

Spring 1999

## The Use of Demonstrative Exhibits at Trial

Mary Quinn Cooper

Follow this and additional works at: <http://digitalcommons.law.utulsa.edu/tlr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Mary Q. Cooper, *The Use of Demonstrative Exhibits at Trial*, 34 Tulsa L.J. 567 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol34/iss3/6>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [daniel.bell@utulsa.edu](mailto:daniel.bell@utulsa.edu).

# TULSA LAW JOURNAL

Volume 34

Spring 1999

Number 3

## PRACTITIONER'S GUIDE

### THE USE OF DEMONSTRATIVE EXHIBITS AT TRIAL

Mary Quinn Cooper<sup>†</sup>

#### I. INTRODUCTION

Success in the courtroom hinges upon how effectively and persuasively attorneys are able to present a client's case or refute the opposing party's case. Crucial evidence can be rendered useless or even a liability if the jury does not understand the evidence or appreciate its significance. Demonstrative exhibits and aids provide the means "[t]o clarify, to dramatize and to emphasize" critical evidence in a case.<sup>1</sup> While not always offered into evidence, such visual presentations usually include "maps, models, charts, diagrams, graphs, photographs, films, videotapes," and summaries.<sup>2</sup> Although the use of demonstrative exhibits is nothing new, a study of Oklahoma federal and state case law reveals fairly little on the topic. The absence of such case law is likely due to lack of litigation concerning illustrative materials,

---

<sup>†</sup> Partner and trial attorney in Tulsa, Oklahoma with Rhodes, Hieronymus, Jones, Tucker & Gable. The author would like to acknowledge the assistance of Tom Steichen, Kerry Lewis, and Suzanne Schreiber in the preparation of this practitioner's note.

1. CELIA W. CHILDRESS, *PERSUASIVE DELIVERY IN THE COURTROOM* 619 (1995).

2. Ronald J. Rychlak & Claire L. Rychlak, *Real and Demonstrative Evidence Away From Trial*, 17 AM. J. TRIAL ADVOC. 509, 512 (1993). "From a practical standpoint, the primary difference is that 'real evidence' is evidence that was involved in the matter at the heart of the trial, and 'demonstrative evidence' is evidence that is simply used to help illustrate testimony." *Id.* at 510; see also E. Scott Savage, *Demonstrative Evidence: Seeing May Not Be Believing but It Beats Not Seeing at All*, 8 UTAH B.J. 17 (1995).

since demonstrative exhibits are becoming the norm in courtrooms across the country. Section II discusses why demonstrative evidence is crucial to successfully trying a lawsuit. Section III provides suggestions for overcoming legal hurdles such as rules requiring the exchange of exhibits, judicial discretion to include or exclude exhibits, evidentiary requirements in introducing exhibits, and the cost of using exhibits. Section IV outlines how to prepare demonstrative evidence for use in any trial. Finally, Section V summarizes the recent technology aiding in demonstrative exhibit presentation.

## II. WHY USE DEMONSTRATIVE EXHIBITS?

Everyone at some point, whether at a meeting, a deposition, or in the classroom, has endured a presentation that seems to drone on forever. No matter how interesting the program, there is a tendency to let the mind wander, resulting in a failure to fully comprehend. Jurors often experience trials in the same way. Critical evidence is intermixed with mind-numbing minutia. Cross-examination muddles and confuses what may have been the clear testimony of a key witness. Unfortunately, practitioners who have been living and breathing a lawsuit for months and possibly years may fail to appreciate the consequences of relying solely on oral testimony to present a case.

One advantage of presenting demonstrative evidence to a jury is it focuses the jury's attention in a way oral testimony alone simply cannot. Humans receive and respond to information through their senses: sight, sound, smell, touch, and taste.<sup>3</sup> Consequently, jurors are more likely to understand and retain information if attorneys engage more than one sense in communicating information. By involving jurors' senses when presenting critical evidence, practitioners may gain an advantage in presenting a case which can translate into a verdict in the client's favor.

Visual perception, particularly when combined with simultaneous audile perception, is the most effective manner of communicating information in a courtroom setting.<sup>4</sup> "For example, when people are instructed through auditory modality alone, and recall is subsequently tested, they recall about 10 percent of what they heard, in contrast to recalling 85 percent of information presented orally with visual aids."<sup>5</sup> Whether a simple slip and fall negligence trial or a document-intensive, complex commercial lawsuit, logically jurors comprehend and retain data that can be seen as well as heard.<sup>6</sup>

Another advantage of demonstrative exhibits is they give attorneys added control over the presentation of the evidence. Demonstrative exhibits can guide and assist an unintelligible witness. Effectively using a demonstrative exhibit can throw

---

3. See Gail A. Jaquish & James Ware, *Adopting An Educator Habit of Mind: Modifying What It Means To Think Like A Lawyer*, 45 STAN. L. REV. 1713, 1720 (1993) (footnote omitted).

4. See CHILDRESS, *supra* note 1, at 620.

5. Jaquish & Ware, *supra* note 3, at 1721.

6. See CHILDRESS, *supra* note 1, at 629.

the opposing counsel off stride and bring the jury's focus back to the evidence supporting a client's position. Finally, demonstrative evidence can bring together various strands of evidence into a single piece that can assist the jury in seeing the big picture. For example, opposing counsel may have introduced evidence beneficial to a client in a disjointed and fragmented manner. The jury may not appreciate the consequence of such evidence until demonstrative evidence is presented, such as in the form of a cumulative chart, thus bringing evidence together into a single focal point.<sup>7</sup>

In a recent products liability case brought against an automobile manufacturer, I was able to effectively use demonstrative evidence to underscore evidence favorable to my client, the automobile manufacturer. The plaintiff claimed the vehicle was defective and unreasonably dangerous as a result of a seat belt feature commonly referred to as a "comfort feature." A comfort feature permits a seat belt wearer to relieve the tension on the shoulder strap of a seat belt by pulling out the shoulder strap and introducing a small amount of slack into the shoulder belt. Most domestic vehicles built in the 1980s had such a feature. The plaintiff, seven months pregnant and a front passenger in the vehicle during a head-on collision, claimed the design of the comfort feature allowed her to inadvertently introduce a considerable amount of slack into her shoulder strap when she bent over to pick her purse up off the floor. She alleged that when she sat up, the slack remained. The plaintiff asserted the alleged slack eliminated the protective effects of wearing the seat belt during the collision, which caused her to suffer serious injuries to her face. Conversely, the automobile manufacturer was able to prove she was not wearing her seat belt at all during the accident.

During trial, testimony showed the plaintiff was found with her buttocks off the edge of the seat bottom and on the floorboard. The court allowed me to use a "buck" as demonstrative evidence. A buck is a portion of an exemplar vehicle that can be put together in a courtroom. The buck showed the interior compartment of the subject model vehicle, including the seats, the seat belts, the floorboards, and the windshield. Also, the buck was made even more effective by using it in conjunction with crash tests. The automobile manufacturer created two crash tests using the same model vehicle and a dummy similar to the size and weight of the plaintiff. In the first crash test, the dummy was belted with the same amount of slack the plaintiff claimed had been inadvertently introduced when she bent down to pick up her purse. After the crash, the dummy remained in her seat even with the slack in her shoulder belt. The second crash test used an unbelted dummy. After the crash, the unbelted dummy's buttocks were off the edge of the seat bottom just like the plaintiff's. Jurors could see how the plaintiff's version of events simply could not and did not happen. While an expensive and technical demonstrative exhibit, it was effective, and possibly the only way to expose the truth to the jury.

---

7. See *id.* at 639. Other functions of demonstrative aids include (1) "reinforc[ing] the spoken word," (2) organizing complex ideas, (3) "add[ing] authenticity," and (4) "build[ing] credibility." *Id.* at 627-28.

### III. OVERCOMING THE LEGAL HURDLES

All demonstrative exhibits need not be admitted into evidence. Exhibits used to aid in a witness' testimony will be made in the record via witness testimony.<sup>8</sup> "But if . . . using an exhibit to make [the] record, then it is essential to present the exhibit into evidence."<sup>9</sup> Because evidence rules do not distinguish between demonstrative exhibits offered into evidence and those that are not, the legal hurdles attorneys must overcome typically arise in either case.<sup>10</sup> The most important point to remember in assessing demonstrative exhibits, whether offered into evidence or not, is the judge's discretionary authority to admit or exclude the exhibit reigns supreme.<sup>11</sup>

#### A. The Exchange of Demonstrative Exhibits

The Federal Rules of Civil Procedure require the exchange of expert and non-expert demonstrative exhibits.<sup>12</sup> Accordingly, all three federal districts in Oklahoma generally require the exchange of demonstrative exhibits prior to trial. Courts in the Eastern District require the exchange date to be set in the Scheduling Order,<sup>13</sup> while courts in the Northern District require the parties to display demonstrative exhibits to each other at least forty-eight hours prior to trial,<sup>14</sup> although courts typically set a date in the Scheduling Order. The Western District does not have an explicit local rule regarding demonstrative exhibits, yet trial experience indicates pretrial disclosure is essential. Some courts in the Western District also specify in the Scheduling Order when counsel must exchange demonstrative exhibits. Regardless of the court, failure

8. See 3 GEORGE A. DAVIDSON & WILLIAM R. MAGUIRE, BUS. & COM. LIT. IN FED. CTS. § 36.10 (Robert L. Haig ed., 1998).

9. *Id.*

10. See *id.* For a discussion of the use of demonstrative evidence in settlement negotiations, discovery, motion practice, preparation of witnesses, and appeal, see Rychlak & Rychlak, *supra* note 2, at 512-27.

11. See FED. R. EVID. 611(a); OKLA. STAT. ANN. tit. 12, § 2611(A) (West 1998).

12. See FED. R. CIV. P. 26(a)(2)(B) (requiring the exchange of expert demonstrative evidence at the time the expert report is filed) and FED. R. CIV. P. 26(a)(3)(c) (providing that in the absence of a judicially directed final pretrial order, parties must exchange demonstrative exhibits thirty days prior to trial). The exchange of expert demonstrative evidence can present:

practical problem[s]: Most cases settle; jury-quality demonstrative exhibits are expensive; therefore, the exhibits are usually not prepared until well after expert reports are furnished.

Also, at the time expert reports are exchanged there have been no expert depositions (under Fed. R. Civ. P. 26(b)(4)(A), expert depositions may be taken only after all reports have been provided). Until that time—or, at a minimum, until all responsive expert reports have been served—not all of the issues have crystallized and not all potentially necessary exhibits can be prepared.

Gregory P. Joseph, *Federal Practice: Expert-Related Rules*, NAT'L L.J., Jan. 11, 1999, at B13.

Parties can overcome these difficulties by dealing with them through pretrial motions, the Scheduling Order, or stipulating the exchange of exhibits will be deferred to the time of the pretrial order in lieu of F.R.C.P. 26(a)(2)(B). See *id.*

13. See E. DIST. OKLA. LOC. RUL. 16.1(B)(11).

14. See N. DIST. OKLA. LOC. RUL. 16.2(Q). "All demonstrative aids, exhibits, and summaries intended to be used for any purpose at trial shall be displayed to opposing counsel at least 48 hours in advance of trial." *Id.*

to disclose exhibits may result in automatic exclusion of the undisclosed evidence.<sup>15</sup>

Neither the Oklahoma District Court Rules nor the Rules for the Fourteenth District (Tulsa) discuss the exchange of demonstrative exhibits prior to trial. Even so, pretrial disclosure avoids a claim of unfair surprise.

### B. Judicial Discretion

Courts are vested with broad discretion to permit or exclude demonstrative exhibits at trial.<sup>16</sup> The trial court's discretionary authority is grounded in statute.<sup>17</sup> In federal court, F.R.E. 611(a) sets the standard for the use of demonstrative evidence, stating:

Control by court. 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, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.<sup>18</sup>

Oklahoma statute § 2611(A) uses wording similar to the federal rule.<sup>19</sup>

In keeping with Rule 611(a) and § 2611(A), a court has the duty of determining whether the demonstrative evidence accurately reflects the evidence presented.<sup>20</sup> The Tenth Circuit has held courts should give appropriate instructions when admitting demonstrative exhibits into evidence.<sup>21</sup> Such instruction may lessen the prejudice of demonstrative evidence if the court alerts or instructs the jury regarding perceived inaccuracies.<sup>22</sup> Of course, the court always retains the power to exclude demonstrative evidence if its prejudice outweighs its usefulness to the jury.<sup>23</sup>

Many judges recognize the necessity of demonstrative exhibits, finding that

15. See FED. R. CIV. P. 37(c)(1); see, e.g., *United Phosphorus v. Midland Fumigant*, 173 F.R.D. 675, 677 (D. Kan. 1997) (excluding undisclosed exhibits) (cited in Joseph, *supra* note 12, at B13). Rule 37(c)(1) will not apply if the parties can show "substantial justification." FED. R. CIV. P. 37(c)(1). In deciding if there is "substantial justification," courts generally consider whether the failure to disclosure was in good faith, whether disclosure was within the disclosing parties control, and whether the demonstrative evidence will present unfair surprise. See Joseph, *supra* note 12, at B13.

16. See *McEwen v. City of Norman*, 926 F.2d 1539, 1552 (10th Cir. 1991) (holding trial court did not err in allowing short reenactments of plaintiff's witnesses' testimony). For Oklahoma state court, see OKLA. STAT. ANN. tit. 12, § 2611(A) (West 1998) Evidence Subcomm. Note. "Section 611(A) dealing with the control by the judge of the mode of interrogation of witnesses puts the matter in the discretion of the trial court." *Id.*

17. See OKLA. STAT. ANN. tit. 12, § 2611(A) (West 1998); see also *Carroll v. State*, 347 P.2d 812 (1959).

18. FED. R. EVID. 611(a).

19. See OKLA. STAT. ANN. tit. 12, § 2611(A) (West 1998).

20. See *Wilson v. United States*, 350 F.2d 901, 907-08 (10th Cir. 1965); see also *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir. 1988).

21. See *Wilson*, 350 F.2d at 907-08 (holding no reversible error in allowing demonstrative exhibits when plaintiff did not request any cautionary instructions, but warning "it would be proper to give appropriate instructions defining the use of . . . charts when received into evidence").

22. See *United States v. Rengifo*, 789 F.2d 975, 982-83 (1986).

23. See *United States v. Holton*, 116 F.3d 1536, 1542 (D.C. Cir. 1997), *cert. denied*, 118 S. Ct. 736 (1998) (excluding audiotape transcript, because it did not enhance the jurors' understanding of the tape recording).

"such summaries are useful and oftentimes essential . . . to expedite trials and to aid juries in recalling the testimony of witnesses."<sup>24</sup> "Judges do not hesitate to admit [demonstrative exhibits] that are substantially accurate and helpful to the factfinder . . . ."<sup>25</sup> However, attorneys may overcome any reluctance to allow demonstrative exhibits by following a few guidelines:

- ▶ Ensure the demonstrative exhibit accurately reflects the evidence.
- ▶ Conform the presentation to match the court's desires and expectations. Know the likes and dislikes of the judge, the courtroom deputy, and the bailiff in the court in which the case is to be tried. If possible, ask the courtroom deputy about the general attitude of the judge toward demonstrative exhibits.
- ▶ Know the physical limitations of the courtroom. If using a demonstrative exhibit requiring an extensive set-up, find out well in advance exactly what will be needed to make it work smoothly and properly.
- ▶ Set up the demonstrative exhibit before court is in session. The judge is more likely to permit the use of a demonstrative exhibit if its use appears effortless and unobtrusive.
- ▶ Practice using the demonstrative exhibit several times. Anticipate possible failures or problems and have appropriate back-ups available.
- ▶ Plan at least one alternative to present the evidence if the judge decides a demonstrative exhibit cannot be used or can only be used in a limited way.

### C. Introducing Demonstrative Evidence

Demonstrative evidence may be presented, but not necessarily introduced into evidence, by any witness to demonstrate his or her testimony.<sup>26</sup> Generally speaking,

24. *Speier v. Webster College*, 616 S.W.2d 617, 618-9 (Tex. 1981); see also *United Int'l Holdings, Inc. v. The Wharf, Ltd.*, 174 F.R.D. 479, 483 (D. Colo. 1997) (holding "demonstrative exhibits . . . aided jury understanding of the voluminous and complex evidence presented, and that those exhibits were necessary to the case and not 'merely illustrative' of expert testimony").

25. Gregory P. Joseph, *Demonstrative Evidence*, 473 PRAC. L. INST. LITIG. 31, 47 (1993).

26. Evidence rules apply equally to both introduced and non-introduced demonstrative exhibits. See Davidson & Maguire, *supra* note 8. "The Federal Rules of Evidence do not distinguish between 'demonstrative exhibits' and 'illustrative aids' or, for that matter, 'visual aids.' Although such tools are increasingly accepted and even encouraged, practice still varies as to whether such tools can be used in opening statements, or provided to the jury during deliberations." *Id.* Interestingly, in *Oklahoma* audio and video exhibits admitted into evidence and not considered testimony are properly received by the jury during deliberations. See, e.g., *Cleary v. State*, 942 P.2d 736, 744 (1997) (holding videotaped confession admitted into evidence and given to jury during deliberations did not constitute reversible error); *Al-Mosawi v. State*, 929 P.2d 270, 284 (1996) (holding audiotape did not constitute testimony of a witness therefore allowable to jury during deliberations).

however, expert witnesses are used when the demonstrative evidence compiles evidence or testimony from more than one source or witness.<sup>27</sup> For example, an expert witness who is testifying regarding the extent of a plaintiff's injuries may create a demonstrative exhibit that illustrates facts gleaned from the plaintiff's testimony and medical records, and the testimony of the plaintiff's treating physician. A lay witness might use a diagram of a scene to establish where particular parties were located at the time of an accident. For whatever purpose, the introduction of demonstrative evidence, must satisfy general evidentiary requirements.<sup>28</sup>

**Foundation.** The foundation required depends upon the type of demonstrative evidence to be introduced. A detailed foundation (which should be prepared in advance) is required for computer simulations.<sup>29</sup> However, demonstrative evidence, such as videotapes, needs only portray fairly and accurately the material presented.<sup>30</sup>

**Relevancy.** The demonstrative exhibit must tend to make the existence of some fact at issue more or less probable.<sup>31</sup> One test of relevancy is to determine whether it would be appropriate for the trier of fact to view, in person, the subject matter depicted. If a personal viewing of the subject matter is appropriate, the demonstrative exhibit is likely relevant.<sup>32</sup>

**Other criteria.** Like any other evidence, a demonstrative exhibit will be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion, a propensity to mislead, or repetition.<sup>33</sup> Potential prejudice or confusion concerns may be resolved if the court gives a cautionary jury instruction and affords opposing counsel ample latitude on cross-examination.<sup>34</sup> The rule against hearsay<sup>35</sup> and the standards for expert testimony<sup>36</sup> must also be satisfied if applicable to a particular demonstrative exhibit.

#### D. Taxing the Costs of Demonstrative Exhibits

Because demonstrative exhibits can be costly, attorneys in federal practice should be aware the costs of demonstrative exhibits may be taxed. Under 28 U.S.C.

27. For an interesting discussion of one attorney's suggestions of using an easel pad to highlight, outline, or show contradictions in lay witness testimony, see Savage, *supra* note 2, at 18.

28. See generally FED. R. EVID. Some demonstrative exhibits may be offered as summaries. See FED. R. EVID. 1006; OKLA. STAT. ANN. tit. 12, § 3006 (West 1998).

29. See FED. R. EVID. 901; OKLA. STAT. ANN. tit. 12, § 2901 (West 1998).

30. See GREGORY P. JOSEPH, MODERN VISUAL EVIDENCE § 4.02.

31. See FED. R. EVID. 401; OKLA. STAT. ANN. tit. 12, § 2401 (West 1998).

32. See JOSEPH, *supra* note 30, at 4-5.

33. See FED. R. EVID. 403; OKLA. STAT. ANN. tit. 12, § 2403 (West 1998).

34. See JOSEPH, *supra* note 30, at 47.

35. See FED. R. EVID. 801-02. F.R.E. 801 defines "hearsay" 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." F.R.E. 802 provides in pertinent part: "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

36. See FED. R. EVID. 702. Expert testimony is limited to that allowed under F.R.E. 702 as follows: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

§ 1920(4), the judge or clerk has the authority to tax the costs of "[f]ees for exemplification and copies of papers necessarily obtained for use in the case . . . ."<sup>37</sup> As the language of the rule indicates, the exemplification must be necessary to the case.<sup>38</sup> One commentator asserts "[t]he basic test . . . is whether the 'exemplification' was helpful to the finder of fact in light of the length of the trial, the complexity of the issues and the nature of the evidence."<sup>39</sup> However, courts in the Tenth Circuit have only allowed taxation of costs when it is essential to the case.<sup>40</sup> Further, courts often require "litigants to obtain authorization [from the court] before incurring great expense for exemplification."<sup>41</sup>

#### IV. PREPARING DEMONSTRATIVE EXHIBITS FOR TRIAL

Demonstrative evidence may be used in any trial from the simplest to the most complex. To determine whether to use demonstrative evidence and how to prepare it, practitioners should engage in the following analysis.

**Step One:** Determine what evidence is critical to presenting the client's case as well as undercutting the opposing party's case.

**Step Two:** Decide whether a demonstrative exhibit would assist the jury in understanding the critical evidence.

- ▶ **Will it add credibility?** Is the proposed exhibit accurately based upon direct evidence? Recall the Microsoft antitrust lawsuit in which the government was able to show a computer simulation did not use the computer program under scrutiny.<sup>42</sup>
- ▶ **Will a demonstrative exhibit enhance the jury's understanding and acceptance of the case?** Test the proposed exhibit on a non-lawyer who is unfamiliar with the subject matter of the lawsuit. Does it set out critical but potentially confusing information, such as dates, in an orderly and easy-to-understand fashion?
- ▶ **Will any of the jurors find the demonstrative exhibits distracting?** Too

37. 28 U.S.C. § 1920(4) (1994); see also F.R.C.P. 54(d)(1) (authorizing the taxation of costs to the prevailing party as the court shall direct).

38. See *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 878 F. Supp. 1417 (D. Kan. 1995). "[T]he court is unconvinced these expenses were necessary as opposed to merely illustrative of expert testimony . . . ." *Id.* at 1428.

39. Joseph, *supra* note 25, at 52.

40. Compare *Manildra Milling Corp.*, 878 F. Supp. at 1428 (holding demonstrative exhibits were merely illustrative and not necessary) and *Vornado Air Circulation Systems v. Duracraft Corp.*, 1995 WL 794070, at \*3 (D. Kan., Nov. 29, 1995) (holding while demonstrative exhibits were helpful, they were not necessary to prevailing party's case) with *United Int'l Holdings, Inc. v. The Wharf, Ltd.*, 174 F.R.D. 479, 484 (D. Colo. 1997) (holding demonstrative evidence was properly taxed as it was necessary to the case) and *In re Air Crash Disaster v. Continental Airlines* 1989 WL 259995, at \*4 (D. Colo., July 24, 1984) (holding demonstrative exhibit was a "useful device for translating . . . information to a form which could readily be understood by the jury," thus necessary and taxable).

41. *Manildra Milling Corp.*, 878 F. Supp. at 1428.

42. See *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995).

much information may overwhelm a jury; a juror may focus on a fairly insignificant detail. A demonstrative exhibit that remains in the courtroom may distract jurors from live testimony.

- ▶ **Is it worth the cost?** Evaluate the proposed exhibit to decide if the same point can be made as effectively through testimony, other direct evidence, or less elaborate demonstrative exhibits.

**Step Three:** Determine the most effective demonstrative exhibit. It should be designed to grab the attention of the trier of fact.<sup>43</sup> Keep the following factors in mind when creating an exhibit:

- ▶ **Intensity:** Jurors' eyes are drawn automatically to the brightest lights, the brightest colors, and the loudest noises in the courtroom.
- ▶ **Repetition:** Repeat key words, phrases, and sounds to attract the jury's attention.
- ▶ **Novelty:** Jurors' minds are captivated by anything strange or new. However, be careful not to demean courtroom decorum.
- ▶ **Relevance:** If possible, connect the demonstrative aid to something relevant in the jurors' lives.
- ▶ **Size:** Make sure the jury can easily see what is being illustrated.

Following are a few other concerns worth consideration:

- ▶ **Keep the exhibit simple and avoid information overload.** Because a jury has only a short time period to learn and digest information, the more complicated the exhibit, the more likely a jury will miss its significance.
- ▶ **Conform the demonstrative exhibit to the audience.** A slick exhibit may do as much harm as good before the wrong audience. For example, a simple case in a rural jurisdiction probably does not need an expensive exhibit. Conversely, complex cases involving substantial damages may deserve demonstrative exhibits requiring more technology and expense.
- ▶ **Make the exhibit as flexible as possible.** An exhibit or demonstration may backfire if there is little room to adjust it to the testimony or evidence that is actually presented at trial.

---

43. See *CHILDRESS*, *supra* note 1, at 627.

- ▶ **Ensure the attorney is comfortable using the exhibit.** Even the most spectacular exhibit will be ineffective if the attorney cannot master its use.

**Step Four:** Determine whether the exhibit will match the evidentiary requirements. Prepare an outline in advance to argue for the exhibit's use during trial.

**Step Five:** Have an alternative prepared if the exhibit cannot be used at trial.

## V. RECENT TECHNOLOGY

Computer and video technology are now being used in nearly every major trial in America. Technology provides an organized and persuasive means to present a wide variety of different evidence and theories. For attorneys wishing to visually present evidence at trial, there are several new types of technology available. Following is a summary of three of the most commonly used technologies.

### A. Visual Presenter

Most jurors are familiar with either the DOAR™ System or the ELMO™ System<sup>44</sup> from the O.J. Simpson trial. Each system is actually a video camera on an extendible arm. The visual presenter is used by simply placing physical evidence (such as documents, photos, or even x-rays negatives) on a display surface. The physical evidence is then projected onto a television screen for easy viewing by the jury. A visual presenter can zoom in on an exact portion of physical evidence and highlight key phrases in color. "Wireless" systems are available which reduce the amount of wires running between the presenter and the televisions.

A visual presenter allows the jury to focus on physical evidence as it is being discussed. It is particularly useful in impeaching a witness with prior testimony. Jurors are used to watching television, and like other demonstrative exhibits, a video presenter gives them something to observe.<sup>45</sup> A visual presenter can also import video from a VCR or camcorder allowing the attorney to switch back and forth from videotapes to other types of physical evidence.

While a visual presentation is an effective method of displaying evidence, it is not ideal for all types of evidence. Documents with small text and wide margins will not be as readable as a full page on a video screen. There is also the "fumble factor." Wasted time can result in losing the jury's attention by looking for the document, fumbling around to focus the camera, and zooming in on the pertinent portion of the document. Additionally, courts may require more than one television monitor which

44. Both the DOAR™ and the ELMO™ visual presentation systems can be obtained for approximately \$15,000.00 and are available at a number of electronic device dealers.

45. *But see Savage, supra* note 2, at 19 (positing "most of us have become accustomed to falling asleep in front of a television set . . . different sized blowups of documents . . . may actually keep the jury's attention better than utilizing televised representations of these exhibits.").

makes set-up somewhat cumbersome. Finally, the set-up time may take half an hour or more depending on the physical limitations of the courtroom.

### *B. Presentation Software*

Presentation software programs such as Microsoft's PowerPoint<sup>TM46</sup> or Corel Presentations<sup>TM</sup> allow attorneys to present images of evidence through a projector onto a screen. Documents, photos, or videotapes are scanned into the computer program. Using a slide application, images are created and edited. Attorneys navigate with a remote control from one screen image to another or highlight pertinent portions of the document. Presentation software can also generate overhead transparencies of the "slides" as a backup in the event of a technical problem with the program. Presentation software provides the flexibility to make overnight changes, that cannot be accomplished with a "hard copy" display board. However, editing the presentation requires computer proficiency.

### *C. Document Manager*

Document manager programs such as Summation<sup>TM47</sup> or Trial Director<sup>TM48</sup> scan images of handwritten or typewritten documents into a computerized filing system. Each page of a document becomes a separate electronic "document." Using a scanner wand, documents are instantly displayed on a computer or television monitor. Abstracts of critical information from each document may be created and linked to the document. Such programs are equipped with an integrated full text search-and-retrieval tool. By zooming into a specific portion of a document for closer viewing by the jury, important points can be circled, underlined, or highlighted with a pointer. The document manager is easily installed into most computers. It is particularly useful in document-intensive cases by vastly reducing the amount of paper to manage, document managers allow immediate access to specific items needed for an effective presentation. However, to learn how the document manager works and to use it to its fullest potential requires patience and some computer literacy.

## VI. CONCLUSION

A trial lawyer has the duty to present evidence in a professional and accurate manner. It is the trial lawyer's challenge to make that presentation interesting and exciting. We live in the era of highly publicized trials that whet the appetite of potential jurors to be "wowed" by interesting and exciting presentations of evidence.

---

46. Power Point<sup>TM</sup> is a component of Microsoft Office<sup>TM</sup>, which retails for approximately \$300 to \$400 and is available for purchase at most computer outlets selling Microsoft products or from Microsoft directly.

47. Summation<sup>TM</sup> retails for \$2000.00 for a single user license and \$4000.00 for a network package.

48. Trial Director<sup>TM</sup> for approximately \$1000.00. Both Summation<sup>TM</sup> and Trial Director<sup>TM</sup> are available various vendors who advertise in national legal magazines and newspapers.

The experienced trial lawyer knows that the challenges posed by those frequently unrealistic expectations are difficult.

Demonstrative exhibits help trial lawyers meet those challenges. In using demonstrative exhibits, the trial lawyer must ensure that the demonstrative exhibits are not only affordable and appropriate, but most importantly, are acceptable to the court. By thinking through the evidence and using innovative ways to make the evidence not only clear, concise, and interesting, but also exciting and persuasive, attorneys using demonstrative exhibits can increase the possibility of a verdict in their favor.