

Demonstrative Evidence in Federal Court

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A picture tells a thousand words. Modern trial practice is built upon that premise. How do we get juries to see the pictures we want them to see, and not see deceptive ones that our opposition attempts to use? This article examines those issues in the context of trial practice in federal court.

The phrase “a picture tells a thousand words” likely has Chinese origins. “One hundred hearing not equal one seeing” is the expression of Chinese philosopher Chow Ch’ung, as cited by Kenneth B. Hughes and Benjamin J. Cantor, *Photographs in Civil Litigation*, the Bobbs-Merrill Company, Inc., 1973 at p. 267. Human optics are different from those of cameras, so no matter what the view, it will not be exactly the same as a live witness. The human eye has central vision that is of high resolution, as well as peripheral vision that has less focus and detail. Movement in the periphery of our vision gets our attention, and often brings central vision to focus in on what is moving. Vision is a dynamic process, and works with movement, analysis in the brain and it competes with other senses for

perception to be effective. It takes judgment for a trial court to realize what views are deceptive and misleading and which are simply advocacy.

The criminal trial bar led the way in the use of demonstrative evidence. Early in the last century, photos of heinous crime scenes were used to show the jury what had happened. In the second half of the 1900s, pioneers such as Melvin Belli, Walter Beckham and Bill Colson used demonstrative evidence in civil trials to begin to get adequate awards for injured people.¹

Civil lawyers discovered that by appealing to all sensory input, not just the ears, jurors could learn more effectively.² Belli demonstrated that visual evidence tells a jury what happened.

What is demonstrative evidence? “Demonstrative evidence is the generic label applied to exhibits that share the common characteristic of visualizing for the fact finder data that have been, or can be, admitted in evidence.” Comment to section 15., Civil Trial Practice Standards, American Bar Association, Feb. 1998, Saltzburg, Martin and Capra, Federal Rules of Evidence Manual, 8th Ed., Appendix C. What is the admissibility of demonstrative evidence? ³ Section 15 explains the need to afford each party with review of demonstrative evidence and the opportunity to object before it is shown to the jury. See also, Federal Judicial Center, Manual for Complex Litigation 3d section 22.21 (1995), and Rule 26 of the Federal Rules of Civil Procedure for pretrial disclosure of all non-impairment exhibits, including demonstrative evidence. It is preferable to present unwieldy evidence in the form of Charts, diagrams or other demonstrative evidence. Courts should provide guidance on admissibility before substantial expenses are incurred for creation of exhibits that may not be allowed.

Charts that summarize otherwise admissible data should be admissible themselves under Rule 1006 of the Federal Rules of Evidence. Photographs are admissible as substantive evidence. ³ Wigmore Evidence Section 790 (Chadbourn rev.) United States v. May, 622 F.2d 1000, 1007 (pth Cir.), cert. Denied, 449 U.S. 984 (1980). The comment to the ABA Civil Trial Practice Standards points out the generally favorable view of using demonstrative evidence because it helps juries understand the evidence and issues presented at trial. It cites to Judge William W. Schwartz’s Reforming Jury Trials, 132 F.R.D. 575, 588 (1990) “Much Evidence becomes more

comprehensible when presented with visual aids, such as a chart summarizing data, a chronology, and enlarged picture of an object, a diagram of a building or a map”. Having a court rule before great expense is made to create demonstrative evidence is helpful to the litigants, as the courts need to encourage the use of the most concise and understandable formats for presentation of courtroom evidence.

Most people are visual learners. It helps people process and store information. The foundation for the use of demonstrative evidence is and should be flexible. If demonstrative evidence is sufficiently explanatory of relevant evidence to be of potential help to a fact finder, and not unfairly confusing or misleading, it should be allowed. Rogge Dunn and Karen Hirschmann, *Trial Objections*, James Publishing, 2002, Section 300. It helps jurors recall, organize and understand the evidence. Real or original and representative demonstrative evidence are both admissible. The trial judge has discretion on admissibility, United States v. Bello-Perez, 977 F. 2d 664 (1st Cir 1992) “only rarely – and in extraordinarily compelling circumstances – will we, for the vista of a cold appellate record, reverse a district court’s on the spot judgment concerning the relative weighting of probative value and unfair effect...” relating to demonstrative evidence.

How do we object to visual evidence in Federal Court? Suggested objection forms are “Objection, your honor. The ____ (demonstrative evidence described) is improper since it is _____ (argumentative, lacking foundation, cumulative, unfairly prejudicial or is irrelevant). The basis can be found from a careful examination of the evidence, its foundation questions, related evidence, accuracy, misleading nature, argumentative captions, cumulative or repetitive of other evidence or unfair use of colors. Section 301 for Chart Diagram or Graph. Rogge Dunn and Karen Hirschmann, *Trial Objections*, James Publishing, 2002,. Responses include that witnesses can testify to foundations of preparation, answer specific objections to the related underlying data, relevancy to the issues for determination, showing that the scale is proper and any flaws can be examined through cross examination, show how the demonstrative evidence will aid the jury in its search for truth, allows efficient presentation of evidence, and that the objections really go to the weight to be given the evidence than admissibility and can be effectively examined on cross examination of the foundation witness or argued in closing argument.

If in evidence, the demonstrative evidence should go to the jury room during deliberations. Limiting instruction can be helpful, to deal with objections. *United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985) Courts should be sure the demonstrative evidence is supported by proof or only used as testimonial aids, for summary charts *United States v. Wood*, 943 F.2d 1048. (9th Cir. 1991) Be careful of underlining or highlighting in exhibits to be placed in evidence, as if they unfairly distort the relevant content of the exhibit, they may not be admissible in evidence. *Erwin v. State Farm Fire and Cas. Co.*, 618 F. Supp. 1040 (E.D. Mo. 1985) where phrases about conversations were underlined making the exhibit more unfairly prejudicial than probative.

The distinction between real and demonstrative evidence is the difference between a direct and indirect connection to the evidence in a case. A gun which fired the shot that murdered, a machine which malfunctioned, and a glass bottle that was defective and shattered are real evidence. John A. Tarrantino, *Real or Physical Evidence* Section 570, *Trial Evidence Foundations*, James Publishing Co. 2002. Rule 901(b)(4) of the Federal Rules of Evidence should be considered before attempting to admit such evidence. Real evidence can have a very powerful impact on finders of fact. BNA Civil Trial Manual, Section 91:201, “Real Evidence”

Demonstrative evidence, by contrast, does not need a physical connection with the case, it can demonstrate or illustrate what happened. BNA Civil Trial Manual, Section 91:401, “Exhibits - Demonstrative Evidence” citing 2 McCormick on Evidence Section 216 (4th Ed 1992) “Venturing forth to observe places or objects which are material to litigation but which cannot feasibly be brought, or satisfactorially reproduced within the courtroom, is termed a view”. To paraphrase popular culture, the boldly show what others have seen before. Photos, enhanced photos, drawings, models, charts, medical illustrations, chronologies, re-enactments and demonstrations in court are examples.

Video day-in-the-life films are a type of both real and demonstrative evidence. For a discussion of the use of day-in-the-life films, see Buckley and Deehl, *Trial Tips – Day-in-the-life videos*, Plaintiff’s and Defense Perspectives, Spring 2003 Committee News, ABA Tort Trial and Insurance Practices Section, Trial Techniques Committee. They really show parts of the day of an injured person, but they are edited to demonstrate typical activities or the lack of the same.

Admissible demonstrative evidence should be usable in opening statements. Leonard Decof, *Art of Advocacy, Opening Statements*, Lexis Publishing, 2000. Tangible evidence is very helpful in opening statements, and there is no good reason unobjected to exhibits cannot be used. Dawn Siemer, *Tangible Evidence: How to use Exhibits at Trial*, 2nd Ed., Prentice Hall Law and Business, 1989, Section 1.1.1. “One rule of thumb is you could put anything on a visual aid that you could say” Siemer, at page 9. Avoid personal views opinions or assertions of personal knowledge, reference to matters not reasonably believed to be supported by admissible evidence, and irrelevant matters or arguments that should be saved for closing. Blackboards and easels have traditionally been used as visual representations of the facts in a case, whether drawings of the scenes of accidents, relationships of the parties and witnesses, time lines and medical illustrations. Better graphics and ease of use make PowerPoint presentations the modern equivalent of the omnipresent blackboard used to convey visual information in the classroom or courtroom. PowerPoint presentations are dust-free (nothing quite like white chalk dust on a black suit), and do not make those horrible sounds that black boards create when fingernails or other objects are scraped across the surface.

Videotapes are demonstrative evidence, and can be substantive evidence. Photographs, including videotapes, are also admissible as substantive evidence. 3 *Wigmore Evidence* Section 790 (Chadbourn rev.) *United States v. May*, 622 F.2d 1000, 1007 (9th Cir.), cert. Denied, 449 U.S. 984 (1980). The comment to the ABA Civil Trial Practice Standards points out the generally favorable view of using demonstrative evidence because it helps juries understand the evidence and issues presented at trial. It cites to Judge William W. Schwartzer’s *Reforming Jury Trials*, 132 F.R.D. 575, 588 (1990) The courts need to encourage the use of the most concise and understandable formats for presentation of courtroom evidence. The alternative of going to the home to see what the plaintiff’s life is like is not likely to be well received by most judges concerned with moving their calendars in the most efficient way.

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should be allowed. Rogge Dunn and Karen Hirschmann, *Trial Objections*, James Publishing, 2002, Section 300. It helps jurors recall, organize and understand the evidence. Real or original and representative demonstrative evidence are both admissible. The trial judge has discretion on admissibility, *United States v. Bello-Perez*, 977 F. 2d 664 (1st Cir 1992) “only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court’s on the spot judgment concerning the relative weighting of probative value and unfair effect...” relating to demonstrative evidence. For non-economic damages, this probative evidence in the form of a day-in-the-life videotape should be admitted. Its complete exclusion would prevent the jury from understanding what the effect of a major injury is on a person, and it preserves the dignity of the courtroom by allowing a view of life without having the plaintiff demonstrate personal hygiene methods in the courtroom. It is real evidence. Evidence which demonstrates the need for compensation for the losses that affect everyday life.

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the video was not of a typical day in the life. That could show the good that money would do, a key to motivating jurors. See David Ball's book on Damages, NITA, 2001.

¹ "...criminal trial lawyers no longer embarrass their civil counterparts by their superior use of demonstrative evidence." Belli, Melvin M., Sr., *Modern Trials*, Second Edition, West Publishing Co., 1982, Section 53.1, p. 521

² Belli, Melvin M., Sr., *Modern Trials*, Second Edition, West Publishing Co., 1982, Section 53.1, p. 521

³ Inadmissible evidence is valuable, since anything may be used to refresh a witness' recollection. Graham, *Handbook of Federal Evidence*, Section 612.2 (5th Ed. 2001)