

Effective Use of Demonstrative Exhibits and Demonstrative Aids

By Rodger D. Young and Steven Susser

HAMLET: Do you see yonder cloud that*s almost *in shape of a camel*?

LORD POLONIUS: *By the mass, and 'tis like a camel, indeed.*

HAMLET: *Methinks it is like a weasel.*

LORD POLONIUS: *It is backed like a weasel.*

HAMLET: *Or like a whale?*

LORD POLONIUS: Very like a whale.

-Hamlet, Act III, Scene II

If trial litigation is the art of persuasion, demonstrative tools are one of the practitioner*s most powerful brushes. This article will address the effective use of demonstrative exhibits and aids under Michigan law. It will also focus on the different standards used for presentation to a jury of demonstrative exhibits versus demonstrative aids and the way in which the possibly more forgiving standard for presenting demonstrative aids can be used to the trial lawyer*s advantage.

As used in this article, the term “demonstrative exhibit” refers to tangible pieces of information that are not in the form of a document (e.g., charts, videotapes, models, computer graphics) and that are offered for submission to the jury as a marked exhibit.¹ A “demonstrative aid” is also a tangible piece of information but it differs from a demonstrative exhibit in that an aid is not submitted to the jury for reference during deliberation and, thus, the threshold for presentation of an aid may be lower.² Both demonstrative exhibits and aids would qualify as demonstrative tools. Only the demonstrative exhibit, however, would satisfy the formal definition of “evidence.”³

Demonstrative exhibits and aids share a focus on the visual. Images are much more powerful and have a greater impact than words. The combination of aural and visual presentation is better still. Studies show that when people merely hear information, they recall only about 10 percent of what they heard. By contrast, approximately 85 percent of information is retained by those exposed to the combination of testimony and visual images.⁴ In addition to the benefits from their visual impact and effect on retention, demonstrative exhibits and aids provide a method for guiding the inept or inarticulate witness and can bring various strands of evidence into a cohesive whole.⁵

New technologies have only increased the opportunities and challenges to the modern litigator. Graphics software, such as Microsoft*s Powerpoint or Corel’s Presentations, allows attorneys to create effective charts, graphs, diagrams, slides, and transparencies. Photos, documents, or videos maybe scanned into the computer to assist in the production of such

graphics. Programs such as Doar's Anix Litigation Suite can add 3-D animation to electronic graphics, recreating everything from products to accidents or medical scenes.

Modes of presentation are no longer limited to charts, blowups, or overhead projector transparencies. Visual presenters or "Elmos"—essentially a camera mounted on a sliding track—can project any type of physical evidence on a television screen for easy viewing by the jury. Computers can be hooked up directly to television monitors, allowing the presenter to zoom in on particular images or highlighted text. Document manager programs such as Summation or Trial Director can create a computerized filing and retrieval system that makes the projection of such images easy and efficient.⁶

STANDARDS FOR USE AT TRIAL

Whether they are to be formally admitted into evidence or used solely as an aid, demonstrative tools generally must be relevant and fair.⁷ There is a distinction that a practitioner can try to make between demonstrative exhibits and aids to increase the likelihood that a demonstrative aid will be presented to a jury.

Demonstrative Evidence

To be admissible, demonstrative exhibits must satisfy the same criteria that a document intended as an exhibit must satisfy. As detailed below the governing provisions are Michigan Rules of Evidence 401, 403, 611, and 901. To be admissible, a demonstrative exhibit must be relevant, probative, and authenticated. Moreover, it must satisfy the rules concerning hearsay (MRE 801-806). Finally if the demonstrative exhibit is presented in summary form, it must satisfy MRE 1006.⁸

Whether the demonstrative exhibit is generated by new technology or old, the trial judge has great discretion in deciding if counsel may present such evidence to the jury. The judge's decision will not be reversed unless the appeals court finds both an abuse of discretion and that such error was prejudicial.⁹

Relevance under MRE 401 requires that evidence has some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable [than not]."¹⁰ This is a *de minimis* requirement. Under Rule 403, however, the trial court can exclude evidence, even if relevant, if it finds that its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay waste of time, or needless presentation of cumulative evidence."¹¹

To increase the likelihood of admission, counsel should be prepared to demonstrate that his presentation can be easily set up without undue disruption. In the case of more complex presentations such as computer animations, the exhibit should be previously disclosed to opposing counsel.¹² Otherwise, the judge may find that opposing counsel would be prejudiced

by his inability to challenge the assumptions or accuracy of the exhibit or to effectively cross-examine the presenting witness.

In many cases, it would be advisable for counsel to file a motion *in limine* for approval of his demonstrative exhibit before trial. Such a motion can address the logistics of the necessary equipment in the courtroom and the relevance of the evidence. The motion also may suggest limiting instructions—for example, that the exhibit is not intended to be a precise simulation but is offered only to illustrate certain general principles. Seeking prior approval will stymie opposing counsel's argument for prejudice and enable counsel to make alternative plans if approval is withheld. Finally prior approval will maximize the likelihood that counsel can obtain reimbursement for his exhibits as part of costs.¹³

Authentication under Rule 901 requires that the evidence “is what the proponent claims.”¹⁴ What is sufficient authentication varies with the type of evidence.¹⁵ For example, for a physical item, such as a sample seatbelt, authentication requires that the demonstrative exhibit be a “fair and accurate” depiction of the original.¹⁶ Authentication for a computer animation, on the other hand, generally requires testimony of a qualified expert and, in some instances, showing that the computer is functioning properly the input was complete and accurate, and the program is generally accepted by the appropriate community of scientists.¹⁷

A leading case on authentication in Michigan, *Lopez v General Motors Corp.*,¹⁸ addressed the showing required for recreation or simulation evidence. In *Lopez*, the plaintiff brought suit for injuries from a car accident, alleging that the defendant's seat belt restraint system failed on impact.¹⁹ At trial, the judge allowed into evidence the defendant's two videos of crash tests that used dummies and an impact sled.²⁰ The experiment differed from the facts of the accident in the angle and speed of impact, the weight and nature of the driver, and the thickness of the fender.²¹ The defendant's expert used the videotapes to suggest that even with a properly operating restraint system, a person in an accident similar to the plaintiff's would be expected to receive the type of injuries plaintiff incurred.²²

After a verdict for the defendant, the initial appellate panel reversed.²³ Constrained by Administrative Order No. 1996-4,²⁴ it ruled that under *Sumner v General Motors Corp.*,²⁵ admission of the videotapes was improper.²⁶ The court stated that because the tapes addressed an issue central to the case (whether the seat restraint operated properly during plaintiff's accident) and were visually compelling, they had to meet the “faithful reproduction” or “virtual identity” standard required for re-creation evidence.²⁷

The conflict panel convened pursuant to Administrative Order No. 1996-4 reinstated the judgment in favor of the defendant.²⁸ The panel found that the original *Lopez* panel and the *Sumner* court failed to distinguish between re-creation evidence, evidence used to show how an event occurred, and demonstrative evidence used to illustrate general principles.²⁹ Only the first two had to meet the “faithful reproduction” standard requiring “virtual identity” between proffered evidence and the event that evidence purports to recreate.³⁰ Demonstrative evidence used to assist the testimony of a witness or to illustrate general principles only had to meet the

“substantial similarity” test of *Smith v Grange Mut Fire Ins Ca*, 234 Mich 119, 208 NW 145 (1926).³¹

As the court explained,

*It is not necessary. . . that the conditions be exactly identical, but a reasonable or substantial similarity is sufficient, and the lack of exact identity affects only the weight and not the competency of the evidence, provided always that there is such a degree of similarity that [the evidence will assist the jury].*³²

The court added that the “substantial similarity” rule, focusing as it does on whether the evidence will aid the jury is best understood as merely establishing the threshold requirement of relevancy embodied in MRE 401.³³ The court concluded that admission of the videotapes was not an abuse of discretion since plaintiff had ample opportunity to and did point out to the jury the differences between the test conditions and the conditions of her accident.³⁴ Thus, in Michigan, the distinction between demonstrative evidence of general principles and re-creation evidence is critical.

Demonstrative Aids

Sometimes counsel may want to use demonstrative aids during argument or to assist a witness without seeking formal admittance.³⁵ Courts have recognized the value of such aids and have “encouraged” their use when it would help the jury understand the issues at trial.³⁶ The wise use of demonstrative aids can be a strong tool of persuasion. Unlike formally admitted evidence, a demonstrative aid will typically not need to pass through the same gaunt-lets that demonstrative exhibits would. This is because the demonstrative aid, unlike the exhibit, is intended to substitute for or complement a trial lawyer*s spoken word. Thus, logically if a trial lawyer can say it during the appropriate time at trial, he should also be able to show it.

This differing standard presents a window of opportunity to a thoughtful practitioner. He can exploit an effective chart to obtain added visual impact without having to meet the requirement for admissibility of a typical trial exhibit (such as, authenticity, hearsay summary). For example, a list of the top ten misstatements made by the defendant could be shown to the jury during opening statement, closing argument, and relevant portions of testimony but could not be admitted as an exhibit. The only disadvantage to a demonstrative aid is that it may not be taken into the jury room during deliberations. By that time, however, the effective demonstrative aid has already fulfilled its persuasive purpose.

The trial court has discretion to determine whether and how a litigator may use demonstrative aids and, as with admissibility rulings, the trial judge*s decision will not be reversed absent an abuse of discretion and prejudice.³⁷ The trial judge*s authority to make these decisions stems from MRE 611. The bounds of this discretion, as defined by Rule 611,³⁸ appear similar to the standards outlined above for formally admitted evidence.³⁹

Specifically Rule 611(a) gives the court

*reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to... make the interrogation and presentation effective for the ascertainment of the truth [and] avoid needless consumption of time.*⁴⁰

Demonstrative aids that are not relevant or probative arguably do not lead to “effective ascertainment of the truth”

Nevertheless, because the constraints on the use of demonstrative aids under MRE 611(a) are more vague and less developed than those that constrict the use of demonstrative exhibits under MRE 401,403,901, 1006, and the hearsay rules, a trial lawyer might use a demonstrative aid to make a visual point that he might not be able to make using a demonstrative exhibit.

Again, the chances that a court will allow a demonstrative aid to be approved may be maximized if the opposing counsel is given a prior opportunity to challenge it, particularly when the aid is complex. Also, the more argumentative or misleading an aid is, the more likely the court will find its prejudicial value outweighs its relevancy. Finally under the normal rules of argument, an attorney should not present new facts or misstate testimony.⁴¹ Thus, if counsel uses charts during closing argument, the arguments and facts outlined should be based on evidence previously admitted and not be misleading. In short, both demonstrative exhibits and demonstrative aids must be relevant and fair.⁴²

TIPS FOR THE PRACTITIONER

Demonstrative exhibits and aids are powerful tools in litigation. But, as with any power tool, it can be misused to the user's detriment. The following tips are designed to prevent that from happening.⁴³

Choose demonstrative tools that are appropriate to the case—If you have a simple trial in a small community, the most high-tech demonstrative tools are not cost efficient and may alienate the jury.

Keep demonstrative evidence simple and easy to understand—Focus your demonstrative tools on the most important elements of your case. Your goal is to assist understanding and to persuade, not to overwhelm the jury or distract them from oral testimony. Appropriate use of size and color can maximize effectiveness.

Evaluate your demonstrative tools objectively—Make sure they accurately reflect the information that you wish to convey and make the points you intend. Have several lay persons review the tools before use. Have fellow counsel analyze whether opposing counsel will be able to use the tool against you.

Maximize your chances for admission—Familiarize yourself with the idiosyncracies of your judge. If fellow counsel does not know the court’s reputation, interview the court deputy and bailiff. In cases where it is advisable, seek a motion *in li mine*, make demonstrative tools available to opposing counsel, or suggest limiting instructions for the jury. Design the tools so that they are not unduly prejudicial or misleading and so that they require minimum courtroom disruption.

Familiarize yourself with the courtroom—Know where electrical outlets are. Investigate the best places for equipment. Note the best sight lines for the judge and the jury by sitting in their respective seats. Be aware of light and shadows or objects that might obstruct the presentation. If possible, set up the demonstrative tool before court session begins.

Prepare Backup—Disappointments are inevitable. Make sure you have back-up technical and evidentiary support. For example, if you are preparing a computer presentation, bring a spare computer and an extra disk. If you have not obtained a prior ruling on whether you may use the demonstrative tool, have alternate plans for presenting your evidence or argument.

Make intelligent use of support personnel—Many demonstrative tools cannot be prepared in-house. Do not be penny wise and pound foolish. Professional demonstrative tools maximize effectiveness. Anticipate the need for outside personnel so that they may assist immediately. Re-creations, simulations, or animations are best constructed upon data obtained as soon as possible after the event that gave rise to the litigation. If experts are needed to present the demonstrative tools, rehearse them frequently.

Footnotes

1. *Black’s Law Dictionary* defines “exhibit” as follows:

A paper or document produced and exhibited to a court during a trial or hearing ...as a voucher; or in proof of facts, or as otherwise connected with the subject-matter and which, on being accepted, is marked for identification and annexed to the deposition, report or other principal document, or filed of record, or otherwise made a part of the case. An item of physical/tangible evidence which is to be or has been offered to the court for inspection.

Black’s Law Dictionary (1983) at 296.

2. The terminology surrounding evidence presented to a jury in a non-documentary form can be confusing. Terms such as “demonstrative evidence,” “demonstrative exhibit,” and “demonstrative aid” are often used loosely. In particular, when courts refer to “demonstrative evidence,” it is not always clear whether they are referring to demonstrative tools that need be formally admitted into evidence or whether they are referring to aids to help the jury’s understanding of testimony.

-
3. *Black's Law Dictionary* defines "evidence" as follows:

Any species of proof, or probative matter, legally presented at the trial of an Issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete subjects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.

Black's Law Dictionary (1983) at 287.

4. G. Jacquish & J. Ware, *Adopting an Educator Habit of Mind: Modifying What It Means to "Think Like a Lawyer,"* 45 *StanL Rev* 1713, 1721 (1993), citing D. Vinson, *Jury Trial: The Psychology of Winning Strategy* 40-41 (1986).
5. M. Cooper, *Practitioners Guide: The Use of Demonstrative Exhibits at Trial*, 34 *Tulsa LI* 567 (1999).
6. *Id.* For further information on modern technologies, see A. Lipson, *Art of Advocacy: Demonstrative Evidence* Ch 16 (Lexis Publ 2000); D. Harts, *Reel to Real: Should You Believe What You See?*, 66 *Def Couns J* 514 (Oct 1999); F. Herrera, Jr. & S. Rodriguez, *Courtroom Technology: Tools for Persuasion*, 35 *Trial* 66 (May 1999).
7. *Schuler v Mid-Central Cardiology*, 729 *NE2d* 536, 246 *Ill Dec* 163 (CA III, 4th Dist 2000).
8. There are, of course, other rules of evidence that might be applicable to a particular demonstrative exhibit. This article, however, addresses only those evidentiary rules that the practitioner will most frequently encounter.
9. *Schutte v Celotex Corp.* 196 *Mich App* 135, 492 *NW2d* 773 (1992), *leave to appeal denied*, 442 *Mich* 912,503 *NW2d* 448 (1993); *People v Castillo*, 230 *Mich App* 442, 584 *NW2d* 606 (1998).
10. FRE 401; MRE 401, *Dacon v Transue*, 441 *Mich* 315, 339; 490 *NW2d* 369 (1992).
11. FRE 403, MRE 403, *Castillo*, *supra* n 4; *People v Midgyett*, 49 *Mich App* 663, 212 *NW2d* 754 (1973).
12. In some situations, pretrial disclosure of exhibits may be required, either as part of discovery or pursuant to a pretrial order. See, *Rebolledo v Herr-Vass Carp*, 2000 *US Dist Lexis* 8945 (ND Ill, E Div 2000); G. Joseph, *Expert-Related Rules*, *National LJ* at B13 (Jan 11, 1999).

-
13. 28 USC 1920(4) allows “fees for exemplification? Some courts have found that phrase to include the costs of demonstrative evidence. See, *e.g.*, *Johnson v Rhode Island* 2000 US Dist Lexis 3773 (D RI 2000). However, the award of costs under that provision generally requires prior approval. *Blackward v Tokyo Seat Ca, Ltd*, 1986 US Lexis 30962 (ED Mich 1986).
 14. FRE 901, MRE 901; *Michigan v Hack*, 219 Mich App 299, 308; 566 NW2d 187, 192 (1996), *leave to appeal denied* 456 Mich 884, 570 NW2d 658 (1997).
 15. For a discussion of the necessary authentication and sample foundational questions for each specific type fo demonstrative evidence, see, A. Lipton, *supra* n6, at 2-49.
 16. See *US v Walema*, 1999 US App Lexis 22990 (CA 9,1999).
 17. See *Bledsoe v Salt River Valley Water Users* Association*, 179 Ariz 469,472,880 P2d 689, 692 (CA Ariz, 1994); *Stamper v Hyundai Motor Co*, 699 NE2d 678, 684 (CA Ind, 1998); L. Baer & C. Riley, *Technology in the Courtroom: Computerized Exhibits and How to Present Them*, 66 Def Couns J 176 (1999).
 18. (*Lopez II*), 224 Mich App 618, 569 NW2d 861 (1997), *leave to appeal denied*, 458 Mich 868 (1998).
 19. *Id.* at 621.
 20. *Id.* at 622.
 21. *Id.* at 622 n 3, 625 n 8.
 22. *Id.* at 623.
 23. *Lopez v General Motors Corp (Lopez I)*, 219 Mich App 801, 555 NW2d 875 (1996), reconsidered, (*Lopez II*), 224 Mich App 618, 569 NW2d 861 (1997), *leave to appeal denied*, 458 Mich 868 (1998).
 24. Administrative Order No. 1996-4 requires a panel of the Court of Appeals to follow the rule of law established by a prior published decision of the Court of Appeals issued on or after Nov. 1,1990. The order provides for a conflict panel to be formed when a Court of Appeals panel indicates they are constrained by Administrative Order No 1996-4 to follow an earlier decision with which they do not agree and a majority of the members of the Appeals Court agree to review the decision. See D. Lawson, *Annual Survey of Michigan Law June 1, 1997-May 31, 1998: Evidence*, 45 Wayne L Rev 883, 944 n 442 (1999).
 25. 212 Mich App 694, 538 NW2d 112 (1995).

-
26. *Lopez I, supra*, n 23.
 27. *Id.* at 812-13.
 28. *Lopez II, supra*, n 18.
 29. *Id.*, at 628 n 13.
 30. *Id.*
 31. *Id.* at 628-30.
 32. *Id.* at 630 citing *Smith, supra* at 126.
 33. *Id.* at 629 n 16.
 34. *Id.* at 634.
 35. See *Campbell v Menze Constr Co*, 15 Mich App 407, 409, 166 NW2d 624 (1968) (Use of such aids is “common practice.”) If not formally admitted, demonstrative evidence should not enter the jury room. Error in this regard, however, will not result in reversal absent prejudice. *Phillips v Deihm*, 213 Mich App 389, 402-03, 541 NW2d 566 (1995) (finding no prejudice based upon prior showing to the jury without objection).
 36. See *Schuler, supra*, n 7, 729 NE2d at 545; *Campbell, supra*, n 35, 15 Mich App at 409.
 37. *Id.*
 38. FRE 611(a); MRE 401(a).
 39. Although Rule 611(a) addresses only a court*s ability to control the presentation of “evidence,” courts appear to treat demonstrative aids—though not formal evidence— as falling within the scope of this rule.
 40. FRE 611(a); MRE 491(a).
 41. M. Borelli, *The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom*, 71 Ind LJ 439, 453 (1996).
 42. See *Schuler, supra*, n 7, 729 NE2d at 545.
 43. See A. Lipson, *supra*, n 6, at 2-20; M. Cooper, *supra*, n 5, at 572, 574-76.