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DEMONSTRATIVE EVIDENCE: EXHIBITS FOR THE RICH AND THE POOR

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I. Introduction to Demonstrative Evidence.

To be successful in the courtroom, a trial lawyer must combine the oratorical skills of a prosperous preacher, the desire to win of a rabid Georgia Bull Dog, and the teaching skills of a great sixth grade social studies teacher. This paper focuses on developing and using a particular kind of teaching skill - demonstration and illustration - necessary to educate a jury as to why your client should win. Successful educators know that there are three basic kinds of learners in the average class. Students are either auditory, visual, or kinesthetic learners. These students grow up to be jurors and continue to learn in these three ways. Auditory learners are educated by what they hear and place less importance on what they see. Visual learners are educated by what they see and are less able to pick up information from what they hear. Kinesthetic, or hands on, learners want to learn by using their tactile senses. Most information in a courtroom is in the form of oral testimony, and the auditory learners have a ready source of information and an advantage to help them reach a verdict. The secret to victory is to be on the side which convinces the visual and kinesthetic learners and thus gets their votes in the jury room. These non-auditory learners are convinced by evidence they can see or touch. Effective demonstrative evidence¹ will reach these jurors and give them an understanding of your case which they can

¹ The term “Demonstrative Evidence” is used throughout this paper for all kinds of evidence which is essentially non-verbal. This includes evidence which is admitted into evidence and thus becomes part of the record and material which does not go out with the jury except in the form of memories and impressions.

use in the jury room. “Demonstrative evidence” consists of both *real* and purely *illustrative* evidence². The preparation and use of demonstrative evidence does not vary with whether it is real or purely illustrative or on whether it is admissible or not. This paper discusses the creation and use of demonstrative evidence which will aid all kinds of jurors, but particularly those jurors who prefer to learn visually and kinesthetically. There are many reasons for this:

Research has shown that we get up to 90 percent of our knowledge from visual-sensory impressions and that these are the most memorable and lasting.

...

Visual aids empower the jury. The jury can now, independently, look at the visuals and absorb what they see. They have the choice of listening to you while they are looking at the visuals, or listening to you and then going back to check what you are saying or compare it with what the visuals say and mean. The effect is that you become not only more interesting, but also much more convincing, because as they lose their total dependence and see your intention to treat them as independent grownups and stimulate their thinking, your statements become their facts, not only yours.

...

Converting words to visualized images makes them come alive. In trying to make jurors understand and remember the exact words of a letter, a contract, a deposition or a confession, the mere recital of those words is like whistling in the wind.

...

² “‘Real’ evidence is evidence identified and authenticated as relating directly to the events in issue at trial” Demonstrative or illustrative evidence, on the other hand, is not immediately related to the events in question but instead derives its relevance from its similarity to or representative of the real evidence” PAUL S. MILICH, GEORGIA RULES OF EVIDENCE §10.1 (1995)

Since much of what you do in the courtroom is reminiscent of the schoolroom, go back to another classroom image with me. Remember the excitement, the sense of anticipation when the teacher said it was time for the movie or the slide tape in class? There was the ritual darkening of the room, the moving of equipment, and the rustle of everyone getting comfortable in their seats, ready for the show. That never goes away.³

Effective demonstrative evidence makes a case come alive and motivates jurors to help the side which effectively educates them.

Demonstrative evidence is essential for success in modern trials. Jurors expect it and victory demands it. It can be anything from a simple witness demonstration of a physical act to a multi-thousand dollar working scale model or computer simulation. The key to successful use of demonstrative evidence is to keep in mind that its purpose is to educate the jurors about your side of the case. If that purpose is met, it does not matter what the evidence costs. If that purpose is not met, the evidence has no value regardless of the amount paid.

II. The Basic Law of Demonstrative Evidence.

As noted in footnote two to this paper, demonstrative evidence is either “real” or “demonstrative”⁴. For example, a photograph of a broken tool is demonstrative evidence, and the actual broken tool is real evidence. Both the photograph and the actual tool are usually admissible. This is not to say that all forms of demonstrative evidence are, or should be, admitted into evidence for the jury. The question of admissibility turns on the purpose of the demonstrative evidence and the goal of the attorney who prepares and uses it.

When desired, “[p]roperly introduced documentary and demonstrative evidence goes out with the jury when it retires for deliberation.”⁵ “However, it is not proper to let the jury have

³ SONYA HAMLIN, WHAT MAKES JURIES LISTEN, Chapter 8 (1993)

⁴ If the technical distinction between real evidence and pure demonstrative evidence is of intellectual interest take a look at Robert D. Brain and Daniel J. Broderick, *Demonstrative Evidence, Clarifying its Role at Trial*, TRIAL, Sep. 1994 at 73

⁵ GREEN, GEORGIA LAW OF EVIDENCE §87.1 (4th Ed. 1994)

transcripts of former testimony, depositions, written dying declarations, or confessions in the jury room, because these forms of ‘testimony’ should not be unduly emphasized by giving the jury an opportunity to read them one or more times, whereas oral testimony from the stand is heard only once”.⁶ Nevertheless, while the deposition transcript cannot go out with the jury, counsel can print the testimony and using it as pure demonstrative evidence. The limitation relating to certain materials going out with the jury, a limitation designed to prevent undue emphasis, applies only to what the jury has in the jury room and not what it sees in the courtroom.⁷

“Materials used for illustration may often be introduced in evidence, but need not be actually introduced.”⁸ Regardless of whether demonstrative evidence is tendered into evidence or merely used to educate the jury, the first and foremost rule for using it is that it must be relevant. “The aids must, of course, produce the desired result. If they don’t fit into the case theme like a hand in a glove, they should not be used.”⁹ Demonstrative evidence, like all evidence, must be relevant or it will be excluded¹⁰. That a particular piece of demonstrative evidence is not going to be tendered into evidence does not free it from the requirement of relevance. For the demonstrative evidence to be relevant it must illuminate some important principal in the case.

Another requirement must be met prior to the introduction of all demonstrative evidence: A witness must testify that the evidence fairly and accurately represents, illustrates or explains the real evidence in all material respects.¹¹

Care should be taken to insure that the demonstrative evidence, while relevant, is not unfairly prejudicial and, most importantly, that it is accurate. Inaccurate demonstrative will not

⁶ GREEN, GEORGIA LAW OF EVIDENCE §87.1 (4th Ed. 1994)

⁷ *Hightower v. State*, 166 Ga. App. 744, 305 S.E.2d 372 (1983) *rev’d on other grounds*, 252 Ga. 220, 312 S.E.2d 610 (1984).

⁸ D. LAKE RUMSEY, AGNOR’S GEORGIA EVIDENCE §15-1 (3rd Ed. 1993)

⁹ Stephen D. Heninger, *Cost-Effective Demonstrative Evidence*, TRIAL, Sep. 1994 at 65.

¹⁰ *Elder v. Stark*, 200 Ga. 452, 37 SE2d 598 (1946)

¹¹ *Doster v. Central of Ga. Railroad Co.*, 177 Ga. App. 393, 339 S.E.2d 619 (1985).

only be unusable, whether admissible or not, but will, most importantly ruin the credibility of the lawyer and witness who offers the evidence.

Demonstrative evidence is limited only by the imagination of the advocate. Certainly, the Georgia courts have been liberal in allowing the use of demonstrative evidence. As early as 1881, the Georgia Supreme Court recognized the benefits of allowing models and drawings to be used at trial to illustrate issues in a trial¹². While models and drawings are commonly associated with being demonstrative evidence, trial lawyers are no way limited to physical items. Courts have approved a physical demonstration by a witness of the effect of an injury¹³, as well as sounds¹⁴. Of course, diagrams, drawings and sketches¹⁵ (diagrams and sketches can be used even if the diagram or sketch is not admissible into evidence¹⁶), and photographs¹⁷ are also proper forms of demonstrative evidence. In fact, in certain situations usually involving such things as bank cameras, a photograph can almost be self authenticating¹⁸

Demonstrative evidence is not limited to being used during the trial and presentation of evidence. Just as demonstrative evidence can aid a witness in explaining an element of his testimony, so too can it assist counsel in his opening statement and closing argument. There is statutory authority for the use of demonstrative evidence and aids during opening and closing argument. O.C.G.A. §9-10-183 provides that:

“In the trial of any civil action, counsel for either party shall be permitted to use a blackboard and models or similar devices in connection with his argument to the jury for the purpose of illustrating his contentions with respect to the issues which are to be decided by the jury, provided that counsel shall not in writing present any argument that could not properly be made orally.”

¹² *Augusta and Summerville Railroad Company v. Dorsey*, 68 Ga. 228 (1881)

¹³ *Pidcock v. West*, 24 Ga. App. 785, 102 S.E.2d 360 (1920)

¹⁴ *Central of Georgia Railroad v. Collins*, 232 Ga. 790, 209 SE2d 1 (1974)

¹⁵ *Savannah Ice Delivery Company v. Ayers*, 127 Ga. App. 560, 194 SE2d 330 (1972)

¹⁶ *Long v. Serritt*, 102 Ga. App. 550, 117 SE2d 216 (1960)

¹⁷ *Smith v. State*, 202 Ga. 851, 45 SE2d 267 (1947)

¹⁸ O.C.G.A. § 24-4-28

While this statute uses the term “argument”, and while an opening is supposed to be a “statement” and not an “argument”, the statute applies to both.¹⁹

Keep in mind that most evidence rulings, including those relating to the use of demonstrative evidence, are in the discretion of the trial judge.²⁰ Accordingly, before spending thousands of dollars on a piece of demonstrative evidence, if there is any doubt at all about the usability of the demonstrative evidence at trial, as either evidence or only for demonstration or illustrative purposes, a motion in limine should be filed and an appropriate order obtained. Of course, counsel should keep in mind that sometimes it is better to risk wasting money than to give up the advantage of surprise²¹.

II. Laying a Basic Foundation for Use or Admission Of Demonstrative Evidence.

For most demonstrative evidence a basic foundation must be laid before the demonstrative evidence can be shown to the jury or admitted into evidence.

The foundational requisites for demonstrative proof are not as stringent as those for substantive evidence. This makes sense once the concept of derivative relevance for demonstrative exhibits is understood. With substantive evidence, the rules of evidence require various foundational safeguards as to authenticity, genuineness, personal knowledge, and the like before allowing the evidence to be admitted. That is because a piece of substantive proof directly helps resolve an issue of consequence in the trial.

...

¹⁹ *Lewyn v. Morris*, 135 Ga. App. 289, 217 SE2d 642 (1975). In this case, although it was error for the trial court to refuse to allow the plaintiff’s counsel to use a diagram to explain the positions of the cars involved in the collision, the error was deemed harmless.

²⁰ *Hudson v. State*, 24 Ga. App. 668, 168 SE2d 912 (1933); *Christian Construction Co. v. Wood*, 104 Ga. App. 713, 123 SE2d 10 (1961)

²¹ In Federal Court, the pre-trial orders used in the Northern District prevent surprise use of demonstrative evidence and care must be taken to list all demonstrative evidence which will be used.

A piece of demonstrative proof, however, only helps clarify substantive proof that is otherwise admissible. The main foundational elements necessary for the use of demonstrative proof are that (1) the demonstrative exhibit relate to a piece of admissible substantive proof and fairly and accurately reflect that substantive proof, and (2) the demonstrative proof aid the trier of fact in understanding or in evaluating the related substantive evidence.

...

Long, complicated foundations should usually not be necessary. Evidentiary concern as to the reliability, genuineness, and trustworthiness of evidence presented to a jury needs to be focused on the testimony or other substantive evidence that the demonstrative exhibit illustrates, rather than on the demonstrative exhibit itself.²²

As noted, laying a foundation is usually fairly simple and can be accomplished with three or four basic questions such as in the following examples:

When the demonstrative evidence is a medical illustration: (medical illustrations are illustrations of real evidence - the plaintiff's anatomy)

Q. Dr. Bonebreaker, let me show you what we have marked as Plaintiff's Exhibits number 6 and 7. Did you assist us in having these drawn?

A. Yes I did.

Q. Are they reasonably anatomically correct?

A. Yes, in fact ,they are quite good.

Q. Will they assist you in helping us understand the injuries suffered by Paula Pittiful as a result of the automobile crash she was in last January?

A. Yes, I think they really will.

²² Robert D. Brain and Daniel J. Broderick, *Demonstrative Evidence, Clarifying its Role at Trial*, TRIAL, Sep. 1994 at 74

Q. Will these drawings also help you help us understand the surgeries you performed on Paula in February?

A. Yes, these drawings will really help me explain my surgical technique.

Q. Your honor, we tender Plaintiff's exhibits 6 and 7.

J. Admitted.

When the demonstrative evidence is a scene photograph: (scene photographs are illustrations of real evidence also- the location where the event occurred)

Q. Mr. Witness, let me show you several photographs which we have marked as Plaintiff's exhibits 22, 23, 24 and 25.

A. O.K.

Q. Do you recognize what these photographs depict?

A. I sure do.

Q. What do they show?

A. They show the intersection of Fourth and Vine streets from the north, east, south and west.

Q. Are these photographs reasonably accurate portrayals of how that intersection looked back on January 1, 1996 when the car crash involving Paula Pittiful and Dasterly Defendant occurred?

A. Yes, they are.

Q. Will these four photographs assist you in helping us understand what you saw on that day?

A. Absolutely, especially the one looking north which shows the red light Mr. Defendant ran through.

Q. Your honor, we tender Plaintiff's exhibits 22, 23, 24 and 25.

J. Admitted.

When the demonstrative evidence is a photograph used to illustrate testimony: (purely illustrative photographs are usually not admissible)

Q. Mr. Witness, let me show you several photographs which we have marked as Plaintiff's exhibits 14, 15, 16, 17, and 18. What do these photographs depict?

A. These show the kinds of work that conductors and brakemen on the railroad commonly do.

Q. Are these the kinds of activities which Paula Pittiful did when she worked on the railroad?

A. All of us do these tasks.

Q. Are these reasonably accurate illustrations?

A. Sure are.

Q. Will these photographs help you help us understand the various activities they depict.

A. Absolutely.

Q. Your honor, I would like for Mr. Witness to be able to step down and show the jurors these photographs while I ask him questions. I am not going to tender these photographs, just use them to help Mr. Witness explain his testimony.

J. O.K., step down.

Q. Mr. Witness, what does Plaintiff's exhibit 14 show?

The drill is really the same regardless of the kind of exhibit. Reasonable accuracy and helpfulness, equal relevant evidence, and relevant evidence equals useability. In most cases, if you appear to know how to lay the foundation and are ready to do it, most skilled opposing counsel will not hold you to a very high burden of doing so. On the other hand, if you are ill

prepared and bumbling, and don't know how to lay the foundation, like sharks after blood, the opposing counsel will run you ragged and ruin your credibility with the jury²³

III. Free or Paid for, if it illustrates more effectively than words, its Demonstrative Evidence.

A case scarcely exists that does not benefit from the use of demonstrative evidence. Whether it is simply a list on a flip chart, presented during a closing argument, of the main relevant facts to which a particular witness has testified, a “day in the life video” to illustrate damages, or an in-court experiment in a product liability case, demonstrative evidence is an invaluable way to help the jury understand your case. Demonstrative evidence clarifies, condenses, and cuts through the morass of confusing and conflicting testimony at trial, and can bind disparate elements of proof into a cohesive whole.

The rubric “demonstrative evidence” is exceptionally broad, covering all the myriad techniques a lawyer may use to illustrate and clarify real evidence. “Demonstrative evidence is simply evidence that demonstrates itself by appealing to the five senses.”²⁴ Diagrams, charts, models, and illustrations all fall within the ambit of demonstrative evidence. Demonstrative evidence is virtually unlimited in form; its only limit is the creativity and imagination of the lawyer in devising ways to illustrate and expand upon real evidence. However, “[t]he creation, selection, and use of demonstrative evidence requires more than just money, staff, and technology and more than a generic approach to elements of proof.”²⁵ Successful users of demonstrative evidence will keep in mind the old Chinese proverb which states: “Tell me and I will forget, show me and I may remember, involve me and I will understand.”²⁶

²³ For a detailed discussion of how to lay a foundation for the introduction of evidence see ROBERT A. FALANGA, *LAYING FOUNDATIONS AND MAKING OBJECTIONS IN GEORGIA* (1988), EDWARD J. IMWINKLERIED, *EVIDENTIARY FOUNDATIONS* (3rd Ed. 1995), and my favorite trial book, MICHAEL E. MCLAUGHLIN, *ADMISSIBILITY OF EVIDENCE IN CIVIL CASES* (3rd Ed. 1994)

²⁴ Stephen D. Heninger, *Cost-Effective Demonstrative Evidence*, TRIAL, Sep. 1994 at 65

²⁵ Stephen D. Heninger, *Cost-Effective Demonstrative Evidence*, TRIAL, Sep. 1994 at 65

²⁶ Taken from Stephen D. Heninger, *Cost-Effective Demonstrative Evidence*, TRIAL, Sep. 1994 at 65

Perhaps the simplest way to understand what constitutes demonstrative evidence is to look at demonstrative evidence in the conundrum of all of the various kinds of evidence which is used at trial:

Evidence can be separated into two classes, substantive and demonstrative. Substantive evidence, in turn, can be subdivided into three types: testimonial, documentary, and real.

...

That is, subject to small exceptions, a piece of evidence is testimonial when a witness is talking or otherwise communicating directly to the trier of fact;

...

Documentary when the evidence is something that is now, or is capable of being reduced to hard copy; and

...

Real when the evidence is a palpable object (other than a document) whose inspection imparts some firsthand information to the jury that is relevant to determining an issue of consequence.

...

Demonstrative evidence, on the other hand, has no such physical characteristics that defines it.

...

The same piece of evidence - say, a photograph of a bank robbery in progress - may be substantive or demonstrative depending on the purpose for which it is offered.²⁷

IV. Demonstrative Evidence Ideas - from free to expensive.

²⁷ Robert D. Brain and Daniel J. Broderick, *Demonstrative Evidence, Clarifying its Role at Trial*, TRIAL, Sep. 1994 at 73

When you are planning your trial strategy, the five most important things to decide about demonstrative evidence are: (1) what parts of the case can be enhanced by visual support; (2) what kind of visual support will be most effective; (3) where in the courtroom should you display the visual support; (4) during what stage of the trial do you want the visual evidence shown; and (5) how sophisticated should the visual evidence be for this case and this jury.²⁸

This list of five considerations is well worth considering. Too often, attorneys use elaborate exhibits to illustrate points which do not need illustrating and skimp on preparing demonstrative evidence where it is most needed. Not every point should be illustrated the same way because the effort put into an illustration is likely conveying to the jury messages which may not be intended. For example, in a clear liability automobile collision which resulted in a closed head injury, counsel would be in error to spend five thousand dollars on a scale model of the intersection and then use damages illustrations from generic photocopies of CT scans instead of having real time 3D CT visuals made from the victim's actual thin sliced scans. The jury should not be misled to think that the cause of the collision is more important than the result!

While the list of possible demonstrative techniques is literally endless, listed below, in no particular order, are some commonly used approaches.

A. Courtroom Activity.

The best and cheapest demonstrative evidence is demonstration by the witness with his own hands and body. This kind of demonstrative evidence not only illustrates testimony, and thus educates the jury about the particular activity being described, but just as importantly takes an otherwise shy witness and turns him into a super star. Most attorneys are familiar with representing the manual laborer who has, for his entire adult life, measured himself by his physical abilities. This type of person is often fairly inarticulate and extraordinarily uncomfortable in using words, particularly in front of an audience, to describe events. They much prefer to use their hands and bodies for communication. By encouraging them to step down from the witness

²⁸ DR. JAMES RASICOT, NEW TECHNIQUES FOR WINNING JURY TRIALS 191 (1990)

box and show the jury what they were doing, this kind of shy witness can blossom into a real performer. All of us like to talk about that which we know. A bricklayer might not be very articulate about a lot of things but he can certainly tell, by demonstration, how bricks should be laid.²⁹

Successful counsel will not only keep in mind the benefits of having a witness use his hands and body to illustrate a particular point, but will also be willing and able to do so himself. For example, when asking a witness how a railroad switch works it is far more effective to actually bend over and show the mechanics involved while asking the questions than it is to stand stiffly and merely ask the question. This makes the question clearer for the witness and certainly helps the jury understand what is going on.

When counsel is using, holding, pointing to, or otherwise referring to an item of demonstrative evidence, body language must be kept in mind. For example, if the attorney using a black board or chart blocks the chart with his back, or bends over showing his rear end to the jury whenever he writes on it, a lot of the effectiveness of what is being done will be lost. Similarly, where and how a particular item is held can communicate a great deal about the item. A gun held at the waist is not particularly threatening. A gun aimed at the jury makes it a menacing device.³⁰

B. Real Evidence

“Real” demonstrative evidence is the actual thing involved in the case. It is almost always admissible. For example, if a dentist drops a file down his patient’s throat, the file is real evidence. Insuring that the jury can touch and look at the file after it’s been removed from the client’s intestines is the most effective way to show the instrumentality of harm. While the file

²⁹ For an interesting discussion about a cowboy using a saddle in the courtroom to help him demonstrate why he is no longer able to ride horses see Nancy J. Turbak, *Accentuate the Positive*, TRIAL, Sep. 1994 at 63

³⁰ For a discussion of how and where evidence should be held in a courtroom, see DR. JAMES RASICOT, *NEW TECHNIQUES FOR WINNING JURY TRIALS* 193 (1990)

may be small, a demonstrative photograph of it can be blown-up quite large and make it all the more grisly.

C. Photographs.

Photographs are perhaps the most common form of demonstrative evidence. Our courts have long recognized the use of photographs as demonstrative evidence.³¹ They are not, however, without risk and some degree of care must be taken in the use of them. Counsel should be aware of the fact that photograph evidence can easily be manipulated both intentionally and through inattention and lack of expertise. Of course, intentional misrepresentation would be fraud on the court but, in today's world, it is quite easy to accomplish using computer programs such as PhotoShop. However, this manipulation of the photographic image, would not, in and of itself, make the photograph inadmissible. If there is a witness who will testify that the photograph reasonably depicts the relevant evidence, and that the photograph will assist the

31

A photograph which depicts the victim after autopsy incisions are made or after the state of the body is changed by authorities or the pathologist will not be admissible unless necessary to show some material fact which becomes apparent only because of the autopsy. A photograph which shows mutilation of a victim resulting from the crime against him may, however gruesome, have relevance to the trial of his alleged assailant. The necessary further mutilation of a body at autopsy has no such relevance and may cause confusion, if not prejudice, in the minds of jurors. Pictures of highways at the scene of an accident, of the damaged vehicles, of machinery which injured plaintiff, or of a floor where plaintiff fell, may prove useful. The liberality of the courts toward relevant photographic evidence furnishes a great opportunity to the alert barrister. On the other hand, the lawyer against whose client photographic evidence is offered should be aware of the possibilities of misuse of such evidence. Trial attorneys, especially those who try personal injury suits, should make themselves familiar with photographic equipment and with the practice of photography. Just as a witness may give false testimony, a photograph may falsify or distort. The nearness of the camera to the subject, the angle, the adjustment of the lens, the use of light, failure to show all of the subject and doctoring of the negative, may result in distortion of the reproduction. If factors of this kind are present in a particular instance, it may be possible to discredit the photograph in the eyes of the jury by pointing out features of the picture or by introducing other photographs of the same subject, or by cross-examining the witnesses as to the actual appearance of the object or situation as seen by them.

GREEN, GEORGIA LAW OF EVIDENCE §86 fn. 13 -20 (4th Ed. 1994)

witness in explaining various points to the jury, the photograph will be usable even though manipulated. Obviously, such manipulation does open the photograph, and the witness up cross examination and questions about its credibility.

Photographs can also be inadvertently and intentionally manipulated through the use of various focal length lenses³². For example, a wide angle lens makes items appear further apart from each other than they actually are. Similarly, a telephoto lens can shrink the perceived distances between two items and lead the viewer of the photographs to conclude that two items which are really quite far apart are actually very close. Thus, in taking a photograph, one needs to be careful about the choice of focal lengths. Similarly, for each size photograph there is a correct distance from which it should be viewed to maximize the likelihood that the photograph will actually illustrate the scene which it depicts.³³

D. Models.

In many cases a model is the single best way to illustrate a machine, building, or part. Models can be very simple demonstrative tools or can be scale models of a working machine. The number one risk in models, particularly those that are supposed to work, is that they will fail to work in the courtroom or that they are not in proper scale. This not only breaks up the pace of the case but also ruins the credibility of the advocate who chooses to use a flimsy model. Make sure models of machines are made from the same blue prints as the real machine.

E. Computer Simulations and Recreation Films.

It seems that a week never goes by without getting an advertisement from someone or another who claims to be a computer simulation expert. Not all computer simulation “experts” are indeed experts. Computer simulation costs several thousand dollars and extreme care must be taken. Jurors are aware of the manipulations which can be accomplished through the use of

³² See e.g., Gardner, *The Camera Goes to Court*, 24 N.C.L.Rev. 233 (1946)

³³ To be absolutely accurate one needs to rely on experts such as George Pearl from Atlanta Legal Photo Service. Mr. Pearl can not only choose the right focal length to create the image but also suggest the best distance from which a particular size blow-up should be viewed to insure accuracy.

computer animations. When using this kind of demonstrative evidence be sure that a good projection system is available and in working order.

Recreation efforts are also effective demonstrative evidence. However, these, like computer simulations, are expensive and credibility is essential.

A less expensive alternative to live action film or computer simulation is the simple story board. This is a series of drawings or photographs which are similar to a comic strip in that they show action one frame at a time. These too can be expensively drawn or created from a series of photographs which are simply mounted in chronological order.

F. Day in the Life Films.

A day in the life film can be an extraordinary powerful tool in illustrating to the jury what a severely injured person's life is like. Again, however, care must be taken to insure that the day in the life film is accurate, that any words spoken on the film are not going to be excluded because of the inability of the opposing side to cross-examine the speaker, and that the tape does not look staged.

G. Video Depositions.

While video depositions are not often considered demonstrative evidence they really should be. When taking a videotape deposition it is important to get movement into deponent by encouraging him to look at models, diagrams, and illustrations. Additionally, one should be careful to insure that the deponent looks into the camera during direct examination and looks away from the camera during cross-examination. This can easily be accomplished by standing behind the counter during direct examination and standing to one side during cross-examination.

H. Gizmos, Gadgets, and Buckets of Pills.

The list of potential exhibits to be used as demonstrative evidence, is, literally, endless. For example, someone who takes five pills a day for pain and has a life expectancy of 30 years can have this illustrated by showing a bucket of 54,750 pills graphically displaying what their future holds. A stack of hypodermic needles showing the number of shots that the person has received for pain is also effective. The sound of a train horn; body casts; rods from femurs; x-

rays, rocks; a full sized traffic light, and numerous other items can also effectively illustrate testimony. Be creative and imaginative.

The use of a quality flip chart is far better than a blackboard. A flip chart pad can be used throughout the trial to outline the opening, to identify terms, to list the items with which a witness agrees with your witness, or to summarize important testimony.

Simple blowups of testimony is also effective - it can be written on a flip chart pad or a more expensive enlargement process can be used. If enlargement of deposition testimony is used, retype the pages in a good font which is bold and without serifs. Jurors have never seen the original and will not know the difference. Be accurate, using page and line cites to give the blowup credibility.

Purchase or rent good equipment. Obtain a good TV/VCR combination. Buy an overhead projector. Get an enlargement machine. Consider a LCD projector and the DOAR wireless communicator. Be creative. But, most importantly, know how and when to use the equipment and be comfortable in doing so. Practice, Practice, Practice!

V. How to Use Demonstrative Evidence.

Even the best demonstrative evidence is worthless if it isn't used at all or isn't used properly. "Three universal pitfalls of demonstrative evidence are (1) overuse, (2) failure to deliver the message, and (3) poor presentation."³⁴ These pitfalls can be avoided with forethought and practice. The choice of when to use demonstrative evidence is also important. "Demonstrative evidence is generally best presented as soon as possible during the first part of the trial. It can then be referred to during the entire case-in-chief and used as a refresher during closing argument."³⁵

The use of demonstrative evidence is, unquestionably, essential to effectively communicating information to jurors. However, it is also essential that in using demonstrative evidence that the media does not overpower the message. "The most important single mistake

³⁴ Gary Christy, *A Storybook Approach*, TRIAL, Sep. 1994 at 70

³⁵ DR. JAMES RASICOT, NEW TECHNIQUES FOR WINNING JURY TRIALS 193 (1990)

lawyers make and the one they make most often, is to overload visual aids with too much information all at once. When you do that, anarchy reigns supreme.”³⁶ Jurors will stop listening, even the auditory learners, if there is so much visual stimulation that they are distracted by their efforts to absorb it all. Whenever a chart, model, or photograph is displayed a certain number of jurors will immediately take a moment to analyze what they see before listening to the witness explain what the exhibit means. If there is too much shown all at once, the jurors might not get back to the explanation and will only be confused instead of enlightened.

The most important rule when using demonstrative evidence is practice, practice, practice. “You’ve watched people do it, and it seems simple, but it *is* a minor skill and requires a little work to get smooth and comfortable. The biggest mistake is getting in the way as you write or point. The other problem is to write or print in a straight line, especially down at the bottom.”³⁷ This is particularly true when using a model, when conducting a demonstration or experiment, and when using a high tech piece of equipment. Working models must work. Experiments must show the desired result. And high tech equipment like video presenters, and even VCRs, must operate properly to avoid distracting the jury and harming the credibility of the advocate.

A. Know the Logistics.

Every courtroom is different. Some are huge and local practice rules do not allow the lawyer to move very close to the jury; while others are so small that there is barely enough room for the people much less some huge exhibit. Exhibits must be made with these differences in mind. Regardless of the size of the courtroom, exhibits must be transported to the courtroom. Know what size will fit in your car. This writer insists on having 90% of his illustration type

³⁶ SONYA HAMLIN, WHAT MAKES JURIES LISTEN, 395 (1993)

³⁷ SONYA HAMLIN, WHAT MAKES JURIES LISTEN, 399 (1993)

exhibits in a 30x40 inch format because that is the biggest exhibit which will fit in car with a large trunk.³⁸

Be familiar with the trial judge. There is nothing more frustrating than having a judge who will not let you use an exhibit which you have planned to use. Know his or her limits and comfort factors. Stereotypically, rural judges are sometimes less willing to allow creative exhibits than are city judges. However, this stereotype is not very reliable and the best way to find out about a judge is to ask him or call him.

Be familiar with the courtroom. If the exhibit will not fit in the courtroom it will not have much value. Think about staging. After all, the purpose of demonstrative evidence is to educate the jurors. There is no educational value of an exhibit if no one can see it or if it blocks the view of the witness who is describing it. Going to the trouble and expense of having trial exhibit which will not fit in the courtroom is a waste of time.

In modern trial practice it is the rare case where the physician expert can be convinced to travel to the courthouse. This requires that his testimony be recorded before trial on videotape. Just because the doctor will not be in the courtroom is no reason to skimp on exhibits. If anything, extra care must be taken to liven up that which will otherwise be a boring heads only video. But doctor's offices are usually less equipped to handle exhibits than courtrooms. This requires forethought and planning. When using an illustration at a medical deposition, remember to take a portable easel as the doctor's office will usually not have one. Without an easel, the doctor will have to try to hold the exhibit at a crazy angle while trying to use it and much of the benefit of the thousand dollar exhibit will be lost.

B. Be Prepared.

Never count on the courthouse having a video player and television on which your video will be played. As sure as daylight, the prosecutor will be using the courthouse TV to show a

³⁸ While it is true that really huge exhibits will fit in my wife's car, I have enough to worry about during a trial without having to be concerned about taking her car and leaving various car pools without transportation.

porno tape in a criminal trial at the exact moment when you need it. Get a medium sized TV with a built-in video player and take it to trial.

Never use the courthouse flip chart. You can't take it home at night. You can't control it. It might be flimsy and hard to use. Instead, obtain a quality easel with a hard surface behind the entire flip chart writing area. Take a T-Square to the courthouse to make it easier to write in a straight line.

Take markers, a pointer, and anything else, including multiple easels on which to display exhibits. A few hundred dollars spent for the proper trial arsenal will go a long way in making the case try more seamlessly.

VI. Conclusion

Using visual aids during a trial is not risk free. You could overuse them, use something that your adversary turns against you, fumble with machines that do not work, use models that break as you are using them, and many other pitfalls. These are some of the reasons why visual aids must be carefully thought out and effectively produced. If your planning eliminates the negative aspects of the visual aid, the overall effectiveness of using visual aids can be tremendous.³⁹

VII. CLE Experiment

Hopefully, during the oral presentation of this paper, we will have time for a brief experiment or two. In the first, a simple story will be told and you, the audience, will be asked to recall certain facts. In the second, you will be asked to draw something completely from instructions. The results, if this experiment works, will illustrate why demonstrative evidence is essential to the successful advocate.

STORY EXPERIMENT - PLEASE WRITE YOUR ANSWERS IN THE SPACE PROVIDED:

THE DEFENDANT'S SPEED WAS _____

THE PLAINTIFF BROKE HIS _____ FOOT. (right or left)

THE PLAINTIFF'S CAR IS _____ IN COLOR. (write the color)

³⁹ DR. JAMES RASICOT, NEW TECHNIQUES FOR WINNING JURY TRIALS 197 (1990)

DIAGRAM EXPERIMENT - PLEASE DRAW WHAT I WILL DESCRIBE IN THE SPACE BELOW: