

## **Admissibility of Demonstrative Exhibits**

Demonstrative exhibits fall under the Federal Rules of Evidence 1006; “The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation....” Must show underlying documents so voluminous that they cannot be conveniently in court:

- As long as the underlying documents have been made available to opposing counsel
- The underlying documents are admissible
- The resulting summary is accurate and non-prejudicial
- The summary is introduced through testimony of the witness who supervised its preparation.
- In addition, although underlying documents must be admissible, it is not necessary to admit the underlying documents into evidence in order to admit the summary

### **A. Foundational requirements**

To authenticate the exhibit, the litigator must call a competent witness who has firsthand knowledge of the exhibit and the foundational material which is presented. This Expert witness should be involved in the conceptualization, oversee or participate in the creation, provide foundation materials and decide what the demonstrative purports to show. He must testify that he supervised the preparation of any demonstrative and verify the representational accuracy of the exhibit

### **B. Admissibility requirements for Demonstrative Exhibits**

- Relevance: experts and counsel should be able to explain why the demonstratives advance the determination of the case and
- That the exhibit has probative value and no prejudicial effect.

Objections frequently come from the Family of Rule 403, that the exhibits are unfair and prejudicial, that they may mislead the jury, that they may confuse the issues, that they are inaccurate or inconsistent with the evidence on record. The better and more effective the exhibit, the more likely the other side will search for objections.

Generally, one can usually overcome Rule 403 challenges by examining the Expert.

### **C. Admissibility requirements for Demonstrative Evidence**

Requirements for entering demonstrative into evidence are more stringent. For Computer generated evidence (models or simulations) the criteria usually applied is that of scientific test, experiments and processes. The foundation materials must show validity of the underlying scientific technical theory incorporated and reliability of the information process system in applying computer program to relevant evidence. This is primarily a hurdle for accident recreations.

## **Technology Tutorials**

Technology tutorials frame the understanding of certain technical issues and may influence claim construction.

Submission of tutorials may be live or by an interactive tutorial. Live tutorials benefit more from judges who are prone to asking questions. Interactive/video formats are better reference since they can be played on demand and viewed by the judge or clerks.

In producing interactive/video formats, the most efficient workflow is to determine the content, write the script, storyboard the visuals, and then produce the artwork and voiceover. Moving too quickly on the voiceover or visuals production can result in higher costs.

For Markman argument slides, a good visual structure for the argument puts the hierarchy of evidence, parties' constructions, and supporting evidence in a consolidated format to reduce reliance on several separate documents.

Information density is high but most information is for reference purposes. As a printed piece, this works well after the oral argument is done.

### **Opening Statement**

Opening statements should contain elements of the visuals that will be seen during the trial. For example, key illustrations, tables, graphs can be introduced and actually help tell the story and identify Key points. They don't need to be reproduced exactly as the expert will use them since it is usually helpful to pare down the information displayed.

Persuasive opening graphics also simplify the story that will be told during trial through the witnesses and evidence. They also succinctly state the problem that jurors must resolve.

Timelines are often used in opening but good timelines are more than a chronology plotted to a time scale. They should convey a plot or theme. Trying to include too many events or events from multiple case issues (like willfulness and invalidity on the same timeline) may cause confusion for jurors.

### **The Technical Expert**

Because technical experts bear the burden of bringing most of the evidence into the case, their testimony must be meticulously organized.

Decide early on the structure of the testimony and how to most efficiently organize the evidence.

As a plaintiff, the structure of the presentation may involve grouping several accused products in order to avoid repetitive testimony about products with similar features

As a defendant, you should seek to simplify the decisions jurors must make. For example, if your non-infringement argument relies on a technical distinction, then the background technology provided by the expert should reinforce the concepts that jurors must internalize to find the argument persuasive.

Pace and change of pace are critical to complex testimony. Jurors want to know that progress is being made. It helps to alternate between a series of visuals that change and build content quickly with those that are more static. It also helps to change media and take a slide break--use the document camera, show a board, or introduce a physical demonstrative.

One potential mistake is the use of a testimony outline that gradually builds or is checked off on screen. While it does meet the goal of structuring the presentation, it may unintentionally invite jurors to calculate the remaining presentation length and tune out.

### **The Damages Expert**

There are several options for presenting an analysis of financial factors but the best ones tell a story about the hypothetical negotiation. Elaborate on a few factors that really drive the negotiation.

Demonstratives that step through the calculation of lost profits make the determination more accessible to jurors. Go step-by-step and show where the numbers come from and how they impact the final damages figure.

It is helpful to show the disparity between experts if you can also show that the opposing expert's damages or royalty rate are not consistent with other sources.

Another good visual strategy is to show how assumptions made by the opposing party result raise or lower the damages figure. Once you establish that the assumption is erroneous, replace it with your own. For example, putting a royalty rate in context with the overall value of the product.

### **Misleading Graphics – Some Common Themes**

“But let’s see what they didn’t show you.” Much like editing a political ad to a series of sound bites out of context, parties put their credibility at risk by selecting excerpts of documents or testimony that may be contradicted by another excerpt. Often, when jurors cannot judge the technical merits of the case, they rely on their ability to assess the credibility of a party.

“That’s not the entire story.” Because most demonstratives are produced in advance to opposing counsel, it is often easy to use the electronic formats as the basis for a cross-examination or rebuttal demonstrative. For example, a timeline may be edited to erase irrelevant events and put in alternate events.

Abuse of scale. Charts and graphs are especially prone to plotting choices that may be misleading. Correcting a minimum or maximum scale value can significantly change the visual picture presented by the other side.