

## **Demonstrative Evidence**

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### **I. Introduction**

America is a visual society. Research has shown that people get up to 90 percent of their knowledge from visual-sensory impressions and that these are the most memorable and lasting. This concept also holds true for jurors - studies have shown that jurors retain 10% of what they hear and 87% of what they see. Thus, visual depictions of testimony can be a vital component of an effective trial strategy.

Demonstrative evidence refers to exhibits that are used to illustrate or clarify oral testimony, or recreate a tangible thing, occurrence, event or experiment. Demonstrative evidence may consist of trial exhibits that are admitted in evidence or visual aids that will not be entered in evidence, but are simply used by a witness or lawyer to explain matters that are relevant to the trial. While real evidence exists by virtue of the activities of the parties and witnesses in the case, demonstrative evidence is developed by the attorneys as an aspect of presentation.

The types of demonstrative evidence are limited only by a lawyer's creativity, and, of course, the rules of evidence. Demonstrative evidence can take a variety of forms: models, graphs, diagrams, charts, drawing, photographs, videos, scientific tests, computer reconstruction or any other object that can explain or illustrate issues in the case. For example, attorneys have used hundreds of hypodermic

needles to illustrate the number of shots that a injured person had or a huge glass jar filled with medication to show the thousands of pills a plaintiff must take due to an injury. The choice of what type of demonstrative evidence to use should be based upon your theory and theme of the case and should be developed to simplify and explain the theory in a persuasive manner.

There are three reasons for using demonstrative evidence as a part of your case.

1. **Demonstrative evidence may be used to describe or explain ideas that are difficult to verbalize.**

A picture, (or a model, diagram, demonstration or simulation) is worth a thousand words.

2. **Jurors tend to remember what they see longer than what they hear.**

Of course, visual testimony and verbal testimony on the same point of fact can mutually reinforce each other so as to produce the evidence best remembered.

3. **Demonstrative evidence tends to make the trial less boring for the jury.**

Demonstrative evidence empowers the jury. The jury can now, independently, look at the visuals and absorb what they see. The effect is that you become not only more interesting, but also much more convincing.

## **II. The Basic Law of Demonstrative Evidence**

Substantive evidence helps resolve an issue of consequence in a trial. Demonstrative evidence demonstrates or illustrates the testimony of a witness. Whether to allow the use of a demonstrative exhibit is a matter strictly within the trial court's discretion. Because its purpose is to illustrate testimony, demonstrative evidence is authenticated by the witness whose testimony is being illustrated. That witness will usually identify salient features of the exhibit and testify that it fairly and accurately reflects what he saw or heard on a particular occasion, such as the location of people or things on a diagram. The general test for admitting demonstrative evidence is whether it will truly help the jury understand other relevant matters. The decision on admissibility is within the sound discretion of the trial court. In order to for demonstrative evidence to be admitted, the following outline may be helpful:

- (1) First, there must be some other piece of evidence -- a fact, an object, or testimony -- that needs to be illustrated or demonstrated. Presentation is actually a two-stage process: first some issue of fact, then the explanation or demonstration of that fact. Demonstrative evidence is intended to be an adjunct to the witness' testimony.
- (2) By definition, demonstrative evidence is not offered for its truth, but rather is offered to illustrate or clarify substantive proof that is admissible. Consequently, the foundation necessary for

demonstrative evidence is fairly basic. The main foundational elements necessary for the use of demonstrative evidence are:

- (a) the demonstrative exhibit relate to a piece of admissible substantive proof;
  - (b) the item fairly and accurately reflects that substantive proof;
  - (c) the item is sufficiently explanatory or illustrative to be of potential help to the trier of fact.
- (3) Demonstrative evidence must pass the "three hurdles" of admissibility: relevancy; materiality; and competency (FRE/ARE 401-402).
- (a) relevancy - demonstrative evidence is relevant if it has any tendency to make more or less probable the existence of any fact that is of consequence to the determination of the action.
  - (b) materiality - the evidence goes directly to the purpose of illustration, is easily understandable, produces no wayward inferences, and is not just an exercise in "educating" the court or jury.
  - (c) competency - evidence that fits with the decor and decorum of the court, is ethical, and does not taint the court or subvert the justice process.
- (4) Demonstrative evidence must also meet foundational requirements for accuracy. Although these requirements differ depending on the type of exhibit used, the following requirements should be reviewed for each exhibit you plan to offer or exhibits offered by your opponent:
- (a) authentication -- the demonstrative evidence should convey what it is meant to convey. What it conveys must not alter, distort, or change the appearance or condition of something in

any significant way. A computer enhanced photograph, for example, to make an accident scene look lighter than it actually was is probably inadmissible.

- (b) representational accuracy -- the demonstrative evidence should fairly and accurately depict the scale, dimensions, and contours of the underlying evidence.
- (c) identification -- the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated.

Note: During the process of laying the foundation for demonstrative evidence, the jury gets to look at the evidence. If an objection to the foundation is successful, the exhibit is taken down, but the impression remains on the minds of the jurors, even if the judge instructs the jury to disregard it. This is called *jury view*, and some attorneys consider it to have certain tactical advantages. It's also one of the reasons why pretrial Frye or Daubert hearings are so important.

- (5) The last general rule is that demonstrative evidence must pass an additional balancing test for relevancy -- the character and relevancy of the evidence is balanced against its potential for unfairly prejudicing, confusing, or misleading the jury. This rule necessarily favors the defendant, is rooted in the principle of fundamental fairness, and protects them from unwarranted inferences about bad character or habit. (FRE/ARE 403)

## **RULES FOR TYPES OF DEMONSTRATIVE EVIDENCE**

These are more guides to judicial discretion than specific rules, and involve established practices or procedures for the presentation of various types of demonstrative evidence. Under the discretionary standard, judges may vary greatly decisions of admissibility. Remember to check the local rules as practices may vary considerably by jurisdiction.

- (1) **Plaster casts, molds, and models** -- these are most admissible when viewable in all dimensions. Three-dimensional is always better than two-dimensional.
- (2) **Maps, diagrams, sketches, and charts** -- it's generally not important that the original creator of a map testify, only that whatever used is "official". Police-generated sketches and diagrams fall generally within judicial discretion where accuracy is the main concern. Sometimes, the evidence is taken as hearsay, or falls under one or more hearsay exemptions. A lot depends on the conditions of fairness and reliability at the time the sketch or diagram was made. Charts are viewed as useful adjuncts to testimony or not.
- (3) **Photographs** -- the broad use of photographs is permitted. The photo must substantially and accurately depict the subject matter, and not be unduly prejudicial. Photos that support only one party's theory, or a small part of a theory, are considered self-serving and untrustworthy. Examples of such inadmissible evidence would be

staged or posed photos.

- (4) **Enlargements** -- some courts place limits on the magnification allowed, no more than twenty power, for example.
- (5) **Videotapes** -- videotaped depositions are becoming common in civil cases, A "day-in-the-life" video may also be admitted in civil cases. Videotape records of an accident scene can be admissible, depending on the circumstances. An audio narrative to a videotape is not likely to be admissible.
- (6) **Computer reconstruction** -- reconstruction is a fast-growing forensic specialty, and the expertise involves a projection of possible outcomes mathematically predicted by a computer program. For example, known facts such as weight, physical dimensions, and surface friction are plugged into a computer algorithm to generate an accident simulation. It must be shown the simulation is based on accepted principles of physics, and there may also be requirements involving the credentials of the expert.
- (7) **Scientific tests/demonstrations** -- if a laboratory test is performed in front of the judge and jury, the benefit is that jurors would be allowed to draw independent inferences from it rather than being warned by the judge later that they are free to disregard the scientific testimony. The standard, therefore, is substantial similarity. The expert presenting a test, upon being qualified, is assumed to

represent the theory of virtual certainty that the test would yield consistent results if replicated under substantially similar conditions. However, cross-examination of such experts is notoriously fierce.

### **III. Potential Objections to the Introduction of Demonstrative Evidence**

#### **What Possible Objections Can I Use and/or Expect?**

Rule 403 of the Federal Rules of Evidence codifies the common law power of a judge to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Using Rules 403 and 401 as a template, we will examine some of the possible objections that may be raised to a demonstrative exhibit, and where possible, offer some practical advice on countering those objections when faced with them.

#### **Does it Result in Unfair Prejudice?**

A great deal of demonstrative evidence has the capacity to generate emotional responses such as pity, revulsion, or contempt, and where this capacity outweighs the value of the evidence on the issues in litigation, exclusion is appropriate. A potential problem with certain demonstrative evidence, such as videos, in-court demonstrations or computer generated animation, is that the jury may be unfairly prejudiced by such a graphic representation of an event. Consequently, both the person offering the evidence, and the person seeking to



keep this sort of evidence out of court should be aware that this type of evidence has the capacity to unduly arouse emotional responses and may be challenged on this ground.

### **Does it Mislead the Jury?**

As stated above, visual images can have a very strong impact on a jury. Such images can be easily manipulated, and the potential for misleading a jury is ever present. This is especially true in the areas of computer reconstruction, scientific experiments and videotapes. For example, in a motor vehicle case involving a rollover that occurred at night, on a sharp downhill curve, a demonstration offered by the defense which was performed by an experienced test driver, in the daytime and on level ground should be argued to be misleading.

Furthermore, although the proponents of the evidence may argue that a demonstration does not have to adhere to the strict similarities of a reconstruction, if the circumstances of the accident are so different from the proffered evidence, the results are also largely irrelevant.

### **Does it Cause Undue Delay, a Waste of Time, or Needless Presentation of Cumulative Evidence?**

Attorneys may find themselves with so much available technology that they run the risk of possible preclusion due to the finding that the evidence's "probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Remember that demonstrative evidence, is, by its very nature, a demonstration of evidence which has already been admitted. Choose your exhibits

and visual aids carefully. Do not feel the need to use all the available technology to support your case.

### **Is it relevant?**

Federal Rule of Evidence 401 states that irrelevant evidence is not admissible at trial. However, courts tend to take a very lenient view with respect to exactly what is relevant and what is not. This is particularly true with respect to evidence, that while logically relevant, is not technically in dispute. Evidence which is essentially background in nature can scarcely be said to involve a disputed matter, yet it is universally offered and admitted as an aid to understanding. Considerable leeway is allowed even on direct examination for proof of facts that do not bear directly on the purely legal issues, but merely fill in the background of the narrative and give it interest, color, and lifelikeness. In light of this, someone seeking to exclude demonstrative evidence on the grounds of irrelevance may be well advised to seek exclusion on undue prejudice, waste of time, etc.

## **IV. Selection and Presentation of Demonstrative Evidence**

Selection of an object to aid, illustrate, explain, or itself testify requires planning and imagination. The trial lawyer's choice of demonstrative evidence must be both practical and persuasive.

Although demonstrative evidence may speak for itself, most items need the explanation of a witness to tell the jury the role that the item (whether model or actual) played in the factual pattern of the issues sought to be resolved. Thus, the

selection of the best and proper witness must be taken into account when deciding to use such evidence.

Ordinarily, the witness whose testimony is aided, clarified, or assisted is the same witness (or the best witness) who will provide the necessary foundation for the admissibility of the particular exhibit. However, the persuasive trial lawyer will not stop there. Expert testimony to the technical accuracy (dimensions, color, texture, size, structural composition, etc.) of a particular thing is often necessary to add further probative quality and dimension to lay witnesses' identification and confirmation of the particular object. A combination of lay and expert testimony is advisable (and sometimes necessary) to provide the foundation for some exhibits, such as: accident scene, property boundaries, irregularities in terrain, samples, and finger, palm and footprints.

### **Courtroom presentation techniques**

The trial lawyer gives persuasive impact, evidential quality, and relative importance to demonstrative evidence by the way he treats these items in the courtroom. The jury will give no greater significance or gravity to physical evidence than is warranted by the lawyer's own treatment or presentation of these objects in their presence.

The use of demonstrative evidence requires careful pre-trial planning if it is to be of persuasive probative value. Failure to carefully plan the pre-trial selection, courtroom handling, and juror presentation can turn demonstrative evidence into a hindrance to the attorney who indiscriminately presents such evidence. The

following courtroom techniques will enhance both the importance and juror acceptance of physical evidence:

- (1) Have the evidence readily accessible but well concealed before its actual use.
- (2) The exhibit should be clean, and in an undamaged condition.
- (3) A physical exhibit should be complete for all that it is intended to depict.
- (4) Single-item paper exhibits or photographs should be enclosed in clear plastic binders and blocked or framed for rigidity and ease of handling.
- (5) If paper exhibits (such as medical records or a series of invoices) are voluminous, they should be bound in notebook form, properly indexed, numbered, and sequentially placed with reference or locator tabs to facilitate witness or juror examination.
- (6) The exhibit should be well packaged in an appropriate enclosure (e.g., objects are more impressive when they come out of a carrying case or zippered cover rather than a grocery bag).
- (7) handle the exhibit with dignity and utmost care in the presence of jurors.
- (8) Place or locate free-standing objects at a prearranged place where all jurors can have easy and complete visual access.
- (9) Plan in advance to have available necessary stands or supports.
- (10) If an object is not to be used in evidence, it should not be permitted to remain in the view of the jury. If you suspect your opponent may exhibit objects or articles not to be received in evidence, a motion in limine should be obtained. Such a motion is also the best way to decide any disputed matters of admissibility.
- (11) The contents of voluminous writings, records, or photographs that cannot conveniently be examined in court should always be presented in the form of a chart, summary, or calculation. (See Federal Rules of Evidence, Rule 1006).

- (12) If possible, have a pre-trial run in the same courtroom to someone seated in the jury box in order to detect problems in seeing, hearing, or understanding the demonstrative article or object.

## **V. Twelve Rules of Demonstrative Evidence**

1. Never just tell, if you can show and tell.
2. Keep it simple. The message must be clear and understandable.
3. Create exhibits that have visual interest. Pay attention to scale, color and contrast.
4. To present a cohesive image, prepare exhibits using a common visual theme.
5. Carefully review demonstrative evidence to ensure that the evidence does not directly or inferentially support the opponent's position.
6. Test your evidence on a variety of people to gauge impact and reaction.
7. Prepare your witnesses using the demonstrative evidence they will introduce at trial.
8. If you want to get it in, do not spring it on your opponent at the last minute.
9. Use demonstrative evidence to emphasize your theory and theme of the case.
10. Proper preparation is key - practice using handling and using your exhibits.
11. Do not assume that the courtroom has the proper technology and objects necessary to show your evidence.
12. When using technology, always have a back-up plan.