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OBSERVATIONS TO DEMONSTRATIVE EVIDENCE

ELWYN L. CADY, JR.*

Demonstrative evidence has captured the imagination of advocates as a forceful means of persuasion in legal controversies. Emphasis on this mode of presentation has undergone a cyclic history which was aptly described by a commentator writing seventy years ago as follows:

In the early and rude ages there was a strong leaning toward the adoption of demonstrative and practical tests upon disputed questions. Doubting Thomases demanded the satisfaction of their senses. As society grew civilized and refined, it seemed disposed to despise these demonstrative methods, and incline more to the preference of a narration, at second-hand, by ear and ear witnesses. But in this busy century there seems to have been a relapse toward the earlier experimental spirit, and a disposition to make assurance doubly sure by any practical method addressed to the senses.

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Substantial assistance in the preparation of this study was rendered by Jack R. Wahlquist of the Dallas, Texas Bar and moral encouragement was supplied by Ike Skelton Jr. of the Lexington, Missouri Bar whose earlier critique of demonstrative evidence in the pages of the Review was of pioneering dimensions. See Skelton, The Use of Demonstrative Evidence in Missouri, 21 Mo. L. REV. 57 (1956).

1. Other terms are real evidence, objective evidence, and Wigmore's autoptic preference. In addition, under Wigmore's scheme, the category "Non-verbal Expression" (a subdivision under "Narration as a Testimonial Element") is included. Wigmore, The Science of Judicial Proof, 633 et seq. (3d ed. 1937).


One of the earliest reported uses was in Watson's Trial wherein a sketch of a flag, alleged to have been used in inciting a treasonous assemblage, was introduced in evidence. Objection was made that this "was a matter of verbal description, not of description by drawing." Lord Ellenborough, in admitting the sketch, commented: "Can there be any objection to the production of a drawing, or a model, as illustrative of evidence? Surely there is nothing in the objection."

The leading medicolegal case in which demonstrative evidence proved decisive was the celebrated Webster Case. Of all such evidence used by the prosecution in this trial, the mold of Dr. Parkman's jaw made at the time he had been fitted with artificial dentures three years previously coupled with the teeth spared by the furnace fire is conceded to be the conclusive proof which convicted Professor Webster. A few years later, diagrams of the microscopic appearance of blood were used in State v. Knight to illustrate technical testimony difficult to project verbally.

Today, the re-emphasis on real evidence as contrasted to testimonial evidence is being paralleled by increased scientific interest in what is more generally spoken of as "non-verbal communication." Our whole society, in an age of television, movies, and picture-books, is moving away from purely verbal modes of persuasion. Lawyers, alert to the times, are properly

4. Case of James Watson, the elder, Surgeon, on an Indictment charging him with High Treason, 32 How. St. Tr. 1 (1817).
5. Id., at 125.
7. "This last piece of evidence was conclusive against the prisoner, and he was convicted. Without this closing proof the evidence would certainly have been unsatisfactory," Phillips, Famous Cases of Circumstantial Evidence 47, 49 (1904). See also Williams v. State, 115 Tex. Crim. 28, 27 S.W.2d 233 (1930).
8. 43 Me. 11 (1857). In approving this demonstrative evidence, Chief Justice Tenney stated: "Nothing short of an exact representation to the sight can give with certainty, a perfectly correct idea to the mind. The witness was permitted to present the diagrams, merely to explain his meaning, and not as an infallible test of truth. A diagram approximating in any degree to perfect representation, when exhibited by one qualified from knowledge and experience to give explanations, may do much to make clear his testimony, without danger of misleading." Id., at 132.
stressing non-verbal approaches as supplements to traditional verbal persuasion of juries and judges.

Scholarly analysis of the sometimes nebulous concept of demonstrative evidence has resulted in several technical distinctions whose ramifications are beyond the scope of this article. Suffice it to say that esoteric as these


Although most attention centers on "visual appear," one should realize that dramatic appeal to the other senses is available. "Odor testimony" has been used in Texas with telling effect. Western Cottonoil Co. v. Adkisson, 276 S.W.2d 411 (Tex. Civ. App. 1955); and Western Cottonoil v. Pinkston, 279 S.W.2d 150 (Tex. Civ. App. 1955). Tabor notes the pungency of dung in one of the very early cases. Tabor, Demonstrative Evidence, 29 J. B. A. Kan. 250 (1961). See Flannigan v. City of Springfield, 360 S.W.2d 700 (Mo. 1962).

For those who fear that today's courtroom is being turned into a "chamber of horrors" reference should be made to a murder case tried in New Jersey about 1890:

The defense was that the deceased fractured his skull by a fall during the altercation. To prove that this was probable, Dr. Andress was called as an expert. He had a large package which he fondly handled, and while telling his story, unwrapped. He said that on January 9 he visited New York, and procured a head taken fresh from the body of a man sixty years old. Returning to Sparta, he fastened it on an apparatus resembling a human body, the whole weighing about ninety pounds. This was dropped from a forty-five degree angle, the skull striking a round stone. It was fractured worse than that of Morris, although he weighed one hundred and eighty pounds. The prosecution was so surprised that they forgot to object; and before anyone knew what was coming, the shrunken and ghastly trophy of medical experiment rolled on the floor. The effect was electrical. Women shrieked, men shrunk backward, and the court turned pale. One woman fainted, and for a few moments the room was filled with uproar, the persons in the rear striving to get a view, while those in front retreated from the grinning skull . . . . Browne, Practical Tests in Evidence VIII., 5 Green Bag 268, 270-271 (1893).

For applications dealing with the larger problems of international boundaries see Hyde, Maps as Evidence in International Boundary Disputes, 27 Am. J. Int'l L. 311 (1927). Gilbert T. Adams and J. Melvin Franks of the Beaumont, Texas Bar have reported extensive use of demonstrative evidence in boundary disputes. A typical usage is the offer of chunks of wood from trees in conjunction with expert testimony of woodsmen on tree-age. In Kirby Lumber Corporation v. Smith, 305 S.W.2d 829 (Tex. Civ. App. 1958), a crucial issue was the length of time a certain fence had been in existence. The fence was nailed to a growing tree, and chunks were cut from the trees at the point where the wires were attached, the chunks being admitted in evidence on the question of whether or not the fence had been in place over ten years.

12. Actually, demonstrative evidence is mostly used outside the courtroom, especially in civil cases, as trial men and claimsmen seek fair compromise as well as thorough pre-trial preparation of their medicolegal cases. SinDel and SinDel, Let's Talk Settlement 328 et seq. (1963); Hinshaw, Preparation for Trial—Demonstrative Evidence, 1953 Proc. Sec. Insur. L., A.B.A. 174.

13. Wigmore's division into "Autoptic Preference" and "Non-Verbal Expression" is one; note that he recognizes an overlap of the cases, 3 Wigmore, Evidence
distinctions may seem to the practitioner, some are carried into judicial interpretations of the law of evidence.\textsuperscript{14} Helpful as demonstrative evidence may be, its use is frequently open to objection on at least one of several possible grounds. Both the proponent and opponent must be instantly prepared in court to challenge\textsuperscript{15} or justify\textsuperscript{16} this manner of presentation.\textsuperscript{17} It is because of this necessity that the

\textsuperscript{14} 172-73 n. 2 (3d ed. 1940); 4 WIGMORE, EVIDENCE 254 n. 3 (3d ed. 1940). Gardner has drawn the distinction in terms of “demonstrative” as opposed to the “weaker” illustrative evidence, citing Gulson’s “immediate” as contrasted to “transmitted” evidence. Gardner, \textit{The Camera Goes to Court}, 24 N. C. L. REV. 233, 236, 239 (1946). McKelvey devotes separate chapters to “Pictorial Evidence” (chapter 15) and to “Writings” (chapter 14). \textit{McKELVEY, EVIDENCE} (5th ed. 1944). McCormick indicates that some of these distinctions may well be unsound. \textit{McCORMICK, EVIDENCE} 388 (1954).

\textsuperscript{15} 14. For example, Texas cases have followed the distinction between “substantive” (demonstrative, immediate) and “illustrative” (pictorial, visual aid) evidence as concerns plats. Such plats, offered as “independent evidence” have been excluded when not authenticated by the surveyor who made the plat. Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S.W. 559, 562 (1903).

\textsuperscript{16} Scott singles out photographs as distinct from hand-drawn maps and diagrams and argues that (1) since jurymen are apt to think a photograph is an absolute mirror, slight distortions in photographs justify exclusion; (2) since photography, and more especially color photography, produces a result more life-like than an inanimate drawing, there is increased danger of prejudicially inciting the jury, and (3) since a photograph is thought of as a “silent eyewitness,” it has probative force beyond its value as an illustration. \textit{SCOTT, PHOTOGRAPHIC EVIDENCE} 1001 (2d ed. 1967).

\textsuperscript{17} 15. Delay in objection may result in waiver. State v. Anderson, 384 S.W.2d 591, 606 (Mo. 1964); Alvey v. Sears, Roebuck & Co., 360 S.W.2d 231 (Mo. 1962).

\textsuperscript{18} 16. “About five years ago, I recommended that lawyers follow a suggestion made by Melvin Belli. See Gordon, \textit{Demonstrative Evidence, Past, Present and Future}, 32 Wis. BAR BULL. No. 1 pp 11, 22 (February, 1959). I refer to his proposal that when an attorney plans to use a novel form of presentation of evidence, he should give a full explanation of what is planned to the judge in chambers. The reference was to the use of demonstrative evidence, but I think the suggestion has general application and would apply to most forms of scientific evidence as well. I know that in the urgency of a trial, a judge is often forced to make snap decisions which might not have been made if he had had more time for quiet reflection on the proposal in question.” Gordon, \textit{The Use of Scientific Evidence and Its Legal Limitations}, 9 J. FOR. SCI. 301, 310-311 (1964).

\textsuperscript{19} 17. Though the remainder of the text will be in terms of exhibits “marked in evidence”: the body of evidence in court should not be overlooked. See generally, Spangenberg, \textit{The Use of Demonstrative Evidence}, 21 Ohio St. L. J. 178 (1960). See also North v. Williams, 366 P.2d 406, 408 (1961) (after handling plaintiff’s digit, a juror exclaimed: “her thumb’s ruirnt.”) Compare Green v. Boney, 233 S. C. 49, 103 S.E.2d 732 (1958) (plaintiff walking before jury) with a display before English appellate judges:

\textit{Kansas City Star, July 2, 1966, p. 9, col. 3}

\textit{A Pretty Girl Suffers Loss In Leg Show.}

London (AP)—The three bewigged judges in the court of appeal asked pretty 17-year-old Elizabeth Gough to parade before them so they could see the way her hips swing.

And then the presiding judge, Lord Denning, asked her:

“Could I just see your right leg?”

Elizabeth obliged—and apparently too impressively for her own good.
possible objections are here broadly catalogued into three groups, and the most common objections urged in practice are set forth.

I. "Groundless" Objections

These are, generally speaking, objections that are not well directed at the particular problems raised by the offer of demonstrative evidence. Though usually unsuccessful they are sometimes urged for tactical reasons. In any event it is usually advisable for counsel to shift to other grounds in his attack on the matter offered.

A. Not Instructive

Although a line of Massachusetts cases18 established as a criterion of admission the "practical instructiveness" of an exhibit, it is suggested that this is merely a cliché and so misses the mark.19 The preferable test asks whether the matter is offered "for the purpose of enabling the jury to better understand and apply the evidence."20 Considerations of materiality21 and relevancy22 hold the key to admissibility rather than considerations of "instructiveness."

B. Not "Best Evidence"

This objection to demonstrative evidence—as contrasted to the narrower "documentary evidence"—is not in point, for "... only documents or

The judges yesterday cut from §7,000 to $4,200 the damages she had been awarded in a lower court for a highway accident.

Elizabeth was knocked down by a car in 1962. Her right leg was broken and is now an inch and a quarter shorter.

Lord Denning said the judge who made the award in the lower court was much too pessimistic about the girl's future.

Elizabeth said later of her exhibition in court:

"It was not too embarrassing. The judges were quite nice."


19. Regardless of the informative value of an exhibit, the cases actually deal with the problem of cumulative testimony; Wilcox v. Forbes, 173 Mass. 63, 53 N.E. 146 (1899); or the tendency of the exhibit to "mislead," Carey v. Town of Hubbardston, 172 Mass. 106, 51 N.E. 521 (1898).


Commissioner Holman, commenting on a "faint movie" in Wren v. St. Louis Pub. Serv. Co., 333 S.W.2d 92 (Mo. 1960), apparently places admissibility on the ground of relevance though the film was characterized as "instructive."
things bearing writing, can be within the purview of this rule."\textsuperscript{23} Thus, a Texas trial judge who forbade the use of a skeleton because it did not comprise the very bones of the plaintiff seated at counsel table on a "best evidence" theory was not following orthodox rules of evidence!

C. "Hearsay!"

Unsuccessfully forwarded as an objection in the Richardson case,\textsuperscript{24} this ground is without merit. In reply to the argument that one "cannot cross-examine a picture (or other object)," it should be noted that the material offered is part of, and is used in conjunction with, testimony of a witness who is subject to cross-examination.\textsuperscript{25}

II. VERITY OR CORRECTNESS

A. Lack of Authentication

Failure to establish a proper predicate for introduction of demonstrative evidence is ground for reversal.\textsuperscript{26} This preliminary showing usually takes the form of "identifying" the particular matter to be exhibited by a witness.\textsuperscript{27} In addition, the witness must verify the correctness of the portrayal.\textsuperscript{28} It is not essential that the authenticating witness have actually prepared the photograph, map, drawing, or other exhibit,\textsuperscript{29} nor is it essential that he be the custodian of evidentiary items such as bullets, bodily remains, auto parts, and clothing.\textsuperscript{30} As an example, in Gibson v. State,\textsuperscript{31} the following objection was made:

\begin{itemize}
  \item \textsuperscript{23} 4 Wigmore, Evidence \S 1181, 320 (3d ed. 1940).
  \item \textsuperscript{24} Richardson v. Missouri-K. T. Ry. Co. of Texas, 205 S.W.2d 819 (Tex. Civ. App. 1947) \textit{error dismissed}.
  \item \textsuperscript{27} Williams v. State, 298 S.W.2d 590 (Tex. Crim. App. 1956) (less than positive identification of cap).
  \item \textsuperscript{30} Lestico v. Kuener, 204 Minn. 125, 283 N.W. 122 (1938); Pasadena Research Laboratories v. United States, 169 F.2d 375 (9th Cir. 1948), \textit{cert. den.}, 335 U.S. 835 (1948).
\end{itemize}
No proper predicate has been lain to introduce the photographs in evidence, since their authenticity had not been properly shown and established; the witness called by the State to identify and vouch for the authenticity of the photographs, said that he did not take the photographs, that he did not develop the photographs from their negatives, and he did not say that he was present when they were developed and printed by the photographer who was alleged to have made the photographs.

This was overcome by testimony of the witness that he was present when the pictures were taken, that he had superintended the taking of the photos, and that they were correct representations of the deceased’s body.  

Procedurally, counsel would do well to review the “five steps” ordinarily necessary in verifying demonstrative evidence. Scott summarizes these in connection with photographs and similar procedure is customarily employed with other demonstrative evidence as well.

1. Call the verifying witness to the stand. Set the background for the witness’ testimony. That is, let the judge and jury know why the witness is in court. Is he the photographer? Is he the technician who took the x-rays? Was he at the scene? Is he familiar with Blank’s medical charts? Does he use these charts in teaching his own classes? The answer to this basic “why?” inquiry should be further developed by like queries.

2. Hand the picture to the court reporter and request that it be marked as an exhibit for identification. A widely circulated medicolegal teaching film, “The Medical Witness,” neglects to emphasize this essential step.

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32. Id. at 587, 223 S.W.2d at 629.
   Perhaps the simplest predicate is that required for photographs.
   “Is this photograph a fair and accurate representation of (the subject of the inquiry) as it existed on the day in question?”
   That simple question is the modest predicate necessary in most jurisdictions for an ordinary photograph of a still object. The question presupposes, however, that the witness is familiar with the scene. Generally speaking, the photographer need not be produced, and any person familiar with the scene will suffice.

34. Produced by the Wm. S. Merrill Co. and available for bar and medical groups through the ABA and the AMA offices, Chicago.
35. Although perhaps perfunctory as a technical matter, trial strategists capitalize on this opportunity to let the jury know that the matter being “officially marked” is “something special.”
3. Show the photograph to the opposing counsel and the court. It is at this stage that opposing counsel should analyze carefully the evidence in light of the strategy of the case and determine if there are objections that should be advanced.36

4. Lay the Foundation by testimony that the picture is a fair representation of the subject.37

5. Offer the exhibit in evidence.38

B. Incorrect Representation

A protest that an exhibit is not a fair representation is probably the strongest objection to be leveled at demonstrative evidence. Because of the risks of a general objection,39 counsel should normally follow up by pointing

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36. "No objection!" may be the best way to combat the exhibit. See Person, Combating the Use of Demonstrative Evidence, 1956 Proc. Sec. Ins. L., ABA 430.

37. Scott has deliberately replaced the expression "accurate representation" with "fair representation" in his second edition. SCOTT, op. cit. supra, note 33, § 1451. State v. Sanders, 365 S.W.2d 480, 482 (Mo. 1963). Of course, maps, plats, diagrams and the like may be represented as being less than exact. A crude sketch erroneous in details, was held properly admitted since no harm resulted to the opponent in Banker v. McLaughlin, 200 S.W.2d 699 (Tex. Civ. App. 1947), aff'd, 146 Tex. 434, 208 S.W.2d 843, 8 A.L.R.2d 1231 (1948). But exclusion of a sketch, shown not to be a full and complete survey, was held proper in Ayres v. Patton, 111 S.W. 1079 (Tex. Civ. App. 1908).

38. Standard medical and other scientific charts are admissible in evidence. A muscle chart was apparently employed in St. Louis, S. F. & T. Ry. Co. v. Reichert, 227 S.W. 550, 555 (Tex. City App. 1921), the court holding that the "picture of the muscles described by the physicians, which they testified was correct, was admissible as a part of such description and practically became a part of their testimony." On the other hand, proponent is not required to introduce the chart in evidence when used to illustrate testimony. Stedman Fruit Co. v. Smith, 28 S.W.2d 622 (Tex. Civ. App. 1930). Consequently, counsel that frequently re-use standard charts in the court room are wont to refrain from formally offering such exhibits. See Berry v. Harmon, 329 S.W.2d 784, 793 (Mo. 1959).

39. See Ball, Objections to Evidence, 15 Ark. L. Rev. 69, 71 (1960-61), quoting Judge Lamm's famous language in Bragg v. Metropolitan St. R. Co., 92 Mo. 331, 91 S.W. 527 (1905); Monson v. State, 2 Tex. Crim. 925, 63 S.W. 647, 649 (1901); Monson v. State, 45 Tex. Crim. 426, 76 S.W. 570 (1903). The need to "preserve the record" is pointed out in Young v. State, 49 Tex. Crim. 207, 213, 92 S.W. 414, 415 (1906) (photographs of deceased after autopsy: "(I)n the . . . bill . . . presented to us there is nothing therein showing that the same were not correct photographs, except appellant's objections."); and in Bullock v. State, 73 Tex. Crim. 419, 424, 165 S.W. 196, 199 (1914) (map or plat, not to scale, drawn by civil engineer, was introduced without objection; later, after a number of witnesses had used the map in conjunction with their testimony, "(a)ppellant objected to this in a general way, because the map was not correct, misleading, and calculated to lead said witness into making statements which sustained the state's theory in some particulars." Held, properly overruled.)

More recently, Judge Leedy properly concluded that the words "I object strenuously to introduction of these photographs" was no objection at all. State v. Washington, 368 S.W.2d 439, 443 (Mo. 1963).
out particular inaccuracies. The following objections are variations on this central theme.

1. Distortion. When a proponent offers an exhibit as a true and correct representation and in fact it is not, the court has discretionary power to refuse its admission. On the other hand, courts have shown a disposition to hold that such objection goes merely to the weight of the evidence and not to its admissibility. Consequently, the objection may be overruled and the complaining party then be entitled to a precautionary instruction. He can, of course, expose the distortion on cross-examination or as part of his affirmative case.

2. Injury exaggerated. In an unreported Texas case, "The defendant being indicted for aggravated assault by biting off a piece of the complainant's ear, the complainant was permitted to exhibit the maimed ear to the jury." In exhibiting such a "gaping wound of Caesar" or photo-

40. It is at this juncture that the technical acumen of the advocate is crucial. The mandatory background text is Scott, Photographic Evidence (2d ed. 1967). See also the debate: Heilpern and Schatz, Responsibilities of the Legal Profession to Forensic Sciences: Responsibilities to the Courtroom Photographer, 6 J. For. Sci. 207 (1961); Tuttle and Conrad, Photographs as a Mode of Communicating Testimony, 7 J. For. Sci. 82 (1962). An address to the Medico-legal Society by Dr. P. N. Cardew, "Truth and Deception in Photography" led to the conclusion that medicolegal experts in England rely less than formerly on photographic evidence in forensic practice. Noted, 29 Medico-Legal J. 50 (1961).


44. Carter v. State, 39 Tex. Crim. 345, 46 S.W. 236, 237 (1898), rehearing denied, 39 Tex. Crim. 352 (1898), 48 S.W. 508 (1899), rev'd on fed. question, 177 U.S. 442 (1900), "If the map was not a correct one, this fact could be shown; and the defendant, if he desired, could attack the map by showing its incorrectness, and supply the defects by putting in evidence one of his own." Davis v. Illinois Terminal R. R. Co., 326 S.W.2d 78, 86-87 (Mo. 1959) (counsel's lack of information on night photography at trial time could not found a valid plea of newly discovered evidence on motion for new trial). Brockman v. State, 163 Neb. 171, 79 N.W.2d 9, 14-15 (1956) (appearance photos of rape victim; defense counsel not permitted to attack admission in evidence by expert testimony when police officer during authentication admitted color transparencies were not exact reproductions, such expert testimony being allowed only as part of the defendant's case.)


46. Ibid., "In his brief in People v. Kelly, 94 N.Y. 526 (1884), Mr. John H. McKinley said: 'No gaping wound of Caesar can be used in this age to conflict the inflictor.' But the court held otherwise."
graphs of such a wound, how far can the proponent go in emphasizing the character of the wound?

The line was crossed in People v. Burns with

Pictures of the face, neck, and torso taken after the autopsy. They were particularly horrible because the head was completely shaved. The head shows large incisions which had been made for the autopsy and were thereafter sewn together. In two pictures the lips were practically turned inside out and held with instruments to show the cuts. Both arms showed marks or punctures made by the surgeon, one being particularly ugly . . . . The completely bald head, the surgical cuts and sutures, the ugly punctures, the inverted lips with instruments attached, make the body so grotesque and horrible that it is doubtful if the average juror could be persuaded to look at the picture while the witness pointed out the bruises and abrasions.48

On the other hand, in an Arizona case, the court indicated that since it was entirely proper for the jury to have examined the head of deceased, if that were possible, there was no error in admitting photographs. The court, in commenting on a photograph similar to that of the Burns case, stated that "the fact that the ghastly appearance of the wounds, even though such appearance was heightened by the shaving of the head and the use of mercuriochrome . . . did not make (the photographs) inadmissible. . . ."50 Similarly, in People v. Elmore a death was admittedly caused by a knife wound.

Two photographs of Polio's neck, taken shortly after his death, were received in evidence for the purpose of showing the size and character of the wound inflict upon him. In one of these the cut appeared as it was sewed up prior to his death; in the other the stitches had been removed and the edges of the cut were held apart by two short sticks inserted for the purpose, thus disclosing the incision of the windpipe made by the wound.52

50. Id. at 306, 299 P.2d at 685. More recently the same court has held it proper to admit photographs of wounds "in better condition" than at the time of the injury. State v. Lee, 80 Ariz. 213, 295 P.2d 380 (1956).
51. 167 Cal. 205, 138 P. 989 (1914).
52. Id. at 212, 138 P. at 991. See also People v. Reese, 27 Cal. 2d 112, 301 P.2d 582 (1956), a rape-murder case in which photographs of the victim, showing that her breasts were amputated and the abdomen cut from the vagina to the navel, were admitted.
3. Injury and Background Not in Natural Color. A landmark case in Missouri is Faught v. Washam. Although close reading, attention to later explanatory authority, and personal "grapevine reports" should be indulged, it can be concluded that had a more scientific foundation been laid for the offer of color photography, reversal for a lack of natural color would not have resulted. Special Judge Stone's declaration on this limited point is sui generis:

As for the six colored [sic] photographs in the instant case, we have had sufficient familiarity with male limbs to know that the limbs shown in these photographs are not portrayed in their natural color (and certainly the same is true with respect to their backgrounds), and we have had sufficient experience in trial practice (inexpert as we may have been in that field) to perceive the probable inflammatory impact of such photographs depicting sympathy-provoking injuries in "high and unrealistic colors."

Professor Conrad, pointing out that courts had been liberal in admitting colored photographs or diagrams before the advent of color photography, stresses that color photographs more nearly portray reality even if there are slight deviations from "true color values":

Now we have used black and white photographs for so long that we accept them as the real thing. Actually, black and white photography is considered an abstract medium and does not represent reality as such. . . .

The inherent realism of color photography has been urged, unsuccessfully, as a reason for rejecting black and white photographs.

53. 329 S.W.2d 588 (Mo. 1959).
54. At least one experienced trial lawyer who examined the exhibits admitted that the photos "went too far" even though his personal predilections favor admission of color photographs. See also, Reed v. Shelly, 378 S.W.2d 291, 302 (Spr. Ct. App. 1964) (per J. Hogan).
55. The opinion notes that a photographer had "identified" the photographs on a previous trial when the exhibits were excluded. Also, the medical evidence was "meager." Implied is that a stronger foundation, perhaps with the aid of a medical photographer, might have saved the day. Compare Johnson v. Clement F. Sculley Const. Co., 255 Minn. 41, 95 N.W.2d 409 (1959), Floe v. Sund, 255 Minn. 211, 96 N.W.2d 563 (1959).
56. See SCOTT, PHOTOGRAPHIC EVIDENCE § 1351 (2d ed. 1967).
57. Faught v. Washam, 329 S.W.2d at 600.
59. See also, SCOTT, PHOTOGRAPHIC EVIDENCE § 751 (2d ed. 1967).
60. Conrad, supra note 58, at 177-178.
of the same subject [citing cases]. When color films become the accepted standard of photography, it is conceivable that the courts will sustain objections to black and white photographs lacking the realism of color pictures.60

4. Exhibit Retouched or Marked. The fact that a photograph is retouched is not enough to justify its exclusion.61 Emphasizing marks placed on an exhibit do not necessarily render it inadmissible.62 In State v. Weston,63 plaster casts of the areas of a body wounded by gun-shot were prepared prior to autopsy. Upon these casts were numerous small blue dots placed by a witness comparing the casts with the body at the morgue for the purpose of distinguishing the shot wounds from air bubbles in the casts. One ground of objection was that “after the blue dots which indicate the wounds had been placed upon the cast it was no longer . . . a true representation of deceased’s forearm and hand.”64 Stating that an exact duplicate of “flesh and bone” is not required, Justice Rossman declared:

The jury was amply informed that the sole purpose of the blue dots was to indicate the presence of the wounds. Since the jurors could rightfully look at the indications of the wounds, we cannot understand how the help which these small dots gave them in locating the wounds could have prejudiced any interest properly claimed by the defendant. . . .

(W)e deduce the rule that maps, photographs et cetera, containing markings, are not inadmissible if they are otherwise relevant and if the individual who made the mark or wrote the legend was familiar with the facts and so testifies, or if some other witness, familiar with the facts, adopts the mark or legend as his own.65

5. Misleading, Confusing, or Too Suggestive. This language is often incorporated in objections dealing with many forms of demonstrative evidence.66 There are three situations, however, in which this tenor of objection is especially important.

62. Id. at § 1484. Busch believes the better practice is to offer photographs free of such markings. Busch, Photographic Evidence, 4 De Paul L. Rev. 195, 196 (1955).
63. 155 Ore. 556, 64 P.2d 536 (1937); Skipworth, Admission of Photographs in Evidence in Homicide Cases, 15 Ore. L. Rev. 255 (1936).
64. Id. at 563, 64 P.2d at 541.
65. Id. at 571, 574, 64 P.2d at 542-43.
66. For example, State v. Thomas, 78 Ariz. 52, 275 P.2d 408 (1954) (picture of a body taken prior to autopsy; burnt clothing had been taken from wounds and
First, an objection to a scale model offered in evidence has been sustained on this ground. 67 "While models may frequently be of great assistance to a court and jury, it is common knowledge that, even when constructed to scale, they may frequently, because of the great disparity in size between the model and the original, also be very misleading . . . ." 68

Second are objections to posed photographs or movie re-enactments. The dangers of deception are substantial enough to result in a split of authority among different jurisdictions. 69 A leading authority is Richardson v. Missouri-K. T. R. Co. of Texas, 70 a F.E.L.A. case in which the jury found damages of $6,000 but cut it in half on account of plaintiff's own negligence. To establish plaintiff's negligence, defendant introduced a color motion picture that showed the shop foreman demonstrating how the plaintiff's hand "could be caught and run through the blades" of a shaping machine. The foreman testified, however, that "he did not know how the fingers of appellant were caught in the machine and therefore his experiments did not undertake to show how appellant was operating it at the time." 71 The court thrust aside plaintiff's objections and his plea that by the use of such skillfully technical picture, the appellee took from the appellant the sum of $3,000. 72 "In the final analysis, the increased danger of fraud peculiar to posed photographs must be weighed against their communicative value. Only the additional danger of fraud or suggestion separates this question from that of the admissibility of ordinary photographs." 73 This danger of fraud and suggestion is no doubt at work when judges have excluded "certain photographs which were taken during the period when plaintiff was

opponent claimed photographs consequently misleading; held, properly admitted.) Ortiz v. State, 30 Fla. 256, 267, 11 So. 611, 613 (1892) (photograph taken from distorting angle properly excluded; it "could have been of no assistance to the jury in the case, but would have served as an agency of confusion.")

68. Id. at 378, 71 P. 2d at 89. But see, Church v. Headrick & Brown, 101 Cal. App. 2d 396, 255 P. 2d 558 (1950) (same court; use of scale model approved).
71. Id. at 822-823.
being treated for his injuries and which showed his face distorted with pain."74

The third category comprises comparison exhibits. This not only involves comparison of bodily parts of an injured party with a witness with similar injuries, but also brings into the arena comparison photographs and x-rays. Although it is a common and approved practice to introduce "normal" x-rays for comparison with x-rays of the injured party,75 there is authority that though such x-rays were "proper subject for jury consideration," exclusion by the trial court was not an abuse of discretion.76

Other cases deciding whether an exhibit is "misleading"77 serves as "an agent of confusion,"78 or "injects . . . an issue foreign to the matter under inquiry"79 are also best listed under this general heading.

III. Undue Prejudice

Even though proffered demonstrative evidence passes the test of verity with flying colors, still a large hurdle remains—judicial discretion. Even though an exhibit be perfectly accurate, the trial judge has discretion to exclude demonstrative evidence that may create undue prejudice in the minds of the tribunal—such "sympathy,"80 "distraction,"81 "resentment,"82

77. State v. Thomas, supra note 66.
78. Ortiz v. State, supra note 66.
80. "[T]he jury may heedlessly conclude . . . that since the plaintiff is truly in a pitiable plight, some one at least should be found to compensate him, and the defendant rather than any one else. . . ." 4 Wigmore, EVIDENCE § 1158 (3d ed. 1940). In a leading Missouri case, plaintiff's counsel had an expert witness demonstrate the surgical procedures of a laminectomy by flourishing a scalpel before the jury. The court upheld the defendant's contention that there was no controverted fact issue concerning the laminectomy and that the "purpose of the demonstration was to arouse the sympathy of the jury . . ." Taylor v. Kansas City So. Ry. Co., 364 Mo. 693, 699, 266 S.W.2d 732, 736 (1954) (trial court reversed). Accord, Kickham v. Carter, 314 S.W.2d 902 (Mo. 1958); Fitzpatrick v. St. Louis-S. F. Ry. Co., 327 S.W.2d 801 (Mo. 1959). Compare, Hampton v. Rauterstrauh, 338 S.W.2d 105 (Mo. 1960); 83 A.L.R. 2d 1260 (1962).
81. Willis v. State, 49 Tex. Crim. 139, 146, 90 S.W. 1100, 1104 (1905) (large photograph of sister of defendant excluded; "introduction of the picture of a beautiful woman . . . and the fact that appellant was accustomed to visit her picture and brood over it, would be a matter calculated to distract the attention of the jury from the main issues of the case.")
82. Ray v. State, 160 Tex. Crim. 12, 16-17, 266 S.W.2d 124, 127 (1954) (Ob-
"repulsion,"83 or "indignation"84 that overcomes the rational processes of the trier of fact.85 The ambit of judicial discretion here tends to be narrow; "[W]hen the balance waivers the court should lean toward admission."86 Wigmore compares criminal and civil cases and concludes that the risks of unfair prejudice are of greater frequency in personal injury cases and so implies that the trial court should exercise discretion to exclude more firmly in civil than in criminal cases.87 In any event, the court's discretion is to "prevent abuse" of demonstrative evidence.88

A. Inflammatory

Perhaps the most common objection directed toward exercise of judicial discretion to exclude is that the matter offered is inflammatory. Photographs of corpses in criminal and wrongful death cases are most often considered in the reports. A leading Texas case, Alcorta v. State,89 indicated

[Notes and Citations]

83. See cases cited in 4 Wigmore, EVIDENCE § 1159 n. 3 at p. 262; Knowles v. Crampton, 55 Conn. 336, 11 A. 593 (1887) (section of cadaver offered to demonstrate character of rib and breast-bone formation, excluded.); Commonwealth v. Morgan, 358 Pa. 607, 58 A.2d 330 (1948) (demonstration of rape held prejudicial). But note Judge Learned Hand's comment that in personal injury suits "the very hideousness of the deformity was a part of the suffering of the victim, and could not rationally be excluded in the assessment of his damages." Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951).

84. State v. Wiener, 66 Mo. 13, 29-30 (1877) ("[E]xhibition to the jury of the bones of the vertebral column of the deceased . . . served to show the jury the attitudes and relative positions of the parties when the shot was fired. It was not an unnecessary parade of the bones of the dead man to excite prejudice against his master, but was legitimate and proper evidence, and a party cannot, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded from their consideration.")


that there must be a “serious inflammation” to justify reversal. In that case the state offered five photographs of the deceased’s nude body punctured by thirty-two knife wounds. Since the defendant had admitted the homicide and had conceded that the knife wounds were causative of the death, it was earnestly contended that the photographs would tend to prove no issue in the case and would merely serve to inflame the jury. The majority of the Texas Court of Criminal Appeals held that defendant’s denial on cross-examination that there were thirty-two wounds created an issue of fact justifying admission of the photographs. In dissent, Judge Davidson commented:

The five pictures showing the nude body of the deceased in various positions—ghastly . . . horrible, as they are—were highly inflammatory and calculated to arouse against the perpetrator the prejudice of those who viewed them. They were clearly calculated to cause, and did cause, the jury to inflict the death penalty. But for their introduction in evidence, the jury—in my opinion—would not have assessed the death penalty.90

Reversal of a manslaughter conviction91 was won in the Missouri Supreme Court upon the same objection, the state’s attorney admitting that the photo of a decomposed corpse was “somewhat hideous” and “inflammatory.” Commissioner Barrett reviewed the authorities and concluded:

The photograph . . . was neither needed nor offered for any of the conventional reasons or purposes,—to identify the victim, to show the nature and location of the injury, to illustrate or prove the character of the weapon, the surrounding circumstances, to determine the degree of the crime, or to show the cause of death.92 As a matter of fact, by the state’s admissions, the body was in such a state of decomposition that most of these matters could not be found or illustrated,93 particularly by this photograph.94 In short,

90. Id. 294 S.W.2d at 117. Language by Judge Morrison in dealing with the motion for rehearing suggests that there is a point where pictures of a murder victim lying in pools of blood, especially if the photographs were in color, might become prejudicial as inflammatory.
91. State v. Floyd, 360 S.W.2d 630 (Mo. 1962).
92. Counsel had urged admissibility on the ground that the photo explained the absence of “pathological proof of any cause of death.”
93. Adequate medicolegal investigation can often reveal a cause of death in decomposed bodies. Sir Sydney Smith recounts the solution of such a case in which he took the deceased’s skull into court and demonstrated how a metal file was “dug up” which fitted a depressed skull fracture. SMITH, MOSTLY MURDER 96 (1959).
94. The offer of the photograph came in conjunction with the testimony of a deputy sheriff, not that of the coroner, “a doctor of thirty years’ experience” who had testified concerning the cause of death.
as the court said of another photograph in reversing a manslaughter conviction, this exhibit is "extremely obscene, offensive, vulgar, horrid, and repulsive," and any relevant probative value it may have is far outweighed by the fact that it is needlessly and manifestly inflammatory and therefore prejudicially erroneous.

In Southern Transport Co. v. Adams the court, reversing on other grounds, approved use of photographs of the deceased "in so far as they were pertinent to any issue before the jury" but commented that pictures "emphasizing the horrors of the accident," such as blood on the pavement, should not have been introduced. Language of Railway Express Agency v. Spain, indicates that the objection to photographs as being inflammatory will not be seriously considered unless the objecting party contends that the jury verdict is excessive.

B. Unnecessary

Some opinions exclude demonstrative evidence by holding that the particular exhibit is "unnecessary." Analysis suggests that this is not appropriate terminology. Conceding that the offered evidence is both material and relevant, and so not "unnecessary" in either of those senses, the nature of the objection in contest seems to be that the evidence is inflammatory or cumulative. For example, a landmark case in food law concerned a commercial orange drink which was lacking in vitamin C, according to Food and Drug Administration laboratory studies. Comparative photographs of healthy guinea pigs regularly fed orange juice and those which had apparently died in agony after being fed the beverage in question during controlled tests were held "neither necessary nor proper." But the court, in discussing admissibility, stated that "[i]t is impossible to calculate the effect of such testimony in creating prejudice rather than objective conviction in the minds of the jurors."

95. State v. Robinson, 328 S.W.2d 667, 671 (Mo. 1959).
96. 360 S.W.2d at 633.
97. 141 S.W.2d 739 (Tex. Civ. App. 1940, error dism'd).
98. Id. at 744.
101. See text notes 89-100, supra.
102. See text notes 107, 108, supra.
103. U.S. v. 88 Cases, More or Less, 187 F.2d 967 (3d Cir. 1951).
104. Id. at 975, emphasis supplied. This case has been seized upon as a landmark decision by defense counsel. See Mackall, "I Now Offer this Photograph in Evidence," 20 Ins. Counsel J. 110 (1953). See also Harper v. Bolton, 124 S.E.2d 54, 56 (S.C. 1962).
In an early California case\(^\text{105}\) the court excluded drawings showing the condition of the defendant’s damaged teeth. Commenting that the drawing was not “necessary to illustrate the fact asserted, the opinion reasons that “[t]he extent of the injury could be as well understood from the statement of the dentist who repaired them.”\(^\text{106}\) Apparently the court was considering the evidence as cumulative and so “unnecessary.”

It is submitted that counsel should phrase his objections in terms of the evidence being inflammatory and cumulative rather than in terms of its being unnecessary.

C. Cumulative

Trial courts have discretion to exclude testimony that is merely cumulative and, since demonstrative evidence is usually intertwined with testimony, the court should be able to exclude cumulative exhibits.\(^\text{107}\) On the other hand, it is established that no reversible error occurs if cumulative exhibits are admitted.\(^\text{108}\)

D. Gruesome

Although “[o]ne favorite ground for objection to the admissibility of photographs in evidence is that it is too gruesome,”\(^\text{109}\) the general rule is that gruesomeness per se does not render a photo inadmissible.\(^\text{110}\) Presiding Judge Storckman in a recent Missouri case\(^\text{111}\) well-summarized application of the rule:

Among other things, photographs are admissible to show the nature and location of wounds, to refute self-defense, and to corroborate and clarify the testimony of witnesses. The parallel slash marks on the victim’s arm and face and the wounds in the area of the left temple are better understood when viewed on the


\(^{106}\) Id. at 537.

\(^{107}\) 6 Wigmore, EVIDENCE § 1907 (3d ed. 1940); State Farm Mutual Automobile Insurance Co. v. Jackson, 346 F.2d 484 (8th Cir. 1965).


\(^{111}\) State v. Perkins, 382 S.W.2d 701 (Mo. 1964).
exhibits than when described orally or in the written record. The extent and location of other wounds on his hands and face are more vividly portrayed and bear on the ability of (the victim) to be an aggressor at the time he was mortally wounded. In his statement to the police the defendant said he saw (the victim) with a shotgun and he thought (he) was going to shoot him. An instruction on self-defense was given as the issue was argued to the jury. In oral argument defendant's counsel also suggested that (defendant's wife) might have quarreled with (the victim) and inflicted the wounds. The force and violence of the beating vividly shown by the exhibits throws light on whether the wounds and consequent death were inflicted by an outraged husband or the faithless wife who had been living with her paramour for some time in apparent harmony. For these and other reasons the photographs constituted material evidence, and the fact that they were gruesome was an unavoidable incident of a proper purpose.\textsuperscript{112}

When confronted with gruesome exhibits, the advocate is advised to phrase his objection in other terms.\textsuperscript{113} Scott\textsuperscript{114} lists a number of other "objection words" gleaned from the cases which can be selectively employed in an effort to persuade the trial judge.

\textbf{E. Indecent}

An objection that an exhibit is indecent often raises similar problems to those concerned with the inflammatory or gruesome quality of the demonstrative evidence. The primary issue under this head, however, is the basic scope limits to be established in public trials. When the exhibition is otherwise proper, it should be allowed despite the fact that it borders on the lewd or obscene. To quote Wigmore:

When justice and the discovery of truth are at stake, the ordinary canons of modesty and delicacy of feeling cannot be allowed to impose prohibition upon necessary measures. Where it is a question of what would otherwise be an indecency, two limita-

\begin{footnotesize}
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\item \textsuperscript{112} Citing earlier Missouri authority: \textit{Id.} at 704-705. Wilkins v. State, 155 So.2d 129, 131 (1963 per Justice Thomas), ("True, blood spilled in a murder will appear red and perhaps more gruesome than if it were black in a film taken without color but . . . we do not comprehend how the one shown to have perpetrated the act can successfully complain about the shocking nature of pictures of a horrible scene which he, himself, created."). See Getty, \textit{Blood, Bruises and Photographs}, 1 South Texas L. J. 282 (1954).
\item \textsuperscript{113} For example, in Perkins, counsel convinced Judge Romjue to exclude two photographs of the interior of decedent's skull taken during autopsy showing fragmentation of bone apparently on a "cumulative" theory.
\item \textsuperscript{114} Scott, \textit{Photographic Evidence} § 1231 (3d ed. 1967).
\end{itemize}
\end{footnotesize}
tions seem appropriate; (a) there should be a fair necessity for the jury's inspection, the trial Court to determine; (b) the inspection should take place apart from the public court-room, in the sole presence of the tribunal and the parties. Such seems to be the inclination of the Courts.115

IV. CONCLUSION

It is obvious that the categories employed in this discussion are not mutually exclusive. In highlighting the strengths and weaknesses of the various objections leveled at demonstrative evidence the goal of this discussion is to aid the advocate in carrying his point with the judiciary,116 whether his argument is for or against admission of a particular piece of demonstrative evidence.117

Proponent must not only fulfill his procedural obligation to lay a proper foundation for admission. He must justify his trial technique when objections are raised and must be ready to expose fallacies in his opponent's position.

The opponent, conversely, must be prepared to forward objections that not only have a "ring of reason" but that are sound under the authorities. Dictates of strategy may determine the timing of objections but their phrasing must "follow the law." Our suggested breakdown of the various objections should ease his task in this regard. Despite this opportunity for skillful advocacy, counsel may at times be virtually helpless:

When I first called upon the prisoner, after he had furnished me with some of the pertinent details (he was a disappointed lover who had killed the woman he loved), I asked him how the deceased was dressed at the time of the blow. He said, "in black."


117. The possibilities for demonstrative evidence in varying types of litigation is most recently shown by perusal of various articles contained in the current Am. Jur Trials (12 volumes now published). Also, note that product liability cases in which demonstrative evidence is employed are set out in Frumer and Friedman, 3 Products Liability § 49 (1966).
I observed, “that was better than if the dress had been white.” Upon which the prisoner turned hastily around, and asked what difference that could make. The reply was, “No difference in regard to your offence, but a considerable difference in respect to the effect produced upon the jury by the exhibition of the garments, which, no doubt, will be resorted to.” And so upon the trial it turned out. The black dress was presented to the jury,—the eleven punctures through the bosom pointed out; but no stain was observable, no excitement was produced. At last, however, they went further, and produced some of the white undergarments—corsets, etc., all besmeared with human blood. Upon this exhibition there was not a dry eye in the courthouse. And the current of opinion continued to run against the defendant from that moment until the close of the case, and finally bore him into eternity.¹¹⁸