ABA Section of Litigation 2023 Insurance Coverage Litigation Committee CLE Seminar
March 4, 2023: Compelling Themes for Insurance Coverage Trials

Effective Use of Demonstrative Exhibits in Insurance Coverage Trials

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Demonstrative aids play a visible, and often critical, role in trial presentations, and insurance litigation is no exception. While they come in different varieties that are subject to different limitations that vary by jurisdiction, all demonstratives share the common goal of making a party's case more accessible and engaging—and therefore persuasive—to the trier of fact. This can be especially important in insurance trials, where juries may be asked to engage with arcane and technical coverage issues that can prove challenging even to seasoned coverage counsel. In this article, we explore the broad outlines of the rules governing the use of demonstrative aids and evidence, focusing on federal courts. We then offer pointers on best practices that incorporate insight from a recent trial in a long-tail environmental coverage case.

I. Rules of the Road

Under the Federal Rules of Evidence, there are two primary avenues for introducing demonstratives at trial. First, under Rule 1006, a party may "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Second, pursuant to the trial court's "control over the mode and order of examining witnesses and presenting evidence" under Rule 611(a), parties may be permitted to present demonstrative aids that are illustrative of other evidence or testimony and

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make it more comprehensible to the jury. While both types of demonstratives (which we will call "summary" and "illustrative," respectively) serve to make information clearer and more accessible to the fact finder, there are important differences in the type of content that may be included and the uses to which each may be put.

Summary Demonstratives

As between the two categories of demonstratives, summary demonstratives are subject to more stringent requirements, in part because they are intended to function as an exception to the best-evidence rule. Deeply rooted in common law and more recently codified in Rule 1002 of the Federal Rules of Evidence, the best-evidence rule requires that the contents of a writing, recording, or photograph must be proven by using the original (or, under Rule 1003, a duplicate). But, at common law and in Rule 1006, an exception for summary information was created in recognition that "evidence in summary form can be highly reliable while the practical problems of requiring proof in the form of a large number of originals can present a great danger to accurate fact finding." 31 Fed. Prac. & Proc. Evid. § 8042 (2d ed.). Thus, a summary prepared under Rule 1006 effectively replaces the evidence on which it is based, which might otherwise be too voluminous or complex to use at trial. The documents or information summarized need not be admitted into evidence at trial; however, the proponent still bears the burden of establishing that the underlying information is itself admissible. A chart or summary based on inadmissible hearsay, or on documents that are irrelevant, unfairly prejudicial, or not authenticated will not be admitted. *U.S. v. Bray*, 139 F.3d 1104, 1109–10 (6th Cir. 1998).

Summary demonstratives are also subject to disclosure requirements: the underlying information must have been made available to the other parties at a reasonable time and place prior to trial, and Rule 1006 allows a court to order the proponent of a summary to produce the underlying information in court. The rule does not explicitly require that the summary exhibit itself—as distinct from the underlying information—be disclosed to other parties prior to trial; however, several courts have inferred the rule's requirement that underlying information be "made available" likewise requires advance disclosure of a summary exhibit, on the grounds that other parties must have an adequate opportunity to confirm the summary's accuracy. *See, e.g.*, *Air Safety, Inc. v. Roman Catholic Archbishop of Boston*, 94 F.3d 1, 8 (1st Cir. 1996) ("Common sense dictates that this guaranteed access . . . must include unequivocal notice of the other party's intent to invoke Rule 1006.").

The proponent of a summary demonstrative must also establish that the information to be summarized is sufficiently "voluminous" that it "cannot be conveniently examined in court," though this may be a flexible standard. *See U.S. v. Appolon*, 695 F.3d 44, 61 (1st Cir. 2012) ("No precise test dictates when source materials are sufficiently indigestible to permit summarization under Rule 1006"). For example, "it is not necessary that the documents be *so* voluminous as to be literally impossible to examine." *Bray*, 139 F.3d at 1109 (emphasis in original, quotation omitted). Rather, courts will weigh both the volume and the complexity of the information to determine the admissibility of a summary, and "as either the volume or complexity increases, relatively less is required of the other factor." *Appolon*, 695 F.3d at 61. This approach leaves the trial court with broad discretion: "It is hard to imagine an issue on which a trial judge enjoys

more discretion than as to whether summary exhibits will be helpful." *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 67 (1st Cir. 2002).

Because a summary demonstrative may be admitted as substantive evidence, the proponent must establish that the demonstrative itself meets foundation and authentication requirements. This can ordinarily be achieved through the testimony of a witness who prepared or supervised preparation of the demonstrative and who has knowledge of the underlying information that it summarizes. *See, e.g.*, *Bray*, 139 F.3d at 1110 ("In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation."). Additionally, courts have held that a summary demonstrative may not be used merely to summarize testimony of other witnesses, as opposed to the contents of documents or other evidence. *See, e.g.*, *Appolon*, 695 F.3d at 62.

Finally, a summary, by its very nature, involves omission of information, creating the potential for mischaracterization or misrepresentation. Courts take care to ensure that summary demonstratives are derived from and fairly limited to the underlying evidence, and may exclude a summary that predominantly or significantly reflects the assumptions, inferences, or arguments of the proponent. *See, e.g.*, *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1159–60 (11th Cir. 2004) ("[B]ecause summaries are elevated under Rule 1006 to the position of evidence, care must be taken to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes." (quotation omitted)).

Illustrative Demonstratives

Courts typically allow parties much greater latitude in their use of illustrative demonstratives (sometimes referred to as "pedagogical aids"). These demonstratives "can be more one-sided in their presentation of the relevant information," and may "include witnesses' conclusions or opinions" or "reveal inferences drawn in a way that would assist the jury." *U.S. v. White*, 737 F.3d 1121, 1135 (7th Cir. 2013) (quoting *U.S. v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004)). Foundation and authentication requirements are somewhat more relaxed, and the threshold consideration is whether the demonstrative is a fair and accurate representation of testimony or documentary evidence that has otherwise been admitted to the trial record. The actual provenance of the demonstrative—for example, whether it was prepared by a graphic artist or pulled from a Google image search—may be of no consequence, so long as a witness can competently testify that the demonstrative correctly illustrates the witness's testimony. *See, e.g.*, *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 535 F. Supp. 2d 580, 584 (E.D. Va. 2008) (demonstratives are "authenticated simply on the basis of testimony from a witness that they are substantially accurate representations of what the witness is trying to describe" (quoting 2 McCormick on Evidence § 214 (6th ed. 2006))).

While demonstratives ordinarily should illustrate testimony or evidence already in the record, there may be some additional latitude in connection with expert testimony. Proponents of demonstratives under Rule 611(a) may "draw on authority granted under Federal Rules of Evidence 703 and 705, summarizing data on which experts in the case have relied or summarizing the expert's opinions." *Janati*, 374 F.3d at 273. Because Rule 703 permits disclosure to the jury of *inadmissible* facts and data relied on by an expert where "their probative

value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect," a demonstrative may, under some circumstances, serve as a vehicle for publishing such information to the jury if this condition is met. *See, e.g.*, *Skycam, LLC v. Bennett*, 2013 WL 5328937, at *9 (N.D. Okla. Sept. 20, 2013) (finding "probative value of underlying data" in expert demonstratives "outweighed any prejudicial effect"). Note, however, that there is "a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Fed. R. Evid. 703 advisory committee's note to 2000 amendment.

Courts differ on whether and how illustrative demonstratives are received as part of the evidentiary record. The prevailing view is that such demonstratives are not evidence, but are merely an illustration of what the evidence is, and are therefore not independently admissible and, importantly, cannot be reviewed during jury deliberations. *See, e.g.*, *U.S. v. Buck*, 324 F.3d 786 (5th Cir. 2003) (finding it "proper" to publish a diagram to the jury to assist in understanding expert testimony, but "diagram should not have been admitted as an exhibit or taken to the jury room"). Some courts have recognized that, while "it may be better practice to exclude demonstrative evidence from the jury room," a trial court does not necessarily abuse its discretion when it permits the jury to review illustrative demonstratives. *U.S. v. Salerno*, 108 F.3d 730, 745 (7th Cir. 1997).

Even where demonstratives are not formally received in evidence or available in the jury room, it may be advisable to establish a means for preserving them as part of the trial record, so that an appellate court can have the benefit of reviewing them in conjunction with witness testimony, if necessary. *See Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 136, 143 (E.D.N.Y. 2004) ("There is no reason appellate judges should deny themselves the same learning advantages available to trial judges, juries, and the world at large.").

II. Insights from Recent Practice

In a recent trial involving long-tail environmental insurance coverage, a corporate policyholder sought coverage for significant, strict liability under state and federal Superfund laws for the cleanup of pollution from industrial facilities that were shuttered many decades ago—operations that no longer exist and were run by people no longer alive. Given the age of the facts at issue and the paucity of percipient witnesses, the case was for all intents and purposes a "battle of the experts." The policyholder and the insurer alike relied heavily on demonstrative exhibits to help the jury understand their respective experts' testimony (which was at times highly technical) and to bring to life an entire period of history. During trial preparation and trial, several "best practices" for demonstrative exhibits were developed and employed.

Coordinate disclosures with opposing counsel. As noted above, the disclosure requirements for demonstratives can be somewhat nebulous. In the absence of an applicable court rule or order, it is best practice to confer with opposing counsel and set an agreed-upon deadline for the disclosure of demonstratives to be used. Factors to weigh include the need for sufficient time to review other parties' demonstratives and identify objections to raise in court, and the desire not to telegraph one's expected arguments and lines of questioning to opposing counsel. These concerns might be balanced by, among other things, tailoring the scope of disclosures. For

example, in the above-referenced environmental coverage trial, the parties agreed to disclose illustrative demonstratives to be used with witnesses the evening before each witness testified, and agreed not to disclose opening and closing presentations at all.

Incorporate the evidence. There are several benefits to incorporating admitted evidence into illustrative demonstratives. First, incorporated evidence underscores the demonstrative's credibility, especially when used with an expert witness. It shows the jury that the demonstrative is well-founded in the record and is not a bald conclusion. Second, hewing closely to the admitted evidence substantially reduces the probability that opposing counsel will successfully object to publishing your demonstrative to the jury. Third, when a demonstrative itself is not admitted into evidence, the jury may nevertheless be more likely to recall its content if it is coupled with a piece of evidence the jury will be able to review during deliberations. Indeed, the jury may continue to view that specific piece of evidence in the context of your advocacy.

Some of the most effective demonstratives are essentially mosaics of admitted evidence—for example, in the recent environmental case, old photographs and cover pages from scientific articles—on a single slide with little explanation beyond broad, topical headings. Visually grouping evidence into a clear conceptual category allows jurors to "connect the dots" between exhibits that may have seemed unimportant individually, or where the cumbersome mechanics of admitting exhibits into evidence one-by-one might have caused jurors to lose sight of the forest for the trees.

Less Is More. Avoid overcrowding your demonstratives with excessive text or complicated graphics. This is "PowerPoint 101" and it is particularly important in trial presentations. Where a demonstrative is laden with long sentences, the fact finder may be tempted to read the text and lose focus on the testimony or argument playing out in the courtroom, or they may simply disregard the demonstrative altogether. There is no magic formula or bright-line rule for what makes a demonstrative too "busy," and there may be situations in which significant portions of a key document are worth quoting or highlighting. But as a general rule, think bullet points, not paragraphs. Where larger blocks of text are used, it is helpful to use highlighting and "callouts" to draw attention to a few of the most important words and phrases.

Don't overreach. Demonstratives and summaries can make your case more compelling, but they cannot make your case where you have none to make. For example, graphics and illustrations may present a tempting opportunity to recreate circumstances or occurrences in a way that accentuates features favorable to your case. But using demonstratives to fill an evidentiary void carries risks all its own—particularly where they appear exaggerated or are not otherwise corroborated by record evidence. In the recent environmental case, the insurer's expert presented an elaborate animation that portrayed industrial wastewater discharges from factory outfalls in dark, foreboding colors, supplying a video element otherwise completely absent from the trial. While visually compelling, the animation likely backfired, as the policyholder emphasized during cross-examination that the only contemporary photographs in the record showed white water at factory outfalls.

Keep the experts involved. When preparing demonstratives to accompany expert testimony, it is critical to ensure that they align with the expert's actual opinions, on both substantive and

presentational levels. Substantively, any discrepancy between a demonstrative and the expert's testimony can at least be a distraction and, in more severe cases, may cause serious credibility problems. Where a divergence makes clear that an expert has not been involved in the preparation of his or her own slides, the fact finder may infer the expert is to some extent parroting a script prepared by counsel. From a presentation standpoint, it is important that an expert's demonstratives track the conceptual structure of the expert's testimony, so that they enable the fact finder to follow along. For example, a slide with a bullet-point summary of an expert's principal opinions should follow the same order of counsel's direct examination outline.

III. Concluding Themes

Insurance litigators can make effective use of both summary and illustrative demonstrative exhibits if they keep a few guidelines in mind. Procedurally, it is important, obviously, to adhere to court rules, but where the rules are silent or imprecise, it makes sense to reach an agreement with opposing counsel about which demonstratives will be disclosed when. Also on process, it is important to keep witnesses closely engaged in the preparation of any demonstrative exhibits they will be expected to present at trial. Substantively, two overarching principles should guide the content of every demonstrative: credibility and clarity. A demonstrative exhibit that is not closely tied to underlying facts, documents and testimony— i.e., reality— risks exclusion or, if admitted, rejection by the fact finder as incredible. A demonstrative exhibit that is cluttered, overly wordy, or otherwise difficult to follow risks being ignored. On the other hand, a demonstrative exhibit that clearly and credibly summarizes and emphasizes key evidence, particularly if the evidence is highly technical, arcane, or even boring, can make your insurance case more accessible and engaging—and thus persuasive—to the trier of fact.