



Jeffrey A. Rudman

## Getting your evidence “in” at trial: Build an outline that leaves nothing to chance

A careful pre-trial evidence plan can instill confidence that each piece of necessary evidence will be admitted

You’ve been as thorough as can be working up your case. You’ve pro-pounded, and received responses to form and specially prepared interrogatories, requests for production of document and requests for admissions. You’ve taken depositions of the defendant, persons most knowledgeable, and other key witnesses — some of which you have videotaped. You’ve subpoenaed documents and collected evidence through other investigative means. You’ve followed your discovery plan and worked up your case to the fullest. You may have even survived a motion for summary judgment. Experts on both sides have been deposed. But despite your diligence, you have not been able to settle your case, and now trial is around the corner.

You now shift gears from your plan on getting your evidence, to your plan on getting your evidence *in at trial*. Trial preparation is essential to make sure your pre-trial efforts are utilized to the fullest. If this is your first trial, a careful plan is helpful to having confidence that each piece of useful evidence you have collected in your investigation and discovery will be admitted and will serve to meet your burden of proving each element of each cause of action that will be tried before the jury.

A great place to start is with the documents you are required to submit in advance of the Final Status Conference (FSC). Either the department in which your case will be tried will have a “Pre-Trial Order”, or will

simply follow local rules, such as Los Angeles Superior Court Local Rule 7.9(h) and possibly Local Rule 7.9(i), both of which can be found at the Los Angeles Superior Court Web site ([www.lasuperiorcourt.org/courtrules/CurrentCourtRulesPDF/Chap7.pdf](http://www.lasuperiorcourt.org/courtrules/CurrentCourtRulesPDF/Chap7.pdf)). If you weren’t informed at the Case Management Conference as to which your department follows, you should call the clerk to inquire.

Los Angeles Superior Court Local Rule 7.9(h) requires, among other things, that at least 5 days before the FSC, the parties exchange:

- a list of pre-marked exhibits to be used at trial
- a list of jury instruction requests
- a list of trial witnesses, and
- a proposed short statement of the case to be read to the jury panel explaining the case.

Local Rule 7.9(i) requires these documents to be submitted *jointly* by the parties.

### Creating an *Elements Outline* from the Jury Instructions

You can start to organize and evaluate the evidence you have collected as you prepare your jury-instruction requests. The jury instructions should be your roadmap to presenting your evidence as they represent precisely what you need to prove (or disprove) in your case. From each set of jury instructions that set forth the elements of your causes of action, it is good practice to prepare an outline. You may call it your *Elements Outline*.

It is useful to create a separate page for each element of each cause of action. On each page should be each fact that you have evidence to support and which serves to prove that element. Beneath each fact, you can lay out each piece of evidence, be it testimony, document, photograph, discovery response, etc., that supports that fact. And finally, beneath each piece of evidence, you should lay out the method by which you will introduce that piece of evidence at trial (i.e. trial testimony, documents, photographs, discovery responses, deposition testimony, videotaped deposition testimony, stipulated evidence, etc.).

To use an example, take a premises liability case. Jury Instruction CACI 1000 reads, “[*Name of plaintiff*] claims that [*he/she*] was harmed because of the way [*name of defendant*] managed [*his/her/its*] property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] [*owned/leased/occupied/controlled*] the property;
2. That [*name of defendant*] was negligent in the use or maintenance of the property;
3. That [*name of plaintiff*] was harmed; and
4. That [*name of defendant*]’s negligence was a substantial factor in causing [*name of plaintiff*]’s harm.

Therefore you would begin by creating a separate page for each of the four elements mentioned above (i.e. a page which outlines your evidence to prove that the defendant owned/leased/

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occupied/controlled the property; another page which outlines that defendant was negligent in the use or maintenance of the property; and so on.) Each of these pages should also include portions of other jury instructions that further explain the elements of the cause of action. (i.e. your *Elements Outline* page relating to element 1 above [that defendant controlled the property] may include elements described in CACI 1002 "Extent of Control Over the Premises"; your page relating to element 2 above [that defendant was negligent], may include elements described in CACI 1001 "Basic Duty of Care" and CACI 1003 "Unsafe Condition", etc.).

This format should be followed for each cause of action at issue in your case, with the elements of each relevant jury instruction that pertains to it. Do not forget to create pages for each element of damages, per CACI 3903A, et seq.

Now that you have outlined each element, you should insert each fact for which you have evidence to prove that element, and each piece of evidence that is relevant to that fact (i.e. evidence that has a tendency to prove or disprove the disputed fact. (Evid. Code, §210.)

### Admissibility issues

As you go through this exercise of creating an *Elements Outline*, it is prudent to ask yourself the method in which you intend to offer the evidence, and the likelihood of its admissibility. Each type of evidence, and the method in which you wish to present it, gives rise to evidentiary issues. The Evidence Code and Local Rules should be thoroughly consulted. However, below are some issues to consider:

### Trial testimony

If your evidence will be trial testimony regarding the fact, make sure will be able to lay a foundation with the witness you call to testify. Pursuant to Evidence Code section 702, except for expert opinion testimony, a witness

must have personal knowledge of the matter about which he/she is testifying. (i.e. things they have themselves seen or heard, or otherwise experienced through their own senses, Evid. Code, §702 comment). Whereas experts, who have the requisite qualifications (i.e. special knowledge, skill, training and education regarding the subject, per Evid. Code, §720) can give opinion testimony, not based on personal knowledge. (Evid. Code, §801).

### Writings

Writings are broadly defined by Evidence Code section 250 as "handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored," and therefore includes documents, photographs, video, tape recordings, computerized records and drawings.

If at trial a writing is objected to on grounds of authenticity, you may be faced with offering proof that the writing is what the proponent claims it to be. (Evid. Code, §1400.) A writing can be authenticated in several ways:

- Stipulation of the parties (it is good practice to simply ask your opposing counsel if they will agree to stipulate to authenticity of a writing when there is no reasonable basis to dispute it);
- Requests for Admission (the defendant may have admitted the genuineness of specified documents in response to your REAs). (Code Civ. Proc., §§2033.010, 2033.410);
- Judicial Notice. (Evid. Code, §§451 and 452);
- Custodian's affidavit (e.g. nonparty business records in response to a subpoena duces tecum). (Evid. Code, §§1560-1562.)

If none of the above is available, be prepared to have a trial witness authenticate the writing. A party offering a writing has the burden of offering sufficient evidence to sustain a finding of fact that the writing is authentic. (Evid. Code, § 403.) "A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness." (Evid. Code, §1413.) In the case of a medical bill, a Plaintiff's testimony that he received medical services and received a bill which he/she paid, is sufficient to authenticate the medical bill. (See *McAllister v. George* (1977) 73 Cal.App.3d 258, 261-263 [140 Cal.Rptr 702, 704-7-5].)

Further, "if the content of a writing is in issue, either the original writing or admissible secondary evidence must be produced. Oral testimony is inadmissible to prove the content of a writing unless specified conditions have been met. Evid. Code, §§1520-1523." (See *The Rutter Group's Civil Trials and Evidence* ¶ 8:310.1 and ¶ 8:375ff).

If you cannot lay a foundation for your writing, or it is otherwise inadmissible hearsay, you may still be able to use the writing for other purposes such as showing the writing to a witness to refresh his/her recollection (Evid. Code, §771) or as a past recollection recorded (if the witness lacks sufficient memory to testify, he/she may read into evidence a writing previously made by that witness, if the content would have been admissible if made by the witness while testifying; see Evid. Code, §1237).

Of course, you must also be aware of the "hearsay rule" and the various exceptions thereto, to make sure the offered trial testimony or writings will be admitted. (See Evid. Code, §§1200 and 1220 et seq.)

### Material objects

You may want to introduce a material object, such as the defective product in a product liability action. Evid. Code §140. Similar to a writing, a material

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object must be authenticated, and can be done through stipulation, request for admission responses, judicial notice, or by testimony that the object was the one involved in the incident or one that is substantively similar to it. (See *Civil Trials and Evidence* ¶ 8:45.)

#### **Deposition testimony**

Deposition Transcripts are admissible at trial under certain circumstances. (Code Civ. Proc., §2025.620.) A deposition of a party or officer, director, managing agent, or employee of a party is admissible for any purpose, including impeachment, or as substantive evidence against the party. This holds true whether or not the witness testifies at trial. Therefore, at any time, you may pick up the deposition transcript and read relevant testimony into the record before the jury. (Code Civ. Proc., §2025.620, subd (b).) However, the presentation of deposition testimony may be governed by local rules, such as Los Angeles Superior Court Rule, rule 8.70 (8.70 – before reading deposition testimony into evidence, counsel must obtain leave of court; opposing counsel must be given opportunity to read deposition and interpose any objection).

Further, while witnesses are on the stand (party or non-party) you may use their deposition transcript to impeach their trial testimony. (Code Civ. Proc., §2025.620, subd.(a).)

Lastly, if the requisite “unavailability” is shown, or if the deponent lives more than one-hundred-and-fifty miles from where the trial is being held, a deposition transcript can be used for any purpose against either a party or non-party witness. (Code Civ. Proc. §2025.620, subd.(c).)

#### **Videotaped deposition**

Videotaped deposition of an expert, or treating or consulting physician can be used in lieu of live testimony without the showing of “unavailability” assuming the proper notice was given before the deposition in accordance with Code of

Civil Procedure section 2025.220, subdivision(a)(5) for a deposition notice or Code Civil Procedure section 2020.310, subdivision c) for a deposition subpoena. You must also have given notice to the court and the other parties as to which portions of the deposition you intend to present at trial, so that objections can be made and ruled on prior to showing them to the jury pursuant to Code Civil Procedure sections 2025.340 and 2025.620, subdivision(d).

For all depositions you most likely will need to lodge the original transcript with the Court pursuant to local rules, such as Los Angeles Superior Court Rules 8.71 and 8.72.

#### **Written discovery responses**

##### *Interrogatories*

A party's written interrogatory responses may be used at trial to the extent the responses themselves are admissible. In other words, although the responses may be hearsay, they may be admitted nonetheless as an exception to the hearsay rule (i.e. party admission, prior inconsistent statement, etc.). However, the responses are only admissible against the responding party (i.e. they cannot be used against another defendant. They may be used regardless of whether the party is available to, has or will testify at trial. (See Code Civ. Proc., §2030.410.) Local rules should be consulted regarding the presentation of written interrogatories.

##### *Requests for Admissions*

Responses to Requests for Admissions are admissible in the same fashion as interrogatories. However, they carry greater weight as no contrary evidence may be admitted, in that the admitted facts are deemed conclusively established. (Code Civ. Proc., §2033.410.)

##### *Stipulations*

According to Jury Instruction CACI 106, “attorneys for both sides can agree that certain facts are true.” In fact, the parties can even stipulate to evidence

that would otherwise be inadmissible. (See *County of Alameda v. Risby* (1994) 28 Cal.App.4th 1425, 1430 [34 Cal.Rptr.2d 333, 337].) A stipulation may also be a substitute for evidence, in that there is no need to produce evidence to prove the stipulated fact. (See *People v. Dyer* (1988) 45 Cal.3d 26, 75 [246 Cal.Rptr. 209, 238-239].) The judge can therefore instruct the jury that the stipulated fact shall be considered established. However, evidence offered to prove a stipulated fact can be considered inadmissible as irrelevant (i.e. it does not tend to prove or disprove a *disputed* fact per Evid. Code, § 210). (See also Evid. Code, § 350.)

Although there is a policy encouraging use of stipulations in order to more efficiently use trial time, you should consider whether the jury will be as impressed or impassioned by a mere recitation of a stipulated fact as opposed to proving it through various forms of evidence.

##### *Demonstrative Evidence*

Demonstrative Evidence can be maps, charts, diagrams, models, or demonstrations by testifying witnesses and are as admissible as the testimony they illustrate. This type of evidence is largely left within the discretion of the trial judge who will consider whether the evidence's probative value is outweighed by undue consumption of time, undue prejudice, confusing the issues or misleading the jury pursuant to Evidence Code section 352.

Foundation for demonstrative evidence must be established by testimony or other evidence establishing that it is a fair representation of the underlying witness testimony or other direct evidence. (See *Civil Trials and Evidence* ¶ 8:477-8:519.)

Putting this all together, and using a crude example of a premises liability jury instruction from an *Elements Outline*, you may have a page that looks as follows:

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### Example of an *Elements Outline*

- I. Defendant was negligent in the use or maintenance of the property (CACI 1000)  
Defendant failed to use reasonable care in keeping the property in a reasonably safe condition (CACI 1001)
  - A. A condition on the property created an unreasonable risk of harm (CACI 1003)
    1. Fact: The plaintiff's foot slipped on the floor
      - a. Evidence: Plaintiff felt his foot slip
        1. Witness: Plaintiff
      - b. Evidence: Jane Smith (store patron) testified in deposition that she observed Plaintiff's foot slip
        1. Witness: Jane Smith (store patron)
    2. Fact: The floor where Plaintiff slipped and fell was wet
      - a. Evidence: After his fall, Plaintiff and others observed water in the area where he slipped
        1. Witness: Plaintiff
        2. Witness: Store employee Joe Schmo
        3. Witness: Jane Smith (store patron)
      - b. Evidence: Photographs taken of the floor after the incident showing water on the floor (Exhibit Nos. \_\_\_\_)
        1. Witness: Joe Schmo, store employee who took the photographs
        2. Witness: Plaintiff
        3. Witness: Jane Smith (store patron)
      - c. Evidence: Stan Jones (store patron) testified in deposition that he complained to the store manager that the floor was wet prior to the incident.
        1. Witness: Stan Jones, p. 43, ll. 14-20
    3. Fact: The floor of Defendant's property when wet had a coefficient of friction below industry standards
      - a. Evidence: A coefficient of friction test of Defendant's floor after the incident read 0.3
        1. Witness: Plaintiff's Safety Expert
      - b. Evidence: Industry standard is to maintain a floor so that it has a coefficient of friction of a 0.5 when wet
        1. Witness: Plaintiff's Safety Expert
      - c. Evidence: Both parties' experts testified that a person who is walking at a normal pace is likely to slip on a floor with a coefficient of friction of 0.3 when wet
        1. Witness: Videotaped deposition of Defendant's expert, p. 43, ll. 10-24
        2. Witness: Plaintiff's Safety Expert
  - B. Defendant knew about the dangerous condition (CACI 1003)
    1. Fact: The store manager knew the floor was wet 15 minutes before the accident.
      - a. Evidence: Stan Jones (store patron) testified in deposition that he complained to Henry Richardson (store manager) that the floor was wet 15 minutes before the incident.
        1. Witness: Stan Jones, p. 43, ll. 14-20
        2. Witness: Henry Richardson (store manager)
      - b. Evidence: Defendant's Response to Special Interrogatory No. 19 states Defendant was aware of the spill 2 minutes before the accident occurred.
        1. Witness: Henry Richardson
        2. Witness: Read Special Interrogatory No. 19
      - c. Evidence: Defendant's Sweep Sheet shows spill reported (Exhibit No. \_\_\_\_)
        1. Witness: Jay Stein (employee who filled out the sweep sheet)
        2. Witness: Read deposition transcript of Jay Stein, p. 56 ll. 2-23 (Exhibit A to depo)

Assuming you have created your outline for every element of every cause of action, have appropriately inserted every piece of relevant evidence from your file, and indicated your method for introducing that evidence before the jury, you should be confident that you have what it takes to meet your burden of proof at trial.

From the *Elements Outline*, you have the witnesses to include in your Witness List, and the evidence to include in your Exhibit List. But you do not include deposition transcripts or discovery responses in your Exhibit List.

It is good practice to create an Exhibit List that includes columns for you to be able to check off whether each exhibit has

been identified, objected to, admitted, or refused to be admitted, so that you can keep track as the trial proceeds.

After you have created your Exhibit List, go back to your *Elements Outline* and add the corresponding Exhibit Number next to each piece of physical evidence listed.

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Finally, create a *Witness Outline*, by generating a separate page for each witness enumerated on your Witness List. Under each witness, cut and paste from your *Elements Outline* each fact you have attributed to that witness, and the evidence you have listed to prove it (e.g. exhibit number, discovery response, deposition excerpt, etc.). This way at trial, you will have an outline to question each witness from and insure that each fact is covered and each piece of evidence is introduced. Also create pages for those pieces of evidence that

will come into evidence without a witness (e.g. videotaped depositions, stipulated evidence, deposition transcripts, discovery responses, etc.).

Although what has been recommended here can be a tedious task, being thoroughly prepared your first time to trial will ensure that you have confidence in your ability to prove your case, and that your presentation of evidence runs as smoothly as possible.

*Jeffrey A. Rudman is a partner at the Los Angeles law firm of Greenberg & Rudman LLP. He graduated from Loyola*

*Law School and was admitted to the California Bar in 1998. Rudman serves on CAALA's Board of Governors and is the chair of CAALA's Membership Committee. In April 2007, Jeff was honored with CAALA's Member of the Month Award and was featured in the Southern California legal periodical, Advocate. Later that year he received CAALA's President's Award. Jeff has been selected as one of Southern California's Super Lawyers Rising Stars in 2007, 2008, 2009 and 2010.*

