MY TOP TEN TIPS ON PRESENTING EVIDENCE AT TRIAL

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I. Introduction to Top Ten Tips

Asking an experienced trial lawyer to describe his top ten tips on presenting evidence is a lot like asking someone how to ride a bike. Well, you know, you practice and practice and then you just do it. And after a few skinned knees, once you learn you never forget. Using evidence at trial is much the same - practice, practice, and then you have it. The only difference is that with presenting evidence at trial, unlike riding a bike, you have to stay on top of new ways to do it and you have to keep practicing or a whole world of skinned knees is sure to follow.

II. The Top Ten Tips on Demonstrative Evidence

1. KNOW THE LAW

Effective use of demonstrative evidence is impossible without a complete command of the law. This tip seems simple enough but far too often lawyers prepare wonderful exhibits but can't for the life of them figure out how to use them in accordance with the rules at trial. When confronted with "Objection, Lack of Foundation," "Objection, Hearsay," "Objection, Leading," or "Objection, that thing is so good its just unfair to allow the plaintiff to use such a powerful piece of evidence" they have no idea how to respond. This does not have to be the case. We

must know the law that governs the use of exhibits - both those we seek to admit and those we merely seek to use for demonstrative purposes.

2. HAVE A PURPOSE.

There is an old saying about certain hygiene habits of dogs. People ask: why? Others answer: because they can. Demonstrative evidence is not like that. We must have a real reason. We must have a goal that is to be accomplished by every item of demonstrative evidence. Just because we can prepare an endless series of posters, PowerPoint presentations, and photographic blowups does not mean we should. All evidence must be relevant. That premise is simple enough; but, demonstrative evidence must be more than merely relevant. Effective demonstrative evidence will make that which is complex simple, that which is confusing understandable, and that, which is important, memorable. If it does not achieve one of these goals it does not have a purpose and should not be used.

3. GET STARTED EARLY.

Preparing trial exhibits is a time consuming process. Not only do we have to figure out what we want, but we have to test it and then have it produced. Often we will want to use the evidence in the discovery phase of the case during depositions and at hearings. This can't be done if the decision as to what will be used at trial is not made until the eave of trial. Additionally, some kinds of exhibits take weeks, or even months, to prepare. For example, to prepare a quality computer animation can take several months. First we have to work with the expert to decide what we want to demonstrate. Then, after we decide what we think we want we have to see if we really want it. This involves testing the proposed exhibit with a focus group to determine if it really works. Then, the computer animation creator has to work up a rough draft. This then has to go back to the expert for approval. After approval by the expert, the animation

then has to be rendered with artwork. And lastly the hopefully finished product has to be tested all over again with a focus group to see if it will really work.

4. DEFINE WORDS WITH "WORD PICTURES".

When we think about demonstrative evidence the first things that come to mind are models, photographs, and charts illustrating facts and theories. But we win or lose based on jurors' understanding of words. Yet, we know that most people learn best through images. Accordingly, if we can turn an oral concept like a word into a picture we will be successful in exponentially increasing the likelihood that words will be interpreted in the fashion we want. For example, as plaintiffs' lawyers it is imperative that concepts such as "reasonable care," "standard of care" and "preponderance of the evidence" be understood by our jurors. We can articulate these concepts by using word pictures.

5. SHOW SOME, BLUFF SOME, HIDE SOME.

Trial exhibits eventually have to be shown to the other side - at trial or before. However, they don't all have to be shown at once and we can certainly show exhibits that we don't intend to use. Showing exhibits that illustrate a theme that is not going to be used can be an effective means of protecting the real theme until trial.

6. THINK ABOUT LOGISTICS.

Knowing the law is the easy part. Figuring out how demonstrative evidence should be used is far more difficult. This involves courtroom logistics, body language and theatrics. Don't expect to use newly created demonstrative evidence without thinking about how to employ it based on the actual situation that will exist when showing it to the jury. Go to the courtroom and insure that the jury will be able to see the exhibit from the jury box. Know where you will stand when you use the exhibit and where the witness will be. Be prepared with pointers, laser pens,

and other necessary aids for the use of the exhibit. Make sure models work and that everyone knows how to make them work. Know how to set up the screen and turn on and focus the Elmo, DOAR, or LCD projectors. Jurors have no tolerance for the lawyer who says "I wish my eleven year old was here to turn this stuff on." And don't exclude the jurors by turning your back to them while you write on an easel - include them in the process.

7. PRACTICE

If you have not used exhibits and demonstrative evidence much in the past, do a mock presentation so you will be comfortable with it. This author used his LCD projector and computer combination several times in CLE presentations before he would venture to use it in front of a jury.

8. TOO MUCH *IS* TOO MUCH.

We must also keep in mind that a little is ok, just right is just right, and too much is just that, too much. Perhaps the single most important aspect of presenting the plaintiff's case is to keep a good rhythm. Jurors enjoy a show that keeps moving. They do not, however, have any tolerance for a presentation that bogs down. Nor do they give extra points to the side with the most demonstrative evidence. Instead, they give points the side with the most persuasive demonstrative evidence and they deduct points from the side that has lots of worthless evidence.

9. USE YOUR EXHIBITS IN CROSS EXAMINATION.

Most of us think only about preparing demonstrative evidence for use during our case in chief with our own witnesses. In fact, demonstrative evidence should, actually must, be used at every point in a trial when the process of educating jurors to our side of the case will benefit from the evidence. Using demonstrative evidence to illustrate the fallacies of the witness can be

difficult. However, it can almost always be used to illustrate points of agreement that help our cases.

10. SPEND THE MONEY WHEN IT MAKES A DIFFERENCE

Trial exhibits and demonstrative evidence can be free or can cost tens of thousands of dollars. There is not a direct and perfect correlation between cost and value. However, exhibits, regardless of cost must be of the highest quality. A cheap easel is hardly worth having. A photograph that is blown up and then poorly mounted casts the user in a bad light. Accordingly, however we choose to illustrate a point we must do so in a manner of which we are proud and which sends the proper message to the jury.

III. Introduction to Demonstrative Evidence As A Concept.

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. Students are either auditory, visual, or kinesthetic learners. (There is also a small group known as global learners, but as 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 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 pickup 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. But

pure auditory learners are in the minority. The secret to victory is thus 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 evidence[1] 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* evidence.[2] The effective preparation and use of demonstrative evidence does not vary with whether it is real, or purely illustrative, or on whether it is actually admissible as evidence. 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.
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> . . .
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> 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

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[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.

[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)

> 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.
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> . . .
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> 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.
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> . . .
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> 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 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.

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

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 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.

IV. The Basic Law of Demonstrative Evidence.

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.

In federal court, there is no specific rule governing the use or admission of demonstrative or illustrative exhibits. It must merely be authenticated pursuant to Rule 901(a), which provides:

[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

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Further, federal judges have discretion to allow the use of illustrative exhibits pursuant to Rule 611(a), which provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth,…

A. Computer or Technologically Generated Evidence.

More and more these days demonstrative evidence is computer generated. This high tech evidence creates some special problems for the trial lawyer that differs from run of the mill photographs and documents.

There are three broad categories where high tech demonstrative evidence exhibits have been used: (1) as evidence; (2) as an aid to the jury (for illustrative purposes only); and (3) as part of argument.[5] Technological proof may be admitted into evidence either through the common law approach to the use of demonstrative evidence or through the Federal (or applicable state) Rules of Evidence. The latter approach takes into consideration not only relevancy - balancing the evidence's probative value versus prejudicial effect, but also concerns the more complicated standards for the admission of novel scientific evidence. Most courts seem to agree that if technologically produced evidence meets the qualifications of a scientific experiment in the hands of an expert or satisfies traditional evidentiary rules it can actually be admitted into evidence. High-tech evidence that is merely "illustrative" for the jury is, surprisingly, more

controversial. If the evidence tends to suggest what really happened, but is based upon the trial lawyer's theory of the case rather than upon accepted scientific principles, there is a significant risk that the technological evidence will be excluded so as not to mislead the jury.

In order for computer generated visual evidence to be admitted as *substantive* evidence, the Federal Rules of Evidence impose several requirements. The evidence must be authenticated, it must be relevant, it must pass the hearsay rule, and it must pass the requirements for expert opinion as declared by the Supreme Court.

1. Authentication

Technologically presented evidence must be authenticated or identified under Federal Rule 901(b)(9). The Rule states that authentication "is satisfied by evidence sufficient to support a finding that the mater in question is what its proponent claims." The Rule further provides that if the evidence involves a particular method or procedure, additional evidence must be submitted that describes the "process or system used to produce a result and shows that the process or system produces an accurate result." Computer generated evidence can be authenticated by establishing the accuracy and reliability of the computer hardware and software and then establishing the reliability of the system's ultimate product.

2. Relevance

It goes without saying that all evidence must be relevant to be admissible.[6] Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

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[5] Gary S. Fergus, "Trial by Technology: Preparation and Use of High Tech Exhibits in the Courtroom."

[6] Fed. R. Evid. 402.

without the evidence."[7] Relevant evidence is generally admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[8] Most objections to computer generated visual evidence are based on Rule 403. In order to overcome such an objection, it must be demonstrated that the evidence is accurate and fair – it is not misleading nor does it distort the truth. Additionally, the proponent will need to argue that while complete, the evidence is not overly long or duplicative. Certainly, another important consideration is that presenting the evidence to the jury cannot disrupt the proceedings. Finally, the evidence should be shown only once to avoid an unfair prejudice objection. This last requirement will not likely apply to the use of computer-generated evidence during argument;[9] however, the other requirements should be taken into consideration in the context of closing argument as well.

3. Hearsay

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[10] The Federal Rules define a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[11] The "declarant" is defined simply as "a person who makes a statement."[12] Hearsay is not admissible unless the evidence fits within an exception to the general rule. It is easy to see why computer generated visual evidence will

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7 Fed. R. Evid. 401.

8 Fed. R. Evid. 403.

9 "The rationale for permitting high tech exhibits as part of closing arguments is that they are no different from the analogies used by trial lawyers in making their arguments today." Gary S. Fergus, "Trial By Technology: Preparation and Use of High Tech Exhibits in the Courtroom."

10 Fed. R. Evid. 801(c).

11 Fed. R. Evid. 801(a).

be subject to hearsay objections. The "declarant" is the individual, perhaps a computer expert, who entered data into the computer. The "statement" or "assertion" is what is created by the computer, which is intended to convey the truth about a material issue. As such, the evidence is an out-of-court statement by a declarant offered for the truth of the matter asserted.

Computer generated demonstrative evidence does not fit into any of the enumerated exceptions; however, it may be offered if it satisfies the requirements of the language of Rules 803(24) and 804(b)(5) – referred to as the "catchall" exception. These Rules provide for the admission of hearsay evidence if the evidence has the "equivalent circumstantial guarantees of trustworthiness" and are is not unfair to the opponent. To qualify under the "catchall exception" the following conditions must be satisfied: (1) the evidence must be probative of a material fact; (2) it must be more probative than any other evidence that is reasonably attainable; (3) the purposes of the rules and the interests of justice must best be served by allowing admission; and (4) the proponent of the evidence must give the opponent sufficient notice.[13] If the proffered evidence raises an objection, the proponent bears the burden of showing that the evidence satisfies the conditions for "equivalent circumstantial guarantees of trustworthiness."

In the alternative, the proponent could argue that the technologically presented evidence is similar to a hypothetical question posed to the expert, which is permitted under Fed. R. Evid. 702. If this method is utilized, the evidence is offered as a response to the hypothetical and merely illustrates the expert's opinion; therefore, it is not substantive evidence.

4. Expert Opinion

To the extent that the computer-generated evidence is deemed expert opinion, it must pass the expert testimony requirements of Rules of Evidence 702, 703 and 705.

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[12] Fed. R. Evid. 801(b).

Rule 702 allows qualified experts to testify and express their opinions about a scientific, technical, or other specialized area if that testimony is helpful to the trier of fact or resolves a fact in issue. Rule 703 requires that the facts or data relied upon by the expert be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject;" however, the evidence need not be independently admissible. Finally, Rule 705 states that experts do not have to disclose the underlying facts or data upon which their opinions are based unless required by the court. Additionally, the expert may testify about the "ultimate issue to be decided by the trier of fact" under Rule 704(a).

While the Rules appear to allow a great deal of latitude for expert testimony and opinions, recent interpretations of the Federal Rules by the Supreme Court have made the use of scientific evidence much more difficult.[14] Before assuming that the evidence is admissible pursuant to the Rules, a thorough understanding of the restrictions imposed by the Court is essential.

B. Out with the Jury?

In most states, when desired, "[p]roperly introduced documentary and demonstrative evidence goes out with the jury when it retires for deliberation."[15] In places where it does not, such as North Carolina, special care must be taken to insure that the jury has ample opportunity to see and appreciate the exhibits during the trial and during closing argument. But, keep in mind that testimony, even when in the form of a deposition transcript or summary of testimony is not evidence that goes out with the jury. This is because

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13 Fed. R. Evid. 803(24), 804(b)(5).

14 *See General Electric v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, (1997); *Khumo Tire Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999).

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

> "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."[16]

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 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.[17] 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 jury.[18]

"Materials used for illustration may often be introduced in evidence, but need not be actually introduced."[19] 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

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16 GREEN, GEORGIA LAW OF EVIDENCE §87.1 (4th Ed. 1994); see also footnote 7

17 *Norfolk & Western Ry. Co. v. Puryear*, 463 SE2d 442 (Va. 1995) in which summaries of testimony were allowed to go out with the jury. Distinguishing such inadmissible exhibits from an admissible summary of documents such as medical bills, the court held: "the admissibility of such summaries is not subject to the discretion of the trial court. A "trial court has no discretion to admit clearly inadmissible evidence because 'admissibility of evidence depends not upon the discretion of the court but upon sound legal principles.' " Coe v. Commonwealth, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986) (quoting Crowson v. Swan, 164 Va. 82, 92, 178 S.E. 898, 903 (1935)). Thus, we hold that the trial court erred in admitting the written summaries into evidence." *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).

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

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

theme like a hand in a glove, they should not be used."[20] Demonstrative evidence, like all evidence, must be relevant or it will be excluded.[21] 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.[22] 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 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 that offers it.

V. 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

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

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

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

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.[23]

Laying the foundation for the use of demonstrative evidence follows a simple recipe. A "go-by" recipe for the introduction of demonstrative evidence is as follows:

(1) The witness must testify as to firsthand knowledge of the thing or place that the exhibit demonstrates;

(2) Mark the exhibit for identification;

(3) Direct the witness' attention to the exhibit;

(4) Elicit testimony from the witness that (s)he recognizes the exhibit or what the exhibit depicts;

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

(5)Elicit testimony from the witness that the exhibit is a fair and accurate depiction or representation of a scene or object that is in issue in the case.

Computer generated evidence requires a little bit more as the accuracy and reliability of the data put in and the program's rendering powers are sometimes necessary components of the foundation too.

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:

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[24] 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.

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[24] 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.

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 Pitiful and Dastardly 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 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 usability**.

In order to introduce a written work in evidence, four fundamental foundational requirements must be met. The writing must be shown to be: 1 - relevant, 2 - authentic, 3 - meet the requirements of the original document rule, and4 - either qualify as non-hearsay or meet an exception to the hearsay rule. In most cases, if we appear to know how to meet theses foundational requirements 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, the opposing counsel will run us ragged and ruin our credibility with the jury.[25] Our presentation will be ruined.

VI. Free or Paid for, if it illustrates more effectively than words, 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."[26] 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."[27] 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."[28]

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[25] 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)

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

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

[28] 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.
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> . . .
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> 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;
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> . . .
>
> 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.
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> . . .
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> 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.[29]

VII. Demonstrative Evidence Ideas - cost free to expensive.

[29] 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.[30]

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. 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 mislead 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 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

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[30] DR. JAMES RASICOT, NEW TECHNIQUES FOR WINNING JURY TRIALS 191 (1990)

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.[31]

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.[32] 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

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[31] 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

[32] 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)

"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 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.[33] 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

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[33]

> 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)

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 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 lenses[34]. 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.[35]

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 and they can be used in just about any case. But make sure that every photograph offered adds to the case.

D. Models.

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

[35] 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.

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, models are sometimes the only way to effectively illustrate alternative design or complicated machines.

E. Computer Modified Exhibits, Simulations and Recreation Films ("High Tech" Evidence).

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. Jurors are aware of the manipulations that can be accomplished through the use of 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. 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 storyboard. 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.

(i) Are the Costs Recoverable?

Obviously, the cost of putting together sophisticated demonstrative evidence is a consideration from the very beginning. The equipment is generally quite expensive and other materials used can add up as well. If specialized support personnel is needed, the costs of their services need to be considered as well. The question then arises to what extent these expenses are recoverable as "costs" pursuant to 28 U.S.C. § 1960. Because technologically presented evidence is still relatively new, the issue has not really been addressed by the courts. However, one can extrapolate from cases concerning taxation of exhibit costs and deposition expenses to discern whether costs for these high-tech exhibits will be recoverable.

The only statutory provision arguable covering exhibit costs in general is Section 1920(4), which permits taxation of "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." *See, e.g. Maxwell v. Hapaq-Lloyd Aktiengese Llschaft*, 862 F.2d 767, 770 (9th Cir. 1988). While *Maxwell* held that 1920(4) covers exhibits and "other illustrative materials," those materials are not fully defined. There is also authority for finding that costs of this nature are *not* taxable. "There is no statutory provision for the taxation of charts and exhibits as costs." *Johns-Masville Corp. v. Cement Asbestos Products Co.* 428 F.2d 1381, 1385 (5th Cir. 1970).

The Eleventh Circuit Court of Appeals has grappled with the variation in rulings on this issue and has held that exhibits are not to be included in recoverable costs.

> Notwithstanding this holding, *Johns-Manville* permitted taxation of exhibit costs if the prevailing party received pretrial authorization to produce the exhibits. *See id.* We must determine what effect the Supreme Court opinion in *Crawford Fitting* has on *Johns-Manville*. *Crawford Fitting*, which was issued after *Johns-Manville*, held that courts can tax costs only with statutory authorization. 482 U.S. at 445, 107 S.Ct. at 2499. Considering *Johns-Manville* in light of *Crawford Fitting,* we hold that exhibit costs are not taxable because there is no statutory authorization.

United States EEOC v. W&O, Inc., 213 F.3d 600, 622-623 (11th Cir. 2000). In a footnote, the *W&O* Court addressed the fact that its decision was contrary to the view in other Circuits and nevertheless found it sound. 213 F.3d at 623, n. 15.

The Court's ruling in *EEOC v. W&O* should not alter previous decisions finding that other technologically produced evidence can be taxed. *See, e.g. Morrison v. Reichold Chemicals, Inc.*, 97 F.3d 460, 464 (11th Cir. 1996) ("Even though 28 U.S.C. § 1920 speaks only of 'stenographic' transcription costs, the Court believes that the costs of video depositions are encompassed in that Section.") It should be noted that the costs will be taxable only if the deposition is noticed for video and no objection is posed. *Id.* Additionally, while the costs of making the video itself are taxable, a party cannot recover costs for the rental of equipment to present the deposition, nor is the fee for a videographer to play the video at trial a taxable cost. *Id.*

(ii) Ethical Issues in Created or Manipulated Exhibits.

Because of the potential to mislead with computer generated exhibits, a discussion of the relevant ethical rules is worthwhile. A review of the Canons of Ethics and the Advisory Opinions of State Disciplinary Board do not mandate or proscribe any particular conduct for the use of technologically presented evidence. However, some of the basic rules do pertain to the presentation of evidence in general, and proponents will be wise to consult the rules if any question exists as to the appropriateness of the method, form or intent of the presentation. Some of the rules that may be pertinent include the following.

> EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal
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> EC 7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the

cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. . . .

EC 7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, . . . a lawyer should not make any prefactory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence . . .

DR 7-106 Trial Conduct.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) state or allude to any matter that he has not reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

(2) ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

(3) assert his personal knowledge of the facts in issue, except when testifying as a witness.

Obviously, in order to represent your client "zealously within the bounds of the law," a lawyer has to know what the law is. That law includes the evidentiary issues addressed, albeit

briefly, here. If the evidence proffered is relevant and will reasonably aid the jury in its search for the truth, there should not be any ethical constraint to offering the evidence assuming a good faith basis for doing so. As noted above, the ethical rules contemplate an advocate's right to argue that an existing rule should be extended or modified to validate the cause presented. It is unlikely that unless technologically prepared evidence is known to be false and intended to mislead it will form the basis for an ethical violation.

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.

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 or an ELMO unit. 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.

X. 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.[36]

[36] DR. JAMES RASICOT, NEW TECHNIQUES FOR WINNING JURY TRIALS 197 (1990)