



## Feature Article

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# Essentials of Demonstrative Evidence

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Presentation of evidence at trial is constantly evolving. In this digital age, the use of visual aids and visual communication is critical in helping the jury understand the issues it must decide. The trial attorney who presents his case without effective and persuasive demonstrative evidence runs the risk of the jury not understanding the themes he has presented at trial. A thorough understanding of the use of demonstrative evidence and the necessary evidentiary foundations is essential.

## Overview of Demonstrative Evidence

### Definition of Demonstrative Evidence

A picture is worth a thousand words is an old cliché. Visual aides to explain to, or educate, the jury are necessary tools to provide lasting impressions on the jury during its deliberations. Demonstrative evidence is evidence that appeals to the senses of sight, sound, or touch of the jurors. Demonstrative evidence is evidence that is not the actual or real piece of evidence, but is a representation or depiction of the actual or real piece of evidence. Trial Evidence, Second Edition, Thomas A. Mauet and Warren D. Wolfson, pp. 321 – 326, (2001).

### Significance of Demonstrative Evidence at Trial

Very few trials are simply won based on what testimonial evidence from the witness stand jurors hear. Demonstrative evidence provides an extra dimension to testimonial evidence, especially expert testimony. Moreover, demonstrative evidence often provides the cohesive context for the jury's understanding of how the testimonial evidence and real evidence (*e.g.* tangible objects) relate to the themes presented at trial, and to the issues the jury just decide. Persuasive and understandable demonstrative evidence, if presented properly at trial, will likely have positive and lasting impact on the jury.

## Purposes for Use of Demonstrative Evidence

In order to be effective, presentation of demonstrative evidence requires more than just hiring a trial graphics company and relying on retained expert witnesses to decide what exhibits will be created to tell your side of the story at trial. The overriding purpose for using demonstrative evidence is to assist the jury to understand the issues, especially the proponent's side of the case. Developing your "visual strategy" is just as important as developing your "theme strategy" for trial. These two strategies should be part of your cohesive trial strategy.

When developing the purpose for each aspect of your presentation of demonstrative evidence, the following factors should be considered:

1. What testimonial evidence will be enhanced by demonstrative exhibits?
2. What type of visual aids will be most effective in conveying the intended themes of the case at trial?
3. When would be the most appropriate time to introduce the demonstrative exhibits to the jury?
4. How will you present the demonstrative evidence to the jury (*e.g.*, models, charts, power points)?

Trial Techniques, Sixth Edition, Thomas A Mauet, pp. 217 – 220, (2002).

There are many types of demonstrative evidence. Demonstrative evidence can include photographs (*People v. Bounds*, 171 Ill. 2d 1, 47 (1995)); videotapes (*Barry v. Owens-Corning Fiberglas Corp.*, 282 Ill. App. 3d 199, 202 (1st Dist. 1996)); motion pictures (*Cisarik v. Palos Community Hospital*, 144 Ill. 2d 339, 342 (1991) (day-in-the-life film)); tape recordings (*People v. Williams*, 109 Ill. 2d 327, 337-38 (1985); *Finney v. Finney*, 256 Ill. App. 3d 424, 427 (1st Dist. 1993)); transcripts of tape recordings (*People v. Hunley*, 313 Ill. App. 3d 16, 37-38 (1st Dist. 2000) (transcript of 911 tape)); chart (*Schuler v. Mid-Central Cardiology*, 313 Ill. App. 3d 326, 337 (4th Dist. 2000) ("risk stratification" chart)); models (*Smith v. Ohio Oil Co.*, 10 Ill. App. 2d 67, 75 (4th Dist. 1956) (model skeletons; citing cases)); graphs and drawings (*Cisarik*, 144 Ill. 2d at 341 (characterizing these as demonstrative evidence)); experiments (*People v. Hayes*, 353 Ill. App. 3d 355, 357-60 (4th Dist. 2004) (having defendant walk in front of jury to show his limp)); and views (*Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 796-97 (4th Dist. 2002)).

Irrespective of the type of demonstrative evidence used at trial, the purposes for which the trial lawyer should use demonstrative evidence are:

1. To educate, describe, or explain themes, ideas, or concepts at trial;
2. To enhance or reinforce the testimonial evidence, especially expert testimony;
3. To persuade the jury to see why your case is based on commonsense, science, engineering, the physical evidence, or medical evidence;
4. To dissuade the jury from believing your opponent's themes or side of the case;
5. To create interest and keep the attention of the jury focused on your trial themes;
6. To create a lasting favorable impression in the collective minds of the jurors which they will remember during jury deliberation.

Mauet, pp. 217-220.

Only after consideration of *what demonstrative evidence will be used; when it will be used; and how it will be used*, will your “visual strategy” mesh with your “theme strategy” and provide a framework for an effective and persuasive overall trial strategy.

## Foundations for Demonstrative Evidence

### Foundational Requirements for Admission of Demonstrative Evidence

Demonstrative evidence has no substantive probative value in itself. *Cisarik*, 144 Ill. 2d at 341; *Stavrou v. Edward Health Services Corp.*, 2016 IL App (2d) 150002-U, ¶ 33. Instead, demonstrative evidence serves as a visual aide to the jury in comprehending the verbal testimony of a witness. *Spyrka v. County of Cook*, 366 Ill. App. 3d 156, 167 (1st Dist. 2006). The primary considerations in determining the admissibility of demonstrative evidence are relevancy and fairness. *See*, Ill. R. Evid. 401, 402, and 403; *Schuler*, 313 Ill. App. 3d at 337; *Sherman v. Cryns*, 203 Ill. 2d 264, 283-84 (2003). The admissibility of demonstrative evidence rests within the sound discretion of the trial judge. *Herman v. Will Twp.*, 284 Ill. App. 3d 53, 61 (3rd Dist. 1996). The trial court’s determination regarding the admissibility of demonstrative evidence will not be disturbed on appeal absent a clear abuse of discretion. *Herman*, 284 Ill. App. 3d at 62. As for relevancy, in order for the demonstrative evidence to be admissible, the demonstrative exhibit must actually be used to illustrate or explain the verbal testimony of a witness as to a matter that is relevant to the case in question. *See, Schuler*, 313 Ill. App. 3d at 337; *Spyrka*, 366 Ill. App. 3d at 167. Even if the relevancy test has been satisfied, demonstrative evidence may still be excluded by the trial judge if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *See*, Ill. R. Evid., 403; *Cisarik*, 144 Ill. 2d at 342. Given that demonstrative evidence has no probative value in itself, demonstrative exhibits should never be sent into the jury room during jury deliberations.

A proper foundation must be laid before a piece of demonstrative evidence can be admitted into evidence for demonstrative purposes and then published to the jury. The foundational requirements for admission of demonstrative exhibits are:

1. **Competent witness**—someone having personal knowledge of the demonstrative exhibit (*Cisarik*, 144 Ill. 2d at 342);
2. **Fair and accurate representation** —the demonstrative exhibit relates to a piece of admissible substantive evidence and fairly and accurately reflects or depicts that admissible substantive evidence (*Id.*);
3. **Assist the jury’s understanding of the issues**—the demonstrative exhibit will assist the jury to understand the testimony of the witness (or understand the issues raised at trial) (*Schuler*, 313 Ill. App. 3d at 337).

In addition to these foundational requirements, as previously stated, the relevancy of the demonstrative exhibit must be balanced against the potential for unfair prejudice, confusion, or misleading the jury. Courts look favorably upon the use of demonstrative evidence because it helps the jury understand the issues raised during the trial. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 30.

## Citations and Foundations for Demonstrative Evidence

The list of different types of demonstrative evidence evolves with technology. Below are the citations for admission of certain demonstrative exhibits as well as the evidentiary foundations for their admission.

### (a) Day-in-the-Life Video

A day-in-the-life film is a form of a motion picture or photograph. As such, it is admissible on the same basis as photographs. *Cisarik*, 144 Ill. 2d at 342. The foundation for a day-in-the-life demonstrative exhibit is as follows:

1. Witness has personal knowledge of the filmed object.
2. The film is an accurate portrayal of what it purports to show.
3. The film is only admissible if its probative value is not substantially outweighed by the danger of unfair prejudice.

### (b) Photographs

Photographs which illustrate the subject matter of testimony are admissible into evidence for the purpose of portraying a particular situation, explaining certain testimony, or enabling the jury to apply the testimony to the facts of the case. *Lawson v. Belt Railway Co. of Chicago*, 34 Ill. App. 3d 7, 26 (1st Dist. 1975). The foundation for photographs as demonstrative exhibits is:

1. Witness is familiar with the scene portrayed in the photograph;
2. Photograph fairly and accurately shows the scene as it appeared on the relevant date;
3. The probative value is not outweighed by prejudicial effect;
4. The photograph will assist the jury in understanding the testimony.

Photographs may be relevant to the issue of plaintiff's pain and suffering and arguably relevant to how plaintiff sustained his injuries. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 418 (1st Dist. 2005). The foundation for photographs depicting plaintiff's injuries is the same as stated above.

### (c) Video Animation

A video animation that shows plaintiff's theory of the case must include all relevant evidence even that contrary to plaintiff's theory. All evidence in the video must be in the record. If not, then the video animation is inadmissible. The foundation for admission of a video animation is as follows:

1. The data used by the expert to create the video animation and put into the computer programs was accurate;
2. The integrity of the data was preserved;

3. The data was accurately inputted into a properly working computer;
4. Computer software used to create the animation is based on accepted scientific methodology;
5. The animation accurately reflects how the event happened;
6. The animation will assist the jury in understanding or determining a fact in issue.

Without this foundation, a video animation is inadmissible. *See, Spyrka*, 366 Ill. App. 3d at 167-68 (1st Dist. 2006); *French v. City of Springfield*, 65 Ill. 2d 74, 81-82 (1976). Unlike a day-in-the-life film, a video animation is subject to disclosure prior to sixty days before trial pursuant to Illinois Supreme Court Rule 218. *Spyrka*, 366 Ill. App. 3d at 166.

#### (d) Experiments / Demonstrations

Conditions of an experiment or demonstration must be substantially similar to those it attempts to duplicate. *Galindo v. Riddell, Inc.*, 107 Ill. App. 3d 139 (3d Dist. 1982). Given the subject matter of this type of demonstrative evidence, laying a proper evidentiary foundation for the admission of an experiment is more complicated:

1. An expert witness possesses the necessary expertise to design and conduct an out-of-court experiment;
2. The expert witness must be qualified as an expert in his relevant field;
3. The expert witness relied on his personal knowledge or other sources of information regarding the facts;
4. After analyzing the accident, the expert witness identified the significant factors that would have to be duplicated in order to replicate the accident;
5. The expert witness describes how the experiment was designed to ensure that the experimental conditions were substantially similar to those that occurred at the time of the accident;
6. The expert witness conducted the experiment or supervised the experiment as it was conducted by others.
7. The experiment led to a particular outcome;
8. The videotape of the experiment will assist the jury in understanding the expert witnesses testimony. *See, Brennan v. Wisconsin Central Limited*, 227 Ill. App. 3d 1070, 1087 (2d Dist. 1992). However if the test or experiment is designed to test only one or two aspects directly related to the underlying event, exact duplication of the essential conditions is not necessary. *Id. See also, Brown v. Ford Motor Co.*, 306 Ill. App. 3d 314, 318 (1st Dist. 1999) and *Carrillo v. Ford Motor Co.*, 325 Ill. App. 3d 955, 967 (1st Dist. 2001).

#### (e) Models

Models may be used for demonstrative purposes to aid a witness in explaining his testimony about a piece of real evidence such as a machine. The foundation for a model is as follows:

1. The model is relevant;
2. The witness is familiar with the scene or object represented by the model;
3. The model is reasonably accurate or to scale;
4. The model will assist the jury in understanding the witnesses testimony.

Three-dimensional models may be admissible when the object at issue is unavailable or impracticable to be presented to the jury. The necessary foundation for a model is that it be an accurate representation and the foundation must be laid by a person who has personal knowledge of the object and can testify that the object is an accurate portrayal of what it purports to show. *Preston v. Simmons*, 321 Ill. App. 3d 789, 801-802 (1st Dist. 2001); *Ocasio-Morales v. Fulton Machine Co.*, 10 Ill. App. 3d 719 (1st Dist. 1973).

### Objections to Demonstrative Evidence

Illinois Rule of Evidence 403 codifies the authority of the trial court to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Thus, when ruling on the admissibility of demonstrative exhibits, the trial court will ask the following questions:

- Is the demonstrative exhibit relevant;
- Does the demonstrative exhibit result in unfair prejudice;
- Does the demonstrative exhibit mislead the jury;
- Does the demonstrative exhibit cause undue delay, waste of time, or needless presentation of cumulative evidence?

Thus, based on Rule 403 of the Illinois Rules of Evidence, objections to demonstrative exhibits include:

1. The evidence is immaterial or irrelevant;
2. The evidence will confuse the jury or mislead the jury;
3. The probative value of the demonstrative exhibit is outweighed by its potential for undue prejudice;
4. The demonstrative exhibit must be excluded because it is cumulative of other evidence.

### Conclusion

In sum, as courtrooms become more technologically advanced, the significance of demonstrative evidence will become increasingly important. Visual aids in the form of demonstrative exhibits are an integral part of the trial lawyer's presentation of evidence to the jury. The trial lawyer's visual strategy must comport with the major themes of the case for a cohesive and consistent trial strategy. A trial lawyer cannot rely on a graphics company or expert witness to prepare the demonstrative evidence. The trial lawyer must understand the evidentiary foundations required for admission of demonstrative evidence.

### About the Authors

**Hon. Donald J. O'Brien, Jr.**, graduated from Northwestern University School of Law, 1963. Judge O'Brien was a principal in the firm of *O'Brien, Redding and Hyde* for 27 years. He has 27 years of experience as a trial lawyer, including



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