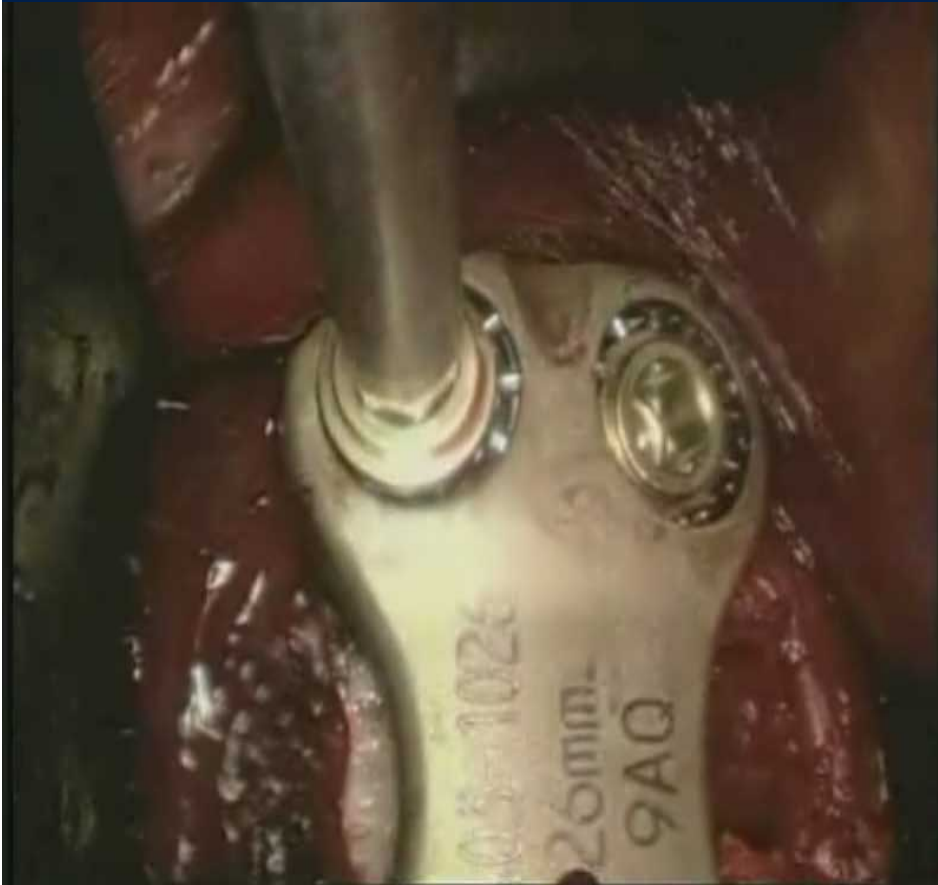


Demonstrative Evidence

Hilda C. Galvan

Jones Day

A Picture is Worth A Thousand Words



Types of Evidence

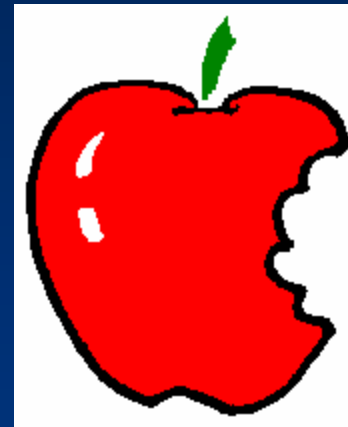
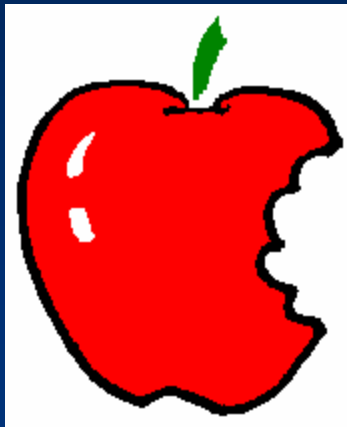
- Testimonial Evidence
- Documentary evidence
- Real evidence
 - A physical part or component of the controversy itself, *but not* photographs or other demonstrative images of that component. (The Accused Product/Prior Art System)
- Demonstrative Evidence
 - Derivative evidence that is designed to clarify one or more of the other three types of evidence.
 - Photos, videos, models, computer animations of the Accused Product/Prior Art System

Purpose of Demonstrative Evidence

- To clarify, simplify, explain and illustrate previously admitted evidence.

Two Bites at the Apple

- Admissible evidence
- Not Admissible Evidence



“Demonstrative Purposes Only”

Admissibility

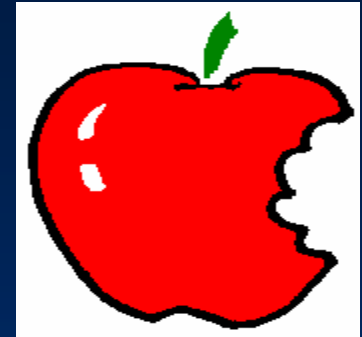
- Did you prepare or direct the preparation?
- Briefly describe your preparation of the exhibit
- Is it accurate (or substantially similar, or drawn to scale or does it represent or show what it purports to represent?)
 - Yes, except for (point out discrepancies & inaccuracies)
- Will this exhibit **assist** your explanation of the subject event?
- Will this exhibit **clarify** the issues for the jury?

Objections to Admissibility

- Confuse and mislead the jury
 - Rather than assist and simplify
- Other standard objections:
 - Unduly prejudicial
 - Cumulative, Inaccurate, Unreliable
 - No proper foundation
 - Hearsay, Incorporates inadmissible hearsay

For Demonstrative Purposes Only

- Objection-Exhibit is Inaccurate.



- Since the exhibit will aid the witness' explanation and will clarify matters for the jury, I ask that the court permit me to use the exhibit **for demonstrative purposes only**, with the clear understanding that no one is claiming that it is accurate.

Types of Demonstrative Evidence & Admissibility Standard

- Models
- Charts, Graphs & Diagrams
- Documents
- Photographs, Slides, Films & Videos
- Audiotapes
- Computer-Generated Materials
- Live Demonstrations

Models

- Foundation Requirement:
 - “Substantial similarity”
- Typical Objections:
 - Evidence is cumulative
 - Evidence is inaccurate
 - Evidence is unreliable
 - Evidence is intentionally misleading

Charts, Graphs & Diagrams

- Foundation Requirement:
 - Reasonably Accurate and Correct
 - Need not be drawn to scale
 - Discrepancies should be explained to the jury
- Typical Objections:
 - Evidence will confuse or mislead the jury
 - Evidence is unduly prejudicial
 - Evidence is cumbersome and time-consuming
 - Evidence is cumulative
 - Evidence is inaccurate
 - Evidence is unreliable
 - Evidence is intentionally misleading

Photographs

- Foundation Requirement:
 - Reasonably Accurate and Correct
- Typical Objections:
 - Evidence will confuse or mislead the jury
 - Evidence is unduly prejudicial
 - Evidence is cumbersome and time-consuming
 - Evidence is cumulative
 - Evidence is inaccurate
 - Evidence is unreliable
 - Evidence is intentionally misleading

Computer-Generated Materials

- Computer-Generated Animations
- Computer-Generated Simulations
- Computer-Generated Reconstructions

Simulations v. Reconstructions

- Computer-Generated Simulations
 - Computer is programmed to model or mimic what the expert opines the accused device/prior art system are doing
- Computer-Generated Reconstructions
 - An actual recreation of what happened.

Live Demonstrations

- Foundation Requirements:
 - “Substantially similar” conditions
 - Performed by a qualified person
 - Materials used are working properly & of the types which should be used
 - Any substances which are tested are properly identified

When Demonstrative Evidence May Be Used?

- *Markman* hearings
- Summary Judgment Hearings
- Opening Statement
- Direct or Cross Examination
- Closing Argument

Who May Create/Use Demonstrative Evidence?

- Fact witness
- Expert witness
- Trial counsel

Must Demonstrative Evidence Be Produced to Opposing Counsel Before Use at Hearing or Trial?

- It depends on a number of factors, rules and practices.
- If the demonstrative evidence originates from or supports a testifying expert's opinion, an obligation to produce the evidence may lie under F.R. Civ. P. 26(a)(2)(B) (“any exhibits to be used as a summary of or support for the opinions”).
- Dependent upon local rule provision or local practice, a final pretrial order identification of trial exhibits may or may not include identification of demonstrative evidence.
- If there is an intention to use a demonstrative exhibit only during cross examination, there may be no obligation to produce the exhibit prior to its use during cross examination, again dependent on local rule provision or local practice.

Demonstrative Evidence Useful In Trying a Patent Infringement Case

- Outlines/lists of presentation, argument, precedential points/event lists
- Color-coded claim charts
- Computer Animations/Simulations
- Timelines, including interactive and multi-strand timelines
- Overlays/progressive exhibits
- Models
- Jury Notebooks
- Story boards/cartoons/caricatures of witnesses

Claim charts

Link deleted

Computer Animations & Simulations

Link deleted

Timelines

- Interactive timelines
- Multiple-strand timelines

Link Deleted

Other Demonstrative Exhibits

- Overlays/progressive exhibits
- Jury Notebooks
- Story boards/cartoons/caricatures of witnesses