

University of Texas at Austin/School of Law
2005 Page Keeton Civil Litigation Conference

October 27-28, 2005

CREATING AND PRESENTING PERSUASIVE DEMONSTRATIVE EVIDENCE

Andy Payne

Payne Law Group
2911 Turtle Creek Blvd.
14th Floor
Dallas, TX 75219

214/252-1888
email: andy@paynelawgroup.com
www.paynelawgroup.com



ANDY PAYNE

Andy Payne is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization and is Board Certified in Civil Trial Law by the National Board of Trial Advocacy. He is the founding partner of the Payne Law Group, and a former partner with the law firm of Howie & Sweeney, L.L.P. He graduated third in his class from Baylor Law School where he served as Executive Editor of the *Baylor Law Review*. He is a *Magna Cum Laude* graduate of the Baylor Law School and a *Cum Laude* graduate of Texas Christian University where he received a B.B.A. in Finance. Mr. Payne is currently serving on the State Bar Pattern Jury Charge Committee for Medical Malpractice and Products Liability. Mr. Payne is a sought after products liability and personal injury expert. Currently, he is an Adjunct Professor of products liability at the SMU Law School and a frequent lecturer for lawyer's groups across the state.

Mr. Payne's practice is focused on product defect and aviation cases. He also routinely handles significant personal injury cases arising from commercial vehicle collisions. In his practice, he handles cases involving life-changing events where millions of dollars and the client's long-term security are at stake.

Mr. Payne is a Director Emeritus of the Dallas Trial Lawyers Association. He is a Fellow of the Texas Bar Foundation, the Dallas Bar Foundation and a member of the Texas Center for Legal Ethics & Professionalism. He is a Fellowship Member and on the Board of Directors for the Texas Trial Lawyers Association. He is also a member of the ATLA, the DBA, the ABA and the Mac Taylor Inns of Court. He has earned Martindale-Hubbell's highest rating (AV) through a peer review evaluation. Andy has been consecutively selected by *D Magazine* as one of The Best Dallas Lawyers Under 40, and by *Texas Monthly* as a Texas Super Lawyer. Andy has successfully tried numerous cases to jury verdict in State and Federal Courts.

**CREATING AND PRESENTING
PERSUASIVE DEMONSTRATIVE EVIDENCE**

I.	INTRODUCTION	1
II.	WHY DEMONSTRATIVE EVIDENCE WORKS	1
III.	WHEN TO USE DEMONSTRATIVE EVIDENCE	2
	A. Pretrial Uses of Demonstrative Evidence	2
	B. Advantages of the Early Use of Demonstrative Evidence	2
	C. Videotaped Depositions	2
	D. Hearings	3
	E. Mediations	3
	F. Use of Demonstrative Evidence In Trial	3
	1. Admissibility Considerations	3
	2. When to use demonstrative evidence during the trial.	4
IV.	GATHERING SOURCE MATERIALS: RESOURCES AND TECHNOLOGY	5
	A. Obtaining Source Materials	5
	1. Video Interviews of Key Witnesses	5
	2. Video Interviews of the Client	5
	3. Television News Coverage	6
	4. Newspaper Photographs	6
	5. Police & Medical Examiner Photographs	6
	6. Scene Photographs	6
	7. Family and Work Photographs	6
	8. Sympathy Cards	6
	9. Day-in-the-Life Footage	7
	10. Aerial Photography	7
	11. Answering Machines and Call Notes	7
	12. 911 Tapes	7
	13. Home Videos and Movies	7
	14. Medical Illustrations	7
	15. Stock Photography	8
	B. Technology To Capture Source Materials Yourself	8
	1. Video Kit	8
	2. Digital Cameras	8
	3. Scanners	8
	4. Video Capture Equipment	8
V.	CREATING DEMONSTRATIVE EVIDENCE	8
	A. Necessary Equipment	9
	1. Computer	9
	B. Necessary Software	9
	1. Publishing Software	9

	2.	Presentation Software	10
	3.	Photo Editing Software	10
	4.	Video Editing Software	10
VI.		PRESENTING YOUR DEMONSTRATIVE EVIDENCE	10
	A.	Presentation Hardware Essentials	10
		1. A Laptop Computer	10
		2. LCD Projector	11
		3. Document Cameras	11
		4. Audio Systems	12
		5. Portable Presentation Screens	12
	B.	Presentation Software	12
		1. Presentation Software for Mediation, Opening Statement and Closing Arguments	13
		2. Presentation Software for Trial and Witness Examination ...	13
VII.		TYPES OF DEMONSTRATIVE AIDS	13
	A.	Photographs	13
	B.	Charts, Drawings and Sketches	14
		1. Witness Lineups	14
		2. Proof Checklists	14
		3. Summary Boards	14
		4. Miscellaneous	14
	C.	Models	14
		1. Safer Designs	15
		2. Anatomical Models	15
		3. Exemplar Products	15
	D.	Animations	15
	E.	Computer Modeling	15
	F.	Medical Illustrations	16
	G.	Videotaping	16
		1. Creative Use of Video Depositions	16
		2. Settlement Video Documentaries	16
		3. Day-In-the-Life Videos	17
		4. Things Too Big for The Courtroom	17
		5. Re-enactments	17
		6. Testing	18
		7. Witness Interviews	18
	H.	Settlement Brochures	18
	I.	Computer Multimedia Presentations	18
VIII.		CONCLUSION	18

Creating and Presenting Persuasive Demonstrative Evidence

Andy Payne

I. INTRODUCTION

Demonstrative evidence illuminates the substantive evidence and makes the issues in a case easier to understand and to follow. Today, jurors are accustomed to receiving information in a short format with the help of visual aids. For instance, newspapers and television broadcasts increasingly incorporate graphics to help explain stories. While I believe jurors would have always benefitted from the use of demonstrative aids, today, what was once beneficial has now become an essential. With a society-wide change in how information is presented, demonstrative aids are critical to success in the courtroom.

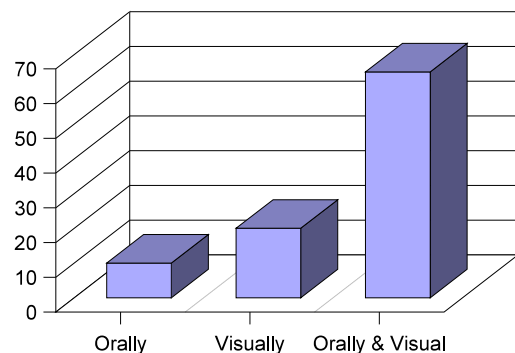
This paper briefly discusses why demonstrative evidence works and how to get it into evidence. But, the majority of the paper will focus on the logistics of creating and presenting persuasive demonstrative evidence. Technology today allows—and soon will require—every trial lawyer to implement effective demonstrative evidence in their presentations. Showing up in a courtroom or mediation without demonstrative evidence can be like showing up at a gun fight with a knife. Don't do it.

II. WHY DEMONSTRATIVE EVIDENCE WORKS

Studies document why demonstrative evidence works, but common sense tell us why it is true—demonstrative evidence makes a presentation more interesting and memorable. Maintaining focus and attention during the reading of a long deposition or even during a videotaped deposition can be a challenge. The use of demonstrative evidence breathes life into concepts and evidence that would otherwise be unacceptably boring.

The common sense conclusion that demonstrative evidence makes a presentation more memorable is supported by science. McGraw-Hill published the Weiss-McGrath study, which was designed to evaluate information retention. The study compared retention of information presented in three different formats: (1) orally only; (2) visually only; and (3) visually and orally. After information was presented, information retention was measured at various intervals. After 72 hours (the length of a short trial) the group presented information solely by oral means retained only 10% of the information. The group receiving information solely by visually means retained twice the information, but still only 20% of the total presented. But those who receive the information both orally and visually retained 65% of the information presented. The study documented, with visual and oral presentation, individuals both retain more information initially

Weiss-McGrath Study



and retain that information for a longer

period of time.

In addition to simply making the subject matter more interesting, showing the jury a diagram, chart or animation lends credibility to what is said by the lawyer or witness. Jurors are

Creating and Presenting Persuasive Demonstrative Evidence

simply more likely to believe something they see with their own eyes versus that which is said to be true by a lawyer or a witness.

Finally, demonstrative evidence can help synthesize the vast amounts of information introduced at trial. Studies show that jurors are overwhelmed by the amount of information presented during a trial.¹ They can become easily bored, confused and frustrated. Visual aids help fight the boredom battle and give visual cues that make following the evidence much easier. Demonstrative evidence is essential in helping the jurors get their arms around the more difficult concepts. Concepts that if they do not understand; they will not find for your client. Use of demonstrative aids can clarify complex issues and highlight the most important evidence.

III. WHEN TO USE DEMONSTRATIVE EVIDENCE

A. Pretrial Uses of Demonstrative Evidence

Most cases settle. Many times the best and only opportunity to use demonstrative aids occurs pretrial—during videotaped depositions, hearings and mediations. Although less frequent in its occurrence, many lawyers still fail to take advantage of demonstrative evidence throughout the entire litigation process.

B. Advantages of the Early Use of Demonstrative Evidence

Early use of demonstrative evidence has numerous advantages. First, the early use of demonstrative evidence subtly communicates to your opponent your trial ability and your willingness to expend creative energy and resources on the case. Early use of demonstrative evidence also gives you time to test the demonstrative aids and make refinements prior to the trial.

C. Videotaped Depositions

I always try to incorporate demonstrative evidence in my videotaped depositions. Although too often forgotten, depositions are videotaped so they can be played for the jury. Watching a witness testify by video deposition is much more boring for a juror than calling that same witness live in the trial. This is all the more reason to implement demonstrative evidence during videotaped depositions.

When using demonstrative evidence in videotaped depositions, be mindful of the limitations associated with the video equipment and those operating the video equipment. The best thought out demonstrative evidence will be nothing more than a distraction if the videographer can not fit it in the frame of the shot or worse yet the videographer keeps the frame focused just on the witness to the exclusion of the demonstrative aid. To prevent a disaster, use a professional videographer to record your evidence. Spend the time to meet with the videographer in advance and communicate exactly what you want captured on the videotape. When recording critical testimony using demonstrative evidence or when using a unfamiliar videographer, consider taking an assistant to the deposition with the sole job of watching the video and making sure it is framed correctly. If it is not, stop and ask the questions again.

Charts, blow-ups and models work best in videotaped depositions. They are generally easy for the video staff to follow. Additionally, these items get the witness out of the chair and change the shot from that of the talking head to an interactive full body shot.

I also believe that on location depositions work wonderfully. Witnesses can be deposed in gas processing facilities, on boats, in plane simulators or at the accident site. Deposing a key witness or police officer at the accident scene can be amazingly powerful. Imagine asking: “When did Mr. Jones began to apply the brakes?” And having a officer respond: “He hit his brakes here where we see these skid marks.” Or in a plane simulator having your expert explain how the plane dove while the video shows the plane in a

¹ Roy Kreiger, *Now Showing at a Courtroom Near You*, 78 A.B.A. J. 92 (Dec. 1992)

Creating and Presenting Persuasive Demonstrative Evidence

nose dive. On-site testimony can be a powerful tool in the trial lawyer's arsenal; don't overlook the opportunity to conduct an on location deposition.

Finally, do not forget the magic of the editing suite. In almost every videotaped deposition, the witness is shown documents and medical records in the form of exhibits. Amazingly, most often those exhibits are never shown to the jury while the videotaped deposition is played. Rather, everyone is forced to endure the witness or lawyer reading from the document. If the exhibit will be admitted into evidence, let the magic of the video editing suite spice up the testimony. I have our editors split screen the video and show the highlighted medical records or exhibits from which the witness is reading. This way the jury both sees and hears the evidence—something we know will dramatically increase retention.

D. Hearings

Trial Courts generally appreciate some limited use of demonstrative aids during hearings. I recommend consulting the bench book or local counsel to gain an understanding of your judge's view of demonstrative evidence during hearings. In most courts, be careful not to overuse demonstrative exhibits or allow those exhibits to slow a hearing. I find demonstrative evidence is useful to show the judge a product, scene or mechanism not easily or briefly described with words. In a lengthy hearing with multiple issues, a summary chart or bullet points can be helpful to both the court and the advocate who can use the same as a reminder or checklist of items to discuss.

E. Mediations

Short of trial, mediation is the time when I most often use demonstrative evidence. Many times the decision makers (insurance adjusters and corporate counsel) are not present to see your masterful opening statement or your persuasive use of demonstrative evidence throughout the trial. Mediation gives you the opportunity to persuade the decision maker that your position is right and settlement should be

reached. Accordingly, demonstrative aids should be an integral component of your mediation presentation.

The use of demonstrative aids in mediation also has another powerful advantage. The advocate is not limited by the rules of evidence. Your vision of the key events can be portrayed how you see them. You can show the video documentary of your clients, something that you would not be able to do at the trial. Your presentation can use sounds and music that would never be allowed in Court. This flexibility leads to an even better presentation.

I use a Power Point presentation at mediations. In addition to effectively presenting the case, a Power Point presentation has a tremendous secondary benefit. Creating the presentation forces you to review the evidence, organize the key evidence in a persuasive manner and test the weaknesses of your presentation as you listen to the opposing perspective.

F. Use of Demonstrative Evidence In Trial

1. Admissibility Considerations

It may be cool, but can you get it to the jury? With an understanding of the basic predicates and with an accurate reflection of the admitted substantive evidence, demonstrative aids are generally no problem to get before the jury.

In general, there are two types of evidence: substantive evidence and demonstrative evidence. Substantive evidence is the testimonial, documentary and real evidence admitted in the case. Under State and Federal Evidence Rule 401, substantive evidence is generally admissible if it makes a fact of consequence more or less probable than it would otherwise be. Unlike substantive evidence, demonstrative evidence does not make a fact more or less probable, but is used to explain or to illustrate the substantive evidence admitted in the case. Courts have defined demonstrative evidence as that evidence "admitted solely to help the witness explain his or her testimony" that the exhibit has "no probative force beyond

Creating and Presenting Persuasive Demonstrative Evidence

that which is lent to it by the credibility of the witness whose testimony it is used to explain.” *Carson v. Polley*, 689 F.2d 562,579 (5th Cir. 1982).

Demonstrative evidence is generally admissible if it is shown to be relevant, shown to assist a witness in explaining his or her testimony, and its probative value outweighs its prejudicial effect.² Thus, the foundational elements for demonstrative evidence require: (1) that the demonstrative evidence relate to a piece of admissible substantive evidence; (2) that the demonstrative evidence fairly and accurately reflect the substantive evidence; and (3) that the demonstrative proof aids the trier of fact in understanding or evaluating the substantive evidence.³ A trial judge is given broad discretion in determining whether to admit or to reject demonstrative evidence and the judge’s ruling will only be overturned when there is a clear abuse of discretion.⁴

I find that demonstrative aids are most often welcomed by a court. However, in introducing demonstrative evidence, always be prepared to have a sponsoring witness say that the demonstrative aids fairly and accurately represent some substantive evidence, i.e. the accident site and that the demonstrative evidence will help explain his or her testimony to the jury.

Finally, the most common objection successful in excluding demonstrative evidence is a 403 objection that the prejudicial effect of the demonstrative exhibits outweighs its

probative value. Given that the probative value of demonstrative aids is generally weak to non-existent, be careful to avoid particularly prejudicial demonstrative exhibits and be prepared to meet a typical 403 objection.

2. When to use demonstrative evidence during the trial.

I try to use demonstrative evidence during all stages of the trial. First, consider using demonstrative evidence during your opening statement. Generally, the use of demonstrative evidence during an opening statement requires cooperation from the Court and opposing counsel. Recall that demonstrative evidence is used to illustrate or to explain substantive evidence. During the opening statement, there will be no substantive evidence admitted and therefore the use of demonstrative evidence will have to be with the agreement of court and counsel. Nevertheless, demonstrative evidence can be a powerful tool to reinforce your themes and visually organize the evidence that will be presented to the jury over the coming weeks.

Use demonstrative aids with almost every witness called. As a general rule, I like to use at least one demonstrative aid with each fact witnesses. Obviously, this is not a hard and fast rule. I do not recommend creating a useless demonstrative aid just for the sake of doing so. However, liability fact witnesses generally lend themselves to the use of charts and diagrams to explain the products and the accident scenes involved.

While the general rule is at least one demonstrative aid per fact witness, I generally use three to four demonstrative aids when examining experts. We are involved in many product liability cases. I like to bring the product itself, a model, video recreation, and/or an animation for my expert to narrate. This gives my expert an opportunity to get off the witness stand and get his hands on the actual evidence. I will often have damage experts use anatomical models, surgical instruments and medical illustrations in presenting their testimony. Again, the idea is to have these experts get out of the witness box and teach the jury on a more informal basis.

² See FED. R. EVID. 403; TEX. R. CIV. EVID. 403; *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389 (Tex. 1998).

³ Robert D. Brain and Daniel J. Broder, Inc., *Demonstrative Evidence: Clarifying Its Role at Trial*, Trial, Sept. 1994, at 74; *The Derivative Relevance of Demonstrative Exhibits: Charting Its Proper Evidentiary Status*, 25 U.C. Davis L. Rev., 957, 968 (1992).

⁴ See *Goff v. Continental Oil Co.*, 678 F.2d 593, 596 (5th Cir. 1982)

Creating and Presenting Persuasive Demonstrative Evidence

The use of demonstrative evidence in closing arguments is an absolute essential. In making closing arguments, I always argue the charge. Use the Elmo, blow-ups, or Power Point presentations to present and to highlight key instructions and definitions from the Court. I often use a red marker or Power Point presentation to tell the jury exactly how I want them to answer the charge. Demonstrative aids used throughout the trial can be reused during closing argument to reinforce themes and important points. Many times I use witness summary boards during closing arguments to highlight key testimony. These witness summary boards can easily be made on a Power Point presentation. I include the witnesses name and title, a video still or digital picture taken at the Courthouse and the exact trial testimony used. I also find that the use of demonstrative aids in opening and closing arguments provides me with cheat sheets so that I may argue the case with little or no dependence on notes. My next slide in essence serves as my cues for the next portion of my argument.

Using demonstrative aids in both the pretrial negotiations and throughout the trial can illuminate the substantive evidence and the critical issues in the case.

IV. GATHERING SOURCE MATERIALS: RESOURCES AND TECHNOLOGY

The obvious starting place for the creation of persuasive demonstrative exhibits is gathering the underlying source of materials. This portion of the paper suggests some areas to explore for source materials. Secondly, this section addresses some of the basic technological equipment you will need to capture this source material yourself.

A. Obtaining Source Materials

Obviously, the demonstrative evidence that ends up being used at trial will have its foundation in the substantive evidence uncovered through the normal discovery processes, (Requests for Production, Interrogatories, Request for Disclosure,

Depositions, etc.) but there are often overlooked sources that may be helpful in creating demonstrative aids for use in pretrial mediation or settlement discussions. I routinely consider the following sources for pretrial demonstrative aids:

1. Video Interviews of Key Witnesses

Videotaped statements of key witnesses will generally not be admissible at trial. Nevertheless, I find these interviews to be invaluable. As a Plaintiff's lawyer, I generally have the opportunity to interview all the key witnesses, obtain videotaped statements, and pin witnesses to specific positions before I ever file the lawsuit. While the statements themselves are generally not admissible, once I have them on video their depositions are almost always consistent with their previous statements. Should they deviate, I could use their prior statement for impeachment purposes. In addition to the obvious benefits of obtaining these statements, I find that doing so is rather disheartening to my opponents. Once they begin their investigation, they are generally shocked to learn that all of the key witnesses in the case have given me a video statement supporting my position. Using edited video interviews of these witness statements during mediation has met with great success.

2. Video Interviews of the Client

I generally conduct video interviews of my client for use in settlement negotiations, settlement videos, and mediation. These videotapes are unlikely to ever come before the jury, but they can be enormously persuasive in educating decision makers on the likeability of your client. Videotaped client interviews give the decision makers a glimpse of how your clients will be perceived by the jury. Videotaped interviews of the clients can be powerful, emotional catalysts to a settlement. These interviews put a name and face with the decision maker's file.

Although it has never been raised in one of my cases, be careful to only videotape discussions that you would be comfortable providing to the other side. An argument certainly could be made that this process was not

Creating and Presenting Persuasive Demonstrative Evidence

done with the intent of communicating legal advice and should not be afforded protection under the attorney/client privilege. While I do believe that good arguments exist both ways, the safe practice is simple to limit videotaping to those items which you are comfortable providing to the other side.

3. Television News Coverage

At times a case you may be handling will be television newsworthy. Many major accidents are captured by television news crews and their news helicopters. Obviously, the raw pictures themselves may be, and likely will be, evidence that is admissible in trial. Always obtain these photos. They are generally of professional quality and are taken with an eye towards evoking emotion. I have also found, that the corresponding sensational comments by newscasters often lends credibility to the severity of the incident. The subtle message is that if this collision is an item worthy of the five o'clock news, the decision makers should also give it serious consideration.

4. Newspaper Photographs

I have found newspaper photographs invaluable in a number of cases. These photographs are often scene photographs that will be useful both in the pretrial and trial phases. I have found newspaper photographs particularly fruitful with the smaller town weekly papers. Inevitably, if there is any wreck within the jurisdiction of a small town newspaper, they will send their photographer. If you are lucky, they may have even interviewed some witnesses and provide you with some early leads. I routinely check the local newspapers where my incident has occurred to determine whether there is any newspaper coverage.

5. Police & Medical Examiner Photographs

Most of us already appreciate that police officers and medical examiners take photographs in most major accidents. However, I am always surprised to learn how many times lawyers stop at ordering just a copy of the police report. Make it a practice to subpoena the entire

police officer's file, including notes, calculations, photographs, statements and other materials used to compile the police report. Most often the police officer's photographs are the best scene photographs available.

6. Scene Photographs

We do quite a bit of automotive product liability cases. In these cases, documentation of the condition of the scene is critical. Immediately upon being hired in a case, we send an investigator to document the scene where the incident occurred. The photographs should document all evidence left on the roadway—skid marks, yaw marks, gouge marks, and debris patterns. Likewise, the fields should be photographed to show the location of burrows, gouges, and debris. The point of rest of the vehicle should always be documented. Look for signs of medical attention being provided. EMS often leave tools of their trade at the location where the victim is found. These photographs together with police and news photographs should give you good scene photographs for use at trial.

7. Family and Work Photographs

When we are hired to represent a family, one of the first tasks we undertake is to gather all family photographs and work photographs to use in settlement presentations, settlement brochures, and collages for use at trials. While it may be difficult to describe a relationship between a father and a son, a photograph of a father carrying his son on his shoulders and the smile they both have can communicate more than a skilled advocate could ever do with words.

8. Sympathy Cards

We routinely ask to review any sympathy cards that the family has received. Many times these cards contain heartfelt words of what your client may have meant to others in his or her lifetime. These sympathy cards can provide leads to powerful potential witnesses and make outstanding demonstrative aids.

Creating and Presenting Persuasive Demonstrative Evidence

9. Day-in-the-Life Footage

If your client has a debilitating injury, obtaining footage of their daily routine can be an invaluable tool to communicate the true difficulties associated with the incident. A day-in-the-life video, which is accurate and not overly prejudicial, will many times be allowed into evidence with a life-care planner or physical medicine and rehabilitation doctor narrating. More often, day-in-the-life videos demonstrate to decision makers the truly life changing nature associated with the incident.

10. Aerial Photography

Aerial Photography is enormously helpful in many personal injury cases. An aerial shot of the scene can be used as real evidence in the case. Many times I will obtain an aerial shot of the scene, intersection or roadway involved. We will then use this aerial photograph throughout the pretrial process as deponents describe how the incident occurred by actually marking on the aerial photograph itself. Aerial photography can be obtained at a fairly modest price. Moreover, aerial satellite photographs are available on the internet for free at www.teraserver.com, www.globalexplorer.com, and www.earth.google.com. These websites can provide satellite photographs with surprising detail. These photographs can then be used in mediation presentations or trial easily and inexpensively.

11. Answering Machines and Call Notes

Ask your clients if they have saved any voice messages from victims. You can usually incorporate these into a powerful

message for use during settlement negotiations.

12. 911 Tapes

Obtain the 911 Call Logs. These logs will often identify witnesses who saw the incident but did not stop to be interviewed by the police. Further, these tapes will often provide dramatic and emotional descriptions of the incidents. These are generally admissible as excited utterances under an exception to the hearsay rule and make a wonderful addition to a settlement presentation.

13. Home Videos and Movies

Like family photographs, home videos and movies truly capture family relationships that are either lost or inadequately described with words alone. Always obtain copies of home movies and videos for use in your settlement presentations.

14. Medical Illustrations

We have all seen anatomically correct medical illustrations. While a medical illustration tailored to your case can be expensive, many times the medical illustration is a powerful demonstrative aid during the direct examination of a physician. When a customized medical illustration does not make sense, generic medical illustrations can be used by simply downloading medical illustrations off websites. The following websites provide such generic illustrations: www.adam.com; www.lifearth.com; www.nlm.nih.gov and, www.wmagraphics.com/med.html

15. Stock Photography

Sometimes you may not have time to obtain the perfect photograph for your case. In the pretrial context you may want to consider using stock photography for a visually appealing filler. The following internet sites provide stock photography:

www.freestockphotos.com ;
www.comstock.com ; www.corbis.com ;
and www.eyewire.com .

B. Technology To Capture Source Materials Yourself

Most demonstrative aids that you will use in the pretrial and trial arenas can be captured using basic technology that is available to all attorneys. The following is a list of the basic equipment you will need to capture the source materials necessary for the creation of persuasive demonstrative aids.

1. Video Kit

Our firm has invested in a handful of simple video kits. These video kits include everything we need to do basic interviews or scene documentation. Your kit should include a digital camcorder, a digital camera, camera lights, power supplies (batteries, back-up batteries and power cords), blank tapes, a tripod and lapel microphones. We routinely use these video kits to document scenes, conduct video surveillance, interview witnesses and interview clients.

2. Digital Cameras

A digital camera is a cheap and easy way to capture demonstrative evidence.

Digital cameras can transfer digital files directly into Power Point presentations for use at mediation and trial. As stated above, we have a digital camera in each of our video kits to document scenes, vehicles or other critical evidence. Good digital cameras can be obtained for between \$300 - \$1,000.

3. Scanners

Unfortunately, most documents and photographs that you encounter will not be in a digital format. Invest in a good scanner to capture family photographs, sympathy cards and other source materials. Scanners can be purchased for between \$200 - \$500 at any computer store.

4. Video Capture Equipment

Like scanners that transform photographs and documents into a digital format, video capture cards transform VHS videos into a digital format. This allows the user to manipulate and to edit the video within the computer.

Using the basic technology outlined above, you can capture evidence, which will be later used in the creation of persuasive demonstrative evidence.

V. CREATING DEMONSTRATIVE EVIDENCE

Today, the majority of demonstrative evidence can be created with nothing more than a home computer, a high quality color printer and basic software packages. In this portion of the paper, I will describe the equipment and software necessary to create your own demonstrative exhibits. With just

Creating and Presenting Persuasive Demonstrative Evidence

these basics, the majority of your demonstrative aids can be easily and inexpensively created.

A. Necessary Equipment

1. Computer

I recommend purchasing a laptop computer. Today's laptop computers have the necessary processing power to run the programs needed to make demonstrative aids. Additionally, a laptop computer has advantages over a desktop in that the laptop can be taken on the road and used to present your demonstrative evidence at seminars, mediations and/or trial.

If you are considering the purchase of a laptop computer, I would recommend the following minimums. (1) The operating system should be Windows XP. (2) The processor should be at least a Pentium 3, 850 megahertz processor. My recommendation is to buy the most powerful processor available. Not only are more powerful processors necessary to run the demonstrative creation and presentation programs, but they are necessary to smoothly play videos downloaded onto your laptop. (3) I would recommend at least a 30 gigabyte hard drive. Having the largest hard drive available allows you to store photographs, videos and images that will be used in your demonstrative aids. All of these items take up considerable hard drive space. Accordingly, it is best to have an abundance of hard drive capacity. (4) Finally, your computer should have a DVD Player. DVD is quickly becoming the dominant media format. The introduction of DVD burners now allows lawyers to burn 2 ½ hours of video onto a single DVD. A laptop equipped with a DVD player can play

the video and access other images from a DVD.

My recommendation for laptop manufacturers are Dell Computers at www.dell.com; Sony Vaio Computers at www.sonymstyle.com/vaio/notebooks or IBM Thinkpads at www.IBM.com.

B. Necessary Software

1. Publishing Software

Publishing Software is used to create printed brochures and boards. The desk top publishing software I recommend is Microsoft Publisher, which can be purchased at www.microsoft.com/office/publisher/. The price of this software is \$339.00. We use Microsoft Publisher to create settlement brochures. The key documents, medical records, photographs of the scene, and photographs of the injuries can easily be imported and narrated in a colorful and powerful manner. These demonstrative aids are easily created in the desk top publishing program. Once you have a format for doing so, the settlement brochures can be customized for different cases with relative ease.

A second use of desk top publishing software is the creation of single page exhibits either to be shown with the Elmo, overhead projector, or on foam core boards. You can create the exhibits you wish in these programs and e-mail them to companies to print enlarged versions on boards.

2. Presentation Software

Presentation Software is similar to publication software in that images, documents, and photographs can be organized on separate pages called slides. Additionally, the presentation systems allow the user to play video excerpts directly from the presentation software. Presentation software is include in this portion of the paper because the software is useful in creating and in formatting the demonstrative aids in addition to presenting them through an LCD projector or otherwise. The presentation software that I recommend is Microsoft Power Point which can be purchased at www.microsoft.com/office/powerpoint or Corel Presentations which can be purchased at www.corel.com. Both programs cost approximately \$400.

3. Photo Editing Software

Photo editing software allows photographs to be edited and polished for later use in a presentation or publication created in Microsoft Publisher or Power Point. I have used photo editing software to crop unwanted images and clarify and brighten others. The very best photo editing software is Adobe Photoshop which can be purchased at www.adobe.com for \$609.00.

4. Video Editing Software

I personally do not edit my own videos. I think this is an area that takes some time and is better and more professionally conducted by a professional editor. Nonetheless, simple video editing can easily and inexpensively be accomplished on a case that does not justify

outsourcing these items. The best video editing software is Adobe Premiere Software which can be purchased at www.adobe.com for \$549.00.

Adobe Premiere is a highly sophisticated video editing platform that contains a vast number of features most of which would go unused by the layman editor. Today, many digital camcorders and laptops come with video editing software included. Likewise, video capture cards that transfer VHS video to a digital format will include basic editing software. Most of this software is very inexpensive and should satisfy the basic editing needs of the legal profession.

VI. PRESENTING YOUR DEMONSTRATIVE EVIDENCE

Presentation of your demonstrative evidence can be accomplished by use of several different mediums. The presentation of demonstrative exhibits in traditional formats (such as charts, graphs and blow-ups) is well known by most practitioners. Accordingly, this portion of the paper will focus upon presentation of demonstrative exhibits using technology.

A. Presentation Hardware Essentials

With very basic hardware, demonstrative evidence can be inexpensively presented at mediation and trial. The following are essential hardware items to add to your equipment presentation inventory.

1. Laptop Computer

As previously discussed in Section V.A.1., of this paper, a laptop computer is the

Creating and Presenting Persuasive Demonstrative Evidence

centerpiece of the hardware used in presenting demonstrative evidence. My recommendations for laptops were presented earlier in this paper and will not be repeated here.

2. LCD Projector

LCD Projectors allow the presenter to show computer-generated demonstrative evidence, Power Point presentations, play video from a VCR and show documents. In essence, a LCD projector acts like a television or monitor that allows multiple inputs from a VCR, document camera and your computer. The LCD projector provides high quality images on a large screen even under lighted conditions.

In considering an LCD projector, it is important for the projector to have at least 1,000 lumens. This represents the projector's ability to project bright images. The more lumens, the brighter the images. It is also important to confirm that the LCD projector you are considering has the capability for multiple inputs and an easy switching mechanism. This is important so that you can run a cable from your VCR, your ELMO and your computer directly to the LCD projector. The projector switching device should allow you to easily switch back and forth from these different sources for presentation of your demonstrative evidence.

LCD projectors are priced between \$2,000 - \$6,000. I recommend the Epson PowerLite Series priced from \$2,204. More information regarding these LCD projectors can be obtained at www.epson.com. Infocus also has a very good line of LCD projectors from \$1,999. More information about these LCD projectors can be obtained at

www.infocus.com. Finally, my firm uses an NEC Series projector which has worked quite well. These projectors start at \$2,220. More information regarding these projectors can be obtained at www.nec.pj.com.

I would like to provide some final thoughts regarding LCD projectors. Consider purchasing a back-up projector, particularly if you plan to use the projector in the Courtroom. Likewise, it is important to have replacement bulbs on hand. It would certainly be an unenviable position to be out of town at trial with a computer full of wonderful demonstrative evidence but no ability to show the jury your work because the LCD projector light bulb was out. As always, plan in advance for the worse and have appropriate back-up systems available.

3. Document Cameras

I believe that most practitioners are becoming more and more familiar with document cameras. Many of the larger cities have court-owned document cameras available for use. Dallas County's ABOTA Chapter purchased document cameras and big screen T.V.s for all of Dallas' Civil courtrooms. This provides an invaluable resource for use by lawyers in all cases large and small. While document cameras may be available in some courtrooms, the vast majority of courtrooms still do not have document cameras available to litigants.

I would highly recommend purchasing a document camera to use during trial. Document cameras are essentially fancy overhead projectors. The document cameras work by suspending an actual video camera onto an arm above the surface of the machine. Documents are then placed on the surface of the machine. The camera can be

Creating and Presenting Persuasive Demonstrative Evidence

zoomed and focused in on certain portions of documents. The video captured is then output to a T.V. or a LCD projector thereby displaying the document, photograph or three dimensional object for the jury to view. Document cameras are excellent tools for showing exhibits, the charge, photographs, and even three dimensional exhibits. Once you have used a document camera to cross-examine witnesses with exhibits, you will truly appreciate its value.

In purchasing a document camera, consider the following important features. First, consider a document camera with a back light for displaying x-rays. Second, your document camera should contain multiple inputs as with the LCD projector. Any document camera purchased by you should absolutely have zoom and auto focus features. These features are enormously important in highlighting certain items in documents without the necessity of refocusing each time.

Document cameras are available for purchase from between \$1,000 - \$7,000. While the initial cost may be significant, this critical presentation tool can be used over and over again without additional expense. There are two primary manufacturers of document cameras. Elmo manufactures a document camera priced from \$1,750. Additional information regarding Elmos can be obtained at www.elmo.com. A second document camera company is Doar Presentations. These document cameras range from \$1,049 to \$7,099. Additional information regarding Doar presenters can be obtained at www.doar.com.

4. Audio Systems

An often overlooked aspect of the presentation system is a powerful audio system. The LCD projector or computer speakers are wholly inadequate to powerfully communicate sound to juries. Audio systems which will amplify computer output sounds with subwoofers and multiple speakers are well worth the money. Most of these systems can be purchased from between \$200 - \$500 at Best Buy or CompUSA.

5. Portable Presentation Screens

Another needed, but overlooked item is a portable presentation screen. A presentation screen is necessary for use with an LCD projector. Presentation screens are now well designed so that they can be easily expanded for use and easily stowed away. I recommend the Da-Lite 4 Model C, 72" by 96" which is priced at \$665.00. More information regarding presentation screens can be obtained at www.da-lite.com.

B. **Presentation Software**

Once equipped with the basic hardware, you will need presentation software to effectively present your exhibits and demonstrative aids during mediation and trial. There are numerous software packages available. I use a combination of presentation software in cases that I handle. Some software is better for use during mediation, opening statements and closing arguments. Other software is better for presentation of exhibits and for use during examination of witnesses.

Creating and Presenting Persuasive Demonstrative Evidence

1. Presentation Software for Mediation, Opening Statement and Closing Arguments

Some presentation software is designed to present slides. These presentation systems work very well during mediation, opening statements and closing arguments. Both of the recommended presentation systems allow you to incorporate video, photographs, still images and to type your own text. Most importantly, these features are very easy to use and to implement with little or no training. My recommendations for these types of presentation systems are Microsoft Power Point priced at \$339.00. Microsoft Power Point can be purchased at www.microsoft.com/office/powerpoint/ or Corel Presentation which can be purchased for \$339.00 at www.corel.com.

2. Presentation Software for Trial and Witness Examination

The Power Point and Corel presentation systems discussed above work excellent in preplanned scenarios. However, we as trial lawyers, know that the trial process is dynamic. Often times an examination of a witness can change instantaneously. Power Point and Corel presentations do not allow the flexibility to adjust to these quick changes. Accordingly, it is necessary to use another trial presentation software to display exhibits during the trial.

The trial presentation software I recommend allow exhibits to be scanned into the computer prior to trial. Each exhibit is assigned an exhibit number and bar code. These bar codes can be printed out on stickers to be placed in your witness notes or

trial notebook. Further, these bar codes can be placed in your exhibit book. From any of these locations, a bar code scanner can instantaneously pull up an exhibit by simply scanning the bar code or by typing in the exhibit number on a key pad. Once the document is displayed through the presentation system, the lawyer can highlight and zoom in on important portions of the exhibit. Unlike a Power Point presentation, you are not limited in going to just the next slide. These systems allow you to skip around to different exhibits.

Further, these trial presentation software packages allow you to play videos and show images. The limitations of the trial presentation software are that you cannot easily add text to boxes and backgrounds, nor use design templates or animation. For this reason, Power Point and Corel presentations makes a more appealing presentation, but they lack flexibility needed for witness examinations.

The two trial presentation systems I recommend are Sanction Trial Presentation software priced at \$395.00. The Sanction Software can be purchased at www.verdictsystems.com/sanction.html The second trial presentation system I recommend is In Data's Trial Director priced at \$595.00. This software package can be purchased at www.indatacorp.com/software/default.asp.

VII. TYPES OF DEMONSTRATIVE AIDS

A. Photographs

Photographs still remain as the most used form of demonstrative evidence. As

Creating and Presenting Persuasive Demonstrative Evidence

discussed in the previous portions of the paper, these photographs can be obtained from the police department, fire department, newspapers, television stations, and medical examiner offices. In order to introduce a photograph into evidence, you need a sponsoring witness who is familiar with the object or scene depicted and can testify that the photograph is a “fair” and “accurate” representation of the scene or item in question.

B. Charts, Drawings and Sketches

Second to photographs, the most used demonstrative aids are those existing in charts, drawings and sketches. Charts, drawings and sketches can be used to highlight particularly important items or as a supplement to a computer presentation. The following are examples of commonly used charts and boards:

1. Witness Lineups

In a complicated case with many witnesses, I often use a witness lineup chart that simply contains a photograph of the witness, the witness’ name, and a generic description of the witness’ relation to the case. This has proved to be immensely helpful for juries in keeping the players in a case straight in their minds.

2. Proof Checklists

I have seen different lawyers use proof checklists in a variety of ways that are enormously effective. One way to use a proof checklist is to list, in your opening statement, certain facts that will be proved. A board with these proof items can be introduced during the opening statement. As

the proof comes in during the trial, a visible check mark can be placed next to the proof item so that the jury mentally will understand and believe these items have been proven. At the end of the case, the proof check list can be used as a format or discussion point in the closing argument.

3. Summary Boards

Summary boards can be used with charts, drawings, sketches, or through a multi-media presentation. Basically, a summary board includes a picture of a witness, his or her name and the key items to which he testified. In a lengthy case, summary boards can be important tools to remind the jury of the key witnesses and their critical testimony.

4. Miscellaneous

The uses of charts, drawings and sketches are limited only by the evidence and the imagination of the lawyer. We are all aware of charts, drawings and sketches used to depict accident scenes, witness testimony and other important concepts in a case. Spend time thinking about the evidence and expand your demonstrative evidence beyond the ordinary.

C. Models

One the most effective demonstrative aids is models. Models have what most other demonstrative aids lack – a third dimension. The following are models that we frequently use in our trials:

1. Safer Designs

Daubert now requires that experts many times build and test safer alternative designs. In our product liability cases, we will commission engineers to not only design but to build prototype safer alternative designs that eliminate the dangerous defect we allege exists. There is almost no more powerful tool than having your expert show a product that safely and effectively can be built to address a particular issue. Obviously, building prototype safer alternative designs is not practical in some cases, but when it is feasible they can be enormously effective demonstrative tools.

2. Anatomical Models

Anatomical medical models are readily available through many different providers. Lawyers and Judges Publishing Company provides countless models, as do other suppliers. Anatomical models are tremendously helpful in videotaped doctor depositions and doctor direct examinations. Using model bones and muscles to show mechanism and extent of injury is a powerful demonstrative tool.

3. Exemplar Products

If the size and space of the Courtroom permits, an exemplar product can be used to show concepts in a case. Having your expert work with the product in the courtroom lends great credibility to his testimony and makes the communication much more effective.

D. Animations

Animation is the cutting edge in demonstrative evidence. Animations are simply invaluable. Animation provides a three dimensional perspective and can be presented without limitations associated with real life. Animations can capture and show items that do not lend themselves to other demonstrative aids. For instance, a object too small or too difficult to see can be easily animated. I have used animations to show the innerworkings of products. My medical malpractice colleagues have used animations to show how various organs function within the body. Conversely, animations can show events occurring on a larger scale that could not be duplicated with the use of other demonstrative aids. The innerworkings of a gas processing plant cannot easily be shown through a series of photographs, but can easily be brought to life in animation. Animations created under the supervision of an accident reconstructionist or other qualified expert, can be used to show fair and accurate representations of how collisions occurred. Actually seeing the timing, position and movements of vehicles through an accident scene and collision goes beyond painting a picture with words, but actually shows the jury the accident sequence itself. Think about using animations to illuminate critical evidence in your case or when other demonstrative aids fall short.

E. Computer Modeling

Computer modeling is a way to satisfy many of the prerequisites associated with *Daubert* challenges in the absence of expensive testing. For instance, in rollover cases, we hire experts who use computer modeling to test proposed safer alternative designs. This computer modeling can cheaply and accurately test our safer

Creating and Presenting Persuasive Demonstrative Evidence

alternative design. In fact, Ford Motor Company uses a computer modeling program called A.D.A.M.S. This program allows Ford to change various components on the vehicle and test those changes with their A.D.A.M.S. computer model to see how various changes affect rollover propensity. We can use this same technology to test our experts' safer alternative designs.

While the use of computer modeling is important substantive evidence, it has the corresponding effect of creating powerful demonstrative evidence. The data associated with computer modeling can easily be transferred to a computer animator who can then animate the various models created by your experts.

F. Medical Illustrations

Medical Illustrations are really a form of board or chart. Medical illustrations can generically illustrate anatomy or injuries. Stock medical illustrations are readily available in publications and off the internet. See Section V.A.14. of this paper for additional information on obtaining generic medical illustrations.

In addition to generic medical illustrations, there are professional medical illustrators who can customize illustrations to the facts and injuries that exist in your case. These customized medical illustrations, with the supervision of medical experts, can be valuable tools for an expert explaining injuries to a jury. I like using medical illustrations that compare normal anatomy with the injured anatomy through either side-by-side comparisons or plastic overlays. I find this particularly useful and important when the injury is difficult to

understand. Showing the jury a normal anatomical position versus the victim's anatomy can effectively demonstrate the injury. Whether generic or customized, medical illustrations are powerful demonstrative aids in personal injury cases.

G. Videotaping

Videotaping events, witnesses, products and scenes is a mainstay of demonstrative aids. The following are my thoughts on videotaped demonstrative evidence.

1. Creative Use of Video Depositions

In the past few years, I have tried to change my videotaped depositions to incorporate graphics and exhibits. A skilled video editor can literally take an exhibit discussed with a witness, highlight the important information and show that visually as the witness' voice is overlaid or a split screen is used to show both the witness and the document at issue. This allows for both the oral presentation and the visual presentation of information, which results in a significantly higher retention level. Additionally, using videotaped depositions in this format makes them much more interesting to a juror.

2. Settlement Video Documentaries

Settlement video documentaries are extremely important. One of the most difficult things to communicate to decision makers are the likeability of your clients. I truly believe what others have said, "Your client is your case." If the jury does not like your client they generally will not like your

Creating and Presenting Persuasive Demonstrative Evidence

case. This most important aspect is best communicated to decision makers by use of a settlement video documentary. Our firm routinely does video interviews with our clients. We couple these interviews with home movies, photographs, interviews with friends and witnesses to produce video settlement documentaries. In producing settlement video documentaries, I typically do not address liability. It is my belief that I can cover liability issues more effectively through a multimedia presentation at the mediation. I use the video settlement documentary simply to show a decision maker the likeability of my client, and the catastrophic change to my client's life as a result of the incident. Like settlement brochures, video settlement documentaries put a face, soul and life with the decision maker's file.

3. Day-In-the-Life Videos

Day-in-the-life videos can be important tools to show a jury or decision maker the true difficulties associated with your client's everyday routine. We use day-in-the-life videos in conjunction with a spouse's testimony or in conjunction with a life care planner's testimony. The video is played for the jury and narrated from the stand by either of these sponsoring witnesses who will explain the difficulties and problems associated with various tasks to be accomplished by the victim. It is one thing to say that it's hard for my wife to get out of bed and it is quite another to show exactly how difficult a simple task like this can be. Day-in-the-life videos, in the right case, can be powerful communicators of a client's true impairment.

4. Things Too Big for The Courtroom

Jury views are a rare occurrence. Video allows you to take the scene to the jury when the jury can't go to the scene. I have used video to record plant inspections, scene locations, and large products. These videos should be recorded in a well thought out and detailed manner. The videotape can then be narrated by an expert who can explain what is shown to the jury. I like to have my expert in the video pointing at various important items. Showing your expert at the scene-hands on-gives that expert additional credibility.

5. Re-enactments

Re-enactments are powerful ways to show the jury how various incidents occurred. Re-enactments require the use of sponsoring witnesses to testify that the re-enactments fairly and accurately depicts the events shown. Getting re-enactments into evidence requires the foundation that the conditions of the re-enactment and those of the original events are substantially similar.⁵

Re-enactments can be extremely expensive. In most cases, use of an animation can recreate events in an effective and less expensive manner. Nevertheless, we have used re-enactments in fire cases to show the emotion associated with the incident. Re-enactments almost always prove to be very powerful demonstrative aids when justified by the case.

⁵See *Pittman v. Baladez*, 312 SW2d 210, 216 (Tex. 1958).

6. Testing

In product liability cases we crash test vehicles or conduct other testing on products involved. While your experts are still consulting experts, videotape their testing for later use during trial. The experts can narrate the testing during their testimony to explain why it supports their opinions. This gives credibility to the witnesses and brings to life what could otherwise be a boring testimony about a test procedure.

7. Witness Interviews

As explained earlier in the paper, I routinely interview key witnesses. These witness interviews can then be edited together for use in settlement and mediation presentations or as potential impeachment evidence at the trial.

H. Settlement Brochures

Settlement brochures are, in essence, demand letters that invoke the power of the visual presentation. We routinely use settlement brochures to set our cases apart to the decision maker. Settlement brochures can be easily and cheaply produced with various desktop publishing programs. The settlement brochure can incorporate pictures, scans of key exhibits, scans of accident reports and injury photographs. A settlement brochure should cover basic liability facts and outline the damages. I end all of my settlement brochures with the damage elements submitted to the jury, and my breakdown of a demand for each of the various elements.

I. Computer Multimedia Presentations

Computer multimedia presentations such as Power Point are enormously flexible tools in presentation of demonstrative evidence. Almost every form of demonstrative evidence discussed herein can be presented through the use of a multimedia computer presentation. Photographs, charts, drawings and sketches can all be shown via a Power Point presentation. Further, the presentation software now is capable of reliably playing videotape. Computer multimedia presentations can and should be the cornerstone of most presentations.

VIII. CONCLUSION

Whether in a deposition, a mediation, a settlement discussion or a trial, the trial lawyer's job is to communicate persuasively a client's position. Demonstrative aids are an integral part of this communication process. With the evolution of technology, creating and presenting persuasive demonstrative evidence has become easy and inexpensive. I encourage you to invest the time and resources to acquire and to learn the basic technology discussed in this paper. Once you have learned and understand the basics, creating and presenting demonstrative evidence will become a routine part of every case you handle. In the end, incorporating demonstrative evidence in every stage of your litigation practice will make you a more effective advocate and communicator.