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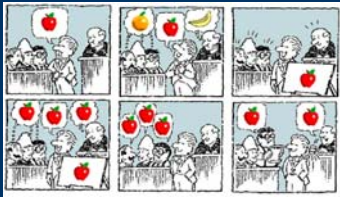
## Illustrative Evidence in Litigation

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## Why illustrative evidence?

- + One Picture is Worth Ten Thousand Words
- + Advocacy: art and science of persuasion
- + Persuasion methods can be refined
- + Time is at a premium
- + Images persuade better than words
- + Images are remembered better than words

## Words relate, Pictures illuminate



## Types of Illustrative evidence

- + computer animations
- + accident reconstruction
- + colour-coded chronologies
- + graphs, charts, easels, posters
- + PowerPoint graphics
- + how-to videos posters
- + aerial photography

## Types of Illustrative Evidence

- + day in the life videos
- + photographs
- + geological samples
- + scale models
- + failure analysis animations
- + surveys of attitudes
- + surveys of land

## Still more types

- + weather reports
- + topographical maps
- + cutaway views
- + storyboards
- + results of focus groups
- + enlarged photographs
- + use your ingenuity

### When will we use it

- ⊕ At trial
- ⊕ Opening Statement
- ⊕ Enhance expert witness' evidence
- ⊕ Help fact witnesses explain or recall
- ⊕ Part of Expert Reports
- ⊕ Keep it in front of the judge or jury during the trial as reminder or reference

### Trial enhancements

- ⊕ Even in a documents trial
- ⊕ Computer technology may save time
- ⊕ Documents scanned on monitors
- ⊕ Large flat screen that everyone can see
- ⊕ No document briefs
- ⊕ Website or CD-ROM for all documents
- ⊕ Click to locate documents on computer

### Is it feasible?

- ⊕ Demonstrative evidence is more developed in US cases
- ⊕ Damage awards are much higher
- ⊕ Constitutional guarantee to jury trials
- ⊕ The graphics you use will be proportional to what the case is worth
- ⊕ Don't be penny-wise and dollar foolish

### But most cases don't get to trial

- ⊕ Pre-trial illustrative evidence is important
- ⊕ Also persuade 'analyzers of fact'
- ⊕ Defendant's decision makers
- ⊕ Defendant and his/her counsel, mediator
- ⊕ Opposing expert
- ⊕ Pre-trial judge

### Pre-trial Illustrative Evidence

- ⊕ Client risk assessment presentations
- ⊕ Trial team tutorials in complex cases
- ⊕ Oral argument on motions - charts, graphs
- ⊕ Focus groups and mock trials
- ⊕ Expert witness reports
- ⊕ Discovery

### An idea to consider

- ⊕ Settlement Brochures on CD-ROM
- ⊕ Mediation Brief on CD-ROM
- ⊕ Rules of evidence don't apply
- ⊕ Can map out positions more aggressively
- ⊕ Put spin on the evidence
- ⊕ Photos, Diagrams, Videos, Charts
- ⊕ Animations

### What kinds of cases

- ⊕ Personal Injury & Medical Malpractice
- ⊕ Construction
- ⊕ Equipment Failure
- ⊕ Intellectual property & e-commerce
- ⊕ Calculation of damages
- ⊕ Economic issues - charts, graphs
- ⊕ Every case is a story that be shown better!

### Now for a little law

- ⊕ Prepare in advance and give notice
- ⊕ Some judges are resistant to technology
- ⊕ Judges can suffer sensory overload
- ⊕ Too much demonstration is not persuasive
- ⊕ Be ware of "junk science"
- ⊕ Call the graphics person as a witness

### Test for admissibility

- ⊕ Relevance, even if hearsay
- ⊕ Underlying facts can't be proved by expert
- ⊕ Judge must decide what weight to attach
- ⊕ No weight is attached until facts proved
- ⊕ Where opinion is based on mélange, weight is given only part of facts proved
- ⊕ Judge has discretion to admit or not

### Test for admissibility

- ⊕ Draper v. Jacklyn SCC 1970
- ⊕ Even where relevant, graphics or pictures may be excluded if trial is by jury only
- ⊕ Evidence must assist trial judge
- ⊕ Probative Value must exceed the Prejudicial effect
- ⊕ Expert must be qualified

### Admissibility of Novel Science

- ⊕ SCC 2000 - R. v. J.-L. J. Binnie J. P.13-14
- ⊕ "Reliable Foundation" test as in US case of Daubert v. Merrell Dow
- ⊕ Has technique been tested?
- ⊕ Has it been exposed to peer review?
- ⊕ Is there a rate of error or standards?
- ⊕ Is it generally accepted?

### Use in opening statement

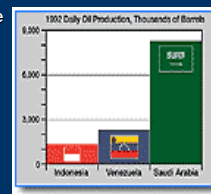
- ⊕ Graphic is not misleading or prejudicial
- ⊕ Counsel undertakes to prove by evidence
- ⊕ Judge may find graphic too demonstrative where there is a jury
- ⊕ Judge's discretion

### Demos can be misleading

- ⊕ Are measurements to scale?
- ⊕ Are camera angles unfair?
- ⊕ Impact of colour, shading or sunlight
- ⊕ Error in facts, math, locations, identity
- ⊕ Inadequate investigation of facts
- ⊕ Incompetence
- ⊕ Intention to mislead?

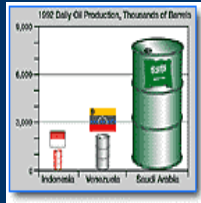
### Examples of misleading Demo

- ⊕ Graph shows three volumetric comparisons
- ⊕ It is portrayed as an accurate reflection of the difference between them



### Why it's misleading

- Volume is 3-D
- To represent it fairly the graph must also be 3-D
- The difference is remarkable
- More examples: [www.legalarts.com](http://www.legalarts.com)



### Effective Storytelling

- US lawyers have developed this better because of jury trials
- Our judges love chronologies
- Chronologies don't have to be boring



### More effective storytelling

- Computer enhanced graphics have eye appeal and readability
- All of these online at [www.legalarts.com](http://www.legalarts.com) with explanations



### Simplify it - the judge will get it

- Judges are easily persuaded when the point is clear
- It's counsel job to prove the case
- Judge should not have to figure it out.



### 10 Commandments of Demos

- [www.craigball.com](http://www.craigball.com) - some are applicable to US jury trials but still helpful
- Keep it simple
- Use familiar images and contexts
- Scale, colour and contrast matter
- Don't use confusing visuals - Keep the same theme

### 10 Commandments of Demos

- Do focus groups to test your theories
- Develop visuals for use before trial
- Use visuals when preparing witnesses
- Use a demonstrative aid with every witness
- Give notice of what you intend to submit
- Don't tell when you can show and tell (or Don't Relate, Illuminate)

### Acknowledgments

- ⊕ My associate, Brandy Dowdall, did much of the research and drafting of the paper
- ⊕ The Apple cartoon is from Craig Ball's website and is © Browning & Co.
- ⊕ [www.legalarts.com](http://www.legalarts.com) was very helpful
- ⊕ [www.trialvis.com](http://www.trialvis.com) and [www.doar.com](http://www.doar.com) are also worth a look.

### The Bottom Line

- ⊕ When people were illiterate, advocates used images to persuade
- ⊕ When people became literate, advocates resorted to words
- ⊕ But images are more effective than words
- ⊕ And now we have the means to deliver the most persuasive images.

### Illustrative Evidence in Litigation

- ⊕ This presentation was made at a Continuing Legal Education Program presented by Osgoode Hall Law School Department of Professional Development on October 14, 2004.
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