

DEMONSTRATIVE EVIDENCE (ON A BUDGET)

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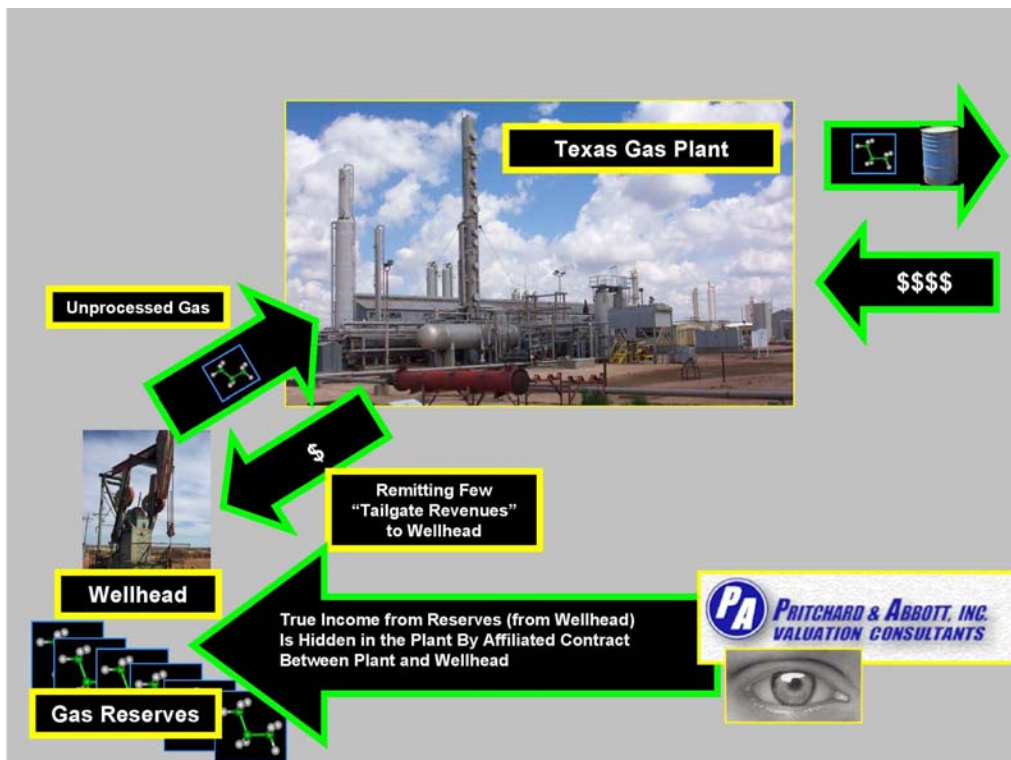
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I. Use the “Budget” to Your Advantage: Making Your Own Demonstratives Means Improved Advocacy.

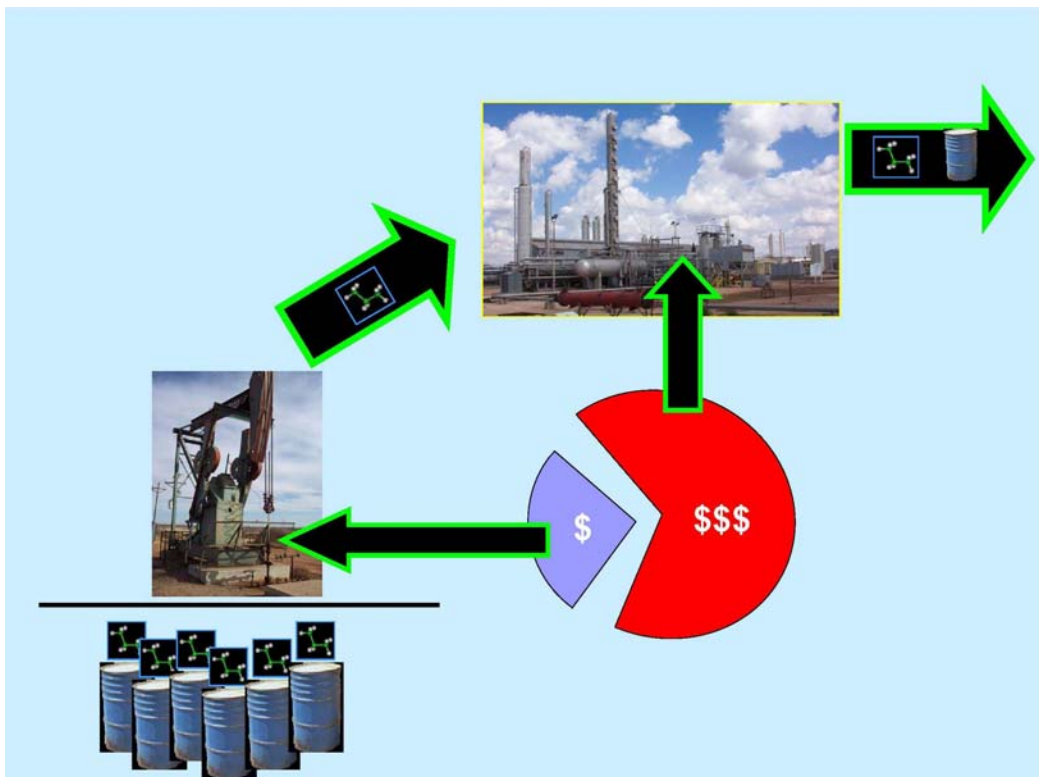
I create and use demonstrative evidence on a budget and actively encourage my colleagues to do likewise. The “budget” restraint often results in superior demonstratives and certainly produces a better advocate for them. Working on a budget typically means working largely on your own – so that you personally handle, feel and create the demonstratives. The process will make you a better advocate for what you want to explain. Consider my creating this demonstrative:



I combined the photos with the other graphics in this slide. No one but me researched this slide's legal (taxation) point. My advocacy – and only my advocacy – appears in this slide. I own it, and I am a better advocate because I made it. I – more than any attorney in the room – am the best prepared to explain the slide's concepts, piece by piece. If a judge refuses to let me show this slide at trial, the process of preparing it has trained me to explain its concepts without actually showing the slide. (Note that the slide is probably too busy – certainly for a jury. But it would be effective for a hearing with a judge and taxation official.) I would not be as strong an advocate for the slide's contents – but for my personal involvement in preparing this slide. Make your own demonstratives.

Working on a budget generally means simpler demonstratives – combining just a few photos, document images, or physical materials. The resulting demonstratives are less susceptible to objection as irrelevant and/or prejudicial under the Rules of Evidence. Many well-polished and expensive demonstratives – like high-quality computer-generated motion pictures – never see the jury box because they are too advanced and too potentially prejudicial/confusing. Simpler usually means more admissible. Go simple.

Simpler certainly means more understandable. Consider this slide:



It makes the same point (about ad valorem taxation of gas reserves) as the previous slide – but with less text and less clutter. When I explain the slide, I won't be competing with my own slide for the audience's attention. Each image in the slide will appear separately, building what you see above piece by piece. The audience will focus on my spoken words, occasionally glancing at the slide in order to conceptualize what I'm explaining – with no temptation to read the slide while I'm talking.

Finally, the budget approach to demonstratives may be your only option. Perhaps your hourly client doesn't want to pay for expensive demonstratives. Or, perhaps you're on a contingency fee and can't/won't spend the money for a graphics firm. If the budget approach is your only option, it's a good option to be stuck with.

II. Why Are You Using Demonstratives?

Your answer could be (a) I want to be a better advocate and have some fun by livening up the hearing/trial; (b) I'm afraid my opponent will have demonstratives, so I'm making them just in case; or (c) demonstratives are expected nowadays (certainly at trial).

Hopefully, "(a)" more so than "(b)" motivates you. If so, your demonstratives will be stronger. But the fear of your opponent's demonstratives is good enough reason to make your own. If you expect your opponent to have demonstratives, you absolutely should make your own, so that you'll be as strong an advocate as your opponent. All things being equal, the attorney with the best facts usually wins the jury trial, and the attorney with the better case law usually wins the hearing. (Face it: even great lawyers usually can't get around terrible facts or terrible case law.) But in close cases, good advocacy prevails over poor advocacy. As explained above, the preparation of demonstratives – combined with your practicing with them – makes you a much better advocate, thereby improving your chances of victory.

"(c)" – that is, demonstratives are expected – is certainly correct for all but the simplest and shortest trials. Demonstratives are becoming expected in lengthy hearings and certainly are expected at most trials. Jurors – and not just Gen Xers and Yers¹ – expect to see them, generally want to see them, and are disappointed when they don't see them. Frankly, many jurors *need* to see them in order to fully understand your case, particularly difficult or abstract concepts like timelines, mathematical/accounting issues, and causation issues. Judges presiding over lengthy hearings often need to see them for the same reasons.

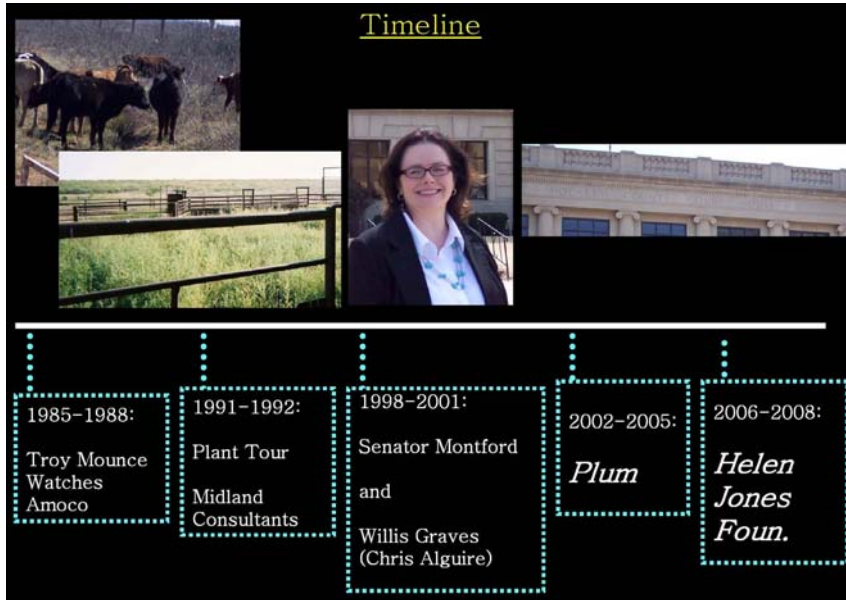
Let's meditate on "(a)" a little further: you're making demonstratives because you want to be a stronger advocate with a more lively presentation. When this reason, which is the best reason, motivates you to make demonstratives, you must decide what you wish to accomplish. I generally am aiming for one of these four objectives:

- (i) explaining technical, difficult or abstract concepts (*e.g.*, timelines, mathematical/accounting issues, and causation issues)
- (ii) creating a visceral reaction in my audience (*e.g.*, day in the life videos)

¹ Jury consultants and leading trial lawyers frequently cite Gen Xers and Yers as a primary reason for using demonstratives. The argument goes that in order for them to understand abstract concepts these younger jurors need the visual stimulation that their upbringing has bred in them. That may be the case, but my focus-group and jury-trial experience has taught me that older jurors benefit just as well as Xers and Yers from demonstrative evidence.

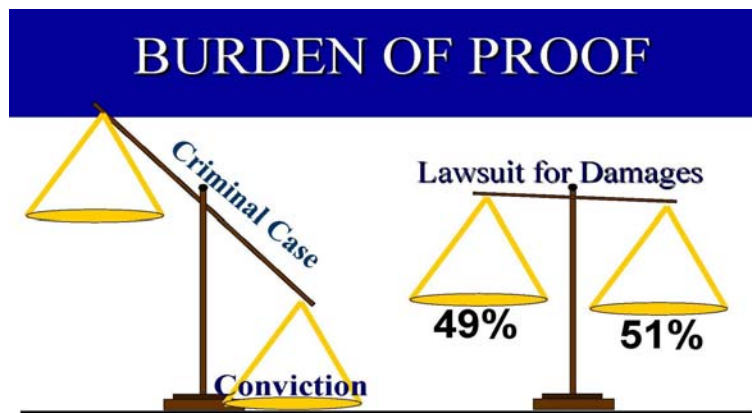
- (iii) entertainment or change of pace (to prevent boredom)
- (iv) mnemonics: using an image to fix a simple, important concept in the audience's memory

Here's an "(i)" demonstrative, with which I explained a complex 25-year timeline:



Note that each image, with text, would appear in order from left to right. I'd show the image and text, explain it thoroughly, and then show the next image and text. Don't show numerous images at one time, and the less images and less text shown collectively, the better.

Often jurors don't truly understand the relatively lax burden of proof in a civil case. A conceptual image can help them with the somewhat abstract expressions "preponderance of the evidence" and "more likely than not." But be careful not to overuse the image below – which is an example of another "(i)" demonstrative – lest you appear to be seeking the jury's acceptance of a weak case (*i.e.*, one that truly needs a lax burden of proof just to get by):



Here's an example of "(ii)" – a video-taped deposition of kind 96 year old man, facing numerous, intrusive, and suggestive questions by an aggressive opposing counsel, while his kind daughter helps him to hear and answer the questions:



The deposition testimony, of course, is evidence. The demonstrative is the appearance of the witnesses giving the testimony. The visceral reaction? The jury wonders why this older plaintiff has to go through such excruciating and, at times, pointless questions for a relatively small amount in controversy. The jury may punish the questioning attorney's client accordingly. Playing a video-taped deposition is general procedure in Texas state trials, as well as many other state trials. Federal courts, on the other hand, generally do not admit depositions when the witness is "present and testifying." *See* FRCP 32(b).

Below is another demonstrative that draws a visceral reaction: a photo from a quality camera taken by an expert witness on lighting-nuisance standards and city ordinances. Provided you and your expert can convince the jury that the photo is accurate (and the one below is accurate), you will readily prove that the lights at issue violate applicable city ordinances:

