# Evidence (Real & Demonstrative)

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## I. TYPES OF EVIDENCE

There are four types of evidence in a legal action: **A.** Testimonial; **B.** Documentary; **C.** Real, and; **D.** Demonstrative.

### A. TESTIMONIAL EVIDENCE

Testimonial evidence, which is the most common type of evidence, is when a witness is called to the witness stand at trial and, under oath, speaks to a jury about what the witness knows about the facts in the case. The witness' testimony occurs through direct examination, meaning the party that calls that witness to the stand asks that person questions, and through cross-examination which is when the opposing side has the chance to cross-examine the witness possibly to bring-out problems and/or conflicts in the testimony the witness gave on direct examination.

Another type of testimonial evidence is expert witness testimony. An expert witness is a witness who has special knowledge in a particular area and testifies about the expert's conclusions on a topic.

In order to testify at trial, proposed witnesses must be "competent" meaning:

1. They must be under oath or any similar substitute;
2. They must be knowledgeable about what they are going to testify. This means they must have perceived something with their senses that applies to the case in question;
3. They must have a recollection of what they perceived; and
4. They must be in a position to relate what they communicated

Testimonial evidence is one of the only forms of proof that does not need reinforcing evidence for it to be admissible in court.

## B. DOCUMENTARY EVIDENCE

Documentary evidence consists of any information that can be introduced at trial in the form of documents. "Documents" are broader than just information written down on paper and include information recorded on any media on which information can be stored. Examples of documentary evidence include written documents, photographs, tape, CD and DVD recordings and videotapes.

Documentary evidence can be either direct evidence or circumstantial evidence, depending on what it is being used for. Direct evidence is evidence that directly proves a fact that is at issue in the case. Circumstantial evidence is evidence that proves a certain thing only if a certain inference or assumption is made.

### Best Evidence Rule

Documentary evidence must meet the requirements of the "best evidence rule" before it can be admitted into court. The best evidence rule, however, does not mean that you have to put the best evidence forward. This rule requires that either an original of a document (including a film or other recording) or a reliable duplicate be used. The rule comes from the eighteenth century in which copies of documents were typically handwritten by scribes who could easily make errors. Today, the best evidence rule is not as important as it used to be. Still, however, it is important to know the best evidence rule in case an objection is made based on the rule -- or if you need to make an objection based on the rule.

Procedure:

1. First ask yourself if rule is implicated

2. Then ask if you have to use original, is there an exception

Summary of Rule:

Fed. R. Civ. P. 1002: To prove the content of a writing, recording, or photo, the original writing, recording or photo is required, except as otherwise provided in these rules or by Act of Congress.

If Best Evidence rule applies then:

1. Generally, duplicate is admissible to the same extent as the original

2. Duplicates, however, are not admissible if unfair to admit in lieu of the original or a genuine dispute as to the original's authenticity exists

3. Even if original is require, production of such original can be excused under certain circumstances

Exceptions Where Original Need Not Be Produced:

1. Original lost or destroyed

2. Original not obtainable

3. Original in possession of opponent

4. Collateral (Unimportant items).

**C. REAL EVIDENCE**

Real evidence, also called physical evidence, refers to tangible objects and things the jury can physically hold and/or inspect. Real evidence is usually involved in an event central to the case like a product in a products liability case. For example, in a products liability case in which the plaintiff was injured when the blade protector on the power saw she was using unexpectedly fell-off, the plaintiff may want to introduce the power saw into evidence to show the jury the defective saw that caused her

injuries.

In some cases it is not practical to bring the real evidence to court because of the size or form of the real evidence. In those situations, a party may want to use demonstrative evidence.

**Difference between Real Evidence and Documentary Evidence:**

Real evidence is a material object that plays a direct part in the incident at issue in the case. Documentary evidence, on the other hand, are only the carriers of the evidence – they are not the evidence itself. The actual evidence is the information recorded on the paper, tape or disc.

## D. DEMONSTRATIVE EVIDENCE

Demonstrative evidence refers to exhibits used to illustrate or clarify oral testimony or recreate a tangible thing, occurrence, event or experiment. Demonstrative evidence can either be a trial exhibit that is admitted in evidence at trial or a visual aid that will not be entered in evidence, but is used by a witness or attorney to explain matters to the jury. While real evidence exists by virtue of the activities of the parties and witnesses in the case, demonstrative evidence is developed by the attorneys as part of trial strategy.

Demonstrative evidence can be computer-generated animations, simulations, videos, models, graphs, diagrams, charts, drawing, photographs, scientific tests, computer reconstruction or any other object that can explain or illustrate issues in the case. The limits on demonstrative evidence are an attorney's creativity and the rules of evidence. The choice of what type of demonstrative evidence to use should be based upon your theory and theme of the case and should be developed to simplify and explain the theory in a persuasive manner.

Some reasons to include demonstrative evidence in trial strategy:

1. Demonstrative evidence may be used to describe or explain ideas that are difficult to verbalize;

2. A picture (or a model, diagram or animation) is worth a thousand words;

3. Jurors remember what they see longer than what they hear;

4. Demonstrative evidence can make a trial less boring for the jury; and

5. Demonstrative evidence empowers the jury. Jurors can look at the visuals and absorb what they see.

Whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion. The general test for admitting demonstrative evidence is whether it will help the jury understand some relevant issue in the case. A proper foundation must be laid before demonstrative evidence is allowed.

**Rules of Evidence Pertaining to Demonstrative Evidence**

Federal Rules of Evidence 611 and 1006 apply to admission of demonstrative exhibits. Non-substitute or pedagogical summaries are admitted under Rule 611, which affords the courts "control over the mode ... [of] presenting evidence." Fed. R. Evid. 611.

Because pedagogical summaries are not substantive evidence, courts are often willing to allow a party more discretion in presenting its unilateral view of the evidence: "For instance, such exhibits may include witnesses' conclusions or opinions or reveal inferences drawn in a way that would assist the jury." *United States v. White*, 737 F.3d 1121, 1135 (7th Cir. 2013). Pedagogical summaries, however, are excluded from the jury room. *Id.* at 1136.

Summary exhibits under Rule 1006 can be substituted for actual evidence "to prove the content of voluminous writings ... that cannot be conveniently examined in court." Fed. R. Evid. 1006. Under this rule, a proponent of a summary exhibit must satisfy four elements for admission: (1) the summarized material must be "voluminous" and not conveniently subject to examination in court; (2) the summary or chart must be an accurate compilation of the voluminous records; (3) the records summarized must be otherwise admissible into evidence; and (4) the underlying documents must be made available to the opposing party for examination and copying.

The requirements of Rule 1006 usually are not a barrier for admission. For example, in *White*, *Supra*, four bankers boxes worth of mortgage transaction documents were sufficiently voluminous to warrant a summary exhibit. Courts have also equated a case's complexity with volume: "The complexity and length of the case as well as the number of witnesses and exhibits is also considered in determining whether summary evidence is appropriate." *United States v. Tsoa*, 2013 U.S. Dist. LEXIS 165895, at *12. In *Tsoa*, the court admitted a summary exhibit under Rule 1006 of underlying records totaling less than 100 pages, noting that "while the volume of material is not overwhelming, the evidence is certainly complex." *Id.*

Although Rule 1006 does not mandate the production of the summary itself before trial, most courts recognize that the spirit of the rule would be "thwarted" by not providing the summaries before trial "'because, without notice of the summaries' contents, adverse parties cannot know what to look for in the source material to determine if the summaries are accurate."' *United States v. Dukes*, 242 Fed. Appx.

37, 50 (4th Cir. 2007) (quoting C.A. Wright & V.J. Gold, 31 Federal Practice and Procedure § 8045, at 549 (2000)).

**RELATIONSHIP TO OTHER RULES OF EVIDENCE**

Like all other evidence, demonstrative evidence must also satisfy the threshold mandates of Rules 401 – 403, must avoid improper hearsay or satisfy an exception, must be properly authenticated, must be based on personal knowledge of the testifying witness, and must pass the criteria in Rules 701 or 702, to the extent it includes opinion testimony.

(1) Relevance & Prejudice

Demonstrative evidence must be relevant under Rules 401 and 402. It must be helpful to the factfinder and have a tendency to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

In addition to relevance concerns, demonstrative evidence must also possess a probative value that is not substantially outweighed by the dangers of unfair prejudice, issue confusion, misleading the jury, undue delay, waste of time, or needless duplicity. Fed. R. Evid. 403.

Computer animation demonstrative evidence can have an undue impact on the jury. Therefore, the Tenth Circuit warned that courts should "carefully and meticulously examine proposed animation evidence" to ensure that it is truly relevant and not unduly prejudicial. *Robinson v. Missouri Pacific R. Co.*, 16 F.3d 1083 (10th Cir. 1994).

(2) Hearsay

A demonstrative summary exhibit cannot summarize or include inadmissible hearsay. Even where only portions of the underlying source material constitute improper hearsay, those defects may be imputed to the summary exhibit as a whole. *See* Wright & Gold, 31 Federal Practice and Procedure § 8043, at 527. In *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154 (11th Cir. 2004), the Eleventh Circuit held a proposed summary exhibit that listed trade secrets allegedly disclosed to the defendant was improperly admitted by the district judge. The Eleventh Circuit held the district Judge's admission of that exhibit was an abuse of discretion because it constituted improper hearsay.

The hearsay exceptions in Rules 803 and 804 also apply to demonstrative exhibits. The business records hearsay exception found in Rule 803(6) is frequently applied to admit summaries of voluminous business records. Invoking the business records exception obligates the proponent to lay a proper foundation, not just for the summary exhibit itself, but also for the underlying records.

Rule 803(6) requires a custodian to testify that the records were made contemporaneously with the events and prepared and maintained in the course of a regularly conducted business activity. Without a live witness, litigants can still invoke the business records exception by submitting a certification under Rule 902(11). This can be easily overlooked when attempting to introduce a summary in lieu of the underlying business records themselves. Furthermore, merely proffering a Rule 902(11) certificate is not sufficient to gain admission of a summary exhibit; rather the certificate must be entered into evidence along with the summary.

(3) Opinion Testimony & Authentication

Courts usually require opinion evidence be presented elsewhere on the record before it can be used in a demonstrative summary. *See, e.g.*, *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154 (11th Cir. 2004).

For example, in *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007), the Third Circuit upheld the district court's rejection of a summary exhibit because it included improper opinion testimony:

Authenticating a demonstrative exhibit requires personal knowledge about the creation of the exhibit. *See* Needham v. White Laboratories, 639 F. 2d 394, 403 (7th Cir. 1981) ("Before a summary is admitted, the proponent must lay a proper foundation as to the admissibility of the material that is summarized and show that the summary is accurate."); and Rule 602. Generally, the exhibit should be introduced through "the witness who supervised its preparation." *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998).

Rules 701 and 702 govern the admission of opinion testimony for lay and expert witnesses. In order for the demonstrative exhibit to include lay witness opinions, it must be based on that witness' own perception and helpful to understand the witness's testimony or determine a factual issue. Rule 701.

Expert opinion testimony requires a qualified witness under Rule 702. Courts, however, treat expertise in the creation of an exhibit differently than expert testimony depicted in an exhibit:

## II. ADMISSIBILITY OF DEMONSTRATIVE EVIDENCE

Evidence must be relevant, material and authentic before a judge will permit its use in a trial. The process whereby a lawyer establishes these basic prerequisites is called laying a foundation. With regard to demonstrative evidence:

(1) First, there must be some other piece of evidence -- a fact, an object, or testimony -- that needs to be illustrated or demonstrated. Presentation is actually a two-stage process: first some issue of fact, then the explanation or demonstration of that fact. Demonstrative evidence is intended to be an adjunct to the witness' testimony.

(2) By definition, demonstrative evidence is not offered for its truth, but rather is offered to illustrate or clarify substantive proof that is admissible. Thus, the foundation elements necessary for the use of demonstrative evidence are:

(a) the demonstrative exhibit relates to a piece of admissible substantive proof;

(b) the exhibit fairly and accurately reflects that substantive proof; and

(c) the exhibit is sufficiently explanatory or illustrative to be of potential help to the trier of fact.

(3) Demonstrative evidence must pass the "three hurdles" of admissibility: relevancy; materiality; and competency (FRE/ARE 401-402).

(a) relevancy - demonstrative evidence is relevant if it has any tendency to make more or less probable the existence of any fact that is of consequence to the determination of the action;

(b) materiality - the evidence goes directly to the purpose of illustration, is easily understandable, produces no wayward

inferences, and is not just an exercise in "educating" the court or jury; and

(c) competency - evidence that fits with the decor and decorum of the court, is ethical, and does not taint the court or subvert the justice process.

(4) Demonstrative evidence must also meet foundational requirements for accuracy. Although these requirements differ depending on the type of exhibit used, the following requirements should be reviewed for each exhibit you plan to offer or exhibits offered by your opponent:

(a) authentication -- the demonstrative evidence should convey what it is meant to convey. What it conveys must not alter, distort, or change the appearance or condition of something in example, to make an accident scene look lighter than it actually was is probably inadmissible;

(b) representational accuracy -- the demonstrative evidence should fairly and accurately depict the scale, dimensions, and contours of the underlying evidence; and

(c) identification -- the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated.

## III. WHEN TO PUT OPPOSING "EVIDENCE" TO THE TEST

### A. Motions in Limine

The best time to put the opposing side's evidence to the test is in pretrial motions in limine and in any manner set forth in the Judge's Standing Order. Many Judges have Standing Order's that address challenges to evidence. For example, Judge Mark Cohen's Standing Order Regarding Civil Litigation states in part:

**K. Pretrial Order**

* * *

The exhibits intended to be introduced at trial shall be specifically identified. The parties shall mark their exhibits using Arabic numbers

(Plaintiffs Exhibits 1 or Plaintiff Jones-1 if more than one plaintiff, for example). The parties shall adhere to the guidelines of color coding of exhibit stickers set forth in LR16.4(B)(19)(b), NDGa.

In listing witnesses or exhibits, a party may not reserve the right to supplement their list nor may a party adopt another party's list by reference. Witnesses and exhibits not identified in the Pretrial Order may not be used during trial unless a party can establish that the failure to permit their use would cause a manifest injustice.

In preparing the Pretrial Order, each party shall identify to opposing counsel each deposition, interrogatory, or request to admit response, or portion thereof, which the party expects to or may introduce at trial, except for impeachment. ***All exhibits, depositions, arid interrogatory and request to admit responses shall be admitted at trial when offered unless the opposing party indicates an objection to it in the Pretrial Order.***

**L. Pretrial Conference**

The Court will conduct a pretrial conference prior to trial. The purpose of the conference is to simplify the issues to be tried and to rule on evidentiary objections raised in the pretrial order and motions in limine.

At the pretrial conference, the parties will be required to identify the specific witnesses that will be called in their case-in-chief. ***The Court may require the parties to bring to the pretrial conference those exhibits they plan to introduce at trial and to which there are***

***objections, so that the Court may consider the objections thereto.***

Unless otherwise directed, all motions in limine shall be filed at least fourteen (14) days before the pretrial conference. Briefs in opposition to motions in limine should be filed at least seven (7) days before the pretrial conference. Unless otherwise indicated, the Court will decide motions in limine prior to or at the pretrial conference.

The attorneys for all parties are further directed to meet together by agreement, initiated by counsel for the plaintiff, no later than ten (10) days before the date of the pretrial conference to (1) discuss settlement, and (2) stipulate to as many facts and issues as possible.

In Re: Cases Assigned to Judge Mark H. Cohen, Standing Order Regarding Civil Litigation, pgs. 16 - 18 (Emphasis added).

**B. During Trial**

While a party may have an opportunity to challenge opposing party's documentary, real, demonstrative and known and/or anticipated testimonial evidence prior to trial through motions in limine and any other process set forth in the Judge's Standing Order, counsel still has to be prepared to make objections to proposed evidence at trial -- especially testimonial evidence. That is because even though you may have taken a witnesses' deposition, it still may not be possible to anticipate every question that may be asked of a witness at trial or the answers a witness may give at trial.

Making evidentiary objections during trial is a skill that is honed through practice and patience. When opposing counsel asks a witness a question at trial, you may have only a couple of seconds -- at most -- to object to the question. Within that couple of seconds, you have to determine whether the question is objectionable, what objection should be made and whether it is worth it to raise the objection. The situation is even more harrowing if a witness, in response to a question that you do not find objectionable, gives an answer that you believe is objectionable. There could be consequences from making too many objections at trial. The jury may think you are trying to hide something from it. On the other hand, there could be consequences from not raising an objection. You may allow the jury to hear testimony that should not be allowed and, in this sense, the phrase "if you snooze you lose" applies. First, if you do not object to improper evidence, you lose the right to raise such objection on appeal. Second, if you wait until the witness answers an objectionable question to raise an objection -- then even if the Judge grants the objection and gives the jury curative instructions, that cannot undue what has already been done. The jury will remember what the witness said regardless of the curative instruction.

With all of this in mind, counsel at trial must balance the right and need to make evidentiary objections during trial. This is a core skill of a trial attorney and practice make better -- not perfect.