Words, words, words, picture!

How we weave the fabric of our case into a story at trial

By Brendan C. Gannon

They say a picture is worth a thousand words, and that you never forget a face. Visual aids and explanations are crucial to helping your jurors understand the issues that they have to decide.

So, what is demonstrative evidence? 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).)

The plaintiff's lawyer who presents his case at trial without using effective and understandable visual aids (demonstrative evidence) is rolling the dice because the jurors may not understand the testimony they heard. Not many trials are won these days based only on what the witnesses say – the jurors want to *see and hear* what happened.

Persuasive and understandable demonstrative evidence exhibits – when they are admitted and presented properly – will have an abiding and favorable impact on your jurors and their deliberations. To be *effective*, you should not just hire a random graphics company to create an animation, you need to think about how your "visual strategy" for trial can be as critical to winning as your "theme strategy." These are the questions that you need to ask yourself when developing your "visual strategy for trial:

1. What types of visuals will help illustrate my trial themes to the jury?
2. Whose testimony will be (or needs to be) clarified by my demonstrative evidence?
3. When will be the most effective time in the trial to present my demonstrative evidence?
4. *How* will I present the demonstrative evidence to my jury?

Here we concentrate mostly on that last question – *how*, legally, can I get *my* demonstrative evidence exhibits admitted into evidence during the course of my trial? Of course, it is important to answer all of the questions before trial, but the rule of admission is a great place to start. The practice tips and cases in this article therefore seek to provide you with what you will need to get started on the process of admitting your demonstrative evidence.

The purpose behind the admission of demonstrative evidence

In California, it is very well settled in the law that demonstrative evidence is admissible for the purpose of clarifying witness testimony. (*People v. Kynette* (1940) 15 Cal.2d 731, 755.) Again and again, the rule is clear – the demonstrative evidence is admissible when it is used to *illustrate* testimony, and the demonstrative evidence is usually authenticated by whose testimony is being illustrated. In order to achieve admission at trial, your demonstrative evidence does not need to be exact, but it does need to be *substantially similar* and helpful to the jury's understanding of the witness's testimony. (*Andrews v. Barker* (1968) 267 Cal.App.2d 530, 537.) Not identical, just substantially similar.

This is not a new rule. As stated in John Henry Wigmore's third edition of his Evidence treatise, demonstrative evidence is "*as much a part of the witness' testimony as his oral statements, such a document takes an evidential place simply as a non-verbal mode of expressing a witness' testimony.*" (Wigmore, Evidence, 3d ed., § 790, at p. 175.)

The general demonstrative evidence admission rule

During a trial, a witness may testify that a piece of demonstrative evidence, i.e., a chart, diagram, or other visual aid helps to illustrate his trial testimony – it helps the jurors understand the evidence. That's the rule to know.

Thus, when an animation, a re-creation, a chart, diagram, or model (etc.) may assist the witness' explanation of his testimony regarding an event, medical procedure, listing of people or events, or other things, it should be admitted. (*People v. Ham* (1970) 7 Cal.App.3d 768, 780.) Courts regularly allow the use of visual aids to illustrate the plaintiff's injuries and allow for a better understanding of medical causation of injuries. (*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].)

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. (*Ibid.*) You should also keep in mind that lawyers may be permitted at trial to question a witness regarding demonstrative evidence, without offering it as evidence. (*People v. Cossey* (1950) 97 Cal.App.2d 101, 112.)

Hypothetical example – Admitting your accident reconstruction animation

As a hypothetical example, amongst your case load right now, you have a traffic accident case where you want to make an accident reconstruction animation and get that admitted at the trial. It is important to remember that the foundation for the animation's admission will come through the testimony of your accident reconstruction expert – i.e., the person whose testimony is being illustrated. Your position before the court (when

the defense attorney inevitably challenges the admission of the animation) is that the reconstruction animation will "show" his opinion to the jury and it will help them understand how the accident actually happened – because it is substantially similar.

For the admission of your hypothetical accident reconstruction animation, you should know the following cases as there can be some specificity for these rules that all follow the "substantially similar" precept that applies for the admission of all demonstrative evidence. So, when it comes to accident reconstruction animations, you should know that 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.) Thus, an animation is treated like a demonstrative aid, and is admissible if "it is a fair and accurate representation of the evidence to which it relates." (*People v. Duenas* (2012) 55 Cal.4th 1, 20, 21-23 [in shooting case, computer animation of proposed bullet trajectories was admissible to illustrate expert's opinions].)

Therefore, before your own trial judge you should argue that the animation will assist the jurors in understanding your expert's testimony because the animation is *substantially similar* to what occurred at the scene. Thus, without extraneous facts or information, you can argue that the demonstrative evidence exhibit that you seek to have admitted is a "fair and accurate representation of the evidence to which it relates." Showing that to the judge will significantly increase your chance of admitting the demonstrative evidence.

Additionally, produce the demonstrative exhibit to the other side as soon as you can. It only helps your argument on Evidence Code section 352 to show that (1) you disclosed the demonstrative evidence exhibit early, and (2) it was completed and provided prior to the deposition of the expert whose testimony will be clarified by the demonstrative evidence exhibit. This gives the other side due process rights to ask the testifying witness about the exhibit, any assumptions made, etc.

Defeating the objection you will face – More probative than prejudicial

As mentioned above, the defense will most likely challenge your attempt to get that accident reconstruction animation admitted. The legal basis behind the defense attorney's challenge will most likely be Evidence Code section 352 – the "more prejudicial than probative" argument.

In this situation and under Evidence Code section 352 generally, the judge really has near complete discretion. Once the judge makes a decision regarding the admissibility of your demonstrative evidence exhibit, that's that (the judge's decision can only be overturned on appeal for an abuse of discretion.) So, you will want to do everything you can to defeat the prejudicial argument and demonstrate that the animation exhibit is "substantially similar" and *necessary* to assist the jury in understanding the accident reconstruction expert's testimony.

In addition to this Evidence Code statute, the defense will most likely cite to these cases: *People v. Hollie* (2010) 180 Cal.App.4th 1262, *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, and *People v. Lenart* (2004) 32 Cal.4th 1107 – for the proposition that your demonstrative evidence results in "undue prejudice" caused by the exhibit's prompting of an overly emotional reaction by the jury not warranted by the actual evidence. Accordingly, the defense will argue in this way that your demonstrative exhibit(s) is more prejudicial than probative and therefore inadmissible under the Evidence Code and supporting case law.

How do you defeat this argument?

The best way to get the demonstrative exhibit admitted is to create demonstrative evidence exhibits that are – once again – *substantially similar* to the hard evidence facts that are explained through the evidence via the testimony of your expert witness. As they say – foundation, foundation, foundation, so you therefore need to show that the demonstrative evidence is foundationally supported by the incontrovertible and "hard" evidence.

Thus, for that accident reconstruction animation example we are using, there is no need to include unsupportable and extraneous information in the animation that the defense attorney will only complain about. Instead, get the judge on your side and show that the defense attorney is being unreasonable by complaining about an exhibit that has been very reasonably prepared that meets the applicable "substantially similar" standard.

Fun case-law examples for guidance

From a bomb to a pistol to a chair experiment, you can get it admitted

Admittedly, the facts of your case might not be as interesting as the *Kynette* case – where the prosecution admission of a *bomb* was the demonstrative evidence in dispute.

The case went to the Supreme Court of California, where the defense attorneys challenged the trial court's admission of a bomb – "the contention being that no proper foundation was laid therefor." (*People v. Kynette* (1940) 15 Cal.2d 731, 755.) However, despite the defense's contentions, the high court affirmed the trial court's evidence decision, stating that:

> The prosecution experts, who were amply qualified, testified at great length as to the kind and character of the fragments of the bomb found at the scene of the explosion . . . they expressed their expert opinions as to the kind of bomb that had been employed. They then identified a model bomb which had been constructed by them or under their supervision and testified that while not necessarily identical it represented substantially and approximately the type of bomb which had been

> used in the Raymond building… we find no error in the trial court's ruling . . . (*Ibid.*)

Admitting a demonstrative evidence pistol

Similarly, under proper circumstances, "a pistol can be admitted in evidence for the limited purpose of illustration." (*People v. Ham* (1970) 7 Cal.App.3d 768, 780.) The appellate court stated that in "presenting a pistol for illustrative purposes a proper foundation must be laid. In laying such foundation it is paramount that it be established that the pistol was substantially similar to that which it seeks to illustrate." (*Ibid.*)

In *Ham*, the party presenting the demonstrative evidence (the prosecuting district attorney) was able to meet the "substantial similarity" threshold by putting up an expert ("Groth"), whose testimony the appellate court summarized as follows:

> Here it was testified to by Groth that a .22 or .25 small caliber pistol was used in the robbery and when he identified the gun in question as substantially similar he was conceptualizing and illustrating his testimonial description of defendant's weapon.

(*Ibid.*)

Admitting a demonstrative evidence chair experiment

And further, in *Andrews v. Barker Bros*, the plaintiff sustained injuries when he sat in a chair made by the defendants that suddenly collapsed under his weight. In order to prove that the chair was made correctly and that the Barker Bros were not negligent, the defense acquired an expert ("Nass") who testified that he:

> Obtained four chairs of the design of the subject chair and experimented with them . . . In the final and decisive test he sat upon the chair, leaned the chair backward until the front legs were nine inches off the floor and the rear legs were inclined backward at an angle of 31 degrees from the vertical, then shifted his weight onto the left rear leg of the chair; the leg collapsed forward and Nass held onto a safety rope to keep from falling. The purpose of this fantastic maneuver was to provide a basis for the claim that Andrews was guilty of contributory negligence.

(*Andrews v. Barker Bros., Corp.* (1968) 267 Cal.App.2d 530, 537.)

The admission of this testimony was of course challenged, but the Second District Court of Appeal ruled that the testimony regarding the demonstrative experiment was, in fact, properly admitted because "Nass (defense expert) could not obtain an identical chair from Virtue but obtained from another source chairs proved to be of the same design and construction. The court ruled there was sufficient similarity; there was no evidence of dissimilarity; the matter was within the court's discretion and the ruling was a correct one." (*Id.* At 537-538.)

Concluding thoughts – Why and how your demonstrative evidence is admitted

Demonstrative evidence really helps to provide a cohesive context for the jury's understanding of what they have just heard at the trial from the witnesses. It assists their analysis of how the testimonial evidence and the "real" evidence (physical objects) both relate to the themes that you have presented to them at the trial. Therefore, you need to use demonstrative evidence at your trial and make sure that you can show to the judge that it is "substantially similar" and will not result in prejudice that outweighs its probative value on the issues.

Long story short, good demonstrative evidence *will* have a positive and abiding effect on your jury that might just help you carry the day and win the case.

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