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Making the Most of Demonstrative Evidence
in the 21st Century

James E. Doyle American Inn of Court

October 17, 2008

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Demonstrative Evidence:

Physical evidence that one can see and inspect (such as a model or photograph) and that, while of probative value and usually offered to clarify testimony, did not play a direct part in the incident in question.

Why Use Demonstrative Evidence? Practical Reasons and Social Science Implications.

Lori Hickman – Dewitt Ross & Stevens, S.C.

I. Grab the Jury's Attention

II. Teach the Jury

A. Different Presentation Modality Preferences: Auditory vs. Visual.

1. Individuals learn more quickly and retain more information when that information is presented in the preferred mode or in dual modes. (David Prabu and Elliot Hirshman, *Dual-mode presentation and its effect on implicit and explicit memory*. AMERICAN JOURNAL OF PSYCHOLOGY 111, 77 (1998); Lisa M. Korenman and Zehra F. Peynircioglu, *Individual Differences in Learning and Remembering Music*, JOURNAL OF RESEARCH IN MUSIC EDUCATION, 55, 48-64 (2007)).

B. Demonstrative evidence allows us to:

1. Tailor the presentation of evidence to multiple learning styles
2. Increase retention of important information by the jury
3. Break down/explain complex or technical information to assist comprehension
4. Recreate an event or occurrence
5. Summarize key points, events or dates

III. Persuade the jury

Back to the Basics: Evidence Rules Overview

Claudia Lombardo – UW Law Student

I. Statute governing the Exclusion of (Demonstrative) Evidence

- A. Wisconsin: Wis. Stat. § 904.03 allows for the exclusion of otherwise relevant evidence 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.
- B. Federal Rule: Rule 403: Although relevant, evidence may be excluded 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.

II. Basic Rules of Admissibility

- A. Wisconsin
 1. The determination as to whether to allow demonstrative evidence to be presented to the jury rests primarily with the trial court. (*Hernke v. Northern Ins. Co.*, 20 Wis. 2d 352, 359, 122 N.W.2d 395 (1963)).
 2. The trial court's decision will be affirmed so long as "the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach (*Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982)).
 3. Demonstrative evidence, whether a model, a chart, a photograph, a view, or a duplicate (of an item believed to have been stolen in the commission of a crime) is used simply to lend clarity and interest to oral testimony (*Anderson v. State*, 66 Wis. 2d 233, 248, 223 N.W.2d 879 (1974)).
 4. Demonstrative evidence does not have to exactly replicate the circumstances at issue, but rather be sufficiently similar such that a jury can get a view of the issues involved (*Maskrey v. Volkswagenwerk Aktiengesellschaft*, 125 Wis. 2d 145, 370 N.W.2d 815 (Ct. App. 1985)).
 5. All that is necessary is a witness, who need not be an expert, to testify based on personal knowledge that the demonstrative evidence is a fair and accurate representation of what is depicted (*State v. Peterson*, 222 Wis.2d 449, 588 N.W.2d 84 (Ct. App. 1998)).

B. 7th Circuit

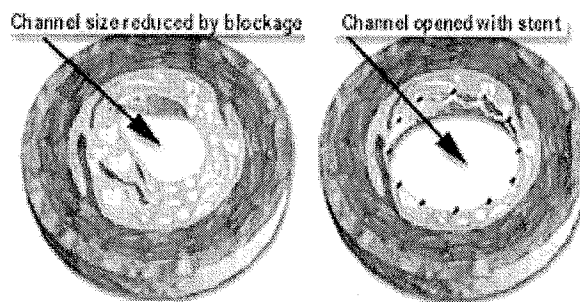
1. The decision to allow demonstrative aids rests in the discretion of the district judge. Judge did not abuse discretion by admitting “into evidence a scale model of the crime scene, which the jury was permitted to examine during its deliberations.” *United States v. Salerno*, 108 F.3d 730, 742 (7th Cir. 1997).
2. The court permitted screen names to be converted to real names on computer chat logs which were used as demonstrative evidence. “In *Salerno*, we upheld the district judge's decision to admit into evidence a scale model of a crime scene and to allow the model to be brought into the deliberation room. (citation omitted). We see no reason not to extend the logic of allowing models, maps, sketches, and diagrams to incorporate these particular chat excerpts as well.” *U.S. v. Burt*, 06-3415 (7th Cir. 7-26-2007)
3. A district judge did not abuse his discretion by admitting a gun and ski mask as evidence in a bank robbery case. The “district judge reduced any unfairness that might have devolved upon Towns by explicitly instructing the jury that as to the bank robbery, the gun and the ski mask were admitted into evidence for the limited demonstrative purpose of providing examples of the gun and ski mask that were actually used in the robbery.” *U.S. v. Towns*, 913 F.2d 434 (7th Cir. 1990)

Cartoons in Court - Court Treatment of Demonstrative Evidence Issues in *Roy v. St. Lukes Medical Center*

Byron Lichstein – UW Faculty

I. Summary of facts

- A. Dr. administering angiogram to patient
- B. Patient has pre-existing stent in her artery



- C. During procedure, Dr. displaces patient's stent; patient claims Dr. was negligent in doing so
- D. Negligence turns on whether stent had fully grown into wall of patient's artery. If it had, it would have put up enough resistance such that Dr. should not have kept going with the angiogram when he hit the resistance. If stent hadn't grown into the vessel wall, it wouldn't have put up enough resistance such that Dr. should have known to stop.
- E. Dr.'s expert witness makes animation depicting the parties' theories of how the stent looked before it was displaced. Trial court lets it in.
- F. Jury finds Dr. not negligent

II. Issue: Was the animation admissible?

- A. Patient's arguments and CoA's holdings (Dist. I, Judge Curley)
 - 1. Unfair surprise: not disclosed until Day 5 of 8-day trial
 - a. CoA: Patient never requested continuance, and doesn't explain how evidence would have been any different if animation had been provided earlier.
 - 2. Lack of foundation: expert witness who made the animation didn't see how far the actual stent was grown into the vessel wall and didn't conduct

the procedure, so he had insufficient personal knowledge to make the animation.

a. CoA: witness who made the animation need not have conducted the actual procedure; expert witness can testify to possibilities about what happened, and can clarify w/animation.

3. Animation doesn't accurately represent testimony. Animation makes it look like the stent hadn't grown into the vessel wall at all, when in fact Dr.'s own expert acknowledged that it had partially grown in.

a. CoA: Demonstrative evidence need not be exact representation of testimony. Cure for inaccuracies in animation was CX, not inadmissibility.

Discussion of the Mechanics of Securing Admission of Demonstrative Exhibits

Nathan Curry – Kopp, McKichan, Geyer, Skemp & Stombaugh, LLP
Wade Harrison – Godfrey & Kahn, S.C.

- I. Get ruling on the fly.
- II. Stipulate to admissibility.
- III. Get an advance ruling with a Motion in Limine.

The purpose of the motion in limine is to obtain an advance ruling on admissibility of certain evidence.¹ The motion seeks to avoid injection into trial of irrelevant, inadmissible, or prejudicial evidence at any point, including the voir dire examination, opening statements, and direct and cross-examinations and therefore preventing mistrials based on evidentiary irregularities. The use of the motion in limine has expanded from its original use for suppressing prejudicial evidence to obtaining a ruling on admissibility generally.² For instance, a party may move to admit certain evidence by a motion in limine. Although the Wisconsin Statutes do not expressly recognize the motion in limine, it has been judicially noticed that its use is common in this state and in many jurisdictions.³

A motion in limine is proper where (1) the trial court has directed that the evidentiary issue be resolved before trial; (2) the evidentiary material is highly prejudicial or inflammatory and would risk a mistrial if not previously addressed by the trial court; (3) the evidentiary issue is significant and unresolved under existing law; (4) the evidentiary issue involves a significant number of witnesses or a substantial volume of material making it more economical to have the issue resolved in advance of trial so as to save the time and resources of all concerned; or (5) a party does not wish to object to the evidence in the presence of the jury and thereby preserves the issue for appellate review by obtaining an unfavorable ruling via a pretrial motion in limine.⁴

The court may grant the motion, it may deny the motion, or it may defer its ruling until the trial.⁵ Typically, making a motion in limine, without objecting at trial, preserves a party's right to appeal that issue.⁶ However, when the court defers its ruling, the party must object at trial.⁷ If a motion in limine is granted and an attorney violates it at trial, the opposing party

¹ State v. Horn, 139 Wis.2d 473, 488 n. 8, 407 N.W.2d 854 (1987).

² State v. Wright, 268 Wis.2d 694, 673 N.W.2d 386 (2003).

³ See id.

⁴ See State v. Bergeron, 162 Wis.2d 521, 528-29, 470 N.W.2d 322 (Ct.App.1991).

⁵ See Blinka, Wisconsin Practice: Evidence 2d § 103.3.

⁶ See Bergeron, 162 Wis.2d at 528, 470 N.W.2d at 324.

⁷ See id.

should move for a mistrial.⁸ Even though it may not be granted, a motion for mistrial should be made to preserve the issue for possible appeal.

IV. Overcoming an adverse ruling on a demonstrative exhibit.

⁸ See Gainer v. Koewler, 200 Wis.2d 113, 119, 546 N.W.2d 474, 477 (App.), rev. denied, 205 Wis.2d 134, 555 N.W.2d 814 (1996) (denying a motion for mistrial based on violation of a motion in limine, because improper evidence was not prejudicial, questioning attorney committed violation only once, and witness's credibility balanced out improper evidence).

Demonstrations of Demonstrative Evidence

I. Jim Peterson – Godfrey and Kahn, S.C.

- A. Liar, Liar, Pants on Fire: The Use of a Reconstruction to Support Witness Testimony in a Fire Negligence Case

II. Karen Gallagher - Coyne, Schultz, Becker & Bauer, S.C

- A. Recreating the Scene of the Incident: Use of Computer Animation in a Medical Malpractice Case.

III. David Relles - Relles, Long & Milliken, LLP

- A. Making Lemons Into Lemonade: Transforming Illegible Handwritten Notes into Compelling Trial Evidence.

