

# Demonstrative Evidence

By Shannon L. Clark, JD

The presentation of the case is undeniably more effective when traditional evidence is illustrated by demonstrative evidence. Demonstrative evidence adds variety to a trial and is often a refreshing break for jurors from run-of-the-mill testimony. It also allows jurors to process evidence visually, in addition to auditorally. Used effectively, demonstrative evidence can add drama to the presentation of evidence and capture and hold the jury's attention. In short, "[d]emonstrative evidence permits the trier of fact to itself observe a matter that is at issue rather than simply hear it described by the testimony of witnesses." Daniel J. McAuliffe and Shirley J. Wahl, *Arizona Practice, Civil Trial Practice*, Vol. 2A § 21.19 at 70-71 (2d ed. 2001).

## Real or Illustrative Evidence

Demonstrative evidence can be either "real" (e.g., an actual accident scene, product or object or "illustrative" (i.e., evidence used to illustrate the testimony of witnesses)). Demonstrative evidence can take many forms. Photographs or video footage of a scene or object can be used to illustrate testimony and demonstrate physical characteristics of the scene or object. Witnesses can prepare sketches, diagrams or utilize other visual aids to illustrate and expand their testimony. Three-dimensional scale models of scenes can be effective not only to illustrate how an event occurred, but also to visually demonstrate the location

of witnesses and other salient information. Computer simulations and animations may also be used as demonstrative evidence provided required foundation for their admissibility is established. In appropriate cases, jurors may also be brought to a remote location to view a scene, building or large object that cannot easily be

**Demonstrative evidence can take many forms. It can be powerful stuff.**

brought into the courtroom.

People can also be effectively used as "demonstrative evidence." A plaintiff can demonstrate scarring, limitations in range of motion or physical characteristics that are at issue. Other witnesses (including experts) and even attorneys may be utilized to make demonstrations for the jury.

## The Law

Demonstrative evidence is evidence used to illustrate a trait, characteristic or testimony. Demonstrative evidence generally consists of things (e.g., weapons,

clothing, photographs, replicas, movies, etc.) as distinguished from testimonial evidence about things. "Admissibility of demonstrative evidence lies largely within the discretion of the trial court." *Rogers v Raymark Industries, Inc.*, 922 F.2d 1426 (9th Cir. 1991). Demonstrative evidence such as charts, graphs, or models "used to clarify other evidence used in a trial—has been a part of the American trial process for over a century. . . . Although evidence may lack relevance in the traditional sense, the Court noted its admissibility could correspond to a more pragmatic understanding of the way jurors process information. . . ." *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 138 F.Supp. 2d 357 (E.D.N.Y. 2001).

To be admissible, demonstrative evidence must be "sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact." *American Law on Products Liability* § 54:58 (3d ed. 1987). Typically, demonstrative evidence is in tangible form and is admitted as an exhibit, which the jurors may take with them to the jury room for consideration during their deliberations. See *U.S. v. Salerno*, 108 F.3d 730 (7th Cir. 1997). Demonstrative evidence which "tends to prove material issue is admissible if its probative value outweighs prejudicial tendency." *U.S. v. Cartano*, 420 F.2d 362 (1st Cir. 1970). While the admission of demonstrative evidence is not improper

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merely because it is gruesome, or because it may tend to influence the emotions, it should not be admitted merely for dramatic effect, or to arouse feeling, as by unduly exciting antipathy or sympathy. . . .”

*Thomas v. C.G. Tate Const. Co., Inc.*, 465 F. Supp 566 (1979).

### Purpose of Demonstrative Evidence

Demonstrative evidence is admissible to “assist jurors in understanding basic principles” but cannot be offered for the “truth of the matter asserted” making the demonstrative evidence hearsay. *U.S. v. Martinez*, 588 F.3d 301 (2009). “If demonstrative evidence is relevant, it is admissible if it is substantially similar to the original and not unduly prejudicial.” *U.S. v. Stone*, 2012 WL 933353 (March 20, 2012). Thus, demonstrative evidence used for illustrative purposes is admissible so long as it fairly illustrates or resembles a disputed trait or characteristic.<sup>1</sup> See, e.g., *Muth v. Ford Motor Company*, 461 F.3d 557 (5th Cir. 2006).

This is a looser standard for admissibility than experiments or replications, which may only be admitted if the conditions of the experiment substantially match the circumstances surrounding the event. See *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988). When demonstrative evidence is offered “only as an illustration of general scientific principles, not as a re-enactment of disputed events, it need not pass the substantial similarity test, but such demonstrative aids, however, must not be misleading in and of themselves” *Muth*, 461 F.3d at 566.

When the demonstrative evidence is “real” evidence (the actual thing in issue), the foundation for admissibility of such evidence is simply that the thing is what the proponent says it is and it is relevant in the case. *U.S. v. Yazzie*, 59 F.3d 807 (9th Cir. 1995). A determination of whether an article has been properly identified is an exercise of judicial discretion “which will not be disturbed unless there is no com-



petent evidence in record to support it.” *Meadows & Walker Drilling Co. v. Phillips*, 417 F.2d 378 (5th Cir. 1969). This foundation may be supplied by circumstantial evidence. See *id.*; see also *State v. McCutcheon*, 162 Ariz. 54, 58, 781 P.2d 31, 35 (1989).

### Practice Pointers

Demonstrative evidence is powerful stuff, and cases can be won and lost based upon the effectiveness of a party’s demonstrative evidence. The following suggestions can help maximize the use of demonstrative exhibits and increase your chances of having such evidence admitted at trial.

**1. Lay a strong foundation.** To have demonstrative evidence admitted, it is the proponent’s burden to establish that

the demonstrative evidence fairly depicts the event or thing it is intended to. A broad brush approach to laying foundation is helpful. For example, if you have an animation of a motor vehicle accident, you presumably prepared it in connection with an accident reconstructionist. Your reconstructionist will help lay the foundation. But don’t stop there. If you are working with accident witnesses, get testimony or statements from them confirming that the animation fairly depicts the accident sequence. Get testimony from the animator or computer programmer that the animation was created based upon measurements and scales provided by the reconstructionist or investigating law enforcement officer.

## 2. Don't wait until the last minute to

**disclose demonstrative evidence.** In the normal course of things, we typically exchange our demonstrative exhibits at the eleventh hour before the final pretrial management conference. If you anticipate that the use of demonstrative evidence is going to be a contested issue in your case (and it likely will), don't wait. Disclose your demonstrative evidence early so as to provide the opposing party sufficient opportunity to evaluate it. Follow up with opposing counsel and find out whether there will be objections based upon the demonstrative exhibits. You then have time to cure any deficiencies that could impair your ability to have the evidence admitted or take the matter up with the court by way of an advance motion *in limine*. Where possible, get stipulations regarding authenticity and foundation.

**3. Do it right.** Demonstrative evidence is very persuasive and effective in illustrating key points at trial. Often, however, it can be expensive. If you're going to do it, do it right. Don't cut corners and risk being outshined at trial by your adversary.

<sup>1</sup> Its probative value must also outweigh any undue prejudice its admission would create under a Rules 402 and 403 analysis.

Shannon Clark is a shareholder at Gallagher & Kennedy in Phoenix, AZ where he focuses his practice in catastrophic personal injury and wrongful death cases. After graduating from Duke University School of Law *with honors*, and prior to joining Gallagher & Kennedy, Shannon served as a law clerk to the Honorable Mary M. Schroeder, Circuit Judge for the U.S. Court of Appeals, Ninth Circuit. Prior to dedicating his practice on plaintiffs' personal injury and wrongful death cases, he handled a wide-range of cases, including criminal defense, insurance defense and commercial litigation. Shannon was selected for inclusion in *Best Lawyers in America* in 2012, *Southwest Super Lawyer*, *Rising Stars*, and the *National Trial Lawyers Top 100 Trial Attorneys*.



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