GOOD EXHIBIT, GOOD ARGUMENT

by Charles B. McFarland

> **TRIAL: THE ACT OR PROCESS OF TESTING, TRYING, OR PUTTING TO THE PROOF.**
>
> **ARGUMENT: A COURSE OF REASONING AIMED AT DEMONSTRATING TRUTH OR FALSEHOOD.**

In trial, a lawyer's efforts for his client are directed at demonstrating either the truth of his position or the falsity of his opponent's position. In short, what the lawyer does is argument. From choice of clothing to closing remarks, the lawyer is constantly presented with opportunities for argument. The arguments a lawyer makes, or fails to make, can mean the difference between victory and defeat for his client.

In most aspects of a trial, experience gives seasoned lawyers a distinct advantage over younger lawyers in recognizing when to make arguments, what arguments to make, and how to make them effectively. An important area in a trial where the field can be leveled, however, is in the exhibits. In a sense, exhibits have the advantage over the parties, the witnesses, and the lawyers. A good exhibit can make its argument after the witnesses have been excused, the evidence has been closed, the lawyers have made their closing remarks, and the jury has retired. And yet, many exhibits, whether prepared by experienced or inexperienced trial lawyers, do not. Instead, the exhibits are forgotten the minute they are out of the jury's view, and with good reason: they are forgettable. The result is a wasted opportunity for argument.

A good exhibit is argument. Irrespective of experience level or number of trials, the lawyer's job is the same: to win his client's case. Documents from the case, together with testimony from the witnesses, are the columns across which the lawyer drapes his arguments. These columns do not come ready-made for the jury's digestion: the jury often needs help to understand how the facts support the client's position. If the facts established in a case are dots on a page, the lawyer's role and responsibility is to connect these dots with argument. A good exhibit is one of the ways a lawyer can do this. While a document from the case can establish a fact, a good exhibit can give context to a seemingly innocuous fact, show how one fact relates to another, or prove a pattern from seemingly ambivalent facts. But it cannot do anything without input from the lawyer.

AN EXHIBIT MUST BE SIMPLE

There are three main criteria to consider in putting together a good exhibit. First, it must be admissible. Second, it should be limited to a single, important point. Third, it must be simple. A stranger to the facts of the case should not only be able to understand it but also use the exhibit to convince others.

ADMISSIBILITY

Relevant, But Not Too Relevant

An exhibit can't do anything if it isn't admitted into evidence. To be admitted, a good exhibit must be relevant evidence: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FRCE 401. A good exhibit should not be subject to a valid relevance objection. If it is, it violates one or both of the other criteria

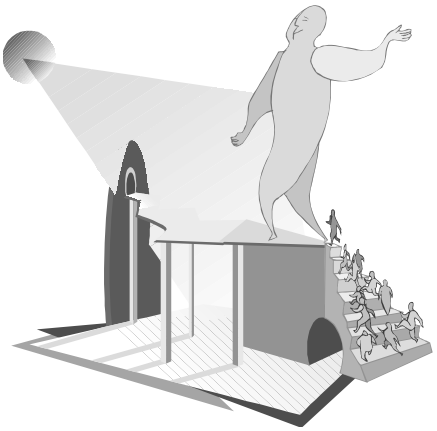
Continued on page 6

Charles B. McFarland's *practice is in civil and Eminent Domain litigation in the law firm of Vinson & Elkins in Houston, Texas.*

*(**Good Exhibit** continued)*

for a good exhibit by making more than one point or presenting too much information.

The real danger lies in putting together an exhibit that is *too* relevant. While the goal is argument, the temptation to be argumentative must be resisted. It is far more persuasive to show the jury where they should go than to push them or pull them where you want them to go. Certain personality types will resist the push-or-pull type of advocacy by nature. Others that recognize it will resent it. A good exhibit is not an attempt to push the jury where you want them to go; it is an opportunity to show them where they should want to go. More importantly, assuming they want to go to a just verdict, it is an opportunity to show them who they can trust to lead them there.



An argumentative exhibit in this context is counterproductive. The importance of avoiding presenting an argumentative exhibit is not to eliminate possible objection from opposing counsel. An argumentative exhibit reduces the lawyer's credibility and should be avoided whether counsel objects or not. An experienced lawyer may not object to the other side's argumentative exhibits, instead letting the jury see just how hard the other side needs to push or pull the facts for its side to win. Exhibits that attempt to characterize the facts, rather than state them, or that contain "persuasive" modifying language erode the lawyer's credibility and are vulnerable to an argumentative objection.

Avoiding Too Much of a Good Thing

With a good exhibit, the only objection should be that it is cumulative. The good exhibit seeks to summarize or encapsulate a set of facts that will be contained in or established through other documents or testimony. Thus, if these other documents or testimony are already in evidence, the good exhibit is, technically, cumulative of the other evidence. *See* FRCE 403. This is an objection that tends to be sustained more and more as the trial continues, particularly if the prejudicial (but not unfairly prejudicial) effect of the exhibits becomes clear to the judge. In the worst-case scenario, these exhibits should be admitted for demonstrative purposes, to assist the witness in presenting his testimony and the jury in understanding it. However, this does not do much for the lawyer once the case has been submitted to the jury and the exhibit does not make it back to the jury room. For this reason, the lawyer needs to try to overcome the cumulative objection whenever possible.

One approach to overcoming this objection is to introduce the exhibit into evidence before the underlying document or testimony. If the other evidence has not been admitted, then the exhibit cannot be cumulative of it. For documents, this requires a two-step authentication process: step one authenticates the underlying document; step two authenticates the exhibit as a true and correct excerpt from the document. The difference from the normal sequence of events is that the underlying document is not offered into evidence, at least not until after the exhibit is admitted. The rule of optional completeness will allow the other side to introduce the underlying document if the offering party does not.

This process is simpler if the underlying evidence is testimony. Instead of eliciting the testimony and asking if the exhibit summarizes the testimony, the witness should first testify to whether the exhibit is a fair and accurate summary of the testimony in issue. The exhibit is then offered into evidence before the testimony.

Of course, the lawyer should always be prepared to proceed with the exhibit as a demonstrative aid if an objection to its admissibility is sustained. The majority of people learn visually, and combining visual and auditory presentations of materials results in a much greater retention rate of the information presented. Even if the exhibit is not admitted into evidence, if it enables the jury to have a clearer understanding of the witness's testimony, it has increased the effectiveness of the presentation of evidence and, accordingly, the lawyer's credibility.

MAKING YOUR POINT

The exhibit should focus on one important point. Even in a simple car wreck case, jurors are bombarded with more information than they can reasonably be expected to keep up with. They are looking to the lawyers for cues as to what is important, what it is that they should really focus on. If possible, the lawyer should try to reduce the case to 3 to 5 important points. This may not

Continued on page 7

*(**Good Exhibit** continued)*

be possible for a complex case. Whether the case has 3 important points or 20, however, each important point should have the benefit of a good exhibit driving its message home to the jury.

This brings up two issues: the number of points to make in a trial and the selection of those points. The lawyer must be cognizant of the fact that each additional point made dilutes the importance and effect of other points. The lawyer therefore must choose the points to focus on carefully. A less-is-more approach can be very beneficial in this process. One technique is to try to explain, in three sentences or less, why your client should win. The points made in these sentences should be the cornerstones of the main points of the case and, therefore, the exhibits. In addition to limiting the number of points, the selection of the points to be emphasized is critical to the effectiveness of the exhibits. If a jury concludes that a point emphasized by an exhibit is not important, future points that may be very important will be tuned out. There is a white-noise effect: emphasizing everything has a similar effect to a presentation that emphasizes nothing. The jury is left without a guide to the issues that are important to a resolution of the case. This is unacceptable.

Sometimes, the hardest part of a case is deselecting evidence that, despite its relevance, should not be included in the trial presentation. However, its importance cannot be overstated. While experience is an advantage in this process, preparation can make up the experience gap when it comes to exhibits. Accordingly, the lawyer should work and rework the important points of the case, and the exhibits to reflect these points, until each resonates on logical, emotional, and moral levels.

KEEPING IT SIMPLE

The effectiveness of an exhibit is lost if it is too complicated to be understood. The lawyer should strive for a level of simplicity that ensures not only that the jury will understand it but also that one or more sympathetic jurors can use it to explain the lawyer's case at a time, after the jury has retired, when the lawyer no longer can. When a juror does not understand a lawyer's case, the juror is not likely to attribute this failing to his own inadequacies. Keeping the exhibits simple shows the jury that the lawyer's case does not depend on a confusion of the issues or attempts to mislead it. This also reduces the chance for an objection and, in the event of an objection, of it being sustained.

WHAT IS THE POINT?

The point of a good exhibit is to present a clear, coherent, and reliable argument of the lawyer's version of a set of facts. More fundamentally, the point is to demonstrate the lawyer's credibility. Credibility is a lawyer's most powerful argument. On a certain level, it is the lawyer's credibility that is on trial, particularly in complex cases, where the myriad of facts may require jurors to rely on someone to guide them. It should go without saying that you want to be that guide. The lawyer must constantly be looking for opportunities to show jurors that he can be trusted to get it right.

This exercise is not without risk. An exhibit is an indication to the jury of the kind of path you will lead them down if they choose to follow you. You can help your credibility through your exhibits, but you can also hurt it. If an exhibit's characterization of the facts is unfair or inaccurate or even unclear, this damages your credibility the same as any unfair argument would.

It is, however, a risk worth taking. There is no more consistent way to ensure success in jury trials than by gaining the jury's trust. This should be the goal of every trial lawyer, and the way to get there is to establish one's credibility. Experience may indicate credibility, but it is not determinative, and all lawyers should be looking for every opportunity to show that they are worthy of the jury's trust. The ability to put together an exhibit that makes your point without overstating your case will go a long way to showing the jury that, irrespective of experience, you can be trusted to guide them to where they want to go: a just result.