

EVIDENTIARY FOUNDATION

THE MECHANICS

1. Mark the Exhibit. Usually, this is accomplished by handing the item to the clerk and asking him/her to mark it as an exhibit. The clerk will then announce (for the record) that "Exhibit ____ has been marked". Occasionally, exhibits are pre-marked by counsel before the trial. Once it has been marked, refer to the item as "exhibit ____" until it has been otherwise identified on the record.
2. Show to Counsel.
- *3. Ask permission to approach the witness.
4. Show the witness the exhibit. The record must reflect what you are doing. (E.g. "Handing you what has been marked as exhibit ____, I ask if you can identify it.")
5. Lay foundation. The manner in which you do this will vary with the exhibit and purpose for which you are offering it. See the "Issues" handout.
6. Offer the exhibit. Mechanics: Do not "move" the exhibit into evidence. ("I offer exhibit ____".)
Procedure: This is a critical moment for your opponent. They may do one of three things: Voir Dire, Object, Not Object.
- *7. Request that the ID symbol be struck. In jurisdictions that where the exhibit is only called "exhibit ____" after it is admitted. In these jurisdictions, before admission, the exhibit is referred to as "What has been marked for identification as exhibit ____".
8. Ask permission to show to the jury/court.
9. Show to the jury/judge. It is recommended that you have at least four (4) copies of the exhibit to facilitate the use of the exhibit. One copy each for you, opposing counsel, judge, and witness. The witness' copy is the official exhibit which the clerk actually marks.

* Optional depending on jurisdiction and judge.

FOUNDATION LEGAL ISSUES

1. Relevance. 401.
2. Authentication. 901 et seq.
3. Best Evidence Rule. 1001 et seq
4. Hearsay. 801 et seq
5. Privilege.
Parole evidence, dead-man statute, attorney work-product, Miranda, etc.

Instant Evidence

Testimonial - Knowledge - “How do you know...”

Documentary – Authenticity – “Is the document True and Correct?”

Real Evidence - Identity –

Is the exhibit in the “Same or Substantially Similar Condition as....”

Does the exhibit “Fairly & Accurately Depict...”

Demonstrative – Clarification –

“Would the exhibit assist you in explaining your testimony to the jury?”

Examples:

Documentary - Authenticity

Government Documents 803(8-10)

Business Records 803(6-7)

Published Writings 803(17)

Legal Documents

Personal Documents

Past Recollection Recorded 803(5)

Ancient Documents 803 (16)

Family History 803 (11-13)

Admissions 801(d)(2)

Real Evidence

Objects

Samples

People (body parts)

Animals

Views

Photographs

Field trips & videos

On-Site Recordings

Surveillance Video/Audio

Manual Video Tape

Transportation Device (black box)

Electro-magnetic Transmissions.

Demonstrative - Clarification - Looks Like

Diagrams

Exemplars

Animations

Reconstruction/Reenactments

Adapted from Mark Dumbroft’s “Instant Evidence”