CARLTON FIELDS

Using Technology to Resolve Construction Disputes

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Demonstrative Aids It is virtually impossible to adequately explain a complex construction case without demonstrative aids. Demonstrative evidence has been used by litigants in mediations, arbitrations and trials for years. However, recent technological advances have revolutionized the use of demonstrative aids in litigation. Demonstrative evidence is any visual aid or exhibit that may help a juror or trier of fact understand a material fact or issue. *Padovano*, Fla. Civ. Prac. § 20.3 (1999 ED). To be permitted, the demonstrative evidence must be an accurate and reasonable reproduction of the object involved. *Alston v. Shiver*, 105 So. 2d. 785 (Fla. 1958); *Brown v. State*, 550 So. 2d. 527 (Fla. 1st DCA 1989). While demonstrative aids are usually not admitted into evidence or taken into a jury room for deliberations, they are nonetheless subject to a §90.403 balancing to assure that their probative value is not outweighed by their prejudicial effects. Trial judges have broad discretion in deciding what demonstrative aids may be used. In arbitration, latitude concerning their use is even greater. And, the greatest latitude for using such aids is seen, of course, in mediations where each litigant may unilaterally decide what aids to use to support its story. There are many different types of demonstrative aids. The simplest forms are charts, videotapes, and blow ups of documents. New technologies have significantly increased the numbers and types of aids available to facilitate the presentation of complex cases. Graphics software such as Microsoft's PowerPoint or Corel's Presentations enables even those who are not tech savvy to create charts and tables, project images onto large screens, and even create elementary forms of animation. Photos, documents, or videos can be embedded into the presentations. More sophisticated programs such as Doar's Anix Litigation Suite can add three-dimensional animations to graphics, enabling the advocate to literally bring to life flat, one-dimensional construction drawings. Most courtrooms are now equipped with ELMOS — essentially, a high tech overhead projector — that can project onto a screen most types of physical evidence. Computers can be connected to television monitors, allowing the presenter to zoom in on particular documents, images, or highlighted text. Demonstrative aids also include samples and mockups. These types of demonstrative aids have particular and unique applications in construction cases. Perhaps one of the most effective ways to explain to a trier of fact a defective condition in, for example, a sliding glass door, is to bring a sample into the courtroom so it can be seen firsthand. Scale models or mockups can be used to demonstrate larger sections of the building. There are few substitutes that help a jury understand a given problem better than a three-

dimensional, live sample of a defective condition. It is difficult to imagine trying a construction case without demonstrative aids. Their effective use can facilitate the presentation of documents and the integration of videotaped deposition testimony with construction drawings, project photographs, and sections of the building. **A. Use at Mediation** Depending on the complexity of the case, the parties should consider using demonstrative aids in mediation proceedings. The complexity of construction cases is no less an obstacle in a mediation than in an arbitration or trial. In fact, because a litigant is not encumbered by the rules of evidence during mediation, he or she has significant latitude when using aids to make a point. Cost is the biggest downside to using elaborate demonstrative aids at mediation. Accordingly, a litigant must evaluate the likelihood of resolving the case at mediation and factor that into determining whether to invest in expensive aids. Litigants should be mindful that, generally, mediation success rates are extremely high and likely justify the costs of effective presentations. Another consideration is the principle of primacy. A mediation is the first opportunity for a litigant to tell his or her story to the decision makers. In fact, mediation will be the only opportunity a litigant has to speak directly with the adverse party. Making a thorough, strong and persuasive impact reflects not only the strength of your case, but also your readiness for trial. And, if the case does not settle, most of the demonstrative aids can likely be recycled for use at the trial. **B. Use at Trial or Arbitration** The use of demonstrative aids at trial must satisfy the rules of evidence and, if applicable, the local rules of court. As stated above, demonstrative aids must be an accurate and reasonable reproduction of the object involved. The "object" is typically a piece of evidence that must be admitted into the record. Thus, while demonstrative aids are not necessarily evidence that is received into the record (and, therefore, cannot be taken into the jury's deliberation), they must nonetheless conform to the fundamental rules requiring relevance. For evidence to be relevant, it must have a logical tendency to prove or disprove a fact that is of consequence to the action's outcome. §90.401, Fla. Stat. (2011). In Florida, the definition of relevance combines the traditional principles of "relevancy" and "materiality." These two concepts are, thus, merged. The demonstrative aid must fairly and accurately depict the relevant, admitted evidence that it is intended to demonstrate. Moreover, it must aid the trier of fact in understanding or evaluating the other evidence to which it relates and assist the witness whose testimony it purports to illustrate. Whether the demonstrative aid is electronic or traditional, the trial judge has broad discretion to decide whether counsel can use it, or if limitations will be placed on its use. A judge's decision on the use of demonstrative aids will not be disturbed on appeal absent an abuse of discretion, or prejudicial error. Because demonstrative evidence can have such a powerful impact, however, it often draws strong objections by the opposing side. The most typical basis for objections is that the exhibit is misleading. It is therefore critical to assure that whatever demonstrative aid is used faithfully and fairly represents the object it is intended to interpret. It is not worth the risks of "pushing the envelope" on a demonstrative aid that may not be representative, as a sustained objection will leave the litigant without any means by which to adequately describe the complex matter at hand. Another typical objection to a demonstrative aid is that its prejudicial effect will outweigh its probative value. However, if special care is taken to assure that the aid accurately represents the object, and the litigant does not seek to embellish or push the envelope, such

objections can be overcome. Electronic exhibits and computer animations, in particular, are more likely to draw vigorous objections. Their inherent complexity coupled with the typical trial judge's lack of technical knowledge increase the risk that such demonstratives will be subject to successful challenges. Accordingly, when a litigant intends to use computer-generated graphics or other forms of electronic animations, the litigant's expert/consultant should be prepared to testify regarding the simulation's preparation and to authenticate, by personal knowledge, that the context of the animation fairly and adequately portrays the facts and will help illustrate the related testimony in the case. It is possible that an adversary will argue that computer simulations are a form of scientific evidence offered for a substantive purpose, meaning that it has independent probative value and can be used by an expert as a basis for the expert's opinion. If, in fact, the expert's testimony is based on a computer simulation, then it may be subject to a *Daubert* or *Frye* test. This possibility should be carefully considered so the litigant is completely prepared to address these challenges if made. **C. Practice Pointers**

> **1. Experts or Consultants**

Most attorneys lack adequate training or experience to make full and effective use of electronic demonstrative aids. Accordingly, it is always wise to engage a demonstrative evidence specialist early and make him or her part of the trial team. To be most effective, a consultant must know exactly what the attorney wants to convey. Thus, the consultant should be told the theme of the case and be given a summary of the storyline. Just as important, the consultant should be allowed to communicate directly with the substantive experts to gain a complete understanding of the technical details that must be communicated.

> **2. Stipulate to the Use of Demonstrative Aids**

It is good practice to identify and dispose of admissibility concerns before the trial begins. Most courts require the parties to meet in advance of trial to exchange exhibits and disclose demonstrative aids. This is the best opportunity to reach agreement on the use of the aids. If agreement cannot be reached, the parties should at least seek to narrow their differences as much as possible and then raise those disputes through motions *in limine*.

> **3. Use Appropriate Aids**

If the case involves simple issues, you probably do not need computer-generated images to tell your story. If the case is pending in a small community, or if you represent a large corporation against an individual, the use of highly technical and expensive graphics may be perceived as overkill and distract from the important issues.

> **4. Consult Local Rules and Judge's Preferences and Know the Courtroom**

Another good practice is to determine if there are local rules governing the use of electronic aids. If there are no written rules, the advocate should ask the court if it has any special rules or requirements regarding the use of demonstrative aids. If nothing else, the litigants should determine

the capability of the courtroom (or hearing room, in the case of mediation or arbitration) to handle the electronic tools that the aids would require. The consultants should communicate with the court clerk or other personnel to confirm the availability of equipment and access to power sources, etc. Note the best sight lines for the judge and jury and test the sound and lighting capabilities.

> **5. Always Test the Equipment**

Also, it is absolutely imperative that the equipment be tested before the trial begins. There are few things worse than spending thousands of dollars on electronic demonstrative aids only to have them rendered useless by defective equipment.

> **6. Prepare Backups**

Glitches are inevitable. Make sure you have technical backup and, to the extent possible, redundancy. For example, if you plan to use computer-generated images, bring a spare computer with an extra disk. And it is always a good idea to print a hard copy of your presentation. If worse comes to worse, the hard copy may be all that is left to use with the jury. **Conclusion** Though construction cases are inherently complex and can be extremely dull, the creative and effective use of technology can clarify and enliven dull facts. The key is to evaluate the case early, distill the complex issues into an understandable and concise theme, and weave the facts of the case into a cohesive story that humanizes your client and answers the fundamental questions. Technology is an indispensable tool in telling the story.

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