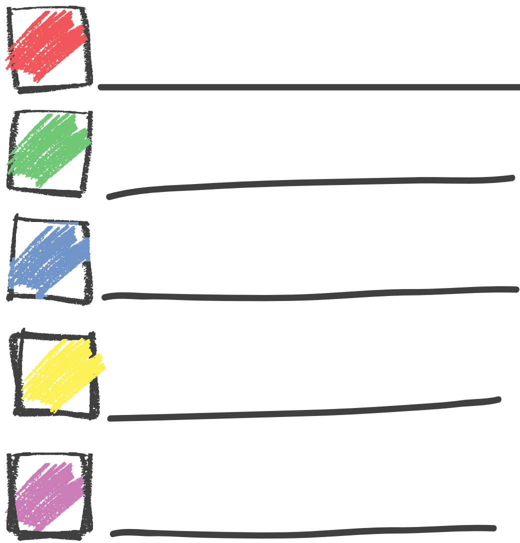
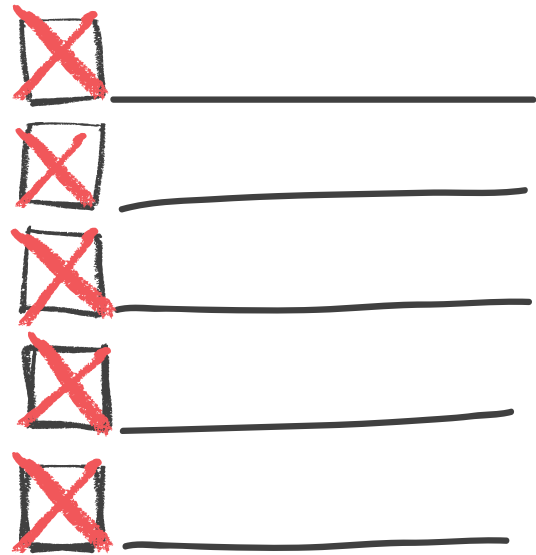
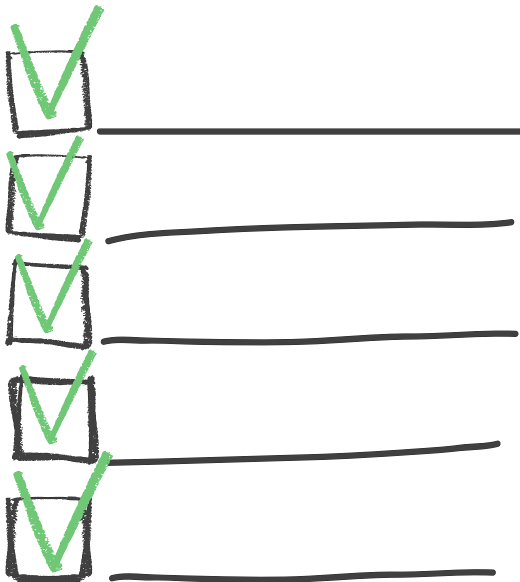
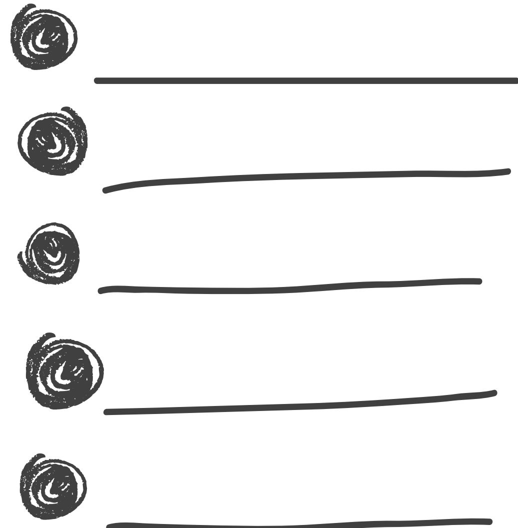

©iStock.com/Nastyaaroma

Drafting and Exchanging Exhibit Lists for a Federal Civil Trial

Creating exhibit lists is a critical part of preparing for a federal civil trial. Failure to select and review key exhibits and thoroughly consider the evidentiary issues involved when preparing an exhibit list can negatively impact counsel's presentation of evidence at trial and the overall outcome of the case. At the same time, overlooking the importance of properly scrutinizing the opposing party's exhibit list similarly can lead to unfavorable consequences. To avoid potential objections to exhibits from opposing counsel and the inappropriate exclusion or admission of exhibits, counsel should understand the main considerations for identifying exhibits and drafting and exchanging exhibit lists.

© 2022 Thomson Reuters. All rights reserved.

JONATHAN S. TAM
PARTNER
DECHERT LLP

Jonathan is a partner in the Products Liability and Mass Torts group in the firm's San Francisco office. He represents product manufacturers, including major pharmaceutical, medical device, and consumer electronics companies, in complex and high-stakes mass tort product liability litigation, consumer fraud actions, and class actions.

KIMBERLY O. BRANSCOME
PARTNER
DECHERT LLP

Kimberly is managing partner of the firm's Los Angeles office and is a member of the firm's Products Liability and Mass Torts group. Her experience includes serving as lead trial counsel in a variety of complex litigation matters and advising clients from a broad range of sectors, including the pharmaceutical, consumer products, oil and gas, and automotive industries.

JAY BHIMANI
PARTNER
DECHERT LLP

Jay is a partner in the Products Liability and Mass Torts group in the firm's Los Angeles office. He counsels clients across a range of industries on commercial litigation matters, with a focus on product liability and mass torts, and has substantial experience in securities litigation. Jay's trial work has resulted in notable defense verdicts.

ALLIE K. OZUROVICH
ASSOCIATE
DECHERT LLP

Allie is an associate in the Products Liability and Mass Torts group in the firm's Los Angeles office. She focuses her practice on complex commercial litigation matters, with an emphasis on product liability. She is experienced in all aspects of litigation, including fact and expert discovery, depositions, dispositive motions, trial, and appellate briefing.

Exhibit lists, which are formal documents that list the exhibits a party may use at trial, are one of the most critical pretrial documents in a federal civil trial. Before trial, parties must file and exchange an exhibit list as part of their pretrial disclosures under Federal Rule of Civil Procedure (FRCP) 26(a)(3). Parties must generally identify all of the exhibits that they expect to present at trial and those they may offer if the need arises, with some exceptions (FRCP 26(a)(3)(A)(iii)).

The process of drafting and exchanging an exhibit list involves many considerations, including how to format the list, identify which evidence gathered during discovery to include on the list, determine whether the potential exhibits are admissible under the Federal Rules of Evidence (FRE), and lodge objections to exhibits and potentially resolve those objections with opposing counsel before trial.

This article addresses key issues and considerations relevant to exhibit lists in a federal civil trial, including:

- The rules generally applicable to exhibit lists in federal civil litigation.
- The types of materials that counsel may list as exhibits.
- Drafting an exhibit list.
- Exchanging exhibit lists with opposing counsel.
- Stipulating with opposing counsel on the admissibility of certain exhibits.
- Handling objections to the exhibits listed on both counsel's and opposing counsel's exhibit lists.

APPLICABLE RULES

Before beginning the process of preparing exhibits for use in federal civil litigation, counsel should review:

- FRCP 26(a)(3), which governs pretrial disclosures, including exhibit lists.
- The FRE, which govern the admissibility of evidence.
- Applicable rules that may supplement the FRCP and the FRE and address the format, length, deadlines, procedure, and content for drafting and exchanging exhibit lists, such as:
  - the district court's local rules;
  - the district court's standing, administrative, or general orders;
  - the district court's case management/electronic case filing (CM/ECF) rules;
  - the individual practice rules for the presiding judge; and
  - any case-specific orders.

District courts typically post:

- Their local rules, standing orders, judges' individual rules, and required or sample forms on their websites.
- Case-specific orders on the electronic docket for a particular case, which counsel may access through CM/ECF.

© 2022 Thomson Reuters. All rights reserved.

TYPES OF EXHIBITS

The types of exhibits counsel may list and ultimately use in a trial vary depending on the case. Nearly anything can become an exhibit. Examples include:

- Documents, such as business records created in the ordinary course of business or government-created documents.
- Journals and scientific articles.
- Photographs.
- Electronically stored information, such as Facebook messages or emails exchanged between the parties.
- Physical evidence, such as a product at issue in the case or a notebook that a party produces.
- Video and audio recordings.

Parties must generally disclose in advance all exhibits they expect to use at trial, typically in the form of an exhibit list. A major exception to this rule is where a party intends to use an exhibit solely for impeachment, in which case the party does not need to disclose it on an exhibit list.

However, counsel can introduce evidence as an exhibit in a federal trial only if:

- The exhibit is admissible under the FRE (see below *Admissibility of the Exhibits*).
- The court overrules any objections to the exhibit from other parties (see below *Grounds for Objecting to Exhibits*).
- The court did not grant a motion *in limine* or issue any other pretrial orders that would preclude introduction of the exhibit (see below *Addressing Objectionable Exhibits Through Motions in Limine*).
- The parties specifically stipulate that counsel can use the exhibit even if it is not admissible under the FRE (see below *Stipulating with Opposing Counsel*).

DRAFTING AN EXHIBIT LIST

The FRCP disfavor surprises, especially at trial. For this reason, parties must generally disclose in advance all exhibits they expect to use at trial, typically in the form of an exhibit list. A major exception to this rule is where a party intends to use an exhibit solely for impeachment, in which case the party does not need to disclose it on an exhibit list. (FRCP 26(a)(3); see below *Contents of the Exhibit List*.)

Counsel should not confuse the final exhibit list submitted before trial with a party's broader initial disclosure obligation under FRCP 26(a)(1), which requires the parties to exchange certain information early on in a case (for more information, search Initial Disclosures (Federal) on Practical Law).

When drafting the exhibit list, counsel should:

- Properly format the exhibit list.
- Ensure that the exhibit list contains all exhibits that counsel may use at trial (with certain exceptions).
- Evaluate the admissibility of each listed exhibit.

FORMAT OF THE EXHIBIT LIST

Unless the court orders otherwise, an exhibit list must be:

- In writing.
- Signed by counsel.
- Served like any other document in federal court.

(FRCP 26(a)(4).)

The basic format of exhibit lists is generally similar across federal district courts. However, the exact requirements may vary depending on the district court's and presiding judge's rules and orders. For example, some district courts and judges may require counsel to use a specific form for exhibit lists. Before preparing an exhibit list, counsel should review the applicable rules and district court website to determine if the court or presiding judge has specific formatting rules or provides required or sample forms (see above *Applicable Rules*).

Courts often require or prefer parties to draft the exhibit list in a table or chart format with columns for each type of required information. For each exhibit, the exhibit list may need to contain:

- A designation of the party offering the exhibit (for example, plaintiff or defendant), which is often abbreviated, and the exhibit number.
- The Bates number or Bates number ranges for the exhibit.
- The date of the exhibit, if applicable.
- A description of the exhibit.
- Information identifying the deposition at which the exhibit was previously used, if applicable (for example, John Doe Deposition or 6/1/21 John Doe Deposition), as well as the number of the exhibit as marked during the deposition.
- An indication of whether the exhibit is sealed and, if so, the basis for sealing it (for example, because the document is confidential).
- An indication of whether the exhibit has redactions and, if so, the basis for the redactions (for example,

© 2022 Thomson Reuters. All rights reserved.

Trial Exhibit No.	Beginning Bates No.	End Bates No.	Document Date	Description	Deposition Exhibit No.	Sealed/ Basis	Redactions/ Basis	Objections	Counter-Objections	Ruling on Objections
DX-0001	DEF00001	DEF00002	9/10/2020	Email from Employee John Doe to Employee Jane Doe	John Doe Deposition, Ex. 5	Yes/ Confidential	None			
DX-0002	GOV0001	GOV0051	10/25/2018	Government Report on Company	Bill Smith Deposition, Ex. 4	No	None			

because the exhibit contains personal information, such as a Social Security number).

- A blank space or column to enter the following once the parties have exchanged exhibit lists (see below *Exchanging Exhibit Lists with Opposing Counsel*):
  - opposing counsel's objections;
  - counsel's counterarguments to those objections; and
  - the court's ruling as to whether to admit the exhibit into evidence.

For example, the contents of an exhibit list may appear as shown in the box above.

The text of FRCP 26(a)(3)(A)(iii) also requires parties to indicate whether they expect to offer each item at trial or may offer the item only if the need arises. However, in practice, doing so may not always be feasible. For example, large-scale litigation often necessitates voluminous exhibit lists because counsel cannot reasonably anticipate all of the ways in which the evidence may unfold at trial. In these cases, many courts do not require parties to indicate on their exhibit lists which exhibits they expect to offer at trial. Courts in these cases may instead require that counsel identify a set of priority exhibits for which they would like the court to render rulings on admissibility.

CONTENTS OF THE EXHIBIT LIST

A pretrial exhibit list should include all exhibits counsel may use in court, including summaries of other evidence (FRCP 26(a)(3)(A)(iii)). However, an exhibit list does not need to list exhibits that counsel plans to use solely for impeachment (FRCP 26(a)(3)(A)).

Before drafting an exhibit list, counsel should organize and review all of the documents and information collected in discovery. To help identify critical exhibits for each element of the claims and defenses in a case, counsel should consider preparing a proof matrix (sometimes called an order of proof) (for a sample proof matrix, with explanatory notes, search Proof Matrix on Practical Law).

When compiling an exhibit list, counsel should:

- Include all essential exhibits.
- Avoid including cumulative or unnecessary exhibits, especially if they may reveal trial strategy to opposing counsel.
- Ensure that the list does not contain duplicate exhibits.
- Avoid including contradictory exhibits that the other side can exploit at trial.
- Carefully review longer exhibits to ensure they do not contain harmful material.

If counsel anticipates even a remote chance of needing to use an exhibit at trial, counsel should include the exhibit on the final exhibit list or risk the court later excluding the exhibit (see, for example, *Paulsen v. State Farm Ins. Co.*, 2008 WL 449783, at *4-5 (E.D. La. Feb. 15, 2008); *Aid for Women v. Foulston*, 2005 WL 6964192, at *2, *4-5 (D. Kan. July 14, 2005)). Courts are likely to exclude an exhibit that does not appear on the list unless one or more of the following limited circumstances applies:

- Counsel seeks to use the exhibit solely for impeachment (see, for example, *Grand Slam Club/ Ovis v. Int'l Sheep Hunters Ass'n Found., Inc.*, 2008 WL 11375375, at *2 (N.D. Ala. Jan. 10, 2008)).
- Counsel seeks to use the exhibit solely for rebuttal purposes (see, for example, *Jeffries v. Pac. Indem. Co.*, 1997 WL 774459, at *1-2 (4th Cir. Dec. 17, 1997)).
- Counsel shows that the exhibit was omitted from the list inadvertently and the omission does not prejudice another party (see, for example, *Goodloe v. Daphne Utils.*, 2015 WL 2165806, at *4-6 (S.D. Ala. May 7, 2015); *Moore v. BASF Corp.*, 2012 WL 4344583, at *1, *5 (E.D. La. Sept. 21, 2012)).
- Critical evidence is discovered after submission of the exhibit list that could not have been discovered beforehand, and not allowing introduction of the exhibit would result in manifest injustice (see, for example, *Xiong v. Lincoln Nat'l Life Ins. Co.*, 2009 WL 3367487, at *2 (E.D. Cal. Oct. 19, 2009); *Am. Family Mut. Ins. Co. v. TeamCorp., Inc.*, 2008 WL 11363650, at *2 (D. Colo. Dec. 18, 2008)).

Despite the risk of exclusion, an exhibit list should not contain every piece of discovery collected. To avoid objections, motion practice, and the ire of the court, counsel must exercise judgment and find a careful balance between an exhibit list that is overinclusive and underinclusive. Courts may reject lengthy exhibit lists and require parties to pare them down or face

© 2022 Thomson Reuters. All rights reserved.

sanctions (see, for example, *Powell v. Carey Int'l, Inc.*, 547 F. Supp. 2d 1281, 1289 (S.D. Fla. 2008), aff'd, 323 F. App'x 829 (11th Cir. 2009)).

ADMISSIBILITY OF THE EXHIBITS

Counsel should ensure that each exhibit on the list is admissible and anticipate objections to the extent possible (see below *Grounds for Objecting to Exhibits*). To be admissible, the exhibit:

- Must be:
  - relevant (FRE 401 and FRE 402); and
  - authentic (FRE 901 and FRE 902).
- Must not:
  - have probative value that is outweighed by a danger of unfair prejudice or other concerns (FRE 403);
  - consist of inadmissible hearsay (FRE 801 to FRE 807);
  - violate the best evidence rule (FRE 1001 to FRE 1008); or
  - be protected from disclosure by the attorney-client privilege or work product doctrine.

EXCHANGING EXHIBIT LISTS WITH OPPOSING COUNSEL

To provide each party with an opportunity to object to the admissibility of another party's listed exhibits, parties must exchange and promptly file their final exhibit lists at least 30 days before trial, unless the court orders otherwise. Courts may require parties to submit their exhibit lists as part of the final pretrial order (for more information, search Final Pretrial Order Under FRCP 16(e): Overview on Practical Law). After exchanging and filing the exhibit lists, the parties then have 14 days, unless the court sets a different time, to lodge any objections to the admissibility of another party's listed exhibits and the grounds for the objections. (FRCP 26(a)(3)(B); see below *Grounds for Objecting to Exhibits*.)

Courts typically set their own procedures for the exchange of exhibit lists and objections to exhibits, with requirements for:

- The formatting of exhibit lists and objections.
- The timing and nature of the exchanges.
- Whether the parties should present the exhibit lists as a joint submission or separately.

Most courts require that the parties file and serve their exhibit lists as PDFs. In addition to filing and serving PDF versions, the parties should consider negotiating a simultaneous exchange of native copies of their exhibit lists in an editable format (for example, in Microsoft Word or Microsoft Excel). This enables the parties to enter their objections directly into their opponent's document without having to first convert opposing counsel's PDF to an editable format, which can often result in lost or misplaced text and formatting issues. The parties can then easily convert the document back into a PDF for serving and filing.

STIPULATING WITH OPPOSING COUNSEL

Many cases involve dozens or even hundreds of exhibits. To save time and resources in these cases and to minimize objections, counsel should consider pursuing an agreement or a stipulation with opposing counsel before trial to establish the parameters for exhibits and admissibility. For example, the parties may consider agreeing to:

- **Dispense with the need to list exhibits for cross-examination.** The parties may choose to enter into a broad agreement that materials used on cross-examination of witnesses do not need to be on the exhibit lists, so as to preserve overall case strategy and attorney work product before cross-examination.
- **Not challenge certain exhibits.** The parties may agree in advance to not object to certain categories of exhibits at trial because the exhibits satisfy some or all of the admissibility requirements that the parties set out in their stipulation.
- **Not challenge the authenticity of certain exhibits.** Although strategic purposes may exist for raising authenticity challenges or forcing opposing counsel to take all of the authentication steps that applicable rules require, it may be more practical and efficient to stipulate to the authenticity of select evidence.
- **Treat certain documents as business records.** Both parties may benefit from the efficiency of agreeing before trial to treat a series of documents as business records, such as those that appear on company letterhead and are authored by witnesses who were authorized to make such records. Unless the status of a document as a business record is truly in dispute, reaching an agreement can help streamline the presentation of evidence at trial, which judges and jurors both appreciate. This type of agreement eliminates the need to call a records custodian to testify about the authenticity of a document, which can be tedious, disrupt the flow of the trial, and waste precious time in the trial that the parties could otherwise use to focus on the merits of the case.
- **Exchange a set of priority exhibits.** Particularly in cases with voluminous exhibits, it may be prudent to exchange with opposing counsel a set number of priority exhibits (for example, 20 to 50) that both parties can review and determine in advance whether to stipulate to their admissibility.
- **Exchange witness materials prior to the witness's testimony.** Especially in a long trial with many witnesses, it may be beneficial to enter into an agreement with opposing counsel to disclose a certain number of days before calling a witness all exhibits that counsel anticipate using on that witness's direct examination, as well as any demonstrative aids that

© 2022 Thomson Reuters. All rights reserved.

counsel intend to use with the witness (for example, a slide presentation).

The benefits of pursuing stipulations or agreements with opposing counsel may include allowing the parties to:

- Resolve evidentiary objections outside of court.
- Reduce the number of sidebars to address evidentiary issues at trial.
- Engage in more efficient and direct cross-examinations.

Addressing carefully structured classes of exhibits instead of individual exhibits may expedite the negotiation process on issues like agreeing to authenticity or to treat certain documents as business records. This is especially critical when piecemeal approaches are not practical due to time or resource constraints.

However, counsel should enter into any evidentiary stipulations cautiously. The stipulation should:

- Memorialize the nature and scope of the agreement and clearly define the parties' agreed-on parameters.
- Clearly describe what the parties are agreeing to regarding distinct issues such as authenticity, foundation, relevance, and overall admissibility. For example, a stipulation that evidence is authentic does not necessarily mean that the parties have agreed that the exhibit is admissible.

Taking these steps reduces surprises and the potential for opposing counsel to use the stipulation in court to introduce an exhibit that the parties did not address in their agreement or to improperly argue that the parties agreed to the admissibility of certain evidence when they did not.

Counsel should also consider asking the court to enter any stipulation about exhibits as a binding and enforceable order, although many courts enforce voluntary stipulations even when not issued as orders. If the parties seek a court order, counsel should submit a proposed order for the court with the motion. Some courts may require parties to include any stipulations or agreements about exhibits (including those addressing the exchange of exhibit lists, objections, and how the parties will handle exhibits at trial) in the final pretrial order.

Even if not required, and subject to the court's approval, counsel may still wish to consider including stipulations in the pretrial order that address exhibit-related items, such as whether:

- Photocopies can be used instead of originals.
- Certain exhibits should only be admissible as to certain parties. Although generally any party can use an exhibit already admitted into evidence even if another party initially introduced the exhibit, in some cases, such as those involving multiple defendants, the parties may agree or seek an instruction that a particular exhibit is only admissible as to a certain defendant.
- A party can object to another party's introduction into evidence of an exhibit that is already on the objecting party's list of exhibits.

Search Evidentiary Stipulation and Proposed Order for a sample stipulation and proposed order that parties can use to memorialize and enforce their pretrial agreements on admissibility or authenticity, with explanatory notes and drafting tips.

Counsel should consider pursuing an agreement or a stipulation with opposing counsel before trial to establish the parameters for exhibits and admissibility.

HANDLING OBJECTIONABLE EXHIBITS ON THE LIST

Counsel should anticipate making and receiving objections to exhibits. When addressing exhibits with the opposing party, counsel should:

- Know the common grounds for objecting to exhibits.
- Understand the process for objecting to exhibits.
- Negotiate with opposing counsel to try to resolve objections without court intervention.
- Consider bringing a motion *in limine* to obtain a court ruling where the parties are unable to resolve objections in advance.

GROUNDS FOR OBJECTING TO EXHIBITS

Common grounds for objecting to exhibits include objections based on:

- **Lack of authenticity.** This issue may arise especially where a third party produced the exhibits. For some exhibits, it may be necessary to authenticate materials using witness testimony from individuals (such as record custodians) who can explain the source of the exhibit and how the exhibit was produced in the case. For other exhibits, authenticity may be evident from the face of the exhibit or from circumstantial evidence. Where possible, the parties should consider stipulating to an exhibit's authenticity before trial. (For more on authenticating evidence, search Evidence in Federal Court: Overview and E-Discovery: Authenticating Electronically Stored Information on Practical Law.)
- **Hearsay.** Hearsay statements, including in exhibits, are generally inadmissible absent an applicable exception

© 2022 Thomson Reuters. All rights reserved.

under FRE 802. This is because they are statements made out of court that cannot be tested through cross-examination and are therefore not sufficiently reliable. (See *Rodríguez v. Boehringer Ingelheim Pharms., Inc.*, 425 F.3d 67, 76 (1st Cir. 2005); *Smart & Assocs., LLC v. Indep. Liquor (NZ) Ltd.*, 226 F. Supp. 3d 828, 839 (W.D. Ky. 2016); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 563 (D. Md. 2007).) There are several ways to overcome a hearsay objection to an exhibit, including by:
- establishing that the party is not offering the exhibit for the truth of the matter asserted, but instead for another purpose, such as to establish notice to the recipient or to show the declarant's state of mind (FRE 801);
- establishing that the exhibit meets one of the many exceptions to the rule against hearsay set out in FRE 803 (such as because it is a business record, a medical record made for purposes of diagnosis, a public record, or an ancient treatise) (see, for example, *Kim v. JP Morgan Chase Bank N.A. (In re Kim)*, 809 F. App'x. 527, 540 (10th Cir. 2020)); or
- offering to redact or remove the hearsay portion of the exhibit if the rest of the exhibit is non-hearsay or otherwise admissible.

- **Lack of relevance.** To be admissible, an exhibit must be relevant to a case. Because the bar for relevance is low, to overcome this objection, counsel need only establish that the exhibit tends to make a consequential fact more or less probable than it would be without the exhibit. (FRE 401.) When evaluating a relevance objection to an exhibit, counsel should think through:
  - the pertinent elements of each claim or defense; and
  - how that exhibit supports or rebuts a particular component of the claim or defense.
- **Lack of foundation.** A lay witness should have personal knowledge of an exhibit to testify about that exhibit at trial (FRE 602). Whether or not a witness who has such knowledge (sometimes called a sponsoring witness) is required for exhibits may vary from court to court. Many courts require that lay witnesses have the requisite personal knowledge to describe and explain the contents of a document (see, for example, *Sullivan v. Warminster Twp.*, 461 F. App'x. 157, 162-63 (3d Cir. 2012); *United States v. Begay*, 42 F.3d 486, 502 (9th Cir. 1994); *United States v. Pac. Gas & Elec. Co.*, 2016 WL 3903384, at *2-6 (N.D. Cal. July 19, 2016); *Corning Inc. v. SRU Biosystems*, 2005 WL 2465900, at *8 (D. Del. Oct. 5, 2005); *BD v. DeBuono*, 193 F.R.D. 117, 132-33 (S.D.N.Y. 2000)). Additionally, rules may vary where an exhibit is admitted into evidence with one witness and counsel then attempts to use that exhibit with another witness who is unfamiliar with the document. If the court's rules are not clear or do not expressly require a sponsoring witness, counsel should consider negotiating an agreement with opposing counsel to require a sponsoring witness for each document introduced into evidence. This can help prevent:
  - any objections to foundation; and
  - attempts by opposing counsel to admit a series of documents without a witness and making arguments directly based on these documents during the opening statement and closing argument.
- **Information that requires speculation or legal conclusions.** To be admissible, an exhibit cannot contain material that is speculative or renders a legal conclusion (see, for example, *Virgin Mobile USA, L.P. v. Keen*, 447 F. Supp. 3d 1071, 1080-82 (D. Kan. 2020)). However, if the exhibit is relevant for another purpose, such as to show motive, counsel may be able to overcome this objection.
- **Undue prejudice.** Exhibits may be excluded from evidence if their probative value is outweighed by undue prejudice (FRE 403). Examples of exhibits that are commonly excluded under FRE 403 include those that:
  - are meant to inflame the jury's emotions (see, for example, *Escobar v. Airbus Helicopters SAS*, 2016 WL 6080612, at *1 (D. Haw. Oct. 5, 2016) (excluding under FRE 403 graphic images of dead bodies and badly burned remains at the scene of the helicopter accident on which the lawsuit was based)); or
  - unfairly attack a witness's or client's credibility or character based on events that have no bearing on the issues in the case (see, for example, *Hammonds v. Yeager*, 2017 WL 10560525, at *1, *7-9 (C.D. Cal. Aug. 8, 2017) (holding that the decedent's mug shot was inadmissible under FRE 403 as impeachment evidence in a wrongful death action against the truck driver who killed him)).

Given how sensitive these types of exhibits can be, counsel should consider addressing their admissibility (or inadmissibility) through motions *in limine* where possible. A court's rulings on motions *in limine* create parameters on what is and is not fair game at trial so that all parties can prepare accordingly. (See below *Addressing Objectionable Exhibits Through Motions in Limine*.)

Search Evidence in Federal Court: Overview for more on the admissibility and exclusion of evidence under the FRE.

PROCESS FOR OBJECTING TO EXHIBITS

The exact procedure for making and responding to objections to exhibits varies from case to case and depends on factors like the judge's rules and preferences, the parties' resources, and the needs of the case.

The pretrial scheduling order in a federal case may set a time period for the parties to meet and confer to discuss objections to exhibits once the parties exchange exhibit

© 2022 Thomson Reuters. All rights reserved.

lists (for a sample proposed scheduling order, with explanatory notes and drafting tips, search Scheduling Order Under FRCP 16(b) on Practical Law). After both parties have served their exhibit lists, counsel should aim to review each exhibit listed by opposing counsel for any objectionable content and set up a meet and confer within a reasonable time period.

At the meet and confer, the parties can focus on objections to specific exhibits or discuss categories of exhibits that share similar objectionable qualities, which may be the more productive approach if the exhibits in the case are voluminous. For example, while scientific or medical literature is generally not admissible under FRE 802, it is often good practice to include it on the parties' exhibit lists because the learned treatise exception to the hearsay rule (FRE 803(18)) may permit expert witnesses to discuss and rely on statements contained in such literature. The meet and confer process often results in more efficiency where the parties can reach an agreement as to how to handle at trial the categories of documents that may be objectionable across both exhibit lists.

When considering objections, it is important to balance the need to preserve a party's objections at trial with the aim of maintaining credibility with the court. To that end, while objections should be fulsome, counsel should avoid objecting for the sake of objecting, especially when counsel is reasonably certain that the court is likely to admit the documents at trial. Counsel should exercise their strategic judgment in objecting to those documents which have a material impact on the case and which are truly not admissible under the FRE.

Although many judges prefer to have objections registered before trial to allow time to make appropriate rulings, a judge may also require the parties to reserve objections during the pretrial planning stage until the parties confirm which exhibits they actually intend to use at trial. A judge may also permit the parties to agree to give a few days' notice (for example, 48 or 72 hours) before using an exhibit at trial to allow the opposing party time to register objections then.

NEGOTIATING OBJECTIONS WITH OPPOSING COUNSEL

Although evidentiary discussions with the opposing party can be tedious and potentially acrimonious, counsel should attempt to resolve all but the thorniest of objections before seeking court intervention. Particularly in cases with a large number of exhibits, a common strategy is for counsel to make concessions on certain documents, even if they are objectionable, to advance the negotiations and minimize the number of disputes that require court intervention (sometimes called horse trading).

Before negotiating objections or making concessions, counsel should:

- Understand the origins of any exhibits they intend to put forward.
- For each exhibit, know:
  - which witnesses can or should testify about it; and
  - the basic framework supporting each exhibit's admissibility (for example, how it complies with the requirements of FRE 401 and FRE 402).
- Consider arranging or classifying exhibits by origin, topic, claim, and whether the document involves any sensitivities (for example, confidential or attorneys' eyes only designations) to help stay organized.
- Review all parties' exhibits and categorize each party's exhibits into those for which:
  - counsel must strongly argue for admission;
  - counsel must strongly oppose and argue for exclusion; and
  - admission or exclusion is negotiable.

Although negotiation is a key element of trial preparation, a party should never agree to allow patently inadmissible evidence to be presented before the jury simply to reach agreement with the other side. Similarly, if a document is crucial to a case and is potentially admissible, counsel should insist on its admission and seek court intervention, such as through a motion *in limine*, if the parties cannot resolve the objection.

ADDRESSING OBJECTIONABLE EXHIBITS THROUGH MOTIONS *IN LIMINE*

If, after good-faith negotiations, the parties are unable to agree on what exhibits a party can or cannot properly present at trial, a party should consider bringing strategic motions *in limine* to:

Trial Exhibits Toolkit (Federal)

The Trial Exhibits Toolkit (Federal) available on Practical Law offers a collection of resources to assist counsel with identifying, preparing, and presenting exhibits in federal court. It features a range of continuously maintained resources, including:

- Presenting and Handling Exhibits in a Civil Trial (Federal)
- Motion in Limine: Motion or Notice of Motion (Federal)
- Motion in Limine: Memorandum of Law (Federal)
- Motion in Limine: Proposed Order (Federal)
- Admissibility of Evidence in Federal Court Flowchart
- Drafting and Exchanging Exhibit Lists Checklist (Federal)
- Introducing Exhibits Into Evidence Flowchart (Federal)
- Preparing and Using Exhibits Checklist (Federal)
- Preparing for Trial Checklist (Federal)
- Using Documents as Evidence Checklist (Federal)

© 2022 Thomson Reuters. All rights reserved.

- Obtain advance rulings that critical exhibits to which the opposing party objects are admissible at trial.
- Exclude the opposing party's exhibits. For example, counsel may argue that the exhibits are:
  - irrelevant or immaterial (see for example, *Africano v. Atrium Med. Corp.*, 2021 WL 4477867, at *3 (N.D. Ill. Sept. 30, 2021)); or
  - unduly prejudicial (see, for example, *Africano v. Atrium Med. Corp.*, 2021 WL 4940974, at *2-3 (N.D. Ill. Oct. 5, 2021)).

Motions *in limine* are particularly helpful for evidentiary issues that are hotly disputed between the parties and that are likely to have an impact on the presentation of evidence in the opening statement.

Courts decide motions *in limine* typically before but sometimes during trial, outside the presence of the jury. For this reason, counsel should consider using motions *in limine* as part of their trial strategy in every case because:

- The motions are a way to highlight key evidence for the court.
- A jury does not witness any defeat if counsel does not prevail on the motion.
- Having the court resolve the motion before trial avoids the assertion of objections to exhibits in front of a jury, which may improperly signal a red flag to jurors and cause them to think an exhibit is more important than it is.

Motions *in limine* are particularly helpful for evidentiary issues that are hotly disputed between the parties and that are likely to have an impact on the presentation of evidence in the opening statement. A major benefit of motions *in limine* is that they provide counsel with a roadmap as to what the judge's ground rules are likely to be at trial. Based on those ground rules, counsel can create an opening statement that includes only the evidence they think is likely to be admitted at trial.

However, a party may still raise objections to an exhibit at trial, even if the exhibit was not the subject of a motion *in limine*.

Attorneys use varying strategies when employing motions *in limine*. Some reserve motions *in limine* for only the most important evidence. Others file motions *in limine* liberally to try to obtain a favorable court ruling on at least some of the evidence. Some motions are lengthy, relying on a great deal of caselaw, while others are short and rely on the court to use its common sense to exclude certain items.

Regardless of counsel's strategy, counsel should keep in mind certain general guidelines when bringing a motion *in limine*. In particular, counsel should:

- **Be mindful of the deadline.** To ensure that the court is prepared in advance to receive and rule on any motions *in limine*, and to avoid missing the opportunity to have the court hear argument on critical evidence outside the presence of the jury, counsel should pay attention to the deadline for motions *in limine* and ask the court to set a deadline for such motions where:
  - the court does not automatically include a separate deadline for motions *in limine* in its pretrial scheduling order; and
  - it is not clear that any general pretrial motion deadline applies to motions *in limine*.
- **Use motions *in limine* to include (as opposed to exclude) evidence sparingly.** It is up to the opposing party to object to the admission of evidence. However, a motion *in limine* seeking an advance ruling in favor of admissibility without knowing the opposing party's position on that particular piece of evidence may unnecessarily put the onus on the moving party to establish its case for admissibility without the benefit of knowing whether and on what basis the opposing party objects to the exhibit.
- **Avoid filing a frivolous motion *in limine*.** Doing so can jeopardize counsel's credibility with the court and trigger the potential for sanctions (for more information, search Sanctions in Civil Litigation (Federal) on Practical Law).
- **Strictly abide by the court's ruling on the motion.** In some cases, a court may partially grant or deny a motion *in limine* and allow a party to use an exhibit for limited purposes or only in select contexts. Counsel must strictly abide by this type of evidentiary ruling or risk consequences that may include losing credibility with the court or even a new trial. (See, for example, *Goodman v. Safeco Ins. Co. of Ill.*, 2015 WL 1399655, at *1-3 (M.D. Fla. Mar. 26, 2015) (upholding the granting of a new trial to the defendant based on statements that the plaintiffs' counsel made during closing argument in violation of the court's *in limine* rulings).) It is also counsel's responsibility to inform their witnesses of the pertinent motion *in limine* rulings and ensure that those witnesses abide by them when giving testimony based on exhibits.

Search Motion in Limine to Exclude Evidence Checklist (Federal) for more on the key issues and considerations when bringing a motion *in limine* to exclude evidence from a federal civil trial.

© 2022 Thomson Reuters. All rights reserved.