1-1-2014

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Recommended Citation

Robert Jarvis, *A Primer on the Use of Dangerous Trial Exhibits*, 37 American Journal of Trial Advocacy 519 (2014).

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Abstract

It sometimes is necessary at trial to introduce a dangerous exhibit—such as a bomb, gun, or knife—to bolster a client's story, discredit an opposing witness, or give the jury a clearer picture of the underlying events. Doing so, however, requires care and planning. Not only do many courts have specific rules regarding how such exhibits are to be noticed, handled, and displayed, but there are also numerous practical and tactical considerations that must be weighed. In this Article, the author presents the first comprehensive discussion regarding dangerous trial exhibits and offers suggestions for their successful use.

Introduction

Introducing a dangerous exhibit at trial—such as a gun, a knife, or a bomb—requires a good deal of planning. Many courts require specific procedures to be followed by attorneys who want to use such exhibits. For example, the local rules of the United States District Court for the District of South Dakota provide:

> As used in this rule, the phrase "unsafe or dangerous exhibit" includes narcotics and other controlled substances, firearms, ammunition, explosives, knives, any object capable of use as a weapon, poisons, dangerous chemicals, hazardous substances, and any other item or matter that may present a substantial risk of physical injury or property damage if not properly handled, stored, or protected.
>
> No one is permitted to bring an unsafe or dangerous exhibit into a courtroom for any purpose, including as evidence at a trial or hearing, without first notifying the federal judge handling the trial or hearing and the United States Marshals Service. Before any such exhibit is brought into a courtroom, the lawyer or pro se party responsible for the exhibit must make certain all reasonable measures have been taken to render the exhibit as safe as possible. Such measures include, but are not limited to, the securing in sealed containers all controlled substances, poisons, dangerous chemicals,

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and hazardous substances, and the disabling of all weapons. All such measures should be approved prior to trial by the judge and the United States Marshals Service.[1]

Some tribunals are even more explicit in their directions. A Colorado state court has issued a standing order that directs:

> Firearms shall have a device that disables the use of the firearm installed (e.g. trigger lock, cable lock, etc.). The Sheriff's Office shall be advised of the intent to bring a firearm into the court for use as evidence no less than three days prior to the hearing. A Sheriff's Deputy shall inspect the firearm to ensure that it is unloaded and that the mechanical block is properly installed prior to it being brought into the court.
>
> Ammunition shall never be in the courtroom at the same time as the firearm. The moving party shall coordinate with the Sheriff to secure the ammunition in a separate room outside the courtroom and away from the firearm.
>
> . . . .
>
> Knives shall be kept in their sheath. If there is no sheath, one should be fabricated using multi-layer cardboard and strapping or duct tape. Butterfly or gravity knives shall be secured in the closed position with heavy tape.
>
> Razors, box cutters, and other sharp instruments shall be kept in heat-sealed evidence collection pouches, double-layered to guard against puncture of the pouch by the item.
>
> Bombs, bomb components, blasting caps, and fuses may only be allowed in the court if they are inert. No live bombs are permitted in the courtroom. Digital photographs may be substituted in lieu of the exhibit if the device cannot be made inert.
>
> . . . .
>
> Drugs and drug paraphernalia, once admitted, shall be locked in the court's safe during recesses, lunch hours, and at times when they would otherwise be left unattended by court staff. . . .
>
> Bio-hazardous exhibits (those covered with blood or other bodily fluids) must remain sealed in plastic at all times. Rape kits or exhibits which may contain DNA evidence or which require controlled storage conditions to preserve the integrity of the sample shall be returned to the appropriate law enforcement evidence custodian for proper storage and retention.[2]

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[1] *Criminal Local Rules of Practice*, U.S. DIST. CT. DIST. S.D. 21-22 (Oct. 2013), https://www.sdd.uscourts.gov/sites/default/files/local_rules/2013criminal rulesfinal101513.pdf (under R. 57.3H, entitled "Unsafe or Dangerous Exhibits").

[2] Standing Order Concerning the Safeguarding, Retention and Disposal of Trial Exhibits and Demonstrative Evidence 11-06, (Colo. Trial Ct. 2011), *available at*

Obviously, the primary concern with any dangerous exhibit is the safety of those who may come into contact with it. As has been written elsewhere:

> Local court rule or policy may expressly prohibit bringing any dangerous . . . exhibit into the courtroom without first, out of the jury's hearing, securing the court's permission to do so [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 8.59].
>
> Even in the absence of a court rule, this is a wise policy to follow. Dangerous . . . exhibits may not only disrupt the trial but might subject persons in attendance to a risk of serious harm as well.[3]

Beyond safety, however, the lawyer who wants to use a dangerous exhibit must consider a number of other matters. These matters are discussed below in full.

I. Is an Exhibit Dangerous?

Determining whether an exhibit is dangerous is not always easy. A gun, for example, normally is considered dangerous but poses little risk when it is not loaded. By the same token, a pair of household scissors normally is not considered dangerous but can inflict serious—even fatal—injury if turned on a person. In *People v. Brown*,[4] the intermediate appellate court wondered if a "citizen, brazen enough to carry a steak knife on a weekend picnic," could be convicted under a statute outlawing dangerous weapons.[5]

Even the most innocuous item poses some risk. Still, it would seem that counsel should always err on the side of caution and alert the court if there is any possibility that a reasonable person might consider a particular exhibit dangerous.

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http://www.courts.state.co.us/userfiles/file/Court_Probation/5th_Judicial_District/Order%2011-06.pdf.

[3] 48-551 CALIFORNIA FORMS OF PLEADING AND PRACTICE—ANNOTATED § 551.220 (2013).

[4] 260 N.W.2d 125 (Mich. Ct. App. 1977), *rev'd*, 277 N.W.2d 155 (Mich. 1979).

[5] *Brown*, 260 N.W.2d at 130.

II. Is a Dangerous Exhibit Needed?

It is not always necessary to physically introduce a dangerous exhibit. For example, if opposing counsel stipulates to the exhibit's characteristics, it may be enough to advise the court or the jury of the stipulation. Likewise, a photograph or model of the dangerous exhibit may be all that is needed. Yet another option is to have a qualified expert describe (either orally or in writing) the dangerous exhibit to the fact finder.

A South Carolina statute entitled "Admissibility of photographic evidence of destructive devices; custody of inert devices introduced into evidence," authorizes multiple substitution options:

> Unless otherwise ordered by a court of competent jurisdiction, photographs, electronic imaging, video tapes, or other identification or analysis of a destructive device, explosive, incendiary, poisonous gas, toxic substance, whether chemical, biological, or nuclear material, or detonator identified by a qualified bomb technician or person qualified as a forensic expert in the field of destructive devices is admissible in any civil or criminal trial in lieu of production of the actual destructive device or detonator.[6]

If the dangerous item no longer exists, a model (or some other substitute) may have to be used. In *United States v. Cox*, the trial court's decision to allow three mockup pipe bombs to be introduced and taken into the jury room was upheld because the actual bombs had been detonated.[7] Likewise, in *Patterson v. Commonwealth*, photographs were allowed to be introduced at a robbery trial because the government inadvertently destroyed the knife used to commit the crime.[8]

III. Maintaining a Dangerous Exhibit's Integrity

If a dangerous exhibit is to be brought into the courtroom, the lawyer must consider how to make it safe without affecting its integrity. Mechanical devices, for example, need to be rendered inoperable but

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[6] S.C. CODE ANN. § 16-23-760(A) (2012).

[7] 633 F.2d 871, 874-75 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981).

[8] No. 2002-SC-0491-MR, 2004 WL 537932, at *4 (Ky. Mar. 18, 2004).

should not have their individual components compromised. This can be quite difficult to do, especially if there is a dispute as to exactly how the device was used (or was intended to be used). Non-mechanical devices present similar challenges because rendering them harmless may make it impossible for the court or jury to reach accurate conclusions about their properties.

Before changing a dangerous exhibit (or running any tests on it), an agreement should be reached with opposing counsel and approved by the court. Next, the changes (or testing) should be conducted by a qualified third party and photographs should be taken of the process to document precisely what was done. Of course, only so much of the dangerous exhibit as is actually needed should be used, with the remainder left in its original state. The technician should prepare a written report memorializing the changes (or tests) and be available to testify at trial. Whenever possible, all counsel should be given the option of being present while the technician performs his or her work.

In *Arnold v. Laird*, a four-year-old child was bitten by a dog named Blanket.[9] When the child's parents sued, Blanket's owners asked to show Blanket to the jury.[10] The trial court granted permission, and the jury subsequently returned a defense verdict.[11] In upholding the propriety of the trial judge's decision, the Washington Supreme Court discussed how changes in a dangerous exhibit's condition prior to trial should be handled:

> Plaintiffs next assign error to the jury's observation of Blanket during the trial. Defendants provided a foundation for the observation by introducing testimony that her feeding and care had not been altered, that she had not received any obedience training, and that she looked much the same. The parties' expert witnesses disagreed over how much the passage of time and having had a litter of puppies would have altered her appearance and disposition. The question of change or lack thereof thus became a question for the jury based upon conflicting evidence.
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> . . . .

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[9] 621 P.2d 138 (Wash. 1980) (en banc).

[10] *Arnold*, 621 P.2d at 140.

[11] *Id.*

> When the issue in dispute is the dog's condition and demeanor, i.e., whether it is "dangerous" or not, showing the dog to the jury could, in some cases, be the most probative evidence available. . . . Given a proper foundation to support the assertion that there was a similarity of conditions on the date of the incident and the date of observation, there is no reason why observation of the animal necessarily should have been forbidden.
>
> Inasmuch as the trial court initially determined there was a substantial similarity of conditions, it was within the trial court's sound discretion to allow the observation. We find no abuse.[12]

Like any piece of evidence, a dangerous exhibit must be properly authenticated. In *Bridges v. State*, a defendant convicted of aggravated robbery objected to the introduction of a machete.[13] In holding that the trial court was correct in allowing the item in, the appellate court noted:

> Bridges insists in issue two that the trial court erred by admitting a machete into evidence without a showing of a proper chain of custody. Detective McAllester testified that the machete in question, State's Exhibit No. 22A, was the same machete that was found at the residence of Bellah and that it was the same machete that was transported to and received back from a crime lab, the Southwest Institute of Forensic Sciences in Dallas. He related that, when an item of evidence, such as the machete, is taken into evidence, it is logged, tagged, and placed in a secured evidence room until such time as it is needed for court or if it is needed to be taken to the crime lab for analysis. He stated that at no time is it ever available to anyone other than four detectives who have access to the room. Detective McAllester acknowledged that he did not know who transported the machete to the crime lab. The trial court admitted the machete into evidence, over Bridges's objection that the chain of custody was not clearly shown from the time the State had the machete until the time of trial.
>
> Tagging an item of physical evidence at the time of its seizure and then identifying it at trial based upon the tag is sufficient for admission barring any showing by the defendant of tampering or alteration. . . . Inasmuch as Bridges has presented us no evidence of tampering or alteration, the trial court did not abuse its discretion by admitting the machete into evidence.[14]

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[12] *Id.* at 141.

[13] No. 11-03-00396-CR, 2005 WL 3473328, at *1 (Tex. Ct. App. Dec. 15, 2005).

[14] *Id.* at *3.

IV. Publishing a Dangerous Exhibit to the Jury

By their very nature, dangerous exhibits provoke both curiosity and apprehension. Therefore, care must be taken in how, when, and where dangerous exhibits are presented to the jury. As has been pointed out elsewhere, "unlike most exhibits, obviously lethal weapons such as guns and knives are inherently inflammatory."[15] Indeed, the mere mention of such exhibits can lead to challenges. In *James v. United States*,[16] for example, an alleged bomb-maker unsuccessfully sought to have his indictment thrown out because an FBI agent told "the grand jury that certain bomb materials brought into the grand jury room could kill the jurors if exploded."[17]

In *State v. Valdez*,[18] a defendant on trial for selling cocaine objected when two guns that were found in his home were shown to the jury before they were admitted into evidence:

> MR. FITZKE: If it please the Court, at this time, the defendant requests the Court to order a mistrial in this case and discharge the jury presently impaneled for a specific reason which I request to have noted of record. May I expound upon that a little bit? May the record show, please, that even after an admonition off the record from the Court, the State continued to exhibit two dangerous looking weapons before the jury, neither of which had yet been admitted into evidence and neither of which the Court has already ruled may be admissible only for a limited purpose and not for the purpose of proving the truth or falsity of any issue in this case.
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> . . . .
>
> THE COURT: Well, there is a way to cure it, and that is, if it is received in evidence, it will be harmless error anyway. I've told counsel and I will tell the witnesses for the state now, the rule on exhibits is, they shall not be demonstrated to the jury until the judge has decided whether to receive it. That's pretty simple and follow it.[19]

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[15] State v. Silvey, Nos. WD 48413, WD 37433, 1994 WL 226666, at *9 (Mo. Ct. App. May 31, 1994) (Ellis, J., dissenting), *aff'd*, 894 S.W.2d 662 (Mo. 1995).

[16] No. 00 CIV.8818LAKGWG, S297CR185, 2002 WL 1023146 (S.D.N.Y. May 20, 2002).

[17] *James*, 2002 WL 1023146, at *14.

[18] 476 N.W.2d 814 (Neb. 1991).

[19] *Valdez*, 476 N.W.2d at 818 (quoting an ore tenus motion made by defense counsel).

The guns were later admitted into evidence and the defendant was found guilty.[20] On appeal, the defendant renewed his objection, which was held to be baseless:

> Since the weapons were finally received in evidence, it does not constitute reversible error, in the circumstances of this case, for counsel to refer to them. After the guns were received in evidence, defense counsel again objected that "flaunting [the guns] in front of the jury at this time is nothing but inflammatory." The court replied, "I wouldn't characterize what they are doing is flaunting them."
>
> The record does not show the physical acts complained of, and the trial court determined that there was no "flaunting" of the guns. The record does not show, in any way, that the court erred in denying defendant's motion for mistrial.[21]

Similarly, in *State v. Stojetz*, a defendant convicted of murder objected to the manner in which the prosecutor showed a set of knives to a witness.[22] Once again, a poorly-preserved record resulted in an affirmance:

> Appellant contends . . . that the prosecutor improperly "coached" a witness to identify a certain exhibit as the murder weapon. At trial, corrections officer Browning testified that after appellant and five other inmates entered the Adams A unit of Madison Correctional, appellant held a shank knife to his throat and forced him to surrender the keys to the jail cells. Browning further testified that he was able to view the shank that appellant held to his throat. The prosecutor then directed Browning to walk over to a table in the courtroom where six shank knives were displayed as State's Exhibits 2 through 7. The prosecutor then asked Browning whether he recognized any of those knives as the knife appellant held in his hand as appellant entered the Adams A unit. Browning replied: "Yes." The prosecutor then asked: "Could you point it out to us, please? State's exhibit 3?" Browning answered: "Yes." The prosecutor further inquired: "Is there [sic] the knife he held to your throat?" Browning again responded: "Yes." At that point the state concluded its direct examination of Browning.
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> Appellant asserts that the above passages from the transcript indicate that prior to identifying the exhibit, Browning's attention was improperly directed by the prosecutor to State's Exhibit 3. . . .

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[20] *Id.* at 816.

[21] *Id.* at 818.

[22] 705 N.E.2d 329, 333 (Ohio 1999).

> Appellant failed to object to the prosecutor's line of questioning. The issue is thus waived except for plain error.
>
> Contrary to appellant's assertions, the transcript passages at issue are subject to more than one interpretation. Appellant argues that the prosecutor suggested or coached Browning as to which shank to identify as belonging to appellant. However, the transcript could also be reasonably interpreted to mean that the witness pointed to the shank marked State's Exhibit 3 and the prosecutor merely verbalized the choice made by Browning to verify that it was indeed his choice. Unfortunately, the record does not reflect that Browning was pointing to or indicating a particular shank.... Accordingly, we find no plain error here.[23]

V. Bringing the Jury to a Dangerous Exhibit

Some exhibits simply are too dangerous to bring into the courtroom. In such instances, arrangements should be made to have the jury travel to a location where the exhibit can be safely displayed.

In the aforementioned case involving the child who was bitten by a dog, the trial judge let the jury observe Blanket on the courthouse lawn.[24] In finding this location to be proper, the Washington Supreme Court wrote: "The method by which an observation may take place is within the trial court's discretion. In some cases it may be best to bring an animal or other object into the courtroom. In other cases this may be impossible or undesirable."[25]

VI. Dangerous Exhibits in the Jury Room

Many issues arise when a jury requests to handle a dangerous exhibit and take it in the jury room during deliberations. One source cautions against allowing the jury to do so:

> The court should avoid sending certain admitted exhibits into the jury deliberation room, such as toxic substances and chemicals, contraband drugs, firearms and currency. These exhibits can be viewed in the courtroom prior

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[23] *Stojetz*, 705 N.E.2d at 339-40.

[24] Arnold v. Laird, 621 P.2d 138, 141 (Wash. 1980) (en banc).

[25] *Id.* at 142.

> to or during deliberations, or in the jury room pursuant to court direction. Firearms, ammunition clips or cylinders should be rendered safe or inoperable for trial. If toxic exhibits must be handled by the jury, protective garments, such as surgical-type, disposable gloves can be provided, or the exhibits can be placed in sealed containers.[26]

In *State v. Long*, the Montana Supreme Court reached the opposite conclusion in a case involving methamphetamines.[27] The court began its discussion by writing: "Although we have never squarely addressed the issue of whether exhibits allegedly containing dangerous drugs should be allowed in the jury room, we have noted that permitting the jury to examine physical evidence in conjunction with trial testimony 'is not only permissible but enlightened.'"[28]

Finding no rule prohibiting dangerous exhibits from being given to the jury, and observing that the trial judge had issued an appropriate warning, it rejected the defendant's claim that her right to a fair trial had been compromised.[29]

In *Drayton v. State*, the defendant was accused of "brandishing a strange-looking gun which he placed next to [the victim's] head."[30] At trial, the defendant argued that the gun was inoperable and, as such, "the state failed to prove that the assault . . . was accomplished with a deadly weapon."[31]

At the conclusion of the trial, the judge permitted the jury to take the gun into the jury room.[32] Because the gun still contained a round of ammunition, the judge issued the following cautionary instruction:

> [T]he Court instructs you that the exhibit which is presently being held by the court bailiff and which will be out with you is at this time, could be at

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[26] JURY INSTRUCTIONS COMM. OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.9, at 86 (4th ed. 2013), *available at* http://www.ca9.uscourts.gov/district/guides/MJTP.pdf.

[27] 113 P.3d 290 (Mont. 2005).

[28] *Long*, 113 P.3d at 295.

[29] *Id.* at 295-96.

[30] 306 S.E.2d 731, 731 (Ga. Ct. App. 1983).

[31] *Drayton*, 306 S.E.2d at 731.

[32] *Id.*

> this time and may be at this time in an extremely dangerous condition and the Court instructs you that you should handle it accordingly. Observation is the reason that this Court instructs you as to that possibility. This Court is not instructing you that this is a dangerous exhibit and this Court is not instructing you that it is not a dangerous exhibit. This Court is instructing you it may be an extremely dangerous exhibit and asks you to exercise considerable discretion in any movement of the same after it is left in your care.[33]

After the jury returned a guilty verdict, the defendant appealed against the cautionary instruction. Siding with the trial judge, the appellate court wrote:

> Appellant argues that this charge constituted an impermissible comment on the nature of the evidence. We disagree. The court was justifiably concerned about the deliberating jurors handling a firearm with a potentially live round of ammunition in the chamber, even though the weapon appeared to be inoperable. This concern was shared by counsel for appellant and counsel for the state. The trial judge carefully chose his words so as to point out only the obvious fact that the instrument might be dangerous. He was careful to note that he was not instructing them that it was dangerous. Under the circumstances in which it was given, the instruction was wholly proper and was not error.[34]

In *Commonwealth v. Martin*, the defendant was accused of rape.[35] The complainant testified that the defendant told her he had AIDS.[36] No other evidence was introduced regarding the defendant's seropositivity.[37] Nevertheless, the trial judge advised the jury:

> I want to point out that there are a couple exhibits, specifically one, the rape kit, that I will not send in with you because of some concerns that I might have, and I think you might have concerning the handling of it. If there are any one of you who feel an overriding need to examine that rape kit, I will provide you with gloves to do so.[38]

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[33] *Id.* at 732.

[34] *Id.*

[35] 676 N.E.2d 451, 452 (Mass. 1997).

[36] *Martin*, 676 N.E.2d at 452.

[37] *See id.* at 458.

[38] *Id.* at 457.

On appeal, the defendant argued that the instruction had biased the jury, but the Massachusetts Supreme Judicial Court disagreed: "The implication the defendant now draws from the judge's remarks do not rise to a ground for reversal, especially in the absence of an objection [at trial]."[39]

In *People v. Ramirez*, an inmate was accused of possessing a homemade shank.[40] In his jury instructions, the judge explained: "During the trial, several items—actually, one item[,] was received into evidence as an exhibit. You may examine the exhibit if you think it will help you in your deliberations. The exhibit will be sent into the jury room with you when you begin to deliberate."[41]

Immediately after giving this instruction, the judge held a sidebar with counsel.[42] The judge then further instructed the jury:

> I want to make one correction with respect to the exhibit. It will not go into the jury room unless you ask to see it and in which case the bailiff will bring it back for you. One of our concerns is whenever we have an item, whether it be a potential weapon, or even not, that is sharp, we don't want to run the risk that any jurors are going to inadvertently stick themselves with it. So you may ask to see it and it will be brought to you by the bailiff if you do wish to see it.[43]

On appeal, the defendant claimed that his federal and state constitutional rights had been violated by the judge's instructions.[44] Finding no reversible error, the appellate court affirmed the conviction:

> In this case, the trial court's succinct statement regarding exhibit No. 1 directly related to the safety precautions routinely taken by courts when any exhibit could be dangerous to those handling it. The trial court's reference to the instrument as "sharp" was merely to explain the cautionary step of having the bailiff take charge of the item. The trial court was careful to state, "whether it be a potential weapon, or even not" to avoid calling it a weapon. The statement was made to correct the jury instruction that indicated the jurors would have the exhibit in the jury room.

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[39] *Id.*

[40] No. B217435, 2010 WL 4354241, at *1 (Cal. Ct. App. Nov. 4, 2010).

[41] *Ramirez*, 2010 WL 4354241, at *2.

[42] *Id.*

[43] *Id.*

[44] *Id.*

> . . . Moreover, the jurors had seen the instrument during trial and had the ability to request to see it again during deliberations. We have viewed the shank. It is readily apparent that the instrument has a sharp narrow point at the end of the black metal portion. A reasonable juror could reasonably determine that the instrument was sharp just by viewing it.[45]

VII. Forwarding a Dangerous Exhibit to the Appellate Court

It normally is not necessary to forward a dangerous exhibit to the appellate court. Recognizing this fact, the United States Court of Appeals for the Eleventh Circuit has adopted the following policy:

> In many districts, by local practice, discovery material is not filed with the clerk. Furthermore, exhibits may sometimes be returned to the parties. Parties are expected to notify the district court of any exhibits which they believe should be transmitted to the court of appeals, and if not then on file with the district court, to provide said exhibits to the district court clerk. *Contraband or dangerous exhibits shall not be sent except by court order.*[46]

Nevertheless, care should be taken to preserve a dangerous exhibit and, in an appropriate case, seek permission to enter it as an appellate exhibit. In *People v. Brown*, the defendant was convicted of carrying a dangerous weapon in his car.[47] On appeal, there was no opportunity to examine the item because "although entered as an exhibit at trial, [it] has since been destroyed. We are unaware of its exact dimensions and uncertain whether it was blunt-ended or pointed."[48] As a result, the appellate courts were forced to proceed just on the paper record.[49]

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[45] *Id.* at *3.

[46] *Eleventh Circuit Rules and Internal Operating Procedures (IOPs)* 52-53 (Aug. 1, 2013) (under IOP 3 to Fed. R. App. P. 11, entitled "Preparation and Transmission of Exhibits") (emphasis added), *available at* http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG13.pdf.

[47] 260 N.W.2d 125 (Mich. Ct. App. 1977), *rev'd*, 277 N.W.2d 155 (Mich. 1979).

[48] People v. Brown, 260 N.W.2d 125, 126 (Mich. Ct. App. 1977), *rev'd*, 277 N.W.2d 155 (Mich. 1979) (footnote omitted).

[49] *Id.* at 126.

Conclusion

Relatively few lawsuits involve a dangerous trial exhibit. Nevertheless, when a lawyer has such a case, following the steps outlined in this Article will help matters proceed much more smoothly.