

Evidence Hot Topics and More

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Expert Opinions at Trial:
Evidence to use,
demonstrative, what and
how you have to prove it.

WHAT IS DEMONSTRATIVE EVIDENCE?

Demonstrative evidence is pretty much any evidence *other than testimony* that is presented during the course of a trial. Demonstrative evidence includes *actual* evidence such as hardware removed from a fracture site and *illustrative* evidence (e.g., photographs and charts showing the scene or injuries). Both types of demonstrative evidence are admissible depending on the foundation you lay.

The best way to get any important demonstratives into evidence is to produce them as early to the other side as possible. If you plan on having an exhibit that an expert uses to explain their testimony and theories, make sure to have it finished and provided with the expert for their deposition. This gives the other side the opportunity to ask about the exhibit, any assumptions made and other questions. Providing to the other side right before the expert is going to testify potentially raises a fairness issue for the opposing counsel that can be avoided.

If you plan to do an electronic opening statement (such as with PowerPoint and/or Keynote), make sure to provide all slides that have exhibits, diagrams or pictures to the other side long before the opening.

I like to file a *motion in limine* that asks for a ruling that all the attached diagrams, exhibits and evidence be allowed for use in Opening; then, I would attach all the opening statement slides to the motion.

I have been told by some attorneys that they have never been allowed to show evidence in an opening statement absent agreement and stipulation of opposing counsel (which is rarely given). However, if you provide demonstratives to the court early, for a timely determination of any real objection to the evidence at trial, then the perfunctory objections of opposing counsel may be overruled.

Evidence can be classified in two broad categories: “demonstrative evidence” and “substantive evidence.”

Demonstrative evidence is “that evidence addressed directly to the senses without intervention of testimony.” Such evidence includes real objects such as charts, graphs, videotape, and computer animation, which illustrate some verbal testimony. This type of evidence carries no independent probative value, and its primary purpose is to illustrate the testimony of a witness to help the jurors understand difficult factual issues.

While the same requirements for foundation and test for admissibility apply whether the demonstrative evidence is computer generated or not, courts also recognize a computer animation's dramatic effect and inherent potential to mislead or confuse the jury, and thus require prior proper disclosure and opportunity to object, often giving jurors cautionary instructions. In addition to compliance with prior disclosures regarding its intended use, computer-generated evidence must also be authenticated under Federal Rules of Evidence (FRE) 901 and 902, and it is subject to general evidentiary standards of relevancy under FRE 401 and 402 and fairness under FRE 403. New Jersey Rule of Evidence 1001(b) governs the use of photographs and videotapes. Our Courts will reject video, DVD or other simulations where their probative value is outweighed by their potential for undue prejudice under NJRE 403.

Untimely, disclosure to opposing counsel and to the court of the intent to use computer-generated exhibits will almost certainly result in their exclusion.

Most evidence requires a proper foundation, and proposing counsel must first establish the authenticity of the exhibit by evidence sufficient to support a finding that the matter in question is what it purports to be. This is accomplished by a witness who has personal knowledge of the exhibit's subject matter and testimony by that witness regarding the exhibit's accuracy.

Once the proper foundation is established, the exhibit must be shown to be relevant to a material issue in the case. All relevant evidence is admissible unless a statute or rule proscribes it. Highly relevant evidence will be excluded under Rule 403 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."

- By definition, demonstrative evidence is not offered for its truth, but rather is offered to illustrate or clarify substantive proof that is admissible. Consequently, the foundation necessary for demonstrative evidence is fairly basic. The main foundational elements necessary for the use of demonstrative evidence are:

- (a) the demonstrative exhibit relate to a piece of admissible substantive proof;
- (b) the item fairly and accurately reflects that substantive proof
- (c) the item is sufficiently explanatory or illustrative to be of potential help to the trier of fact.

- Demonstrative evidence must pass the three prong test: relevancy; materiality; and competency (FRE/ NJRE 401- 402).

- Demonstrative evidence must also meet foundational requirements for accuracy. Although these requirements differ depending on the type of exhibit used, the following requirements should be reviewed for each exhibit you plan to offer or exhibits offered by your opponent:

- (a) authentication -- the demonstrative evidence should convey what it is meant to convey. What it conveys must not alter, distort, or change the appearance or condition of something in any significant way. A computer enhanced photograph, for example, to make an accident scene look lighter than it actually was is probably inadmissible.

- (b) representational accuracy -- the demonstrative evidence should fairly and accurately depict the scale, dimensions, and contours of the underlying evidence.

- (c) identification -- the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated

- Note: During the process of laying the foundation for demonstrative evidence, the jury gets to look at the evidence. If an objection to the foundation is successful, the exhibit is taken down, but the impression remains on the minds of the jurors, even if the judge instructs the jury to disregard it. This is called jury view, and some attorneys consider it to have certain tactical advantages.

- The last general rule is that demonstrative evidence must pass an additional balancing test for relevancy -- the character and relevancy of the evidence is balanced against its potential for unfairly prejudicing, confusing, or misleading the jury. NJRE 403