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Effective Use of Demonstrative Exhibits In Appellate Practice

The practice of law requires an acute ability to communicate information with considerable clarity and precision. Nowhere is this truth more evident than in trial practice. Effective trial lawyers routinely employ the use of demonstrative exhibits to communicate to judges and jurors, among other things, the nature of personal injuries, effects of takings in eminent domain, and scientific or empirical information. Surprisingly, however, rarely are demonstrative exhibits utilized in appellate oral arguments. Given the short period of time advocates are permitted during oral arguments to convey generally convoluted facts and legal arguments, it is in the context of appeals where exhibits have significant value. This brief presentation therefore explores the procedure and underlying legal basis for employing the use of exhibits in appellate oral arguments, and briefly addresses those types of exhibits likely permissible.

Procedure & Legal Basis

As with most procedural matters, a request for leave from the court for authority to do some specific act is typically raised through motion practice. Although the Florida Rules of Appellate Procedure do not have a particular provision governing the use of demonstrative exhibits, Rule 9.330 sets forth the applicable standard requirements for appellate motion practice. As with trial motions, appellate motions require the movant to "state the grounds on which it is based, the relief sought, argument in support thereof, and appropriate citations of authority." Fla. R. App. P. 9.300(a). Unlike motions for extensions of time, other motions do not require a certificate that the movant's counsel has consulted with the opposition. However, it is recommended that this practice be employed, especially in cases where counsel enjoy a cooperative, professional relationship. Courts typically are more inclined to grant the requested relief when the other side offers no opposition, or better yet, consents to the requested relief.

Motions for leave to use demonstrative exhibits at appellate oral arguments should initially articulate for the court those specific exhibits deemed helpful, clearly specifying the type of exhibit and what it demonstrates. For example, the movant would specify that a particular exhibit is an aerial photograph that demonstrates the actual before-taking condition of condemned property. Reference to the exact trial exhibit number and the fact that the exhibit is part of the record on appeal is critical. It is helpful to include if possible a reduced copy of the proposed exhibit. The motion should also clearly specify the proposed use of the exhibit. A general statement that the exhibit will

facilitate the presentation of the case and the court's understanding of certain facts or issues should suffice.

The elusive element in this scenario are citations of authority in support of the relief requested. Thorough research on this subject revealed no Florida state or federal cases discussing the basis for or propriety of using exhibits at oral arguments. The power of the court to permit the use of exhibits during oral arguments, however, would appear to fall within the broad gambit of its inherent powers. "Every court has the inherent power to do all things that are necessary for the administration of justice within the scope of its jurisdiction . . . ." Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978). These powers would include those specific acts which enable the court to perform efficiently its judicial functions. Id. at 136 n.3. Certainly there exists an inherent power to permit, among other things, the use of exhibits to facilitate oral arguments notwithstanding the lack of an express procedural rule. It is important to distinguish that by permitting the use of such exhibits, an appellate court is not engaging in prescribing rules of procedure which is the exclusive province of the Florida Supreme Court.

Certain procedural rules provide additional support for the use of exhibits at oral arguments. Rule 9.200 ensures that the record contain, inter alia, all exhibits filed in the lower tribunal. Fla. R. App. P. 9.200(a)(1). Rule 9.200 also establishes a mechanism by which any party may include in the record other items filed in the lower tribunal, including physical evidence. Fla. R. App. P. 9.200(a)(1), (2). Moreover, the appellate rules permit any party to prepare an Appendix of any "portions of the record deemed necessary to an understanding of the issues presented." Fla. R. App. P. 9.220. It can be gleaned from these specific rules an objective of facilitating the court's consideration of the case, which arguably would include the use of demonstrative exhibits at the oral arguments.

Broad and Cassel has employed (successfully), both as the appellant and as the appellee, the use of demonstrative, large-scale exhibits in two recent condemnation appeals before the Fifth District Court of Appeal. In both instances a motion for leave was filed; however, the requests were handled differently by the court. In Broad and Cassel's first experiment with the permissibility of exhibits at oral arguments, the court for unknown reasons never ruled on the motion prior to oral arguments. Broad and Cassel nevertheless brought the exhibits to the court and set them up for presentation. When called upon by the court to present arguments, we advised the court that we had an administrative matter to raise first regarding the use of the exhibits. The court granted the request from the bench without requesting rebuttal from opposing counsel and without any discussion. The second motion for leave was initially denied by the court without prejudice to renew after oral arguments had been scheduled. This position is logical considering that oral arguments are a matter within the sound discretion of the court and may not be granted in every appeal. The renewed motion was ruled upon by a brief order from the court, though without any opposition from the adversary and without any discussion from the court.

It was interesting to note that at both of the oral arguments many questions by the panels were specifically posed to matters evident from the exhibits. Indeed in both cases at least half of the questions from the panel required resort to the exhibits to explain the answer more clearly. It was also interesting that at the conclusion of one of the oral arguments, the appellate panel requested counsel to leave the exhibit with them for their deliberation. Its import on that appeal cannot be discounted.

Permissible Exhibits

Demonstrative exhibits that were entered into evidence at trial and are properly included in the record on appeal should be permitted for use at oral arguments. Exhibits that are relatively objective and are simply proposed to facilitate a presentation of the facts (such as an aerial photograph) are not only extremely helpful, but will also likely bring little objection either from the court or opposing counsel. The use of exhibits that are subjective or contain matters in dispute -- for example, drawings proposing certain post-condemnation development schemes - may be contested and thus requests for leave should be made as soon as possible after oral arguments have been scheduled. It would not be wise to raise an objected administrative matter at oral arguments; time is too valuable and the court's indulgence may be strained.

The interesting question is whether purely demonstrative exhibits that were not introduced as evidence at trial could ever be used in oral arguments. An example of this type of exhibit would include a simple chart that graphically displays a time line of correspondences that were introduced as evidence. Granted it is well-settled that an appeal is not an evidentiary proceeding and, thus, an appellate court will not consider evidence that was not presented in the lower tribunal. Altchiler v. State Dept of Professional Regulation, 442 So. 2d 349, 350 (Fla. lst DCA 1983) (quoting Hillsborough County Bd. of County Comms'rs. v. PERC, 424 So. 2d 132, 134 (Fla. lst DCA 1982)). It is therefore highly improper for an advocate to include in an appendix material or matters outside of the record or to refer to such material or matters in a brief. Altchiler, 442 So. 2d at 350. Purely demonstrative exhibits that simply assemble trial exhibits for presentation purposes, and are not intended as additional evidence, arguably fall outside of this proscription. The potential for an admonishment from an appellate court, however, perhaps makes this specific issue ripe for thorough debate rather than immediate implementation.

Conclusion

In conclusion, the value of demonstrative exhibits to convey information more effectively cannot be discounted. This proposition holds especially true in appellate practice where counsel's recitation of facts and argument are extremely constrained by time limits. The intent of this presentation was to demonstrate that exhibits can in fact (and should) be used in appellate oral arguments, and typically all that is recommended is leave from the court. From a practical perspective, counsel should be aware of each lower tribunal's practice with respect to exhibits. Some judicial circuits, Orange County for example, do not transmit large-scale exhibits to the appellate court along with the record; rather, counsel must make independent arrangements for the transmission of such parts of the record.

The strength of Broad and Cassel's Appellate Practice Group arises from the skill and experience of its appellate attorneys who have litigated significant cases before the United States Supreme Court and the Florida Supreme Court. Our reputation for quality workmanship, innovative arguments, and straightforward presentation gives us high credability in our submissions to the Appellate Courts. This article was prepared with C, Ken Bishop for use in a seminar hosted by the Williams' Inns of Court.

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