

Demonstrative Evidence

By Thomas J. Tallerico and Jeffrey G. Raphelson

Demonstrative exhibits are relatively easy to have admitted and they can take almost any format so long as they illustrate or clarify a witness's testimony. It is this flexibility that makes them powerful tools of persuasion. By applying established design and presentation principles to the creation of demonstrative exhibits, trial counsel can create exhibits that neatly illuminate the key points of a witness's testimony and potentially enhance the witness's credibility.

First, the basics

Demonstrative evidence is any form of evidence that illustrates or explains the testimony of a witness. It can be a diagram, map, drawing, photograph, model, chart, presentation, or some other method of clarifying testimony, and it may be used by an expert or a lay witness. It differs from substantive evidence, such as an agreement or correspondence at issue in a case, in that it has no independent probative value. For example, a computer animation could be used to show an eyewitness's version of what *actually happened* during an automobile accident. As discussed below, the foundation for such testimony need only assure the court that the animation will demonstrate the witness's testimony. A computer simulation, on the other hand, would be used to show what *must have happened*, by extrapolating from certain data (such as the weight, location, and direction of travel of each vehicle involved in the accident).

based on the laws of physics. The witness proffering the simulation likely would not have observed the accident and must offer foundation for the simulation that assures the court of the scientific principles on which it is based.¹

In Michigan, “[d]emonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case.”² Further, “demonstrative evidence is admissible if it bears ‘substantial similarity’ to an issue of fact involved in a trial.”³ With respect to demonstrative evidence used during expert testimony, “when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert’s testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event.”⁴ Beyond this, Michigan has not established specific criteria for reviewing the propriety of a trial court’s decision to admit demonstrative evidence.⁵ Such evidence, and the testimony it illustrates, must satisfy traditional requirements for relevance and probative value.⁶

In federal court, the standards are similar. Generally, “[d]emonstrative evidence is admissible to assist jurors in understanding basic principles.”⁷ To meet this standard, courts in the Sixth Circuit determine whether the demonstrative evidence is relevant and not unfairly prejudicial.⁸ In *United*

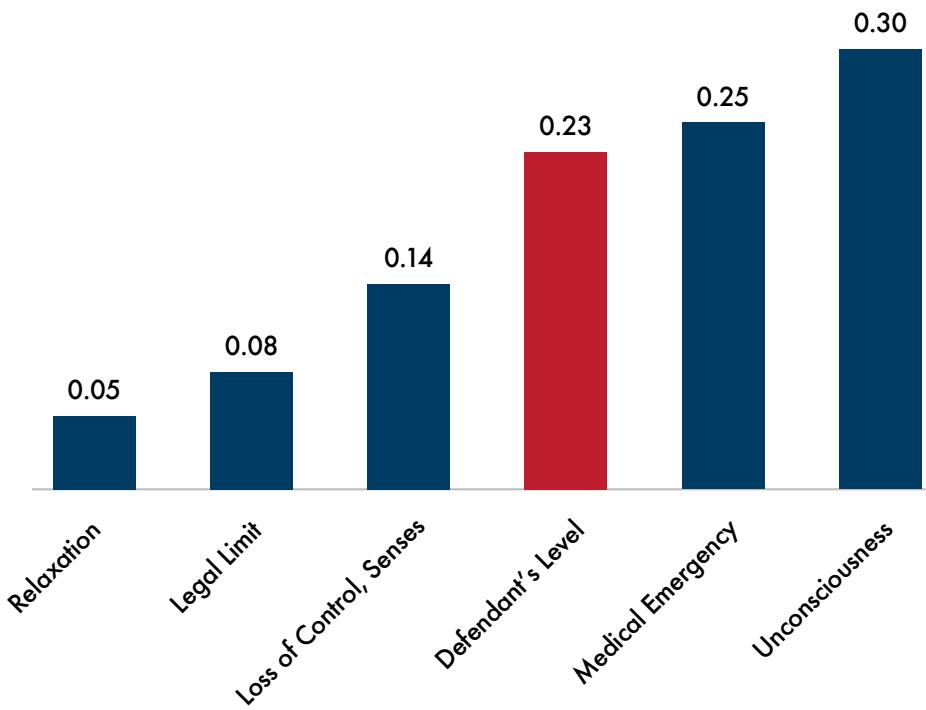
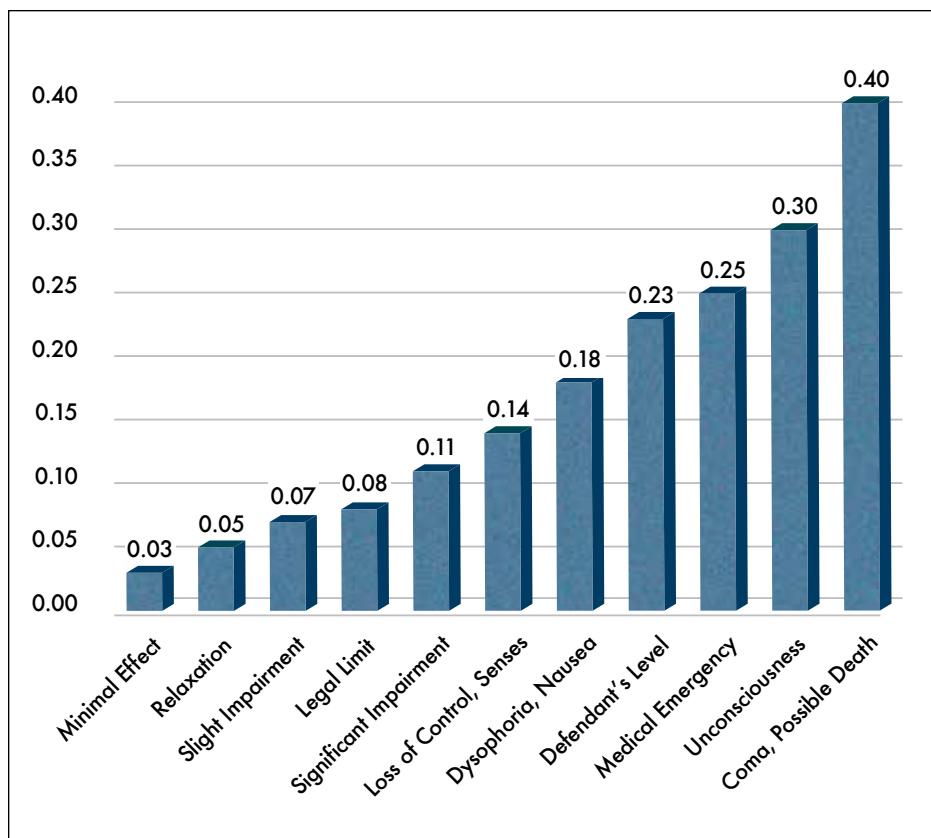
States v Humphrey,⁹ the Sixth Circuit affirmed the admission of 107 coin bags, 101 of which were filled with Styrofoam peanuts, as demonstrative evidence to assist the jury in picturing defendant stealing 214 bags filled with coins from a bank. The court found that admitting the bags was relevant and probative to demonstrate how many bags could fit in the bank vault and it was not unfairly prejudicial because it was only half the number allegedly stolen.¹⁰

Foundational testimony to support the admission of a demonstrative exhibit will vary slightly depending on the type of exhibit. For example, to admit a photograph or video of a scene at issue, the presenting witness must persuade the court that:

- the photograph or video is relevant;
- the witness is familiar with the scene or events depicted in the photograph or video;
- the witness is familiar with the scene or events as of a relevant date, time, etc.; and
- the photograph or video fairly and accurately shows the scene as it appeared on the relevant date.¹¹

Admitting a map or model requires similar testimony, but also verification that it is to scale. To admit a drawing, the witness must testify that it is reasonably accurate and not misleading.¹² These foundational

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requirements are flexible enough to allow counsel latitude in creating persuasive demonstrative exhibits.

Effective use of demonstrative evidence

Before devoting time to planning and creating demonstrative exhibits, counsel must confirm that the court or fact finder will be receptive to them. Not all are. The authors are aware, for example, of a recent U.K. arbitration in which a major U.S. law firm proffered models of various buildings that were at issue in the case only to learn that the arbitrators, who were British barristers, were not receptive. They preferred to have extensive discussion of applicable authorities. As such, the exhibits turned out to be counterproductive. The moral: consider your audience before preparing demonstrative exhibits.

By contrast, in this age of expanding media, U.S. juries are more likely to respond to well-conceived demonstrative exhibits.¹³ Counsel's challenge is to craft the most persuasive exhibit possible within the strictures of admissible evidence. There are a number of authorities on effective communication and presentations that can help.¹⁴ Enhancing the clarity of an exhibit will increase its persuasiveness.

Design principles suggest that when creating a demonstrative exhibit, the advocate must be conscious of the presentation space and arrange elements on that space with focus. Thus, when preparing a diagram, avoid the temptation to load the space with too much information. At the top left of this page is a slide that might be used to illustrate a defendant's state of intoxication as a function of blood-alcohol level.¹⁵

In this example, including too much data dilutes the impact of the important data, and overusing technical features, such as three-dimensional graphics and fill effects, distracts from the message altogether. Now, consider a more direct approach in the graph below it. This example makes a more conscious use of the space and focuses the viewer on the central message: the defendant had a high level of intoxication. The reduced detail does not lessen the impact of the message; it enhances the impact.

The degree of freedom that counsel has to apply these design principles will vary with the type of exhibit. For example, a photograph of an accident scene has fewer options. The presenter may crop it or use Photoshop to remove stray pedestrians or vehicles (unless their presence is important to the witness's testimony), but the arrangement of items in the scene is otherwise fixed. Other forms give the presenter freedom to select the critical elements and arrange them so as to direct the viewer to the important aspects of the testimony.

Finally, counsel must remember that demonstrative evidence should illustrate testimony and not replace it. A PowerPoint slide that presents a witness's testimonial points line by line distracts the fact finder from the

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witness and may be inadmissible as cumulative. However, a slide that illuminates a single point succinctly allows the fact finder to quickly return his or her attention to the witness and gives the witness more time to establish credibility. By enhancing the witness's testimony on that point, it is additive and admissible, barring other objections.

Conclusion

Well-conceived demonstrative evidence can enhance a witness's testimony by illustrating his or her critical points. The most persuasive demonstrative evidence focuses the fact finder on a specific point without the distraction of extraneous elements. Principles of effective communication and design can assist trial counsel in developing such exhibits and, when presented to a receptive fact finder, the effect of such exhibits can be dramatic. ■



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The authors thank their colleague, Michael J. Serra, for providing some of the research presented in this article.

ENDNOTES

1. Most jurisdictions that have addressed the admissibility of computer simulations as substantive proof or as the basis for expert testimony admit it subject to the same foundational requirements as scientific evidence, although several employ a standard that resembles the test in *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923); i.e., admissibility is conditioned on a sufficient showing that (1) the computer is functioning properly, (2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party so that they can be challenged), and (3) the program is generally accepted by the appropriate community of scientists for use in the particular situation at hand. See *Commercial Union Ins Co v Boston Edison Co*, 412 Mass 545, 549; 591 NE2d 165 (1992); *Bray v Bi-State Dev Corp*, 949 SW2d 93, 98 (Mo Ct App 1997); *Kudlacek v Fiat SpA*, 244 Neb 822, 843; 509 NW2d 603 (1994); *State v Clark*, 101 Ohio App 3d 389, 416; 655 NE2d 795 (1995).

2. *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008), quoting *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).
3. *Lopez v Gen Motors Corp*, 224 Mich App 618, 628; 569 NW2d 861 (1997), quoting *Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 126; 208 NW 145 (1926).
4. *Bulmer*, 256 Mich App at 35.
5. *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998).
6. *Id.*
7. *United States v Martinez*, 588 F3d 301, 311 (CA 6, 2006).
8. See *Stryker Corp v XL Ins America*, unpublished opinion of the U.S. District Court for the WD of Michigan, issued January 23, 2007 (No 4:01-cv-157) ("As a demonstrative exhibit, the Court will consider [defendant's] objections that exhibit 33 is irrelevant, cumulative and unfairly prejudicial.").
9. *United States v Humphrey*, 279 F 3d 372 (CA 6, 2002)
10. *Id.*
11. Mauet, *Trial Techniques* (5th ed), p 183. In some instances, the witness may also have to testify that the evidence will assist in explaining his testimony.
12. *Id.* at 185, 187.
13. "A two-minute video, if well made, will make a greater impression on the minds and emotions of jurors than the world's best expert." Panian, *Truth, Lies, and Videotape: Are Current Federal Rules of Evidence Adequate?*, 21 Sw U L R 1199, 1214 (1992), quoting Chernow, *From the Bench: Video the Courtroom—More than a Talking Head*, ABA J Litigation (1988), p 5.
14. A particularly useful work on presentations generally is Reynolds, *Presentation Zen: Simple Ideas on Presentation Design and Delivery* (2d ed) (Berkeley: New Riders Press, 2011).
15. See McDonald Center for Student Well-Being, *What Is Intoxication?* <<http://oade.nd.edu/educate-yourself-alcohol/what-is-intoxication>> (accessed September 25, 2015).



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