RULES FOR ADMISSIBILITY OF DEMONSTRATIVE TOOLS

BY KENNETH N. THAYER

Demonstrative exhibits and other visual aids can be immensely valuable tools for attorneys trying business cases. Indeed, the use of charts, timelines, models, videos or computerized graphics can bring dry, esoteric information to life and render it comprehensible for jurors.

To use demonstrative exhibits and visual aids effectively at trial, it is crucial to first understand the respective rules governing their admissibility. Unlike visual aids, demonstrative exhibits are considered evidence in the record and, consequently, are subject to higher admissibility standards. By contrast, visual aids (sometimes called "chalks") are merely illustrative tools that may be permitted under a lesser showing.

Trial judges are given "broad discretion in the admission" of demonstrative exhibits and visual aids at trial.[1] If appealed, their decisions are reviewed under an "abuse of discretion" standard and are rarely overturned.[2] That said, trial judges do not have unfettered discretion in ruling on a demonstrative's admissibility, but are instead guided by several factors.

ADMISSIBILITY REQUIREMENTS FOR DEMONSTRATIVE EXHIBITS

To be admitted as an exhibit, a demonstrative must: (1) be relevant; (2) be a fair and accurate representation of the object, event or transaction it purports to depict; and (3) have probative value that is not substantially outweighed by its potential to cause undue prejudice or to confuse or mislead the jury.[3] The relevance factor simply requires that the demonstrative have a "rational tendency to prove an issue in the case."[4] The second factor — requiring a "fair and accurate representation" — is more difficult to satisfy and tends to be the most common area for dispute.

SUBSTANTIAL SIMILARITY

In assessing a demonstrative's fairness and accuracy, courts ask whether it is substantially similar to the object or event being depicted.[5] In other words, the law does not require that your demonstrative be an identical match; rather, differences between the demonstrative and the original object or event will not be fatal to admissibility, so long as the court is satisfied that a sufficient degree of similarity exists.[6] Notably, courts have not defined the term "substantial similarity" in this context. Trial judges are instead left to make the determination on a case-by-case basis. *See e.g., Welch*, 31 Mass. App. Ct. at 166 (admitting video depicting dust concentrations in trial concerning asbestos-related injuries, based on testimony that the sites presented in the video closely matched plaintiff's work sites where injuries occurred); Lally, 45 Mass. App. Ct. at 332 (admitting video of "sled test" in car accident trial, based on testimony that the sled test depicted similar vehicle speed, occupant-positioning, and point of impact as the actual accident).

AUTHENTICATION

Like all evidence, demonstratives must be authenticated prior to being admitted at trial. Unless stipulated in advance, authentication will require a witness who is competent to testify that the demonstrative fairly and accurately represents what it purports to represent.[7] This witness should therefore be sufficiently familiar with both the demonstrative and the original object or event itself. While some types of demonstratives can be authenticated by lay witnesses, more technologically or conceptually complex demonstratives may require authentication through a qualified expert.

For example, in the *Renzi* case, a dispute arose regarding the authenticity of digital mammogram images that had been packaged into a PowerPoint presentation and submitted as a trial exhibit. Plaintiff sought to have its expert witness authenticate the images. The expert testified that she was familiar with both the digital images and the original x-rays, and that the images were "substantial likenesses" to the originals and had not been enhanced in any way. The court found this sufficient and admitted the images as properly authenticated.

PREJUDICE, CONFUSION AND MISLEADING THE JURY

Demonstratives that are deemed likely to confuse or mislead juries will be excluded at trial, either as unfairly prejudicial or as insufficiently fair and accurate.[8] In a recent criminal case, the Appeals Court overruled the trial judge and held that a purported summary should have been excluded from trial on grounds of potentially misleading the jury.[9] The exhibit at issue was a PowerPoint presentation that combined various pieces of evidence to create a chronology of the defendant's actions prior to, during, and after the alleged crime. The Appeals Court determined that the PowerPoint should have been excluded, because by selecting and emphasizing certain exhibits over others, the exhibit could have distracted the jury and misled them as to the significance of other evidence in the case.

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On the other hand, some courts have found that, where a demonstrative's differences from the object or event in question were "obvious," the jury is unlikely to be confused or misled and, thus, the demonstrative may be admissible.[10]

Often, the demonstratives at issue in business litigation consist of physical depictions of relevant data, such as dollar amounts, dates, contract terms, and goods purchased or sold. The presentation of numerical data is an area rife for distortion, manipulation or simple error that can lead to objections on grounds of prejudice and confusion. Trial attorneys seeking to introduce demonstratives containing these types of data must therefore exercise caution to ensure that their demonstrative is admitted, including potentially obtaining opposing counsel's consent to the exhibit or, alternatively, preparing multiple versions of the exhibit for use at trial.

PERMISSIBILITY OF VISUAL AIDS

Unlike demonstrative exhibits, visual aids (which may consist of charts, demonstrations and any other form of demonstrative) are not introduced into evidence and, consequently, have a lower threshold for presentation at trial.[11] The primary reason for this is that, unlike demonstrative exhibits, visual aids merely explain relevant concepts or testimony, but do not independently make any material fact more or less likely to be true.

Visual aids may be used to illustrate a sci entific principle being described by an expert witness who has relied on that principle in formulating his ultimate opinion.[12] The visual aid may be permitted at trial to enhance the fact finder's ability to understand this testimony. Because the visual aid is not evidence, there is no requirement that it be "substantially similar" to any actual object or event at issue in the trial.

For example, in a medical malpractice trial involving treatment of a bullet wound, the Massachusetts Appeals Court affirmed a trial judge's decision to allow defense counsel to present images of a separate bullet wound as a visual

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identify for the court the genuinely disputed material facts. But often the idea gets buried and lost in the reams of paper that make up much summary judgment briefing in the BLS. Both judges noted frustration that 9A(b)(5) statements have become not just unhelpful but, at times, a hindrance. A 200-page statement, with 100 or more supposedly undisputed facts, is not out of the ordinary.

Of course, we at the bar are largely to blame when, in our responses to a moving party's statements, we obscure admissions by surrounding them with legal argument and other "facts." It would certainly be best if attorneys were moved by judges' frustrations to improve our habits, but we are often moved by our nature (or clients) to advocate zealously within the constraints of the rules. Thus the question, and the problem: what does Rule 9A require?

Rule 9A(b)(5) contains 1,172 words. Of those, just one word describes what the responding party must submit in response to the moving party's factual assertions: a "response." The opposing party "shall include a response" to the moving party's statement of facts. True, there are other qualifiers in the rule: if the response relies on opposing evidence, there must be record citations; the purpose of the rule is to provide the judge the parties' positions "in easily comprehensible form"; and a statement is deemed admitted "unless controverted as set forth in this paragraph." But none of these directly adds meaning to the word "response."

In this way, perhaps, Rule 9A has become complex (some would say counterproductive) over time. Unraveling all the complexity is beyond the scope of this brief comment, but one way the rule can be improved is by clarifying exactly what a "response" requires — and what it forbids. For example, the counterpart to Rule 9A in our federal court requires the responding statement to be "concise," a word not found in Rule 9A. L.R. 56.1 (D. Mass.). The Southern District of New York is more direct by deeming admitted any factual assertion not "specifically controverted" by the opposing party's "short and concise" response. L.R. 56.1 (S.D.N.Y.). Some have suggested requiring the response to "admit" or "deny" the fact asserted, in a form similar to MRCP 36, which governs requests for admission.

As the roundtable made clear, the time is ripe for the bench and the bar to work to clarify the rule. Effective advocacy and efficient dispute resolution depends on it. Together, we can make put the "summary" back in summary judgment practice again. ■

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aid.[13] Plaintiff objected to the images, claiming they lacked sufficient similarity to the injury at issue because they showed a different bullet trajectory. In ruling that the slide could be presented to the jury (but not admitted as evidence), the court found that the images' purpose was to demonstrate the impact of the bullet, not its trajectory. The Appeals Court found no abuse of discretion, noting that the plaintiff had an opportunity to cross-examine defendant's expert with respect to the differences between the images and the plaintiff's actual injuries.

CONCLUSION

If used effectively, demonstrative evidence and visual aids can be highly persuasive tools in any business trial. When utilizing these tools, it is critical to keep in mind the respective rules governing their admissibility and to ensure that your demonstrative complies with those rules. ■

1. *Renzi v. Paredes*, 452 Mass. 38, 51–52, (2008).
2. *Id.; see also Dow v. Bullfinch*, 192 Mass. 281, 285 (1906).
3. L*ally v. Volkswagen Aktiengesellschaft*, 45 Mass. App. Ct. 317, 332 (1998).
4. *G.E.B. v. S.R.W.*, 422 Mass. 158, 167 (1996).
5. *Welch v. Keene Corp.*, 31 Mass. App. Ct. 157, 166 (1991) (holding that demonstratives "which do not exactly replicate the conditions giving rise to the alleged injury are admissible . . . where there is a substantial similarity between [demonstrative] and the conditions that gave rise to the litigation."); s*ee also Com. v. Chipman,* 418 Mass. 262, 270 (1994) ("demonstration may be admitted in evidence provided it sufficiently resembles the actual event so as to be fair and informative.").
6. *See Jodoin v. Toyota Motor Corp.,* 284 F.3d 272, 279 (1st Cir. 2002) (finding abuse of discretion where trial judge required demonstrative to be "virtually identical" to event depicted).
7. *Renzi,* 452 Mass. at 52 ("The person testifying as to the substantial similarity of the [demonstrative] and the original need not be the [creator] but may be a person familiar with the details pictured.").
8. *See e.g., Com. v. Chukwuezi*, 475 Mass. 597, 603 (2016) ("In determining whether to admit a computer-generated simulation like the one at issue here, a trial judge must determine . . . whether the evidence will confuse or mislead the jury.").
9. *Com. v. Wood,* 90 Mass. App. Ct. 271, 279 (2016).
10. *Lally,* 45 Mass. App. Ct. at 333 (1998) (holding that the jury could understand and appreciate the differences between the car crash at issue and defendant's demonstration of same using a sled-pulled car with crash-test dummies while still retaining the video's useful insights).
11. *Everson v. Casualty Co. of America*, 208 Mass. 214, 220-221 (1911) (a witness's rough sketch upon a blackboard of the scene of an automobile accident or a crime is allowed as a visual aid, but not admissible as an exhibit)
12. *Com. v. Lyons*, 70 Mass. App. Ct. 1109 (2007) (explaining that visual aids help "the jury in understanding potentially abstruse expert testimony," or other complex facts and concepts.)
13. *Teller v. Schepens*, 25 Mass. App. Ct. 346 (1988).