No Ideas But in Things: A Practitioner's Look at Demonstrative Evidence[1]

by Ervin A. Gonzalez and Kyle B. Teal

The power of visual stimulation in forming a persuasive argument cannot be understated. Poet Williams Carlos Williams famously wrote, "no ideas but in things…."[2] In writing that line, it can be argued that Dr. Williams was simplifying a universal truth that carries over to modern-day courtrooms: The art of conveying ideas is most effectively done by showing, rather than telling, your audience what it should know. In Williams' specific context, he appealed to readers with imagery that conveyed certain feelings or truths.

Similarly, for today's litigators, the best arguments can be displayed through the use of demonstrative evidence and exhibits. Indeed, studies have shown that visual aids used in conjunction with oral presentations may increase understanding and retention levels by as much as 65 percent.[3] It is well known that such "evidence is generally more effective than a description given by a witness, for it enables the jury, or the court, to see and thereby better understand the question or issue involved."[4]

In today's technologically savvy society, the influence of visual imagery by use of demonstrative evidence is as powerful and prevalent as ever. The use of this power, however, presents certain obstacles for practitioners. Courts must carefully evaluate issues of admissibility to determine whether demonstrative aids are relevant, are not misleading or confusing, and "constitute an accurate and reasonable reproduction of the object involved . . . ."[5]

Significantly, trial court judges are afforded broad discretion as to whether demonstrative exhibits should be presented to a jury and admitted into evidence.[6] As always, a well-prepared strategy and supported argument for or against the admissibility of such evidence will go far in tipping the court's discretion toward a favorable result. The trial court's discretion carries great weight, even on appeal, as the trial judge's ruling will not be disturbed absent a clear abuse of that discretion.[7]

First, it is essential to decide whether the use of demonstrative evidence is warranted with regard to satisfying an element of proof, reinforcement, explanation, or illustration of an issue. Next, counsel should decide the medium for presenting the evidence (*e.g.*, videotape or photograph, diagram or drawing, chart or time line, blowup poster, or original-size exhibit). The chosen medium will prompt the appropriate admissibility and foundation analyses. There are also circumstances when the thoroughness and timing of a foundation can play an important role in jury persuasion.

All too often, the creation of demonstrative evidence becomes a last-minute decision before trial. Fortunately, companies that specialize in trial graphics can usually accommodate an attorney's request within hours. However, the presentation of properly developed and effective demonstrative evidence requires meticulous preparation. This practitioner's guide is intended to assist Florida litigators in some of the trickier aspects of presenting and introducing demonstrative evidence before and during trial, as well as precluding the introduction of such evidence through appropriate objections.

The Basics

First, *real* evidence should be distinguished from *demonstrative* evidence. Demonstrative evidence is generally referred to as crafted "representative" evidence that serves to assist in the comprehension of certain facts and details. "In

other words, demonstrative evidence is a medium for presenting testimony, documentary, or real evidence."[8]

Real evidence is typically referred to as an object that has played a direct role in the incident giving rise to the litigation. For real evidence to be admitted, the object must be authenticated, relevant, and cannot be hearsay unless it falls under an exception.[9] With the widespread use of technology in the courtroom, such as digital, video, and computer-generated evidence, demarcations among these categories of evidence tend to blur.

Nevertheless, courts must distinguish demonstrative evidence from mere illustrative aids. Categorizing evidence should be a serious consideration for litigators, as the distinction between aids and evidence is crucial. Failure to make such a distinction can lead to reversible error as, unlike substantive evidence, demonstrative aids are not allowed in the jury room during deliberations.[10] Usually, the more accurate the demonstrative exhibit's depiction of the facts of the case, the more likely it is to be admitted into evidence.

Maps, charts, or drawings may be useful as aids, but might not be admissible evidence. Despite not being admitted as evidence, demonstrative aids may still be used to demonstrate a pertinent point with the trier of fact. Examples of demonstrative evidence include, but are not limited to, the following: models, maps, videotapes, DVD, film, audiotapes, recordings, photographs, replicas, computer animations, x-rays, handwriting exemplars, time lines, demonstrations, experiments, scientific tests, and original objects (*e.g.*, weapons and defective products).

Second, in the interest of avoiding potentially case-shattering surprises, pretrial stipulations should be made and motions in limine should be filed and set for hearing well in advance of trial. Obtaining pretrial rulings on admissibility can also save money, considering multidimensional models tend to be quite persuasive, but often include a hefty price tag. Pretrial efforts to determine whether a model can be introduced as evidence or as a demonstrative aid will preemptively confirm whether a party should spend the time and expenses preparing it.

Pretrial practice regarding admissibility is not without its pitfalls. Attorneys should be wary of motions in limine that are tantamount to improper summary judgment motions or motions to dismiss that seek to exclude mention of a dispositive issue and effectively render one party without a case.[11] An improper ruling on a motion for summary judgment masquerading as a motion in limine could result in reversible error.[12] It is also important to note that, even if a litigator obtains a favorable pretrial order on a motion in limine, the attorney is not yet out of the woods. Some courts view pretrial rulings as entirely tentative,[13] meaning that "[a]fter evidence is actually adduced at the trial, the judge may suffer a change of mind and decide — contrary to a pretrial ruling — that evidence may have to be admitted or excluded."[14]

One hurdle in establishing the admissibility of demonstrative evidence is relevancy.[15] Plainly stated, Fed. R. Evid. 401 defines relevant evidence as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence," and "the fact is of consequence in determining the action."[16] Its state counterpart, F.S. §90.401, offers even less in the way of specifics or guidance, stating: "Relevant evidence is evidence tending to prove or disprove a material fact."[17] This broad, plain language makes for a seemingly simple standard to satisfy, and courts acknowledge having wide discretion in determining this phase of the admissibility process.[18]

However, complications arise when the statutory reasons to exclude relevant evidence are evaluated. With slight variations, Fed. R. Civ. P. 403 and F.S. §90.403 deem relevant evidence inadmissible if its probative value is substantially outweighed by the danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[19] Certain exhibits or aids may be only peripherally relevant to some aspect of the case, but are so emotionally charged that introducing them to the jury would be unfairly prejudicial to the objecting party and would only inflame juror's sentiments without proving or disproving any dispositive details of the case.[20]

In *Jackson v. State*, 107 So. 3d 328 (Fla. 2012), the Florida Supreme Court reversed a conviction and remanded upon finding that the trial court abused its discretion when it admitted a videotape recording of an interrogation of the suspect.[21] During the interrogation, detectives repeated personal beliefs and attacked the character of the suspect.[22] The interrogation did not result in a confession, and was obviously used by the prosecution to elicit sympathy for the victim and create a strong inference of guilt.[23] The interrogation video was effectively serving as a mechanism to paint the state's picture of the villainous defendant and the heroic victim without providing anything relevant to the issues of the case.

In other criminal cases, if authenticated images offer guidance as to the cause, location, or mechanism of death or injury, or the intent of the defendant, the images typically constitute admissible evidence.[24] Conversely, gruesome video footage, photographs, or drawings depicting shocking images of a crime or a victim should not be admitted if those images fail to speak directly to a critical fact at issue and, instead, only infuriate the trier of fact.[25] If the images unequivocally address a disputed issue in the case, the balancing test would likely shift in favor of the party seeking admissibility unless there is a less inflammatory, but equally effective, method of proving the material fact.[26] That is, unless the probative value of the image is substantially outweighed by its prejudicial effect, the image would be deemed relevant and admitted into evidence.

Photographic images are the most accessible type of demonstrative evidence in personal injury cases. For example, it is no surprise that photographs of a plaintiff's or a victim's unsightly wounds tend to resonate with a jury. The photographs may be admissible if the nature and extent of the plaintiff's damages are in dispute. Similarly, in cases involving real

property, aerial photographs and plats are useful when overviews of locations and scenes would aid the trier of fact in better understanding the subject property at the center of the litigation.

Relevancy can be easily established when introducing photographs if they assist in comprehending witness or expert witness testimony.[27] However, this common law rule is not without its limitations. When the images at issue are merely tangentially relevant to the case, and are so ghastly and inflammatory that they risk tainting the entire jury trial, exclusion of the evidence is appropriate.[28] The balancing test also lends itself to judicial discretion. As always, litigators should be armed with strong, analogous caselaw and well-crafted arguments to win the motion or preserve the argument for appeal.

Along with establishing relevancy, litigators must authenticate[29] real evidence by confirming with a witness who has personal knowledge that the evidence fairly and accurately represents the object, person, or location at issue. Furthermore, if the demonstrative evidence used is an illustrative aid, the exhibit is subject to the doctrine of substantial similarity.

Substantial Similarity

Under the doctrine of substantial similarity, a litigator must establish that the demonstrative exhibit he or she intends to use at trial is substantially similar to the object or area in question. Demonstrative evidence must "constitute an accurate and reasonable reproduction of the object involved."[30] A witness who intends to use a demonstrative aid should first clarify that the exhibit will facilitate the presentation of testimony to the jury.

The substantial similarity doctrine applies when a "party seeks to admit prior accidents or occurrences involving the opposing party, in order to show, for example notice, magnitude of the danger involved, the [party's] ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care, and causation."[31] The doctrine serves to "protect parties against the admission of unfairly prejudicial evidence, evidence which, because it is not substantially similar to the accident or incident at issue, is apt to confuse or mislead the jury."[32]

This doctrine is stringently applied when litigation strategy calls for analysis of prior occurrences or nonoccurrence for demonstrative purposes. Litigators often introduce prior accidents, and thereby attempt to introduce related objects, such as vehicles or airplane engines, similar to that which allegedly caused injury. The substantial similarity test is strictly adhered to in cases involving such evidence. This strategy is often aimed at indicating that the defendant had notice of particular defect and failed to fix it. Such evidence "is admissible only if it pertains to the use of the same type of appliance or equipment under substantially similar conditions."[33] The proponent of this type of evidence must meet the burden imposed by the substantial similarity test before the evidence can be admitted.[34]

In *Godfrey v. Precision Airmotive Corp.*, 46 So. 3d 1020 (Fla. 5th DCA 2010), the Fifth District Court of Appeal found that the plaintiffs failed to meet their burden when they attempted to admit more than 100 prior incidents involving airplane parts different from those at issue in the case.[35] The plaintiffs proffered their expert's testimony that the Teledyne airplane engine at issue in the case was similar to that of other manufacturers', and that numerous carburetors shared the same defects as that which caused the subject plane crash.[36] The court explained that even if the prior accidents had involved the same Teledyne engine, that fact alone would have been insufficient to admit the prior accidents, considering the expert conceded that failure to change the engine oil when needed could cause the same complications as the alleged defect in the subject engine.[37]

In the context of the admissibility of nonoccurrence evidence, the First District Court of Appeal set aside the trial court's verdict in *Hogan v. Gable*, 30 So. 3d 573 (Fla. 1st DCA 2010), after determining that the lack of prior accidents involving a dunking booth was improperly made a focus of the trial. The dunking booth at issue was modified from its original construction to include a wire mesh that plaintiff claimed caused the injury.[38] The court stated that the trial court failed to establish whether the dunking booth was in a substantially similar condition before admitting the nonoccurrence evidence.

The doctrine is inapplicable when the offered evidence is "pointedly dissimilar" and "not offered to reenact the accident."[39] In products liability cases, this analysis often requires the court to distinguish between a recreation, and a "pointedly dissimilar" demonstration in order to determine whether the evidence is subject to the substantial similarity doctrine. This distinction is noted in *Mitsubishi Motors Corp. v. Laliberte*, 52 So. 3d 31 (Fla. 4th DCA 2010), a case involving an automobile accident death of a passenger in a Mitsubishi Nativa — a sports utility vehicle. The Fourth District Court of Appeal addressed the trial judge's ruling that videos showing various tests performed on passenger seats of other makes and models were inadmissible.

The Fourth District found that the substantial similarity doctrine was not applicable, given that Mitsubishi admittedly did not attempt to recreate the accident. However, the court ultimately affirmed the trial court's exclusion on the basis of hearsay, prejudice, and lack of foundation and relevancy.[40] As the trial judge noted, Mitsubishi's demonstrative evidence was not subjected to the substantial similarity test, but its stark differences from the actual accident made it less probative and relevant, as well as highly prejudicial.[41]

By contrast, in a construction accident case, *Simmons v. Roorda*, 601 So. 2d 609 (Fla. 2d DCA 1992), the Second District allowed the testimony of a witness regarding his inspection of a crack in a truss, which was discovered after the accident and was not in the same truss that had collapsed under the plaintiff.[42] The trial court originally refused to admit a photograph of the different truss, despite the fact that it was in the same system as the truss that caused the injuries. The appellate court reversed, finding the

photograph relevant to the issue of failure to inspect.[43]

In cases in which the demonstrative aid is a replica or reproduction of the object or accident in question, it must be a reasonably exact reproduction or replica that the jury sees substantially the same object as the original.[44] If a litigator intends to use a model as a demonstrative exhibit, he or she should first show that it fairly and accurately represents the original and is built to scale.[45] This factual judgment call is also left to the broad discretion of the trial court judge.[46] Accordingly, the proffering attorney is expected to "give good reason for its acceptance into evidence."[47] The merits of such an argument are especially scrutinized in this context.

In *Alston v. Shiver*, 105 So. 2d 785, 791 (Fla. 1958), a 1958 case addressing a personal injury claim from an assault and battery, the Florida Supreme Court reversed the trial court's ruling admitting an axe handle as a replica of the stick used to beat the plaintiff. The court emphasized the witness' statement that the replica axe handle was longer than the stick used in the beating, stating: "The evidence shows the new handle to have been three feet long and the stick used in the beating to have been about two feet long. It should not have been admitted for this reason."[48]

Courtroom Stunts

The substantial similarity doctrine also applies to courtroom demonstrations and experiments. This type of demonstrative evidence is the most dramatic, but also the chanciest. The courtroom stunt involving the infamous bloody leather glove in the O.J. Simpson murder trial serves as a stark reminder that blindly agreeing to certain demonstrations could prove devastating to an attorney's case.[49] When attempting to introduce a demonstration or experiment, counsel should be prepared to argue against a 403 objection that the demonstration's probative value is substantially outweighed by its prejudicial effect. Litigants should also be prepared to beat the argument that the demonstration is so dissimilar to what it purports to demonstrate that it is inadmissible. Many times, the response to such an argument is that the demonstration or experiment does not have to *flawlessly* resemble the key events;[50] rather, only substantial similarity is required.

Courts tend to approach experimental evidence with great caution.[51] It is usually deemed inadmissible "where the conditions attending the alleged occurrence and the experiment are not shown to be similar."[52] However, Florida appellate courts have ruled that dissimilarities between test conditions and conditions surrounding the actual event may go to the *weight* — not the relevancy or materiality — of the evidence.[53] Therefore, "[i]f enough of the obviously important factors are duplicated in the experiment, the court may conclude that the experiment is sufficiently enlightening that it should come into evidence."[54] Even a demonstration as dramatic and grisly as plunging a knife into a Styrofoam model of a victim's head may survive trial if opposing counsel fails to appropriately request a curative instruction or move for a mistrial.[55]

Despite caselaw that indicates certain liberal treatment by the courts, the original conditions and circumstances at issue should be duplicated as closely as possible. It is preferable not to go beyond the scope of what is required because the admissibility of this type of evidence resides completely within the discretion of the court. To maximize the probability that the appropriate foundation will be laid, the expert who conducted the experiment or supervised the demonstration should be in court to present the evidence.

Instructions and Other Distractions

Inevitably, the admissibility of demonstrative evidence often leads to epic arguments. Such arguments may have the unwanted effect of lending a controversial exhibit more credence than is warranted. For example, in response to an argument between attorneys regarding the admissibility of an exhibit, a judge may wish to compromise and admit the exhibit, but with a limiting instruction to a jury. In fact, in some circumstances, the court is required to instruct the jury on the proper scope of evidence.[56]

The dangers of unintended emphasis by way of limiting instructions are well documented in civil and criminal cases.[57] Ironically, the compromise of admitting evidence and attempting to limit its scope of influence by curative instruction tends to highlight the controversial aspect of the exhibit. The results of confusing jury instructions can be detrimental to a party moving for mistrial, considering the difficulty in making such an argument and, if an appeal is an option, the tough abuse of discretion standard of review.

In *Laliberte* the trial judge repeatedly used the word "defect" in a confusing manner while instructing the jurors on an issue regarding the passenger seat during an inspection of two models of the subject vehicle.[58] While the jury was examining the vehicles, both passenger seats would not fully recline. In providing the instruction, the judge only meant to convey that the seats were supposed to recline, but for some reason were not operating properly.[59] Despite the judge's instructions causing at least one juror confusion about the meaning of the word "defect," the Fourth District still affirmed the trial court's denial of Misubishi's motion for mistrial.[60] This was a tough break for the defendant, considering the crux of the plaintiff's case was proving the automobile's defect.

When the evidence at issue is a written document, however, redaction sometimes simplifies this issue by obviating the need for jury instructions. This avoids the quandaries often presented by limiting instructions that may have a reverse effect on the jury. For example, in *Zinz v. Concordia Properties, Inc.*, 694 So. 2d 120 (Fla. 4th DCA 1997), the Fourth District reversed the trial court's admission of a real estate contract containing an invalid indemnification clause in a premises liability action. The court instructed the trial judge that irrelevant portions of the contract, including the prejudicial indemnification clause, should be redacted before being admitted.[61]

Expert Testimony and Exhibits

The rules governing demonstrative

evidence used to illustrate expert opinion testimony vary slightly from those governing exhibits associated with fact witnesses. For experts, the proponent must first ensure that the exhibit illustrates an expert's opinion. If so, the proponent must then lay the foundational requirements necessary to introduce the expert's opinion.

The Florida Legislature on July 1, 2013, amended the relevant statute to replace the *Frye* test with the *Daubert* test. The *Daubert* test raises the following issues when evaluating whether to allow an expert's testimony: 1) whether an expert's testimony is based on sufficient facts; 2) whether the expert used reliable principles methods; 3) and whether those methods were applied correctly to the facts of a case.[62]

In making this significant change, the legislature "in its codification of the federal *Daubert* test, made clear that 'pure opinion testimony' was no longer admissible."[63] *Daubert* was expanded upon by *General Electric Co. v. Joiner and Kumho Tire Co., Ltd. v. Carmichael*, 522 U.S. 136, 143 (1997), which rendered the *Daubert* test applicable not only to "new or novel" scientific evidence, but to *all* expert opinion testimony.[64] The proponent bears the burden of establishing the admissibility by a preponderance of the evidence.[65]

Expert testimony naturally raises the question of admissibility of the demonstrative evidence relied upon to render opinions. Experts' exhibits have their own set of rules for laying a foundation, which overlap with the requirements of basic demonstrative exhibits.[66] The following steps are necessary for the admission of experts' opinions and corresponding exhibits:

> (1) [T]he opinion evidence must be helpful to the trier of fact; (2) the witness must be qualified as an expert; (3) the opinion evidence must be applied to evidence offered at trial; and (4) pursuant to section 90.403, Florida Statutes, the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value.[67]

To introduce tests, studies, or experiments, the proponent should argue that the expert relied on the proffered tests to render their opinions. The Fourth District also tackled this issue in *Laliberte*, when it addressed the admissibility of tests conducted by seatbelt design and bio-mechanic experts, which rotated surrogate passengers in vehicles turned on a spit to mimic the rollover accident at issue.[68] In affirming the trial judges' ruling that the tests were inadmissible, the court noted the lack of an energy management loop necessary to accurately recreate the accident circumstances, and stated that "[s] ignificantly, Mitsubishi did not argue that its experts relied on these tests to render their opinions."[69]

In many cases, the reliance issue is moot due to the obvious role the demonstrative evidence plays in forming the expert's opinion. For example, in most personal injury cases, x-ray or magnetic resonance imaging (MRI) films are common examples of evidence presented to the court, as well as doctor reports evaluating the films. Technically, x-rays are nothing more than photographic negatives that should be subject to no more than the same objections and admissibility considerations as photographs.

An expert is needed, however, to explain the sometimes complex details in an x-ray. Therefore, more foundational elements are required. Even so, x-rays are typically admitted into evidence.[70] Admissibility complications often arise, however, when the radiologist who interpreted the films is not the same witness who is called to authenticate the resulting report in court. [71]

It should be noted that x-rays can be converted to positive prints that may be easier to use in the courtroom, and that, in some circumstances in which the films cannot be located, testimony regarding such films is subject to the best evidence rule.[72] Experts also rely on MRI films or their reports regarding same when testifying.[73] Litigators may attempt to impeach a doctor if the clear evidence of injury in the MRI film does not match the contents of the doctor's report. Though, doctors should not be held to the *exact* wording in their reports.[74]

Finally, the application of *Daubert* did not affect the admissibility of computer animations or video recordings as demonstrative exhibits whose foundational requirements remain that they must fairly and accurately depict what they purport to show.[75] The Second District Court of Appeal addressed such an issue in *Smith v. Geico Cas. Co.*, 127 So. 3d 808, 810-11 (Fla. 2d DCA 2013). The court held that a time-lapse video was admissible because it fairly and accurately represented the bus accident in question. Moreover, the defense stated that Geico's accident reconstructionist planned to use the video to aid his testimony.[76]

While especially adroit litigators can often admit this type of evidence with ease, establishing a fair and accurate depiction isn't always simple. The judge's decision will depend on the accuracy of the exhibit to the actual facts of the case, as well as the strength of the objections from the other side.

Objections

When attempting to preclude an exhibit from being entered into evidence, the trial attorney should argue that the exhibit does not truly and accurately portray what it purports to portray. The attorney may also argue that the exhibit is not necessary to assist the witness in explaining her testimony. A hearsay objection may also be made.[77] Finally, if the exhibit may mislead the jury or cause confusion or undue prejudice, a motion may be made under F.S. §90.403 in circuit court or Rule 403 in federal court, arguing that the probative value of the exhibit is substantially outweighed by its prejudicial effect.

If the objections are pertaining to a model or replica, the usual argument is that the model fails to accurately portray the object or location at issue. The attorney seeking to use the exhibit should counter with the argument that the models are not required to be exact replicas.[78] For example, the Mitsubishi Monteros examined by the jurors in *Laliberte* were not the same automobile in which the plaintiff's son lost his life. Even if the exhibit is not admitted in evidence, the attorney may still use it as a demonstrative aid if the appropriate foundation is met.

Photographs and videos can be attacked as exaggerating or reducing

distances, altering apparent height or other measurement, and showing more or less of a scene than is necessary to prevent a misleading depiction. If any of these objections are encountered, the attorney should clarify whether the objections are directed at the weight and credibility of the photograph or whether the attorney is attacking its admissibility. Problems with photographic authenticity have greatly increased since the use of photograph-altering technology has become common. Now, just about anyone with a computer can change a photograph or video to suit their agenda.

With regard to videos, blatantly biased depictions or reenactments will likely be rejected as "patently deceptive and prejudicial."[79] The Second District made such a ruling in *Campoamor v. Brandon Pest Control, Inc.*, 721 So. 2d 333 (Fla. 2d DCA 1998), when a video produced by the defense team plainly conflicted with the evidence. The lawsuit alleged that an exterminator was negligent in his application of the pesticide. The video in that case showed the exterminator explaining the proper process for exterminating termites. The court observed the following:

> The videotape is essentially a self-serving videotape deposition without the benefit of the opposing party participating. Interspersed throughout the videotape are computer-produced animations depicting the drilling and injection process done in the proper manner. Also appearing at various locations are printed statements beginning with "Mr. Morgan does . . ." followed by Morgan's narration. The videotape concludes with an animation of a workman kneeling and injecting the pesticide in the proper manner. This animation is preceded by the caption, "Mr. Morgan injects into drilled holes."[80]

The court also noted that the trial judge permitted the self-serving video into the jury room during deliberations. This, by itself, would be sufficient to warrant a reversal.[81] By contrast, digitally enhanced stills can survive objections if they prove to be fair and accurate, and it is shown there is no distortion of the stills on the original videotape.[82]

Regarding the use of charts, there are certain limitations that should be considered when addressing or making objections.[83] In certain cases, a chart of mortality tables used during closing argument should not remain with the jury during deliberations.[84] Litigators who are able to persuade a judge to allow demonstrative exhibits into the deliberation room may be fervent to make such a last impression with jury, but should be prepared to eventually try the case over again. The only proper remedy for such an error is a new trial.[85]

Litigators should make sure that the chart is not merely cumulative of other testimony and not misleading. Moreover, the chart cannot contain inaccuracies, unfairly prejudicial captions, or otherwise inadmissible statements (*e.g.*, hearsay). If the attorney encounters a seemingly insurmountable objection, he or she can request a limiting instruction (*e.g.*, that the chart is not to scale or can be viewed for only a limited purpose) or may use the chart solely as a demonstrative aid.[86] As noted earlier, however, the curative instructions often paradoxically emphasize the harmful aspect of an exhibit to the jury.

Conclusion

Few deny the value and effectiveness of demonstrative exhibits. However, some believe that too much technology in the courtroom is counterproductive.[87] Exhibits that are too ostentatious or detailed may lack persuasive force the same way a long email written in all capital letters seems over-the-top and ridiculous. In the same vein, using too many demonstrative exhibits in trial may dilute the impact of each individual exhibit.

In our current high-tech world, the use of modern demonstrative aids is sometimes critical to stay competitive in the courtroom. It is much easier and sometimes less expensive to carry a flash drive or a recording device to court than it is to lug around bulky three-dimensional models. Indeed, some litigation experts and practitioners believe that, as litigators, we must accept the free flow of information in the courtroom by way of digital technology and adapt our practice to anticipate its inevitable onslaught.[88] Considering the fact that screens pervade all aspects of modern life and are now the main source of information, digital exhibits are becoming essential and should be used in combination with the more traditional, tangible exhibits.

As litigators, we must remember Dr. Williams' thesis and carry it out through our courtroom practice. Sometimes, our arguments and our strategies are simply not enough to win. In those times, we must use things to convey our ideas.❑

[1] This practitioner's guide was adapted from the 14th chapter in The Florida Bar's Florida Civil Trial Practice titled "Demonstrative Evidence." Ervin A. Gonzalez, Demonstrative Evidence, Civ TP FL-CLE 14-1.

[2] William Carlos Williams, Paterson (1963). Williams is perhaps best known as the prolific poet who penned the oft-quoted poem, *The Red Wheel Barrow*.

[3] Karen D. Butera, *Seeing Is Believing: A Practitioner's Guide to the Admissibility of Demonstrative Computer Evidence*, 46 Clev. St. L. Rev. 511, 513 (1998).

[4] *Alston v. Shiver*, 105 So. 2d 785, 791 (Fla. 1958).

[5] *Taylor v. State*, 640 So. 2d 1127, 1134 (Fla. 1st DCA 1994); *see* Fla Stat. §90.403 (2014).

[6] *See United States v. Possick,* 849 F.2d 332, 339 (8th Cir. 1988); *McCoy v. State*, 853 So. 2d 396, 405 (Fla. 2003); *First Fed. Sav. & Loan Ass'n of Miami v. Wylie*, 46 So. 2d 396 (Fla. 1950); *see also Hunt v. State,* 746 So. 2d 559, 561-62 (Fla. 1st DCA 1999); *Brown v. State*, 550 So. 2d 527 (Fla. 1st DCA 1989). It is widely recognized that trial courts have a superior vantage point in ruling on the admissibility of demonstrative exhibits. Accordingly, the trial court's rulings will not be disturbed absent a clear abuse of discretion. *Chamberlain v. State*, 881 So. 2d 1087, 1102 (Fla. 2004) (citing *Harris v. State,* 843 So. 2d 856, 863 (Fla. 2003)).

[7] *Gosciminski v. State*, 132 So. 3d 678, 697 (Fla. 2014) (quoting *Brooks v. State,* 918 So. 2d 181, 188 (Fla. 2005)).

[8] Ashley Lipson, *Instant Evidence: How to Assess Admissibility When Every Second Counts*, 32 The National Legal News Magazine No. 11, 72 (Nov. 1996).

[9] *See, e.g.*, *United States v. Myers*, 972 F.2d 1566, 1580 (11th Cir. 1992) (evaluating the admissibility of a video tape recording of the defendant in jail to determine a fact at issue); *Bruce v. McClure*, 220 F.2d 330, 335 (5th Cir. 1955) (discussing laying the foundation for the admissibility of real evidence in the context of corporate books).

[10] *Young v. State*, 645 So. 2d 965, 966-67 (Fla. 1994) (citing Fla. R. Crim. P. 3.400(a)(4) (emphasis added)). In this criminal case, the Florida Supreme Court stated "that a trial court has the discretion to allow the jury to take into the jury room 'all *things received into evidence* other than depositions.'"; *but see State v. A.R.,* 213 N.J. 542, 558-59 (N.J. 2013) (cautioning against

allowing the jury unfettered access to video-recorded statements). The court in *Young* referenced the "policy underlying the exclusion of depositions from the jury room is to prevent the jury from placing undue emphasis on the deposition over the oral testimony presented at trial." *Young*, 645 So. 2d at 966-67.

[11] *Buy-Low Save Centers, Inc. v. Glinert*, 547 So. 2d 1283, 1284 (Fla. 4th DCA 1989); *Brock v. G.D. Searle & Co.,* 530 So. 2d 428, 431 (Fla. 1st DCA 1988) ("[T]rial courts should not allow motions in limine to be used as unwritten and unnoticed motions for partial summary judgment or motions to dismiss.").

[12] *See Rice v. Kelly,* 483 So. 2d 559, 560 (Fla. 4th DCA 1986); *Dailey v. Multicon Development, Inc.,* 417 So. 2d 1106 (Fla. 4th DCA 1982).

[13] *State v. Zenobia*, 614 So. 2d 1139, 1139-40 (Fla. 4th DCA 1993).

[14] *Id.*

[15] *See Cave v. State*, 660 So. 2d 705, 708 (Fla. 1995) (citing *Burns v. State,* 609 So. 2d 600 (Fla. 1992)) ("The test of admissibility of photographic evidence is relevance.").

[16] Fed. R. Evid. 401.

[17] Fla. Stat. §90.401 (2014). Section 90.402 is somehow even less instructive than the federal rule. It reads: "All relevant evidence is admissible, except as provided by law." Fla. Stat. §90.402 (2014); *see also McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007).

[18] *Wright v. State,* 19 So. 3d 277, 291 (Fla. 2009) ("A trial court has broad discretion to determine the relevancy of evidence.").

[19] Fed. R. Evid. 403; *see also* Fla. Stat. §90.403 (2014).

[20] *Taylor v. State*, 640 So. 2d 1127, 1134 (Fla. 1st DCA 1994). In *Taylor*, a criminal case, there was no dispute as to the cause of death or number of blows struck. The inflammatory nature of the "distinctly feminine appearance of the clay heads used by the medical examiner to explain the blows, was certain to evoke an emotional response in the minds of the jurors, on a matter that had little or no bearing on the question for the jury," which was the question of appellant's sanity at the time of the offense.

[21] *Jackson*, 107 So. 3d at 339, 344.

[22] *Id.* at 341. The court noted that the "jury would be inclined to give great weight to the investigating officers' statements that Jackson was guilty 'without a shadow of a doubt,' that his denials lacked credibility, and that [the victim] was a 'rising star' in the community who was intent on starting a family."

[23] *Id.* at 339.

[24] *Bruno v. Moore*, 838 So. 2d 485 (Fla. 2002); *Philmore v. State*, 820 So. 2d 919 (Fla. 2002); *Naylor v. State*, 748 So. 2d 385 (Fla. 3d DCA 2000).

[25] *Taylor*, 640 So. 2d at 1134.

[26] *See Gosciminski v. State*, 132 So. 3d 678, 698 (Fla. 2014) (affirming trial court's ruling that testimony and diagrams regarding cell tower coverage were relevant to defendant's location at the time of the murder and were, accordingly, admissible); *Delhall v. State*, 95 So. 3d 134, 155 (Fla. 2012); *Wright v. State*, 19 So. 3d 277, 291 (Fla. 2009) (ruling that a 9mm cartridge was relevant and properly admitted as there was a clear nexus to defendant's charges of murder and possession of a firearm by a convicted felon); *Hertz v. State*, 803 So. 2d 629, 641 (Fla. 2001) (finding photographs of charred bodies "relevant to show the position and location of the bodies when they were found by police and assisted the crime scene technician in describing the crime scene); *Pope v. State,* 679 So. 2d 710, 713 (Fla. 1996) (holding that photographs of bloody bathroom where the stabbing occurred, the victim's bloody clothes, and autopsy photographs were relevant to establish "the manner in which the murder was committed and to assist the crime scene technician in explaining the condition of the crime scene when the police arrived").

[27] *See Larkins v. State*, 655 So. 2d 95 (Fla. 1995) (affirming admissibility of a photograph depicting a person lying in a pool of blood because it helped explain the medical examiner's testimony); *Citrus County v. McQuillin*, 840 So. 2d 343 (Fla. 5th DCA 2003) (allowing photograph of decedent in body bag was not error because it tended to support expert witness' theory).

[28] *See Gomaco Corp. v. Faith*, 550 So. 2d 482 (Fla. 2d DCA 1989) (finding photographs of the victim's nearly severed foot were inadmissible, despite surgeon's testimony that the photographs would help him describe the surgical procedure and the extent of the victim's injuries); *Johnson v. Florida Farm Bureau Casualty Insurance Co.*, 542 So. 2d 367 (Fla. 4th DCA 1989) (affirming exclusion of photograph of dead child because it would overwhelm the jury, despite plaintiff's argument that the photograph was relevant to the mother's mental pain and suffering).

[29] Even when the demonstrative aid being offered into evidence is the actual object at issue, it must be shown that "it is substantially the same condition as at the pertinent time…." *Chamberlain*, 881 So. 2d at 1102; *Walker v. State*, 82 So. 3d 115 (Fla. 4th DCA 2011).

[30] *State v. Duncan,* 894 So. 2d 817, 829-831 (citing *Brown v. State*, 550 So. 2d 527, 528 (Fla. 1st DCA 1989)).

[31] *Heath v. Suzuki Motor Corp.,* 126 F.3d at 1396 (quoting *Jones v. Otis Elevator Co.,* 861 F.2d 655, 661 (11th Cir. 1988)) (internal citation and footnotes omitted; alteration in original); *see Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1316 (11th Cir. 2005).

[32] *Heath,* 126 F.3d at 1396

[33] *Godfrey v. Precision Airmotive Corp*., 46 So. 3d 1020, 1022 (Fla. 5th DCA 2010) (citing *Frazier v. Otis Elevator Co.*, 645 So. 2d 100, 101 (Fla. 3d DCA 1994) (citations omitted)) (finding "the original trial judge erred in admitting evidence of other pallet jack accidents at trial where it was not shown that such accidents involved the use of an Otis pallet jack under substantially similar conditions as plaintiff's accident").

[34] *Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 860 (Fla. 3d DCA 2007), *rev. den.*, 984 So. 2d 1250 (Fla. 2008).

[35] *Godfrey*, 46 So. 3d at 1022; *Ry. Express Agency, Inc. v. Fulmer*, 227 So. 2d 870, 873 (Fla. 1969); *Lasar Mfg. Co., Inc. v. Bachanov*, 436 So. 2d 236 (Fla. 3d DCA 1983); *Warn Indus. v. Geist*, 343 So. 2d 44 (Fla. 3d DCA 1977).

[36] *Godfrey*, 46 So. 3d at 1022.

[37] *Id.*

[38] *Hogan*, 30 So. 3d at 574-75.

[39] *Mitsubishi Motors Corp. v. Laliberte*, 52 So. 3d 31, 38 (Fla. 4th DCA 2010) (citing *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1316 (11th Cir. 2005)).

[40] *Id.*

[41] *Id.*

[42] *Simmons,* 601 So. 2d at 611.

[43] *Id.*

[44] *Chamberlain,* 881 So. 2d at 1102 (quoting *Harris v. State,* 843 So. 2d 856, 863 (Fla. 2003)); *Walker v. State*, 82 So. 3d 115 (Fla. 4th DCA 2011) (affirming trial court's finding that state was permitted to use a firearm as a demonstrative aid despite the fact it was not identical to the gun used to perpetrate the crimes).

[45] *See* Fla. Stat. §90.901 (2014) ("Authentication or identification of evidence is required as a condition precedent to its admissibility.").

[46] *Chamberlain*, 881 So. 2d at 1102.

[47] *Alston v. Shiver*, 105 So. 2d 785, 791 (Fla. 1958).

[48] *Id.*

[49] *List of the evidence in the O.J. Simpson double-murder trial*, Associated Press, Oct. 18, 1996 (Simpson was asked to try on the glove in the courtroom); *'If it Doesn't Fit, You Must Acquit,' Defense Attacks Prosecution's Case; says Simpson was Framed*, CNN (Sept. 28, 1995) (the glove did not fit, which later served as inspiration for defense lawyer Jonnie Cochran's case winning motto: "if it doesn't fit, you must acquit.").

[50] *See Rindfleisch v. Carnival Cruise Lines*, 498 So. 2d 488, 492 (Fla. 3d DCA 1986); *Hisler v. State*, 42 So. 692, 695 (Fla. 1906).

[51] *Rindfleisch*, 498 So. 2d at 492. *Rindfleisch* involved a slip-and-fall accident on a cruise ship. With regard to a coefficient of friction test, the defendant's expert admitted that he did not know whether the step he tested was the step on which the plaintiff slipped, whether the condition of the step he tested was similar to the condition of the step in issue, where on the ship the tested step was located, or what had happened with regard to the step in the more than three years between the date of the accident and the date of the test. The trial court admitted the evidence and the appellate court found that the rule of substantial similarity had been eroded and that dissimilarities between test conditions and conditions surrounding the actual event went to the weight, not the relevancy or materiality, of the evidence.

[52] *Hisler*, 42 So. at 695.

[53] *Id.*; *Dempsey v. Shell Oil Co.*, 589 So. 2d 373, 380 (Fla. 4th DCA 1991).

[54] *Rindfleisch*, 498 So. 2d at 493.

[55] *Brown v. State*, 550 So. 2d 527, 529 (Fla. 1st DCA 1989).

[56] Fed. R. Evid. 105 ("If the court admits

evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."). *See also* FLA. STAT. §90.107 (2014) ("When evidence that is admissible as to one party or for one purpose, but inadmissible as to another party or for another purpose, is admitted, the court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted."); *United States v. Dickerson*, 248 F.3d 1036, 1046 (11th Cir. 2001); *United States v. Nixon*, 918 F.2d 895, 901 (11th Cir. 1990); *but see United States v. Martin*, 794 F.2d 1531, 1533 (11th Cir. 1986) (noting that direct evidence of a crime charged rendered Rule 105 inapplicable, and obviated any need for a limiting instruction).

[57] *Jackson v. State*, 107 So. 3d 328, 341 n. 15 (Fla. 2012), *reh'g den.* (citing *Eugene v. State*, 53 So. 3d 1104, 1112 n. 4 (Fla. 4th DCA 2011); *Bradshaw v. State*, 61 So. 3d 1266, 1267 (Fla. 3d DCA 2011) ("We also acknowledge that the Fourth and Third District Courts of Appeal have noted that the prejudice of an interrogating officer's statements could be obviated or reduced by reading a limiting instruction to the jury.")).

[58] *Laliberte*, 52 So. 2d at 34-35.

[59] *Id.* at 34 (it was discovered later that coin was lodged in each of the reclining mechanisms, precluding the seats from reclining).

[60] *Id.* at 38.

[61] *Zinz,* 694 So. 2d at 122.

[62] *See* FLA. STAT. §90.702 (2014); *see generally Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993); *see also General Electric Co. v. Joiner* and *Kumho Tire Co., Ltd. v. Carmichael*, 522 U.S. 136, 143 (1997); Ch. 2013-107, §1, LAWS OF FLA. (2013); *Perez v. Bell S. Telecommunications, Inc.,* 138 So. 3d 492, 497 (Fla. 3d DCA 2014).

[63] *Booker v. Sumter County Sheriff's Office/N.Am. Risk Services*, 166 So. 3d 189, 193 (Fla. 1st DCA 2015). Specifically, the legislature expressed its intent to "prohibit in the courts of this state pure opinion testimony as provided in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007)." *Perez v. Bell S. Telecommunications, Inc*., 138 So. 3d 492, 497 (Fla. 3d DCA 2014), *rev. den. sub nom. Perez v. Bell S. Telecomm., Inc.*, 153 So. 3d 908 (Fla. 2014).

[64] *See Kumho Tire*, 526 U.S. at 147-49 ("The initial question before us is whether this basic gatekeeping obligation applies only to 'scientific' testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony.").

[65] *Booker*, 166 So. 3d at 193 (citations omitted).

[66] *Pierce v. State*, 718 So. 2d 806, 809-10 (Fla. 4th DCA 1997) (finding a computer animation exhibit admissible).

[67] *Id.* at 809 (citing *Kruse v. State,* 483 So. 2d 1383, 1384 (Fla. 4th DCA 1986)). Furthermore, when assessing the reliability of the methodology used by the experts, *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), provides some of the flexible and nonexclusive factors that a judge may consider: 1) If it can be tested, has it? 2) Has it been subjected to peer review and/or publication? 3) If error rates can be determined, have they? 4) Are there standards controlling the technique's operation; if so, have they been maintained? 5) Is the methodology generally accepted as reliable within the relevant scientific community? *Booker*, 166 So. 3d at 194.

[68] *Laliberte*, 52 So. 3d at 36-37.

[69] *Id.*

[70] *See* CORRINE C. HODAK, REAL AND DEMONSTRATIVE EVIDENCE, Evd. FL-CLE 10-1.

[71] *See Williamson Candy Co.*, 144 So. 2d at 523 (noting that admission into evidence of x-ray report prepared by radiologist who did not testify was not proper when there existed other competent evidence to establish injury, but that "the radiologist's report might have been admissible if offered and proved as a part of the hospital record under" the business records exception to hearsay).

[72] *Hernandez v. Pino*, 482 So. 2d 450, 454 (Fla. 3d DCA 1986). The Third District held that "in the absence of evidence that an x-ray was intentionally lost or destroyed, and where the party seeking to exclude the opponent's testimonial evidence as to the contents of the x-ray has had the x-ray examined by his own experts who are able to form and express opinions regarding its contents, the best evidence rule will apply to admit the expert testimony of both parties' experts." *See generally Evidence and Witnesses*, 23 FLA. JUR. 2d §349 (2015).

[73] *Hammer v. Sentinel Insurance Company*, Case No. 08-019984 (13th Cir., Sept. 27, 2010) (ruling that MRI with diffusion tensor imaging and testimony pertaining to it constituted admissible evidence).

[74] *Allstate Prop. & Cas. Ins. Co. v. Lewis*, 14 So. 3d 1230, 1234 (Fla. 1st DCA 2009).

[75] *Smith v. Geico Cas. Co.*, 127 So. 3d 808, 810-11 (Fla. 2d DCA 2013).

[76] *Id*.

[77] *See* FED. R. EVID. 801-806; FLA. STAT. §90.802-805 (2014).

[78] *See First Federal Savings & Loan Ass'n of Miami v. Wylie*, 46 So. 2d 396 (Fla. 1950); *see also Cloyd v. State,* 943 So. 2d 149, 166 (Fla. 3d DCA 2006) (permitting 14 mugs of beer as demonstrative evidence of number and size of beers consumed by pilots prior to flight in a prosecution for operating an aircraft while intoxicated).

[79] *Campoamor v. Brandon Pest Control, Inc.*, 721 So. 2d 333, 334-35 (Fla. 2d DCA 1998).

[80] *Id*.

[81] *Id.*

[82] *Dolan v. State*, 743 So. 2d 544, 546 (Fla. 4th DCA 1999) (citing *English v. State*, 422 S.E.2d 924 (Ga. Ct. App. 1992)).

[83] *Campoamor*, 721 So. 2d at 334-35; *Louisiana-Pac. Corp. v. Mims*, 453 So. 2d 211, 212 (Fla. 1st DCA 1984) ("The use of the chart during argument is not a matter of right but discretionary with the judge. It is a widely accepted practice, but when the argument is concluded the chart must be promptly removed from the jury's observation."); *see also Ratner v. Arrington,* 111 So. 2d 82 (Fla. 3d DCA 1959).

[84] *Louisiana-Pacific Corp.*, 453 So. 2d at 212-13 ("The designation of the chart as a court's exhibit, lending to it the sanction and influence of the judge, is an error far more grievous than leaving it in view of the jury during phases of the trial for which its use is unnecessary."); *but see Newberry Square Development Corp. v. Southern Landmark, Inc.*, 578 So. 2d 750 (Fla. 1st DCA 1991) (allowing jury back into courtroom to view chart of claimed damages, which then remained out of jury's view, was not reversible error).

[85] *Louisiana-Pacific Corp.*, 453 So. 2d at 212-13.

[86] *Id.*

[87] James McElhaney, *Gizmos in the Courtroom*, 83 A.B.A. J. 74 (1997).

[88] Sharon D. Nelson, John W. Simek, *Courtroom Evidence: Evolution or Revolution?*, LAW PRAC. 22, 24 (May/June 2013); Professor Charles Nesson, *What You Have Said in the Dark: The Evolution of Media in the Courtroom and the New Challenges of Containing the Jury's Information Space,* 24 ST. THOMAS L. REV. 383, 398 (2012).

BIOS