



Topic: “Introducing Documentary Exhibits in Court”
Opinion by: Justice Doug Campbell

Date: November 14, 2014
Related Topic: Issue No. 2: “ Use of Exhibit Books”

This memorandum was prepared by Justice Doug Campbell in reply to the request of ACJ O’Neil as outlined in his Notice to the Bar dated November 6, 2014. It represents Justice Campbell’s personal viewpoint and may or may not require some adjustment to conform to the preferences or practices of individual Judges. That will be left up to the Judge and the lawyer, if any, involved. Readers who make use of the within material do so therefore at their own discretion and subject to their own judgment.

Formulation:

- *There must be no doubt in the record as to what document is being proved;*
- *Judges at Trial and on Appeal need to be sure as to what document the witness was referencing;*
- *The opposing lawyer must have time to object to the admissibility of the document.*

Some Common Practices in use that should be avoided:

- 1) The lawyer approaches the Court Reporter and passes the document to her and asks that it be marked as an Exhibit. **Before or after** that event, he passes a **different copy** to the witness and asks questions about it - often without any mention of the Exhibit number. **Problems: 1)** *The record does not reflect a connection between the actual marked document and the one that the witness is referencing. A Court of Appeal Judge or the Trial Judge is not necessarily certain about what the witness has before her. 2)* *The actual Exhibit; i.e., the one marked by the Court Reporter, has not been identified or reviewed by the witness and therefore, technically, has not been proved. 3)* *The opposing lawyer or self-represented party has had no opportunity to object to its admissibility;*

Or:

- 2) The lawyer initially fails to have the document marked and shows a random copy to the Witness (often without any identification of it) and asks questions and may or may not later have it marked with an Exhibit number. **Problems: (Same As above listed problems);**

Or:

- 3) The document has not been copied and the only available copy is given to the Witness (*which means that the Judge, the opposing lawyer, the self-represented party and/or the Questioning Lawyer does not have the document during the questioning; thus no one involved can properly follow the examination of the witness*).

In my opinion, the preferred way to introduce a document in evidence is for the Questioning Lawyer (or Self-represented Litigant) to:

- a) **Bring to court** the correct number of copies of the document so that there will be an Original to be marked as an Exhibit, a copy for the Judge, one for the opposing lawyer or lawyers or self-represented parties and one for herself; [she/he must not come to Court with insufficient copies and *he/she must be sure that all copies are not poisoned with sketches or notations*];
- b) **Identify** one of those documents as the Original;
- c) **Make available** a copy to every lawyer or Party opposite and wait for them to object to its admissibility before proceeding further (*if they have already seen it or if it is non-contentious, the pause for them to object can be very brief*);
- d) **Pass the original** to the Court Reporter and ask that it be marked as an Exhibit; (and once this has been done), retrieve it from her/him... (*Do not show the document to the witness before it is marked by the Court Reporter....and do not show the witness a copy*);
- e) At the same time, **pass a true copy** of the document to the Court Reporter and ask that it be made available to the Judge;
- f) **Pass the original** document, which by then has been marked by the Court Reporter with a number, to the witness and say the words: "*I show you exhibit Number (X)*" and then ask questions about it;

Except when that fact is contentious, it is sometimes appropriate to assist the witness by asking a leading question to, for example, identify the nature of the document – eg..: "*I show you Exhibit # 1, which is a set of unaudited Financial Statements for ABC Company Ltd for the year ended December 31, 2013*"....and then ask questions. Do not do so if it is likely that the area is contentious; but when unsure, give notice that you intend to lead the witness so that opportunity for an Objection exists.

- g) **So, the sequence is:**
 1. bring the **correct number** of copies,
 2. pass a copy to **opposing lawyers or self-represented parties** first, and pause,
 3. pass the **original** to the court reporter next, with a copy for the Judge,
 4. pass **the marked original** to the witness and identify it by its exhibit number and, then,
 5. **ask questions** about it.
- h) **When the witness finishes testifying, be sure that the exhibit is returned to the Court Reporter and not removed from the courtroom by the witness.**