created to support your case. Consider the expenses you're willing to invest in a particular case. What real evidence is

[1] Weiss-McGrath Report, McGraw Hill

mandatory (*e.g.*, medical records in admissible form) and what demonstrative evidence (*e.g.*, computer animation) might you like to have? Expenses may run from pennies for simple copying charges to thousands of dollars for customized medical illustrations, reenactments and animations, or scale models. A cost/benefit analysis at the outset of a case may prevent getting upside down in expenses later.

Gathering the Evidence

Spend time learning as much as you can about your clients and how the injury that brought them to you has affected their lives. Preferably, spend time in their home with them. Look around. Ask them to share personal mementos, photo albums, and so forth. Think outside the box. What evidence distinguishes your case from others? What tangible items exist to help illustrate your client's injuries? Consider doing a focus group to develop themes, to determine what evidence to use and what not to use, and to test the effectiveness of your message.

► Tip – Always inspect the originals. This is particularly important with medical records, maintenance records, and other documents that often have entries from numerous people. Look for different-colored inks or highlighted portions which may not be distinguishable on a photocopy. Compare copies of the same records from different sources and fly-speck them for differences.

► Tip – Think early and often about any evidence which might be subject to destruction or spoliation and act quickly to secure it. Get notice letters out to potential parties or those who might dispose of evidence, consider obtaining a TRO, and otherwise lock down key evidence as soon as possible.

Suggested resources for gathering evidence are outlined in section IV, below, but the list is by no means exhaustive. The key is to never get complacent about developing the evidence, but rather to be proactive in considering what you need and where you might find it.

Developing the Evidence

Get your clients, witnesses and experts involved in gathering and developing evidence, particularly in creating demonstrative evidence, to ensure completeness, accuracy and familiarity. Make sure that evidence which must be proven-up by affidavit or depositions on written questions is in admissible form and timely filed. Routinely disclose newly-obtained evidence throughout the discovery period. Use checklists and calendars to minimize overlooking important pre-trial deadlines. Consult local rules and ask court coordinators of evidentiary matters which may be unique to a particular court or locale.

► Tip – Be sure that the development of evidence that requires expert testimony is coordinated with input from your expert (*e.g.*, medical illustrations, economic-loss tables, etc.). Have the exhibit reviewed and blessed by the expert before attempting to use it for the first time at trial.

► Tip – Develop any special presentations your expert may wish to utilize at trial far enough in advance so that you can supplement the information in discovery. Some courts have not allowed experts to use demonstrative aides (such as PowerPoint presentations) that were not timely disclosed prior to trial.[2]

Using the Evidence at Trial

A. Timely Disclosure

Pay close attention to see that your evidence has been disclosed fully and in a timely manner. When in doubt, supplement.

B. Survey the Courtroom in Advance

If you will be trying your case in an unfamiliar court, visit the courtroom well in advance of trial to determine if there are any logistical problems to presenting and using your evidence. Does the court have an easel? A dry-erase board? A video screen? An ELMO? A VCR and TV? A light box for viewing X-rays? Where are the electrical outlets? Does any of your evidence require special handling through security scanners or a particular courthouse entrance or elevator? Learn these things far enough ahead of trial so that you can make any special arrangements or adjust your evidence strategy.

C. Make Practice Runs

Review key evidence with your witnesses prior to trial so they'll know what you intend to use and how it is designed to enhance their testimony. This is particularly important where the evidence is interactive or requires action by the witness, such as a chronological series of photos, or a computerized accident reconstruction, or any tangible items that can be manipulated or activated. With demonstrative evidence you create, try it out on staff or colleagues before trial to test whether it is effective.

D. Pack Your Bags Carefully

Consider what your witnesses may need to best use the evidence at trial. For example, be sure to have large colored markers, highlighters, laser pointers, and so forth readily available. Have your exhibits pre-marked, organized and indexed. Have letter-sized reproductions of any large or three-dimensional exhibits available for convenience of the court reporter and completeness of the record.

E. Enhance *Voir Dire* and Opening Statement

If permitted by the trial judge or where evidence is pre-admitted, consider what evidence might be effective in *voir dire* and opening statement. Care should be taken to not use exhibits in opening statement that distract the jurors' attention from your message. For

[2] *See, e.g., State Farm vs. Rodriguez*, 88 S.W.3d 313 (Tex.App. – San Antonio 2002, pet. denied)

example, avoid exhibits that are heavily detailed or that require a good deal of concentration to interpret and understand. Instead, use clear, concise evidence that simply conveys one or two key points and assure the jury that you will bring them more as trial unfolds. Charts showing photographs of key witnesses can be used to introduce the witnesses and explain their anticipated testimony, and can be brought back out in closing argument to remind the jury of who said what.

F. Getting the Most from Your Evidence

While jurors might not outwardly appreciate smooth and organized introduction and use of exhibits, they are most definitely turned off by fumbling and disorganized lawyers wrestling with unwieldy exhibits or foundations. Plan your use of evidence ahead of time with an eye for measured, efficient introduction and logical utilization with proper witnesses. Resources abound with foundation checklists for every imaginable type of evidence or exhibit; copy a checklist and put it in your trial notebook next to your outline for a particular witness or line of questioning. When appropriate, such as cross examination with the "smoking gun," build anticipation and heighten drama.

Blown-up versions (foam board or via ELMO) of key evidence enhances examination of witnesses and can be brought out again in closing argument. If a larger version of, for example, a medical illustration or a key document is to be offered and admitted, have a letter-sized version of that same evidence for ease of reference during jury deliberations. To keep the record clear, reference the fact that what you're using is an accurate, larger version of a specific piece of evidence.

G. Overcoming Common Objections

Objections frequently raised to evidence, particularly demonstrative evidence, are unfair prejudice, cumulativeness, lack of substantial similarity or misleading, and failure to timely disclose the evidence in discovery. Have concise "spot briefs" prepared in anticipation of any evidentiary hurdles your opponent might raise. These briefs should be short and simple and can often be recycled from case to case with a few simple changes. The benefit of having spot briefs is that they make you contemplate potential objections your evidence might face and they give the court an extra measure of comfort in ruling in your favor. Conversely, have spot briefs ready in support of your objections to your opponent's evidence.

H. Develop an "Ear for the Record"

Justices Jack Pope and Charles Hampton advise trial counsel to "walk and talk" the exhibit into evidence in order to focus the jury on the evidence and to make a clear appellate record.[3] The old "let the record reflect" statements that the attorney is doing such-and-such with so-and-so, while somewhat archaic, nonetheless emphasize that a particular piece of evidence is being used and help breathe some life into the sterile transcribed record.

[3] Pope & Hampton, *Presenting and Excluding Evidence*, 9 TEXAS TECH LAW REVIEW 403, 408 (1978)

I. Publishing the Evidence

Be mindful not to hand evidence to the jurors for their inspection before or during key testimony from the witness. Conversely, well-timed publishing of evidence at the conclusion of your examination may keep the jurors focused on that exhibit instead of on your opponent's cross-examination.

J. Taking Opposing Witnesses on *Voir Dire*

When considering what evidence your opponent is likely to seek to admit at trial, review the proper predicates and ensure that they are first laid. You may also ask to take the sponsoring witness on *voir dire* for the purpose of testing his or her ability to properly authenticate a piece of evidence.

K. Consult the Court Reporter

Cross-reference what you think you've admitted with what the court reporter says you've admitted before resting. Throughout trial, have an assistant keep track of the offering and admitting of evidence which was not pre-admitted.

L. Closing Argument

Carefully select the evidence you wish to emphasize or use in closing argument, and resist the urge to use too much. Precious time is often wasted moving from one exhibit to the next and the result can be simply to distract the jury. Identify a handful of key items, organize them in advance, and transition smoothly though them. Consider evidence admitted by your opponent that in fact supports your case, and emphasize this in your argument. When appropriate, tie your very final words to one powerful exhibit, so that the visual image and your call to action linger in the jurors' minds as they retire to deliberate.

IV. SAMPLE EVIDENTIARY RESOURCES

In addition to the routine testimonial and documentary evidence in most personal injury trials, more and more cases are now enhanced through computer animations, anatomical models, pieces of equipment or machinery, and medical devices, among other things. The list of possible evidence available to the trial lawyer is endless, but includes:

A. Photographs and Video

"A picture says a thousand words." Always gather as many photos as possible of the plaintiff and his or her family (pre- and post-injury), the scene of the incident, the aftermath, the vehicles, etc. Also, the internet offers a wealth of resources for stock photos, maps, aerial photography, satellite imagery and so forth.

Consider taking photographs from the witness's perspective, *e.g.*, from a driver's seat of a car or from a particular vantage point. Pay attention to common objections to photos such as prejudicial, misleading (particularly posed photographs) or unfair/inaccurate representation (time of day, time of year, changes in scene, etc.). With graphic or grisly photos, consider offering cropped or edited versions. Have several staff members look through the photos carefully to make sure there is nothing in them that might be offensive to the jury (for example, beer cans or clutter or anything distracting). If your opponent has photos that he or she intends to use at trial, consider personally visiting the scene or viewing the object depicted in order to ensure the accuracy of the photos.

B. Charts, Medical Illustrations, Anatomical Models, X-Rays and Other Medical Records and Tools

Hardware, medical tools, medical illustrations, color-enhanced x-rays and other diagnostic tests, anatomical models, and entries in medical records all make for fantastic evidence and exhibits.

► Tip – Maintain a "foundation package" containing all of the evidence that your artist relied upon in creating the animation, illustration, model, etc., such as photos, maps, diagrams, measurements, and so forth. Also, meet with the artist at the outset to see that he or she has a complete understanding of why, how and through whom you intend to use the exhibit. Arrange for the artist to personally inspect the scene or the thing that is the subject of their illustration. Identify your artist as a retained expert and be prepared to provide all the information required by TEX.R.CIV.P. 194.2(f).

C. Maps, Satellite Images, Diagrams, Blueprints

Download maps and satellite images from internet sources such as Google Earth and Mapquest. Contact county appraisal offices and aerial surveyors.

D. Charts, Tables, Graphs, Calendars, Timelines

A common objection to charts, graphs and summaries is that the underlying data or documents is either unreliable or was not made available to the other side far enough in advance to permit evaluation of the accuracy of the exhibit. Thus when preparing these exhibits, pay close attention to where the information comes from and that the foundational data is produced in discovery and otherwise withstands scrutiny. Another common objection is that the exhibit is unfairly suggestive or argumentative, particularly if commentary is included in the exhibit.

E. Law Enforcement, 9-1-1, Emergency Response, Governmental Agencies

Make use of the Freedom of Information Act[4] and Texas Open Records Act.[5] Inquire with as many law enforcement or emergency responders as you can identify (for example, don't overlook the local sheriff's department or city police who may have investigated a wreck along with the Texas Department of Public Safety). Consider local, state and federal governmental agencies that might track issues in your case. Consult licensing and regulatory agencies. In death cases, obtain the medical examiner's file and interview the medical examiner.

F. Governmental Publications and Industry Standards

Search the internet for ready-made exhibits and evidence published by governmental entities or industry groups. This is also a helpful way to find potential retained experts.

G. Computer Databases, "Black Boxes" and Other Electronic Equipment

Ask for electronically-stored evidence in discovery. Consider taking the deposition of a defendant's technological information specialist to learn what evidence might have been overlooked in the paper discovery. Send notice letters and/or TROs to secure evidence.

H. Local newspapers and newscasts

Staff and free-lance photographers are often a great source of evidence, particularly photographs and video.

I. Day-in-the-Life Videos

Day-in-the-Life videos of the plaintiff and his or her family can convey limitations and impairments very powerfully, but care must be taken not to overplay such evidence and risk having an objection sustained. Also, Defendants are typically able to discover all footage, not just the edited portions you want to show, so be mindful of what all is being filmed.

J. Experiments, Demonstrations and Recreations

Don't forget the "foundation package" mentioned above in Section IV.B. in support of experiments, demonstrations or recreations, which are all subject to objections as being unreliable or misleading.

K. Learned Treatises

Recall that TEX.R.EVID. 803(18) permits statements from learned treatises to be read into evidence, but the book itself is not received as an exhibit.

[4] 5 U.S.C. §552 (*but see* exemptions at §552(b))
[5] TEX.GOV'T.CODE ANN. §552.001, *et seq.*

L. Military Memorabilia, Sports and Scholastic Awards, Family Scrapbooks

These types of items offer an instant and powerful glimpse into the lives of your clients, and one or two special items can convey more than oral testimony ever could.

M. You Name It

The bottom line is that any evidence that helps explain, enhance or simplify your case should be considered and used whenever appropriate.

V. PRESERVING ERROR

Remember that rulings on the parties' Motions *in Limine* do not preserve error if the disputed evidence is later offered at trial; that requires a timely and sufficient objection contemporaneous with its attempted use.

When making an offer of proof, be sure the disputed evidence is admitted for that limited purpose so the appellate court is not simply reviewing whether or not the evidence should have been admitted. In other words, don't merely speak into the record what you want to admit and why; submit the disputed evidence itself.

VI. DON'T OVERLOOK "EXHIBIT A"

Perhaps there is no more compelling piece of evidence than your client. Jury consultants are quick to tell us that the jury is watching the parties' every move, every mannerism, every facial expression. Remind your client throughout trial that they must assume a juror is watching them at all times in and around the courthouse. Personal habits that some find offensive (smoking, chewing gum, etc.) should be curtailed.

VII. CONCLUSION

Throughout preparation and trial, all efforts are focused on the ultimate goal of getting the trier of fact to understand the case, to retain the information, and to act in favor of your client. Good habits developed early and refined with experience will ensure that you put on your client's best case, and the evidentiary tools available to help you achieve this goal are limited only by cost and imagination.