

TRIAL EXHIBITS AND DEMONSTRATIVE EVIDENCE

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I. Introduction to Demonstrative Evidence

Our job as advocates is to teach jurors the facts they need to know to reach a decision favorable to our clients. To be successful in the courtroom, we must develop the teaching skills of a great sixth grade social studies teacher. Effective teaching skills include the use of presentation skills - demonstrative and illustrative - necessary to educate a jury as to why our client should win.

Successful educators know that there are three basic kinds of learners in the average class: auditory, visual, or kinesthetic. There is also a small group known as global learners, but because these jurors benefit from all types of evidence they are not treated separately here. These students grow up to be jurors and continue to learn in one of these three ways:

1. Auditory learners are educated by what they hear and place less importance on what they see.
2. Visual learners are educated by what they see and are less able to pickup information from what they hear.
3. 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. But pure auditory learners are in the minority. In fact, “Humans assimilate 83 percent of data through sight; only 11 percent is gained through hearing, with the rest divided among the other

senses.”¹ Thus, the secret to victory is to be on the side that convinces the visual and kinesthetic learners. The party that proves its case to these learners will get their votes in the jury room. These non-auditory learners, in fact the majority of humans, are convinced by evidence they can see or touch. Effective demonstrative evidence² will reach these jurors and give them an understanding of our case that they can use in the jury room.

“Demonstrative evidence” consists of both *real* and purely *illustrative* evidence³. The effective 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. Effective case presentation will aid all kinds of jurors, but particularly those jurors who prefer to learn visually because this learning method is the most important process by which jurors obtain information. 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

¹ Jim M. Perdue, Jr., *The Art of Demonstrative Evidence*, TRIAL, May 2005, p. 46

² 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.

³ “‘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)

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.

...

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.⁴

Effective demonstrative evidence makes a case come alive and motivates jurors to help the side that effectively educates them. Demonstrative evidence use, as part of effective case presentation, not only takes into consideration the individual items of demonstrative evidence but also how each exhibit fits into the whole of the trial and how it will effect the jurors during the trial.

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. Whatever form it takes, it must communicate to the jurors both objectively and subjectively. We must know not only how the exhibit appears, and how it will be remembered in the jury room, but we must also be cognizant of any subtle messages its sends to the jury about our thoughts about the case and ourselves. The key to successful use of demonstrative evidence is to keep in mind that its

⁴ SONYA HAMLIN, WHAT MAKES JURIES LISTEN, Chapter 8 (1993)

purpose is to educate the jurors about our side of the case – from every prospective. 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. Free or Paid for, if it illustrates more effectively than words, then it is Demonstrative Evidence.

Proper case presentation demands the use of demonstrative evidence. To fail to effectively use demonstrative evidence is to abandon the majority of jurors who need this kind of stimulus to truly understand the facts. Whether it is simply a list on a flip chart, presented during a closing argument, of the relevant facts to which a particular witness has testified, a “day in the life video” to illustrate damages, or an in-court experiment, demonstrative evidence is an invaluable way to help the jury understand our 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.”⁵ Diagrams, charts, models, computer animations, 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.”⁶ Successful users of demonstrative evidence will keep in mind the old Chinese proverb that states: “Tell me and I will forget, show me and I may remember, involve me and I will understand.”⁷

⁵ Stephen D. Heninger, *Cost-Effective Demonstrative Evidence*, TRIAL, Sep. 1994 at 65

⁶ Stephen D. Heninger, *Cost-Effective Demonstrative Evidence*, TRIAL, Sep. 1994 at 65

⁷ 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 that 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.⁸

III. The Basic Law of Demonstrative Evidence.

⁸ Robert D. Brain and Daniel J. Broderick, *Demonstrative Evidence, Clarifying its Role at Trial*, TRIAL, Sep. 1994 at 73

As noted in footnote two to this paper, demonstrative evidence can be either “real” or “demonstrative”⁹. Demonstrative evidence can be further broken down into evidence that is “substantially similar” to the real evidence¹⁰ or is a representation of the real evidence¹¹. “It is a recognized rule that where something is used in comparison with another to illustrate a condition or point that it is necessary that such conditions be substantially similar.”¹² For example, an accident reconstruction that is substantially similar to the actual collision is demonstrative evidence. Similarly, a photograph of a broken tool is demonstrative evidence because it is a representation of the real evidence, the actual broken tool. 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.”¹³ But, keep in mind that testimony, even when in the form of a deposition transcript is not evidence that goes out with the jury. This is because

“it is not proper to let the jury have 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”.¹⁴

Nevertheless, while the deposition transcript cannot go out with the jury, counsel can print the testimony or a summary of the good parts and use it as pure demonstrative evidence. The

⁹ 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

¹⁰ *Doster v. Central of Ga. R.R. Co.*, 177 Ga. App. 393 (1985) (allowing experiment at scene of incident to come into evidence as it was substantially similar to the actual incident)

¹¹ *Long v. Serritt*, 102 Ga. App. 550 (1960)

¹² *Doster, supra*

¹³ GREEN, GEORGIA LAW OF EVIDENCE §87.1 (4th Ed. 1994)

¹⁴ GREEN, GEORGIA LAW OF EVIDENCE §87.1 (4th Ed. 1994)

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.¹⁵ Often an opponent to the admission of demonstrative evidence will argue that the evidence should be excluded because it is a continuing witness in the jury room. While this objection is widely sustained as to oral testimony, it is not valid as to medical illustrations used to illustrate testimony (even where the illustrations have been thoroughly discussed by a witness). These kinds of exhibits should be allowed to go out with the jury¹⁶.

“Materials used for illustration may often be introduced in evidence, but need not be actually introduced.”¹⁷ 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.”¹⁸ Demonstrative evidence, like all evidence, must be relevant or it will be excluded¹⁹. 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.²⁰ This foundation is easily accomplished with basic foundation questions.

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 evidence

¹⁵ *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)

¹⁶ *Gabbard v. State*, 233 Ga. App. 122, 503 S.E.2d 347 (1998)

¹⁷ D. LAKE RUMSEY, *AGNOR’S GEORGIA EVIDENCE* §15-1 (3rd Ed. 1993)

¹⁸ Stephen D. Heninger, *Cost-Effective Demonstrative Evidence*, *TRIAL*, Sep. 1994 at 65.

¹⁹ *Elder v. Stark*, 200 Ga. 452, 37 SE2d 598 (1946)

²⁰ *Doster, supra*

will not only be unusable, whether admissible or not, but will, most importantly, ruin the credibility of the lawyer and the witness through whom the evidence is offered. As part of the presentation of a case, a misleading item of demonstrative evidence can be devastating to the side who offers it.

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 trial²¹. While models and drawings are commonly associated with being demonstrative evidence, trial lawyers are in no way limited to physical items. Courts have approved a physical demonstration by a witness of the effect of an injury²², as well as sounds²³. Of course, diagrams, drawings and sketches²⁴ (diagrams and sketches can be used even if the diagram or sketch is not admissible into evidence²⁵), and photographs²⁶ 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 authenticating²⁷

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

²¹ *Augusta and Summerville Railroad Company v. Dorsey*, 68 Ga. 228 (1881)

²² *Pidcock v. West*, 24 Ga. App. 785, 102 S.E.2d 360 (1920)

²³ *Central of Georgia Railroad v. Collins*, 232 Ga. 790, 209 SE2d 1 (1974)

²⁴ *Savannah Ice Delivery Company v. Ayers*, 127 Ga. App. 560, 194 SE2d 330 (1972)

²⁵ *Long v. Serritt*, 102 Ga. App. 550, 117 SE2d 216 (1960)

²⁶ *Smith v. State*, 202 Ga. 851, 45 SE2d 267 (1947)

²⁷ O.C.G.A. § 24-4-28

are to be decided by the jury, provided that counsel shall not in writing present any argument that could not properly be made orally.”

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.²⁸

Keep in mind that most evidence rulings, including those relating to the use of demonstrative evidence, are in the discretion of the trial judge.²⁹ 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 surprise³⁰.

IV. Laying a Basic Foundation for Use or Admission of Demonstrative Evidence.

A basic foundation must be laid before most 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

²⁸ *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.

²⁹ *Hudson v. State*, 24 Ga. App. 668, 168 SE2d 912 (1933); *Christian Construction Co. v. Wood*, 104 Ga. App. 713, 123 SE2d 10 (1961). This is particularly true in the Federal Courts in which the trial court is given very broad discretion, even if his evidentiary ruling is case dispositive. *General Electric v. Joiner*, zx U.S. zx, (1997).

³⁰ 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 that will be used. This includes demonstrative evidence that an expert will use to illustrate his testimony.

admitted. That is because a piece of substantive proof directly helps resolve an issue of consequence in the trial.

...

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.³¹

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

Example 1: *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.

³¹ Robert D. Brain and Daniel J. Broderick, *Demonstrative Evidence, Clarifying its Role at Trial*, TRIAL, Sep. 1994 at 74

Q. Will they assist you in helping us³² understand the injuries suffered by Paula Pitiful as a result of the automobile crash she was in last January?

A. Yes, I think they really will.

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.

Example 2: *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 Pitiful and Dastardly Defendant occurred?

³² Note that the word "us" is used instead of "me" or "the jury". Effective case presentation demands that the advocate be an advocate for the jury and that he or she convince the jury that he or she is part of the jury. Thus, "us" is used to refer to the team of the plaintiff's lawyer and the jury as a team.

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.

Example 3: *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 Pitiful 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 we appear to know how to lay the foundation and are ready to do it, most skilled opposing counsel will not hold us to a very high burden of doing so. On the other hand, if we are ill prepared and bumbling and don't know how to lay the foundation, like sharks after blood, the opposing counsel will run us ragged, ruin our credibility with the jury³³, and our presentation will be ruined.

V. Demonstrative Evidence Ideas – It's All in the Planning.

Before ordering demonstrative exhibits, you need a plan. Demonstrative exhibits should not be superfluous; instead, they should illustrate key points you want a jury to understand and should assimilate with your trial theme. A good approach is to schedule a brainstorming session at least three months before trial to consider nothing but demonstrative evidence.³⁴ The meeting should have the following ground rules and goals:

1. Make sure senior members of the trial team are available to attend and that they understand they are to be primary contributors. If you've hired outside graphic consultants to assist in the design and production process, invite them to attend the session also.
2. Let all attendees (especially any artists and artist wanna-bes) know that they'll be expected to check their paintbrushes at the door. The goal of this session is to develop a detailed list of the most important demonstrative evidence ideas, not to design the visuals that will communicate these

³³ 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)

³⁴ Greg Krehel, *Think first, draw second: planning better visuals*, TRIAL, April 2000.

ideas. Keeping idea definition separate from design development yields better ideas, better designs, and reduced costs.

3. Assign one attendee the role of scribe. He or she will make a record of the proceedings using a flip chart or a computer with a projector attached. This makes it easy for everyone who is participating to see the list of ideas being discussed and for the scribe to make revisions as the session proceeds.
4. Prepare a worksheet that the scribe will use to organize the thinking developed during the session. The worksheet is a table composed of rows and columns that you can create using word-processing or database software. Each row represents a single demonstrative evidence idea. The columns list critical information about each. Here are the columns you'll want: title, type, issues, mission statement, data source, for use by, estimated cost, key, and production status. The purpose of each column is described below.
5. Develop an outline of the case issues. As you discuss, you'll use this outline to ensure you're developing ideas for all issues.
6. Finally, circulate a memo laying out the objectives, agenda, and ground rules for the session. Include the issue outline as an attachment.³⁵

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.³⁶

³⁵ Greg Krehel, *Think first, draw second: planning better visuals*, TRIAL, April 2000.
³⁶ DR. JAMES RASICOT, NEW TECHNIQUES FOR WINNING JURY TRIALS 191 (1990)

This list of five considerations is well worth considering. Too often, we use elaborate exhibits to illustrate points that do not need illustrating and then skimp on preparing demonstrative evidence where it is most needed. One needs to decide what points need illustrating and simplifying before deciding to use demonstrative evidence. Not every point should be illustrated the same way because the effort put into an illustration is likely conveying to the jury messages that may not be intended. For example, in a clear liability automobile collision that resulted in a closed head injury, we 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. In such a case, the jury should not be misled to think that the cause of the collision is more important than the result! Instead, a simple drawing of the intersection may suffice for liability, but detailed, oversized medical illustrations of the CT scans may be necessary to explain the significance of the head injury to a jury.

VI. Demonstrative Evidence Ideas – From Free to Expensive.

While the list of possible demonstrative techniques is literally endless, listed below, in no particular order, are some commonly used approaches that can dramatically aid in the effective presentation of the case.

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. Many of us 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 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.³⁷

Successful case presentation demands that we keep in mind the benefits of having a witness use his hands and body to illustrate a particular point as well as the benefits gained from our own body language. 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. (This is also a great way to ask a leading question without anyone knowing it.)

Effective case presentation demands that when we use, hold, point to, or otherwise refer to an item of demonstrative evidence, we must keep our body language in mind. For example, when using a black board or chart if we block the chart with our backs, or bend over showing our rear end to the jury whenever we write 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.³⁸ In short, the most important part of our case presentation is body language and courtroom presentation skills. And the best part is that this presentation method is absolutely free.

B. Real Evidence

“Real” demonstrative evidence is the actual thing involved in the case, but it may be used as demonstrative evidence, and if so, 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

³⁷ 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

³⁸ 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)

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 may be small, a demonstrative photograph (a representation of the file) of the can be blown-up quite large and make the story you are trying to convey to the jury 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.³⁹ Photographs are not, however, without risk and some degree of care must be taken in the use of them. We should be aware of the fact that photographic 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

39

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)

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 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 upon cross examination, to serious credibility questions.

Photographs can also be both inadvertently and intentionally manipulated through the use of various focal length lenses⁴⁰. 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 that are really quite far apart are actually very close. Thus, in using a photograph, we need 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.⁴¹

Digital photography (and photographic manipulation through the use of computer programs such as Adobe® Photoshop®) is a relatively new tool for a trial attorney. While unaltered and enlarged digital images should be as easy to admit as its traditional film counterpart, attempting to introduce an enhanced digital image at trial creates a whole new set of issues. As Professor Imwinkelried has noted, “In many cases, the proponent cannot rely on sponsoring testimony by a witness familiar with the object or scene. The image may be an enhanced one that no one ever saw or could have seen. Even the photographer saw an image different from the one shown in the exhibit.”⁴² To best ensure that your evidence will be admitted, you must lay the proper foundation by establishing:

1. The witness is an expert in digital photography.

⁴⁰ See e.g., Gardner, *The Camera Goes to Court*, 24 N.C.L.Rev. 233 (1946)

⁴¹ 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.

⁴² Edward J. Imwinkelried, *Can this photo be trusted?*, TRIAL, October 2005, p. 48

2. He or she describes image enhancement technology, including both the creation of a digital image consisting of pixels and the computer manipulation of the pixels.
3. In general, both parts of the process are valid.
4. There has been adequate research into the specific application of image enhancement technology involved in the case.
5. The research resulted in the development of computer software for this application.
6. At a given time and place, the witness received a film photograph.
7. The witness followed proper procedure in digitizing the photograph.
8. The witness also followed correct procedure in using computer software to enhance the film photograph.
9. The witness recognizes the exhibit as the photograph that was produced when he or she used the software to enhance the film photograph.⁴³

While this may seem like overkill, you cannot risk losing a key piece of evidence (and possibly thousands of dollars) by failing to convince the judge of the enhanced image's admissibility.

In using photographs as part of our presentation, we need to decide on the number of photographs, the size of the photographs, and the manner in which the photographs will be mounted and displayed. Generally an 11 x 17 inch color photocopy is sufficient for most uses. These can easily be mounted onto foam core with spray adhesive. Larger enlargements can be made with digital imaging by a variety of vendors. The cost of photographs is relatively low, which allows photographs to be used in just about any case. Before spending the money on oversized photographs, remember to make sure that (1) the photograph will be admissible (i.e., someone will testify that it is a true and accurate depiction of the real evidence) and (2) that every photograph offered adds to the prosecution of your case.

D. Models.

⁴³ Edward J. Imwinkelried, *Can this photo be trusted?*, TRIAL, October 2005, p. 48

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.

Custom-made scale models are expensive. It is not unusual to spend two to five thousand dollars for a good model. However, in some cases models are the only way to effectively illustrate alternative design or complicated machines.

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 generally costs more than ten thousand dollars and extreme care must be taken to use it wisely. Before selecting an expert in this area, one should request references from prior cases where the expert’s work was held admissible. Credibility is paramount as opposing counsel and jurors are aware of the manipulations that can be accomplished through the use of computer animations. Finally, when using this kind of demonstrative evidence be sure that a good projection system is available and in working order; the effectiveness of a computer animation, no matter how fair and accurate, may be reduced entirely if you cannot present it in a technically sound manner.

Recreation efforts are also effective demonstrative evidence. However, these, like computer simulations, are expensive and credibility is essential. To insure credibility of any filmed recreation it is essential to keep the “out takes” and insure that they are available in the courtroom should the cross-examiner want to see them. The jury’s assumption of what the destroyed “out takes” showed is vastly more damaging than any reality.

A less expensive alternative to live action film or computer simulation is the simple story board. This is a series of drawings or photographs that 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 that 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 the 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 camera 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. Do not rely on the court

or the opponent for a flip chart. Purchase a good one and insure that is its sturdy. While a quality flip chart and easel is not cheap, the investment will last for many trials – major and minor.

A simple blowup of actual and summarized 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 and when a quote is used put the language in quotation marks. Blowups of cross-examination can be used to great effect during cross examination. This is particularly effective where the witness agrees with critical points. During closing argument, blowups of quoted or summarized testimony should not be read to the jury. Instead, the exhibit is displayed while we talk about the witness. This way we get a double shot at the jurors – oral and visual. When using blow-ups, however, make sure they are only used to illustrate key points; the overuse of blowups can desensitize a jury to your key points.

Purchase or rent good equipment. Obtain a good DVD player – you can even use a portable DVD player which generally cost approximately \$100. Buy an overhead projector. Get an enlargement machine. Consider a LCD projector and the DOAR wireless communicator or an ELMO unit. Flat panel televisions are now also relatively lightweight and inexpensive and can be used repeatedly (42' LCD televisions can cost under \$700 and weigh less than 50 pounds). Be creative, but, most importantly, know how and when to use the equipment and be comfortable in doing so. Practice, Practice, Practice!

I. Technical Issues

Merely having an item of demonstrative evidence created is not enough. We need to know the proper color scheme, the proper timing, and proper display technique. For example, we need to know that about 23% of adults have some degree red/green color blindness. Thus, if we create an exhibit with hues that cannot be distinguished by one fourth of our jurors we have not accomplished our goal of educating these jurors. The most readable color combination is

black on white. Similarly, the most visible color combination is black on yellow. However, if we use this color combination for everything, like the boy who cried wolf, the important points will be diminished in value.

VII. Perfecting the Use of 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."⁴⁴ 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."⁴⁵

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 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."⁴⁶ 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.

A. Practice Makes Perfect.

The most important rule when using demonstrative evidence is practice, practice, practice. In fact, preparing last minute exhibits and failing to practice through dry runs are

⁴⁴ Gary Christy, *A Storybook Approach*, TRIAL, Sep. 1994 at 70

⁴⁵ DR. JAMES RASICOT, *NEW TECHNIQUES FOR WINNING JURY TRIALS* 193 (1990)

⁴⁶ SONYA HAMLIN, *WHAT MAKES JURIES LISTEN*, 395 (1993)

considered two pitfalls of using demonstrative evidence.⁴⁷ “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. 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. When using a flip chart, 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.”⁴⁸

Again, in order to avoid the, “Sorry your honor, I had this working yesterday,” moments at trial, practice is essential. Use a straight edge when writing on easels. Use a laser pointer when referring to photographs and blowups and always have fresh replacement batteries on hand. Get to the courtroom as early as possible each day to test the equipment as cleaning crews and other may unplug, move or otherwise inadvertently sabotage your presentation equipment.

B. Know the Logistics.

Because every courtroom is different, visit the courtroom where you will be trying your case well in advance of trial. 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 exhibits in a 30x40 inch format because that is the biggest exhibit which will fit in a car with a large trunk.⁴⁹

You should also be familiar with the equipment the courtroom has at its disposal; the increasing number of “courtrooms of the future” may allow you to leave your projector and

⁴⁷ Mark C. Joye, *Avoiding the ten pitfalls of demonstrative evidence*, TRIAL, Nov. 2004, p. 94

⁴⁸ SONYA HAMLIN, WHAT MAKES JURIES LISTEN, 399 (1993)

⁴⁹ 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.

DVD player at the office, but before you do, make sure you are familiar with the court's equipment and that it will be available throughout your trial.

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 a trial exhibit that 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 "talking head" 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.

We should never count on the courthouse having a video player and television on which our video will be played. As sure as daylight, the prosecutor will be using the courthouse TV to show a porno tape in a criminal trial at the exact moment when you need it. Get the biggest TV, preferably with a built-in video player, that will fit in your car 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.

VIII. 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.⁵⁰

⁵⁰ DR. JAMES RASICOT, NEW TECHNIQUES FOR WINNING JURY TRIALS 197 (1990)