

“DO YOU HEAR WHAT I HEAR?”

Why Demonstrative Evidence Makes A Difference

Said a little lamb to a shepherd boy: “Do you hear what I hear?”

If the Shepherd boy was like our jurors – probably not!

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By:

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INTRODUCTION

Some time ago, as winter was turning to spring, I was traveling on Route 19-23 heading to the far western reaches of North Carolina for a trial. Christmas was a couple of months passed but the peaks of the surrounding mountains remained snow-covered. There was still a winter feeling in the air. I tried to concentrate on real business but kept drifting off into what some people refer to as “la-la land,” that state of mind which lets you drive with precision even though your mind is somewhere else. I found myself humming a yuletide tune -- “Do You Hear What I Hear.” Although lyrics are by no means my strong suit, I started singing the following rendition: “Said a little lamb to the shepherd boy, ‘do you hear what I hear?’” At that very moment, for whatever reason, two

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distinct thoughts came to my mind. First, any ambition I had to become a singer was unquestionably wishful thinking. Second, and more importantly, if the shepherd boy was anything like our jurors, he probably did not hear the same thing that the lamb heard. However, the song goes on --- "Do you see what I see?" For several reasons, the chances are much better that the little lamb and the shepherd boy, although probably not hearing the same thing, did in fact see the same thing. From these events and observations comes an important lesson for those of us who are criminal defense litigators -- we must do more than present mere testimony to our jurors. We must find creative ways to present our cases that will cause jurors to do more than listen to testimony -- ways that will make them tap into their various senses -- while deciding the fates of our clients.

Capital cases are not much different from non-capital cases when it comes to using demonstrative evidence. However, a troublesome trend seems to be developing in capital litigation to move away from the basic corollaries of non-capital case demonstrative evidence in favor of family history charts or genographs, pressure charts, and various other visual aids used to explain the testimony of experts. Although these things are powerful and should continue to be used in capital trials, the use of these items should not be in lieu of traditional demonstrative evidence. That which follows is applicable to the trial of all criminal cases, both capital and non-capital and is offered to hopefully rekindle the creative fires of all criminal defense attorneys.

The "Same Old - Same Old"

When it comes to demonstrative evidence, a majority of criminal defense lawyers get caught in the trap of doing the "same old-same old." Whether this stems from law school theoretical teaching, from lawyers repeating what they have "learned" watching other lawyers, or from the sheer comfort that goes along with doing things the way they have always been done, wonderful

opportunities to be incredibly persuasive are regularly lost. We must begin to be more creative with demonstrative evidence in our efforts to persuade jurors. In the words of Ralph Waldo Emerson:

A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do ... Speak what you think today in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today.

Emerson's quote summarizes the all-too-obvious. When it comes to demonstrative evidence, we must change our ways, try new things, and work out of the demonstrative evidence rut into which many of us have fallen. The creative use of demonstrative evidence affords criminal defense attorneys numerous unique opportunities to become more powerful persuaders. Furthermore, preparing and presenting quality demonstrative evidence is not necessarily an expensive proposition..

What Is "Demonstrative Evidence?"

Black's Law Dictionary

Demonstrative Evidence: That evidence addressed directly to the senses without intervention of testimony. Real ("thing") evidence such as the gun in a trial of homicide or the contract itself in the trial of a contract case. Evidence apart from the testimony of witnesses concerning the thing. Such evidence may include maps, diagrams, photographs, models, charts, medical illustrations, X-rays.

This definition, although commonly used, reminds me of fishing from an ocean pier -- it gets you out in the water a good way but it just doesn't go out far enough to let you fish for the big ones. Put another way, its good as far as it goes but lacks something to be desired. If we limit ourselves

to defining demonstrative evidence in this manner (which I suggest is the way many of us tend to view the matter), "demonstrative evidence" becomes nothing more than a synonym for "exhibit." However, there is much more to demonstrative evidence than those items which we mark with an exhibit sticker, proffer to the court for introduction, and then pass to the jury.

The Definition We Must All Start Using

Demonstrative evidence is anything and everything, regardless of whether admissible or even offered as evidence, including attorney/client/witness demeanor in the courtroom, which tends to convey to and evoke from the jurors a "sense impression" that will benefit our case, whether through advancing our case in chief or diminishing the prosecution's case.

By "sense impression" I mean anything and everything which is calculated to target, or is likely to affect, the jurors' senses (i.e., sight, smell, hearing, touch) thereby empowering jurors to give greater appreciation to our clients' defense(s) through interpreting various testimony, evidence, and arguments in a particular context which complements the themes and theory of our defense. In other words, our cases are like giant, roll-top desks with many slots for information. Some of these slots are marked for the prosecution and some for the defense. The trial is a fight over getting jurors to place evidence in particular slots. Based upon our presentations, jurors will interpret evidence, assign weight to it, and place it into one of the slots in the desk. By effectively using demonstrative evidence and tapping into the jurors' sense impressions, our ability to get the jurors to place particular evidence into our slots is markedly increased.

Rationale Underlying the Enhanced Persuasiveness of Demonstrative Evidence

The trial of criminal cases continues to center around oral testimony. However, the second-hand sense impressions conveyed to jurors through verbal testimony have far less impact than the same information conveyed through the creative use of demonstrative evidence. But what is it about demonstrative evidence that gives it enhanced persuasiveness? In the words of McCormick:

"Since 'seeing is believing,' and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect."

McCormick On Evidence § 212 (E. Cleary 2d ed. 1981). Despite this rationale seeming all-too-obvious, criminal defense lawyers tend to leave demonstrative evidence consideration until the last minute, often times never getting around to creating or using demonstrative evidence at trial.

We Must Start Making Better Use of Demonstrative Evidence Now

Criminal defense lawyers often fail to make use of demonstrative evidence to its potential. However, there is no question but that demonstrative evidence is one of the MOST POWERFUL persuasion tools a criminal defense attorney has in his or her litigation arsenal. Whether your audience is a jury or the judge, the rationale is the same -- "seeing is believing." For the reasons that follow, we must start changing our ways right now -- not tomorrow, next week, next month, or next year.

1. _____ Diminishing Ability To Use Imagination: Back when I was a young lawyer, fresh out of law school, attorneys seemed to depend on their abilities to sway jurors through verbal gymnastics, fancy speeches, and a big dose of charisma during closing arguments. Although

this Clarence Darrow-type approach worked for some lawyers, had they used more demonstrative evidence, their defenses would have been better. But in those times, the general public was, and consequently our jurors were, a different crowd than they are now.

a. Television Then And Now: Much of the change seen in the general public has been brought about by the advancement of television. Twenty years ago, television was largely two-dimensional. That is, the television shows that were being watched tended to be black and white, included such shows as “I Love Lucy,” “The Andy Griffith Show,” and “The Honeymooners,” and were filmed using one or two cameras. By using a limited number of cameras, the viewer was forced to fill in various parts of the show that could not be seen. For example, on the “Andy Griffith Show,” when Opie was being lectured by Andy, the viewer could not always see what Aunt Bee was doing. The viewer created his or her own version of what Aunt Bee was doing in the background. One viewer might have concluded that Aunt Bee was smirking, another that she was laughing, and yet another that she was sympathetic. This required the viewer to use his or her own imagination to fill in the blanks. Now to be sure, most viewers probably came up with about the same conclusion because the structure of the program pushed them in that direction. The important thing was, and is, that the viewers made use of their imaginations.

Today, though, television has become multi-dimensional. Programs are filmed using ten or fifteen cameras giving the viewer a complete perspective of everything that is going on. There is little room, if any room at all, for the viewer to

make use of his or her imagination.

b. Music And The MTV Generation: Not only has television gone hi-tech, but so too has the world of music. I think back to my early years and remember how we listened to music on the radio, on our record players, and ultimately on 8-Track tapes. Occasionally we would get to see the artists perform on television, usually on American Bandstand. There were no music video versions to watch. As a result, each listener used his or her imagination to decide what the song was about -- what the words actually meant. I can recall a time when one of my friends and I had a big disagreement about one of the popular songs by Bread. I thought the lyrics went "and taking them all for granted." He thought the lyrics were "and taking them off of branches." Needless to say, the two of us had extremely different opinions as to what the song actually meant. At least, though, we were using our imaginations.

Today the music industry has gone almost exclusively to the music video. A significant portion of the general public is tuned into MTV or its equivalent. The result is that, as with television, the listeners (viewers) are told what the song means, in vivid color, with stereophonic sound, and from every available camera angle. With nothing left for the imagination, there is little room for disagreement over what the lyrics actually say. Consequently, there seldom are differences of opinion about what a particular song means. Most importantly, though, there presently are very few opportunities for the general public to tap into their imaginations.

c. **The General Public Is Our Jury Pool:** The viewers of modern television and the listeners to modern music and MTV are the same people who serve as our jurors. The younger ones will be our jurors of the future. Because the general public is now being media-trained to avoid using imagination, we, as lawyers, must work harder than we used to when attempting to persuade jurors in the courtroom. One of the best answers to this problem is to use demonstrative evidence to tap into the imaginations and sense impressions of jurors in ways we can't possibly do with just our charm, our charisma, and our fancy words.

2. **Prosecutor's Have Figured It Out:** The second reason we must start using demonstrative evidence right now is that prosecutors have figured out the power and persuasiveness of demonstrative evidence and are actively using it against us. In a recent capital murder case in my home town, a man was on trial for the kidnaping, rape, and ultimate murder of a young woman. He randomly selected her while she was out jogging, abducted her, took her to a remote place in the woods, tied her to a tree, then eventually took her life. The jury did not deliberate long at the guilt/innocence phase, finding the defendant guilty of first degree murder. During the trial, the prosecutor brought in the actual tree to which the victim had been tied. During her penalty phase closing argument, the prosecutor bound herself to the tree and talked from the perspective of the victim in her final moments of life. The jury seemed to hardly hesitate in returning a death sentence. Compelling? Yes. Did it change the outcome? Maybe. Was it persuasive? ABSOLUTELY! And it was persuasive in a way mere words could not have as effectively conveyed. This is what prosecutors are doing in today's litigation arena. We simply cannot wait any longer to at

least even the scales.

Some Creative Suggestions Given Limited Budgets

Some time ago, attorney Jon Sands, Assistant Federal Public Defender from Phoenix, Arizona, and I together presented a lecture on demonstrative evidence. I had been giving a presentation entitled “Demonstrative Evidence: Perspectives, Pointers, and your Pocketbooks.” Jon had been doing one called “Guerilla Warfare Demonstrative Evidence.” We combined these presentations and the following are some excerpts.

Very few of us have the opportunity to represent wealthy clients. As a result, most of us have very limited budgets when it comes to trial preparation. With limited budgets it becomes necessary to find ways to create quality demonstrative evidence that isn't too expensive -- “on the cheap” as Jon would say. Here are some ideas for demonstrative evidence which are inexpensive, easy to make and can be persuasively used in trial:

1. **Diagrams:** Use of diagrams is a wonderful way to get you up out of your seat, away from your podium and close to the jury. In that many jurisdictions require counsel to either remain at counsel table or at a podium, anything you can do to get away from these locales and closer to the jury **must** be exploited. Diagrams are an excellent way to do this. I have found that you can make diagrams for less than ten dollars. If you need a diagram that shows the floor plan of a house or building, use your computer. In the Windows program, under the "Accessories" section you will find a program called "Paintbrush." Through this program you can create small versions of floor plans which can then be enlarged and

mounted at your local print shop. If you have a color printer, you can even use colors which are easily enlarged with a color copier (slightly more expensive).

You will find, though, that the end-product created out of “Paintbrush” is a bit rough around the edges. For about twenty-to-thirty dollars, you can purchase an architectural, home design program for your computer. These programs allow you to lay out floor plans to scale, include furnishings which you can place in various locations, and even allow you to add decks, swing sets, and landscaping. The program I use was a close-out and cost about seven dollars. The end product is extremely professional, is relatively easy and quick to prepare, and is an inexpensive addition to your trial preparation materials which can be used over and over again.

Diagrams also give you the opportunity to have a witness tell his or her story more than once. The more times the witness’ version of the events is told, the more likely the jury is to believe what is said. Use a funnel approach to diagrams. First use one showing a large area, then a second one using a smaller section of the first, then end up with one that focuses on the relevant location (i.e., neighborhood, house plan, room). This gives you and the witness multiple, legitimate opportunities to repeat the witness’ version of the events.

Protect Your Diagrams: Prosecutors will often attempt to undermine your diagrams in a variety of ways. You must do what you can to protect the integrity of your evidence. Prosecutors often mark up our exhibits and leave the exhibits looking like a doodle pad. This is easily avoided through purchasing (at little cost) a sheet of clear plastic which you attach

to your diagram following direct examination. Fasten it down forcing the prosecutor and his or her witnesses to mark on the plastic. Once done, you can remove the plastic and effectively use the diagram in closing without the distraction of the various markings made by the prosecutor and his or her witnesses.

Jon Sands uses PAM vegetable spray on his diagrams. He puts "Velcro" on the diagram where he wants to affix something. He then sprays the diagram with PAM. The magic of this is that you can't write on a diagram sprayed with PAM. The prosecutors usually don't have "Velcro" and when they try and write on the diagram the ink beads up. Even if the prosecutor does have some "Velcro," it doesn't stick to the PAM-covered diagrams either.

2. **Make Use of Art Students:** I have had great success in using local art students to create demonstrative evidence. Most of these people will want little or no money to produce the work product -- usually they are so enamored with being involved in a criminal case that they will work for free. Have them produce their work then have it enlarged and mounted which will cost only a few dollars. The work product is attractive, usable, and uniquely different than anything you will see the prosecutor bring out.

3. **Use Architect And Engineering Students:** As with art students, these students will work cheap or for free. They can build models for you of just about anything. Houses and other buildings can be reproduced to scale. Models are impressive to use in the courtroom and are extremely helpful in demonstrating various points of your case to the jury.

4. Use Color Photocopies: Many of your photographs will be small. The cost of enlarging photographs into bigger photographs is significant. Take your small photos to the copy center and get them to do a color enlargement and mount these on a foam board. An enlargement from a snap shot to an 8 by 10 is about two dollars compared to the approximate fifteen-to-twenty dollars necessary to do a photo-to-photo enlargement. Given today's technology, the quality of photocopy enlargements is quite good. You can also scan the photos into your computer and enlarge them that way. Projecting them onto a screen is also a good idea.

5. Make Slides From Photos: Many of us use Power Point or Corel Presentations. Once you scan your photos, you can create a program to show them in a certain order. Turn down the lights, and show them to the jury. Often times the impact of a slide is much greater than a photograph. Juries love it when you turn down the lights. There is also the added benefit that each juror will be taking in the information at the same time and under the same conditions. Think of what happens when a photograph is passed to the jury. Each juror looks at it separately while the judge is saying 'move along counselor.' The case keeps moving, other evidence which may be important is being offered, and the jury is called upon to look at the photo and also take in everything else. Slides make them do but one thing at a time -- look at the slides.

Using slides can also be justified to the trial judge as a "time-saving" procedure. If the witness has several photos to go through, put them in a single photo album. Have the witness identify each photo then offer the album into evidence. Advise the judge that there is only one set and rather than take the time for each juror to go through the album, you have

made slides of each picture and they are merely copies of the actual exhibit. Then dim the lights, go through the slides one at a time as the witness describes what is being shown.

6. Make Use of Overhead Projector: If you don't have the funds for a computer and a projector to show your pictures via Power Point, go back to basics and find an overhead projector. You can probably find one in an antique store for about twenty dollars. Most copy machines will allow you to reproduce something onto acetate for use on an overhead projector. This is cheap and gives you an opportunity to get a lot of bang for your buck out of various aspects of the trial. I have used this for comparing the testimony of a witness at trial to that which he/she has said on an earlier occasion. Copy both, juxtaposition the two and put them up on the overhead. Show the jury how the two differ. The fact that a witness has blown hot and cold is brought home much more effectively if you show them as opposed to just telling them. During closing use the witness' plea agreement comparing it to how he/she testified about having no expectations from providing testimony. You might want to put the relevant jury instructions on credibility up if you plan to talk with the jury about a particular witness' testimony. Many court reporters have the ability to down-load the daily testimony onto disk. You can then put it on your computer, print it out, and copy it to an overhead for use during cross examination, argument to the court, or closing argument to the jury.

7. Paint Chips: Paint chips are the sample colors you get from your paint store. Wal-Mart has them, K-Mart has them, they are easy to get hold of and they are free. The

value of the paint chip is found in cross examination of an occurrence witness. Your client was apprehended driving a blue car. The witness who saw the incident says the bad guy was driving a blue car. On its face, and with nothing more, you have a problem here. By using paint chips you can approach the witness and say:

Mrs. Smith, you said the car you saw was blue. Was it closer to this blue or to this blue?

By doing this, and you can do it over and over using various blue colors, you force the witness to select between options and make choices. This can create the appearance of uncertainty. It certainly makes the point that “blue” can mean a lot of things. The witness whose testimony was damaging is softened a bit. Paint chips can also be used with skin tones. For example:

Officer Jones, the store clerk told you the robber was a black man. Did you understand the clerk to mean his skin tone was closer to this color or to this color...

When you do the skin tone, paint chip cross with your police officer have him or her come down in front of the jury with his/her back to the defendant. When you start using the paint chips, nine times out of ten the police officer will peak over his or her shoulder to look at the defendant. This is a wonderful time to say “no cheating now.” The point is brought home that even the officer isn’t sure, and the point is brought home demonstratively, powerfully, and persuasively. Even if the officer does not sneak a peak, you can still say to the officer “now don’t peek.”

8. Modern Technology Isn't Always Good: One of the neatest contraptions to come on the market is the laser pointer. If you are in a jurisdiction where you are required to remain by a podium or at counsel table, laser pointers give the judge a basis to prevent you from moving up towards the jury because it can be used from across the room. The wooden pointer, on the other hand, puts you in a position where you must be allowed to move to the diagram, which if strategically placed by you near the jury, gives you the opportunity to move around in the courtroom. In addition, computers can crash. You must have a back-up plan in the event your computer refuses to cooperate with you in the courtroom.

Non-Evidence Demonstrative Evidence

By defining "demonstrative evidence" as I have suggested, anything you do in the courtroom which is calculated to demonstrate something, even if an exhibit sticker is never affixed, or even if it is not formally offered, is necessarily included. At a very basic level, non-evidence demonstrative evidence includes how you dress, how you act, react, or respond, and your overall attitude. However, the concept of non-evidence demonstrative evidence goes much farther, as illustrated by the following ideas and pointers.

1. What's Good For The Goose...: In almost every criminal trial, the prosecutor will ask a witness something along these lines:

- Mr. Jones, do you see the person who robbed you in the courtroom?
- Would you describe for the jury what he is wearing?
- Your Honor, could the record reflect that the witness has identified the defendant.

Maybe I'm just getting tired of hearing this line of questioning. However, it occurred to me that "what's good for the goose is good for the gander." Now whenever I have a snitch on the stand who I am cross examining, I include the following line of questioning:

- Sluggo, you met with the district attorney to cut a deal.
- That district attorney is in the courtroom.
- Describe for the jury what that district attorney is wearing.
- Your Honor, I ask that the record reflect that Sluggo has identified prosecutor Jonathon Johanson, this man right here, as being the person who cut the deal with him.

This process is intended to do two things. First, continue to establish Sluggo's "yuck" factor. Second, spread Sluggo's "yuck" factor onto the prosecutor. There is also the additional benefit that doing this is incredibly fun.

2. Observe Witness Demeanor: Through discovery or otherwise, you will likely know the probable substance of **what** a witness will say on the stand. However, until you actually get the witness on the stand, you will likely have little idea as to **how** the witness will testify. By this I mean that witness demeanor is something you will have to analyze quickly. Sometimes you can find a gem and use it demonstratively during your cross. For example, in a sex offense case where you suspect the child is being coached by his or her parent, when the child is testifying, position yourself between the child and the parent/coach. You will find that the child and/or the parent will move to maintain eye contact. Keep repositioning yourself and force them to do this over and over again. The jury will catch on and before long the jury will look like the gallery at a tennis match -- left, right, left, right,

turning first to the child and then to the parent/coach. The point is brought home that the child is being coached. However, nowhere in the trial transcript will that which was so persuasive be revealed.

3. Make Quantity Testimony Visual: Find ways to make important quantities visual.

a. Quantity and Liquids: We often have witnesses testify who admit, either on direct or on cross, that they had been drinking at the time they supposedly observed that to which they are now testifying. If the witness says he or she had consumed about a case of beer that night, bring in a case of beer, count out the cans or bottles with the witness in front of the jury. Use the cans demonstratively in closing argument to again bring home the point that the witnesses, by his or her own admission, had “this much alcohol to drink.” The impact is much greater if you show quantities as opposed to just talk about them.

b. Quantity and Size: Sometimes there is an issue in our case about the size of something. For example, if your client is charged with breaking into a pinball machine and stealing \$125.00, try and establish through the various witnesses that the defendant, who they say they saw leaving the area, didn't have anything in his hands, had no bulges under his shirt, his pockets or his clothing. Then go to the bank and get \$125.00 worth of quarters. Show the jury the size of that much money. Thump it down on counsel table demonstrating its weight. The bottom line then becomes it could not have

been your client or there would have been some evidence of this large, heavy amount of money in his possession.

c. Lack of Quantity in Rape Cases: In some rape cases, your defense will be, in essence, this was not rape it was regret. Establish through the investigating officers that they examined every article of the victim's clothing. Show that the detailed investigation, using microscopes and magnifying glasses, revealed that not a thread was loose, not a button torn free, not a zipper out of line. Use the physician to show that no evidence of trauma was found. Make two boxes to use in closing argument. Label one "Regret" and the other "Rape." With the jury, go through each item of clothing, as well as the other physical evidence. Make sure to point out that each piece of evidence could support the conclusion that sex occurred but that nothing about the evidence supports the conclusion that there was any force used or rape. When you have finished talking with the jurors about each piece of evidence, place each item in the box marked "Regret." You are creating a full box marked "Regret" versus an empty box marked "Rape" thereby showing in a quantitative way that all of the evidence points to innocence. Attorney Sheila Lewis with the New Mexico Public Defender's Office in Santa Fe tells me that she used this idea in one of her cases and when she mistakenly started to place an item of evidence in the "Rape" box, one of the jurors corrected her.

4. Aural Demonstrative Evidence: Getting jurors to listen to things other than mere testimony can also be particularly persuasive. Again using an example provided by Jon Sands, in a sexual assault case, Jon subpoenaed the bed on which the sexual assault had allegedly occurred. His investigation had revealed that many people were at home when this supposedly happened, were each in close proximity to the bed, and the bed had extremely squeaky springs. He introduced the bed into evidence then made his closing argument to the jury while sitting on the bed, bouncing up and down, making the bed squeak loudly. Jon's point was brought home perfectly -- listen to all of the noise that must have been made. Had a sexual assault occurred, the squeaking bed would have been heard by someone else in the house. No one heard it therefore it did not happen.

The aural senses of jurors can also be tapped into by using BB's and a metal bowl or galvanized pail. I use this in cases which center on fingerprints. We have all had cases like this where our client has been identified as the culprit but the identification is somewhat shaky. The strongest evidence against the defendant is that his fingerprint is found at the crime scene. In that the science of fingerprints is based upon similarities, not differences, and the examiners generally quit once they have found anywhere from six to twelve points of identification, there remains some 150 points of identification that are never discussed by the "expert." In closing argument you can ask the jurors to close their eyes and listen.

- This case boils down to whether this fingerprint is in fact the defendant's.

- But we know so little about the print. All we know is that it is supposedly the same in six places. (Slowly drop six BB's into the pail, one at a time).

- But there are some two-hundred places we know nothing about. (Slowly pour 150 BB's into the pail).

- I don't know how you define reasonable doubt, but I'd say you just heard it.

The impact of the differences in the two sounds is incredible. You can use the BB's in the pail in any situation where you have a large quantity versus a small quantity. Experiment with different types of pails. Some make better sounds than others. Although I started using BB's, I now use steel shot pellets which you can get in any sporting goods store. Steel shot is heavier and makes a louder noise when the pellets hit the pail.

5. Humanize Your Client: Find ways to make jurors conclude that the defendant is a real person, possessed of life, emotion, and feelings. Especially in death cases, it is imperative to do more than just have witnesses tell about their past experiences with the defendant. When the football coach testifies that the defendant was on his team, find and use a photograph of the defendant in uniform. If he got a trophy, find it and use it at trial. Perhaps the best example of humanizing the defendant comes from Attorney Bryan Stevenson who tells a true story that goes something like this:

In a little town in the South, a man was on trial for his life. The odds were already stacked against him for he was black and his victim was a young white woman. The evidence of guilt was strong and the jury didn't take long to convict him of first degree murder. At the sentencing hearing the defense called the man's third grade teacher. The teacher was an elderly, white-haired woman, having taught the young man some twenty-years before. She took the stand and told the jury how she had been impressed with the defendant when he was her student. She described how he had promise but that she instinctively knew it would never be achieved for he had come from a family that hadn't placed much emphasis on education. She recalled how one day she had taught his class how to make Gods eyes -- two sticks crossed over around which yarn of different colors is woven. A few days later, on her way to her car after school, she heard the pitter patter of little feet running after her and felt a tug on

her skirt. She turned around and saw it was the young defendant. In his hand was a Gods eye -- one he had made for her in his home, at his kitchen table, using his yarn. She described to the jury how this had touched her deeply. Then she reached into her pocketbook, pulled out the Gods eye and said "I have kept it with me ever since."

The teacher's testimony by itself was powerful. However, by bringing out the Gods eye and showing it to the jury, an even more powerful and persuasive message was conveyed to the jury -- the sincerity of this woman became unquestionable. That the young man had goodness somewhere inside him was established. No exhibit sticker was affixed to the Gods eye but it was probably the most powerful and persuasive piece of evidence presented by the defense. I'm told the jury spared this man's life.

CONCLUSION

When it comes to demonstrative evidence, the sky is the limit. Not every technique of demonstrative evidence has been discovered and used, and the techniques that have been used can always be done differently and better.. Evidence is important because it means something. Virtually all evidence can present more than one meaning. Constantly evaluate the evidence in your case to see not only how it might be perceived by the prosecution. If other meanings are helpful to your case, create ways to demonstrate those to the jury. Don't be confined to "the same old - same old," what other attorneys regularly do, or what you comfortably feel will be accepted without controversy. Be bold and creative -- make better use of that incredibly persuasive weapon in your litigation arsenal -- demonstrative evidence.

