



Presentation of Exhibits in a Premises Liability Case — A Practical Primer

by Scott Anderson

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Premises liability cases present special problems and opportunities for trial presentation and effective use of exhibits. In order to achieve the best result, plaintiff's counsel must effectively use liability and damages exhibits to grab attention and keep it. Special consideration should be given to maximizing an exhibit's impact while minimizing unnecessary costs. Use mediation preparation as the time to organize and prepare your exhibits for trial presentation, as well as to practice using your software and hardware.

What to Obtain Via Discovery and Otherwise Liability

As always, trial presentation begins with your discovery. Consider your potential exhibits in a premises liability case that revolves around a foreign substance (i.e., soap or grease) on the floor of a store. Your discovery plan should include obtaining the store policies for maintaining the floor, floor inspection reports, your client's accident report on file with the store, witness statements, reports of similar incidents, and annual store reviews by corporate.

Understand that if your defendant is a large chain store, it may refuse to produce corporate manuals, alleging them to be confidential, proprietary information desperately sought by their competitors. Push for their production and negotiate a protective order if necessary to secure production.

Unless you have an admission of notice by the store, proving constructive notice of the dangerous condition is necessary. Determine which employees would have been able to see the condition had they been paying attention. Determine who is responsible for inspections. Determine whether the defendant is following its own policies. Locate warnings and labels for proper use of a cleaner. Buy a bright yellow mop bucket and 'wet floor' warning sign to demonstrate how the store could have safely avoided the problem.

Prosecutors in criminal cases strive to put a weapon in the defendant's hands in front of the jury to help the jury visualize the defendant committing the crime. Plaintiff's counsel should think in a similar manner. Get witnesses out of the witness chair and on the floor to demonstrate what occurred. Have your corporate defendant show you their warning sign (or lack thereof). Point out the store's failure to follow its own guidelines for safety and accident investigation.

For a design defect (i.e., dangerous handicap ramp), your discovery plan should include building plans, lease documents to determine responsibility, construction documents, and prior accident reports. Obtain applicable building codes to determine compliance. Have an engineer or architect evaluate the site to determine if there are code violations. Consider the standard within the community by examining other sites and finding better, safer examples. Consult texts and learned treatises to find safer designs. Take multiple photographs. Move beyond merely proving your client fell, and prepare yourself to show how the fall could have easily and inexpensively been prevented.

Damages

Presentation of damages exhibits in a premises liability case is the same as other personal injury matters. Before you file suit, obtain all pre-injury and post-injury medical records. Pre-injury records are critical to determine whether you actually want to file suit. Read your exhibits before defense counsel does.

Preferably before mediation and certainly before your medical depositions, get a medical illustration to demonstrate the injury and surgery. Videotape the medical depositions and use your medical illustration during the deposition. Have the doctor explain the details of the incisions, screws, and rods necessary to perform the surgery. As a cost saver, consider only getting the digital image of your medical illustration rather than the more expensive foam board blowup.

During your doctor's deposition, project the image on a screen and have the doctor explain the procedure with a laser pointer or by hand.

Lost wages should be proven with overwhelming evidence. Obtain five years of tax records from your client. Past earnings remain the best indicator of likely future earnings. If past earnings can't be verified, consider assigning a value to work time based on minimum wage. It's a conservative estimate that doesn't offend. Don't just rely on an out-of-work note; instead, have your doctors confirm under oath that your client was unable to work. Retain an economist to testify as to present-day value of future lost wages and future medical care, and confirm his data is accurate, easy to follow, and ready for projection.

Displaying Your Exhibits

Some cases merit a "spare no expense" approach to exhibits, while other cases are financially viable only if a more frugal approach to displaying exhibits is taken. Have a frank conversation with your client about these considerations. For those reasons, there is no size-fits-all approach to displaying exhibits. Consider the wide variety of options and pick the approach best for your client.

Regardless of the approach, well before trial, list your exhibits, number them, scan them, provide them to opposing counsel, and work to stipulate as much as possible into evidence. These steps will help you prepare, let the defendant know you're prepared, and smooth your trial presentation. The steps will also reveal potential evidentiary issues if your proposed stipulation is not accepted.

Old School Still Works, But . . .

For decades the preferred approach for documents and photo exhibits was to have an "official" copy for the clerk that could be tendered to a witness, a copy for the judge, and a copy each for every juror. With the ubiquity of color copiers, packets of documents and photos can be efficiently generated; this method works, but it is cumbersome. Jurors can flip through at will, and not necessarily stay on the point counsel is trying to make. Furthermore, jurors

can ignore testimony as they study exhibits. Lastly, this method trends towards tedium. For document intensive matters, this method can be terribly boring. Modern jurors are accustomed to flat screen TVs, projectors, surround sound, and sophisticated graphics. A persuasive advocate must be prepared to give the people what they want.


Updated Approaches

Digital presentation using TV or a projector and screen captures eyeballs. Multiple tools are available to help present exhibits. Whether you borrow or buy this equipment, set it up and practice with it. Consider either a large screen TV, or a high-lumens, low-noise projector. Just like TVs, projector size and cost have both greatly dropped in recent years. Screens are now lightweight and mobile. Get your cords, cables, stands, extension cords, speakers, and tape together. Visit your courtroom in advance, and consider whether you should use a television or a projector, locate your power sources and consider the jurors' and the judge's perspective. Learn how to operate the light switches and blinds. Get the court's permission to use technology. Play your video depositions all the way through on the player or laptop you intend to use in court to confirm everything works. See what resources the court has to offer. Many federal courtrooms are prewired with individual monitors for the judge and each juror, but use is sometime limited to U.S. attorneys. If necessary, get the Clerk's permission to enter the courtroom early and set the equipment up to see how it fits and works.

More than one method of exhibit presentation may be used, and some are easier to use on the fly than others. Rarely does a trial go exactly as expected. Obscure documents become important; overlooked photos become suddenly vital. Consider the following options, listed in no particular order, for getting your message across:

ELMO Presenter Ease of use is its forte. With this presenter you lay your document, photos, x-rays, or art down on its flat top and it will project an image onto a screen or monitor. The presenter is a color video camera mounted above a light table that projects a real-time image. It is not necessary to scan your documents and photos prior to use, so preparation time is minimal. ELMOs are simple and effective, but because you are still physically handling the document, the technology feels dated and it is ultimately a different form of paper shuffling. Prices start at \$600.

Smartboard Whiteboards combine basic touchscreen technology with a projector to broadcast an image of your exhibit from your laptop that can be highlighted and otherwise manipulated to draw attention to significant parts. Various colored digital pens allow you to draw attention to important lines within documents with the pen or your finger, and otherwise mark up documents such as deposition pages to great effect. Your children likely have this technology in their school. Video depositions and Powerpoints may be displayed by projector on the whiteboard. Powerpoints may be advanced by merely



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Who wrote the anonymous letter?
What is under an obliteration? Were
medical records altered? Were pages
substituted? Was the testator's hand
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touching the screen. Whiteboards are large but mobile; the technology is stable and reliable. Prices and features vary greatly, exact pricing is frustratingly elusive, but count on spending \$1,000 plus the cost of a projector.

Powerpoint We've seen it, we've used it, and it is still effective. For twenty years advocates have relied on Powerpoint many times to great effect. You probably already have Powerpoint in your MS Office software. Nevertheless, there is such a thing as death by Powerpoint. Don't read your slides to your audience. Avoid overuse of the templates. Instead, use the slides much like we used index cards, as prompts for topics to cover. The result is more interesting, compelling, and ultimately more effective.

Powerpoint allows some animation such as flying arrows, highlights, and call-outs. Photos can be shown to great effect and video can be imbedded. However, Powerpoint presentations must be prepared in advance and animation cannot be done on the fly. Furthermore, once your Powerpoint slides are placed in their final order, it is cumbersome to rearrange the order. However, for mediation, where you're not facing the risk of the court deeming your critical document inadmissible, Powerpoint is an effective and easy tool.

PC-Based Trial Presentation Software

More sophisticated than Powerpoint, trial presentation software such as Sanction and Trial Director provide comprehensive solutions for trial. ExhibitView is a similar program. Exhibits can be assigned unique barcodes that appear in only your exhibit notebook. Imagine using your wireless barcode reader to pull up and display each exhibit in whatever order you deem necessary, as your assistant pulls out and blows up the critical portions. Such software, hardware, and training is expensive and time consuming.

Generally, an assistant is needed at trial to run the software, display the proper exhibit, generate prearranged animations, or generate calls-outs and highlights on the fly. Exhibits must be scanned in advance, but thereafter you can highlight important sections, insert arrows, and call out

and blow up important sections. Video depositions can be edited and played in part or in whole. In the right hands, this software will streamline and improve your trial. If the court rules an exhibit inadmissible, simply pull it out of your barcoded notebook so it never gets inadvertently displayed. Single user licenses of Trial Director cost \$695. Sanction is \$595. Maintenance fees are extra, and you will need a laptop and a monitor at a minimum. A projector, screen, and wireless barcode scanner are recommended.

New School iPad Applications

Trial presentation software for use with the iPad has bootstrapped itself into the realm of easier use. While older, PC-based software often required a program operator to assist the lawyer in the presentation of exhibits, iPad-based trial software, once mastered, can be used without the cost and distraction of a program operator.

As a believer that all trial work involves elements of theater, use of interesting technology to capture and maintain a jury's interest is a worthy goal. iPad trial software can accomplish that goal. With an iPad and good software, the lawyer can handle the iPad at counsel table while it is wirelessly connected to a projector or television. That means no more duct taping wires to the courtroom floor and bearing the court's regular warnings to the jury to be careful of all the wires.

During witness examination, you may approach a witness with the iPad, screen touch the exhibit to be presented and draw on the screen with your finger to illustrate key points of the exhibit. Some software allows side-by-side exhibits. All software but the most rudimentary offer zoom in boxes of exhibits known as call-outs, highlighting ability, laser pointer, and underlining. These features are all available in the aforementioned Sanction and Trial Director programs, but those require greater training and lack the novelty of the iPad. The laser pointer displays a temporary red dot where the user's finger traces on the exhibit. Video depositions may be played from the iPad through a projector. The court and jury will be fascinated by the use of the iPad, and its simpler and less expen-

sive than laptop programs such as Sanction and Trial Director.

Trialpad 2.0 is the leader in this field. It offers side-by-side exhibits, Trialpad allows file transfer by Dropbox, iTunes, email, and iPad photoroll. Users need to be comfortable with these requirements and be fairly techno savvy. Trialpad costs \$89.

Exhibit A is Trialpad's competitor and contains many of the same features but at a substantially lesser price. For only \$9.99, Exhibit A is certainly worth examining to see if you like it.

ExhibitView has expanded its PC trial presentation to include an iPad application. For \$69, users get highlighting, drawing, and enlargement capabilities. Videos may be played, but ExhibitView lacks some other features offered by competitors. For current ExhibitView users, it allows materials organized in the PC software to be directly exported for iPad use.

Warnings and Other Fine Print

Technology fails unexpectedly. Practice is critical, and redundancy of hardware and your files is required for all but the foolhardy. For those who have shared my experience of having the trial judge steam and the jury fantasize about escaping while the equipment failed to deliver, it doesn't matter that the DVD player came from the Clerk of Court who swore it worked fine. It will be your case and your reputation on the line. While technology needs to be embraced and used, there is also value in having the oversized posterboard of a cringe-inducing surgical procedure propped behind counsel table during the duration of the trial to drive home damages. If a single document is critical to your case, consider going old school for that particular document and placing a hard copy in each juror's hand. Such a method will garner the extra attention the exhibit merits, and you and your client will be pleased with the results. ♦