



## Visual aids from pleadings through trial

### A BRIEF OVERVIEW OF WHAT DEMONSTRATIVE EVIDENCE YOU CAN GET ADMITTED AND WHEN TO USE IT

The best trial attorneys are good storytellers. This piece of advice is something we often hear in our practice. But in addition to telling our clients' stories on paper and through our oral advocacy, as trial attorneys we should be using visual aids. Not just in trial, but in our pleadings, mediation briefs and presentations throughout the life of our cases.

In California, we have the right, subject to the court's discretion, to present visual evidence, which is usually referred to as demonstrative evidence, and can take the form of charts, graphics, blowup photos, and videos, to name a few examples. However, for federal practitioners, a newly proposed rule of evidence, Federal Rule of Evidence, Rule 107, would provide a black-letter rule for the use of visual evidence in court and

would allow the the trial court to keep out visual evidence if it is "outweighed by "the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time."

Text of proposed FRE Rule 107 provides:

#### PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE Rule 107:

**Illustrative Aids (a) Permitted Uses.** The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

**(b) Use in Jury Deliberations.** An illustrative aid is not evidence and must

not be provided to the jury during deliberations unless: (1) all parties consent; or (2) the court, for good cause, orders otherwise.

**(c) Record.** When practicable, an illustrative aid used 16 at trial must be entered into the record. **(d) Summaries of Voluminous Materials Admitted as Evidence.** A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

(Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure (September 2023).)

As originally drafted, the rule contained a notice requirement, but trial attorneys pushed back and argued that the notice requirement would take away the spontaneity of trial and result in

gamesmanship and tipping off strategy plays to the defense.

Yet, as a practical matter, the court's discretion to limit presentation of visual aids can prove problematic if you find yourself engaged in the heat of battle, even without a notice requirement. This article will give you practical advice on how to get your visual aid before the jury and judge in both state and federal courts.

But first, a refresher on evidence: "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact. (Evid. Code, § 140.)

"Evidence" is anything "offered to prove the existence or nonexistence of a fact" – including "testimony, writings, material objects, or other things presented to the senses ..."

The statutory definition includes anything *offered* as proof, whether or not admissible. (Evid. Code, § 140, Law Rev. Comm'n Comment.)

### "Presented to the senses"

The definition includes *anything* that can be seen, heard, touched, smelled, etc. by the trier of fact ... including:

- testimony
- writings
- material objects
- demonstrative evidence (charts, photos, models, etc.)
- audio/video recordings
- jury views
- scientific evidence
- opinion evidence; and
- depositions and discovery

(Rutter Group, California Practice Guide: Civil Trials and Evidence, Chapter 8A-A (A. Types of Evidence).)

In California state court, visual evidence must meet three conditions to be admissible. First, we need relevancy (Evid. Code, § 210.) Second, the witness must have personal knowledge/or it must accurately reflect an expert opinion. (Evid. Code, §§ 702, 801.) And lastly, it must not necessitate an undue

consumption of time or create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352; *Endicott v. Nissan Motor Corp.* (1977) 73 Cal.App.3d 917, 930-931.)

Additionally, counsel will need to lay foundation as to the accuracy and purpose of the visual aid prior to offering it. More importantly, counsel may question a witness regarding demonstrative evidence, without offering it as evidence. (*People v. Cossey* (1950) 97 Cal.App.2d 101, 112.)

Illustrative aids or demonstratives are useful tools for storytelling; however, you need to consider your story in selecting your aid. For example, in a car accident case, a photo may be more suitable than the diagram on a police report to show area of impact.

You should also pay attention to design to make sure your fonts, colors and designs match your theme and are easy to understand. The last thing that you want to do is use an aid in a way that violates the law by confusing the jury, in either a state or federal court.

#### **Practice timing**

Organize the timing of your visual aids with your storytelling.

#### **Engage the senses**

Use visuals that engage multiple senses. Use images, sound, and even physical evidence to immerse the jury in the story. Under the newly proposed FRE 107 and California law, visual aids can be admitted into evidence and used during jury deliberations if the parties agree (federal) or if you have laid the proper foundation and overcome a 352 objection (state).

When preparing your case, it never hurts to review the jury instructions, and California has one on demonstrative evidence. The jury instruction reads:

5020. Demonstrative Evidence

During the trial, materials have been shown to you to [help explain testimony or other evidence in the case/[specify other purpose]]. [Some of these materials have been admitted into

evidence, and you will be able to review them during your deliberations. Other materials have also been shown to you during the trial, but they have not been admitted into evidence.] You will not be able to review them during your deliberations because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials.

(CACI 5020.)

### When to use demonstrative evidence

Do not wait until trial to start using demonstratives. Gather demonstratives early on, such as photos, charts, organizational diagrams, and floor maps to name a few. The demonstratives can be included in your complaint, discovery responses and moving papers, where appropriate.

You can also rely on summaries in the form of visual evidence under the secondary evidence rule which provides that the content of a writing may be proved by (1) an otherwise admissible *original* (Evid. Code, § 1520), or (2) otherwise admissible secondary evidence. (*Id.*, § 1521, subd. (a).) However, to be "otherwise admissible," secondary evidence must be authenticated.

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or (b) the establishment of such facts by any other means provided by law." (§ 1400; *People v. Skiles* (2011) 51 Cal.4th 1178, 1187.) Practically speaking, if you want to use a summary as an aid, you should have your summarized documents pre-admitted or have a pocket brief reading explaining why they are admissible.

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