Laying a Foundation to Introduce Evidence
(Preparing and Using Evidence at Trial)

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JUDGE'S PERSPECTIVE The Honorable Maria P. Rivera
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First Appellate District, Division Four

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Scope of Guide

This Action Guide is primarily for the attorney seeking to introduce evidence at trial, but also includes grounds on which opposing counsel may object to admission of evidence. It helps the trial lawyer identify evidence and prepare the necessary evidentiary foundations. It also describes courtroom procedures and etiquette, and includes judicial perspectives as well as sample records of foundations, objections, and offers of proof.

The appendixes include a checklist of objections and sample trial preparation systems, a sample evidence memorandum, and a sample motion in limine.

Abbreviations

ADR	A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005)
Expert Witness	California Expert Witness Guide (2d ed Cal CEB 1991)
Trial Objections	California Trial Objections (Cal CEB Annual)
Civ Proc During Trial	California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995)
Effective Intro of Evidence	Effective Introduction of Evidence in California (2d ed Cal CEB 2000)
Handling Expert Witnesses	Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008)
Subpoenas	Handling Subpoenas (Cal CEB Action Guide December 2006)
Evidence Benchbook	Jefferson's California Evidence Benchbook (3d ed CJA-CEB 1997)
Obtaining Discovery	Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007)
Prep Trial	Preparing for Trial (Cal CEB Action Guide March 2008)
Witkin, Evidence	Witkin, California Evidence (4th ed 2000)

About the Authors

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When Preparing Evidence Before Trial

STEP 1. REVIEW GENERAL RULES OF EVIDENCE

RECOGNIZE TYPES OF EVIDENCE

The types of evidence that may be presented at trial are:

a. Testimony of both:

(1) Lay witnesses (see step 29, below); and

(2) Expert witnesses (see step 28, below);

b. Documentary evidence (see steps 15-27, 31-34 below, and Appendix G);

c. Demonstrative evidence (see step 35, below); and

d. Physical or "real" evidence. See Appendix G.

Further Research: See Evid C §140.

ANALYZE HOW YOU WILL USE EVIDENCE

Analyze evidence to determine if you will use it to:

a. Prove or disprove factual issue;

b. Refresh recollection;

c. Impeach witness;

d. Rehabilitate witness;

e. Aid with judicial notice; or

f. Illustrate concept with charts, graphs, or blowups.

CONSIDER NEED TO LAY FOUNDATION

For some evidence to be admissible, you must satisfy preliminary requirements, or "lay a foundation," that, *e.g.*:

Lay Witness

Witness has personal knowledge of facts about which witness is testifying (see step 29, below);

Expert Witness

Expert is qualified to testify about *this* evidence (see step 28, below);

Documentary Evidence

Document is authentic (see step 18, below);

Demonstrative Evidence

Evidence clarifies a witness's testimony and is substantially similar to the facts at issue in the case (see step 35, below);

Physical Evidence

Evidence is relevant, *e.g.,* in the same condition as during the incident or period in question. See Appendix G.

COMMON WAYS TO LAY FOUNDATION

Common ways to lay a foundation include:

a. Stipulating to preliminary facts, *e.g.,* that photograph fairly depicts those facts;

b. Requesting an admission during discovery, *e.g.,* that document is authentic (see Obtaining Discovery: Initiating and Responding to Discovery Procedures (Cal CEB Action Guide March 2007), referred to throughout this Action Guide as Obtaining Discovery);

c. Requesting judicial notice; and

d. Having witness testify about the necessary preliminary facts. See step 18, below, for sample testimony.

WHEN TO LAY FOUNDATION

When laying a foundation:

a. Better practice is to present any required preliminary facts *before* offering evidence (see step 18, below); but

b. You may present additional evidence of preliminary facts *after* opponent objects. See steps 20-21, below.

KNOW COMMON OBJECTIONS

Review rules of evidence so that you can readily anticipate and respond to an objection or claim of privilege for all evidence you plan to introduce. For a discussion of each objection and claim of privilege, see California Trial Objections (Cal CEB Annual), referred to throughout this Action Guide as Trial Objections.

MAINTAIN A CHECKLIST

Many experienced trial lawyers and judges maintain a checklist of objections and claims of privilege for handy reference at trial. See Appendix C.

Further Research: See Effective Introduction of Evidence in California, chaps 1, 32-34 (witness testimony), chap 4 (laying a foundation), chap 24 (expert witness), chap 39 (physical and demonstrative evidence) (2d ed Cal CEB 2000), referred to throughout this Action Guide as Effective Intro of Evidence.

STEP 2. IDENTIFY POTENTIAL TRIAL EVIDENCE

IDENTIFY ISSUES AND CASE THEMES

Become familiar with both legal and factual issues of the case, so that you know what evidence you need, by reviewing:

a. Pleadings in case;

b. Jury instructions, to learn:

(1) Elements of cause of action or defense; and

(2) Your client's burdens of proof and producing the evidence.

PREPARE ISSUE OUTLINE

Outline for each factual and legal issue in the case:

a. Every element that must be established;

b. All facts needed to prove each element;

c. All evidence needed to prove each fact; and

d. The applicable law.

Anticipate Opponent's Evidence

Issue outline should also include:

a. Facts and evidence your opponent is likely to use;

b. The objections to that evidence; and

c. Your rebuttal evidence.

REVIEW AND REVISE OUTLINE

Review and revise issue outline to:

a. Select evidence to be used;

b. Determine how evidence will be used, *e.g.*:

(1) Prove or disprove factual issues;

(2) Refresh recollection;

(3) Impeach witness;

c. Identify potential objections to your evidence by opposing party; and

d. Identify need for additional evidence.

DEVELOP EFFECTIVE TRIAL PREPARATION SYSTEM

Use an effective trial preparation system that:

a. Allows you to calendar evidence-related tasks and check off evidence as you gather it; and

b. Alerts you to evidence that you still need to gather.

NOTE

Avoid failure to secure evidence by keeping close track of time-sensitive tasks, *e.g.,* need to have accident scene photographed as close to time of accident as feasible.

Further Research: For sample trial preparation systems, see Appendix A, and Preparing for Trial, steps 23-31, Appendix C (Cal CEB Action Guide March 2008), referred to throughout this Action Guide as Prep Trial. See also California Trial Practice: Civil Procedure During Trial, chap 3 (3d ed Cal CEB 1995), referred to throughout this Action Guide as Civ Proc During Trial; Effective Intro of Evidence, chap 2 (planning case; securing witnesses and evidence; witness preparation; trial notebook).

STEP 3. DECIDE WHEN TO BEGIN PREPARING FOR TRIAL

INITIATE TRIAL PREPARATION SYSTEM EARLY

As soon as you open your case file, begin structuring and implementing your system. For a discussion of avoiding failure to secure evidence, see step 2, above. For sample systems, see Appendix A; see generally Civ Proc During Trial, chap 2.

WHEN TO START PREPARING FOR TRIAL

Experienced attorneys vary regarding when they begin preparing in earnest for trial.

Wait Until Trial Is Likely

Some attorneys, especially if they are on a contingency fee, may wait until settlement or summary judgment appears unlikely.

Begin Early

Other attorneys prepare early, *e.g.,* many months before initial trial date is set, to allow for any additional discovery or investigation. See Civ Proc During Trial §2.25.

When Expert Witness Is Needed

If you will need an expert witness to testify in your case, begin trial preparation early enough to:

a. Comply with expert witness disclosure requirements; and

b. Prepare your expert for deposition and trial.

Consider Value of Case

Consider value and likely outcome of case:

a. When determining how much time you will need to sufficiently prepare for trial and when to begin preparing; and

b. When determining whether to increase your settlement efforts.

TRIAL COURT DELAY REDUCTION RULES

UNDERSTAND TRIAL COURT DELAY REDUCTION RULES

Most general civil actions are subject to the provisions of the Trial Court Delay Reduction Act (Govt C §§68600-68620). Govt C §§68605.5, 68608. Review *current* local rules (many counties post their local court rules on their websites) to ascertain how they affect your case. In addition, regularly monitor the applicable Government Code provisions and California Rules of Court.

Review California Rules of Court

The Judicial Council:

a. Has promulgated special rules establishing standards for more complex cases (Govt C §68603(c); Cal Rules of Ct 3.400-3.403, 3.710-3.715, 3.751; Cal Rules of Ct, Standards of J Admin 3.10); and

b. May adopt other statewide procedures and rules for the program. Govt C §68612.

Review Local Court Rules

Structure your trial preparation system to accommodate applicable trial court delay reduction and other local rules concerning,

e.g.:

a. Pretrial marking of exhibits for identification (see, *e.g.,* Los Angeles Ct R 8.60);

b. Pretrial disclosure of intended trial exhibits (see, *e.g.,* Los Angeles Ct R 7.9(h); Mendocino Ct R 5.3(k); Ventura Ct R 8.12(E); see also Civ Proc During Trial §§13.35-13.38);

c. Pretrial disclosure of expert witnesses (see, *e.g.,* San Diego Ct R 2.1.11);

d. Trial briefs (see, *e.g.,* Fresno Ct R 2.6.1(C));

e. Jury instructions (see, *e.g.,* Fresno Ct R 2.6.1(B)); and

f. Motions in limine (see, *e.g.,* Santa Barbara Ct R 1302; Los Angeles Ct R 8.92).

Further Research: See Effective Intro of Evidence; see also Prep Trial for deadlines, timeline, and checklist of steps to prepare for trial.

STEP 4. OBTAIN POTENTIAL TRIAL EVIDENCE FROM AVAILABLE SOURCES

OBTAIN FROM CLIENT

Obtain:

a. Client's personal knowledge of the case;

b. Any documents under client's control that you determine are, or may be, relevant to the case; and

c. Identity of any other sources of information that you determine are relevant to the case, *e.g.,* potential witnesses.

OBTAIN FROM OPPONENT AND OTHER PARTIES

During discovery, determine what evidence your opponent has or knows of, *e.g.,* obtain and review:

a. Parties' responses to discovery requests, *e.g.,* answers to interrogatories, responses to requests for admissions;

b. Deposition or other prior testimony of parties or witnesses; and

c. Any documents produced by opponent.

OBTAIN FROM NON-PARTIES

Obtain materials from independent third parties by using a subpoena duces tecum.

Use Depositions

Use deposition testimony, including reenactments and physical demonstrations during video-recorded depositions. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 1109, 68 CR2d 883.

Conduct Investigation

Conduct investigation yourself or retain investigators and experts to discover facts *not* available from your client or opponent, *e.g.*:

a. Physical evidence created by underlying occurrence, *e.g.,* aircraft wreckage, defective components;

b. Evidence created or obtained by post-occurrence investigation or informal discovery, *e.g.,* photographs; and

c. Independent witness statements.

OBTAIN CUSTOM-PREPARED EVIDENCE

In considering custom-prepared exhibits, whether prepared by witnesses, experts, or professional services, evaluate:

a. Purpose of exhibit;

b. Way in which exhibit will be put into evidence;

c. Whether exhibit is economically justified; and

d. Whether and how exhibit might be used against your client by opposing counsel.

NOTE

Be sure to take into account the risk of an adverse jury reaction to "high-tech" exhibits, *i.e.,* a jury may infer that your client is spending too much money on expensive exhibits. This concern is waning with the growing public awareness of inexpensive

computer graphics.

Further Research: See generally Civ Proc During Trial, chap 10.

Photographs

Photographs can convey information to trier of fact in a versatile and inexpensive way.

Video Recording

Video recording is especially effective and increasingly inexpensive.

OBTAIN DURING LITIGATION

During litigation, review and consider evidence available from, *e.g.*:

a. Pleadings;

b. Formal stipulations of parties;

c. Judicial notice (mandatory and discretionary);

d. Live testimony at trial of parties or representatives;

e. Live testimony at trial of nonparty percipient witnesses; and

f. Live testimony at trial of expert witnesses.

JUDGE'S PERSPECTIVE

If a location is relevant (*e.g.,* a collision site or the site of a fire), visit the site and examine it carefully yourself.

STEP 5. ORGANIZE EVIDENCE FOR TRIAL

OBJECTIVE

Sort evidence by issues and witnesses for easy access and analysis.

WHAT TO DO

Use trial preparation system you have developed to (for sample systems, see Appendix A, and Prep Trial, Appendix C; see generally Civ Proc During Trial, chap 2):

Sort Evidence

Review all evidence and sort by issues and witnesses;

Decide How to Use Evidence

Review evidence to determine its use by:

a. How you plan to use it;

b. When you plan to introduce it; and

c. Procedural and foundational requirements for using it; and

Streamline Evidence

Streamline evidence to extent possible.

Further Research: For a more extensive discussion of the steps involved in organizing evidence for trial, see step 6, below.

STEP 6. DECIDE HOW AND WHEN YOU WILL PRESENT EVIDENCE AT TRIAL

OBJECTIVE

Determine how and when to present each witness, exhibit, and other item of evidence most persuasively during trial.

JUDGE'S PERSPECTIVE

Many experienced attorneys begin by preparing a draft of their closing argument. This is a useful method for identifying all of the testimony and other evidence needed to prove (or defend) the case.

OUTLINE CASE

Use your trial preparation system (for sample systems, see Appendix A; Prep Trial, Appendix C; see generally Civ Proc During Trial, chap 3) and outline your case step by step, including:

Witness Testimony

Points you plan to establish through each witness (see step 8, below);

Exhibits

Exhibits you intend to offer (see step 10, below);

Demonstrative Evidence

Demonstrative evidence you plan to offer (see steps 10, 35, below);

Deposition

Whether you plan to offer deposition excerpts (see steps 10, 26-27, below) and, if so:

a. When to offer them (indicate in your outline);

b. Include volume, page, and transcript line number for quick reference; and

c. Consider that your decision to introduce portions of the deposition may motivate opposing counsel to seek to introduce other excerpts (see CCP §2025.620(e)), and analyze how that will affect your case;

Judicial Notice

Whether you should ask court to take judicial notice of certain evidence and, if so:

a. Review Evid C §§450-455 on evidence that court may judicially notice (see step 10, below);

b. Evaluate likelihood that court will grant your request; and

c. Show in your outline at which points you will seek judicial notice and note legal support for your request;

Visual Aids

Whether you will use visual aids as part of your evidentiary package and, if so, how.

NOTE

Courts are increasingly installing in-court audiovisual systems, with television screens available for display of exhibits, demonstrations, transcripts, and video-recorded testimony. Before trial, counsel should determine the availability of such

equipment. Further, if the equipment is available, counsel should learn its capabilities and technical requirements, to identify how best to use it and anticipate how it may be used by the opponent.

JUDGE'S PERSPECTIVE

Do not overuse "blowups." If you start working with more than a dozen, they become cumbersome and may result in embarrassing delays as you search for the one you need. Select only the most critical documents for foam-board blowups. In addition, *always* mark the blowups with their exhibit numbers, and provide the actual documents to the clerk for the record (the blowups are treated as merely copies of the exhibits). In an exhibit-intensive case, ask the judge to permit you to distribute binders with copies of key exhibits to the jurors.

ANALYZE KEY STRATEGY CONCERNS

As you outline your case, make sure that it reflects your review of the rules of prima facie admissibility (see Appendix B) and decisions about timing and manner of using all evidence you plan to introduce, *e.g.*:

a. Whether you should disclose the evidence during opening statement;

b. Whether you need or want to obtain an order in limine to establish (see steps 12-14, below):

(1) Admissibility of the evidence; or

(2) Order that evidence will be presented;

c. Which witnesses you should interrogate about evidence;

d. Which witnesses you should *not* question about evidence, even though they have knowledge of it;

e. Whether you can gain an advantage by surprise use of evidence;

f. In a jury trial, whether you should disclose evidence to court before you refer to it before the jury;

g. Whether it is procedurally necessary to disclose evidence to certain witnesses before asking others about it;

h. What is the best way to reveal substance of an exhibit to jury;

i. Whether you should specifically discuss evidence during closing argument; and

j. What you will do if evidence is excluded. See step 7, below.

JUDGE'S PERSPECTIVE

Be certain that the evidence you outline to the jury in your opening statement will be admissible. If you tell jurors that you will present certain evidence and it isn't admitted, they are likely to draw adverse inferences about your case. Voir dire is not a proper time to tell the jury the facts of the case.

If you decide in the course of the trial to refer to evidence that may be considered sensitive or improper, inform the court about the evidence before making the jury aware of it. Keep in mind that the judge may react differently to the evidence than you do, and that by raising the evidence without the judge's approval, you risk a mistrial.

DETERMINE SEQUENCE OF PRESENTATION

Decide sequence in which you want to present the evidence by analyzing:

a. Most persuasive sequence;

b. Sequence allowing clearest presentation of information;

c. Sequence avoiding undue repetition;

d. When you will present your *strong* witnesses; and

e. When you should present your *weak* witnesses.

ARRANGE EVIDENCE TO FIT SEQUENCE

Arrange evidence to fit this order of presentation, keeping in mind that the exigencies of trial may require a change in the sequence.

Further Research: See Effective Intro of Evidence, chaps 5-6 (order of proof and of witness examination).

STEP *7*. EVALUATE YOUR EVIDENCE AND ANTICIPATE OBJECTIONS

ANALYZE YOUR EVIDENCE

For each piece of evidence, ask yourself:

a. Why it is relevant (see Appendix B);

b. Whether it is subject to other common objections (see Appendix C);

c. How you are going to lay foundation, *e.g.,* authenticate document or demonstrative evidence (see steps 18 and 35, below);

d. Whether evidence creates any logistical problems, *e.g.,* will you need to bring equipment into the courtroom to display demonstrative evidence or to present documentary evidence (see step 35, below); and

e. Whether evidence potentially violates:

(1) Evidentiary rule; or

(2) Public policy. See, *e.g.,* Veh C §20013 (accident report).

JUDGE'S PERSPECTIVE

Resolve foundation problems *before* trial. If you have an exhibit for which you must lay a foundation, clearly identify and prepare *in advance* all questions and answers that show that the evidence is admissible.

DECIDE HOW TO OVERCOME OBJECTIONS

If you believe you will encounter objections when introducing certain evidence, decide:

a. How to overcome objection (for discussion of preparing evidence memos, see below, and steps 20-21, 23, below); and

b. What to do if evidence is excluded, *e.g.*:

(1) Make offer of proof (see step 23, below); and/or

(2) Offer again at a later time when you have more foundational evidence. See step 25, below.

JUDGE'S PERSPECTIVE

Research evidentiary problems *before* trial so that citations of supporting authority are *immediately* available when needed.

Brief an issue if it is significant, unusual, or complex, but avoid a lengthy treatise, because:

- Trial judges do not have enough time to read lengthy briefs and numerous citations;
- Generally judges prefer, and consider sufficient, *accurate* citation and discussion of one or two controlling cases.

PREPARE EVIDENCE MEMOS

For Exhibits

Attach an "evidence memo" (see Appendix D) to remind yourself at trial of how to respond to expected objections, including, *e.g.*:

a. Explanation of relevancy;

b. Written checklist of questions to ask witness to authenticate exhibit; and

c. Legal citations, summaries, briefs, or copies of legal authorities supporting admission.

For Oral Testimony

Adapt "evidence memo" to set out how you expect to overcome objections.

PREPARE BRIEF

Consider preparing a short written brief in which you set forth authority for admission of the evidence; you can present this brief to the court at trial when and if the evidentiary issue arises.

Further Research: See Effective Intro of Evidence, chap 3 (how to combat objections).

STEP 8. PREPARE WITNESS EXAMINATION PLAN FOR EACH WITNESS

OBJECTIVE

Prepare a witness examination plan for each witness to allow you to:

a. Present your evidence clearly and logically through each witness you use; and

b. Anticipate and rebut any potential objection to that testimony.

NOTE SPECIAL TERMINOLOGY

Indicate at beginning of plan any specific terminology you plan to use in this case, *e.g.*:

a. How you expect to address each witness; and

b. Which specific expressions relate to the case.

ORGANIZE EXAMINATION

Organize your examination plan by:

a. Listing points you plan to cover with each witness (for discussion of outlining case, see step 6, above);

b. Arranging points so that the witness can naturally, comfortably, and clearly tell his or her story; and

c. Noting next to each pertinent point:

(1) Any documents or other demonstrative evidence you plan to introduce through witness;

(2) Any visual aids you plan to use to help explain the testimony or documentary or demonstrative evidence; and

(3) All anticipated objections and legal support for your position.

DEVELOP QUESTIONS

Write questions, in whole or using key words, that correspond to points you plan to cover with the particular witness during direct examination. See Effective Intro of Evidence, chap 1 (how to ask questions).

DEVELOP CROSS-EXAMINATION STRATEGY

For each witness you expect opposing party to call:

a. Consider possible answers witness may give on *key* points on direct examination and develop a line of questions to follow those answers;

b. Annotate examination outline with sources of impeachment, *e.g.,* deposition transcript (by page and line number, or exhibit), so that you can easily locate portion you want to use for impeachment; and

c. For friendly witness called by other party as adverse witness, formulate questions or areas of questioning that will rehabilitate witness.

ANTICIPATE YOUR REBUTTAL

To help rehabilitate favorable witness or refute evidence introduced by opposing side:

a. Prepare questions for witness; or

b. Identify deposition testimony or other documents.

Further Research: See Civ Proc During Trial §§5.18-5.21; see also Effective Intro of Evidence, chaps 1 and 5 (how to ask questions; order of proof and witness examination); Prep Trial, step 50.

STEP 9. PREPARE WITNESSES TO TESTIFY

OBJECTIVE

Prepare witnesses to testify to ensure that favorable witnesses are as confident, predictable, knowledgeable, and persuasive as possible.

PLAN PREPARATION SESSION

Timing

Make sure that you allow adequate time to prepare witness; allow a cushion in case preparation takes longer than you anticipate.

Attendees

Decide whether for this case it is better to meet individually with each witness or with some witnesses jointly.

BEGIN PRACTICE SESSION

Consider beginning session by telling witness about lawsuit so that witness understands where his or her testimony fits into case; *e.g.,* discuss:

a. Nature of lawsuit;

b. Parties' contentions; and

c. Substance and meaning of witness's expected testimony (direct and cross).

REVIEW DIRECT EXAMINATION

"Walk through" direct testimony with witness by stating at least the substance of what you will ask and receiving the response:

a. Do *not* give witness a script (for discussion of reviewing possible questions about practice session, see below);

b. Discourage witness from memorizing specific answers;

c. Discuss significance of each question and answer so that witness understands reasons that questions will be asked;

d. Show witness trial exhibits about which witness has knowledge and may be examined; and

e. Admonish witness not to speculate.

NOTE

Keep in mind that the attorney-client privilege does not attach to communications with nonparty witnesses.

JUDGE'S PERSPECTIVE

Witnesses frequently:

- Respond to a simple question with both the answer and inappropriate prefatory and explanatory remarks;
- Expand their answers to include materials well beyond the scope of the question;
- Include conclusions, hearsay, and matters outside their personal knowledge; or
- Verbalize their train of thought leading up to the answer called for by the question (which can be most irritating to judge and jury).

Ideally, witnesses should:

- Listen carefully to the question;
- Answer *only* the question that was asked; and then
- *Wait* for the next question.

REVIEW CROSS-EXAMINATION

Review areas of anticipated cross-examination:

a. Discuss any vulnerable areas so that witness will be ready for the most penetrating questions by opposing counsel, *e.g.*:

(1) Prior inconsistent statements;

(2) If witness has been deposed, prior testimony; and

(3) Any other bases for impeachment;

b. Remind witness to remain calm and not show undue hostility toward opposing counsel;

c. Note witness's obligation to tell the truth and explain that it is acceptable to respond with "I do not know" or "I do not remember," if those are truthful answers;

d. Caution witness to pause slightly before answering to allow you to interpose any objection or claim of privilege; and

e. Tell witness not to be defensive when questioned; many questions are best answered with nongrudging agreement.

JUDGE'S PERSPECTIVE

A realistic, rigorous "practice" cross-examination session is the best way to give your witness a sense of what to expect—both the questions to anticipate and the witness's likely emotional responses. The well-prepared witness will tell his or her lawyer later: "Your cross-examination was much tougher than opposing counsel's!"

REVIEW POSSIBLE QUESTIONS ABOUT PRACTICE SESSION

Advise that opposing counsel may examine witness about preparation session:

a. Instruct witness to tell the truth;

b. If you review documents with witness to refresh recollection of any matter about which witness testifies, an adverse party has the right to demand to see those documents (Evid C §771; see Civ Proc During Trial §§5.5-5.7, 12.62):

(1) If writing is subject to lawyer-client privilege, be prepared to argue immediately that privilege precludes disclosure (Evid C §§950-962; see *Wellpoint Health Networks v Superior Court* (1997) 59 CA4th 110, 68 CR2d 844; *Sullivan v Superior Court* (1972) 29 CA3d 64, 69, 105 CR 241); and

(2) If writing is subject to attorney work product rule, make the same argument even though you may not necessarily prevail (see CCP §§2018.010-2018.080):

(a) Work product rule applied at trial to protect investigator's notes in *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 648, 151 CR 399; but

(b) Court doubtful that attorney work product privilege can ever be claimed at trial in *Mize v Atchison, Topeka & Santa Fe Ry. Co.* (1975) 46 CA3d 436, 448, 120 CR 787.

REVIEW COURTROOM PROCEDURES

Explain courtroom procedures, decorum, and demeanor (for checklist of instructions, see Prep Trial, Appendix L; Civ Proc During Trial §§5.22-5.47), *e.g.*:

a. That the court proceedings are formal, and witness should dress conservatively, but not out of character;

b. That witness will have to take an oath;

c. Whether and when witness should stand or sit, and whether witness will be asked to leave the box, *e.g.,* be asked to point something out on a diagram;

d. Role of court reporter and benefits of speaking slowly and clearly; and

e. That witness should not respond, if there is an objection, until after the judge has ruled on the objection.

JUDGE'S PERSPECTIVE

Instruct your witnesses not to argue with opposing counsel, and let witnesses know that you will object if opposing counsel begins to argue with them.

SUGGEST OBSERVATION

For an inexperienced witness, you may want to suggest that the witness attend and observe a trial, especially the cross-examination.

END SESSION

Reinforce witness's confidence regarding both what the witness will be saying and how well he or she will be saying it.

Further Research: See Civ Proc During Trial, chap 5; see also Effective Intro of Evidence, chaps 2, 19 (witness preparation; credibility); Prep Trial, step 50.

STEP 10. SATISFY PRETRIAL PROCEDURAL REQUIREMENTS FOR EVIDENCE

LAY WITNESSES

DISCLOSE LAY WITNESSES

If Interrogatory

Satisfy any discovery obligation to disclose witnesses' identities or knowledge.

If Local Pretrial Disclosure Rules

Satisfy any local court rule or order requiring either pretrial disclosure of witnesses or advance notice of the time that witnesses will be called. See, *e.g.,* San Diego Ct R 2.1.11; Placer Ct R 20.1.13.

SUBPOENA NONPARTY WITNESSES

For nonparty witnesses:

a. Personally contact all friendly nonparty witnesses and discuss with them:

(1) The nature and purpose of a subpoena;

(2) That you will be serving a subpoena on them to ensure that they attend trial; and

(3) How to make the service as nonintrusive as possible;

b. Issue and serve appropriate subpoenas.

Further Research: On how to proceed, see Handling Subpoenas (Cal CEB Action Guide December 2006), referred to throughout this Action Guide as Subpoenas; see also CCP §1987(b).

NOTE

Because some witnesses will react angrily to a subpoena being served by a process server, it is important to notify witnesses beforehand.

SEND NOTICE TO ATTEND TO PARTY

Serve appropriate notices to attend trial. CCP §1987.

See Prep Trial, steps 43, 55.

EXPERT WITNESSES

DISCLOSE EXPERT WITNESS

Satisfy CCP §2034.260(b) discovery and disclosure requirements by disclosing:

a. Name and address of witness;

b. Summary of expert's qualifications;

c. Summary of substance of expert's testimony;

d. Statement that expert has agreed to testify;

e. Statement that expert is sufficiently familiar with action to give meaningful deposition; and

f. Expert's hourly and daily fee for consulting and providing deposition testimony.

NOTE

When it comes to issues that both sides anticipate will be disputed at trial, you cannot reserve the right to designate experts in the initial exchange, wait to see who the opposition designates, and then name an expert as a purported rebuttal witness. *Fairfax v Lords* (2006) 138 CA4th 1019, 41 CR3d 850.

DISCLOSE REPORTS

Disclose all discoverable reports and writings of expert, if requested. CCP §2034.270. Check to determine if local court rules require compliance with CCP §2034.270 without a party's request. See, *e.g.,* San Diego Ct R 2.1.11.

MAKE EXPERT AVAILABLE

Make expert available for deposition when requested. CCP §§2034.270, 2034.300, 2034.410-2034.470.

JUDGE'S PERSPECTIVE

Ascertain the availability of expert witnesses (and key lay witnesses) *before* the trial-setting conference. Judges tend to disfavor requests for a continuance of the trial date to accommodate witnesses' scheduling conflicts.

CONSEQUENCES OF FAILING TO COMPLY WITH DISCLOSURE PROCEDURES

If you fail to comply with the expert witness procedures of CCP §§2034.210-2034.730, you may not be able to present your expert evidence at trial (CCP §2034.300*), e.g.*:

a. Failure to disclose name of expert on causation precluded trial court from granting continuance when expert was unavailable and ultimately resulted in dismissal of complaint (*Gotschall v Daley* (2002) 96 CA4th 479, 116 CR2d 882);

b. Expert's testimony may be excluded at trial when expert relied on privileged information to formulate opinion (*Fox v Kramer* (2000) 22 C4th 531, 541, 93 CR2d 497);

c. Expert may be precluded from testifying at trial on subject not adequately described in pretrial expert witness declaration (*Bonds v Roy* (1999) 20 C4th 140, 83 CR2d 289).

Further Research: See Handling Expert Witnesses in California Courts (Cal CEB Action Guide May 2008), referred to throughout this Action Guide as Handling Expert Witnesses; on expert witnesses generally, see California Expert Witness Guide (2d ed Cal CEB 1991), referred to throughout this Action Guide as Expert Witness.

EXHIBITS AND DOCUMENTS

SATISFY DISCOVERY OBLIGATIONS

Satisfy discovery, disclosure, and production obligations.

SATISFY LOCAL RULE OR PRACTICE REQUIREMENTS

Satisfy any local court rule or practice on:

a. Requirement for exchange and/or disclosure of exhibits (see, *e.g.,* Los Angeles Ct R 7.9(h); Placer Ct R 20.1.13);

b. Pretrial resolution of issues of admissibility (see, *e.g.,* San Diego Ct R 2.1.18); and

c. Pretrial marking of exhibits (see, *e.g.,* Los Angeles Ct R 7.9(h)).

MEET REQUIREMENTS TO ADMIT COPIES

Under the secondary evidence rule (Evid C §1521), copies of writings are admissible to prove the content of the original writing, unless the court determines that:

a. A genuine dispute exists concerning material terms of the writing and justice requires the exclusion; or

b. Admission of the secondary evidence would be unfair.

Further Research: For a discussion of secondary evidence, see Appendix B; see also Effective Intro of Evidence, chaps 47-48 (secondary evidence rule).

USE PRETRIAL PROCEDURES TO AUTHENTICATE EVIDENCE

Admissions

Use request for admissions procedures to eliminate issues of authenticity or admissibility. CCP §§2033.010-2033.420; see Obtaining Discovery, steps 38-40.

Business Records

For business records, use:

a. Subpoena duces tecum procedure to secure production at trial of original business records of a nonparty (CCP §§1987-1987.3, 2020.010-2020.510; see Subpoenas, steps 9-12); and

b. Provisions of Evid C §§1560-1562 and CCP §§2020.410-2020.440 to authenticate business records at trial by affidavit.

NOTE

Although an Evid C §§1560-1562 affidavit may authenticate the records, it does *not* establish the business record exception to overcome the hearsay exception, unless all of the additional requirements of Evid C §1271 are met. *Taggart v Super Seer Corp.* (1995) 33 CA4th 1697, 1705, 40 CR2d 56; see also *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 720, 128 CR2d 529.

Official Documents

If official document, obtain certified copy from the clerk/recorder's office. Evid C §§1530-1531.

Private Records Destroyed

If private record or document is destroyed in a calamity or disaster, use CCP §1953.10 procedure to establish existence, substance, genuineness, and authenticity. CCP §§1953.10-1953.13. See *Daddario v Snow Valley, Inc.* (1995) 36 CA4th 1325, 43 CR2d 726.

Further Research: See Effective Intro of Evidence, chap 11 (authentication), chap 13 (business records), chap 36 (official records).

DEPOSITION TRANSCRIPTS

SATISFY REQUIREMENTS

For deposition transcripts:

a. Verify that *original* transcript is available to be lodged or filed with court by reporter or custodial attorney when needed (CCP §§2025.520-2025.620);

b. Verify that review, correction, and signing procedures have been completed (CCP §§2025.520-2025.530);

c. Satisfy any local court rule or order requiring prior disclosure of portions of deposition transcripts to be used (see, *e.g.,* Los Angeles Ct R 8.70); and

d. Comply with requirement that you exercise pretrial diligence to secure attendance at trial of unavailable witnesses so that depositions may be read (Evid C §§240, 1290-1294; CCP §§2025.320(f), 2025.620(c)).

JUDGE'S PERSPECTIVE

Be prepared to prove by admissible evidence that you have exercised appropriate diligence. Merely stating "as an officer of the court" that you have been diligent in trying to secure an unavailable witness does not make an adequate record and will be rejected by most judges.

Depositions recorded by video or audio technology

SATISFY REQUIREMENTS

If you plan to use video- or audio-recorded depositions, satisfy disclosure requirements. CCP §2025.340(m).

Notify Court, Other Parties

If you intend to introduce all or part of deposition testimony at trial, notify court and all parties *in writing* in "sufficient" time for (CCP §2025.340(m)):

a. Trial judge to hear and rule on the written objections of opposing parties; and

b. Any editing of the recording.

Respond to Objections

It is a good idea to respond to objections in *writing,* although the code does not discuss the form of your response. See CCP §2025.340(m).

Receive Court Directions

The court can (CCP §2025.340(m)):

a. Rule on objections;

b. Allow parties to designate additional testimony to be offered;

c. Allow further objections that court decides justice may require;

d. If you or another party designate *only a portion* of the recorded testimony for use at trial, order you (or other party also designating a portion) to:

(1) Suppress the nondesignated portions; or

(2) Prepare an edited version of the recording.

NOTE

The trial judge may ask you and other counsel to edit the recording to include only admissible material. Do not expect the judge to play the recording and determine which portions to edit.

Preserve Original Recording

If court orders suppression or editing of a portion of the recording, make sure that original is preserved *unaltered.* CCP §2025.340(m).

Satisfy Statutory Requirements

You must satisfy all statutory requirements:

a. Unless otherwise ordered by the trial judge, a transcript of any electronic recording you offer into evidence must be (Cal Rules of Ct 2.1040):

(1) Marked for identification; and

(2) Tendered to court and opposing parties.

b. If audio- or video-recorded deposition was not also stenographically recorded (CCP §2025.340(m)):

(1) Have court reporter prepare a stenographic transcript from the recording;

(2) Offer transcript into evidence at trial when recorded testimony is offered. See, *e.g.,* steps 19, 26, below. For discussion of motion pictures and video recordings, see Appendix G.

c. Clerk must file a duplicate of the transcript of the recording, which becomes part of clerk's transcript on appeal. Cal Rules of Ct 2.1040.

Further Research: See Handling Depositions (Cal CEB Action Guide February 2007); Civ Proc During Trial §§12.16-12.31.

INTERROGATORIES AND REQUESTS FOR ADMISSIONS

SATISFY REQUIREMENTS

For interrogatories and requests for admissions:

a. Confirm that *original* interrogatories and requests for admissions, with corresponding answers and responses, are verified and available for use at trial (CCP §§2030.010-2030.410, 2033.010-2033.420, 2033.710-2033.740); and

b. Satisfy any local court rule or order requiring prior disclosure of interrogatories or admissions to be used at trial (see, *e.g.,* Los Angeles Ct R 8.70).

JUDICIAL NOTICE

MANDATORY JUDICIAL NOTICE

Judicial notice *must* be taken of (Evid C §451):

a. California and federal statutory and case law;

b. Any matter specified in Govt C §11343.6 (certified copy of regulation and order of repeal), Govt C §11344.6 (published regulation and repeal in California Code of Regulations), or Govt C §18576 (state civil service board rules and amendments), or in 44 USC §1507 (contents of Federal Register);

c. Rules of Professional Conduct for attorneys, and rules of practice and procedure for courts of the state;

d. Rules of pleading, practice, and procedure prescribed by United States Supreme Court, *e.g.,* rules for:

(1) United States Supreme Court;

(2) Court of Claims;

(3) Customs Court;

(4) Federal Rules of Civil and Criminal Procedure;

(5) Admiralty Rules; and

(6) General Orders and Forms of Bankruptcy;

e. True signification of all English words and phrases and all legal expressions; and

f. Facts and propositions that are "so universally known that they cannot reasonably be the subject of dispute."

DISCRETIONARY JUDICIAL NOTICE

Judicial notice *may* be taken of (Evid C §452; for discussion of giving notice to convert discretionary to mandatory, see below):

a. Statutory and case law of any state;

b. Resolutions and private acts of Congress and the California legislature;

c. Regulations and legislative enactments issued under United States authority, or that of any public entity in the United States;

d. Official acts of the legislative, executive, and judicial departments of:

(1) The United States; or

(2) Any state;

e. Records or rules of any court of:

(1) California;

(2) Another state; or

(3) The United States;

f. The law of:

(1) An organization of nations;

(2) Foreign nations; and

(3) Public entities in foreign nations;

g. Facts and propositions that are of "such common knowledge" within the territorial jurisdiction of the court that they cannot reasonably be disputed; and

h. Facts and propositions:

(1) Not reasonably subject to dispute; and

(2) Capable of "immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

PROVIDE COPY OF MATERIAL TO COURT AND PARTIES

A party requesting judicial notice of material listed in Evid C §452 must provide the court and each party with a copy of the material, presumably at the time the request for judicial notice is made. If the material is part of a file in the court in which the matter is being heard, the proffering party must:

a. Specify in writing the part of the court file sought to be judicially noticed; and

b. Make arrangements with the clerk to have the file in the courtroom at the time of the hearing. Cal Rules of Ct 3.1306(c).

NOTE

A court will decline to take judicial notice of material that is not relevant. *People ex rel Lockyer v Shamrock Foods* (2000) 24 C4th 415, 422 n2, 101 CR2d 200; *AL Holding Co. v O'Brien & Hicks, Inc.* (1999) 75 CA4th 1310, 1313 n2, 89 CR2d 918.

GIVE NOTICE TO CONVERT DISCRETIONARY TO MANDATORY

To *require* court to take judicial notice of matters listed in Evid C §452 (Evid C §453):

a. Notify each adverse party that you will request judicial notice, early enough to allow the party to prepare to meet the request; and

b. Give court enough information to allow it to take judicial notice, *e.g.,* a copy of the law of a foreign nation. Cal Rules of Ct 3.1306(c).

NOTE

Party requesting judicial notice has burden of supplying court with sufficient reliable and trustworthy sources of information about the matter; court is not required to seek out on its own initiative sources of information. *People v Moore* (1997) 59 CA4th 168, 177, 69 CR2d 56.

JUDGE'S PERSPECTIVE

It is important to use the procedures of Evid C §453 to convert judicial notice from a discretionary to a mandatory act. If the court has discretion not to take judicial notice, it may exercise that option as a matter of caution.

Keep in mind that the rules regarding judicial notice are quite restrictive:

- Because a fact is commonly accepted in the society or the particular locality may not necessarily make it an appropriate object of judicial notice.
- The court may take judicial notice of the "records" (*e.g.*, pleadings and motions in the court file) of a case in another court, but this does not prove the truth of the matters contained in those documents.

Further Research: See Effective Intro of Evidence, chap 31 (judicial notice).

STEP 11. ANTICIPATE AND RESOLVE LOGISTICAL DIFFICULTIES

DETERMINE COURTROOM PROCEDURE

Talk to clerk or other attorneys who have appeared in the particular judge's courtroom to determine the procedures desired by that court in connection with:

a. Equipment for demonstrations and demonstrative evidence;

b. Display of exhibits for information.

NOTE

You may also want to check local legal publications, *e.g.,* Los Angeles Daily Journal, or the court's own website for information concerning judges' courtroom procedures.

ANTICIPATE COMMON PROBLEMS

Witnesses

Be sure that witnesses are going to be available when they are needed.

Equipment

If equipment is necessary for demonstrations, be sure that:

a. It is available and operating; and

b. You know how to use it.

Further Research: For a discussion of the equipment needed for an electronically based multimedia presentation, see Allen, *Technology and the Trial Attorney*, 25 CEB Civ Litigation Rep 140 (Aug. 2003).

Other Materials

Be sure that courtroom contains materials you may need, *e.g.*:

a. Screen;

b. Easels;

c. Marking pens;

d. Electrical outlets;

e. Tape;

f. Tacks;

g. Pointer; and

h. Other items.

Exhibits and Demonstrations

For your exhibits and demonstrations:

a. Consider space problems that may be created by displaying exhibits at trial;

b. Consider possible problems getting exhibits to and into the courtroom;

c. Determine whether bulky exhibits will create storage problems for the court;

d. Consider where exhibits will be placed while witnesses are being interrogated about them;

e. Consider where exhibits will be located after evidence is in, while parties are giving closing statements and the jury deliberates; *e.g.,* you may want to request that exhibits be put away if you do not want opposing party's diagram up during your closing;

f. Consider whether light or acoustical characteristics of courtroom may impair any planned demonstrations; and

g. Determine whether anticipated exhibits or demonstrations will create difficulties with courthouse or courtroom security. See, *e.g.,* San Diego Ct R 1.4.2.

Example: Relying on a blackboard drawing that will be erased at the conclusion of trial is a poor alternative to having the drawing on a piece of paper that can be marked and made a part of the permanent record.

JUDGE'S PERSPECTIVE

Never try to use a piece of equipment during trial unless you have mastered its use in advance.

No two courtrooms are exactly alike. Get to the courtroom well before the trial session begins to determine:

- The equipment that is available;
- Optimum equipment location and operating order; and
- Any other logistical problems.

In identifying probable needs and problems, keep in mind that:

- Both the jury *and the judge* need to see all the evidence. A judge who cannot see evidence will have a tough time considering that evidence when ruling on your posttrial motions.
- It is important to use equipment that will preserve for appeal a record of evidence demonstrated during the trial.

When Dealing With Admissibility Issues Before Trial Begins

STEP 12. RESOLVE ADMISSIBILITY QUESTIONS BEFORE TRIAL IF ABLE TO DO SO

DETERMINE LOCAL PRETRIAL REQUIREMENTS

Before trial begins, the court may require you to:

a. Lodge objections to evidence; and

b. Meet and confer to resolve evidentiary issues.

REVIEW LOCAL COURT MOTION IN LIMINE REQUIREMENTS

Courts increasingly are requiring motions in limine to be in writing and in advance of trial. Check local rules for requirements for form and timing of motions in limine. See, *e.g.,* Alameda Ct R 4.6; Los Angeles Ct R 8.92 (meet-and-confer declaration required); Santa Barbara Ct R 1302.

JUDGE'S PERSPECTIVE

In complex cases there is a tendency to overuse motions in limine. This overtaxes the court's limited time and resources and may result in the judge requiring you to select only five or ten to be addressed before trial, leaving other evidentiary issues to be dealt with during trial as they arise. When possible, confer with opposing counsel and present stipulations rather than motions with respect to routine matters (*e.g.,* exclude witnesses from the courtroom; exclude evidence of collateral source; exclude undesignated experts; exclude evidence of insurance).

Further Research: See Trial Objections §§2.3-2.14; 3 Witkin, California Evidence, *Presentation at Trial* §369 (4th ed 2000), referred to throughout this Action Guide as Witkin, Evidence; see also Effective Intro of Evidence, chap 3 (in limine motions); Prep Trial, steps 48-49.

STEP 13. ANTICIPATE OPPOSING COUNSEL'S IN LIMINE MOTION

WHEN APPROPRIATE

Anticipate that opposing counsel may make an in limine motion to prevent you from referring during voir dire or opening statement to evidence that opposing counsel claims is improper.

ELEMENTS OF MOTION

Analyze whether opposing counsel has included these elements:

a. Counsel's intention to move in limine to:

(1) Exclude specified evidence; or

(2) Establish order or presentation of evidence, *e.g.,* require plaintiff to present direct evidence before circumstantial (see *Price Waterhouse v Hopkins* (1989) 490 US 228, 104 L Ed 2d 268, 109 S Ct 1775);

b. Counsel's reason for believing that you have the evidence and will offer it at trial;

c. Specific ground for excluding evidence, *e.g.,* that it violates attorney-client privilege (Evid C §§950-962) or will unduly prejudice jury (Evid C §352);

d. Why it is not sufficient to object at trial; *e.g.,* jury should not hear question; and

e. Legal argument supporting motion.

OPPOSE MOTION

Be prepared to show that court should not grant motion and/or that opposing counsel has not complied with procedural requirements.

NOTE

If opposing party's motion is in writing, ask court for permission to prepare written opposition to motion.

IF COURT GRANTS MOTION

If court grants opposing party's motion:

a. The court may prohibit you from mentioning or referring to excluded evidence at any time during trial, including:

(1) Voir dire;

(2) Opening statement;

(3) Examination of witnesses; and

(4) Closing argument.

b. The court may require you to instruct witnesses not to refer to this evidence during testimony.

c. If court order is either in writing or recorded in the minutes:

(1) Issue is preserved for appeal;

(2) Court will be able to hold you in contempt if you violate order. See *Charbonneau v Superior Court* (1974) 42 CA3d 505, 513, 116

CR 153; *Ketscher v Superior Court* (1970) 9 CA3d 601, 604, 88 CR 357; CCP §1209(a)(5).

IF COURT DEFERS RULING ON MOTION

If court takes motion in limine under submission or indicates an inability to decide the issue until hearing further evidence, opposing counsel may request an *interim* order prohibiting you from referring to challenged evidence until court has ruled on its admissibility.

JUDGE'S PERSPECTIVE

Experienced judges, when confronted with motions in limine, are generally aware that by the time the issue comes up during the trial, the entire case may have taken on a very different perspective than it had at the outset. As a result, you can expect that the judge will make all rulings on in limine motions conditional, reserving the power to revisit the issue should there be a new or unexpected development in the course of the trial.

Judges frequently will make a provisional ruling, *e.g.,* "I'll grant the motion conditionally, but at the time the issue arises during the trial we'll have a bench or chambers conference to see about admissibility in the context of the case at that time."

Further Research: See step 12, above, regarding requirements for motions in limine.

STEP 14. IF APPROPRIATE, MOVE IN LIMINE TO ADMIT

WHEN APPROPRIATE

If you have significant concerns about admissibility of evidence that you plan to offer, consider making motion in limine to *admit* the evidence (Evid C §402(b)), *e.g.,* when you believe it would be less disruptive to have court consider preliminary facts before trial.

Can Use to Admit Evidence

You can make a motion in limine to exclude or admit evidence.

COMPLY WITH LOCAL RULES

Check local rules to determine proper procedure for making this motion.

IF ORAL MOTION

If you make an oral motion (not recommended), ask court to have court reporter record proceeding.

IF MOTION DENIED

If motion is denied:

a. Renew motion at proper point during trial if you believe you can overcome an objection to evidence; or

b. Determine whether you can use other evidence to prove your point.

Further Research: See steps 12-13, above, regarding requirements for motions in limine; see also Civ Proc During Trial §13.134; Effective Intro of Evidence, chap 4 (preliminary fact hearings).

When Introducing Exhibits at Trial

STEP 15. ACTION 1: MARK EXHIBIT FOR IDENTIFICATION

WHO MARKS EXHIBIT

Before Trial

If you already marked the exhibit to comply with local rule or practice (for discussion of satisfying local rule requirements for exhibits and documents, see step 10, above), remember to present the exhibit to court clerk before trial for logging into clerk's record.

At Trial

At trial:

a. Court clerk typically marks exhibit while simultaneously logging exhibit into the clerk's record;

b. Exhibit is then within court's custody and control.

JUDGE'S PERSPECTIVE

In a document-intensive case, whether or not there is a local rule requiring it, all exhibits of both parties should be premarked in accordance with an agreed-on system that will permit the marking of additional exhibits at trial with the least difficulty. You will score many points with the court clerk if you also provide him or her with an exhibit log describing all premarked exhibits, with appropriate columns to fill in the dates of identification and introduction, and with additional lines for exhibits marked at trial.

DESCRIBE ON RECORD

When exhibit is first handled during trial, briefly describe it on the record (see Sample Record: Marking Exhibit, below) when you ask that the exhibit be marked for identification.

If Describing a Document

If you are describing a document:

a. Tailor description so that it does not disclose document's substance; and

b. Disclose substance only *after* court receives document into evidence. See steps 22 and 24, below.

Further Research: See Civ Proc During Trial §§13.46-13.49.

SAMPLE RECORD: Marking Exhibit

Counsel: Your Honor, I would ask that this document be marked as defendant's Exhibit B for purposes of identification. It is a letter addressed to Mr. Smith and dated July 25, 2007.

NOTE

This is when document is marked by the clerk as Defendant's Exhibit B.

JUDGE'S PERSPECTIVE

Judges disagree about the need for identifying an exhibit at the time it is marked. Determine the preferred practice of the particular trial judge at the beginning of trial.

- Some judges prefer the practice;

- Other judges consider it unnecessary, especially when it generates disputes because the descriptions become too detailed.

Be wary of document descriptions that:

- Are thinly veiled arguments; or
- Disclose the substance of exhibits that may not be admitted into evidence.

Many judges consider it unnecessary for counsel to state on the record that the exhibit has been disclosed to opposing counsel. All the participants assume that disclosure has taken place as a matter of course, and most assuredly any opposing counsel who has not seen a document will be on his or her feet objecting in a nanosecond.

KEEP EXHIBIT LOG

Maintain a log of the status of *every* proffered trial exhibit (for sample log, see Appendix F):

a. Keep this log for both your own exhibits *and* opposing counsel's exhibits;

b. When exhibit is marked, record in log:

(1) Number or letter that is marked;

(2) Description;

(3) Date offered into evidence (see step 19, below); and

(4) Status in the record, including date of ruling on admissibility (see step 22, below);

c. Update log to reflect exhibit's receipt into evidence (see step 24, below);

d. Use log to remind you to:

(1) Provide additional authenticating testimony;

(2) Make subsequent motions to strike opposing counsel's evidence; and

(3) Obtain definitive rulings on admissibility.

MARK COPY OF DOCUMENT

If exhibit is a document, mark a copy for your own use (for discussion of sample system #1, see Appendix A), with the court's identifying number or letter for later easy reference.

JUDGE'S PERSPECTIVE

Once an exhibit is marked and logged in the clerk's record, the court clerk retains custody until formally released by the court.

- Be particularly careful to comply with this rule with exhibits that were never received into evidence, because they are frequently the subject of questions on appeal.
- Leave marked exhibits with the courtroom clerk, because it is extremely easy to have exhibits "wander off" with witnesses or counsel, or otherwise turn up in odd places.

STEP 16. ACTION 2: SHOW EXHIBIT TO OPPOSING COUNSEL

IF MAKING DISCLOSURE AT TRIAL

If you are disclosing an exhibit at trial:

a. Disclose the exhibit when you ask that it be marked, unless you have shown the exhibit to opposing counsel as part of pretrial marking/disclosure requirement (for discussion of satisfying local rule requirements for exhibits and documents, see step 10, above); and

b. Hand opposing counsel a copy of the exhibit; or

c. If exhibit cannot be copied, or disclosing it to counsel would risk simultaneous disclosure to jury, disclose exhibit *before* displaying it in courtroom.

SAMPLE RECORD: Showing Exhibit to Opposing Counsel

Q: Could you tell us what model of car it was?

A: It was one of those small, four-wheel-drive vehicles.

[*Counsel shows (or, alternatively, hands a copy of) document to opposing counsel.*]

Counsel: Your Honor, I would ask that this document be marked as Defendant's Exhibit B for purposes of identification. It is a one-page document with the printed heading "Witness Statement" and it is dated July 25, 2007.

STEP 17. ACTION 3: SHOW EXHIBIT TO JUDGE

IF EXHIBIT WAS COPIED

If exhibit was copied, hand the clerk *both*:

a. Original exhibit to be marked; *plus*

b. Copy of exhibit for judge's personal use.

NOTE

Judges are increasingly requiring that their copy of exhibits be three-hole punched and that a binder for exhibits be provided in advance.

SAMPLE RECORD: Providing Exhibit for Judge

Q: Could you tell us what model of car it was?

A: It was one of those small, four-wheel-drive vehicles.

[*Counsel shows (or, alternatively, hands a copy of) document to opposing counsel.*]

Counsel: Your Honor, I would ask that this document be marked as Defendant's Exhibit B for purposes of identification. It is a one-page document with the printed heading "Witness Statement" and is dated July 25, 2007.

[*Counsel hands document and copy to clerk, keeping another copy of the document for own use. Clerk marks documents, hands copy to judge, and returns original to counsel.*]

Counsel: May I approach the witness with the exhibit?

Court: Go ahead.

IF PROBLEM WITH EXHIBIT

Ascertain from local rules (see, *e.g.,* Los Angeles Ct R 8.46, 8.59) or from judge whether early disclosure is required, outside of jury's presence, if exhibit is:

a. Sensitive;

b. Bulky; or

c. Potentially objectionable.

STEP 18. ACTION 4: DEVELOP FACTUAL BASIS FOR ADMITTING EXHIBIT INTO EVIDENCE

OBJECTIVE

Develop factual basis for admission to:

a. Show relevancy;

b. Establish authenticity; and

c. Overcome potential evidentiary objections. See Appendix C.

HOW TO DO IT

Use methods developed during pretrial preparation to show required factual basis, *e.g.*:

Witness

Ask witness questions you have prepared for this purpose (see Sample Record: Witness Authenticates Document, below);

Judicial Notice

If appropriate, ask court to take judicial notice, and be prepared with supporting authority if opposing counsel objects (for discussion of judicial notice, see step 10, above);

Stipulation

Assuming you and opposing counsel already have stipulated to the factual basis or to admissibility, read stipulation into record;

Presumption

Inform court and opposing counsel of presumptions providing the factual basis; or

Discovery Responses

Read deposition or responses to interrogatories or requests for admissions, if they provide the factual basis.

IF WITNESS AUTHENTICATES

If you are using a witness to authenticate the exhibit, be prepared to (see Sample Record: Witness Authenticates Document, below):

a. Ask questions that establish the witness's knowledge of exhibit; and

b. Ask witness to explain what exhibit is.

NOTE

Determine whether court requires counsel to ask permission to approach witness. See, *e.g.,* Sacramento Ct R 7.02.

Further Research: For other sample foundations and objections for specific types of evidence, see Appendix G.

JUDGE'S PERSPECTIVE

It is inappropriate for counsel to stand near a witness being examined, particularly during cross-examination.

- Witnesses are usually quite nervous and, if counsel stands too near, can be intimidated;

- Even when the witness is friendly, counsel should stand some distance away so that the witness will be encouraged to speak loudly enough for both the judge and the jury to hear clearly.

SAMPLE RECORD: Witness Authenticates Document

Counsel: May I approach the witness with the exhibit, your Honor?

Court: You may. [*Counsel then approaches the witness.*]

Counsel: Mr. Smith, I am handing you a document that now has been marked for purposes of identification as Defendant's Exhibit B. Would you please review this document and tell us whether you recognize it?

[*If counsel has approached witness, this is a good time to return to counsel's table.*]

A: Yes, I do.

Q: What is it?

A: It's a letter I received from Mr. Jones's accountant on July 25, 2007, shortly after he and I discussed my tax return.

Further Research: See Effective Intro of Evidence, chap 11 (authentication).

STEP 19. ACTION 5: OFFER EXHIBIT INTO EVIDENCE

WHEN TO OFFER

Offer exhibit into evidence *immediately* after laying the foundation for introducing it into evidence.

HOW TO OFFER

Offer an exhibit by:

a. Motion, *e.g.,* "Your Honor, I *move* that Plaintiff's Exhibit A, a letter to Mr. Smith dated July 26, 2007, be admitted into evidence";

b. Request, *e.g.,* "Your Honor, I *request* that Defendant's Exhibit B be received in evidence"; or

c. Offer, *e.g.,* "Your Honor, we *offer* Plaintiff's Exhibit M into evidence."

NOTE

If there is any uncertainty about which exhibit you are offering into evidence, *e.g.,* two documents were handled at the same time, or you obtained foundational testimony from more than one witness, briefly describe the exhibit *again.*

JUDGE'S PERSPECTIVE

Inexperienced trial lawyers often *mistakenly* believe that:

- Asking the clerk to mark an exhibit puts it automatically "in evidence"; or
- Merely offering the exhibit into evidence will accomplish this, even though the judge has never ruled on the offer.

Until the court grants your motion, request, or offer to receive the exhibit in evidence, you *cannot:*

- Disclose the exhibit's content to the jury;
- Argue the meaning or value of that content during closing argument; or
- Have the benefit of the evidence during postverdict motions or on appeal.

STEP 20. ACTION 6: MEET OBJECTIONS TO ADMITTING YOUR EVIDENCE

SHOW THAT OBJECTION LACKS MERIT

Use "evidence memo" (see step 7, above) or other pretrial preparation to show court that opposing party's objection or claim of privilege is without merit.

TRY OTHER METHODS TO OVERCOME OBJECTION

If you are unable to convince court to overrule objection, try other methods to overcome objection, *e.g.,* those discussed in the material that follows.

ADMITTED FOR LIMITED PURPOSE

OFFER EVIDENCE FOR LIMITED PURPOSE

a. Evidence is frequently admissible for some purposes while inadmissible for others. Evid C §355.

Example: Evidence that defendant repaired the stairs after plaintiff slipped on them is inadmissible under Evid C §1151 (subsequent safety measures). Defendant testifies that the stairs could not be made any safer, and you offer evidence of the remedial work for the limited purpose of attacking defendant's credibility. See Effective Intro of Evidence, chap 7 (evidence offered for a limited purpose).

b. If you want to use evidence that may be subject to objection:

(1) Try to find alternative reasons to make it admissible; and

(2) Be prepared to develop and explain those reasons at trial.

c. If you succeed, the evidence will be admitted for the jury to consider along with a limiting instruction from the court restricting its use. See CACI 206.

NOTE

You risk committing misconduct if evidence is received for a limited purpose and you use it in argument for an improper purpose. *Granville v Parsons* (1968) 259 CA2d 298, 66 CR 149.

JUDGE'S PERSPECTIVE

Do not become too creative with alternate grounds for admissibility. The evidence must be relevant to prove an issue in the case. For example, attorneys frequently rely on the "state of mind" exception in response to a hearsay objection, but the declarant's state of mind is not often at issue and only rarely tends to prove any element of the case.

CONDITIONALLY ADMITTED

OFFER EVIDENCE SUBJECT TO CONDITION

When there are logistical problems in admitting some evidence, because, *e.g.,* its foundation involves more than one witness, ask court to admit evidence on condition that you will later introduce foundational testimony. Evid C §403(b).

Procedure

Request conditional admission by:

a. Explaining logistical problem to court;

b. Outlining theory of admissibility;

c. Stating nature and source of additional facts; and

d. Assuring court of your intent and ability to develop those facts at a later time.

See step 21, below, for Evid C §403 procedures.

Motion to Strike

If you do not develop the additional foundation after evidence has been conditionally received, burden is on *opposing party* to move to strike the evidence. Civ Proc During Trial §15.63.

If Court Grants Motion

If court has previously received evidence conditionally and then grants motion to strike, opposing counsel may be able to successfully move for mistrial or new trial. Civ Proc During Trial §13.136.

OBJECTIONABLE ENTRIES EXCISED

WHEN APPROPRIATE

When an otherwise admissible writing contains objectionable material, be prepared to offer exhibit with objectionable portion excised.

OFFER EXHIBIT

If you believe that entire document may be admissible, offer it into evidence *before* raising any possibility of excising challenged portion.

If Opposing Party Objects

Offer an excised copy of exhibit in response to an objection from opposing counsel.

OFFER EXHIBIT WITH EXCISED PORTIONS

If questioned portion is clearly objectionable or is unimportant to you, ask court, *outside jury's presence,* to admit an excised copy *before* offering original exhibit into evidence.

PREPARE EXCISED COPY

Before coming to court, if possible, prepare an excised copy of exhibit (for discussion of minimizing prejudicial impact, see below):

a. Excise objectionable portions by using white-out, redacting tape, or paper to cover excluded portions, and then photocopying a "clean" copy, which then can be marked and used as an exhibit.

b. When objectionable portion can be excised only by physically covering that portion of original exhibit, do so before bringing exhibit to court.

NOTE

Make and bring enough copies for all counsel and the court.

IF COURT ADMITS EXCISED EXHIBIT

If court rules that a copy of excised exhibit is admissible:

a. Edited copy will be received in evidence;

b. Original unaltered exhibit remains part of the record, marked "*for identification only*."

MINIMIZE PREJUDICIAL IMPACT

Consider Jury Speculation

Consider:

a. Risk that jury will speculate about what might have been deleted from an obviously altered exhibit; and

b. That speculation could be prejudicial to either side.

Avoid Potential Prejudice

Avoid potential prejudice by:

a. Asking for an admonition to jury stating that speculation is inappropriate; or

b. Asking court to allow exhibit to be read to jury (rather than inspected by it). See, *e.g.,* Los Angeles Ct R 8.67.

Further Research: See Effective Intro of Evidence, chap 3 (how to combat objections), chap 7 (evidence offered for limited purpose).

Source: Evidence/Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Action Guide)/When Introducing Exhibits at Trial/STEP 21. ACTION 7: IF APPROPRIATE, PRESENT PRELIMINARY FACTS AT HEARING

STEP 21. ACTION 7: IF APPROPRIATE, PRESENT PRELIMINARY FACTS AT HEARING

WHEN APPROPRIATE

Present preliminary facts at hearing when:

a. Court's decision to admit or exclude proffered evidence depends on proof of a preliminary fact (see Evid C §§310(a), 400-406); and

b. Opposing counsel objects to foundational proof of your proffered evidence.

Proffered Evidence

Proffered evidence is evidence that you, as proponent, wish to admit, *e.g.,* lay testimony. Evid C §401.

Preliminary Fact

A preliminary fact is foundational proof, *e.g.,* of personal knowledge or genuineness, that you offer to support admission of that evidence. Evid C §400.

PURPOSE OF HEARING

"Preliminary fact" hearing (either Evid C §403 or §405) allows court to decide whether preliminary fact exists.

CONSIDER EXCLUDING JURY

Avoid risking that jury will hear evidence that court either excludes or admits over objection, by asking court to exercise its discretion and conduct hearing outside jury's presence. Evid C §402(b); *Mize v Atchison, Topeka & Santa Fe Ry. Co.* (1975) 46 CA3d 436, 448, 120 CR 787.

PRESENT EVIDENCE OF PRELIMINARY FACT

For "preliminary fact" hearing:

a. Determine whether Evid C §403 or §405 procedures apply (see below); and

b. Be prepared to present evidence to establish disputed preliminary fact; *e.g.,* present witness testimony, documents, physical evidence (Evid C §140), to enable trial judge to determine that preliminary fact exists.

SECTION 403 DETERMINATION

WHEN EVID C §403 PROCEDURES APPLY

Evidence Code §403 procedures apply when you need preliminary facts to show:

Relevancy

Relevancy, *e.g.,* if offering a photographic reenactment of accident, you must show as preliminary fact that reenactment was conducted under the same or substantially similar conditions as those existing at time of accident (see *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110; *People v Kaurish* (1990) 52 C3d 648, 692, 276 CR 788; for discussion of photographs, see Appendix G).

Personal Knowledge

Personal knowledge of witness concerning subject matter of his or her testimony, *e.g.,* if proposed testimony is that a car went

through a red light, you must show as preliminary fact that witness was at the scene and saw the occurrence (see Sample Record: Showing Personal Knowledge, step 29, below).

Authentic Writing

That writing is authentic, *e.g.,* that letter received by Mr. Smith is the one written to him by Mr. Jones's accountant (see Evid C §1400; see also Appendix G for typical foundations for specific writings).

NOTE

"Writing" is broadly defined to include letters, words, pictures, sounds, symbols, or a combination of these. Evid C §250.

Identity

That a particular person made a statement or performed other conduct, *e.g.,* if offering evidence that Allen slandered Barbara during a telephone conversation with Carl, having Carl testify to show that he knew Allen's voice and recognized that the caller was Allen.

WHAT COURT DETERMINES

Court:

a. Decides whether there is sufficient evidence to sustain a finding that preliminary fact exists; and

b. If so, admits evidence.

Further Research: Evid C §403(a).

EFFECT OF DETERMINATION

Court (Evid C §403(c)):

a. Decides *only* whether proponent made a prima facie showing that preliminary fact exists; and

b. Then instructs jury to:

(1) Determine whether preliminary fact exists; and

(2) Disregard evidence unless jury finds that preliminary fact does exist.

Sample Instruction: For sample jury instruction, see Trial Objections §21.12.

Further Research: For further discussion of determination under Evid C §403, see Trial Objections §§21.10-21.14.

SECTION 405 DETERMINATION

WHEN EVID C §405 PROCEDURES APPLY

Evidence Code §405 procedures apply when preliminary fact determination is not governed by Evid C §403 or §404 (privilege against self-incrimination), *e.g.*:

a. Claims of privilege (see Evid C §§900-1070);

b. Hearsay evidence (see Evid C §§1200-1380) (except for *identity* of declarant, a §403 issue);

c. Secondary evidence of a writing (see Evid C §§1520-1567);

d. Admissions and confessions (see Evid C §1152), *e.g.,* whether admission is inadmissible because it was made during compromise negotiations or mediation proceedings.

HOW §405 PROCEDURES DIFFER FROM EVID C §403 DETERMINATION

This differs from Evid C §403 determination because court first indicates (Evid C §405(a)):

a. Who has burden of proof; and

b. Who has burden of producing evidence.

WHAT COURT DETERMINES

Court:

a. Decides existence or nonexistence of preliminary fact; and

b. Admits or excludes proffered evidence as required by the rule of law under which the question arises. Evid C §405(a).

EFFECT OF DETERMINATION

If a preliminary fact involved in the Evid C §405 hearing is also a fact at issue in the dispute itself, the jury is (Evid C §405(b)):

a. *Not* informed of the court's determination in the §405 hearing; and

b. *Not* instructed to disregard evidence admitted as a result of that hearing if jury's determination of the same fact differs from court's determination.

Example: *A,* the victim in a prosecution for incest, claimed that she was defendant *X*'s wife and entitled to the marital privilege. The court determined under Evid C §405 that *A* was *X*'s *daughter* and was not entitled to the marital privilege. The jury also had to determine whether *A* was *X*'s daughter as part of the crime of incest. The jury was *not* told that the judge had decided that *A* was *X*'s daughter, and was *not* instructed to ignore *A*'s testimony if it found that *A* was *not X*'s daughter. *People v MacDonald* (1938) 24 CA2d 702, 76 P2d 121. See Jefferson's California Evidence Benchbook, chap 25 (3d ed CJA-CEB 1997), referred to throughout this Action Guide as Evidence Benchbook.

Further Research: See Comments to Evidence Code. See also Trial Objections, chap 21; Evidence Benchbook §§2.32-2.58, 23.1-23.15; and Effective Intro of Evidence, chap 4 (preliminary fact hearings).

STEP 22. ACTION 8: OBTAIN DEFINITIVE RULING ON ADMISSIBILITY

OBJECTIVE

Obtain a definitive ruling on admissibility so that you can:

a. Make a clear record of:

(1) Court's ruling that exhibit may be used as evidence; or

(2) Court's refusal to admit, so that you can preserve your client's rights on appeal;

b. Keep track of exhibits that court admits or refuses to admit; and

c. Follow up to make sure all your evidence is admitted.

COURT'S POSSIBLE RULINGS

Court may:

a. Admit exhibit for all purposes and against all parties;

b. Admit exhibit, but only for limited purposes or against certain parties (for discussion of admitting for limited purpose, see step 20, above);

c. Admit exhibit, but with portions excluded or excised (for discussion of admitting for excising objectionable entries, see step 20, above);

d. Conditionally admit exhibit, subject to additional foundational testimony (for discussion of admitting conditionally, see step 20, above);

e. Conditionally admit exhibit, subject to subsequent motion to strike (for discussion of admitting conditionally, see step 20, above);

f. Exclude exhibit;

g. Request further foundation (see step 21, above); or

h. Take matter under submission.

If Conditional Admission

Conditional admission reflects court's:

a. Uncertainty about exhibit's ultimate admissibility; and

b. Desire to move trial forward.

PRESERVE THE RECORD

Put *any* court ruling *on the record.* Avoid unreported sidebar conferences and discussions in chambers when you or opposing counsel ask for a ruling.

JUDGE'S PERSPECTIVE

Make a record of what happens at a sidebar conference by having it reported or by specifically referring to it in the courtroom *on the record* at the first opportunity (*e.g.,* at the next break when the jurors have left the courtroom). Similarly, if an in-chambers conference is not reported, do not forget to put on the record *a summary* of the points in contention that were discussed in

chambers to preserve your objections and arguments.

Do not hesitate to ask that conferences be reported. Competent judges are also interested in making a thorough record. However, do not treat this as carte blanche to have multiple sidebars lasting several minutes each. Note that some judges will not allow sidebars at all; determine your judge's practice before trial.

If the timing of the introduction of a controversial piece of evidence is of critical importance to your case, request an in-chambers conference with the reporter present, or ask that the jury be excused so that the matter may be argued fully on the record.

MAINTAIN EXHIBIT LOG

Record in your exhibit log the status of evidence, including date of ruling on admissibility in the record (for sample log, see Appendix F).

Compare Log With Clerk's Record

Periodically, compare your log during trial with clerk's formal record to verify accuracy of both.

Use Log as Reminder

Use log to remind you to:

a. Provide additional authenticating testimony;

b. Make subsequent motions to strike opposing counsel's evidence; and

c. Obtain definitive rulings on admissibility.

JUDGE'S PERSPECTIVE

Disclosing to the jury the substance of an exhibit that has not been received into evidence is improper and may constitute:

- Misconduct;
- Contempt (if done in violation of court's prior ruling); or
- Grounds for a mistrial or reversal on appeal.

FOLLOW UP

Monitor status of the record by referring to your exhibit log (see Appendix F) and fulfill your obligations to:

a. Offer further evidence;

b. Make needed motions; and

c. Provide a legal brief on the issue.

NOTE

If you do not make follow-up offer or obtain definitive ruling by court stating for the record why exhibit was not admitted, you risk waiving any claim of error on appeal. *Spanfelner v Meyer* (1942) 51 CA2d 390, 391, 124 P2d 862.

STEP 23. ACTION 9: MAKE AN OFFER OF PROOF

WHEN TO MAKE OFFER

Make an offer of proof when court rules *not* to admit evidence, to persuade trial court to reverse its decision.

WHEN REQUIRED TO MAKE OFFER

You *must* make offer when court rules *not* to admit evidence, to make sure that court knows and the record for appeal reflects (Evid C §354(a)):

a. Substance of excluded evidence;

b. What excluded evidence will prove;

c. Relevance of excluded evidence; and

d. That jury was not present.

WHEN OPTIONAL

While not technically necessary, consider making an offer of proof for evidence excluded during cross-examination (Evid C §354(c)) to:

a. Persuade court to reconsider previous ruling; or

b. Explain how additional facts would alter exclusion.

"OFFER OF PROOF" DEFINED

When court excludes evidence, you:

Identify

Set forth the "substance, purpose, and relevance of the excluded evidence" (Evid C §354(a)); and

Offer to Prove

Offer to prove substance of rejected evidence, *i.e.,* state what court or jury would perceive if evidence were admitted (see *United Sav. & Loan Ass'n v Reeder Dev. Corp.* (1976) 57 CA3d 282, 294, 129 CR 113), *e.g.,* state contents of:

a. Testimony of witness; or

b. Writing.

See Sample Record: Offer of Proof, below.

HOW TO MAKE OFFER

Make offer:

a. Orally;

b. In writing; or

c. By interrogating witness(es) outside jury's presence.

Further Research: See Civ Proc During Trial §§13.138, 15.50-15.60.

JUDGE'S PERSPECTIVE

Offers of proof are very important and are frequently forgotten or inadequate:

- Making the offer of proof through the witness is the most effective way to do it. It leaves nothing for speculation about what the witness personally might have said. This method is more convincing for both the trial and appellate judges.
- When you make the offer you should show the substance of an exhibit through the exhibit itself, because it becomes a part of the court's record when marked for identification.

SAMPLE RECORD: Offer of Proof

Sample Questions Resulting in Objection

Q: Now, Dr. Marston, based on your examination of Mr. Gray, the X-ray results—which you brought with you—and the nature and severity of his injuries, did you form a medical conclusion about whether Mr. Gray would be permanently disabled from his occupation as a carpenter as a result of those injuries?

A: Yes, I did.

Q: Would you tell the jury what that conclusion was?

Sample Objection (Insufficient Foundation)

Opposing Counsel: Objection, your Honor. There's been no showing that Dr. Marston has seen or examined the plaintiff in over 2 years, and Mr. Gray himself has testified that his condition has improved significantly during that time period. For this witness to offer an opinion about the plaintiff's current or future physical condition or his ability to do his job adequately would be sheer speculation.

Court: Ms. Dunne? [*proffering counsel*]

Proffering Counsel: Your Honor, the doctor has testified that he personally examined and treated Mr. Gray for his various injuries. He therefore has personal knowledge of the plaintiff's condition at that time and should be allowed to testify about the opinion he formed at that time. That opinion is certainly relevant to showing the severity of the injuries for which Mr. Gray is now seeking damages.

Dr. Marston should also be allowed to express his opinion regarding the prognosis of Mr. Gray's condition in the future, based on the nature and permanency of the injuries that Mr. Gray sustained. That is something doctors are called on to do every day, both in practice and in the courtroom. As a medical doctor, he knows certain injuries are going to heal only so much. That's the case here, as Dr. Marston will explain if allowed.

Court: I'm going to sustain the objection.

Proffering Counsel: May I make an offer of proof, your Honor?

Court: Certainly, at our regular afternoon break.

[*The court generally tries to hear offers of proof at the convenience of the jury, e.g., at the beginning or end of the court day or during breaks.*]

Court: The record will reflect that the jury is on break and that counsel for all parties are present. Ms. Dunne, did you wish to make an offer of proof?

Sample Offer of Proof

Proffering Counsel: Yes, your Honor, and I'll be brief. Dr. Marston was asked what medical conclusion he had reached with respect to whether Mr. Gray would be permanently disabled as a result of his injuries.

Had Dr. Marston been allowed to answer that question, he would have testified that it was his medical conclusion that Mr. Gray was disabled as a result of the injuries caused by being thrown by the defendant's horse; that, because of the manner in which Mr. Gray's arm and shoulder bones were crushed, Mr. Gray would never regain more than 60 percent of his original flexibility or strength in that arm and shoulder; and, therefore, in the doctor's medical opinion, that Mr. Gray's disability would be permanent. Thank you, your Honor.

Further Research: See Effective Intro of Evidence §§3.21-3.26.

STEP 24. ACTION 10: DISCLOSE TO JURY SUBSTANCE OF EXHIBIT ADMITTED IN EVIDENCE

OBJECTIVE

Disclose to jury the substance of an exhibit admitted in evidence to make jurors aware of the exhibit's meaning and importance.

HOW TO DISCLOSE

Your specific method of disclosure will vary, depending on:

a. Type of exhibit;

b. Importance of exhibit;

c. Authenticating witness's qualities;

d. Court's practices; and

e. Time and expense considerations.

OPTIONS

Disclosure can be made by having:

a. Witness read exhibit in its entirety;

b. Attorney read exhibit in its entirety;

c. Witness read exhibit only in part, and in response to questions;

d. Attorney read exhibit only in part;

e. Exhibit displayed on video display, or by enlargement;

f. Copies of exhibit distributed to individual jurors for review; or

g. Original exhibit circulated among jurors for review.

ADVANTAGES AND DISADVANTAGES OF OPTIONS

Reading Exhibit in Part

Disadvantages of reading exhibit in part:

a. If you disclose exhibit only partially, you risk that jury will suspect unfair editing or concealment; and

b. If you do not have the entire document read, opposing counsel may have undisclosed material portions read. CCP §2025.620(e).

Displaying Exhibit

a. *Advantage of displaying exhibit:* Most persuasive option.

b. *Disadvantages of displaying exhibit:*

(1) The courtroom may not be equipped for PowerPoint display;

(2) Overhead projectors are cumbersome; and

(3) Enlargements are expensive.

Distributing Copies of Exhibit to Jurors

Disadvantage of distributing copies to jurors: Must obtain prior court permission.

Circulating Original Exhibit Among Jurors

Disadvantages of circulating original exhibit:

a. Must obtain prior court permission.

b. Least preferred because it is time consuming and court may prevent jurors from examining exhibit while witness is testifying about it.

JUDGE'S PERSPECTIVE

Reading an exhibit or passing it among jurors is time consuming and the court may not allow it, so:

- Consider using blowups or overhead projectors; and
- Remember that both the judge and jury will appreciate your saving time during the trial.

Consider Using A Computer

Computers have greatly enhanced an attorney's ability to display exhibits effectively at trial:

a. A scanned exhibit can quickly and easily be displayed in its entirety, and portions of an exhibit can be highlighted, magnified and compared with portions of other exhibits.

b. Having exhibits scanned onto a computer allows for quick display of exhibits without fumbling with original exhibits, exhibit binders or blowups.

c. If there are numerous exhibits, a computer operator is highly recommended. A knowledgeable computer operator in the courtroom allows counsel to make or modify presentations extemporaneously. Opposing counsel will frequently stipulate to sharing the cost of a neutral outside vendor for this service.

WHEN WITNESS MAKES MARKS ON EXHIBIT

If you plan to have witness mark an enlargement, treat that document as a separate exhibit; *e.g.,* have clerk mark it as a new exhibit.

STEP 25. ACTION 11: VERIFY RECORDED ADMISSION OF EXHIBITS INTO EVIDENCE

OBJECTIVE

Verify recorded admission of exhibits into evidence to make certain that:

a. All proffered exhibits have been formally and unconditionally received into evidence; and

b. Clerk's record reflects their receipt.

WHEN TO VERIFY

Verify before close of your case.

HOW TO VERIFY

Verify by:

a. Reviewing your exhibit log to ascertain whether court has admitted all exhibits;

b. Comparing your exhibit log with court clerk's formal record;

c. Checking each exhibit to ensure that all "For purposes of identification" labels have been removed; and

d. Reoffering any exhibit for which there is any question and obtaining a definitive ruling.

When Introducing Other Evidence Not Offered as Exhibits

STEP 26. IMPEACH WITNESS WITH PRIOR DEPOSITION TESTIMONY

LODGE TRANSCRIPT

Before or when witness first takes the stand, lodge with court the *original* deposition transcript with appropriate certification by court reporter.

IDENTIFY TRANSCRIPT

Before you begin reading prior testimony, briefly identify the transcript for the record and jury.

ASK FOUNDATIONAL QUESTIONS

Although it is usually unnecessary, consider using foundational testimony to impress jury with the importance of prior inconsistency, *e.g.,* that witness remembers the deposition, and knew that he or she was answering under oath. For sample foundational questions, see Sample Record: Impeaching With Deposition Testimony, below; Civ Proc During Trial §12.65.

JUDGE'S PERSPECTIVE

Developing these foundational questions is extremely useful in underlining the importance of the testimony to be read.

Most jurors have not had depositions taken and do not realize that the witness's testimony was given under oath and that the deponent was probably represented by counsel at the deposition.

ASK COURT'S PERMISSION

Request permission to read from the transcript. It is generally preferable to read it yourself, rather than ask a witness to read it.

NOTE

Consider requesting court to instruct jury on nature and importance of deposition testimony. See CACI 208.

DESIGNATE PORTIONS

Announce which portions you intend to read by inclusive page and line numbers. For sample designation, see Sample Record: Impeaching With Deposition Testimony, below; see also Appendix E for written designation.

WAIT FOR REVIEW AND OBJECTIONS

Pause long enough for court and opposing counsel to review designated portions for possible objections. If opposing counsel has any objection to any specific portion, it should be made and resolved before that portion of the transcript is read.

READ TRANSCRIPT

Read designated portion carefully into record, prefacing each question with the word "Question" and each answer with the word "Answer."

DO NOT ASK WITNESS TO EXPLAIN

After you finish reading designated portion of transcript, you do *not* need to ask witness:

a. To explain discrepancies or to comment on the testimony; or

b. Whether his or her recollection has been refreshed.

DO NOT OFFER INTO EVIDENCE

It is generally unnecessary to offer deposition transcript into evidence and court generally will reject such an offer.

REFER TO DURING CLOSING ARGUMENT

You can read or display previously read deposition testimony only during closing argument. *People v Coontz* (1953) 119 CA2d 276, 282, 259 P2d 694; Civ Proc During Trial §19.29.

JURY CANNOT SEE DURING PRIVATE DELIBERATIONS

Jurors are not allowed to take deposition transcripts into deliberations. CCP §612.

SAMPLE RECORD: Impeaching with Deposition Testimony

Sample Testimony to Be Impeached

Q: Now, at the time that you made the decision to ride the horse here, you knew that you were not a particularly good rider, correct?

A: Yes.

Q: In fact, you had ridden a horse only two times in your entire lifetime before this incident, correct?

A: Yes.

Q: And the last time you had been on a horse before this incident was about 25 years ago, right after you got out of high school?

A: That's true.

Q: When you got out to the ranch, you were sufficiently concerned about having to ride a horse that you were actually scared, weren't you?

A: I wouldn't say that.

Q: Weren't you scared when you went out to the ranch to ride the horse, Mr. Gray?

A: No.

[*Counsel reaches for deposition transcript.*]

SAMPLE FOUNDATIONAL QUESTIONS

Q: You recall that your deposition was taken in this matter, don't you?

A: Yes.

Q: That deposition was taken at my offices in San Francisco?

A: Yes.

Q: And you came to the deposition with your attorney, Mr. Lee.

A: Yes.

Q: And you understood at that deposition that your testimony there was being given under oath, just as it is here in this courtroom today?

A: Yes.

Q: And after the deposition was taken, you received a letter telling you that it was available for you to read and correct, didn't you?

A: Yes.

Q: And you didn't make any corrections to the transcript, did you?

A: No.

Sample Designation and Reading

Counsel: At this time, your Honor, I would like to read to the jury from Mr. Gray's deposition testimony in this case. I'm referring to the deposition given on April 18, 2007, page 47, lines 10 to 15.

[*Counsel pauses.*]

"Question: What was your state of mind as you approached the horse that day?

"Answer: I was scared."

Further Research: See Effective Intro of Evidence, chap 19 (credibility), chap 28 (former testimony), chap 41 (prior inconsistent statements).

STEP 27. PRESENT PRIOR TESTIMONY OF ADVERSE OR UNAVAILABLE WITNESS DURING CASE IN CHIEF

LODGE TRANSCRIPT

Unless under local rules you have already designated the transcript (for discussion of deposition transcript, see step 10, above), lodge with court the *original* transcript with appropriate certification by court reporter.

NOTIFY COURT AND COUNSEL

Notify court and counsel of your intent to read prior sworn testimony.

AUTHENTICATE TRANSCRIPT

If Deposition Transcript

Authenticate deposition transcript:

a. By showing compliance with deposition review, correction, and signature requirements (see CCP §§2025.520-2025.560); or

b. If you cannot show compliance with deposition procedures, develop authentication foundation for reported testimony, using, as appropriate:

(1) Witness testimony, *e.g.,* attorney who attended deposition;

(2) Stipulations (see Effective Intro of Evidence, chap 51);

(3) Judicial notice (for discussion of judicial notice, see step 10, above; Civ Proc During Trial, chap 14); or

(4) Discovery admissions.

Transcript of Other Testimony

Authenticate other testimony by using, as appropriate:

a. Witness testimony, *e.g.,* attorney who was present during all of former testimony (see Effective Intro of Evidence, chap 28 (former testimony));

b. Stipulations (see Effective Intro of Evidence, chap 51 (stipulations));

c. Judicial notice (for discussion of judicial notice, see step 10, above; Civ Proc During Trial, chap 14); or

d. If all else fails, call court reporter who recorded the testimony. See Effective Intro of Evidence, chap 28 (former testimony).

ESTABLISH UNAVAILABILITY FOUNDATION

If you want to use former testimony of unavailable declarant against person who was not party to former proceeding:

a. Establish opportunity and similar motive to cross-examine. Evid C §1292; see *Rufo v Simpson* (2001) 86 CA4th 573, 604, 103 CR2d 492.

Example: *X* was involved in an automobile collision with *D*. *X* was insured by Insurance, Inc. *D* sues *X,* and Insurance, Inc. provides a defense. During the trial, Agent testifies that Insurance, Inc. had wrongfully refused to settle *D*'s claim. Agent dies after the *D v X* trial. *X* sues Insurance, Inc. for bad faith and seeks to have Agent's testimony admitted under Evid C §1292.

b. If necessary, establish witness's unavailability. Evid C §240; CCP §2025.620(c)(2).

ESTABLISH HEARSAY EXCEPTION

To overcome any hearsay objection, establish foundation for appropriate exception, *e.g.*:

If Offered Against Party

State that prior testimony is being offered as admission. See Evid C §§1220-1222.

If Statement of Nonparty

State that prior testimony is being offered as, *e.g.*:

a. Declaration against interest (Evid C §1230; witness must be unavailable);

b. Prior *inconsistent* statement (Evid C §1235; witness must have previously testified in this case);

c. Prior *consistent* statement (Evid C §1236; witness must have previously testified in this case); or

d. Former testimony (Evid C §§1290-1294; witness must be unavailable).

Further Research: See Trial Objections §§19.13, 19.19-19.22, 19.28; see also Effective Intro of Evidence, chap 20 (declarations against interest).

DESIGNATE PORTIONS OF TRANSCRIPT

Designate portions to be read and request permission to read them.

PROVIDE WRITTEN DESIGNATION

If court requires you to do so, or as a matter of courtesy, provide court and opposing counsel with a written designation of the portions that you want to read. For sample designation, see Appendix E.

WAIT FOR REVIEW AND OBJECTIONS

a. Before reading designated portion, pause long enough for court and opposing counsel to review designated portions for possible objections.

b. If opposing counsel has any objection to a specific portion, the court should resolve it before that portion of the transcript is read.

READ TRANSCRIPT

a. Read designated portion into record, prefacing each question with the word "Question" and each answer with the word "Answer."

b. If the testimony is lengthy, ask the court for permission to have someone play the role of the witness when reading the transcript.

STEP 28. EXAMINE THE EXPERT AND ELICIT EXPERT OPINION TESTIMONY

SATISFY LOCAL COURT RULES

Some judges may require hypothetical questions of experts to be submitted in advance and in writing. See, *e.g.,* Los Angeles Ct R 8.85 (not required unless court otherwise directs).

QUALIFY EXPERT

Make factual showing, typically through expert's own testimony, that, relating to issue in dispute, witness has *special*:

a. Knowledge;

b. Skill;

c. Experience;

d. Training; or

e. Education. Evid C §720; see *Petrou v South Coast Emergency Group* (2004) 119 CA4th 1090, 1095, 15 CR3d 64 (malpractice action; emergency room experience within 5 years of alleged malpractice required of expert witness).

JUDGE'S PERSPECTIVE

Most judges rule at some point before an opinion is given that the witness either is or is not an expert within a certain area:

- These designations frequently can be rough and overbroad, and questions within the designated area may in fact be beyond the witness's actual expertise.
- To avoid the problems caused by this general designation, some judges may decline the request for designating someone as an expert in any general area, and rule only on whether the person has sufficient expertise to answer specific questions.

DEVELOP OPINIONS

To develop expert's opinions:

a. Establish expert's personal knowledge of facts or assumptions constituting basis for opinions and show manner in which that knowledge was acquired;

b. Have expert give opinions and then explain reasons for them.

NOTE

The techniques described in a and b, above, may be reversed or combined.

Further Research: For a more extensive discussion of material covered in this step, see Handling Expert Witnesses, steps 33-37; Expert Witness, chaps 12-13. See also Effective Intro of Evidence, chap 24 (expert witnesses).

STEP 29. EXAMINE THE LAY WITNESS

HUMANIZE WITNESS

Have witness give sufficient personal identifying information so that jury can assess credibility and ability to recount. See Sample Record: Humanizing the Witness, below.

SHOW PERSONAL KNOWLEDGE

Establish witness's *personal* knowledge about matter before asking questions about it, through:

a. Witness's own testimony; or

b. Other admissible evidence.

See Sample Record: Showing Personal Knowledge, and Sample Record: Establishing Basis for Personal Opinions, below.

ASK FOR FACTS OR OPINION

Have witness recount knowledge or opinion regarding disputed matters.

JUDGE'S PERSPECTIVE

It is not unusual for lay testimony to be based inappropriately on hearsay rather than on true personal knowledge, undoubtedly resulting from a mistaken belief that a person who has been told of a particular fact has personal knowledge of that fact.

Anticipate opposing counsel's objection to any foundation consisting merely of the witness being asked whether he or she "knows this of his or her own personal knowledge."

Competent opposing counsel will require you to lay a foundation of personal knowledge. Evid C §702.

SAMPLE HEARSAY FOUNDATION

For a sample testimonial foundation to avoid hearsay objections, see discussion of excited utterance in Appendix G.

SAMPLE RECORD: Humanizing the Witness

Counsel: Defendant calls as its next witness Mrs. Judith Anderson.

[*At this point, Mrs. Anderson walks through the courtroom to the witness stand. The clerk administers the oath and instructs her to state her full name and address.*]

Witness: Judith Johnstone Anderson, 2 Lupine Court, San Rafael, California.

Clerk: You may be seated.

Court: You may proceed, counsel.

Counsel: Thank you, your Honor. Good morning, Mrs. Anderson.

Witness: Good morning.

Sample Testimony on General Personal Matters

Q: It is correct to address you as Mrs. Anderson?

A: Yes. I have been married for 9 years.

Q: What is your husband's name?

A: John Anderson.

Q: What does he do for a living?

A: He is a lineman for the telephone company.

Q: Are you employed outside the home, Mrs. Anderson?

A: Yes, I am.

Q: Could you tell us what you do?

A: I am an accountant with PricewaterhouseCoopers.

Q: How long have you worked there?

A: Almost 5 years.

Q: Are you in the process of obtaining your CPA designation?

A: Yes, I am.

SAMPLE TESTIMONY SHOWING CREDIBILITY

Q: Could you describe for us what your educational background is, leading up to your going to work at PricewaterhouseCoopers?

A: Well, let's see. I went through high school and grammar school in Napa. After I graduated from Napa High, I started college at Napa Junior College, where I went for a year. Then I transferred to the University of California in Berkeley, where I stayed until I graduated in 2000. My major at Cal was sociology. After I graduated, I realized that I was more interested in business than sociology, and so I enrolled in the MBA program at Hayward State, where I graduated in 2002. At that point, I went to work at PricewaterhouseCoopers. [*Shows basis for later testimony.*]

Q: Does your work at PricewaterhouseCoopers have a particular focus or specialty?

A: Yes, I primarily work in the tax department, although in order to get my CPA I have to do a certain amount of work in a number of different areas of the firm. [*Shows basis for later testimony.*]

SAMPLE RECORD: Showing Personal Knowledge

Q: I would like to turn now to discuss with you the dispute between my client, Mr. Rue, and the defendant, Mr. Molton. Have you met both of those individuals before coming here today?

A: Yes, I have. [*Shows opportunity to perceive.*]

Q: Have you ever been present when those two gentlemen discussed the possibility of doing business with one another?

A: Yes, I have. [*Shows personal knowledge.*]

SAMPLE RECORD: Establishing Basis for Personal Opinions

Q: How long have you known Mr. Molton?

A: 10 years.

Q: How well do you know him?

A: Pretty well. We've been in the same department the last 5 years. We have worked on the same accounts the last 2 years.

Q: Do you have an opinion concerning his character for honesty or telling the truth?

A: I sure do.

Q: What is it?

A: He's a very careful man who is scrupulously honest.

Further Research: See generally Civ Proc During Trial §§11.47-11.81; see also Effective Intro of Evidence, chap 14 (opinion evidence).

STEP 30. REFRESH WITNESS'S RECOLLECTION IN THE COURTROOM

WHAT YOU CAN USE

You can use almost any item to refresh recollection. Comment to Evid C §771; see 3 Witkin, Evidence, *Presentation at Trial* §§177-180.

If Using a Writing

If you use a writing to refresh witness's recollection, opposing counsel is entitled to (Evid C §771):

a. Inspect the document;

b. Cross-examine the witness about the document; and

c. Introduce into evidence pertinent portions of it.

COMPARE WITH PAST RECOLLECTION RECORDED

Refresh Recollection

When refreshing recollection:

a. You do *not* need to offer into evidence the *contents* of the document you use to refresh the witness's recollection (see, *e.g.*, *People v Seaton* (2001) 26 C4th 598, 658, 110 CR2d 441);

b. The document you use to refresh the witness's recollection need *not* be:

(1) Prepared by the witness or at witness's direction;

(2) At or near the time of the occurrence;

(3) For purpose of recording witness's knowledge;

(4) Admissible if made by witness while testifying.

Past Recollection Recorded

When offering record of past recollection:

a. You offer the *contents* of the document;

b. The document must have been prepared by the witness or at the witness's direction as a record of witness's knowledge at or near the time of the occurrence. See step 31, below.

SHOW "REFRESHING" DOCUMENT

Show exhibit to opposing counsel.

MARK DOCUMENT

Consider having exhibit marked for purposes of identification. See step 15, above.

REFRESH WITNESS'S RECOLLECTION

To refresh witness's recollection:

a. Ask court for permission to approach witness;

b. Hand document to witness:

(1) Identify document; and

(2) Ask witness to review it, or some portion of it that you specify;

c. Ask witness whether recollection has now been refreshed:

(1) *If not refreshed:* Consider whether document can be authenticated as past recollection recorded and contents admitted into evidence (see step 31, below);

(2) *If refreshed:* Go back and repeat same question that earlier prompted the need to refresh, asking witness to give present recollection. See Sample Record: Refreshing Recollection, below; Civ Proc During Trial §13.9;

d. Do not expect witness to read aloud from document, unless you separately authenticate it and it is received into evidence.

CONSIDER AUTHENTICATING DOCUMENT

Consider separately authenticating exhibit and offering it into evidence. See steps 18-25, above.

JUDGE'S PERSPECTIVE

The objection frequently is made that a recollection cannot be refreshed unless the witness has testified that he or she cannot recall. This is *not* required under California rules.

SAMPLE RECORD: Refreshing Recollection

Sample Testimony Showing Lack of Recognition

Q: Could you tell us what model of car it was?

A: It was one of those small, four-wheel-drive vehicles. I can't remember right now exactly what model it was.

Sample of Refreshing Recollection

[*At this point, the attorney shows the document to opposing counsel.*]

Counsel: Your Honor, may I approach the witness with a document for the purpose of refreshing his recollection?

Court: Go ahead, counsel.

Q: Let me hand you a copy of the statement you gave shortly after the accident. [*Identifies document*.] Would you please take a moment and read the second paragraph of this statement to yourself?

[*Attorney pauses while the witness reads the statement. Attorney returns to counsel table.*]

Q: Does this document refresh your recollection of the model of the car?

A: Yes, it does.

Q: What model was it?

A: It was a Jeep Cherokee, one of those downsized, four-wheel-drive models.

Further Research: For further discussion of material covered in step 30, see Effective Intro of Evidence, chap 44 (refreshing recollection).

STEP 31. INTRODUCE PAST RECOLLECTION RECORDED

OBJECTIVE

Offer a record of past recollection to introduce into evidence over hearsay objection:

a. Contents of writing showing witness's prior recorded recollection (Evid C §1237(a)); or

b. The writing itself, if you represent party *adverse* to party offering contents to show witness's prior recorded recollection. Evid C §1237(b).

WHEN YOU CAN USE

Use a record of a past recollection (Evid C §1237(a)) when:

a. Witness testifies that he or she has insufficient present recollection to testify fully and accurately (but witness's recollection is not refreshed after reviewing document (see step 30, above));

b. Statement would be admissible if made by witness while testifying; and

c. Requirements of Evid C §1237(a) are met.

SHOW OPPOSING COUNSEL

Show prior recorded recollection to opposing counsel.

GIVE COPY TO COURT

Provide copy to court.

MARK DOCUMENT

Have copy marked for purposes of identification. See step 15, above.

EXAMINE WITNESS

Show Writing to Witness

Show writing to witness by:

a. Asking court for permission to approach;

b. Handing exhibit to witness; and

c. Asking witness to review document and verify that he or she recognizes it.

NOTE

Return to counsel's table at this point.

Authenticate

Elicit witness's testimony that writing is authentic (see discussion in step 18, above, and Sample Record: Witness Authenticates Past Recollection Record, below). Evid C §1237(a)(4).

Satisfy Evid C §1237(a)

Develop witness's testimony that writing (Evid C §1237(a)(1)-(3)):

a. Was made when facts recorded actually occurred or were fresh in witness's mind;

b. Was made by:

(1) Witness; or

(2) Some other person at witness's direction;

c. Was made for purpose of recording witness's statement; and

d. Was true and accurately reported.

NOTE

If the writing was made by someone other than the witness and was not made under the witness's direction, you may need the actual maker to testify that the writing was made for the purpose of recording the witness's statement, and that it accurately did so.

READ CONTENTS

After satisfying foundational requirements and examining witness, ask permission to read contents of writing into record and for jury as past recollection recorded.

CONSIDER OFFERING WRITING INTO EVIDENCE

If Adverse Party

If you represent a party *adverse* to party offering the statement:

a. You may offer the writing into evidence; and

b. Writing is not subject to hearsay objection if party offering statement has met foundational requirements.

If Offering Party

If you represent the party offering the statement as a past recollection recorded, you cannot offer the writing itself, even if it meets foundational requirements (see step 30, above), but:

a. You may read contents of writing to jury (Evid C §1237(b)); and

b. Evaluate whether another exception applies, *e.g.,* business records (Evid C §1271), that would permit you to offer writing.

SAMPLE RECORD: Witness Authenticates Past Recollection Record

Sample Testimony Showing Lack of Recollection

Q: Do you recall what you told Mr. Jones's accountant in a telephone conversation on July 25?

A: No. [*Counsel then gives a copy of the past recollection record to opposing counsel and the court.*]

Counsel: Your Honor, I would ask that this document be marked as defendant's Exhibit M for purposes of identification. It is a statement dated July 25, 2007. It has previously been disclosed to opposing counsel.

[*This is when document is marked by the clerk as Defendant's Exhibit M.*]

Counsel: May I approach the witness with the exhibit, your Honor?

Court: You may. [*Counsel then approaches the witness.*]

SAMPLE TESTIMONY SHOWING FOUNDATION

Counsel: Mrs. Jones, I am handing you a document that has now been marked for purposes of identification as Defendant's Exhibit M. Would you please review this document and tell us whether you recognize it?

[*If counsel approached the witness, this is a good time to return to counsel's table; see Judge's Perspective in step 18, above.*]

A: Yes, I do.

Q: What is it?

A: It's a telephone memorandum I wrote immediately after discussing my tax return with Mr. Jones's accountant on July 25. [*Shows when made and by whom.*]

Q: So the statement was written while the facts stated in the memorandum were fresh in your mind?

A: Yes. [*Verifies when made.*]

Q: And you wrote the statement yourself for the purpose of recording the facts?

A: Yes. [*Verifies purpose of writing.*]

Q: Are the facts stated in the statement true and accurately set forth in the statement?

A: Yes. [*Verifies truth and accuracy.*]

Counsel: Your Honor, may I read the statement to the jury? [*Designates portions.*]

Court: Yes.

Counsel: [*Reading*] "Date: July 25, 2007. I told Mr. Jones's accountant that the taxes of $500,000 were paid on April 16, 2007."

Further Research: See Effective Intro of Evidence, chap 38 (past recollection recorded).

STEP 32. INTRODUCE ANSWERS TO INTERROGATORIES OR REQUESTS FOR ADMISSIONS

LODGE WITH COURT

Lodge interrogatories, requests, and corresponding responses with court.

NOTE

Courts are increasingly requiring counsel to perform this task before trial begins. For discussion of interrogatories and requests for admissions, see step 10, above.

ASK COURT

Notify court of intent to read portions.

CONSIDER REQUESTING JURY INSTRUCTION

Consider requesting jury instruction on nature and importance of interrogatory answers or admissions. See CACI 209 (interrogatories), CACI 210 (admissions).

DESIGNATE PORTIONS

Designate portions to be read by set, interrogatory/admission number, page, and lines.

NOTE

If reading multiple interrogatories or requests for admissions, you may be required by local rules, orders, or practice to prepare in advance cut-and-paste extracts of the pertinent portions for ease of reading. See, *e.g.,* Los Angeles Ct R 8.70.

WAIT FOR REVIEW AND OBJECTIONS

Pause to give court and opposing counsel an opportunity to review designated portions for objections.

READ TRANSCRIPT

Read designated portions *slowly and with emphasis*:

a. First read the request; and

b. Then read the corresponding response.

JUDGE'S PERSPECTIVE

Many counsel mistakenly believe that responses to discovery requests, such as interrogatories, are automatically in evidence after they are lodged with the court.

They *cannot* be read to the jury, argued during summation, or relied on as supporting evidence, unless they are formally introduced into evidence following the procedures outlined above.

Source: Evidence/Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Action Guide)/When Introducing Other Evidence Not Offered as Exhibits/STEP 33. INTRODUCE PLEADINGS

STEP 33. INTRODUCE PLEADINGS

CONSIDER EFFECT OF PLEADINGS

Statements made by a party in his or her pleadings (or not denied by the party in a responsive pleading), when offered against that party, are considered either judicial or evidentiary admissions (Evid C §1220):

Judicial Admission

Judicial admission conclusively establishes a fact against the party admitting the fact.

Evidentiary Admission

Evidentiary admission is only evidence of a fact, like any other admission under Evid C §1220.

Further Research: See 1 Witkin, Evidence, *Hearsay* §§97-98.

WHEN PLEADING IS A JUDICIAL ADMISSION

A statement in a verified pleading (or failure to deny an allegation in a verified pleading) is *usually* treated as a judicial admission. 1 Witkin, Evidence, *Hearsay* §§97-98; *Walker v Dorn* (1966) 240 CA2d 118, 120, 49 CR 362.

WHEN PLEADING IS EVIDENTIARY ADMISSION

Pleading is evidentiary admission when it:

a. Includes inconsistent counts or defenses in an unverified pleading (1 Witkin, Evidence, *Hearsay* §§97-98; *Walker v Dorn* (1966) 240 CA2d 118, 120, 49 CR 362; *Pinewood Investors v City of Oxnard* (1982) 133 CA3d 1030, 1035, 184 CR 417);

b. Has been superseded by an amended pleading (1 Witkin, Evidence, *Hearsay* §97; *Meyer v State Bd. of Equalization* (1954) 42 C2d 376, 385, 267 P2d 257);

c. Is from a prior civil action (1 Witkin, Evidence, *Hearsay* §98); or

d. Was not verified, not made or reviewed personally by the party, and not inconsistent with party's testimony. *Ault v International Harvester Co.* (1974) 13 C3d 113, 122, 117 CR 812.

USE AS JUDICIAL ADMISSION

Timing of Disclosure

Timing of formal disclosure of judicial admissions rests with court's discretion. *DeNardi v Palanca* (1932) 120 CA 371, 377, 8 P2d 220.

When to Request Disclosure

Consider requesting disclosure during:

a. Your opening statement;

b. Presentation of evidence;

c. Your closing argument; or

d. Final instructions.

Consider Submitting Jury Instruction

Consider submitting proposed jury instruction regarding the judicial admission.

USE AS EVIDENTIARY ADMISSION

Treat evidentiary admissions like any other prior statement of a party (see Evid C §1220), *e.g.*:

a. Authenticate by testimony or judicial notice; and

b. Consider offering all or part of it as an exhibit. See steps 15-24, above.

Further Research: See Civ Proc During Trial §§14.43-14.46; Effective Intro of Evidence, chap 10 (admissions and confessions).

STEP 34. INTRODUCE STIPULATIONS

IF MAKING STIPULATIONS

If you or opposing counsel offer to stipulate:

a. Make sure that the offer is made outside jury's hearing;

b. Commit stipulation to writing whenever possible and file with court.

READ STIPULATION

Read stipulation to jury and into the record in its *exact* terms.

HAVE JURY INSTRUCTED

Have court advise jury, both when the stipulation is first read and later during final instructions, that any stipulated fact is conclusively presumed to be true regarding stipulating parties. See CACI 106.

PREPARE INSTRUCTION

Prepare specific instruction regarding stipulation to be read by court during final instructions. See CACI 5003.

WHEN YOU MAY DISCLOSE STIPULATIONS

You may disclose stipulations during:

a. Your opening statement;

b. Presentation of evidence;

c. Your closing argument; and

d. Jury instructions.

Further Research: For further discussion of material covered in this step, see Effective Intro of Evidence, chap 51 (stipulations).

Source: Evidence/Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Action Guide)/When Introducing Other Evidence Not Offered as Exhibits/STEP 35. INTRODUCE DEMONSTRATIVE OR EXPERIMENTAL EVIDENCE

STEP 35. INTRODUCE DEMONSTRATIVE OR EXPERIMENTAL EVIDENCE

OBJECTIVE

Introduce demonstrative or experimental evidence to illustrate and clarify witness's testimony.

NOTIFY COURT EARLY

Notify court *early* in trial of your intent to conduct procedure if procedure will:

a. Impose logistical problems;

b. Create any sensitivity; or

c. Entail courtroom delay or disruption. *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110; see *Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 455, 52 CR 518 (court may disallow demonstration if time-consuming, confusing, or misleading).

If Opposing Counsel Objects

If opposing counsel objects, seek early resolution of the issue to assist your trial planning and give you time to correct deficiencies. See steps 12-14 and 21, above.

RECOGNIZE DIFFERENT STANDARDS

Previous *Kelly-Frye* Rule

For many years, the federal and California standard for admitting new scientific tests was governed by *Kelly-Frye* rule, which requires that test used be generally accepted in the scientific community. *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144, originally based on federal case of *Frye v U.S.* (DC Cir 1923) 293 F 1013.

Current Federal Rule

In 1993 case of *Daubert v Merrell Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, the United States Supreme Court held that *Frye v U.S., supra,* had been superseded by the Federal Rules of Evidence, particularly Fed R Evid 702:

a. Admissibility standard of Fed R Evid 703 requires only that the scientific test be "of a type reasonably relied upon";

b. Federal trial court's *Daubert* "gatekeeping" function applies not only to expert testimony based on "scientific" knowledge but also to testimony based on "technical" and "other specialized" knowledge. *Kumho Tire Co. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 250, 119 S Ct 1167.

Kelly Rule in California

Notwithstanding the less stringent federal rule enunciated in *Daubert,* the California Supreme Court has repeatedly reaffirmed the "general acceptance" rule of *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144. See *People v Leahy* (1994) 8 C4th 587, 34 CR2d 663; see also *People v Bui* (2001) 86 CA4th 1187, 1194, 103 CR2d 908; *People v Soto* (1999) 21 C4th 512, 518, 88 CR2d 34.

NOTE

California rule is to be referred to as the "*Kelly*" test or rule, not "*Kelly-Frye.*" *Cooley v Superior Court* (2002) 29 C4th 228, 242, n3, 127 CR2d 177.

CONSIDER ALTERNATIVES TO DEMONSTRATION IN COURT

Consider alternatives to demonstration in court; *e.g.,* expert conducts test or experiment before trial, and you have:

a. Expert describe test or experiment when it forms the basis of his or her opinion (*People v Stoll* (1989) 49 C3d 1136, 1141, 265 CR 111; see *Texaco Producing, Inc. v County of Kern* (1998) 66 CA4th 1029, 1049, 78 CR2d 433 (expert *opinion* must meet criteria for expert but may *not* have to meet *Kelly* or other reliability test); step 28, above; Evid C §§801-803; see also discussion of scientifically accepted technique, Appendix B);

b. Test or experiment recorded and presented as demonstrative evidence to clarify expert's testimony. See *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110 (film of accident reconstruction experiment). For discussion of motion pictures/video recordings, see Appendix G.

NOTE

Many experienced trial attorneys avoid courtroom experiments because of the unpredictability of their outcome. Prerecording a demonstration may be a good alternative.

BEFORE CONDUCTING DEMONSTRATION

On day before or morning of planned demonstration:

a. Remind court of your intent to conduct it; and

b. Explain proposed solutions to any logistical problems.

WHEN TO SET UP DEMONSTRATION

Set up equipment for demonstration before court session begins or during recess *immediately* before procedure is to be performed.

JUDGE'S PERSPECTIVE

If you will be handling physical objects at trial, get organized and set up in advance. Moving items around the courtroom, setting up charts or equipment, and trying to get equipment to work can be very time consuming, and if done while the judge and jury are impatiently watching, can be:

- Irritating to the court;
- Distracting and possibly annoying to the jury;
- Unnerving to you; and
- Ultimately detrimental to the client.

EXAMINE AUTHENTICATING WITNESS

Introduce and explain demonstration or experiment through an authenticating witness (see Sample Record: Demonstrations, below):

a. Show through testimony that procedure involved conditions *substantially similar* to those of the underlying occurrence (see Appendix B; *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 522, 109 CR 110; *People v Kaurish* (1990) 52 C3d 648, 692, 276 CR 788);

b. If scientific testing is involved, be prepared to establish that (see other requirements in Appendix B):

(1) The particular technique is generally accepted in the scientific community, *e.g.*:

(a) Voice-print identification *not* admissible (*People v Kelly* (1976) 17 C3d 24, 30, 37, 130 CR 144);

(b) Bite-mark evidence admissible (*People v Marx* (1975) 54 CA3d 100, 113, 126 CR 350); and

(2) Test is of a type that reasonably may be relied on by an expert. Evid C §801(b).

NOTE

If a scientific technique simply illustrates an expert's testimony and is not being introduced as evidence in and of itself, there is no requirement to authenticate the technique. *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137 (expert witness's computer animation of events admissible without evidence that computer animation is generally accepted in scientific community).

Typical Witness

Usually a witness is either:

a. An expert; and/or

b. A percipient witness.

Outside Jury's Presence

If court has not already resolved possible objections to demonstration or experiment, court may ask you to present authenticating evidence outside jury's presence.

ASK COURT

Ask court's permission to conduct demonstration or to display its results.

RESOLVE OBJECTIONS

If they are not already resolved, resolve any objections regarding admissibility. See steps 12-14 and 20-22, above.

NOTE

Respond to counsel's objection by presenting further authenticating evidence outside jury's presence.

PRESENT EVIDENCE

Present demonstrative or experimental evidence:

a. Professionally;

b. Competently; and

c. With as little disruption as possible.

Make a Record

Make a record by having authenticating witness describe or physically record both:

a. Substance of demonstrative evidence; and

b. Result of demonstrative evidence.

TREAT AS EXHIBIT

If demonstration or experiment includes photographs, motion pictures, or other tangible evidence, treat it as an exhibit and offer it into evidence. See steps 16-19, above.

FREQUENT OBJECTIONS TO DEMONSTRATIONS AND EXPERIMENTS

OBJECTION TO EVIDENCE AS NOT SUBSTANTIALLY SIMILAR

Demonstrations and experiments may be excluded as not substantially similar, *e.g.*:

Excluded

a. Inadequate foundation for source of material tested or mode of preparation (*Rodwin Metals, Inc. v Western Non-Ferrous Metals, Inc.* (1970) 10 CA3d 219, 225, 88 CR 778);

b. Experiment performed by expert based on assumption of facts contrary to evidence (*Andrews v Barker Bros. Corp.* (1968) 267 CA2d 530, 73 CR 284).

Admitted

Other demonstrations and experiments may be admitted, *e.g.*:

a. Film of accident reconstruction experiment conducted by expert before trial (*Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110);

b. Testimony of officer who drove route from scene of crime to defendant's apartment (*People v Terry* (1974) 38 CA3d 432, 445, 113 CR 233);

c. Ringing railroad crossing bell in courtroom (*Greeneich v Southern Pac. Co.* (1961) 189 CA2d 100, 108, 11 CR 235);

d. Adequate foundation that urine tested came from victim. *People v Mattison* (1971) 4 C3d 177, 187, 93 CR 185.

EVIDENCE ADMITTED OVER EVID C §352 OBJECTION

For evidence admitted over Evid C §352 objection, see *People v Pierce* (1969) 269 CA2d 193, 205, 75 CR 257 (expert opinion that trigger of gun would be difficult to pull was improperly excluded).

OBJECTION BASED ON INADEQUATE FOUNDATION— SCIENTIFIC TECHNIQUE

Excluded

Tests not generally accepted in the scientific community may be excluded, *e.g.*:

a. Voice-print identification (*People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; see Appendix B for elements of test);

b. Horizontal gaze nystagmus (HGN) field sobriety test results, if no showing of general acceptance in the scientific community (*People v Leahy* (1994) 8 C4th 587, 607, 34 CR2d 663):

c. Use of sodium amytal (pentothal) interview to elicit repressed memory testimony of alleged sexual abuse (*Ramona v Superior Court* (1997) 57 CA4th 107, 66 CR2d 766):

d. In the absence of a stipulation, results of polygraph examination, as well as the fact of an offer to take, a refusal to take, or the taking of a polygraph examination (*Rufo v Simpson* (2001) 86 CA4th 573, 602, 103 CR2d 492; see also *People v Ayala* (2000) 23 C4th 225, 263, 96 CR2d 682).

e. DNA evidence to determine defendant's genotype. *People v Pizarro* (2003) 110 CA4th 530, 3 CR3d 21, disapproved on other grounds in *People v Wilson* (2006) 38 C4th 1237, 1250, 45 CR3d 73 (testing lab used improper scientific procedure under third prong of *Kelly* analysis).

Admitted

Other tests may be admitted, *e.g.*:

a. Bite-mark identification held to be reliable (*People v Slone* (1978) 76 CA3d 611, 623, 143 CR 61);

b. Results of breath test admitted although not administered according to regulation (*People v Williams* (2002) 28 C4th 408, 121 CR2d 854; *Manriquez v Gourley* (2003) 105 CA4th 1227, 130 CR2d 209);

c. Certain DNA testing has general scientific acceptance, *e.g.*:

(1) Use of unmodified product rule to establish probability of random match (*People v Soto* (1999) 21 C4th 512, 88 CR2d 34);

(2) Restriction fragment length polymorphism (RFLP) analysis (*People v Venegas* (1998) 18 C4th 47, 53, 74 CR2d 262);

(3) Capillary electrophoresis analysis of mixed source DNA sample (*People v Henderson* (2003) 107 CA4th 769, 132 CR2d 255);

(4) Short tandem repeats (STR) test (subtype of polymerase chain reaction technique) to analyze mixed-source DNA sample (*People v Smith* (2003) 107 CA4th 646, 132 CR2d 230).

SAMPLE RECORD: Demonstrations

Sample Testimony of Percipient Witness

Q: Were you present at the intersection of Market and Hyde Streets on July 4, 2007, when two cars collided?

A: Yes, I was. [*Establishes opportunity to perceive.*]

Q: While you were at the scene, did you observe the position of the vehicles at the time they collided?

A: Yes, I did. [*Establishes personal knowledge.*]

Sample Demonstration

Q: Would you please step over to the scale diagram, which is plaintiff's Exhibit A, and place these model cars in the vehicles' positions at the moment of impact?

A: Here and here. [*Witness demonstrates.*]

Sample Description for Record

Q: For the record, are you indicating that the point of impact was in the right-hand southbound lane of Hyde Street?

A: Yes, that's correct.

JUDGE'S PERSPECTIVE

Because of time pressures, counsel may forego having the witness state the "descriptions for the record." When this occurs, the transcript of the witness's testimony becomes useless, either for reading back to the jury or for appeal. An example of what to avoid is, "So then the black car went up here, over across this way, and hit the red car there."

Further Research: For further discussion of the material covered in this step, see Civ Proc During Trial §§13.39-13.44, 13.85-13.111; see also Effective Intro of Evidence, chaps 23 (experiments and scientific tests), 39 (physical evidence); Expert Witness, chap 9.

STEP 36. ARRANGE AND CONDUCT JURY VIEWS

WHEN HELPFUL TO TRIER OF FACT

If appropriate, have jurors view outside the courtroom (CCP §651(a)):

a. Disputed property;

b. Place where any relevant event occurred; or

c. Any object, demonstration, or experiment that would be relevant and admissible in evidence and that cannot be viewed in the courtroom.

CONSIDER WHAT TO INCLUDE IN VIEW

Consider whether you need to take testimony or conduct demonstrations at the viewing site.

NOTIFY COURT EARLY

Because of logistical concerns, notify trial court of request for jury viewing as soon as possible.

INCLUDE IN REQUEST

Include in your request or motion:

a. Description of specific items to be viewed;

b. Showing of relevance and admissibility of proffered evidence, *e.g.,* show that evidence to be viewed is in substantially similar condition to that which existed at the time of the disputed occurrence (see Appendix B; Civ Proc During Trial §§13.110-13.111); and

c. Discussion of how and when viewing will be accomplished, including, *e.g.,* whether you will want to take testimony or conduct a demonstration at viewing site.

JUDGE'S PERSPECTIVE

Be extremely careful to determine what changes, if any, have occurred in the place or thing to be viewed by the jury since the underlying occurrence took place.

Anticipate that opposing counsel will bring any changes to the attention of the trial judge and jury, and will argue that changes provide a basis for preventing the viewing altogether.

MAKE ARRANGEMENTS

If court grants your request:

a. Make arrangements to transport entire court (including judge, jury, court reporter, counsel, and necessary officers) to viewing location; and

b. If you plan to take testimony or conduct a demonstration, arrange with court for both reporting it and possibly video recording it. See CCP §651(b). See Civ Proc During Trial §§13.39-13.44.

NOTE

Seek court approval of arrangements when finalized.

Further Research: See Civ Proc During Trial §§13.110-13.111.

STEP 37. CONDUCT EXHIBITION OF PERSON AT TRIAL

OBJECTIVE

Conduct exhibition of person at trial to show person's injuries or appearance to jury when relevant to the action.

NOTIFY COURT IN ADVANCE

Notify and obtain court's approval *before* you intend to have person exhibited at trial.

EXAMINE AUTHENTICATING WITNESS

Introduce and explain exhibition through an authenticating witness (see Sample Record: Exhibition of Person at Trial, below).

Example: If physical condition in dispute is condition at some prior time, proponent must establish preliminary foundation that condition to be demonstrated is substantially similar to condition at prior time. *People v Wong* (1973) 35 CA3d 812, 835, 111 CR 314.

Typical Witness

Usually witness is:

a. Person to be exhibited; or

b. Medical provider.

HAVE EXHIBITION RECORDED

Be sure that court reporter's record shows that demonstration or exhibition was conducted. See Sample Record: Exhibition of Person at Trial, below.

CONSIDER TAKING PHOTO

Consider taking a photograph of demonstrated condition and making it part of the record.

IF EXHIBITION IS EMBARRASSING

If exhibition is embarrassing, ask court to have each juror inspect the condition of exhibited person in chambers rather than having a mass viewing in open courtroom, but:

a. Take care that process is monitored by all counsel and reported by a reporter; and

b. Ask court to instruct jurors not to ask questions during the session.

FREQUENT OBJECTIONS TO EXHIBITION OF PERSON AT TRIAL

EVIDENCE EXCLUDED AS IRRELEVANT

Defendant was not allowed to exhibit his arms to jury at trial in May 1971 to refute testimony that he had fresh needle marks *the day after* homicide in June 1970; court ruled the evidence irrelevant. *People v Wong* (1973) 35 CA3d 812, 835, 111 CR 314.

EVIDENCE ADMITTED OVER OBJECTION

Evidence was admitted over objection when:

a. Medical witness was allowed to examine and manipulate plaintiff's injured neck in view of jury (*Willoughby v Zylstra* (1935) 5 CA2d 297, 301, 42 P2d 685);

b. Plaintiff was allowed to show burns he received in fire and explosion on ship on which he worked. *Faras v Lower Cal. Dev. Co.* (1915) 27 CA 688, 697, 151 P 35.

Further Research: See Comment to Evid C §140; 2 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§32-33.

EVIDENCE ADMITTED OVER UNDULY PREJUDICIAL OBJECTION

Evidence was admitted over unduly prejudicial objection when:

a. Defendant in paternity action was required to stand in front of jury near the mother holding child in her arms (*Berry v Chaplin* (1946) 74 CA2d 652, 665, 169 P2d 442; see Evid C §352);

b. Rape victim was called to permit jury to observe her, not as a witness, but to show that she was incapable of consenting to sexual intercourse. *People v Morgan* (1987) 191 CA3d 29, 38, 236 CR 186.

EVIDENCE EXCLUDED ON OBJECTION THAT EVIDENCE UNDULY EMBARRASSING

Defendant was not allowed to ask plaintiff to strip to the waist to display her physical injuries to jury on objection that evidence was unduly embarrassing. *Leonard v Hume* (1935) 5 CA2d 41, 43, 41 P2d 965; Evid C §765.

SAMPLE RECORD: Exhibition of Person at Trial

Sample Testimony of Person Being Exhibited

Q: Did you suffer any injuries as a result of being thrown off the horse?

A: Yes, I did. [*Shows relevancy.*]

Q: Would you describe for the jury what those injuries were?

A: When I came off the horse, I slammed up against the corral fence. I hit it so hard that it broke my right arm in two right about here.

Sample Exhibition and Description for Record

[*Witness should indicate location of injury so that court and jury can see it.*]

Q: You're indicating a location about four inches down from the shoulder? [*Description for record.*]

A: Yes, I am.

Q: Has the arm now fully recovered?

A: No, it hasn't. I don't have nearly the strength in the arm that I used to have, the muscles in my arm are a lot smaller than they used to be and are a lot smaller than those in my left arm, and I can't seem to lift the arm up as high in certain directions like I used to.

Q: How high can you lift the arm now?

A: No higher than this.

[*Witness should demonstrate so that court and jury can see.*]

Q: Up to about the level of your shoulder, is that it? [*Description for record.*]

A: That's right.

Q: You mentioned that your right arm is smaller?

A: Yeah.

Q: Have you done any exercise or work to increase the size of your left arm since being thrown off the horse?

A: No, I haven't.

Q: Is your left arm, your healthy one, in substantially the same condition as it was before the incident?

A: Yes. [*Shows relevancy.*]

Q: Before this incident, was there any difference between the size of your left arm and your right one?

A: No, they were pretty much the same.

Counsel: Your Honor, I would ask that Mr. Gray be allowed to step down in front of the jury box and remove his shirt in order to show the jury the difference between his left arm and his right.

Court: Any objection, counsel?

Opposing Counsel: None, your Honor.

Court: You may proceed.

Q: At this point, let me ask you to come down and show the jury the condition of your two arms.

When Preparing for and Participating in Arbitration

STEP 38. REVIEW RULES APPLICABLE TO ARBITRATION

CONTRACTUAL ARBITRATION

CONTRACTUAL ARBITRATION DEFINED

Contractual arbitration (also referred to as general, voluntary, private, or nonjudicial arbitration) is when parties to a contract have expressly agreed that disputes pertaining to the contract will be resolved by binding arbitration (see CCP §§1280-1294.2). Under contractual arbitration:

a. Court proceedings are stayed and arbitrator acts independently of court;

b. Court has no power over proceedings and only limited review over results. See CCP §1286.6(a)-(c) for limited exceptions for vacating arbitrator's award.

OBSERVANCE OF RULES OF EVIDENCE NOT MANDATORY

In contractual arbitration, rules of evidence need not be observed (see, *e.g.,* California Arbitration Act (CCP §1282.2(d)); American Arbitration Association (AAA Commercial Rule 31).

APPLICABLE RULES VARY

Use of evidence varies depending on preferences of arbitrator and counsel.

JUDICIAL ARBITRATION

JUDICIAL ARBITRATION DEFINED

Judicial arbitration occurs when court orders (or parties stipulate) that the dispute will be submitted to nonbinding arbitration (see CCP §§1141.10-1141.31; Cal Rules of Ct 3.810-3.830; local rules and practices). In judicial arbitration:

a. Court retains full jurisdiction;

b. Arbitrator's decision is reviewable de novo. CCP §1141.20.

RULES OF EVIDENCE APPLY

In judicial arbitrations, rules of evidence governing civil actions apply, but with notable exceptions. See Cal Rules of Ct 3.823(b).

EXCEPTION FOR DOCUMENTARY EVIDENCE

The following specified documentary evidence may be admitted without establishing the traditional foundation requirements (Cal Rules of Ct 3.823(b)(1)):

a. Reports of expert witnesses in place of live testimony;

b. Medical reports in place of physician's live testimony:

c. Medical bills;

d. Lost income documentation;

e. Property damage repair bills or estimates;

f. Police reports; and

g. Business records, such as bills and invoices, purchase orders, checks, written contracts, and other documents prepared in the ordinary course of business.

Conditions for Admitting

The two conditions for admissibility of this documentary evidence are:

a. Service of the documents on opposing counsel:

(1) By mail at least **25 days** before hearing (Cal Rules of Ct 3.823(d)); or

(2) By delivery of the documents at least **20 days** before hearing (Cal Rules of Ct 3.823(b)(1)); and

b. Any opposing party may subpoena custodian of record or author of document and cross-examine witness. Cal Rules of Ct 3.823(b)(1).

EXCEPTION FOR AFFIDAVITS AND DECLARATIONS

Written statements of lay witnesses are admissible as if witness testified in person. Cal Rules of Ct 3.823(b)(2).

Conditions for Admissibility

The three conditions for admissibility of statements are:

a. Statement must be in form of an affidavit or declaration under penalty of perjury (Cal Rules of Ct 3.823(b)(2); CCP §2015.5);

b. Service of statement on opposing counsel must be made:

(1) By mail at least **25 days** before hearing (Cal Rules of Ct 3.823(d)); or

(2) By delivery of the documents at least **20 days** before hearing (Cal Rules of Ct 3.823(b)(2)); and

c. Any opposing party may make a written demand at least **10 days** before hearing that the witness appear in person. Cal Rules of Ct 3.823(b)(2).

EXCEPTION FOR DEPOSITIONS

All or part of a deposition may be admitted (Cal Rules of Ct 3.823(b)(3)):

a. Subject to objections available under CCP §2025.410; and

b. "Notwithstanding that the deponent is not 'unavailable as a witness' within the meaning of section 240 of the Evidence Code."

Conditions for Admissibility

The two conditions for admissibility of deposition testimony are:

a. Deposition must have been taken in a manner provided for by law or stipulation (Cal Rules of Ct 3.823(b)(3)(i)); and

b. Notice of intention to submit deposition testimony must be served on opposing counsel:

(1) By mail at least **25 days** before hearing (Cal Rules of Ct 3.823(d)); or

(2) By delivery at least **20 days** before hearing (Cal Rules of Ct 3.823(b)(3)(ii)).

MODIFY WITNESS SUBPOENAS

Procedures for issuing subpoenas for attendance of witnesses at arbitration are the same as for trial (for discussion of subpoenaing nonparty witness, see step 10, above) *except* that form of subpoena must be modified to (Cal Rules of Ct 3.823(c)):

a. Show that appearance is before an arbitrator; and

b. Provide time and place of hearing.

Further Research: See Prep Trial, steps 21-31; A Litigator's Guide to Effective Use of ADR in California (Cal CEB 2005); 6 Witkin, California Procedure, *Proceedings Without Trial* (4th ed 1997).

REVIEW LOCAL COURT RULES

Consult and comply with local court rules and local practices regarding conduct of arbitration hearings. See, *e.g.,* Los Angeles Ct R 12.0-12.14; San Diego Ct R 2.31-2.37.

APPENDIX A
Sample Trial Preparation Systems

The following are sample trial preparation systems. No one system is preferred by all attorneys or suited to all cases. You may want to adapt elements of each in developing your own system, depending on the case and your preferences.

SAMPLE SYSTEM #1: Commonly Used in Cases of Varying Complexity When Preparing for Trial in Earnest

TRIAL BINDER

Use with dividers and tabs; may include (using tab divisions):

Things to do;

Thoughts;

Pleadings;

Exhibit list/log;

Motions in limine;

Witness list;

Voir dire;

Opening statement;

Closing argument;

Jury instructions;

Research;

Chronology;

Key exhibits; and

Miscellaneous.

EXHIBIT BOX

Centralize location for documents and other exhibits you expect to use at trial, and index it for ready access; should include:

Original exhibits (premarked when necessary);

Accompanying evidence memos (see step 7, above), or other research briefs or materials on admissibility;

Sufficient copies of exhibits for you, court, and all other counsel.

NOTE: When planning to read multiple interrogatories or requests for admissions, determine whether local rule or practice will require you to prepare in advance cut-and-paste extracts of the designated portions (see step 32, above) and, if so, include them in exhibit box.

WITNESS BINDER

Prepare for *each* expected witness; should include:

Witness's personal data sheet, including:

Home address;

Work address;

Home telephone number; and

Work telephone number;

Copy of deposition transcript and summary;

Copy of prior witness statements;

Copy of expected trial exhibits about which witness may testify;

Interrogation outline;

Copy of notice to attend trial or return on subpoena; and

Thoughts.

WITNESS LIST

List *all* expected witnesses; use this list to:

Decide the order of calling witnesses; and

Verify that witnesses' trial attendance has been ensured through:

Proper notice;

Subpoena; or

Agreement.

EXHIBIT LIST

List *all* exhibits expected to be used at trial; should indicate:

Whether there has been an accounting yet for the original exhibit;

Identity of witnesses to be questioned about the exhibit; and

How and when the exhibit will be put into evidence;

Make copy of each document to bring to trial.

SAMPLE SYSTEM #2: Commonly Used for Setting Up Files When Case Is First Accepted

SET UP FILES

Use a method for setting up and organizing your files *from the outset* to meet your trial objectives, *e.g.,* by establishing as many files as you need for:

Correspondence;

Pleadings;

Motions and demurrers;

Discovery documents, including a chronological index sheet;

Witness materials, *e.g.*:

Statements and declarations;

Deposition transcripts and summaries;

Documents, including:

An index of document files (list source of each document so that you can quickly refer to this information if you need it to lay a foundation to introduce a document);

Summaries of any voluminous documents;

Your attorney notes;

Legal research;

Strategy ideas, *e.g.*:

Voir dire;

Opening and closing statements;

Other trial tactics.

NOTE: Consider using a computer software program to organize your case materials.

ORGANIZE PHYSICAL EVIDENCE

Consider the kinds of demonstrative and physical evidence you will want to introduce at trial.

REVIEW YOUR CASE FILE

As you review file, analyze uses and sources of potential evidence in light of elements of each side's case that you have to prove and disprove.

Outline Your Case

Consider preparing an issue outline covering:

Every *element* you must establish to prevail, *e.g.*:

If you represent *plaintiff:* Review the elements of the causes of action you pleaded.

If you represent *defendant:* Review the elements of your answer, affirmative defenses, cross-claims, or counterclaims.

Any changes since complaint and answer filed, *e.g.,* because of court orders or new law.

All *facts* you need to prove for each element of your claim or defense.

All *evidence* you need to offer to prove the facts.

Divide outline into categories that allow you to quickly identify evidence needed at trial to prove or disprove an issue, *e.g.,* by:

Issues and subissues;

Percipient witnesses;

Foundational witnesses (if needed to authenticate evidence and these witnesses are different from percipient witnesses);

Expert witnesses;

Applicable law.

Under each category, list:

Specific issue and evidentiary and legal subissues supporting it;

Various items of proof for each issue or subissue, *e.g.*:

Names of percipient witnesses;

Names of foundational witnesses;

Documents; and

Demonstrative evidence;

Law applying to *each* issue or subissue.

NOTE: For discussion and sample issue outline form, see Civ Proc During Trial §§3.22, 3.67.

Outline Opposing Side's Case

Use outline you developed to prove your case and fill in with elements, facts, and evidence you believe other side will use to try to prevail.

Outline Your Rebuttal

Use outline you developed to prove other side's case and note how you would rebut each point and with what evidence.

REVIEW YOUR EVIDENCE

Use the issue outline (see above) and sort through all available evidence to:

Select what you will use;

Identify any need for additional evidence.

ARRANGE EVIDENCE

Arrange evidence in the order in which you intend to present it.

NOTE: For more detailed treatment, see Civ Proc During Trial, chap 3.

Cross-Reference: See steps 2-5, above.

APPENDIX B
General Rules Governing Prima Facie Admissibility

AUTHENTICITY

GENERAL RULE

Counsel must make:

A prima facie showing that the proffered writing is what the proponent claims it to be; and

An accounting of any material post-execution alterations of the writing. Evid C §1402.

JUDGE'S PERSPECTIVE: Judges are skeptical of the catch-all argument (also frequently used to respond to a hearsay objection), "Your honor, it goes to state of mind."

HOW TO AUTHENTICATE

Authenticate by introducing evidence, or by other means provided by law, including (Evid C §§1410, 1421):

Presumptions (see, *e.g.,* Evid C §1452 (official seals; see *Jacobson v Gourley* (2000) 83 CA4th 1331, 1334, 100 CR2d 349), §1552 (printed representations of computer information, programs, and images presumed accurate representation of stored information));

Judicial notice (Evid C §§450-460);

Stipulations;

Responses to requests for admissions or interrogatories (CCP §§2030.210-2030.240, 2033.210-2033.230); and

Court determination of substance, genuineness, or authenticity of documents destroyed or damaged by public calamity. CCP §§1953.10-1953.13.

JUDGE'S PERSPECTIVE: Remember that if the document is offered as proof of the events or statements contained in it, a hearsay exception must also be established.

BURDEN OF PROOF

Proponent has burden of proof. Evid C §403(a). See generally Civ Proc During Trial §§10.5-10.12.

COMPETENCY OF WITNESS

GENERAL RULE

To qualify as a witness, a person must be able to (Evid C §701):

Express himself or herself on the matter in an understandable way, either directly or through an interpreter; and

Understand a witness's duty to tell the truth.

CHILD WITNESS

No particular age limit exists for children. Comment to Evid C §700; Evidence Benchbook §26.8.

ISSUE OF FACT

Whether witness is competent raises issue of fact that judge decides as a preliminary matter. See Trial Objections §18.5.

BURDEN OF PROOF

Objecting party has burden of proving prospective witness's lack of capacity. *People v Craig* (1896) 111 C 460, 469, 44 P 186; *People v Knox* (1979) 95 CA3d 420, 431, 157 CR 238.

LAY OPINION

GENERAL RULE

A lay witness's opinion testimony must be (Evid C §800):

Rationally based on the witness's perception; and

Helpful to a clear understanding of the witness's testimony.

EXAMPLES

Lay opinions may relate to (see Trial Objections §§20.3-20.4):

Speed;

Distance;

State of health;

Age;

Sanity (Evid C §870); and

Value of property. Evid C §§811-823.

PERSONAL KNOWLEDGE

GENERAL RULE

To testify, witness must have personal knowledge of a particular matter, unless he or she is testifying as an expert witness on that subject. Evid C §§702, 801.

WHAT IT REQUIRES

Personal knowledge requires witness to have a present recollection of an impression derived from the witness's exercise of his or her senses. This, in turn, requires both:

Capacity at the time to perceive the facts; and

Capacity at the time of trial to recollect his or her perceptions.

HOW TO DEMONSTRATE IT

Personal knowledge may be shown by any otherwise admissible evidence, including the witness's own testimony. Evid C §702.

WHAT TRIAL COURT DOES

Court makes preliminary finding of personal knowledge in considering admissibility (for discussion of personal knowledge, see step 21, above; Evidence Benchbook §§26.13-26.21):

If counsel opposing evidence objects, court must make preliminary finding before witness is allowed to testify before the jury; but

Jury may reconsider issue of personal knowledge during deliberations.

RELEVANCY

GENERAL RULE

Only relevant evidence is admissible, and unless otherwise excluded, all relevant evidence is admissible. Evid C §§350-351.

DEFINED

Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid C §210), including:

Evidence bearing on the credibility of a witness or hearsay declarant (Evid C §210);

Evidence created solely for the trial or to aid jurors in understanding a witness's testimony. *People v McDaniel* (1976) 16 C3d 156, 174, 127 CR 467; *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110.

BURDEN OF PROOF

Proponent of evidence bears burden of proof. Evid C §§350, 403; see Trial Objections §§17.1-17.7.

JUDGE'S PERSPECTIVE: Because of the number of issues and subissues in any trial, the relevancy of an item of evidence may not be immediately obvious to the court, even when it is pointed out by proffering counsel.

Counsel must be prepared to explain in clear terms both the issue to which the item relates and the relevancy of the item to that issue.

SCIENTIFICALLY ACCEPTED TECHNIQUE

GENERAL RULE

Admission of evidence obtained through scientific technique depends on establishing its reliability. *People v Kelly* (1976) 17 C3d 24, 30, 130 CR 144; *People v Leahy* (1994) 8 C4th 587, 594, 34 CR2d 663; *People v Bui* (2001) 86 CA4th 1187, 1194, 103 CR2d 908; Evid C §801(b).

WHAT IT REQUIRES

To establish reliability, proponent must show that the technique:

Has gained general acceptance in the particular scientific community to which it belongs (*People v Kelly, supra*); or

Is of a type that reasonably may be relied on by an expert (Evid C §801(b)); and that

The correct scientific procedures were used in this case (*People v Venegas* (1998) 18 C4th 47, 74 CR2d 262).

WHAT TO SHOW

To satisfy these foundational requirements, proponent frequently will need the testimony of a properly qualified expert.

To admit specific test results, proponent frequently will have to show substantial similarity of underlying conditions. For discussion of substantial similarity, see below.

Further Research: See generally Civ Proc During Trial §13.109.

SECONDARY EVIDENCE

GENERAL RULES

The content of a writing may be proved by the original or by otherwise admissible secondary evidence. Evid C §§1520-1521. Secondary evidence of such content, however, is excluded if the court determines that (Evid C §1521):

A genuine dispute exists concerning material terms of the writing and justice requires the exclusion; or

Admission of the secondary evidence would be unfair.

Photographic copies made as business records are admissible as the original. Evid C §1550.

ORAL TESTIMONY

In addition, oral testimony is *not* admissible to prove the writing's content, unless (Evid C §1523):

The proponent does not have possession or control of a copy of the writing, and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence (see, *e.g., Dart Indus., Inc. v Commercial Union Ins. Co.* (2002) 28 C4th 1059, 124 CR2d 142;

The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; or

The proponent does not have possession or control of the original or a copy of the writing and either:

The writing or a copy was not reasonably procurable by the proponent by use of the court's process or other available means; or

The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

CRIMINAL ACTIONS

In a criminal action, secondary evidence must also be excluded if the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial (Evid C §1522), but this section does not apply to:

A "duplicate" as defined in Evid C §260;

A writing that is not closely related to the controlling issues in the action;

A copy of a writing in the custody of a public entity; or

A copy of a writing that is recorded in the public records, if a statute makes a record or a certified copy of it evidence of the writing.

BURDEN OF PROOF

Objecting: Opponent of evidence has burden of proof; and

Satisfying the secondary evidence rule: Proponent of evidence has burden of proof.

Further Research: See Trial Objections, chap 24.

SUBSTANTIAL SIMILARITY

GENERAL RULE

The facts or conditions reflected in or underlying the *demonstrative* evidence must be substantially similar to those giving rise to the issue to which the evidence is relevant. *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 521, 109 CR 110 (film of accident reconstruction experiment); *People v Kaurish* (1990) 52 C3d 648, 692, 276 CR 788 (photographs comparing methods of serological testing); 3 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §38.

ITS APPLICATION

It applies to certain types of *demonstrative* evidence, *e.g.,* evidence of experiments, reenactments of an event.

WHAT IT REQUIRES

It requires a preliminary showing that the conditions reflected in the proffered evidence are substantially similar to the conditions existing at the time of the disputed act or event.

WHAT IT DOES NOT REQUIRE

It does not require conditions to be absolutely identical. *Culpepper v Volkswagen of Am., Inc., supra*. See *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 550, 138 CR 705.

BURDEN OF PROOF

Proponent has burden of proof.

Further Research: See generally Trial Objections; Evidence Benchbook; Civ Proc During Trial §§10.5-10.12; Effective Intro of Evidence, chap 23 (experiments and scientific tests).

Cross-Reference: See steps 1 and 7, above.

APPENDIX C
List of Trial Objections

Objections to Competency of Witness (see Appendix B, above)

Unable to express and be understood (Evid C §701)

Unable to understand duty to tell truth (Evid C §701)

Judge at this trial (Evid C §703)

Juror at this trial (Evid C §704)

Without personal knowledge (Evid C §702)

Officer not in distinctive uniform when arrest made (Veh C §40804)

Objections to the Form of Question (Evid C §765, unless otherwise indicated)

Ambiguous, confusing, unintelligible

Argumentative

Already asked and answered

Assumes fact in dispute or not in evidence

Compound

Leading (Evid C §767)

Misquotes witness

Calls for narrative answer

Calls for speculation, *e.g.,* not in witness's personal knowledge (Evid C §§702, 801)

Too general

Objections to Foundation of Offered Evidence

Lacks authentication (see Appendix B, above)

Inadmissible secondary evidence (see Evid C §§1520-1567)

Corpus delicti not proven (see Trial Objections, chap 27)

Expert:

Not qualified (Evid C §720(a))

Basing opinion on improper matter (Evid C §801)

Foundation insufficient (Evid C §§403, 405)

Illegally obtained (US Const amends IV, XIV; Cal Const art 1, §13)

Objections to Substance of Offered Evidence

Altered document (Evid C §1402)

Communication made during mediation process (Evid C §§1115-1128)

Cross-examination exceeds scope (Evid C §§761, 773)

Excludable in court's discretion (Evid C §352)

Expert:

Basing opinion on improper matter (Evid C §801)

Testifying on improper matter (Evid C §801)

Expression of sympathy or benevolence (Evid C §1160)

Hearsay (Evid C §1200)

Improper impeachment (Evid C §§780, 785)

Improper rehabilitation (Evid C §§780, 785)

Irrelevant (Evid C §§210, 350-351; see Appendix B, above)

Opinion inadmissible (Evid C §§800, 802-803)

Regarding liability insurance (Evid C §1155)

Prior inconsistent statement of excused witness (Evid C §770)

Privileged (see Privilege and Related Objections, below)

Recollection refreshed by unproduced writing (Evid C §771(a))

Settlement negotiations inadmissible (Evid C §§1152-1154)

Subsequent safety measures inadmissible (Evid C §1151)

Unduly confusing or time-consuming (Evid C §352)

Unduly prejudicial or inflammatory (Evid C §352)

Violates parol evidence rule (CCP §1856; Com C §2201)

Privilege and Related Objections

Self-incrimination (Evid C §940)

Attorney-client privilege (Evid C §§950-954)

Marital privileges (Evid C §§970-980)

Physician-patient privilege (Evid C §992)

Psychotherapist-patient privilege (Evid C §§1012, 1024 (dangerous-patient exception))

Clergy-penitent privilege (Evid C §§1030-1034)

Sexual assault victim-counselor privilege (Evid C §1035.4)

Domestic violence victim-counselor privilege (Evid C §1037.2)

Official informer (Evid C §1042)

Political vote (Evid C §1050)

Trade secret (Evid C §1060)

Reporter's unpublished information (Evid C §1070)

Attorney work product (CCP §§2018.010-2018.080)

Objections to Conduct of Counsel (see, *e.g.,* Trial Objections, chap 29)

Bringing inadmissible matter before the jury

Asking insinuating and improper questions

Concealing or suppressing evidence

Making impermissible references to insurance

Making derogatory remarks to counsel, party, or witness

Communicating with juror

Misstating law

Objections to Conduct of Judge (Cal Rules of Ct App Div II, Canon 3; see also, *e.g.,* Trial Objections, chap 29)

Commenting on evidence

Examining witness to convey opinion of witness's credibility

Disparaging counsel, party, or witness

Coercing compliance with personal preferences

Interfering with production of proof

Objections to Conduct of Jury (see CCP §§232-234; Civ Proc During Trial §§17.23-17.32)

Concealing relevant matters during voir dire

Receiving evidence out of court

Inattentive during trial

Cross-Reference: See steps 1 and 7, above.

APPENDIX D
Sample Evidence Memorandum

Exhibit:	Contract dated June 15, 2006
Relevance:	Written statement of parties' understanding of obligations on June 15, 2006; signed by both sides.
Manner of Authentication:	Direct of Rue; Cross of Molton
Witnesses to Question About Exhibit:	Rue, Molton, Ramsey
Source of This Exhibit:	Document production by Molton on February 1, 2008.
Location of Original:	Molton file.
Possible Objection(s)/Response:	Document altered; commission amount was erased and changed; response: not material to dispute (Evid C §1402). Dispute here concerns amount of goods to be delivered, not commission schedule.

APPENDIX E
Sample Designation of Deposition

CAPTION

_____

Action No. _____
Defendant's Designation of
Portions of Deposition
Transcripts to Be Read

Deponent: John Jones

Vol. I (January 9, 2008)

1:10-2:14

2:17-2:25

3:5-5:15

26:9-29:3

Vol. II (January 10, 2008)

110:12-110:16

111:1-117:8

125:13-127:18

Deponent: Sally Jones

Vol. I (January 11, 2008)

1:10-10:18

10:22-12:10

13:1-25:2

Dated: _____

_ _[*Firm Name*]_ _

By:_____

Attorney for Defendant

Cross-Reference: See step 10, above; see also steps 26-27, above.

APPENDIX F
Sample Exhibit Log

Plaintiff's Exhibits

Number	Description	Marked for Identification	In Evidence	Comment
1	Rue letter to Molton, 6/9/2006	7/10/2007	7/10/2007	Copy substituted for original 7/10/2007
2	Molton letter to Rue, 6/12/2006	7/10/2007	7/10/2007	
3	Contract dated 6/15/2006	7/11/2007	7/12/2007	Subject to motion to strike

Cross-Reference: See steps 15, 22, and 25, above.

APPENDIX G
Foundations, Objections, and Sample Records for Specific Types of Evidence

JUDGE'S PERSPECTIVE: The common objection that an "insufficient foundation" has been laid for the pending question must include a statement of what is missing from the foundation. See *Parlier v Fireman's Fund* (1960) 178 CA2d 357, 2 CR 906. This is a common-sense rule to ensure that the judge understands the point of the objection.

BUSINESS RECORDS

FOUNDATION REQUIRED

To admit business records, you must establish an exception to the hearsay rule (see Evid C §1271) and authenticity of the records (see Evid C §§1271, 1561-1562), by showing that:

Writing was made in regular course of business (Evid C §1271(a));

Writing was made at or near the time of the act, condition, or event (Evid C §1271(b));

Custodian or other qualified witness identifies the document and how it was prepared (Evid C §1271(c));

Writing appears trustworthy, based on source of information and method of preparation (Evid C §1271(d)); and

Copy produced in court is a true copy of the records as kept at the place of business. Evid C §1561(a)(2).

See *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 128 CR2d 529 (attorney's declaration that contained no information about how reports were prepared or on what source of information they were based, or any evidence that reports were trustworthy did not provide foundation for their admissibility as business records).

SAMPLE RECORD: Business Records

Q: I am handing you a document now marked as Defendant's Exhibit E for purposes of identification. Would you please read the document and tell us whether or not you recognize it?

A: Yes, I do.

Q: Could you tell us what it is?

A: It's the accident report I prepared as a result of this accident. [*Identifies document and who prepared it.*]

Q: Why did you prepare this?

A: It is the procedure at our company that an accident report will be prepared any time an employee is injured on the job. [*Shows writing was made in course of business.*]

Q: Who has the responsibility for preparing those reports?

A: I do.

Q: Was that also true at the time of the accident involving Mr. Gray?

A: Yes.

Q: Is there a procedure you follow in preparing a report such as Exhibit E?

A: Yes.

Q: Could you describe for us what that procedure is?

A: As soon as I learn of an accident, I immediately go to the accident site to talk to the injured employee, if that is possible, and to any witnesses to the accident. I then record in my report what each of these people tells me. I also take a camera with me to photograph anything that might be helpful in recording what happened. [*Shows ordinary course of business.*]

Q: Did you follow that procedure in preparing this Exhibit E?

A: Yes, I did. [*Shows that writing made as a record of an event and mode of preparation.*]

Q: How long was it after the accident that you arrived at the accident site?

A: Within the hour.

Q: How much later was it that you had prepared this report?

A: I did the entire report on the same day. [*Shows that writing made near time of event.*]

Q: How accurate is this record with respect to recording what you observed and heard at the accident site?

A: Very accurate. [*Shows trustworthiness.*]

Q: After this accident report, Exhibit E, was prepared, what did you do with it?

A: The original went into the file that I maintain on all accident reports. A copy of it went to my boss.

Q: Has this report, Exhibit E, been altered or modified in any way since the day you prepared it?

A: No.

Further Research: See Effective Intro of Evidence, chap 13 (business records).

EXCITED UTTERANCE (HEARSAY)

HEARSAY DEFINED

Hearsay evidence is a statement (Evid C §1200):

Made by someone other than a witness while testifying at the hearing; and

That is being offered to prove the truth of the matter stated.

FOUNDATION REQUIRED

Hearsay is not admissible unless you provide facts that satisfy one of the hearsay exceptions (Evid C §1200(b)); the most common exceptions are, *e.g.*:

Business records (Evid C §§1270-1272);

Statements of an adverse party (Evid C §§1220-1227);

Prior statements of witnesses (Evid C §§1235-1238);

Spontaneous statements or excited utterances (Evid C §§1240-1242); and

Statements of mental or physical state (Evid C §§1250-1252).

SAMPLE FOUNDATIONAL REQUIREMENTS—EXCITED UTTERANCE

Statement that (Evid C §1240; see *Rufo v Simpson* (2001) 86 CA4th 573, 590, 103 CR2d 492; *People v Gutierrez* (2000) 78 CA4th 170, 181, 92 CR2d 626 (writing may qualify as spontaneous declaration)):

Purports to narrate, describe, or explain an act, condition, or event perceived by declarant; and

Was made spontaneously while declarant was under stress of excitement caused by such perception.

SAMPLE RECORD: Excited Utterance

[*This example is from a murder case.*]

Q: Did the other bystander say anything about what was happening while it was happening?

A: She sure did. [*Shows time of utterance.*]

Q: Where was she looking at the time she spoke?

A: Right at the defendant and the victim.

Q: Please describe her tone of voice.

A: She was shouting. Her voice was shaking. [*Shows that declarant was excited.*]

Q: How did she look?

A: Agitated. Angry. Like I said, she was shaking and pointing at the two guys. [*Shows that declarant was excited.*]

Q: What did she say?

A: "My God. He's pushing him into the bay!" [*Shows that statement was about event*.]

Further Research: See Evid C §§1240-1242; Trial Objections, chap 19; Effective Intro of Evidence, chap 49 (spontaneous and contemporaneous statements).

MEDICAL RECORDS

FOUNDATION REQUIRED

To admit medical records, you must provide the same foundation as for business records, *i.e.,* by showing that:

Writing was made in regular course of business (Evid C §§1271(a), 1561-1562);

Writing was made at or near the time of the act, condition, or event (Evid C §1271(b));

Custodian or other qualified witness identifies the document and how it was prepared (Evid C §§1271(c), 1561-1562);

Writing appears trustworthy based on source of information and method and time of preparation (Evid C §§1271(d), 1561-1562); and

Copy produced in court is a true copy of the records as kept at the place of business. Evid C §§1561, 1562.

SAMPLE RECORD: Medical Records

Q: What is your occupation?

A: I am the Records Manager of medical records at Valley Hospital. [*Shows witness is qualified.*]

Q: What are your duties as the hospital's Records Manager?

A: Primarily, to file the records of each patient so that they can be located later if needed, to make sure that the records are not seen or taken by unauthorized persons, and also to see that all the central parts of the record have been completed by the doctors, nurses, and other personnel of the hospital before the records are filed. [*Shows trustworthiness and regular course of business.*]

Q: Are you here in court today in response to a subpoena duces tecum served on you as the custodian of records of Valley Hospital?

A: Yes, I am.

Q: What documents did the subpoena require you to bring with you?

A: The medical records of James Gray.

Q: Do you have those records with you?

A: Yes, I do.

Q: Where did you get them?

A: From the medical records library at Valley Hospital.

Q: Are these the original records for Mr. Gray as they are kept by the hospital, or are they copies?

A: These are the original records. [*Identifies records.*]

Q: Did you search for all the records that were described in the subpoena?

A: Yes, I did.

Q: Are these all those records?

A: So far as I could tell.

Q: Are you familiar with the method by which these records were prepared?

A: Yes.

Q: Who prepares or writes the entries on the various pages that make up these records?

A: The entries are made by the nurses, doctors, and other hospital personnel who see the patient. [*Shows regular course of business, and who prepared record.*]

Q: Were these entries made at or near the time of the acts, conditions, and events recorded?

A: Yes, they were. [*Shows writing made at or near time of event.*]

Q: Were these records prepared by those persons in the ordinary and regular course of business?

A: Yes. [*Shows prepared in regular course of business.*]

MODELS/MAPS/DIAGRAMS

FOUNDATION REQUIRED

Model

A model must substantially and approximately represent what it purports to represent. *People v Kynette* (1940) 15 C2d 731, 755, 104 P2d 794; *People v McDaniel* (1976) 16 C3d 156, 174, 127 CR 467.

Map

A map must be a faithful representation of area depicted. *People v Glab* (1936) 15 CA2d 120, 124, 59 P2d 195.

COMMON WAYS TO LAY FOUNDATION

Judicial notice (maps);

Stipulation; and

Witness testimony.

TYPICAL WITNESS

Lay Witness

Witness who uses the visual aid to illustrate testimony.

Expert Witness

Witness who is familiar with matter depicted.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Evidence Admitted

Pistol similar to that used in crime (*People v Ham* (1970) 7 CA3d 768, 779, 86 CR 906);

Reconstructed model of bomb (*People v Kynette* (1940) 15 C2d 731, 755, 104 P2d 794);

Use of mannequin to illustrate bullet trajectories (*People v Robillard* (1960) 55 C2d 88, 98, 10 CR 167);

Map of area of homicide. *People v Sassounian* (1986) 182 CA3d 361, 400, 226 CR 880.

Excluded as Irrelevant

Introduction of gun for illustrative purposes (error when dissimilar to gun used in alleged crime (*People v Vaiza* (1966) 244 CA2d 121, 126, 52 CR 733));

Map drawn by counsel. *People v Jones* (1962) 205 CA2d 460, 467, 23 CR 418.

Excluded Under Evid C §352

Scale model of tract (excluded as misleading (*County of San Mateo v Christen* (1937) 22 CA2d 375, 378, 71 P2d 88));

Illustrative skeleton (excluded, apparently as unduly prejudicial). *Dameron v Ansbro* (1918) 39 CA 289, 298, 178 P 874.

Admitted Over Evid C §352 Objection

Scale model. *Church v Headrick & Brown* (1950) 101 CA2d 396, 414, 225 P2d 558.

SAMPLE RECORD: Authenticating Map

Q: Were you present at the intersection of Market and Hyde Streets on July 4, 2007, when a car hit a child?

A: Yes, I was. [*Shows opportunity to perceive.*]

Q: While you were at the scene, did you observe whether there were painted crosswalks for people walking across Market Street?

A: Yes, I did. [*Shows personal knowledge*.]

Q: And did you also observe whether there were traffic lights governing the flow of pedestrian traffic on Hyde Street crossing Market Street at that location?

A: Yes, I did.

Counsel: Your Honor, may I approach the witness with an exhibit?

Court: You may.

Q: Mr. Jones, I'm handing you an exhibit marked as Defendant's Exhibit C for purposes of identification. For the record, the exhibit is a map bearing the heading "Market Street." Would you please take the time to review this exhibit and then tell us whether or not it fairly and accurately shows the location of the sidewalk and traffic lights at the intersection of Market and Hyde Streets at the time of the accident there on July 4, 2007?

A: Yes, it does. [*Authenticates map.*]

[*At this point, the exhibit can be offered into evidence.*]

MOTION PICTURES/VIDEO RECORDINGS

RELEVANCY

To demonstrate and/or clarify testimony of witnesses;

To record and report experiments or demonstrations; and

In some instances, to show underlying circumstances or injuries, *e.g.,* bank security recording of actual bank robbery or video recording of party's confession.

FOUNDATION REQUIRED

Content must fairly and reasonably depict material facts in dispute or facts substantially similar to those facts. *People v Carpenter* (1997) 15 C4th 312, 386, 63 CR2d 1; *Greeneich v Southern Pac. Co.* (1961) 189 CA2d 100, 107, 11 CR 235.

Computer animation of events is admissible without foundation that computer animation is generally accepted in the scientific community. *People v Hood* (1997) 53 CA4th 965, 62 CR2d 137.

COMMON WAYS TO LAY FOUNDATION

Stipulations; and

Witness testimony:

Lay; and/or

Expert.

Typical Witness

Person having personal knowledge of facts in dispute, who testifies that film or recording fairly depicts those facts or facts substantially similar to them.

Generally, witness is not actual maker of film or recording, unless special technique is used.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Objection—Irrelevant

Film of train running over crossing relevant in determining train crew's reaction time. *Greeneich v Southern Pac. Co.* (1961) 189 CA2d 100, 107, 11 CR 235.

Objection—Filming Was Surreptitious and Misleading

Evidence excluded: Investigator got plaintiff drunk and fraudulently induced plaintiff to ride horseback. *Redner v WCAB* (1971) 5 C3d 83, 93, 95 CR 447.

Evidence admitted: Movies of plaintiff that minimized effect of injuries created a conflict in evidence for jury to reconcile. *Harmon v San Joaquin L & P Corp.* (1940) 37 CA2d 169, 173, 98 P2d 1064.

Further Research: See Civ Proc During Trial §§13.94-13.98.

PHOTOGRAPHS

FOUNDATION REQUIRED

Content of photograph must fairly depict material facts in dispute or facts substantially similar to those facts. *Berkovitz v American River Gravel Co.* (1923) 191 C 195, 201, 215 P 675; *PG&E v Hacienda Mobile Home Park* (1975) 45 CA3d 519, 530, 119 CR 559.

COMMON WAYS TO LAY FOUNDATION

Stipulation;

Request for admission; and

Witness testimony.

TYPICAL WITNESS

Typical witness is someone having personal knowledge of the facts in dispute, who then testifies that photograph fairly depicts those facts. See, *e.g., People v O'Brien* (1976) 61 CA3d 766, 780, 132 CR 616 (photograph of reenactment). See also *People v Smith*

(1963) 223 CA2d 394, 407, 36 CR 119.

Generally, witness is not actual photographer, unless special photographic technique is used or fairness or content of photograph is seriously contested.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Evidence Admitted

Photos of plaintiff's decedent's corpse in wrongful death case held relevant to issues (*Olson v Meacham* (1933) 129 CA 670, 673, 19 P2d 527);

Admission of photographs of highway taken 2 years after collision of automobiles upheld as competent evidence to show condition of highway (*Barone v Jones* (1947) 77 CA2d 656, 661, 176 P2d 392);

Photograph of similar but not identical equipment admissible (*People v Slocum* (1975) 52 CA3d 867, 891, 125 CR 442);

Changes in photographed area did not render photograph inadmissible (*Bateman v Doughnut Corp.* (1944) 63 CA2d 711, 718, 147 P2d 404);

Photograph of accident reconstruction admissible (*Wilson v City & County of San Francisco* (1959) 174 CA2d 273, 277, 344 P2d 828);

Photographs of working conditions consisting of asbestos dust in plant were admissible without foundation of date or place of photograph. *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 92, 37 CR2d 457 (disapproved on other grounds in *Camargo v Tjaarda Dairy* (2001) 25 C4th 1235, 1242, 108 CR2d 617).

Excluded as Irrelevant

Photos of plaintiff's decedent's corpse in wrongful death case held not relevant to issues (*Krouse v Graham* (1977) 19 C3d 59, 137 CR 863); and

Photo of location not involved in dispute held inadmissible without foundation of substantial similarity. *PG&E v Hacienda Mobile Home Park* (1975) 45 CA3d 519, 530, 119 CR 559.

Admitted Over Evid C §352 Objection

Photos of murder victim admissible to show victim's injuries, savagery of attack, and defendant's mental state at time crimes were committed (*People v Heard* (2003) 31 C4th 946, 4 CR3d 131);

Photos of murder victim admissible to show intent, malice, and felony (*People v Jentry* (1977) 69 CA3d 615, 626, 138 CR 250);

Photo of murder victim relevant to show location and manner in which victim was killed (*People v Harris* (1989) 47 C3d 1047, 1095, 255 CR 352). See also *People v Perry* (2006) 38 C4th 302, 42 CR3d 30; *People v Price* (1991) 1 C4th 324, 3 CR2d 106.

Videotape showing murder victim's mutilated genitals not unduly prejudicial (*People v McDermott* (2002) 28 C4th 946, 998, 123 CR2d 654). See also *People v Sanchez* (1995) 12 C4th 1, 63, 47 CR2d 843; *People v Allen* (1986) 42 C3d 1222, 1255, 232 CR 849.

Further Research: See generally 2 Witkin, Evidence, *Demonstrative, Experimental, and Scientific Evidence* §§9-15, 18; Trial Objections §31.4.

Excluded Under Evid C §352

Inflammatory picture's prejudicial effect outweighs probative value (*People v Love* (1960) 53 C2d 843, 854, 3 CR 665; *Akers v Miller* (1998) 68 CA4th 1143, 1147, 80 CR2d 857);

Gruesome color photos of murder victims held cumulative and unduly prejudicial (*People v Smith* (1973) 33 CA3d 51, 69, 108 CR 698);

Photo of nursing home patient's severe bedsore excluded in action against physician for elder abuse. *Akers v Miller* (1998) 68 CA4th 1143, 80 CR2d 857.

SAMPLE RECORD: Authenticating Photograph

Q: Let me hand you a document marked as Plaintiff's Exhibit 10 for purposes of identification. Do you recognize this document?

A: Yes.

Q: Would you tell us what it is?

A: It's a picture I took of my car several days before the accident. [*Identifies photograph and shows that witness has personal knowledge*.]

Q: When was this picture taken?

A: April 18, 2007. It was on my birthday.

Q: Could you tell us whether or not Exhibit 10 accurately and fairly depicts the physical condition of your car just before the collision on April 20, 2007?

A: Yes it does. [*Shows that photo fairly depicts condition at issue.*]

Q: Was there any change in the condition of your car between the time that this photograph was taken and the time of the collision on April 20, 2007?

A: No.

JUDGE'S PERSPECTIVE: Opposing counsel frequently object that the foundation for a photograph must include such items as the type of camera used, the type of film and size of lens, the identity of the photographer, the time of day, and the lighting conditions. This information is, in fact, generally not required for the exhibit to be admitted.

SAMPLE RECORD: Evid C §352 Objection

Proffering

Counsel: Your Honor, we would ask that People's Exhibit 6, the photograph taken of the decedent at the scene of his death, be received in evidence.

Opposing

Counsel: Objection, your Honor. May we approach the bench?

[*At this point, all counsel go to side bar.*]

We would object to admission of this exhibit, your Honor, on the grounds that it is irrelevant or, in the alternative, that its very slight probative value is substantially outweighed by the undue prejudice that it will create. As you can see from looking at the photograph, it graphically depicts with considerable color and great detail the effect of the decedent being shot in the face with a shotgun at close range. There is no dispute in this case that the decedent was shot by the defendant.

The issue is whether that shooting was a result of self-defense. Because the photograph contains nothing to help the jury resolve that issue, we ask that it be excluded as irrelevant.

If the prosecution can make any colorable argument of relevancy, we request that the court exercise its discretion under Section 352 to exclude the photograph, because its display to the jury is very likely to generate undue and unfair prejudice against the defendant.

Proffering

Counsel: Your Honor, we believe the photograph should be admitted into evidence because it shows how close the defendant was to the decedent when the shot was fired. In addition, the angle of the shot indicates that it came from slightly to the side, rather than directly from the front, contradicting defendant's theory that the decedent was lunging at the defendant when the shot was fired.

Court: I am going to exclude the exhibit. After looking at the exhibit itself and hearing the argument of counsel, I have determined that the exhibit's probative value is slight and is substantially outweighed by the danger of undue prejudice to the defendant.

Further Research: See Civ Proc During Trial §§13.91-13.93, 13.117.

REAL EVIDENCE

"REAL" EVIDENCE DEFINED

Physical evidence is something that is:

Historical, not created for trial; and

Substantive, tending to prove an issue in the case.

Examples: Gun used in a murder, surgical instrument removed from plaintiff's abdomen.

FOUNDATION REQUIRED

Foundation is necessary to show that the real or physical evidence is:

Relevant (Evid C §350);

What it purports to be; and

In the same relevant condition as during the incident or period in question. *People v Wong* (1973) 35 CA3d 812, 835, 111 CR 314.

COMMON WAY TO LAY FOUNDATION

Typically, testimony of witness is used to:

Identify the object; and

Determine that it is in the same relevant condition.

SAMPLE RECORD: Gun in Murder Case

[*The witness is the investigating detective.*]

Q: Do you recognize defendant's Exhibit G for identification, Detective Kerr?

A: Yes I do.

Q: What is it?

A: It's the handgun I found at the end of the pier.

Q: How do you know that?

A: Well, it looks just the same and it's got my initials and the date of the incident right here where I scratched them into the grip that day. [*Gun is what counsel purports.*]

Q: Please tell us whether or not it looks to be in the same condition as when you found it.

A: It looks just the same, like I said. [*Gun in same condition.*]

Counsel: Your Honor, we ask that defense Exhibit G be received in evidence.

RECORDINGS

RELEVANCY

Recorded prior statement of party or witness; and

Recorded reenactment of underlying circumstances.

FOUNDATION REQUIRED

Recording must accurately report material facts in dispute or facts substantially similar to those facts.

COMMON WAYS TO LAY FOUNDATION

To lay foundation, introduce:

Stipulations; and

Witness testimony.

Typical Witness

Person having personal knowledge of facts in dispute, who testifies that recording accurately reports those facts or facts substantially similar to them. *Allen v Leonard* (1969) 270 CA2d 209, 219, 75 CR 840 (evidence excluded).

OBJECTION TO EVIDENCE UNDER EVID C §352

Admitted

Recording admitted over objection that it contained gruesome depiction of pain. See *People v Welch* (1972) 8 C3d 106, 114, 104 CR 217.

Excluded

Recording should have been excluded as cumulative. See *Weisbart v Flohr* (1968) 260 CA2d 281, 293, 67 CR 114.

ADMITTED OVER OBJECTION THAT PORTIONS ARE INAUDIBLE

The following support admissibility:

Brief absence of sound during moving reenactment did not prejudice defendants because defendants could testify to what was said during lapse (*People v Dabb* (1948) 32 C2d 491, 499, 197 P2d 1);

Mostly inaudible tape that contained some understandable dialogue did not require exclusion. *People v Polk* (1996) 47 CA4th 944, 951, 54 CR2d 921; *People v Hall* (1980) 112 CA3d 123, 126, 169 CR 149.

Further Research: See Effective Intro of Evidence, chap 11 (authentication), for sample questions.

WRITINGS

FOUNDATION REQUIRED

You must show that:

Writing is what you say it is (Evid C §§1400-1401);

If you use a copy, you fall under an exception to the secondary evidence rule (see Appendix B, above);

If writing includes hearsay, you meet requirements for an exception to the hearsay rule. See *Rufo v Simpson* (2001) 86 CA4th 573, 591, 103 CR2d 492 (letter, diary entries). See also Excited Utterance, above.

SAMPLE RECORD: Authenticating a Contract

Q: During the course of this meeting, which you attended, was any sort of document prepared?

A: Yes, there was. [*Shows that witness has personal knowledge of the document.*]

Q: Who prepared the document?

A: Mr. Molton.

Q: Did Mr. Molton say anything with respect to what the document was at the time he was preparing it?

A: Yes.

Q: What did he say?

A: He said he was putting together a short memorandum of understanding that both he and Mr. Rue could sign to confirm their agreement. [*Shows content of the document.*]

Q: When you were at this meeting, did you see the document that Mr. Molton prepared?

A: Yes, I did.

[*At this point, attorney hands a copy of the document to opposing counsel.*]

Q: With the court's permission, I would ask that this document be marked as plaintiff's Exhibit 1 for purposes of identification.

[*Counsel hands original document and copy to clerk, who then marks it, hands a copy to judge, and returns original to counsel*.]

Counsel: Your Honor, may I approach the witness with the exhibit?

Court: Go ahead.

Q: I am handing you a document that has now been marked Plaintiff's Exhibit 1 for purposes of identification. Would you please review this document and then tell us whether you recognize it?

[*Counsel generally returns to table while witness looks at document.*]

A: Yes. It is the memo that Mr. Molton prepared at the meeting. [*Identifies document.*]

Q: Did you see Mr. Rue sign his name to this memorandum?

A: Yes, I did.

Q: Is that his signature at the bottom of the exhibit?

A: Yes, it is.

Q: Did Mr. Molton also sign this document, Exhibit 1, in your presence during that meeting?

A: Yes, he did. That is his signature at the bottom of the document.

SAMPLE RECORD: Authenticating a Letter

Q: Let me hand you a document that has been marked as Plaintiff's Exhibit 2 for purposes of identification. Would you tell us whether you recognize this document?

A: Yes, I do.

Q: What is it?

A: It is the letter I mailed to Mr. Rue immediately after our telephone conversation on June 12, 2006.

Q: Whose signature is that on the bottom?

A: It's mine.

X-RAYS

RELEVANCY

To show present and past physical conditions; and

To provide comparison between normal body and injured body.

FOUNDATION REQUIRED

The standards applicable to X-rays are the same as those applicable to authenticating normal photographs:

X-ray was taken of person and conditions that are subject of dispute; or

X-ray depicts conditions that are substantially similar to those conditions; and

The manner in which films were taken must indicate reliability. *Sim v Weeks* (1935) 7 CA2d 28, 40, 45 P2d 350.

COMMON WAYS TO LAY FOUNDATION

Stipulation;

Testimony of witness; and

Judicial notice of general acceptance of standard X-ray techniques as a method of portraying the condition of the human body. *Reynolds v Struble* (1933) 128 CA 716, 725, 18 P2d 690.

Typical Witness

Treating doctor;

Radiologist;

X-ray technician;

Medical expert witness; or

Custodian of medical records.

FREQUENT OBJECTIONS AND AUTHORITIES RE ADMISSIBILITY

Objection—Lack of Personal Knowledge

Counsel may object that the doctor ordering, but not actually performing, the X-ray lacks sufficient personal knowledge to authenticate the genuineness and reliability of the resulting film.

This objection generally will be overruled when X-rays are routine and doctor has overall familiarity with patient or taking of that X-ray.

Evidence Admitted Over Objection

Doctor who requested X-rays could testify regarding posture of plaintiff (*Simpson v Steinhoff* (1933) 131 CA 660, 663, 21 P2d 960);

X-rays of normal pelvis were admissible for comparison. *DeMartini v McDonnell* (1936) 14 CA2d 405, 406, 58 P2d 170.

Objection—Improper Opinion Testimony

Counsel may object that custodian, technician, or medical provider authenticating film lacks adequate expertise to express an opinion regarding medical significance of film. See, *e.g.*, *Lamb v Moore* (1960) 178 CA2d 819, 824, 3 CR 507.

SAMPLE RECORD: Authenticating X-Rays (Treating Doctor)

Q: Dr. Smith, did you conduct a physical examination of Mr. Jones in your office on April 11, 2007?

A: Yes, I did. He came in complaining of injuries to his arm.

Q: As part of your examination, did you order that an X-ray be taken of his arm?

A: Yes, I did. [*Shows that X-rays were of Mr. Jones's arm.*]

Q: And was an X-ray film actually prepared on the same day?

A: Yes, it was.

Q: Who prepared it?

A: It was prepared by the radiologist who works in the clinic where my office is located.

Q: And when was it that you first saw the X-ray film that was prepared by the radiologist?

A: The same day. I called the radiologist and told him what I needed. I then sent Mr. Jones next door to the X-ray facility, with instructions to bring the completed X-ray film back immediately for me to review. He was back in about 30 minutes, and I then reviewed the films. [*Shows that X-rays were of Mr. Jones's arm.*]

Q: Did you bring that X-ray film with you to court today?

A: Yes, sir.

Q: How do you know that the film you brought with you is the same film?

A: Several reasons. First, the film, at the time it was prepared, had a small insert in the corner that recorded Mr. Jones's name and the date. That information is actually part of the photograph itself. When I looked at the film when I received it back from the X-ray facility, I looked at this insert to make certain that they had sent me the right film. This film has Mr. Jones's name on it, with the date of April 11, 2007. In addition, when I was done examining the film on April 11, I placed it in the office chart for Mr. Jones, as is my normal practice. It is my office procedure to have all X-rays stay with the file, so that they are always available for review. When I went to get Mr. Jones's file this morning, so that I could produce it in response to the subpoena I received to be here, the X-ray was located in the file. Finally, I've looked at the film, and I remember it as being what I reviewed when Mr. Jones was in my office. [*Shows reliability.*]

[*At this point, counsel can have the document introduced into evidence.*]

JUDGE'S PERSPECTIVE: The major difficulty with X-rays isn't getting them into evidence—it's getting the witness to be able to explain them in a meaningful way.

Most courts and jurors simply do not understand what the witness is talking about when he or she points to various imperceptible shadows, opacities, irregularities, and the like on a particular film. Counsel should work carefully with the witness in this area.

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