



Making certain your demonstrative evidence is admitted

The steps you must take to be certain your often costly demonstrative evidence is presented to the jury

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Almost every client's story we tell in court can be more persuasively told with demonstrative evidence. The process of creating demonstrative evidence often helps us refocus our themes and analyze our case. Most important, if done well, demonstrative evidence can help anchor key elements of our case with an image in the minds of the jury.

Unfortunately, you can have the best looking demonstrative evidence, but if it does not come before the jury, it has no value and certainly is not worth all the money you spent having it created. In order to ensure that you get the demonstrative evidence in front of the jury, you must plan early and establish a proper foundation. In addition, you should prepare a trial brief that you can provide the court, when the defense objects, that establishes your ability to use the specific type of demonstrative evidence that you have prepared.

The case of *People v. Duenas* (2012) 55 Cal.4th 1, 21 highlights both the function of demonstrative evidence and the significant role that demonstrative evidence can play in how you tell your client's story to the jury. The *Duenas* case involved the criminal prosecution of Mr. Duenas who was charged with the first degree murder of a sheriff's deputy. In *Duenas*, the Supreme Court addressed the issue of what standard should be applied for the admissibility of animations that are used for demonstrative purposes to explain an expert's opinion. The Court stated:

As set forth above, a computer animation is not substantive evidence used to prove the facts of a case; rather it is demonstrative evidence used to help a

jury to understand substantive evidence. In a case like this one, where the animation illustrates expert testimony, the relevant question is not whether the animation represents the underlying events of the crime with indisputable accuracy, but whether the animation accurately represents the expert's opinion as to those events.

(*People v. Duenas* (2012) 55 Cal.4th 1, 21.)

After an Evidence Code section 402 hearing, the Court in *Duenas* permitted an animation that demonstrated certain pieces of evidence and principles of physics to illustrate the expert's opinion on how the incident/shooting occurred. Thereafter, the expert was permitted to show the video animation while explaining the expert's opinions to the jury.

The following is a list of categories that can be used as a checklist of possible demonstrative evidence to consider when preparing for trial in a personal injury matter:

- Maps and diagrams of a particular location or roadway which illustrate the site of the incident;
- Medical diagrams or charts to illustrate anatomy or injuries to assist the testimony of medical experts;
- Radiology films with colorization or labels to assist the testimony of medical experts;
- Medical/anatomical models (spine, cervical spine, lumbar spine, brain, etc.);
- Timelines, chronologies, and summaries of work history, past medical history, future medical treatment, medications, disability and work status;
- Tables illustrating recommended future medical treatment or work restrictions, per the testimony of treating physicians and experts;

- Animations illustrating future treatment or surgical needs (shoulder, knee, spine surgery, epidural block and radiofrequency ablations, etc.);
- Animations illustrating opinion testimony of an expert (not a reenactment or simulation, but to illustrate part or all of an expert's opinions);
- Videos of surgeries or similar incidents that show movement of vehicles, equipment or the human body in an event; and
- Tables itemizing and summarizing economic damages (past and future medical expenses, past wage loss, and loss of earning capacity).

Demonstrative evidence is appropriate during opening statement

It is well established that courts have wide discretion in allowing the use of demonstrative evidence during the presentation of witness testimony and during an opening statement.

Courts generally permit the use of demonstrative evidence during an opening statement. CACI 101 sets out the admonition regarding opening statement:

An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. Also, because it is often difficult to give you the evidence in the order we would prefer, the opening statement allows you to keep an overview of the case in mind during the presentation of the evidence. You cannot use it to make any decisions in this case.

(CACI 101.)

The purpose of the opening statement "is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect"



[citation]. . .” (*People v. Green* (1956) 47 Cal.2d 209, 215, overruled on other grounds, *People v. Morse* (1964) 60 Cal.2d 631, 648-649.)

During opening statement, the trial court may allow use of a chart, diagram, or other visual aid that is not itself admissible in evidence. “Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement.” (*People v. Green, supra* at 215 (emphasis added) [dictum because visual aid used in opening subsequently received in evidence].)

Legal support for the use of different categories

During trial, a witness may testify that a chart, diagram or other visual aid is illustrative of her testimony. A chart, diagram, video or model may assist the witness’s explanation of her testimony regarding an event, medical procedure, listing of people or events, or other things. Foundation for the demonstrative evidence is established by testimony or other evidence demonstrating that the visual aid is a fair representation of the underlying witness testimony or other evidence. (*People v. Ham* (1970) 7 Cal.App.3d 768, 780.) Prior to the use of the visual aid, the witness will offer foundational testimony as to the representative accuracy and illustrative value of the visual aid.

Counsel may be permitted to question a witness regarding demonstrative evidence, without offering it as evidence. (*People v. Cossey* (1950) 97 Cal.App.2d 101, 112 [chart listing financial transactions used in cross-examination but not admitted].)

Medical illustrations, models, and animation

Courts regularly allow the use of visual aids to illustrate the plaintiff’s injuries and allow for a better understanding of causation. (See, *People v. Riel* (2000) 22 Cal.4th 1153 [use of mannequin to illustrate victim’s stab wounds was permissible,

where pathologist testified that the mannequin showed the approximate angles of the knife wounds].)

Plaintiff’s counsel may wish to use medical illustrations and models of plaintiff’s back, neck and head that are illustrative of plaintiff’s experts’ opinions regarding the causation of her injuries. It is permissible to create medical illustrations that are derived directly from photos or X-rays of plaintiff’s actual injuries. Photographs and X-rays of plaintiff’s injuries are independently admissible as evidence. (*People v. La Vergne* (1966) 64 Cal.2d 265, 271 [photos showing parties’ injuries are admissible]; *Sinz v. Owens* (1949) 33 Cal.2d 749, 759 [X-rays admissible with expert authentication].) The use of photographs intended later to be admitted in evidence as visual aids is appropriate. (*Green, supra*, 47 Cal.2d at 215; *People v. Kirk* (1974) 43 Cal.App.3d 921, 929.)

Medical illustrations or models demonstrating general anatomical and medical principles relevant to plaintiff’s injuries are permitted. Models are admissible, in the court’s discretion, to assist the jury in understanding the testimony of a witness. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1291 [mannequin used to illustrate bullet wounds and paths].)

Additionally, plaintiff’s counsel may want to offer animations of some of the types of medical treatment plaintiff has received or will receive, according to medical opinion testimony. Animations are “tantamount to drawings,” and are admissible just as hand drawings are admissible upon authentication by a qualified witness. (*People v. Hood* (1997) 53 Cal.App.4th 965, 969.)

Plaintiff’s witnesses, medical treaters and medical experts, must be able to testify that the medical illustrations and animations fairly represent their testimony and are illustrative of medical principles relevant to plaintiff’s injuries.

Map/diagram of incident scene

The trial court may allow use of a photo, diagram, and/or map to illustrate

testimony regarding the scene of the incident at issue and the movements of subject vehicles. (*Rahlves & Rahlves, Inc. v. Ambort* (1953) 118 Cal.App.2d 465 [map admissible in evidence as illustrative of plaintiff’s testimony in boundary dispute]; *People v. Shaffer* (1940) 38 Cal.App.2d 421 [Dept. of Interior map properly admitted where witness had personally covered the territory and had visited area in map].)

Plaintiff’s counsel may wish to use photographs, diagrams and maps of the location of the incident, to illustrate the circumstances of how the incident occurred, equipment malfunctioned or the defendant’s collision with plaintiff’s vehicle.

Charts and listings

Courts permit counsel to offer illustrations that sum up evidence and the testimony of a number of witnesses, and permit summaries or surveys of evidence in the form of a chart. (*People v. Cossey* (1950) 97 Cal.App.2d 101 [counsel properly permitted to exhibit a number of large, legible charts which listed out financial transactions].)

Plaintiff’s counsel may wish to illustrate testimony in summary charts, including a listing of witnesses who will testify to certain facts and opinions, charts, listings and timelines of plaintiff’s medical care and treatment, and timelines of plaintiff’s work history.

Videos/animations illustrating principles

A visual reconstruction of the accident or event in dispute may greatly assist the jurors, particularly where there are contested issues as to medical causation. Courts permit counsel to offer videos as demonstrative evidence if they fairly illustrate a witness’s testimony and accurately portray the matters depicted. (*People v. Carpenter* (1997) 15 Cal.4th 312, 385-386.) Scientific experiments and testing, conducted under substantially similar conditions to the events at issue, are admissible. (*Hasson v. Ford Motor Co.* (1977)



19 Cal.3d 530, 548-550.) Videos of auto accident reconstructions are admissible as demonstrative evidence where the reconstruction is performed under “substantially similar” conditions to the incident. (*Hasson, supra, ibid.*)

While conditions need to be similar in major respects, testing need not perfectly duplicate accident conditions. “(T)he physical conditions which existed at the time the event in question occurred need not be duplicated with precision nor is it required that no change has occurred between the happening of the event and the time the [videotape] is taken.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060; see also, *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1231 [filmed re-

creation of auto accident admissible despite some dissimilarities].)

Plaintiff’s counsel may wish (by using videos or animations) to illustrate accident facts, medical and/or biomechanical testimony regarding how equipment, physical objects or body dynamics were involved in an event. These videos or animations are not intended to reenact the incident with 100 percent accuracy, but rather are intended to demonstrate testimony based on evidence, principles of science and expert opinions that explain how the event occurred.

Conclusion

Know your client’s story. Know how you want to tell your client’s story.

Explore different ways to anchor your client’s story in the mind’s eye of your jury. The most important thing is to have fun with your demonstrative evidence and get it before the jury.



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