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Demonstrative Evidence: Tell and Show

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In jury trials, talk is cheap. Eloquence may be enough to persuade TV audiences, but words alone rarely win verdicts. Jurors expect to be told *and* shown.

Well-crafted visual aids quench our thirst for visual information and allow counsel to persuade through demonstration. They also bring abstract evidence to life, inspire the jury's trust, and frequently motivate their verdict. Yet, these critical tools of persuasion are not used often enough. To be effective, we need to adopt a broader and more creative use of visual aids. After all, without demonstrative exhibits, it's all just talk.

In the age of instant messaging, smart TVs, and never-ending social media bombardment, most of us cannot endure the hardship of a five-minute wait in a grocery checkout line without clawing for our smartphones to provide visual stimulation. The digital age has conditioned all of us to assimilate more information simultaneously through visual and auditory cues.

The same is true for jurors. Their attention spans have become shorter, and they need and desire to be constantly educated and entertained by multimedia presentations.

Trial lawyers who accept this reality and engage jurors through demonstrative evidence will better connect with their audience. They will also be rewarded. In post-trial interviews, jurors frequently report that the most memorable or significant evidence was a demonstrative aid. Many jurors base their verdict largely on the visual exhibits presented.

Studies show why demonstrative exhibits are so effective. People who receive information in multiple formats will remember more information than those who learned by only auditory or visual cues. One study found that people who were both told *and* shown retained six times more information than those who were only told it. Those who learned the information both orally and visually retained it far longer.

Moreover, visual aids also instantly corroborate counsel's statements, enhancing their credibility. Trials are credibility contests. Jurors must determine which attorney is telling the more accurate story. As jurors listen to counsel, they are simultaneously attempting to determine whether the lawyers can be trusted. A visual depiction instantly corroborating counsel's message conditions the jury to trust counsel's statements and accept counsel's version of the factual dispute.

Visual aids also ensure your message is not lost in translation. Through descriptive language, attorneys try to convey a compelling narrative in the light most favorable to their client. But no two jurors ever hear the same closing argument. Even the best-told story leaves room for interpretation.

As jurors' minds race to fill in the gaps, they are left with their own interpretation of counsel's narrative, which necessarily differs in material respects from what counsel intended. We have all experienced this phenomenon when a favorite book gets turned into an awful movie.

Detailed graphics serve as additional cues for jurors to understand the precise message intended by counsel. Because most jurors make up their minds during opening statements, it is important to use demonstrative graphics as early and often as practicable during trial.

Demonstrative exhibits are also effective tools to emphasize a party's narrative. Trial counsel used the following graphic in a bellwether trial challenging an insurer's products:¹

The plaintiffs had purchased low-cost term life policies but demanded benefits provided only with more expensive insurance products. The defendant's counsel explained to the jury that those plaintiffs shouldn't get something for which they hadn't paid. Because the jurors weren't familiar with the differences among various life insurance products, counsel analogized the types of policies to automobiles.

The graphic likened the plaintiffs' term policy to a Toyota Corolla and a more expensive whole life policy to a Mercedes Benz. The images were immediately recognizable, resonated with the jurors, and attacked the plaintiffs' argument. Even jurors unfamiliar with life insurance policies understood the argument that it was unfair and unreasonable for those plaintiffs to expect "a Mercedes" when they paid for "a Corolla" instead.

Demonstrative exhibits can also make complex material easier to understand. Commercial trials frequently involve complicated subjects beyond the jury's ken. Complex financial transactions would be impossible to explain without a graphic aid.

Imagine, for example, trying to explain to a jury the financial transaction depicted in the graphic to the right (see #2).

The exhibit helped explain the relationship between the different entities involved in the complex transaction. It also allowed counsel to step through the transaction's multiple layers with the jury.

So what are demonstrative exhibits? Any visual aid or object that assists the trier of fact in understanding the evidence. The possibilities are limited only by trial counsel's creativity. Below are examples of demonstrative exhibits that were successfully used at trial.

Poster-size displays. Poster boards are excellent pedagogical tools that can be preferable to digital demonstratives. This is especially true in federal courts, where many judges require counsel to address the jury and witnesses from a lectern in the center of the courtroom. Those formalistic practices undermine counsel's ability to connect with the jury through body language and movement. Demonstrative exhibits can break the monotony.

By setting up a poster board or other large demonstrative exhibit closer to the jury, counsel can freely roam the makeshift stage between the lectern and the exhibit. During a long trial, counsel's movement can bring kinetic energy to the testimony, making the exchange more interesting and powerful.

Poster boards can also be an effective tool during witness examinations. Counsel can place the exhibit in the well and periodically ask the witness to step down from the stand and explain certain aspects of the exhibit. During examination, counsel can also step away from the lectern to address the witness or assist the witness by handling the exhibit. The resulting interaction between counsel and the witness will appear less formal and more genuine to the jury.

Digital demonstratives. Computer-aided graphics are excellent trial tools that have become more accessible to trial attorneys of all means. A well-crafted graphic can summarize hours of favorable testimony, simplify complex concepts, and highlight the deficiencies of an opponent's argument. Counsel used this visual aid to show why an inexpensive term life insurance policy did not produce dividends:³

She explained that dividends are allocated only for prime, higher-cost insurance products that create a surplus to draw from. Because the bargain-priced policy did not contribute to the surplus, no dividends would be allocated.

The demonstrative illustrated those concepts by showing numerous pipes contributing funds to the divisible surplus. The right portion of the graphic showed that three products, including the plaintiffs' T20G, did not contribute to the surplus. The graphic emphasized that plaintiffs can't get something for nothing.

An opponent's admissions speak volumes. Counsel can use them to argue that an important point is beyond dispute. They are also effective tools for impeachment. Prior admissions have been traditionally used while impeaching a witness who changes his or her story. But counsel should not miss an opportunity to set up critical impeachment earlier in the trial.

For example, when counsel has reason to believe his or her opponent will retract or change a prior admission, counsel should prime the jury in opening statement for the coming contradiction and should accredit the prior statement by explaining it was made in circumstances requiring the party to be truthful.

Counsel can then sardonically tell the jury, "We will expect the witness to testify consistently here because honest people do not change their story, simply because a jury is

present.” Foreshadowing future impeachment will highlight the contradiction and prevent an opponent from “taking the sting out” during direct examination.

Visual aids allow a lawyer to get full mileage from an opponent’s prior concession. Deposition testimony (through transcript or video) and discovery responses can be made into exhibits and shown to the jury. Telling *and* showing the jury the prior admission conveys its importance and ensures it will not be forgotten.

The same is true for opposing counsel’s statements during trial. While counsel’s statements are not evidence, an opponent’s misstatement or overpromise during opening statement is fertile ground for argument. A good trial lawyer should refer to the misstatements throughout trial during witnesses’ examinations, especially where an opponent’s witness disagrees with his or her own attorney’s opening statement.

Opposing counsel’s misstatements should also be highlighted during closing argument. Unfortunately, the impact of these arguments can be blunted by the jurors’ inability to recall the exact representations made earlier. A demonstrative exhibit that includes a transcript of opposing counsel’s statements will refresh the jurors’ memories and leverage the impact of the opponent’s blunder.

Re-creations. Re-creations can be effective tools to convey the proponent’s interpretation of a disputed event or condition. They are interesting and can make the evidence come alive for the jury. These exhibits range from expensive computer animations to a witness acting out a key event before the jury.

Live demonstrations have the greatest impact because they allow the jury to see and hear the experiment as it unfolds. But live re-creations also bring the highest risk of failure. Counsel should rehearse with the witnesses privately before attempting a live experiment to ensure the results will be favorable. Imagine what would have happened if the infamous glove *had* fit on O.J.’s hand.

When used in closing argument, re-creations can take a more aggressive interpretation of the evidence. The exhibit below was a visual re-creation of testimony about the dangerous and disruptive behavior of residents of unregulated sober living homes in family communities:⁴

While accurate, the exhibit is argumentative, and it may not have been admitted during the evidentiary portion of the trial. Because the exhibit was shown during closing argument, however, the court permitted its use (over objection).

Timelines. Timelines are an indispensable storytelling tool. They can help contextualize key events and underscore cause-and-effect relationships. They can also reinforce your client’s goodwill and reliability.

Consider this example: ⁵

It would be easy for an attorney to tell the jury that MassMutual has been a leader in the insurance industry for 167 years. But the chart *shows* the jury that MassMutual has been a reliable insurer that has had the country’s back without fail. The company has survived

through the worst of times and celebrated the best—all without missing a payment—for 167 years.

The demonstrative conveys a different, more meaningful message to the jury. Many will identify with events depicted in the timeline and develop an affinity for a company that has shared so much of the nation's history.

Easel pads and Elmo projectors. Most courts will have standard equipment allowing for the creation of visual aids in real time before the jury. While easel pads are not as visually appealing as a professionally designed exhibit, they should not be discounted. Trial counsel can highlight the importance of portions of a witness's testimony by writing them down before the jury. The evidence can then be called upon later in trial.

Because the jury was present during the creation of the aid, they will feel more invested in the related questioning or argument. They will also afford the exhibit's content greater credibility.

These simple but effective demonstratives can also be used while cross-examining a difficult witness. When a witness repeatedly refuses to answer a simple question, counsel can write down the question so the text is visible to both the jury and the witness. Counsel can then point to each word while slowly and deliberately reading the question.

As counsel works through the question, the suspense will build. The jury will hear *and* see the simplicity of the question. This technique will highlight the witness's defiance and allow the jury to see that the witness is responsible for the impasse.

Creative use of the courtroom. Some types of demonstrative evidence cost nothing. Counsel should use the courtroom as a tool to explain an event or condition to a jury. Witnesses should be encouraged to explain short distances by using a point of comparison in the courtroom.

Counsel can also use the courtroom to re-create an event while questioning the witness. In a recent case, trial counsel re-created a dangerous condition by using only the 10-by-10-foot area between the jury box and counsel table. The jurors were on the edge of their seats as counsel used the space to *show* the jury how the defective machinery made the catastrophic injury both foreseeable and avoidable. The jurors were so affected by the display that, as they retired for the day, they deliberately walked out of their way to avoid the imaginary danger re-created by counsel.

Maps. Most trials will involve some geographical component. Maps will assist counsel in explaining to the jury where a company is located or where an event happened. Maps can also be used more creatively to advance a proponent's argument.

In example below, numerous unregulated sober living homes were superimposed on a residential neighborhood: 6

Counsel could have used words alone to explain there were over one dozen sober living homes in a family community. But the demonstrative tells a more complete, emotional story.

The unregulated sober living homes can be seen next to family homes. Two were on one street. Three homes bordered an elementary school. The map helps jurors identify with the residents of the community in a way that words alone never could.

Numbers in graph form. Graphs are an excellent way to explain the relationship between two or more variables. 7

Numbers can be dry and uninteresting to anyone but a mathematician. The more numbers counsel throws at jurors, the less likely they will be to retain that information. Graphs allow the numbers to come alive and speak for themselves. They also allow counsel to highlight the most favorable variables to the jury.

Comparative graphics. Juries must choose between competing arguments or interpretations of evidence. Counsel's job is to explain to the jury why counsel's position is correct and the opponent's is not. Demonstrative aids are an excellent way of reducing these differences to a single graphic.

For example: 8

For maximum persuasiveness, the graphic should highlight the points that most undermine the opponent's position. This is especially true during closing arguments, where counsel has license to use more "argumentative" exhibits.

What are the requirements for using demonstrative exhibits at trial?

Courts have broad discretion to allow the use of demonstrative exhibits during all phases of trial. Opening statements are the first opportunity to address the jurors and shape their views of the case. Counsel should not miss this opportunity to show the jury favorable evidence.

By identifying specific evidence during opening statement, counsel will prime the jury for the material when they see it. They will be more likely to interpret the evidence consistently with the proponent's narrative.

Courts will allow counsel to use demonstrative exhibits during opening statement if the exhibits will be admitted. Counsel should, therefore, use exhibits that were not objected to (in jurisdictions requiring pretrial objections to exhibits) or that were the subject of a motion in limine that has already been decided. Most courts also require counsel to exchange any demonstratives to be used in opening statements on a date before trial.

Demonstrative exhibits are most frequently used during the evidentiary portion of trial. Most jurisdictions' rules of evidence separate demonstrative exhibits into two categories.

The first are summary exhibits used to condense the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court (see #9 on the next page). 9

Before this type of demonstrative exhibit can be admitted into evidence, counsel must establish that (1) the summarized material is voluminous and not easily presented to the

court, (2) the summary exhibit is an accurate compilation of the record it summarizes, (3) the underlying voluminous records are independently admissible, and (4) the underlying records were made available to opposing counsel for inspection.

The second category of demonstrative exhibit is used to explain evidence already admitted. Exhibits in this class are not admitted as substantive evidence and may not go to the jury room during deliberations. Parties, therefore, enjoy more latitude in presenting the evidence in a manner that favors the proponent's position. These exhibits may include a witness's conclusion or inferences drawn from other evidence.

Demonstratives used during the evidentiary portion of trial must be introduced by a sponsoring witness familiar with the exhibit. The witness should be prepared to explain that the exhibit would assist in explaining his or her testimony to the jury. The witness should also testify that the exhibit is a fair and accurate representation of what it purports to represent.

While it is preferable for the witness to oversee the construction of an exhibit, the witness must, at a minimum, be familiar with the exhibit and able to discuss its contents. The following is an example of a brief examination laying the foundation for a demonstrative exhibit.

Q: Mr. Smith, do you intend to testify regarding the profitability of distressed asset investments in 2002? . . .

Q: Would Exhibit 1 assist you in explaining your testimony to the jury? . . .

Q: Did you prepare Exhibit 1? . . .

Q: Is Exhibit 1 a fair and accurate summary of the previously admitted financial records relating to the distressed asset investments' profitability in 2002? . . .

Counsel: Move to admit Exhibit 1.

Some courts will be more reluctant to allow exhibits rooted in an expert's assumptions and opinions. They will require that those assumptions be independently admitted in evidence before the exhibit may be shown to the jury.

Demonstrative exhibits may also be used for the first time during closing argument. While no evidentiary hurdles need be cleared, counsel will still need to explain the exhibits, and their relevance, to the jury. Because these exhibits are used during argument, courts will allow more aggressively argumentative exhibits. Like exhibits used during other phases of trial, the exhibit will be prohibited if it is unfairly prejudicial or misleading.

How to create and prepare for using demonstrative exhibits?

Counsel should think of ways to use demonstrative exhibits well before trial. Isolate the most complex concepts in evidence and consider how they can be best explained by a visual aid. These matters will typically be the subject of expert testimony. Counsel should

work with the expert to develop charts, graphs, and other demonstratives that will appeal to the jury.

Other exhibits should be selected to highlight the strongest evidence and arguments. Counsel can draft a “top 10” list of the most favorable evidence and then develop one or more demonstrative exhibits to explain each piece of evidence in a compelling and appealing way.

Once the exhibits are developed, they should be tested with a mock jury. Question the jurors about their initial impressions of the aid. Ask them to explain the exhibit’s message, and ask whether that message is clear. Does the exhibit provide enough context? Are the details easy to read and comprehend? How can the exhibit better convey counsel’s intended message?

After selecting the exhibits, further preparation is still necessary to ensure they are used to greatest effect. Counsel should discuss exhibits with the sponsoring witness and confirm that the witness’s understanding of the exhibit follows his or her own. The witness should also view and handle the exhibit before trial to avoid any blunders before the jury.

Counsel should also practice with the exhibit in the courtroom. Most courts will allow attorneys to access the courtroom before trial. Even the most experienced litigators should take the court up on this offer. Every courtroom is different. Even “uniform” tech systems in the same courthouse have idiosyncratic differences that must be understood before trial.

After “demoing” the audiovisual equipment, counsel should sit in the jury box. Check the sight lines to ensure the exhibits, or screens showing them, are placed in an area easily viewed by every juror.

The effective use of visual aids can be a game changer at your next trial. They are essential tools of persuasion that engage the jury and convince by demonstration. The possibilities for demonstrative exhibits are limitless. Given the importance of visual aids, courts are inclined to permit them at all phases of trial. Well-designed and thoroughly prepared visual aids will ensure a smooth and compelling presentation that will captivate and convince the jury, and win your case.

Remember, as Aristotle wrote: “Persuasion is clearly a sort of demonstration, since we are most fully persuaded when we consider a thing to have been demonstrated.”

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