

# Using Demonstrative Evidence to Get the Most Out of Expert Evidence

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## **Overview**

Experts are needed at trial to *educate* the trier of fact on matters beyond common knowledge. Accordingly, to get the most out of an expert witness, trial lawyers must evaluate how to best assist an expert with their role as educator.

So the question becomes, how do people best learn?

Recent studies have emphasized that we learn 75% of what we know through sight yet, while learning by sight is the most common means of learning, psychological studies indicate that after three days, most people will retain only 20% of what they see. By comparison, most people will only retain 10% of what they hear. However, when you simultaneously combine seeing with hearing, the retention rate three days later rises drastically to 65%.<sup>1</sup>

The answer to how to help your experts in their role as educator is therefore to combine their oral testimony with visual aids.

This paper will provide three simple solutions for using demonstrative evidence effectively with expert witnesses.

## **Using Demonstrative Evidence Effectively with Experts**

In essence, demonstrative evidence is anything visual presented to a trier of fact in relation to any relevant issues. Demonstrative evidence can be real or substantive evidence or simply a visual aid used to illustrate a concept.

The admissibility of demonstrative evidence will vary depending on its intended purpose.

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<sup>1</sup> Weiss-McGrath Report for McGraw-Hill

While the various applicable admissibility tests in relation to demonstrative evidence are beyond the scope of this paper, it should be understood that, to be admissible, it must be relevant, accurate, fair and more probative than prejudicial.

There are countless ways to use and incorporate demonstrative evidence with experts.

Generally speaking, demonstrative evidence is much more important in jury trials where the matters in issue may be highly sophisticated for the common juror.

While there are a host of considerations on what demonstrative evidence to use to most effectively present an expert's evidence, here are three practical tips:

- 1) Use an Elmo;**
- 2) Develop Charts and Graphs; and,**
- 3) Use Understandable Images.**

#### **1) Use an Elmo**

An Elmo is a mandatory device needed for a trial, especially one involving a jury. An Elmo is the 'Swiss Army knife' in your electronic tool kit – it simply does a wide range of useful things.

Essentially, the ELMO is an electronic projector of great versatility. It will project books, photographs, documents, 3-dimensional objects and transcripts onto a large screen with no advance preparation necessary. It can zoom in on key documents or photographs as well.

The ELMO can also be a back-up device for other electronic projection systems which, notoriously, fail at critical times. For example, if you have a printed copy of your opening PowerPoint and for some reason your digital projector is not speaking with your computer, you

can put the printed copy of each slide on the ELMO (with a bit of assistance) and the show goes on.

The ELMO P30 visual presenter has been replaced by the P30 HD which apparently produces a much higher resolution image but is otherwise essentially the same.

In a pinch, you can use the ELMO to take digital photographs of documents and other objects which are then stored on the ELMO's memory chip. They can then be transferred to a computer for other uses. The process is equally useful in reverse. You can load documents on a memory chip, insert it in the ELMO and run a very simple and robust digital slide show using the ELMO.

One of the disadvantages of having an ELMO at trial is that the other side will inevitably want to use it. However, since they may not have the same familiarity with it, they will not use it as effectively as you do, which the jury will not fail to notice.

On a recent trial, my colleague's jury asked to use the ELMO in the jury room during their deliberations. That is surely proof of its effectiveness and utility.

Some court rooms are wired to permit easy use of digital projectors and ELMOs. The new court house in Whitby is a good example of a state-of-the-art facility. Most of the older court houses present challenges – particularly in situating the screen so that everyone in the court room can see it. You will need to be creative in the positioning of the screen and the ELMO, and if the logistics present too great a problem, you may need to ask the judge to change the venue to a larger court room. Some court houses have built-in screens (Whitby for example), but for others, you should not rely on a portable screen supplied by the court house. Your own will likely be in better shape and you should bring one.

In briefing an expert, explain that anytime they refer to a key document they can ask that you put it up on the Elmo. Explain that anything they have in their file can be projected to be seen by the jury and that you welcome them incorporating the use of the Elmo in their testimony. By seeing the key supporting references on the screen, the credibility of your expert's opinion will be enhanced.

The Elmo can also be used to show excerpts from discovery transcripts, real time transcripts during trial (which is strongly recommended as something that should be arranged by counsel), pictures, records and medical illustrations. Start familiarizing the jury with the use of an Elmo, and make them accustomed to having visual supplements to testimony, by putting up your expert's CV on the screen when qualifying your expert.

Most experts do not appreciate that they can better summarize their viewpoint and opinion by using an Elmo to show the jury firsthand the documents that support their opinions.

Be sure to purchase or rent an Elmo to bring it on day one of the trial along with a portable screen and projector when needed. Check out the courtroom in advance to navigate the courtroom challenges in setting up the Elmo and screen so that the expert, the judge, the jury and the lawyers can all see it.

## **2) Develop Charts and Graphs**

While a testifying expert's report will not make itself into evidence, there is no reason why their conclusions can't be synthesized into a chart format and presented to the trier of fact.

So long as a chart or graph presents information fairly, judges generally encourage their use.

Charts and graphs can be extremely valuable in summarizing financial data, comparing pre and post-accident medication, treatment and care needs, explaining future care recommendations and much more.

Wherever possible, develop an admissible chart with your expert that can be presented to the jury in the course of their testimony (and later referred to in closing).

Of course, to comply with the expert report rules, the chart must be based entirely on information within the expert's report. Be well prepared to footnote each reference within the chart to information within the report in order to establish that it is a mere summary.

While comparing pre and post-accident income earning potential sounds complicated, a chart can easily depict the future income loss 'gap' in a way that a jury can better understand.

Similarly, charts are becoming the norm in presenting future care claims and are customarily being used as an attachment to jury questions. Be sure to introduce these charts to the jury during your expert's testimony so that they don't see it for the first time as an attachment to the jury questions. The chart will be an effective way of capturing all of the categories of care needs claimed along with the associated durations and costs.

An expert may not be capable of putting together their own easy to understand chart. Instead, there is nothing wrong with the lawyer putting together the chart so long as it is directly supported by information in the expert's report, and so long as the expert understands the chart so that they can explain it to the jury.

Charts can also be extremely useful in highlighting the issues of contention between experts. The charts can be manipulated (written on) by the expert to identify areas of disagreement and those areas can be highlighted and shown using an Elmo to the jury. For example, often experts disagree on the amount of attendant care required and a chart showing the differences

and identifying the medical support for each opinion is a valuable tool for the trier of fact. Moreover, from a plaintiff's counsel's perspective, a chart is an effective means of ensuring the jury does not omit considering any key care item.

### **3) Use Understandable Images**

Juries understand pictures, videos and colour illustrations. They don't understand old school X-Rays and verbally explained medical procedures.

Use medical illustrations with your experts to depict injuries, surgeries and hardware. Of course, you can always have your expert bring the actual hardware as well, where appropriate, to provide an even better illustration.

Use a day in the life video to allow the expert to highlight and explain why certain equipment or care is warranted using examples known to the jury from the day in the life video that has already made its way into evidence.

Where medical illustrations are not obtained, rely on generic medical illustrations and show them using an Elmo to allow your expert to explain procedures with a visual aid available to the jury to help them understand the complex procedures.

### **Conclusion**

For your expert's opinions to be accepted they must be understood. Using visual aids will help your expert be understood and will add credibility to their opinions.

Familiarize your expert with the availability of an Elmo and how it can be used to show the jury the key documents supporting their opinions.

Work with your expert on developing charts and graphs that summarize their opinions and/or the supporting facts in order to provide a visual enhancement to their oral testimony.

Make sure your expert has a chance to consider whether anything in the day in the life video can provide visual support for their observations or opinions and use medical illustrations, including generic ones, in explaining complex procedures to the jury.

In your first expert briefing discuss what visual aids can be used to help educate the trier of fact on the key issues. Helping a jury visualize the expert's evidence will increase understanding and will increase the likelihood the evidence of your expert will be preferred.

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