

DEMONSTRATIVE EVIDENCE:
ULTIMATE TOOL FOR SETTLEMENT AND VERDICT

By: Edward Steinbrecher, Esq.
Encino, California

STRATEGIES IN PRESENTING MEDICAL EVIDENCE FOR SETTLEMENT

Demonstrative evidence has a huge influence in producing a successful settlement outcome. No longer can you expect favorable attention by merely sending a demand letter with a pile of medical specials and other exhibits. You have created work for the adjuster. It is certain that the adjuster will not do the same kind of effective sales presentation that you can accomplish with a well-prepared settlement package — designed to convince, sell and motivate. The packaging of the demand for settlement purposes will make a difference in getting favorable attention at the onset. The content of the settlement package should also be designed for IMPACT.

Cartier, the worldwide famous jeweler, beautifully packages all of its jewelry and accessories to create anticipation in the receiver of the gift before the package is ever opened. The packaging is expensive and adds nothing to the value of the contents, yet it is an integral part of the presentation. Likewise, receiving a beautiful invitation to a party creates an expectation well in advance of arrival. The packaging of a demand is a critical component often overlooked in the presentation of a demand.

Packaging of the demand creates favorable attention before the contents are examined. It distinguishes your demand from others received by the adjuster, the insurance carrier or the settlement officer. It distinguishes you as a lawyer who believes in your case. It sends a message about your competence, your commitment and your professionalism. The packaging of demands produces results that far exceed demands that are not packaged.

I recommend for serious injury cases that the relevant materials be packaged in a black leather or leatherette book. None of the materials inside of the book should be capable of being removed. The front cover should be imprinted in gold or steel with the client's name, at a minimum, the case name, or a title, such as "DAMAGES TO . . ." or "THE LIFE OF. . ." The value of the package is that it is substantial. It cannot be overlooked or taken apart or shoved into a file. It stands alone. I have been packaging demands for many years and from personal experience, I have received hundreds of compliments from defense attorneys, adjusters and judges regarding the demand packaging. People are more receptive to the contents when packaged.

Items of demonstrative evidence that should be included in the settlement package include a summary of the medical treatment by date highlighting surgeries, important

tests, procedures, therapy, etc. The point of the medical summary is to present the medical evidence in an impactful fashion. The medical summary assures that the adjuster will accept your presentation of the medical facts. Also, include a summary of medical providers, dates of treatment and amounts of bills. The relevant medical records, reports and bills should be included under the summary of medical expenses which are appropriately tabbed for easy reference.

Economic reports demonstrate future medical care needs and loss of earning capacity brought to present cash value. They are more authoritative than attorney calculations. Having an economist prepare a report usually runs between \$1,500 and \$2,500. One of the latest tools allows you to prepare your own economic reports. Advocate Software sells a CD-ROM suited for personal injury and wrongful death cases. With its easy-to-use templates you can create and print out a professional looking economic report in less than thirty minutes. The cost of the CD is approximately \$500. This is a small investment for this integral component of your settlement package.

Medical illustrations should be included in the settlement package. If the case involves unusual or complicated injuries, a medical illustrator must be hired. However, ninety percent of the injuries and surgeries are already illustrated on CD-ROMs published by Adam Software. You can use the stock illustrations or combine several of them into one chart or you can use the precomposed charts with several images on them. You also have the ability to customize the medical illustrations by adding your client's name, date of accident and highlighting any aspect of the illustration with arrows and subtitles, etc. Considering the fact that most custom medical illustrations cost approximately \$750, you can produce these illustrations at your desk with relative ease and inexpensively. You can print them on slick stock to include in your settlement package. These illustrations can be blown up for courtroom use. The value of including medical illustrations cannot be underrated. It highlights the injuries and surgeries graphically and presents a visual understanding of future surgeries.

Life care plans should be included in the settlement package. Since they are self-explanatory, they usually do not need to be summarized. Another important item to present is a summary of relevant verdicts and settlements from similar cases involving similar liability or injuries. You can run a CD-ROM search of Verdicts on Disk and then synthesize this research into a chart showing the name of the case, the type of case and the result. You can eliminate extreme results and focus on the results that support your demand.

Photographs of the accident scene or instrumentality should be included. Techniques that enhance the use of photographs include captioning the photographs for emphasis. I recommend that you include either duplicate original photographs or laser color photocopies. They should be enlarged with no more than two photographs per page. The photographs need to be specially selected for impact. Less is more. The use

of red arrows or other highlighting devices on the photographs works well for emphasis.

Occasionally you will have a case where a series of photographs are capable of telling a story. For example, you may represent an injured person who cannot fulfill their dream of becoming a professional golfer or police officer because of the injury. Imagine the impact of a series of photographs showing the plaintiff's preparation toward his goal prior to the accident.

Other important elements of the demand package are graphs, charts and storyboards. In product liability cases, there is an abundance of technical articles or other notice-related materials that need to be synthesized to prove notice of the hazards, risks, state-of-the-art, prior complaints and accidents, etc. This testimony will be enhanced greatly by using a chart, a time-line or a graph that clearly shows the impact of this evidence.

Whatever materials you choose, you should be guided by IMPACT. The materials in the black settlement book should have an inside title page followed by an index that makes the included materials easy to locate. The settlement book is transmitted with your demand letter or settlement brief. In the letter or brief you will set forth the basis of liability, making reference to photographs and other materials in the black book. You will also set forth a short overview of the damages with reference to the black book. The book itself contains all the demonstrative evidence except videotape presentations.

Many cases lend themselves to a settlement video or the inclusion of a day-in-the-life film or a test, re-enactment or experiment, etc. Providing a videotape with your settlement package enhances the total presentation. You can provide interviews of witnesses, experts, employers and friends or plaintiff's talents prior to the accident or how he ambulates at the present time. The possibilities are endless. Videotape evidence brings the case alive in the minds of those who make decisions about your demand and many others.

Using demonstrative evidence as an integral part of the settlement demand, presents a better opportunity to settle your case now for a higher dollar value. It is worth the time, effort and money to package the demonstrative evidence for settlement purposes.

STRATEGIES IN PRESENTING DEMONSTRATIVE EVIDENCE FOR TRIAL

Demonstrative evidence at trial comes in many forms, but its chief purpose is to PERSUADE. A jury absorbs information through what it hears and sees. Greater impact comes from points that are made visually in addition to oral testimony. Studies have confirmed that jurors only retain ten percent of what they hear after three days, but if the testimony is coupled with visual evidence they are able to retain sixty-five percent after three days.

Selection of demonstrative evidence to be used at trial starts with your initial involvement in the case. What can you show the jury that will have impact and persuade? This is the question in the trial lawyer's mind throughout the presentation of the case. An impactful presentation that will persuade the jury starts with recognition of the value of demonstrative evidence.

As a general rule, demonstrative evidence is evidence that is open to the senses. The only limitation on demonstrative evidence is Evidence Code §352. In the case of a reconstruction, re-enactment or experiment, the requirement of substantial similarity applies. Where the demonstrative evidence is used merely to illustrate the testimony of the expert, substantial similarity is not required. Demonstrative evidence needs to be authenticated by laying a foundation that the evidence is what it is. Do not be afraid to use demonstrative evidence. It is seldom excluded and usually for grounds that the evidence is not based on facts showing substantial similarity or it violates Evidence Code §352.

Photographs of injuries, the scene, instrumentality, maps and scale diagrams graphically drive the point home. These items should not be selected without deep consideration. You do not want to use too many photographs because it will dilute your presentation. Select these items on the basis of impact. Blow them up and mount them on foam core. Not only will it be helpful during the testimony of lay and expert witnesses, but usually these types of exhibits are admitted in evidence and taken into the jury room. One impactful photograph is better than ten mediocre photographs.

Writings such as key documents, brochures, letters, memos, admissions from discovery, should also be blown up so that the jury can follow the witness and hear as well as see the evidence.

If you have a case where there are myriads of technical articles, consumer complaints, prior accidents and lawsuits, it is better to reduce the salient points from the massive stack of writings into a chart that makes the point. The chart can be appropriately labeled, "Notice Defendant Had About Prior Injuries From Use Of Its Product" or "What Defendant Should Have Known About the Risks of. . ." An expert can testify as to the content of each of the articles or complaints giving rise to notice, but its impact is lost unless it is tied together in a storyboard-type of chart. Sometimes these charts are admitted into evidence and other times not. Sometimes they are allowed to be used in closing argument and other times not. The impact comes from tying all of the testimony together so that the jury can understand the point you and your expert are trying to make. Reduce complicated events and important dates to a time-line or chronology chart. Also helpful are demonstrative evidence charts that show what the defendant did versus what the defendant should have done, what the defendant knew versus what it claims to know, how it profited from the scheme, what it was required to do versus what

it did, etc. You and your expert can use this approach to demonstrative evidence to package evidence in an understandable and persuasive fashion.

Demonstrative evidence in the courtroom includes showing the instrumentality, such as the vehicle involved in a crashworthiness case or its component parts, the defective product and exemplars, similar products that are not defective, flooring surfaces involved in the accident, etc. Sometimes it is not feasible to bring the product into the courtroom, such as a large press brake or conveyor system. Working or non-working models can be built or photographs and videotape can be used.

Videotaped evidence works very well with a jury. They are viewing videotapes on television monitors which they are used to. Videotape provides more dimensions than blowing up a photograph. It also allows for creative input as to the content of the videotape. Videotapes can be used to show the dangerous condition or instrumentality, to show how the instrumentality works, such as a conveyor line or a piece of industrial machinery. It can also show an experiment by your expert. Always consider substantial similarity as an objection that the defense will likely make. Your witness must be prepared to provide foundation for the video.

Videotapes work well to show a physical examination of the plaintiff by his doctor. The doctor can explain his examination of plaintiff to the jury using the videotape. Plaintiff's limitations and disabilities are brought to life. This is much more persuasive than the doctor reciting the results of his examination. It has great impact. Day-in-the-life films are very persuasive. They show the jury what the plaintiff is left with and what he must deal with on a daily basis. The key to a successful day-in-the-life film is impact. The film should not be too long because if it is redundant it will bore the jury. Ten to fifteen minutes is a good length for a day-in-the-life film. Historical videos are also a valuable item of demonstrative evidence. They show plaintiff functioning normally before the accident, including sports and recreation, family involvement and good health. They can be presented through the plaintiff or a close family member. Since the videotape is edited, it can contain videotape pre-accident and photographs integrated into the videotape.

There are several good ways to present photographs to the jury. Select the photographs that have the most impact. Blow up the photographs you intend to use, whether to 10" x 12" or larger and mount them on a board so that they tell a story. This is preferable to using one photograph at a time. You can title or subtitle the board and you can also add dates or captions. You can make a larger display that creatively shows the steps that plaintiff was taking to achieve his goal before the accident.

The medical aspects of an injury causing hospitalizations, surgery or treatment, and the need for future treatment are only a small part of the successful presentation of the medical aspects giving rise to value. What emanates from an injury needs to be understood in the context of the plaintiff's life. How has the injury impacted his ability to

work now and in the future? How has the injury impacted plaintiff's ability to participate in recreation and socialization? How does the injury affect the plaintiff as a whole person? Once these aspects are tied to the injuries, the case value is greatly enhanced.

To learn this information the lawyer needs to spend time with the plaintiff finding out what his life was like before the accident and what his dreams and goals were. For example, a plaintiff may have momentum in their life leading to a new or different career path which has now become derailed because of the injuries. This loss could be translated into economic damages in terms of the precluded or diminished future occupation. Perhaps the injuries only affect the plaintiff in his intended occupation, rather than his present occupation. More important, this scenario gives rise to general damages for loss of a dream and goal which has been taken away from plaintiff due to the injuries. Dreams and goals are hardly speculative if the plaintiff had taken any steps in that direction. Dreams and goals are something that every person has, realistic or not. If a person was unable to pursue their chosen dream or goal they would suffer emotional distress from that. A corollary of loss of a dream or a goal is loss of choice. Everyone has a choice in life to be what they want to be, to go to school, to learn a trade, to change careers. If people are unable to do what they have chosen to do and their choice has been taken away by the injury, this can be a devastating consequence of the injury. To present the loss of a dream or goal or choice requires medical opinion that the plaintiff is unable to do what he was intended to do. Supporting evidence includes statements from friends, relatives and co-workers about plaintiff's future intentions, documentary evidence of that intention or steps leading in that direction.

Medical illustrations are a pivotal item for the jury in order to follow the doctor's testimony about the injury, surgeries and future surgeries. X-rays, CT and MRI films do not generally have impact. Medical illustrations do. As long as they accurately depict the condition the doctor can use this aid to assist his testimony. Whether or not medical illustrations are admitted into evidence is up to the judge. Usually they are admitted. Standard medical illustrations are available to be used from the Adams catalog of more than 6,000 medical illustrations. They can be customized to add the name of the plaintiff and date of accident. Emphasis can be placed with appropriate arrows and subtitles.

If there are numerous hospitalizations and surgical procedures a time-line or chronology chart can be used to keep the jury on track. Hardware that was removed from plaintiff can be brought to court for use by the doctor. In serious injury cases, the doctor will testify about future medical care and procedures. A chart should be made covering those procedures, the time when they are expected to occur and the cost presently for those procedures. The jury is able to follow what the doctor is specifying.

In a catastrophic injury case, a life care plan expert usually works with the doctor,

the plaintiff and his family to fashion a life care plan. Rather than have the nurse testify to all the future procedures and items of medical necessity, it is better to blow up portions of the report that relate to these and make a flip chart out of it. The expert can testify from the flip chart when then can be admitted into evidence.

The economist will normally translate future medical care needs and loss of earning capacity to present cash value. Rather than have the economist orally explain the losses to the jury, it is better to make a chart that summarizes the costs in present cash value. The same applies to future earnings and fringe benefits brought to present cash value. These charts can then be admitted into evidence.

There are numerous other methods of presenting demonstrative evidence. For example, documents can be shown on an overhead projector or by use of an Elmo or Doar projector. Documents can also be stored on CD-ROM or laser disc to be projected through a computer onto a screen or TV monitor. Whatever choice of presentation, it is important to also have a hard copy of what is being projected to be put in evidence. Technicalities of presenting evidence through computer and projection equipment will depend on the budget employed and the sophistication of the attorney and support staff. The courtroom is not the place to experiment. Everything must be checked in advance to avoid equipment failure.

Actual demonstrations and experiments in court are risky. They should be attempted unless they are rehearsed. Preparation is the key. In my own experience I have seen experiments fail miserably in trial (luckily it was the defense experiments). A well-planned experiment or demonstration does have impact. Models of the roadway, the scene or the instrumentality are very useful. An accident that occurs on a curvy roadway will be better perceived by the jury while the expert is using a scale model with scale-sized vehicles. Models generally require substantial similarity as foundation. A mockup of a machine or instrumentality allows the jury to visualize what you and your expert want to convey.

Computer animation is an excellent tool. Animation is a videotape comprising thirty frames per second to demonstrate the reconstruction of an accident, the biomechanics of causing an injury, kinematics of the occupants in the vehicle, etc. A computer animation requires intense foundational work. The reconstruction must be precise and support every frame of the presentation. The test of substantial similarity is applicable. The end result of computer animation is that the jury is able to perceive exactly what you are trying to persuade them to understand. This type of demonstrative evidence is expensive to create, but well worth it. Aside from projecting it from a videotape to a TV screen, it can also be projected through a computer onto a larger screen.

One of the benefits of creating charts, graphs and storyboards is that it causes the attorney to acutely focus on the case, to distill the important facts which are then boiled down into a persuasive piece of demonstrative evidence. It keeps the expert on track and it focuses the jury. Complex and technical information is distilled to demonstrate the point for the jury.

If you have a multi-page document and there is a particular paragraph that you want to highlight to the jury, there are several good ways to do it. You can blow up the entire page and then highlight in yellow or underline the important paragraph. The problem is that the jury will tend to read the material that is not highlighted. You can create a graphic board where you are showing the full document in the background while pulling out and highlighting the paragraph for jury focus. If you are using an Elmo or Doar projecting the image through a TV monitor or onto a screen, you can use the projector to focus on the paragraph. Technical articles and long memos lend themselves to this type of presentation where there is a great deal of extraneous material that is not important but a particular phase, sentence or paragraph is.

Plaques, awards, trophies, certificates and ribbons awarded to the plaintiff are valuable pieces of demonstrative evidence. A number of items can be mounted on a board, captioned, subtitled and presented as one exhibit as opposed to thirty separate pieces of evidence. This has greater impact.

Jurors need to be stimulated just like you and I do. They get bored easily, particularly by long, drawn out presentations that are overly verbal. The more technical the presentation, the easier it is for the jury to get bored. A key piece of demonstrative evidence that summarizes foundational testimony helps the jury to understand the complexities. Some lawyers by virtue of their experience are better able to draft demonstrative exhibits, storyboards, graphs, charts and collages. There are numerous professional services providers that do this work for the attorney. Professionals are needed to do a good job of video editing for any historical films and photos and to videotape re-enactments and experiments. Professionals are required to put together a custom computer animation.

Demonstrative evidence comes in all shapes, sizes and forms and with varying price tags. The right amount of demonstrative evidence is that which has impact and persuades, but is not overdone nor is it contrived. Showing is better than telling as we learned in first grade. Jurors will remember your presentation a great deal longer when they see it, as opposed to when they merely hear about it. The size, shape, color, coloring, coding of exhibits is the subject of another article. These are important considerations, however. You want the jury to clearly see it, understand it and assimilate it. If it is too

complicated or too busy, the exhibit will backfire. If it requires a great deal of collateral explanation, it is not getting the message across. Go for impact and you will persuade the jury. Demonstrative evidence is the ultimate tool to obtain a satisfying verdict.