

## Great demonstrative! ... But is it admissible?

We tend to go to trial more often than most trial attorneys, so clients ask us about the different types of demonstrative evidence and their admissibility. Of course, every judge has his or her own standards, but we've found the following to be useful guidelines:

There are three basic categories of visual evidence:

- Substantive evidence
- Demonstrative evidence
- Evidence used as a basis for expert testimony

Computer-generated substantive evidence is the most heavily scrutinized and the most likely to be rejected by the court. In this type of visual production, such as an accident reconstruction that utilizes computers or computers and video (often called "photographic engineering"), the computers are actually extrapolating and interpolating data, filling in "gaps" in data, subjecting the data to mathematical manipulation by specific programs or algorithms and, finally, assembling a final visual work product.

Not surprisingly, the standards for admissibility of visual substantive evidence are identical to the standards that apply to any substantive evidence that is claimed to have independent probative value. The "foundational" tests are: 1) relevancy, 2) authentication/reliability and 3) the balance between probative value and unfair prejudice.

***In our experience, judges rarely unilaterally reject a demonstrative. Rather, in the few instances where they have sustained opposing counsel's objections, jurists have asked for minor revisions.***

The producer of such substantive visual evidence will be called to testify in depth as to how the evidence was constructed. Expect serious cross-examination from the judge as well as

opposing counsel.

A far more lenient standard of admissibility applies to images for use as demonstrative evidence, or for use as the basis of expert testimony. These images need to relate to other relevant, competent and material testimonial, documentary or real evidence; fairly and accurately explain or illustrate the other evidence to which they relate; and aid in understanding or evaluating the other related evidence.

Unlike pure demonstrative evidence, the use of images as a basis of expert testimony may trigger hearsay objections, although we see very little of those kind of objections. In our experience, judges rarely unilaterally reject a demonstrative. Rather, in the few instances where they have sustained opposing counsel's objections, jurists have asked for minor revisions.

On the other end of the demonstrative spectrum, is the "Day in the Life" video, which is susceptible to a far wider set of interpretations from the bench, and therefore are the most volatile. We recommend asking the court for their views on "Day in the Life" videos prior to commencing production.

To fully understand the difference between substantive and demonstrative evidence, see *United States v. Williams*, 657 F2nd 199 (8th Cir. 1981) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).



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