

BENCHMARK INSTITUTE

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FOR SOCIAL JUSTICE

Benchmark Institute is a training and performance development organization dedicated to increasing the quality and quantity of legal services to low-income communities.

Introducing Exhibits

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Exhibits are anything other than testimony that can be perceived by the senses and presented at the trial or hearing. Exhibits include:

- **Real evidence** — tangible objects such as clothes, weapons, tools
- **Demonstrative evidence** — evidence that represents or illustrates the real thing such as photos, videos, diagrams, maps, charts
- **Records** — government or business writings, hospital records, police reports, payment records
- **Writings** — evidence other than records that are in writing such as letters, receipts, contracts, promissory notes

Foundations

Before an exhibit can be offered into evidence in court, a foundation must be laid for its admission. When evidence rules require a fact or event to occur before an article can be considered evidence, that fact or event becomes part of the foundation necessary for the article's admission into evidence. The facts and events that must be shown represent a judgment as to what information demonstrates that the evidence is reliable and trustworthy.

For all exhibits, the first foundation that must be laid is that the article is authentic. If writings and records are offered to prove that the statements within them are true, a foundation must be laid that the article meets a hearsay exception. If a writing's terms are at issue, its proponent must introduce the document itself - the best evidence- rather than testimony of what the document says.

Authentication

A proper foundation means that the material must be proved to be an authentic document and to actually be what it purports to be. For example, pictures, maps and diagrams of an accident scene must be proved to actually be a true representation of that scene. Tangible items such as the gun, the drugs, the clothes -- must be proved to be the items that the proponent says they are. Basic fairness dictates that if an article is to prove something, it should be the genuine or authentic article.

Hearsay

Introducing Exhibits

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Real and demonstrative evidence do not run afoul of the hearsay rule. Writings and records when offered to prove that the statements contained in them are true, however, are hearsay. Proponents of these documents must lay a foundation that the documents are exceptions to the hearsay rule.

For example, if an employer wants to introduce time sheets that show that a worker reported 15 minutes after the required time to begin work to prove that the worker was indeed late, the employer must show that the time sheets meet an exception to the hearsay rule. In this instance the employer could produce testimony that the time sheets meet the business records exception to the hearsay rule.

In most administrative hearings, lack of foundation will not keep an exhibit out of evidence, but will go to the weight of the evidence, that is, how much weight the hearing officer will give the evidence. Advocates should strive to lay proper foundations for exhibits in administrative hearings to heighten the exhibit's credibility.

Most foundations for exhibits introduced in a court are laid by live witness testimony. Advocates should strive to do likewise in administrative hearings. Many times you will have more than one witness who can lay a proper foundation. You should choose the one who has the most knowledge of the exhibit and makes the best impression on the judge. Sometimes you may need more than one witness to lay a proper foundation.

The Mechanics of Getting Exhibits into Evidence

Some hearing officers require that all documents or exhibits be introduced at the beginning of the hearing. The exhibits will be numbered or lettered and then entered into evidence. Any objections or arguments about the exhibit's relevance or reliability are made at this time. Some hearing officers will premark exhibits for identification and then allow you to enter them in evidence at the time of your choosing. Still others will allow you to mark and introduce evidence whenever you choose.

Even if you must put all items into evidence at the beginning of the hearing, we suggest that you refer to the document and lay a foundation at the most logical point in your case. You should always make copies of all exhibits, except impeachment documents, and give them to the opposing advocate when they are introduced.

It's a good practice to let the opposing advocate know what exhibits you will be introducing, particularly if you deal with that advocate on regular basis. Some agencies require that exhibits be submitted to the hearing officer 5 days before the hearing. Others require that parties exchange exhibits before the hearing.

In any case, you should be prepared to offer exhibits in a way that most benefits your client's case. If this method differs from the way the hearing officer usually does it, you should decide how to approach the judge about allowing you to use your chosen method.

Formal Method.

Here is the most formal method, introducing the exhibit at the appropriate time in your case.

Step 1. Have the exhibit marked.

Exhibits are given sequential numbers or letters; 1, 2, 3 or A, B, C and sometimes identified by party, for example, Claimant, County, Employer etc.

A. Please mark this Claimant's Exhibit 1 for identification. (Hand exhibit to judge).

If the exhibits have been premarked at the beginning of the hearing, this step is unnecessary.

Step 2. Show the exhibit to opposing advocate.

A. Your honor, I'm handing Exhibit 1 to Ms. Contreras, the County's advocate. (Hand copy to judge.)

In many instances, the opposing advocate has already seen the exhibit or has a copy of it, so this step is unnecessary. It doesn't hurt to put that fact on the record. In some hearings you also give a copy to the judge at this point or make sure that the judge can see an exhibit you can't copy such as a diagram or tangible object.

Step 3. Ask permission to approach the witness.

A Your honor, may I approach the witness.

J You may.

In only but the most formal hearings is this step required. In many hearings, the witness is sitting next to you.

Step 4. Show the exhibit to the witness.

A Ms. Jones, I'm handing you Claimant's Exhibit 1 for identification. (Walk to the witness or place the exhibit in front of her.)

Step 5. Lay the foundation for the exhibit.**Step 6. Move for admission of the exhibit in evidence.**

A Your honor, I move that Claimant's 1 be introduced into evidence. (Hand or show the exhibit to the judge.)

J Any objections?

O States objections and arguments.

J it will be admitted.

Make sure that the exhibit is entered into evidence. If you are unsure if the exhibit is in evidence, don't be shy, inquire.

A Excuse me, you honor, has the exhibit been entered into evidence?

J Yes, it has.

Step 7. Have the witness use or mark the exhibit.

Once the exhibit has been admitted in evidence, consider how it can be used or marked to increase its usefulness. Photographs and diagrams can be marked to show locations, distances and relationships. Significant sections in documents can be underlined.

Offered at the Beginning of the Hearing

Many hearing officers eliminate formalities and introduce all exhibits at the beginning of the hearing, but remain open to your introducing them when appropriate.

J. I am now marking the documents in the Appeals file. Exhibit A is the Claimant's request for a hearing. Exhibit B is the County's Notice of Action, Exhibit C, the County's Position Statement. Are there any other items to be entered into evidence?

A. In the interest of time I'd like to offer Claimant's exhibits during my examination of witnesses.

J. Very well. Exhibits A, B, and C will be entered into evidence at this time.

A few judges may insist that you introduce your exhibits at this point, no matter how persuasive your arguments. If so, offer the exhibits but make sure to lay your foundation where appropriate in the presentation of your case.

A During examination of witness.... Your honor, may the record reflect that I'm showing Exhibit D to the County representative?

J It will.

A Ms. Howard, I'm showing you Exhibit D. Do you recognize it?

W Yes.

A What is it?

W It's a picture of the closet in my bedroom.

A Does the photo fairly and accurately show how your bedroom closet looked when the investigator, Mr. Pone, came to your house on July 1?

A Ms. Howard, does the photo show the items that were in the closet when investigator Pone was looking in the closet?

W Yes.

A Using this pen, please put an S where the shoes are located.

A Does the picture show where the investigator stood when he looked into the closet?

W Yes.

A Using this pen will you put a P where Pone was standing.

Opposing Exhibits

To show that the item should be excluded or should be given little or no weight you should argue that one or more of the foundational elements are missing. You can make the argument at the time the exhibit is offered and in your closing argument.

- If the agency produces no evidence or unreliable evidence to authenticate the item, argue that the item is irrelevant because no proof exists to support a finding that the article is what the agency says that it is and hence has no connection to the case.
- If the agency produces a witness that tries to authenticate the item, you can cross-examine the witness to show that one or several of the foundational elements is missing and hence the evidence is unreliable; OR
- Have one of your own witnesses testify to show that one or several of the foundational elements are missing.

In almost all instances, judges in administrative hearings will admit the evidence. In any event, if any of the elements are missing, you respectfully should make the argument to keep it out anyway. The method of laying a foundation is through a series of specific questions that establish the necessary facts.

