

Effective Use of Exhibits at the Trial Level: An Appellate Lawyer's Perspective

By: Abbott Marie Jones
Christian & Small LLP
Birmingham, Alabama

Lawyers who spend the bulk of their time handling litigation at the trial level are so experienced at the song and dance of authenticating and admitting evidence at trial that most could probably do it in their sleep. Trial litigators are also skilled at asking the right questions of witnesses to help juries understand what various pieces of evidence mean and how they fit into the entire body of evidence presented at trial.

Appellate lawyers typically do not see the exhibits until the trial court clerk has finished compiling the record on appeal, at which point we spend many hours poring over many hundreds or thousands (or hundreds of thousands) of pages of the entire record looking for the gems. Handling appeals for many different trial lawyers, an appellate lawyer is exposed to many varying techniques for admitting or excluding evidence from the record – the good, the bad, and the ugly.

What follows are a few “best practices” for the effective use of exhibits at the trial level, from the appellate perspective:

- Exhibits submitted with summary judgment briefs or other motions
 - Consider how the exhibit will appear in the appellate record. Many courts compile records electronically, combining all pleadings and transcripts into large PDFs. When scrolling through a PDF, it can be difficult to determine whether a document is a pleading or an exhibit to a pleading.
 - To make exhibits stand out, consider stamping them with a footer label that shows on each page of the exhibit – e.g., Exhibit 2 to Summary Judgment Motion. This will help your exhibits stand out in the record, especially if the same documents are submitted to the court in support of several different pleadings or if some of your exhibits are copies of prior pleadings.
- Marking exhibits for easy references throughout trial and then on appeal
 - If there are voluminous documents that you are putting into evidence, but only part of the document is key, consider marking the key part as a unique exhibit number – e.g., the key drawings in a building blueprint.
 - Many appellate courts require parties to print and submit “record excerpts” of the items referenced in the briefs. You can cut down on printing costs and help keep the appellate court focused on the essentials by marking key portion of a document as a separate exhibit.
 - Consider a sequence of exhibit numbers to present correspondence chronologically, or grouping email chains/letters and their responses together as one exhibit, to facilitate future references.

- Discussing exhibits in a way that the pertinent information is captured on the record
 - Pointing at a large blowup may be helpful for the jury; but saying, “This right here is the crucial area,” does not help the appellate court see what you are seeing at trial.
 - Be specific when referring to a certain section of a document or area of a photograph; pretend there is a blind person in the courtroom and you must communicate to them what is important.
 - If it is difficult to describe with words what a witness is pointing at, give the witness a pen or highlighter, and have them write on a copy of the exhibit – e.g., circle important areas, draw a line to connect the dots, or highlight key provisions. Then have that marked-on version admitted as an exhibit, too (e.g., if it’s Exhibit 34, have the marked version admitted as Exhibit 34-A).
- Making sure demonstrative and oversized exhibits make it into the court’s record
 - Be sure to describe large exhibits thoroughly on the record. When possible, provide shrunken copies for the court’s record.
 - Make sure the clerk or bailiff is keeping oversized or physical exhibits in a safe place in the event an appeal is taken, and that the clerk sends them to the appellate court for review as part of the record.

Hopefully these ideas will help you ensure a clear record and make things easier on the appellate courts reviewing your cases.

[Abbott Marie Jones](#) is an attorney with Christian & Small LLP in Birmingham, Alabama, where she is a member of the appellate litigation practice group.

For more information about Christian & Small LLP, please visit the [International Society of Primerus Law Firms](#).