The American Bar Association
Young Lawyers Division
2014 Spring Conference
Pittsburgh, PA

Persuasive Use of Exhibits in Trial
(CLE)

Renaissance Pittsburgh
Symphony Ballroom C, 2\textsuperscript{nd} Floor
Friday, May 16, 2014
11:30 AM – 12:30 PM
Persuasive Use of Trial Exhibits

“If it doesn’t fit, you must acquit!”

Presented by Kirsha Weyandt Trychta, Esq.
American Bar Association, Young Lawyers Division
Spring 2014 Conference
Pittsburgh, PA • May 16, 2014
Outline for Today

1. Understanding jurors feelings about exhibits
2. Selecting the best witnesses and testimony
3. Creating the demonstrative exhibits
4. Admitting and using the exhibits at trial
Understanding Juries

• People are Visual, Aural, Read/Write, or Kinesthetic learners. Most people have a hard time visualizing things and being spatial.


• Testimony good for aural listeners

• Need to engage visual and kinesthetic learners too

• You want every vote!
What Makes Something Persuasive?

• Has the power to convince (Webster’s)
• Aids the trier of fact
• Does not interfere with the flow of your presentation
• Is un-objectionable or already admissible via pretrial motion
• Induces a settlement

• “I would sooner trust the smallest slip of paper for truth, than the strongest and most retentive memory, ever bestowed on mortal man.” Joseph H. Lumpkin, Miller v. Cotton, 5 Ga. 341, 349 (1848).
Types of Exhibits

“Real”
- A document, record, or other tangible object formally introduced as evidence in court or attached to and made part of a pleading, motion, or contract (Black’s Law)
- Actual evidence from the crime scene, tortious event, or discovery process

“Demonstrative”
- Physical evidence that one can see and inspect, such as a model or photograph and that, while of probative value and usually offered to clarify testimony, does not play a direct part in the incident in question (Black’s Law)
- Usually created for the purpose of litigation
Types of Exhibits

“Real” Examples
• Business, medical, phone records
• lease agreement, contract
• murder weapon; firearms*
• faulty equipment
• injuries, voices, physical traits
• scene views

“Demonstrative” Examples
• models, charts, diagrams,
• photos or videos
• timelines
• day-in-the-life damages videos
• event reconstruction animations

• Only limited by own creativity and ability to satisfy FRE
Real Evidence: Special Caution on Guns

• Make sure to explain gun is UNLOADED and safe

• Use gunlock

• Explain difference between rifle and handgun, pistol and revolver
Real* Evidence: Jury Views

• Jury views, i.e. taking the jury to the scene

• Walk fine line between “real” and “demonstrative,” see U.S. v. Lillie, 953 F.2d 1188, 1190 (10th Cir. 1992)

• In Judge’s discretion, but consider:
  • The view’s importance to the legal issue
  • The extent to which the view could be obtained from other sources
  • The extent to which the view has changed, and
  • The cost and inconvenience

  State v. Pauline, 60 P.3d 306, 325 (Haw. 2002)
Demonstrative Exhibits

• Only limited by one’s own imagination and the rules of evidence

• Think about the movies; push the boundaries

• Think about the nightly news broadcast
Demonstrations

• Demonstration examples: putting on a glove or jacket, smelling a can of air which purports to be a decomposing body, or displaying the murder weapon

• Show injuries for damages, like removing, cleaning, and replacing an artificial eye. Allen v. Seacoast Prod., Inc., 623 F.2d 355 (5th Cir. 1980)

• Can compel defendant to participate in demo, by speaking or displaying unique physical characteristic. See U.S. v. Wade, 388 U.S. 218 (1967)
Demonstrations, continued

• Government allowed to set off a fake pipe bomb in the courtroom that created a fake flash to show how defendant's bomb would have ignited. *U.S. v. Smith*, 502 F.3d 680 (7th Cir. 2007).

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• Plaintiff objected to an in-court scientific demonstration to prove that tampon did not cause toxic shock syndrome that killed plaintiff. Mainly, plaintiff objected that conditions in the courtroom were not sufficiently similar to those in a human vagina, but the court found that the Dr.'s expert testimony as to why that was not the case met all foundational requirements. Kehm v. Procter & Gamble Co., 580 F. Supp. 890 (N.D. Iowa 1982).

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• You **must** decide early

Forces you to think about
• the progress of your case
• the value of your evidence
• the order of your witnesses, and
• the best pieces of evidence to illustrate the important points
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Good Opportunities
• Describing a scene or location
• Clarifying complex or technical testimony
• Guiding an inarticulate or confused witness
• Breaking up long testimony
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3. **What is the most effective demonstrative exhibit?** It should be designed to grab the attention of the trier of fact. Keep the following factors in mind when creating an exhibit: Intensity, Repetition, Novelty, and Relevance.

4. **Will the exhibit satisfy the evidentiary requirements?** Prepare an outline in advance to argue for the exhibit's use during trial.

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• Fed.R.Civ. P. 26(a)(3) provides that parties must exchange demonstrative exhibits thirty days prior to trial
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http://goo.gl/maps/XnGId

Comm. v. JaJuan Essex, OTN G4411363, Prelim Transcript pages 5-6
Clarifying Technical Testimony

• A picture equals 1000 words

• Video of 3 vehicle accident: http://www.youtube.com/watch?v=jr7-jOEP8HM
Day-in-the-life Videotapes

• Offered on issue of damages; document client throughout their daily activities, rehab therapy sessions, client interviews, difficulty getting around during the day, eating or needs for nursing care
• Generally admissible if foundation can be established
• Consider length of a few minutes to 20 minutes
• Decide between sound or no sound
• Use a professional company
“Other” Exhibit Issues

• Alluding to an (inadmissible) exhibit or report

• Missing exhibit presumption

• Spoliation
Alluding to Reports

• During cross-examination, you can hold paper in your hand and reference it – as if the paper contains information

• Impeachment and refreshing recollection

• Example: “So, if so-and-so wrote in a report ... [look at paper] that the bridge was X feet high...”
The Missing Exhibit Presumption

• If the opposing party fails to offer a crucial piece of evidence (or witness) that is within its control, you may be entitled to a presumption that such evidence would have been favorable to your case.

• Typically the party seeking the presumption must prove:
  • the item is only available to the opposing party
  • the item contains or shows special information material to the issue, and
  • the item would not be merely cumulative evidence
Destruction of Evidence (Spoliation)

• “All things are presumed against a wrongdoer”

• Court and jury are entitled to resume that documents destroyed in bad faith while litigation is pending would be unfavorable to the party that has destroyed the documents
Creating the Exhibit

• Outsourcing versus creating in-house

• Basic, must-have supplies

• Your computer, the internet, and Kinkos

• PowerPoint or Prezi

• Private companies
Outsourcing vs. Creating In-House

- Get free quotes and learn typical costs
- Create database of services, prices
- Consider amount of time spent on in-house preparation
- Great way to distinguish yourself from some of the more seasoned and less tech savvy partners
- Homemade exhibits give “little guy” persona and are more adaptable
Basic, Must-Have Supplies

“Old School”
- Measuring tape
- Easel
- Dry-erase board, markers, eraser
- Writing sheet, markers
- Exhibit stickers

“New School”
- Laser pointer
- Laptop computer
- Digital camera
- Digital tape recorder
- Digital scanner
Consider Color, Size, Font

• **Red is an attention-getter.** For an important fact, such as a name, an event, or a dollar total to a series of numbers, use red.

• **Present your client in cool, pleasing colors, such as blues and greens.**

• **Exhibit must be big enough to read, but not so big that it’s awkward to maneuver in courtroom**

• **Arial fonts work best for large exhibits**

• **Use 1 size font per exhibit (exception: title can be larger)**
PowerPoint or Prezi

• Requires computer and display monitor equipment
• Compile documents, photos, and videos
• Edit photos for 403 objections
• Quickly retool for closing argument
• Show to opposing counsel in advance to avoid objection
• Print onto transparencies for backup purposes
• Seven words and seven lines rule
Create During the Trial

• Witnesses can create diagrams / maps during the trial

• No need to disclose in advance, but risky. Consider
  • whether the witness is competent to draw a diagram live before a jury, and
  • whether the finished exhibit will be precise enough to be admitted as evidence

• Be prepared for opposing counsel to erase everything you write on dry erase board or chalkboard, before presenting their testimony
Know Your Courtroom

• **How large** must the exhibits be for all members of the jury to see them?

• Is there a **place where** the jury, the judge and the witnesses can all see the exhibits?

• Will the witness have to **leave the stand** to refer to the exhibit? Will the judge readily permit this?

• Is there an **easel** in the courtroom which will hold such an exhibit? How many **television** sets will be needed to show a video tape?

• Can this be done without turning **the lights** down?
Professional Exhibit Companies

COMPANIES

• Trial Exhibits, Inc. in Florida

• High Impact in Colorado

• AKF in Pittsburgh

• Illustrators at hospitals, newspapers

SERVICES

• Create video depositions

• Create models, charts, graphs

• Will handle your digital exhibits
Admissibility

• Must establish condition of object, identification, and chain of custody

• Authentication, Rule 901: “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is”

• Other key rules of evidence: Relevancy (400s), Witnesses (600s), and Experts (700s)
Admitting the Exhibit – Basic Steps

1. **Mark for identification.** Hand the exhibit to the court reporter or premark before you get to the courtroom

2. **Hand to opposing counsel and judge,** or identify it by the pre-marked number

3. Ask the Court for permission to approach, and **hand the exhibit to the witness**

4. Ask the **witness to identify** the exhibit

5. Ask witness questions to **establish the foundation** for its admission

6. **Move for admission** of the exhibit. If you have not done so, hand the exhibit to the judge. Opposing counsel may make objections. Once the document is admitted, you may then question the witness about the contents and substance of the exhibit. Until the exhibit is admitted, such questions are not permitted.

7. Move to publish or **pass the exhibit to the jury.**

Admitting the Exhibit – Advanced Techniques

• Who can authenticate?
  • Anyone can authenticate, identify, establish chain-of-custody

• When can you offer into evidence?
  • Can not offer exhibit into evidence during other party’s case
  • Cf: asking opposing party or judge to avoid recalling witness

• What order should you present the witnesses / exhibits?
  • Generally: negligence, causation, and damages
Using the Exhibit at Trial

• Provide a copy to each juror, when possible

• Consider giving each juror a 3-ring binder and photocopied exhibits pre-punched

• Wait while jurors examine exhibit

• Leave admitted exhibit exposed for lasting impression
Using Expert Witnesses at Trial

• Involve experts in both creation and presentation process

• Determine what order the expert prefers to discuss the exhibits

• Practice, practice, practice
Preserve for Appeal

• You must introduce the exhibit into the record, in the event of an appeal

• Print out or download PC presentation to a CD

• Individually admit all exhibits contained within a presentation

• Photograph whiteboard exhibits before erasing

• Narrate the testimony
Thank You!
For assisting in the research and development of this presentation.

Terrance Falk
• 2014 Graduate of the Duquesne University School of Law
• Research Assistant to Prof. Trychta

Amy Cacich
• Meetings Assistant, Young Lawyers Division
• American Bar Association

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Questions?
If you have any additional questions, please feel free to contact me.

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Assistant Professor of Clinical Legal Skills &
Director of Academic Excellence

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IN THE COURT OF COMMON PLEAS FOR
THE FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
ALLEGHENY COUNTY - CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

VS.

ED JOHNSON,
Defendant.

CP-02-CR-12345-2014
OTN G1234567

MOTION IN LIMINE
TO DETERMINE THE
ADMISSIBILITY OF EVIDENCE

Filed on behalf of the defendant,
Mr. Ed Johnson

Filed before Judge McReynolds
Courtroom 533

Counsel of record for this party:

Kirsha Weyandt
Counsel of Record for Defendant
PA State I.D. # 203826

600 Forbes Avenue
Pittsburgh, Pennsylvania 15282
P: 412 – 396 – 4617
E: weyandtk@duq.edu
MOTION IN LIMINE TO DETERMINE THE ADMISSIBILITY OF EVIDENCE

And now, here comes the defendant, Ed Johnson, ("Defendant"), by and through his attorney, Kirsha Weyandt, and respectfully avers the following in support of the within motion:

1. The defendant is charged in the above-captioned criminal information with one count of homicide (18 Pa.C.S. § 2501), one count of robbery (18 Pa.C.S. § 3701), one count of unlawfully possessing a firearm (18 Pa.C.S. § 6105), and one count of reckless endangerment (18 Pa.C.S. § 2705) stemming from an incident that occurred on June 16, 2013.

2. The defendant's case is currently scheduled for a jury trial before this Honorable Court on October 16, 2014.

3. The defendant anticipates that the following evidence will be proffered at trial by either or both parties: (a) the videotaped testimony of Andre Burse, (b) the testimony of Officer Sandy Follette regarding the child's statements made to her
on June 16, 2013 (c) the testimony of Detective Canofari regarding the child's statements made to him on June 17, 2013, (d) the testimony of forensic interviewers Richelle O'Malley and Julie Fana and (e) two forensic interview reports dated June 17, 2013 and May 13, 2014, respectively.

4. Defense counsel believes that each of these pieces of evidence may be the subject of an evidentiary objection, and thus requests this Honorable Court to rule upon their admissibility in advance of trial.

TESTIMONY OF ANDRE BURSE'S

5. During the course of the police investigation, the police identified Andre Burse as a potential witness. Due to Mr. Burse's ailing health, the Commonwealth sought to preserve his testimony with a video deposition pursuant to Pa.R.Crim.P. 500.

6. On May 3, 2014, Assistant District Attorney Matt Whitaker on behalf of the Commonwealth and Attorney Lewis Shepherd on behalf of the Defendant conducted a tape-recorded deposition of Mr. Burse at the Presbyterian University Hospital in Pittsburgh.

7. The deposition was video recorded and transcribed by a court reporter. Copies of both have been provided to Defense Counsel.

8. After reviewing the tape recording and transcript, Defense Counsel believes that Mr. Burse's pre-recorded testimony should be excluded from the trial as it appears that the witness is not testifying from his own personal knowledge, but rather based his testimony on information he learned from other parties.
9. Pennsylvania Rule of Evidence 602 states that "a witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

10. Moreover, Pennsylvania Rules of Evidence 801-802 prohibit a witness from offering hearsay statements at trial.

11. The defendant contends that most (if not all) of Mr. Burse's testimony is based on hearsay statements and does not stem from his own personal knowledge. Unfortunately, it is virtually impossible to tell when the witness is testifying from his own personal knowledge and when he is repeating information he learned from others. The witness fails to make any distinction between what he observed personally and what he learned from others; rather the witness repeatedly testifies as if he had personal knowledge only to reveal on cross-examination that the information came from an unnamed hearsay source.

12. Moreover, the defendant denies that he ever had a discussion with Mr. Burse. Defense Counsel had already requested Mr. Burse's jail calls and visitor logs in an attempt to substantiate the alleged conversation, but to date those items have not been provided by the jail or the Commonwealth.

13. Thus, the videotaped testimony of Andre Burse should be excluded from trial.

TESTIMONY OF OFFICER FOLLETTE

14. Defense Counsel contends that the testimony of Officer Sandy Follette as it relates to the statements made by the child on June 16, 2013 is admissible as an
exception to the hearsay rule as an excited utterance and/or present sense impression. Pa.R.E. 803(1)-(2).

15. The discovery materials make clear that Officer Follette encountered the child only moments after the shooting, and that he was visibly upset while they spoke.

16. Moreover, should this Court find that the traditional hearsay exceptions do not apply, the defense would argue that the statements are admissible under the Tender Years Hearsay Act, 42 Pa.C.S. § 5985.1(a)(2)(i).

17. A copy of the officer's report, which provides an outline of the anticipated testimony, is attached as Appendix A.

TESTIMONY OF DETECTIVE CANOFARI

18. Defense counsel contends that the testimony of Detective Canofari as it relates to the statements made by the child on June 17, 2010 is admissible as an exception to the hearsay rule as an excited utterance. Pa.R.E. 803(2).

19. Defense contends that the child was still "startled" and did not have time to reflect prior to giving the statement to the Detective. The Defense argues that given the severity of the startling event, and the short elapse in time, that the child was still under the stress of the startling event.

20. Should this Court find that the excited utterance hearsay exception does not apply, the Defense would argue that the statements are admissible under the Tender Years Hearsay Act, 42 Pa.C.S. § 5985.1(a)(2)(i).

21. A copy of the officer's report, which provides an outline of the anticipated testimony, is attached as Appendix B.
TESTIMONY OF FORENSIC INTERVIEWERS

22. The Defense asserts that the testimony of forensic interviewers Richelle O’Malley and Julie Fana is admissible as an exception to the hearsay rule as a statement made for purposes of medical diagnosis or treatment. Pa.R.E. 803(4).

23. The defense believes that the child made the statements to the forensic interviewers for the purposes of determining whether he was in need of victim services, counseling, or similar mental health treatment. This belief is supported by the reports which indicate that the child was referred to the Center for Victims of Violence and Crime and the Center for Traumatic Stress, where he subsequently received counseling.

24. Should this Court find that the traditional hearsay exceptions do not apply, the Defense would argue that the statements are admissible under the Tender Years Hearsay Act, 42 Pa.C.S. § 5985.1(a)(2)(i).

25. A copy of forensic interviewer Richelle O’Malley’s report, which provides an outline of the anticipated testimony, is attached as Appendix C.

26. A copy of forensic interviewer Julie Fana’s report, which provides an outline of the anticipated testimony, is attached as Appendix D.

FORENSIC INTERVIEWS REPORTS

27. The Defense asserts that the two forensic interview reports dated June 17, 2013 and May 13, 2014, respectively are admissible as an exception to the hearsay rule as records of regularly conducted activity. Pa.R.E. 803(6).
28. These reports were generated in the Child Advocacy Center's regular course of business and are of the type typically produced by forensic interviewers.

29. Moreover, the statements contained within these reports are admissible under both the "statement made for purposes of medical diagnosis or treatment" and Tender Years Act exceptions to the hearsay rule, as described in more detail above.

WHEREFORE, counsel for the Defendant requests that this Honorable Court enter an order ruling on the admissibility of the evidence described above.

Respectfully submitted,

Kirsha Weyandt
State I.D. # 203826
ORDER OF COURT

And now, this ________ day of ___________________________, 2014, upon consideration of the foregoing Motion in Limine to Determine the Admissibility of Evidence, it is hereby ORDERED that:

(a) the testimony of witness Andre Burse ________________ (is / is not) admissible at trial.
(b) the testimony of Officer Follette as it pertains to the statements made to her by the child on June 16, 2013 ________________________ (is / is not) admissible at trial.
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(d) the testimony of forensic interviewers Richelle O'Malley and Julie Fana ____________ (is / is not) admissible at trial.
(e) the reports generated by forensic interviewers Richelle O'Malley and Julie Fana ___________________ (are / are not) admissible at trial.

BY THE COURT:

____________________________
Judge Samuel D. McReynolds
CERTIFICATE OF SERVICE

I hereby certify that I am this day serving upon the persons and in the manner indicated below. The manner of service satisfies the requirements of Pa.R.Crim.P. 576.

Department of Court Records – Criminal Division
114 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

The Court Administrator
114 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

The Office of the District Attorney - ADA Matt Whitaker
401 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
(via hand delivery)

The Honorable Samuel D. McReynolds
533 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219
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Date: __________________________  /s/ _____________________________
9
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Creating the demonstrative exhibits

Outsourcing versus creating in-house

Get free quotes and learn typical costs

Create database of services, prices

Consider amount of time spent on in-house preparation

Great way to distinguish yourself from some of the more seasoned and less tech savvy partners

Homemade exhibits give “little guy” persona and are more adaptable

Basic, must-have supplies

“All Old School”: measuring tape, easel, dry-erase board, markers, eraser, writing sheet, exhibit stickers

“All New School”: laser pointer, laptop computer, digital camera, digital tape recorder, digital scanner, PowerPoint or Prezi

Consider Color, Size, Font

Red is an attention-getter. For an important fact, such as a name, an event, or a dollar total to a series of numbers, use red.
Present your client in cool, pleasing colors, such as blues and greens.

Exhibit must be big enough to read, but not so big that it’s awkward to maneuver in courtroom.

Arial fonts work best for large exhibits.

Use 1 size font per exhibit (exception: title can be larger).

PowerPoint or Prezi

Requires computer and display monitor equipment.

Compile documents, photos, and videos.

Edit photos for 403 objections.

Quickly retool for closing argument.

Show to opposing counsel in advance to avoid objection.

Print onto transparencies for backup purposes.

Seven words and seven lines rule.

Create During the Trial

Witnesses can create diagrams / maps during the trial.

No need to disclose in advance, but risky. Consider (i) whether the witness is competent to draw a diagram live before a jury, and (ii) whether the finished exhibit will be precise enough to be admitted as evidence.

Be prepared for opposing counsel to erase everything you write on dry erase board or chalkboard, before presenting their testimony.

Know Your Courtroom

How large must the exhibits be for all members of the jury to see them?

Is there a place where the jury, the judge and the witnesses can all see the exhibits?

Will the witness have to leave the stand to refer to the exhibit? Will the judge readily permit this?

Is there an easel in the courtroom which will hold such an exhibit? How many television sets will be needed to show a video tape?
Can this be done without turning the lights down?

Professional Exhibit Companies

Examples: Trial Exhibits, Inc. in Florida, High Impact in Colorado, AKF in Pittsburgh, and illustrators at hospitals, newspapers

Services: create video depositions, create models, charts, graphs, will handle your digital exhibits

Admitting & using the exhibits at trial

Admissibility

Must establish condition of object, identification, and chain of custody

Authentication, Rule 901: “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is”

Other key rules of evidence: Relevancy (400s), Witnesses (600s), and Experts (700s)

Admitting the Exhibit – Basic Steps

1. Mark for identification. Hand the exhibit to the court reporter or premark before you get to the courtroom

2. Hand to opposing counsel and judge, or identify it by the pre-marked number

3. Ask the Court for permission to approach, and hand the exhibit to the witness

4. Ask the witness to identify the exhibit

5. Ask witness questions to establish the foundation for its admission

6. Move for admission of the exhibit. If you have not done so, hand the exhibit to the judge. Opposing counsel may make objections. Once the document is admitted, you may then question the witness about the contents and substance of the exhibit. Until the exhibit is admitted, such questions are not permitted.

7. Move to publish or pass the exhibit to the jury.

Admitting the Exhibit – Advanced Techniques

Who can authenticate? Anyone can authenticate, identify, establish chain-of-custody.

When can you offer into evidence? Can not offer exhibit into evidence during other party’s case. Cf: asking opposing party or judge to avoid recalling witness.
What order should you present the witnesses / exhibits?
Generally: negligence, causation, and damages

Using the Exhibit at Trial

Provide a copy to each juror, when possible
Consider giving each juror a 3-ring binder and photocopied exhibits pre-punched
Wait while jurors examine exhibit
Leave admitted exhibit exposed for lasting impression

Using Expert Witnesses at Trial

Involve experts in both creation and presentation process
Determine what order the expert prefers to discuss the exhibits
Practice, practice, practice

Preserve for Appeal

You must introduce the exhibit into the record, in the event of an appeal
Print out or download PC presentation to a CD
Individually admit all exhibits contained within a presentation
Photograph whiteboard exhibits before erasing
Narrate the testimony