

Demonstrative Evidence for the Texas Trial Lawyer
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I.
INTRODUCTION

With the onset of television shows like *CSI* and the ubiquitousness of computers and internet access, it is more important than ever for the trial lawyer to grab the attention of jurors in order to persuade them to the Plaintiff's side of the case. Jurors want the attorney to give a presentation that holds their attention, and it has been proven that jurors retain more of what they both hear and see visually. Demonstrative evidence is the key to keeping a presentation fresh and ultimately can make the difference between a win or a loss for the Plaintiff.

The following material provides a summary of various types of demonstrative evidence and the predicate for admissibility of each. There is no limit to the types of demonstrative evidence that the successful trial attorney can utilize depending on the size of the case and the budget of the attorney. Remember to be creative. Whether it is a \$50.00 blow up of a persuasive still photograph or a \$5,000 computer-generated animation, demonstrative evidence is a key tool in presenting the Plaintiff's case and achieving maximum damage awards.

II.
TYPES OF DEMONSTRATIVE EVIDENCE

A. PHOTOGRAPHS

The saying that "a picture is worth a thousand words" rings true in the courtroom, and photographs should be a fundamental tool for every trial lawyer presenting a personal injury case. A photograph of the scene of the accident can bring to life the scene of the accident for the jury. A good and free way to get an excellent photograph of the location of an automobile accident is to utilize Google Earth (<http://earth.google.com/>). Google Earth has a database of satellite imagery of just about any location in the world.

Photographs can be utilized to show the Plaintiff "before" and "after" the incident in question. Photographs can be utilized by experts to help explain important issues in a case. For example, in a recent case, an expert used photographs taken from the medical examiner's office to show that the deceased was wearing his seat belt at the time of the accident, an issue that was hotly debated in litigation.

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Sources of photographs include the police or sheriff's department, the fire department, newspapers and television stations and the medical examiner's office. Often, family members of the victim may have photographs that will be useful in presentation at trial. Further, medical providers often take photographs of the victim. Make it a point to request photographs from all of these potential sources, as applicable. Our firm frequently makes Freedom of Information Act or Texas Public Information Act requests to obtain photos from various governmental sources.

The predicate for admissibility of a photograph is governed by Texas Rule of Evidence 901(a) which states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

The admissibility of a photograph "is conditioned upon its identification by a witness as an accurate portrayal of the facts, and on verification by that witness or a person with knowledge that the photograph is a correct representation of such facts." *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314-15 (Tex. 1987). The photographer does not have to lay the predicate for admissibility, rather the person photographed, a person present when the photograph was taken or any witness who observed the scene or the object photographed, in addition to the photographer, may lay the predicate for admissibility. *Id.* See also *Briones v. Levine's Dep't Store, Inc.*, 435 S.W.2d 876, 880 (Tex. Civ. App.—Austin 1968), *aff'd* 446 S.W.2d 7 (Tex. 1969).

A change in the object or scene photographed will not render an earlier photograph of the object or scene inadmissible, so long as "the changes are explained such that the photograph will be helpful to the jury in understanding the nature of the conditions at the time of the controversy." *Cheek v. Zalta*, 693 S.W.2d 632, 635 (Tex. App.—Houston [14th Dist.] 1985, no writ).

The admissibility of a photograph is governed under an abuse of discretion standard, and the trial court abuses its discretion only if it acts without reference to any guiding rule or principles such that its decision is arbitrary or unreasonable. *Reichhold Chems., Inc. v. Puremco Mfg. Co.*, 854 S.W.2d 240, 248 (Tex. App.—Waco 1993, writ denied), *overruled on other grounds*.

B. X-RAYS

X-rays are useful in helping the jury understand medical testimony. For example, if a medical procedure involves the placement of metal pins or metal plates, an X-ray will help the physician explain the injury and the corrective procedure. It is best practice to utilize a print of the X-ray versus the actual X-ray itself at trial because it obviates the need for bringing an X-ray viewer to the courtroom. X-rays can be used in conjunction with medical illustrations to explain expert testimony and help the jury understand the significance of the X-ray.

Photographs and X-rays are treated similarly under the Texas Rules of Evidence. *See* TEX. R. EVID. 1001(b) (“Photographs include still photographs, X-ray films, video tapes, and motion pictures.”). An X-ray is authenticated by testimony showing that the X-ray process used to produce the X-ray produces an accurate result. TEX. R. EVID. 901(b)(9). A physician or X-ray technician can testify to the process used to take and identify X-rays.

C. MODELS AND ILLUSTRATIONS

Medical models and illustrations help medical experts explain the plaintiff’s injuries and assist the expert in his or her role as an educator. These exhibits are particularly helpful when the medical testimony is complex. There are numerous companies that specialize in producing medical models and illustrations. Costs can be minimal to expensive depending on the attorney’s budget and needs. Often times, the treating doctor expert will have a model that he or she utilizes in his or her practice that can be utilized for demonstrative purposes if the budget is tight.

The predicate for admissibility of medical models requires that the model be helpful to the jury in understanding the evidence in the case and that the model is an accurate representation of that which it is claimed to represent. *Traders’ Gen. Ins. Co. v. Stone*, 258 S.W.2d 409 (Tex. Civ. App.—Galveston 1953, writ dismissed).

D. GRAPHS AND CHARTS

Charts and graphs are effective in presenting evidence concerning economic damages, including projected future medical expenses and lost earning projections. Charts can also be utilized to display key matters in the court’s charge, *e.g.*, the elements of damage and the suggested answers. An effective chart or graph is one that can easily be understood by the jury.

Speier v. Webster College, 616 S.W.2d 617 (Tex. 1981) is controlling precedent on the admissibility of charts and graphs. In *Speier*, the Texas Supreme Court was asked to decide if the trial court erred in allowing Plaintiff to admit into evidence a chart reflecting testimony on damages. The chart had blanks for each plaintiff and each element of damage. As each plaintiff testified, the attorney filled in the blanks to reflect the testimony of the plaintiff. The court admitted the exhibit into evidence after the chart had been completely filled in. According to the Court, “We recognize that such summaries are useful and oftentimes essential, particularly in complicated lawsuits, to expedite trials and to aid juries in recalling the testimony of witnesses.” *Speiers*, 616 S.W.2d at 618-19. Charts summarizing testimony are admissible subject to the trial court’s discretion. *Id.* Charts utilized by an expert depicting data are admissible so long as the expert testifies to the truth and accuracy of the data. *Id.*

E. TIMELINES

Timelines, a type of chart, are useful when the timing of events is an important issue at trial. With a persuasive timeline, counsel can guide the members of the jury through the case, highlighting critical time periods. The jury will then have the timeline for use in its deliberations.

The Texas Supreme Court in *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 342 (Tex. 1998) (on rehearing), held that the trial court did not abuse its discretion in allowing into evidence a timeline outlining the testimony of an expert. The Court noted, “Charts and diagrams that summarize, or perhaps emphasize, testimony are admissible if the underlying information has been admitted into evidence, or is subsequently admitted into evidence.” *Id.* The Court relied on its previous decision in *Speier*.

F. CRITICAL PATHS

A critical path exhibit is a type of chart that summarizes or emphasizes an expert’s opinions in a case. For example, in a medical malpractice lawsuit, the plaintiff’s attorney can introduce a critical path exhibit that outlines the consequences of a breach of the standard of care and how that breach caused injury. The information in the critical path is organized in horizontal columns. In the first column, the act or omission of the healthcare provider is set forth in the top cell of the column. The chain of events following the healthcare provider’s negligence is outlined in the column below the breach of the standard of care. The last and bottom cell in the column demonstrates that the breach of the standard of care caused the plaintiff’s injuries. In an adjacent column, the critical path exhibit demonstrates the outcome had the healthcare provider acted in accordance with the standard of care. The first and top cell of the column sets forth the action that the healthcare provider should have performed. The following cells in the column show the sequences of events that should have taken place had the healthcare provider followed the standard of care. The last and bottom cell in the second column concludes by showing that the plaintiff would not have suffered injury had the breach of the standard of care not occurred.

To be admissible, a critical path exhibit must fairly summarize or emphasize an expert’s testimony that has already been admitted into evidence or will be admitted into evidence. *Speier*, 616 S.W.2d at 618-19 (Tex. 1981).

G. ANIMATION AND REENACTMENTS

Reenactment of an accident is a highly effective means to show the jury how an incident giving rise to litigation occurred. A reenactment can help an expert witness become a teacher to the jury members. Members of the jury that are favorable to the Plaintiff’s case can utilize the reenactment to persuade the other jury members to the Plaintiff’s side.

Special consideration should be given to computer-generated reenactments. For a computer animator expert’s testimony to be admissible, the animator must be qualified,

and his opinion must be relevant to the case and based upon a reliable foundation. *Costilla v. Crown Equip. Co.*, 148 S.W.3d 736, 741 (Tex. App.—Dallas 2004, no pet.). Once the expert's qualifications are established, the issue is whether the expert's testimony is relevant and reliable. To meet the relevance prong, the expert's testimony must be sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute. *Id.* at 742. The reliability prong is established if the expert's testimony is grounded in the methods and procedures of science. *Id.* The trial court's ruling on the admissibility of computer-generated animation is reviewed under an abuse of discretion standard. *Id.*

The attorney seeking admission of computer-generated animation should: 1) qualify the animation expert by establishing credentials and experience; 2) qualify the computer hardware by showing that the hardware is commercially available, the hardware is generally accepted as valid by the engineering community, and that the hardware's use is generally accepted by the engineering community; 3) qualify the computer software by showing that the software is commercially available, the software is generally accepted as valid by the engineering community, and that the software's use is generally accepted by the engineering community; 4) qualify the input data by showing the source of the data, how data accuracy was checked, how the data was physically input, what assumptions were made, and how the data input was checked; 5) qualify the accuracy of the computed calculations; and 6) qualify the accuracy of the presentation media.²

Reenactments are admissible if used to summarize testimony of an expert. *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 130 (Tex. App.—Beaumont 2001, pet. denied). In *Emmons*, computer-generated animation intended to depict the testimony of an expert witness concerning the sequence of events of an accident was admitted into evidence over the objection of defense counsel. According to the court of appeals, "Video animation and other demonstrative evidence that 'summarize, or perhaps emphasize, testimony are admissible if the underlying testimony has been admitted into evidence, or is subsequently admitted into evidence.'" *Id.* (quoting *Uniroyal Goodrich Tire Co.*, 977 S.W.2d at 342).

Reenactments can be admissible as extrajudicial experiments. *See Pitcock v. B&W, Inc.*, 476 S.W.2d 83, 93 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.). Videotaped reenactments should not be treated any differently than photographs of out-of-court experiments. The predicate for admissibility of an out-of-court experiment is whether there is a "substantial similarity" between conditions existing at the time of the incident at issue and those in existence at the time of the experiment. *Id.* However, it is not a requirement that the conditions be identical. *Id.* It is the province of the trial court to determine if the dissimilarities in condition will serve to confuse rather than aid the jury. *Id.* Once that determination is made, the dissimilarities go to the weight of the evidence. *Id.*

² Howard L. Nations & James L. Barton, *Demonstrative Evidence*, in 1 ADVANCED EVIDENCE AND DISCOVERY COURSE A-90 (1989) (published by the State Bar of Texas).

Reenactments can also be used as simply demonstrative aids to assist a witness in presentation of his or her testimony, much like a model or a chart. The predicate for admissibility under these circumstances requires the expert to testify to the truth and accuracy of the data supporting the reenactment. *See Speier*, 616 S.W.2d at 618-19.

H. PHYSICAL EVIDENCE

Physical evidence consists of the actual items that constitute a part of the case. For example, a defective product that caused the plaintiff's injuries is physical evidence. Physical evidence can also be an item that replicates some item that forms the basis of the case. For example, if physical evidence is destroyed or lost, a party can utilize a model or duplicate for demonstrative purposes to show the jury what the item or object looked like at the time of the occurrence in question.

Physical evidence that can be identified as the same, or in the same or similar condition as it was at the time of the incident in question, is admissible. *Imperial Cas. & Indemnity Co. of Omaha v. Terry*, 451 S.W.2d 303 (Tex. Civ. App.—Tyler 1970, no writ). One who has knowledge of the object's appearance, contents, substance, internal patterns, or other distinctive characteristics can identify physical evidence. TEX. R. EVID. 901(b)(4). If physical evidence does not have unique characteristics, it can be identified by chain of custody testimony. Chain of custody presentation requires various witnesses who testify concerning their knowledge of their part in the chain of custody, so that there is sufficient testimony that the item is what it claims to be. *Bundick v. Weller*, 705 S.W.2d 777, 781 (Tex. App.—San Antonio 1986, no writ).

If the actual object forming a part of the case is not available, one can utilize a replicate of the object for demonstrative purposes. It is up to the trial court's discretion to allow the use of replicates for demonstrative purposes. *Coastal Indus. Water Auth. v. Trinity Portland Cement Div.*, 523 S.W.2d 462, 472 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

I. DAY-IN-THE-LIFE VIDEOS

Day-in-the-life videos are particularly useful to demonstrate to the jury the plaintiff's injuries and disabilities. A day-in-the-life video can help explain why a life care planner's damage model on future medical care is reasonable. Our office utilized a day-in-the-life video recently to show the emotional and lengthy ordeal a family underwent as they cared for their comatose mother and wife who ultimately died as the result of an overdose of narcotics in the PACU.

A day-in-the-life video is admissible so long as the proponent lays the proper foundation that the footage in the video correctly and accurately depicts the people and the scenes shown. *Apache Ready Mix Co. v. Creed*, 653 S.W.2d 79, 84 (Tex. App.—San Antonio, writ dism'd); *See also Sherill v. Plumley's Estate*, 514 S.W.2d 286, 293 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). The admissibility or rejection of a

videotape rests largely within the discretion of the trial court. *Richardson v. Mo.-K.-T.R. Co. of Texas*, 205 S.W.2d 819, 822 (Tex. Civ. App.—Forth Worth 1974, writ dismissed).

J. VIDEOTAPED DEPOSITIONS

Videotaped depositions allow the jury members to get a feel for the witness that might not be evident at trial. For example, a defense expert or fact witness might have been combative or arrogant during a deposition, but, through good defense coaching, is a model witness at trial. Non-verbal gestures and demeanor, which are just as important if not more important than the actual statements of the witness, cannot be captured in a deposition transcript.

Videotaped depositions are an excellent way to impeach a witness on a prior inconsistent statement. Our office always videotapes the depositions of key fact and expert witnesses. Software is available that will allow the user to highlight certain portions of a deposition transcript and simultaneously play the excerpt from the videotaped deposition. Actually viewing the testimony of the witness is a much more effective means of presentation than simply reading the excerpt from the deposition.

Texas Rule of Evidence 613(a) governs impeachment of a witness on a prior inconsistent statement. Counsel is required to inform the witness of the content of the statement, the time and the place the statement was made, and the person to whom the statement was made. *Downen v. Tex. Gulf Shrimp Co.*, 846 S.W.2d 506, 510 (Tex. App.—Corpus Christi 1993, writ denied). Then the witness must be given the opportunity to deny or explain the statement. If the witness unequivocally admits making the statement, then extrinsic evidence of the statement is not allowed. *Novy v. Employers Cas. Co.* 536 S.W.2d 101, 105 (Tex. Civ. App.—Austin 1976, writ refused n.r.e.).

However, pursuant to Texas Rule of Evidence 801(e)(1), a statement is not hearsay if the witness testifies at trial and is subject to cross-examination on the statement, and the statement is inconsistent with the declarant's testimony in a deposition. Thus, the inconsistent videotaped deposition testimony can be offered as substantive evidence as well as impeachment evidence.

Videotaped depositions also preserve testimony for use at trial in the event that the party is not able to call a witness live at trial or if counsel makes a strategic decision not to call a witness live at trial. It is far more compelling for the jury to view the videotaped deposition of a witness who is not called live at trial. Texas Rule of Evidence 801(e)(3) states that in a civil case, a deposition taken in the same proceeding is not hearsay. The rule further provides that the unavailability of the witness is immaterial for purposes of admissibility of the deposition.

III. **CONCLUSION**

Armed with an arsenal of carefully prepared demonstrative aids, the Plaintiff's lawyer can present his client's case in new and exciting ways. Telling a story at trial is much more effective if the storyteller incorporates visual aids to correspond with the testimony and arguments given in the case.