

COPY

SEEING IS BELIEVING:
YOUR MOST PERSUASIVE DOCUMENTARY
EVIDENCE MAY NEVER BE
ADMITTED IN EVIDENCE

Introduction

Despite all the paper we request during discovery, every case comes down to the importance of just a handful of documents. Of course, the trick is knowing what to request, how to pare it down to those few important documents and how to use those documents persuasively to win your case. Too often, lawyers get lost in a sea of documents and forget to do what is necessary to lay a proper evidentiary foundation at trial. How often has this happened to you? Lawyers also frequently assume that a jury automatically will understand the importance of the key documents instead of employing techniques that will guarantee they will understand their significance. The purpose of this article is to reinforce what you already know you should be doing and to share trial-tested ideas concerning how to effectively use documents some of which you will never be able to get admitted into evidence.

Do It The Right Way In The Beginning

Every time you request a document you have to ask yourself its relevancy, i.e., how are you going to use it at trial? If you are going to offer it to prove the truth of a matter in issue at trial (e.g., design defect), you have to make sure you can authenticate it (Evid. Code §1401), establish its relevancy (Evid. Code §210), and overcome the hearsay rule with one or more hearsay exceptions (e.g., Evid. Code §1271, business records), bypass a potential Evidence Code §352 objection and avoid any other statutory exclusionary policy (e.g., Evid. Code §1151) or case. Make a **checklist** and be sure you have satisfied each requirement during discovery.

The easiest way to prepare to lay a foundation is by satisfying these requests during depositions of witnesses. Opposing counsel often will stipulate to items like the business record foundation on the record. A very effective and not often used way to make sure you have done what is necessary is to start the case with the deposition of the custodian of records. This almost always will dispose of authentication and any hearsay objections.

If you decide that you are going to use a document for a more limited relevancy, i.e., notice, knowledge, etc., your foundation may be more limited. For example, if you decide to offer evidence of prior accidents to prove notice only, you do not have to worry about the hearsay rule (Ault v. International Harvester, 13 Cal.3d 113, 121-123 (1974)), but you still may have problems with Evidence Code §352 and case law which specifically deals with the foundational prerequisites for notice.

The bottom line is that you have to train yourself to go through the foundation checklist much like a pilot routinely reviews a written checklist of things he must do before take-off. Make sure you prepare a short (2-4 pages) evidentiary trial brief for each evidentiary issue that relates to the admissibility of your key documents. You never can assume the trial judge will understand the elements of the necessary foundation and most of the time your brief will be the only one submitted on the subject. Evidentiary trial briefs also help you remember your legal argument and trial judges appreciate them because they make their job easier and reduce the risk of legal errors which might necessitate a new trial or a reversal on appeal.

If You Want To Win Your Case,
You Have To Use Your Documentary Evidence

If you have done your homework, you should have no problem getting a key document admitted into evidence, but that is only the first step in its persuasive use at trial. Many lawyers spend their time creating a long exhibit list hoping to explain the significance of these documents during final argument. This is a mistake because final argument is not the place to "sell your evidence." This should be done during your case so by the time of argument the evidence sells itself because the jury already knows its significance.

How can you do a better job selling your evidence during your part of the case? The most obvious way is to **show** it to the jury so they can see it with their own eyes. There are many ways to do this, including blow-ups, overhead projections and passing it around the jury box. There is no one way to do this but there are simple techniques to show your documentary evidence that will significantly improve your ability to persuade the jury with it.

Repetition

The first technique is repetition. One look at a key document is never enough. The jury needs to see it over and over again to become familiar with it. It should be like an old

friend to them by the time of final argument and this will ensure that it is one of the first pieces of evidence they will request and examine in the juryroom. Find a way to show the document to the jury with every witness you can question about it.

Analyze The Document

A second technique is to spend time analyzing the document and focusing on key phrases that will be important to your experts and/or to the jury instructions. Let the jury see it while your witness is explaining it. For example, if you are trying to prove conscious disregard of the rights and safety of others, a document prepared by an engineer of a manufacturer that documents "acceptable accident rates" might be something upon which you want to focus. If you are using blow-ups you could use a transparent highlighter to mark the phrase, you could apply a piece of transparent colored plastic over the words to highlight them, or a plastic overlay on top of the entire document that easily can be removed. An even better technique is to use an overhead projector that has the ability to zoom in and enlarge (e.g., a DOAR machine). This type of projector saves the expense of a blow-up and allows you to blow-up anything at a moment's notice. It should be part of every trial lawyers' arsenal.

Attorney Created Documents

A third technique is for the attorney to create his own document based upon key portions of admitted documentary evidence and the testimony of the witnesses. These attorney created documents give you the advantage of showing, organizing or repeating key evidence to the jury to help sell it. These documents also simplify the evidence for the jury so it is easier to understand. It is a subtle way of prearguing your case to the jury because you are showing you have the evidence to prove your case or you can rule out certain defenses.

An attorney created document should always be marked for identification for at least three reasons: (1) for the record, (2) to sanctify the document as an "exhibit" in the jury's eyes and, (3) to increase the chances it will be admitted into evidence despite the fact it is hearsay and may be subject to an Evidence Code §352 objection for being cumulative. If you do a good enough job designing and creating these documents, your opponent may not object to their introduction into evidence or may stipulate to their admission.

(1) The Grid

One example of an attorney created document is a pre-prepared grid blow-up to help you organize the evidence for the jury. This is particularly useful when you are trying to establish the elements of a cause of action by referring to multiple documents or with a series of witnesses where each witness has facts to contribute but cannot provide everything you need. For example, if you are attempting to prove that several corporations are the alter egos of its owners, you could create a grid with the names of the corporations across the top and the key elements of alter ego down the left side. This fact driven theory is much more easily proven when the jury can see you fill in the pieces of the puzzle as you proceed. Of course, after you complete such a chart, refer to it over and over again as a reference when you are examining other witnesses and always display it in the same location in the courtroom. The chart will become important in the jury's eyes because they witnessed its creation from the evidence, so even if you cannot get the chart itself into evidence, you can talk about how you showed that you met your burden of proof on the chart and point to where the chart was located during the trial. The jury will get the message just as if the chart were before them.

(2) The Checklist

Another useful attorney created document is the checklist. A checklist is simply a way of eliciting testimony from a witness and recording it simultaneously on butcher paper with a bold marker (this is preferable to a chalkboard). This technique has the advantage of emphasizing the testimony, organizing it and giving the notetaking jurors adequate time to copy it. A checklist also should be marked for identification for the reasons stated above.

The checklist is helpful during direct and cross examination. On direct you should consider using this technique on any issue where you have to prove certain elements and the witness will be providing you with facts to establish the elements. This is particularly useful with experts. In a medical malpractice case where the defense argues there is no standard of care because the medication or treatment is new or experimental, you could ask your medical expert to list the factors that are important in establishing a standard of care. Then you elicit testimony to support each factor. You could put a big check mark to the left of each factor as it is proven by the testimony. You could then create a separate checklist to illustrate how the standard of care was breached. Different colored markers and more eye catching symbols will only make this

technique more valuable. Again, this is a much more persuasive way to show the jury your evidence instead of only relying on oral testimony. You engage two senses (hearing and sight) instead of only one.

The checklist is equally helpful during cross examination. For example, get your adversary's expert to admit to the prerequisites to establish a certain defense and then establish the facts do not exist to prove it. Then have the expert rule out the defense and you can cross it out boldly on the paper. This leaves an indelible impression on the jury.

(3) The Timeline

Another attorney created document that is very useful in complex cases is a timeline. This is particularly useful when dealing with complex business transactions, a long complicated history of manufacture and sale of a product and detailed medical treatment, whether it be for liability purposes in a medical malpractice case or for damages in any type of personal injury or wrongful death case. Dates easily confuse people and a timeline created by the attorney as the case progresses is a way of emphasizing the importance of certain dates and putting the events in proper sequence. Even if the timeline does not get into evidence, you can create a similar one for final argument and the jury already will be aware of the sequence of events.

Do not Be Afraid To Read or Show The Bases Of Your Expert's Opinions Whenever Possible

It is established that expert witnesses can base their opinions on matters that are otherwise inadmissible as long as it is the type of evidence that reasonably may be relied upon by an expert in forming his opinion. Evidence Code §801(b). The inadmissible evidence often is hearsay and the first question is determining whether or not the hearsay is reliable. People v. Miller, 25 Cal.App.4th 913, 917 (1994); Witkin California Evidence (3d Ed. 1986) §482. Answering this first question is not the purpose of this paper and that may be the subject of expert testimony.

The issue here is how far an expert can go in testifying about the details of otherwise inadmissible hearsay upon which he has based his opinion. For example, can you read or show to the jury the hearsay basis? The short answer to this question is "maybe" and there is authority and a strategy available for doing

so. It can be very effective but you have to be cautious.¹

The California Supreme Court in People v. Coleman, 38 Cal.3d 69, 92 (1985) held that although an expert may state on direct examination the matters on which he is relying, he cannot testify about the details if they are otherwise inadmissible. See also Genrich v. State of California, 202 Cal.App.3d, 221, 229 (1988); Grimshaw v. Ford Motor Co., 119 Cal.App.3d, 757, 788-789 (1981). The Coleman Court noted that ordinarily the use of a limiting instruction stating that matters upon which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures the hearsay problem. People v. Coleman, supra. The Court went on to say that in situations where hearsay evidence is recited in detail, a limiting instruction may not correct the problem. Id at p.92. However, a trial court is not required to give limiting instructions sua sponte. Grimshaw v. Ford Motor Co., supra at p. 789.

In a civil fraud action where an expert was prevented from testifying from documents prepared by his subordinates concerning the value of damage to an airplane, the Court of Appeal summarized what it believed to be the current law on the subject:

In other words, as relevant here, while an expert may rely on inadmissible hearsay in forming his or her opinion (see People v. Coleman, supra) and may state on direct examination the matters on which he or she relied, the expert may not testify as to the details of those matters if they are otherwise inadmissible. Continental Airlines, Inc. v. McDonald Douglas Corp., 216 Cal.App.3d, 388, 414-415 (1989).

The rationale for this general "no details" rule is the concern that incompetent hearsay evidence will be brought before the jury under the guise of reasons for the expert's opinion. Grimshaw v. Ford Motor Co., supra at pp. 788-789.

Does this mean an expert can never read hearsay documentary opinion basis evidence to a jury? Despite the language of the

¹Of course, you should always consider showing non-hearsay opinion basis evidence to the jury. For example, photographs, pictures in brochures, drawings in patents and other similar evidence are not hearsay and can be very persuasive. The hearsay rule only concerns statements (Evid. Code §§1200, 225).

preceding cases, courts have permitted litigants to read hearsay opinion basis evidence as long as a good reason is stated for doing so and the person offering the evidence is willing to accept one or more limiting jury instructions. The leading case on the subject is West v. Johnson & Johnson Products, Inc., 174 Cal.App.3d, 831 (1985). West was a products liability action involving toxic shock syndrome from a tampon. During the direct examination of plaintiff's expert, the expert testified that he based certain opinions on customer complaints submitted to defendant. He even went so far as to **read** portions of the reports verbatim. Before his testimony, the jury was given a limiting instruction that the evidence of customer complaints was being admitted solely on the issue of notice of defect. The complaints themselves never were admitted into evidence.

The plaintiff won at trial and on appeal the defendant argued it was error to permit the expert to read hearsay to the jury. The Court of Appeal disagreed and found no error:

Evidence about the complaints was admissible, if at all, only to show that the complaints had in fact been made. But in order to demonstrate the relevance of the complaints, some description of them had to be given; otherwise, the jury would have been told simply that 'consumer X complained about O.B. tampons,' without more. Therefore, the trial judge allowed the witness to describe the nature of the complaints and, as part of the description, to read excerpts of pertinent ones. Id. at p. 861.

The court also pointed out that defendant had ample opportunity to describe dissimilarities between the complainants' symptoms and the symptoms of toxic shock syndrome. Furthermore, defendant made no request for a limiting instruction explaining to the jury that the information was admitted only to show the basis of the opinion and not for the truth of the matter. Under the circumstances presented in the case, the court held there was no error.

West was cited with approval in Genrich v. State of California, supra., which was a highway design case concerning a collision between a vehicle and a pedestrian. The trial court allowed plaintiff's expert to use statistical information (i.e., the number of accidents) in a State Wide Integrated Traffic Survey report (SWITRS report). The essence of the expert's testimony was that 244 accidents in the vicinity of the crosswalk

influenced his opinions concerning dangerous condition. However, he admitted that he had not reviewed the actual accident reports and could not tell how many actually were auto/pedestrian collisions. Although the Court of Appeal cited the general rule of exclusion, it held that the trial court did not err in admitting this testimony. However, it did note that the expert had not recited the evidence in detail and he had admitted it was not the primary basis of his opinions.

There is not much authority that charts the extent to which an expert can go in reading or showing the hearsay bases of his opinions. The guidelines for doing so appear to be as follows:

1. Always have an independent relevancy for this testimony to avoid running afoul of the hearsay rule. Notice, knowledge and state of the art are good examples of independent relevancies.

2. Be prepared to offer a limiting instruction to be read to the jury before the opinion-basis testimony is read or referred to. For example, an instruction could state the following: Evidence of prior accidents is offered only as a basis for the expert's testimony and is relevant only to the issue of notice. It is not being offered to prove the issue of dangerous condition.

3. Make a strong argument to support the dual foundation underlying all exceptions to the hearsay rule, i.e., that although this evidence is hearsay, it is trustworthy and necessary. This will make the court more comfortable and will help you bypass the general rule of exclusion.

4. Point out additional safeguards to convince the court that the evidence can be read or shown to the jury. For example, in the West case the court noted that cross examination was available to point out distinctions and differences which would affect the weight of the evidence.

5. Be prepared to read or show excerpts of the evidence rather than reading all of the evidence verbatim. Also be prepared to summarize the essence of the evidence in case the court limits you.

There clearly is authority for reading otherwise inadmissible opinion basis testimony to a jury and the chances of accomplishing this are increased by following the preceding guidelines. For example, in a products case where the only evidence concerning the design of an older, discontinued product is a deposition of the deceased designer, should plaintiff's

expert be able to have his expert read deposition testimony concerning foreseeability? There is no case on the subject in California but this is an example of a situation where an actual quotation could be very persuasive. It would be better still if the plaintiff's attorney could project the actual testimony on a screen with a DOAR machine so the jury could see it.

If you are permitted to read a hearsay basis of an opinion there is no logical reason why you should not also be permitted to show it. The author knows of no California cases on the subject. However, if you intend to show such a statement be certain to follow the preceding guidelines and be aware that you are taking a risk that a Court of Appeal might find that you have violated the "no details" general rule in explaining the statement.

This discussion regarding hearsay opinion basis evidence only underscores the importance of always trying to lay a proper foundation for the independent admissibility of documentary evidence. Otherwise, your only recourse may be to try to get it before the jury through an expert pursuant to Evid. Code §801(b). As seen above, this creates potentially serious problems of proof.

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