

KNOW THE RULES FOR TECHNOLOGY-BASED EVIDENCE

A picture is worth a thousand words. With stunning advances in technology, lawyers can now use videos, computer-generated images and simulations to effectively convey an astonishing amount of information to jurors in a very short period of time. If properly used, lawyers can metaphorically transport jurors back in time to observe the key events that precipitated the lawsuit. Accordingly, technology-based evidence is now an indispensable weapon in the arsenal of most trial attorneys.

While technology-based evidence can be mesmerizing and often dominates pre-trial preparation, it is essential for litigators to fully understand the evidentiary hurdles that must be overcome before technology-based evidence is used or admitted into evidence at trial. Nothing is worse than painstakingly preparing technology-based evidence, only to have it excluded by the judge at trial.

Utilizing Technology to Help Prove Your Case

With the proliferation of television shows like CSI, jurors now expect that the presentation of evidence will integrate technology — providing visual stimulation that contrasts with the doldrums of evidence customarily presented through documents or live testimony. From a practical standpoint, it is often difficult for jurors to digest and recollect all of the important evidence, especially when it is complex and voluminous. For summations or expert testimony, there is absolutely no substitute for technological-based presentations that provide the jury with an expeditious recounting of the pertinent evidence.

While technology can greatly help enhance a case, it is not without its faults. If overused, jurors can experience technology overload — focusing on the "show" rather than the evidence. Strategically, a trial attorney needs to utilize technology for a specific purpose and not just entertain the jury.

It is critical to realize that courtrooms are not immune to Murphy's Law. There is nothing worse than have technical "complications" in the presentation of evidence. Technical glitches are at best distracting. At worst, they can destroy an attorney's or witness' credibility with the jury. Therefore, it is essential that all technological evidence be thoroughly tested prior to trial, and backup plans be made in the event the technology fails. In this regard, it is imperative that a professional be in the courtroom who has experience handling technology in a trial setting.

Admissibility Standards for Technology-Based Evidence

Technology-based evidence is subject to the same evidentiary hurdles as traditional demonstrative evidence. Different evidentiary rules are implicated depending on whether the evidence itself is electronic or whether technological means are used to display non-electronic evidence. If the underlying evidence is a hard copy, such as a photograph, then there are no impediments to use technology to display the evidence as long as a proper foundation has been laid.

Demonstrative technology-based evidence is as admissible as the evidence it seeks to illustrate. Visual evidence can be used to illustrate a witness' testimony if it will help the jury understand the testimony and it is a fair representation of the evidence it purports to illustrate. *United States v. Mohney*, 949 F.2d 1397, 1405 (6th Cir. 1991). Thus, accurate computer generated models or diagrams can be used to illustrate a witness' testimony. *United States v. Beckford*, 211 F.3d 1266 (4th Cir. 2000). (Beckford allows computer-generated diagrams as a demonstrative aid to help illustrate investigative findings concerning observations of bullets, bullet holes and bullet path angles.)

Where computer animations are used to illustrate a witness' testimony, the jury should be instructed that the simulation is not a reenactment of the event. *Hinkle v. City of Clarksburg*, WV, 81 F.3d 416, 427 (4th Cir. 1996); *Datskow v. Teledyne Continental Motors Aircraft Products, a Div. of Teledyne Indus., Inc.* 826 F.Supp. 677, 685–686 (WD NY 1993) (Here, the court instructed the jury that computer-generated animation of fire in an airplane engine was "simply computer pictures" to help them understand [the expert's] opinion.) The proper foundation for such evidence is established by demonstrating that the demonstrative evidence is a fair representation of the underlying admitted evidence. *People v. Ham*, 7 Cal.App.3d 768, 780 (1970). Ultimately, the court has discretion to exclude this evidence if it believes that the probative value is outweighed by the risks of juror confusion. California Evidence Code §352.

It cannot be stressed enough that the technology-based demonstrative aids accurately reflect the testimony — since this is the most likely ground for exclusion.

If one is using computer output as the substantive evidence rather than to simply illustrate the expert's testimony, there are greater implications for admitting the evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Supreme Court interpreted Federal Rule of Evidence 702. Here, the court said that "under the Rules the trial judge must ensure that any and all scientific testimony or evidence is not only relevant, but reliable." Daubert focuses on objective criteria that may provide a safeguard against the admission of evidence that has customarily been received, but may not have a scientific basis.

The factors laid out in Daubert that are used for determining whether a technique is scientific knowledge that will assist the trier of fact are: 1) whether it can be (and has been) tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error in the case of a particular scientific technique; and 4) general acceptance. The court further stated that "[t]he inquiry envisioned by Rule 702, we emphasize, is a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability of the principles that underlie a proposed submission."

Sections 720 and 801 of the California Evidence Code are equivalent to Federal Rule 702. See *People v. Leahy*, 8 Cal.4th 587, 598 (1994) ("Sections 720 and 801, in combination, seem the functional equivalent of Federal Rules of Evidence, rule 702, as discussed in *Daubert*."). Under §801 and the *Kelly/Frye* test, the admissibility of the evidence will turn on whether it is "generally accepted by experts in the field."

Opposing counsel may argue that the evidence, though relevant, should be excluded because it poses a high risk of unfair prejudice under Federal Rules of Evidence Section 403 or California Evidence Code §352. As a result, it is advisable to have the judge pre-rule on the admissibility of graphic animation evidence. The court will weigh the probative value or logical

force of the evidence and compare it to any number of dangers or costs that might be created if the evidence is admitted, such as unfair prejudice or misleading the jury.

Strategically, the most prevalent use of demonstrative evidence is through expert testimony, which if properly presented can substantially enhance the expert's credibility before the jury. For reconstructions of an accident or event in dispute, the reconstruction needs to be made under "substantially similar" conditions to those existing at the time of the event. *People v. Boyd*, 222 Cal.App.3d 541, 565-66 (1990); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 791 (1981). In all circumstances, when there is any doubt regarding the admissibility of the evidence, the litigator should obtain a pre-ruling from the court regarding the admissibility of the demonstrative evidence.

Technology-based demonstrative evidence is now universally recognized as an indispensable tool for litigators in the modern age. Just like everything else in trial, the key to the use of technology-based demonstrative evidence is preparation, preparation, preparation.

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