

Bifferato Trial Practice Forum October 18, 2019
Presentation of Evidence

A. Choosing your Best Evidence

1. Story telling function
 - a. What is the role of evidence in the story?
 - b. Choosing evidence in light of length of trial, to tell the story
2. The analysis:
 - a. [Know the rules]
 - b. Is it admissible?
 - c. What is the foundation?
 - d. How do you submit it into evidence?
3. Quick coverage of pretrial procedures and motions in limine
 - a. Useful pretrial stipulations
 - i. The Court's Form 46 Pretrial Stipulation
 - ii. Understand judge's preferences and request changes that make sense for your case
 - iii. Minimize disputes at trial by stipulating to as much as possible
 - b. Previewing disputes and objections for the Court
 - i. Pretrial Stipulation – stipulating to authenticity and/or admissibility
 - ii. Motions in Limine
 - c. Motions in Limine
 - i. Pitfalls
 - a. The grand strategy – scalpel, not hammer
 - b. Don't rest key pieces of case on this
 - ii. When are they effective?

B. Admissibility

1. The importance of reviewing/referencing the D.R.E.
2. D.R.E. may differ from the F.R.E.
3. Again, stipulations help streamline

C. Foundation

1. Shows the exhibit is what it purports to be
2. Goes hand in hand with authentication. See D.R.E. 901 & 902.
3. First identify, then authenticate.
4. As a practical matter, this helps convey the story and put evidence in context.

D. Submission of Exhibits

1. Timing
 - a. Perils of stipulating to the submission of exhibits at the end of trial
 - b. When to move for submission otherwise
2. Method of moving admission of exhibits
 - a. General
 - i. Announce the exhibit you would like to introduce

- ii. Permit opposing counsel to view the exhibit. (You should have at least enough copies of tangible documents for opposing, the clerk, the Court, the witness, and yourself.)
 - iii. Ask the clerk to mark the exhibit for identification
 - iv. Authenticate the exhibit through witness testimony or other method specified in D.R.E. 901 or 902, unless it is self-authenticating.
 - a. For witnesses:
 - i. Do you know what this is?
 - ii. What is it?
 - iii. How do you know what this is?
 - iv. [Does it fairly and accurately depict_____ at the relevant time? / Is it insubstantially the same condition as it was when you last saw it?]
 - v. Offer the exhibit in evidence
 - vi. Publish the exhibit by showing it to the trier of fact
 - b. Special considerations for tangible exhibits
 - i. Keeping them out of the jury's view until they are admitted
 - ii. No questions regarding them until they are admitted
 - iii. For a civil trial, may ask judge what they want
 - c. Issues and errors that may stem from failure to move exhibits into evidence
 - i. The trier of fact cannot consider the evidence
 - ii. You cannot question witnesses regarding the contents of documents not in evidence
- E. Effective use of courtroom technology to present evidence
 - 1. Elmo
 - 2. Trial Director or similar software
 - 3. Preparation
 - a. Coordination with JIC
 - b. Practice – even in the courtroom
 - c. Make sure the technology makes your presentation more clear, not choppy or more confusing
- F. Objections
 - 1. Listen and pay attention (everyone on your team should)
 - 2. Anticipate objections at the pretrial stage
 - a. Helpful methods of organizing objections and anticipated responses to objections, e.g. charts.
 - b. Consider what topics are a problem for you and where other side might cut a corner
 - 3. Proper foundations for impeachment or prior inconsistent statements
 - 4. Motions to strike and curative instructions
- G. Working your evidence into opening and closing statements
 - 1. Slide shows

2. Demonstrative posters, etc.
3. Elmo
4. Be sure it doesn't distract and enhances the presentation
 - a. Maintain a good flow
 - b. No reading
5. What crosses the line?
 - a. E.g. Gestures, demonstrations

Materials

- DRE/FRE difference handout
- Common Objections and Responses Quick Reference
- Relevant case law