

HELPING THE JURY: AN ARGUMENT FOR SENDING SUMMARY DEMONSTRATIVE EVIDENCE INTO THE JURY ROOM

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When it comes to allowing evidence into jury deliberations, courts have been inconsistent in the way they have treated demonstrative evidence. Some courts require that demonstratives be admitted into evidence and therefore must also go to the jury room during deliberations; others will not allow demonstratives to be admitted into evidence, and therefore prohibit such evidence from going to the jury. In between are courts in which demonstrative evidence may or may not be admitted into evidence and may or may not be allowed into the jury room. In this article the ways in which courts have treated demonstrative evidence is reviewed and evaluated from the perspective of treating jurors as active information-processing trial participants. The author argues that in line with other memory aids that have been increasingly made available to jurors in recent years, such as note-taking, questions of witnesses, plain English instructions, and written jury instructions, three specific types of demonstrative evidence—witness summaries, attorney summaries and requests for relief—should be given to juries for use in deliberations.

Introduction

Technological advances over the last 20 years have changed the landscape of demonstrative evidence presented at trial. Attorneys and witnesses often use elaborate PowerPoint

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presentations or detailed maps and charts, or display professionally prepared poster boards containing important information, including requests for damages. This increased use of demonstratives is aimed at presenting information more clearly to the jury and helping jurors understand the information presented.

Jurors who see demonstratives during trial may reasonably anticipate that they will also be able to consult those maps, charts, boards or other demonstrations during deliberations. Yet they may be forced to rely only on their recollections of the summary material presented in the demonstratives.

In this article I argue that three types of demonstrative evidence, which I refer to as summary demonstrative evidence, can assist the jury during deliberations and should be sent to the jury room.

The three types of summary demonstrative evidence I discuss are: (1) summary charts, diagrams, PowerPoint presentations or other demonstratives prepared by witnesses and shown to the jury to illustrate and explain the content of their testimony; (2) similar demonstratives presented by an attorney (usually in opening statement or closing argument) to illustrate and explain the evidence; and (3) summary charts explaining exactly what relief is being requested.¹ While there are many different types of demonstrative evidence, I argue that these three categories of demonstratives may be particularly useful to juries during deliberations. Because these types of demonstrative evidence are generally not admitted into evidence at trial they are rarely sent to the jury room. However, demonstratives of this type provide condensed information that can help jurors accurately recall evidence. I propose that courts send all three types of summary demonstratives to the jury room during deliberations using standards and procedures that maximize the benefits of the demonstratives while minimizing possible prejudicial effects.

Courts have reached contradictory conclusions about the three categories of summary demonstrative evidence. For example, the United States Court of Appeals for the Tenth Circuit

1. For ease of reference, I will refer to these types of evidence as witness summaries, attorney summaries, and relief requests.

held that summaries prepared by an expert were “well nigh indispensable to the understanding of a long and complicated set of facts.”² By contrast, the Seventh Circuit reversed a lower court’s decision to send a witness’s memoranda to the jury, holding that the witness’s reports were a “neat condensation of the government’s whole case against the defendant. The government’s witnesses in effect accompanied the jury to the jury room.”³

Some courts allow juries to view attorney summaries of witness testimony.⁴ Other courts conclude that there is no reason to send summaries of witnesses’ testimony to the jury room because they are only a reflection of testimony already presented orally.⁵

Finally, when an attorney presents demonstrative exhibits, such as charts explaining damage calculations, some courts have allowed the charts to be sent to the jury room,⁶ others have refused to do so.⁷

The primary argument against sending these three types of summary demonstrative evidence to the jury room is that they are overly repetitive and, therefore, their admission is prevented by the rules of evidence. Some might argue that summary demonstrative evidence falls under Rule 403’s exclusion of “needless presentation of cumulative evidence.”⁸ However, summary demonstratives are not needless if they help condense

2. *Conford v. United States*, 336 F.2d 285, 287 (10th Cir. 1964).

3. *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957). *Accord* *United States v. Pendas-Martinez*, 845 F.2d 938, 945 (11th Cir. 1988); *United States v. Brown*, 451 F.2d 1231 (5th Cir. 1971).

4. *Hobbs v. Harken*, 969 S.W.2d 318 (Mo. Ct. App. 1998).

5. *Douglas-Hanson Co., Inc. v. BF Goodrich Co.*, 598 N.W.2d 262 (Wis. Ct. App. 1999).

6. *Allison v. Stalter*, 621 N.E.2d 977 (Ill. App. Ct. 1993). In *Allison* plaintiff’s counsel prepared a memorandum detailing and providing numbers for the plaintiff’s claim for damages in an auto collision. The Illinois Appeals Court upheld the lower court’s decision to send the memorandum to the jury room during deliberations because the decision was “within the court’s discretion” and the memorandum “was based on evidence presented at trial. . . which the jury was free to accept or reject.” *Id.* at 980.

7. *Lester v. Sayles*, 850 S.W.2d 858 (Mo. 1993). In *Lester*, a personal injury case, the court determined that the calculations on a chart were “nothing more than the opinions and argument of counsel.” *Id.* at 864. The court reasoned the jury might focus on counsel’s argument in the chart and might “mistake the opinions and argument for facts proven in evidence.” *Id.* The court concluded it was a reversible error to allow the jury to view the exhibit during deliberations. *Id.*

8. FED. R. EVID. 403.

and clarify complex evidence. If the evidence is complex, summary demonstrative evidence can actually help prevent confusion of the issues.⁹ The rules of evidence leave the decision whether to allow the evidence into the jury room in the judge's discretion.

The remainder of this article is divided into four sections. Section I provides background describing demonstrative evidence and the many different categories of demonstrative aids. Section II reviews arguments raised by courts for not sending demonstrative evidence to the jury. Section III discusses psychological research about information processing, endorsing the view that jurors are active information processors,¹⁰ and presents arguments for sending demonstrative evidence to the jury room. Section IV presents practical suggestions to guide courts in sending demonstrative evidence to the jury room. I conclude that allowing these three types of summary demonstrative evidence into the jury room enhances jury comprehension of trial information and contributes to the fairness of jury trials.

I. What Is Demonstrative Evidence and When Is It Allowed into the Jury Room?

Demonstrative evidence consists of all things that are not testimonial or documentary evidence.¹¹ Robert Brian and Daniel Broderick describe demonstrative evidence as “any dis-

9. *Id.* (stating, in part, that “Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . confusion of the issues, or misleading the jury . . . or needless presentation of cumulative evidence.”) If summary demonstrative evidence is relevant, Rule 403 cannot prevent its admission as long as the evidence's probative value is to aid the jury in correctly understanding the facts presented at trial by preventing confusion or misleading of the jury.

10. See B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 *IND. L.J.* 1229, 1247-61 (1993); Vicki L. Smith, *How Jurors Make Decisions: The Value of Trial Innovations*, in *JURY TRIAL INNOVATIONS* 8 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 2d ed. 2006).

11. See *McCORMICK ON EVIDENCE* § 212 (John W. Strong ed., West Pub. 5th ed. 1999) [hereinafter *McCORMICK*]. McCormick describes demonstrative evidence as things such as weapons, writing, apparel, and distinguishes those things from assertions of witnesses about things. *Id.* As McCormick states, “[demonstrative] evidence includes all phenomena which can convey a relevant firsthand sense impression to the trier of fact, as opposed to those which serve merely to report secondhand the sense impressions of others.” *Id.* Here McCormick is cited to demonstrate how confusing the definition of demonstrative evidence can be.

play that is principally used to illustrate or explain other testimonial, documentary, or real proof, or a judicially noticed fact.”¹² Thus, demonstrative evidence includes all visual aids presented during trial. Brian and Broderick identify six types of common demonstrative evidence: (1) in-court demonstrations, re-creations, or experiments; (2) models and other tangible objects; (3) charts, diagrams and maps; (4) photographs, movies, and videotapes; (5) jury views; and (6) computer-dependent animations and simulations.¹³ The demonstrative evidence that I focus on here generally fits in the charts, diagrams, and maps category defined by Brian and Broderick.¹⁴

Substantive evidence is relevant if it tends to prove or disprove the probable existence of a fact.¹⁵ Demonstrative evidence makes substantive evidence more understandable, and thereby heightens the perceived effect of substantive proof.¹⁶ Demonstrative evidence is relevant in a derivative sense. For example, in a law suit involving a car accident, a map of the intersection where the accident occurred, detailing the location of items such as parked cars, traffic signals, and trees is demonstrative evidence. The substantive evidence is the actual intersection where the accident occurred. The map is demonstrative. It has a derivative relationship that makes the substantive evidence more understandable. The map helps the jurors visualize the accident scene and better understand the substantive evidence presented.

A. Demonstrative Evidence Offered into Evidence

Attorneys face a decision under the rules of evidence when using demonstrative aids. They must decide whether to proffer the aid without submitting it into evidence or to propose that it be admitted. This decision can have implications for whether the aid will be allowed to go to the jury room.

12. See Robert D. Brian & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 968-69 (1992). Brian and Broderick argue that McCormick mischaracterizes the category of demonstrative evidence. *Id.* at 1005.

13. See *id.* at 969.

14. *Id.* at 969-70.

15. *Id.* at 975. See also FED. R. EVID. 403.

16. See Brian, *supra* note 12, at 972.

Demonstrative evidence must first be relevant in order to be used.¹⁷ Relevant evidence is generally admissible,¹⁸ but demonstrative evidence must also be properly authenticated before it may be used.¹⁹ The decision whether or not to admit demonstrative evidence, even when properly introduced, remains within the judge's discretion.²⁰ Once admitted, the demonstrative evidence may be used by the attorney during the course of trial to clarify and illuminate other pieces of evidence.

In the case of summary demonstrative evidence such as diagrams and charts, the party offering it must show that it fairly summarizes the substantive evidence. For example, in *State v. Evans*, a murder case, the prosecution prepared two exhibits summarizing the testimony of various witnesses.²¹ The state appellate court observed that “[i]llustrative evidence is appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on the accuracy of the evidence.”²² Recognizing that summaries can be powerful persuasive tools, the court provided the following rule: “the court must make certain that the summary is based upon, and fairly represents, competent evidence already before the jury. . . . [T]he chart must be a substantially accurate summary of evidence properly admitted.”²³ The court further stated that the trial court fulfills its duty of ensuring that charts are substantially accurate by “allowing the defense full opportunity to object to any portions of the summary chart before it is seen by the jury.”²⁴ The court concluded that “[t]he jury is . . . free to judge the worth and weight of the evidence summarized in the

17. FED. R. EVID. 401 (“evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”).

18. FED. R. EVID. 402 (With a few exceptions, “[a]ll relevant evidence is admissible” and “[e]vidence which is not relevant is not admissible.”).

19. See FED. R. EVID. 901.

20. See *People v. Williams*, 655 N.E.2d 997, 1001 (Ill. App. Ct. 1995); *Ware v. State*, 702 A.2d 699, 721 (Md. 1997); *Clark v. Cantrell*, 529 S.E.2d 528 (S.C. 2000); *State v. Allison*, No. 01-C-019112CR00363, 1992 WL 217740 (Tenn. Crim. App. 1992); *Vollbaum v. State*, 833 S.W.2d 652, 659 (Tex. App. 1992).

21. *State v. Evans*, No. 376614-4-I, 1998 WL 184909 (Wash. Ct. App. April 20, 1998).

22. See *id.* at *3.

23. See *id.* at *4.

24. *Id.*

chart” once a trial court has determined the demonstrative evidence is admissible.²⁵

The Federal Rules of Evidence allow attorneys to present and judges to admit into evidence summary information in the form of a chart, a written summary, or a calculation, if the information comes from writings, recordings, or photographs that are so voluminous that it would be impractical for the attorney to attempt to present all of the information in court.²⁶ This rule is limited to a narrow category of voluminous evidence and therefore will not likely cover the types of summary demonstrative evidence discussed here. However, with implementation of appropriate safeguards, the judge has discretion to send such evidence to the jury room during deliberations.²⁷

Arguing that courts should admit demonstrative evidence, Brian and Broderick make a compelling argument for changing the wording of Rule 401.²⁸ Such a change would make it easier to admit demonstrative evidence and, thereby send it to the jury room during deliberations.²⁹ However, as Brian and Broderick note, the practice of courts is to assume the relevance of demonstratives under Rule 401 and rule on their admissibility under Rule 403.³⁰ As applied in practice, the current rules give judges discretion to admit demonstrative evidence and send it to the jury room.

B. Sending Demonstrative Evidence to the Jury Room

Many courts treat demonstrative evidence as substantive and require it to be admitted into evidence before showing it to the jury. Other courts allow attorneys to use demonstrations during testimony or arguments without requiring it to be ad-

25. *See id.*

26. FED. R. EVID. 1006 (stating that “the contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.”) The Advisory Committee’s note points out that “[t]he admission of summaries of voluminous books, records, or documents offers the only practicable means of making [the] content available to judge and jury.” FED. R. EVID. 1006, Advisory Committee’s Note. The implicit assumption is that summaries are only appropriate for admission when the information they summarize is so voluminous as to make it unable to be presented reasonably by an attorney at trial.

27. *See infra* Section IV.D.

28. *See* Brian, *supra* note 12, at 1018-1026.

29. *See id.*

30. *See id.* at 976 n.64.

mitted into evidence.³¹ The theory behind this more relaxed standard is that demonstratives, such as charts, graphs, and summaries, are useful for communicating with a jury, whether or not they are admitted into evidence, and attorneys should be allowed to use them.³² However, when courts allow the use of demonstratives not in evidence, they hesitate to allow them without restrictions. Some courts require that the jury be admonished that the demonstrative exhibits are merely for demonstrative purposes and should not be considered evidence in any sense.³³ In courts following this approach, demonstrative evidence is not admitted and, hence, might not go to the jury room.

Jurisdictions vary in their willingness to send demonstrative evidence into the jury room during deliberations. In general, items that have been properly admitted into evidence can be taken into the jury room.³⁴ Some jurisdictions even go a step further by requiring trial judges to send items admitted into evidence to the jury room.³⁵ But in general, the decision whether or not to send items to the jury room is left to the discretion of the trial court.³⁶ In making its decision the trial court balances the probative value of the evidence against any possible preju-

31. See, e.g., *Conford v. United States*, 336 F.2d 285 (10th Cir. 1964); *Williams v. First Security Bank of Searcy*, 738 S.W.2d 99 (Ark. 1987); *Hobbs v. Harken*, 969 S.W.2d 318 (Mo. Ct. App. 1998); *C.T. Taylor Co., Inc. v. Melcher*, 468 N.E.2d 323 (Ohio Ct. App. 1983); *Reichman v. Wallach*, 452 A.2d 501 (Pa. Super. Ct. 1982).

32. See *Conford*, 336 F.2d 285. See also *Hobbs*, 969 S.W.2d 318.

33. See, e.g., *State v. Evans*, No. 376614-4-I, 1998 WL 184909 (Wash. Ct. App. April 20, 1998).

34. *Bieles v. Ables*, 599 N.E.2d 469 (Ill. App. Ct. 1992) (citing 75B AM. JUR. 2D *Trial* § 1665 (1992)). See *State v. Fellows*, 352 N.E.2d 631 (Ohio App. 1975). See also *McCORMICK* § 217.

35. *Evry v. U.S. Auto. Assoc. Casualty Ins. Co.*, 979 S.W.2d 818, 820 (Tex. App. 1998) (“[T]he trial court is required to send all exhibits admitted into evidence to the jury room during deliberations of the jury.” (citing *First Employees Ins. Co. v. Skinner*, 646 S.W.2d 170, 172 (Tex. 1983))).

36. *United States v. Warner*, 428 F.2d 730 (8th Cir. 1970); *Rossell v. Volkswagen*, 709 P.2d 517 (Ariz. 1985); *Modelski v. Navistar Int’l Trans. Corp.*, 707 N.E.2d 239 (Ill. App. Ct. 1999); *People v. Montague*, 500 N.E.2d 592 (Ill. App. Ct. 1986); *Marsillett v. State*, 495 N.E.2d 699 (Ind. 1986); *Weule v. Cigna Property and Casualty Co.*, 877 S.W.2d 202 (Mo. Ct. App. 1994); *Lester v. Sayles*, 850 S.W.2d 858 (Mo. 1993); *Rob-Lee Corp. v. Cushman*, 727 S.W.2d 455 (Mo. Ct. App. 1987); *Hodgdon v. Frisbie Memorial Hospital*, 786 A.2d 859 (N.H. 2001); *State v. Grogan*, 253 S.E.2d 20 (N.C. Ct. App. 1979); *Melcher*, 468 N.E.2d 323; *Reichman*, 452 A.2d 501; *State v. Jensen*, 432 N.W.2d 913 (Wis. 1988); *Douglas-Hanson Co., Inc. v. BF Goodrich Co.*, 598 N.W.2d 262 (Wis. Ct. App. 1999).

dicial effect.³⁷ The court considers: whether the material will aid the jury in a proper consideration of the case; whether a party will be unduly prejudiced by submission of the exhibit; and, whether the material may be subjected to improper use by the jury.³⁸ Demonstrative evidence that has been admitted into evidence will generally be allowed to go to the jury room just like items of substantive evidence.

Some courts treat demonstrative evidence as a distinct class of evidence and will allow use of demonstratives as visual aids during trial, but refuse to allow the items into the jury room.³⁹

There is no bright line rule for whether or not courts will allow demonstratives not in evidence into the jury room. There is very little judicial review of demonstrative evidence that is used during trial without being admitted into evidence. Because the demonstrative exhibit is not formally offered into evidence, the trial judge does not rule on its admissibility. This lack of ruling prevents review by appellate courts. But the few jurisdictions that have reviewed the issue are split on whether demonstratives that are not admitted evidence should be allowed to go to the jury room.⁴⁰ Courts that send only admitted evidence to the jury room refrain from allowing non-admitted demonstrative evidence to the jury room.⁴¹ As one court stated, “[a]s a general rule . . . exhibits should not be sent to the jury room which have not been admitted.”⁴² These courts usually hold that it is reversible error to allow materials not admitted

37. *Montague*, 500 N.E.2d at 599; *People v. Pace*, 587 N.E.2d 1257 (Ill. App. Ct. 1992).

38. *Jensen*, 432 N.W.2d at 921-22; *Marsillett*, 495 N.E.2d at 710.

39. *See, e.g.*, *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980); *United States v. Abbas*, 504 F.2d 123, 124-25 (9th Cir. 1974).

40. *Compare Lester*, 850 S.W.2d at 864 (stating that the “court committed reversible error when it allowed the jury to have during its deliberations a [non-admitted] chart”) with *Melcher*, 468 N.E.2d at 324 (concluding it was not a reversible error for the trial court to send a chart to the jury room that had not been admitted into evidence).

41. *See, e.g.*, *Warner*, 428 F.2d 730 (although the court cited the rule not allowing items not in evidence to be allowed in the jury room, it nevertheless concluded the trial court had committed a harmless procedural error by allowing an indictment not admitted in evidence to be viewed by jurors during deliberations); *Billman v. State Deposit Ins. Fund Corp.*, 563 A.2d 1110 (Md. Ct. Spec. App. 1989); *Lester*, 850 S.W.2d at 864; *Grogan*, 253 S.E.2d 20.

42. *Warner*, 428 F.2d at 738.

into evidence into the jury room because the materials are presumed to be prejudicial.⁴³

Other courts find that demonstrative materials provide an aid to the jurors and allow the materials into deliberations even if they are not admitted into evidence.⁴⁴ The trial court has discretion whether or not to send these types of materials into the jury room.⁴⁵ For example, courts have found summaries provided by attorneys to be practically indispensable to understanding complicated facts and permitted the summaries to go to the jury room.⁴⁶

Before allowing the jury to consider summary demonstrative evidence, the court must conclude that the demonstration fairly and accurately reflects evidence already admitted into evidence and that the aid does not unfairly prejudice the opposing party. The jury is also instructed that the material is merely representative and not evidence.⁴⁷

II. Why Courts Refuse To Allow Demonstrative Evidence into the Jury Room During Deliberations

The major reason courts give for refusing to allow juries to use demonstrative evidence—whether admitted or not—during deliberations is a fear that it might prejudice the jury.⁴⁸ In addi-

43. See, e.g., *Billman*, 563 A.2d at 1116.

44. Although it may seem counterintuitive for courts to allow jurors to review items not admitted into evidence, some courts find the information provided by this evidence is useful enough that a jury should consider it during deliberations. See, e.g., *Williams v. First Sec. Bank of Searcy*, 738 S.W.2d 99 (Ark. 1987). See also *Conford v. United States*, 336 F.2d 285 (10th Cir. 1964).

45. See, e.g., *Williams*, 738 S.W.2d at 393; *Allison v. Stalter*, 621 N.E. 2d 977 (Ill. App. Ct. 1993); *Weule v. Cigna Property and Casualty Co.*, 877 S.W.2d 202 (Mo. Ct. App. 1994); *Melcher*, 468 N.E.2d 323; *Reichman v. Wallach*, 452 A.2d 501 (Pa. Super. Ct. 1982).

46. See, e.g., *Conford*, 336 F.2d at 287.

47. See *id.* at 287-88; *Williams*, 738 S.W.2d at 102.

48. See *United States v. Johnson*, 362 F. Supp. 2d 1043, 1059 (N.D. Iowa 2005) (“[I]t is within the discretion of the Trial Court, absent abuse working to the clear prejudice of the defendant, to permit the display of demonstrative or illustrative exhibits . . . in the jury room during deliberations.”) (quoting *United States v. Downen*, 496 F.2d 314, 320 (10th Cir. 1974)). Extending the Court’s logic, if an exhibit is prejudicial, or has the potential to be prejudicial when used during deliberations, it should not be given to the jury. See also *FED. R. EVID.* 403. (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”) Therefore, even if demonstrative evidence is rele-

tion to a general concern about prejudice, courts also fear that juries may place undue emphasis on demonstrative evidence or that it might take on a life of its own outside of the court's control.⁴⁹

The first argument against allowing demonstrative evidence into the jury room is that because the jury's fact finding should be based solely on evidence admitted during trial, allowing jury members to view non-admitted evidence might unfairly prejudice their decision.⁵⁰

In a Maryland suit to recover money from a debtor, for example, 1,232 exhibits were presented to the jury during the trial.⁵¹ Ninety-four of those exhibits were demonstrative exhibits not admitted into evidence during the trial, and were improperly allowed to go to the jury room.⁵² The box containing the 94 exhibits was accidentally placed in the jury room with other boxes containing admitted evidence.⁵³ During five and a half days of deliberations the jury viewed a few of the exhibits from the box.⁵⁴ Upon being notified of the mistake, the trial court removed the box from the jury room. On review, the appeals court decided that during deliberations the jury should not be permitted to view demonstrative evidence not admitted into evidence because it might unfairly prejudice the jury's decision.⁵⁵ Relying on the principle that juries should only be allowed to consider evidence admitted during trial, the court reasoned that non-admitted evidence contaminated admitted evidence because proper evidentiary procedures were not in

vant and may be useful, the trial court may decide to exclude the evidence from the trial, and from consideration in the jury room, if the court believes the exhibit would be prejudicial or may serve to confuse the jury.

49. See *Holland v. United States*, 348 U.S. 121 (1954), *reh'g denied*, 348 U.S. 932 (1955). See also *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. 1993)(en banc).

50. See *Billman v. State Deposit Ins. Fund Corp.*, 563 A.2d 1110, 1115 (Md. Ct. Spec. App. 1989; *Lester*, 850 S.W.2d. 863 (citing *Zagarri v. Nichols*, 429 S.W.2d 758,761 (Mo. 1968)).

51. See *Billman*, 563 A.2d at 1114.

52. *Id.* at 1111.

53. *Id.* at 1112.

54. *Id.*

55. *Id.* at 1116. This holding was reversed by the Court of Appeals of Maryland because the respondent (the original defendant *Billman*) failed to show "probable prejudice" that justified a new trial under the Maryland standard. *State of Md. Deposit Ins. Fund Corp. v. Billman*, 580 A.2d 1044, 1051-65 (Md. 1990). Nevertheless, the Court of Special Appeals' reasoning still illustrates a court's unfair prejudice logic.

place. Therefore, the court concluded the jury's consideration of such evidence in the jury room was prejudicial and found the trial court's failure to grant a mistrial reversible error.⁵⁶

Second, some courts fear that demonstrative evidence not subject to the procedural safeguards of admission may unduly influence the jury.⁵⁷ For example, in an action to recover for injuries sustained in a traffic accident, a Missouri court prevented demonstrative evidence from going to the jury room based on an undue influence argument.⁵⁸ The court held that the jury should not be allowed to view in the jury room a damages chart prepared by the plaintiff's attorney for fear that the jury would place too much emphasis on the opinions contained in the chart and not enough emphasis on actual probative evidence provided during trial.⁵⁹

Other courts simply feel that because demonstrative evidence repeats information already presented at trial it will overly influence jurors when compared to other evidence.⁶⁰ Courts have expressed concern that allowing the jury to view summaries of witnesses' testimony during deliberations is the same as allowing witnesses to accompany the jury to the jury room.⁶¹ Other courts fear jurors will give undue weight to written transcripts of a witness's testimony especially when compared to memories of oral testimony.⁶² Finally, some are concerned that a summary of a witness's testimony—such as a chart prepared by an expert witness—would be unduly repeti-

56. See, e.g., *Billman*, 563 A.2d. at 1116.

57. *United States v. Pendas-Martinez*, 845 F.2d 938, 941 (11th Cir. 1988). See also, *Dep't of Transp. v. Sharpe*, 486 S.E.2d 619 (Ga. Ct. App. 1998) (citing *Dep't of Transp. v. Benton*, 447 S.E.2d 159 (Ga. Ct. App. 1994)); *Lester v. Sayles*, 850 S.W.2d 858 (Mo. 1993) (en banc); *Hobbs v. Harken*, 969 S.W.2d 318 (Mo. Ct. App. 1998); *Hodgdon v. Frisbie Memorial Hospital*, 786 A.2d 859, 864 (N.H. 2001).

58. See *Lester*, 850 S.W.2d 858.

59. See *id.* at 864.

60. See *Pendas-Martinez*, 845 F.2d 938; *Hobbs*, 969 S.W.2d at 326 (citing *O'Neal v. Pipes Enters., Inc.*, 930 S.W.2d 416, 421 (Mo. Ct. App. 1995)) (distinguishing the facts from *O'Neal* and allowing summary to go to the jury); *Hodgdon*, 786 A.2d at 864-865 (citing *Norfolk and Western Ry. Co. v. Puryear*, 463 S.E.2d 442, 444 (1995)).

61. *Pendas-Martinez*, 845 F.2d at 941 ("The government's witnesses in effect accompanied the jury into the jury room.") (quoting *United States v. Brown*, 451 F.2d 1231, 1243 (5th Cir. 1971)).

62. See, e.g., *Pendas-Martinez*, 845 F.2d 938.

tive, also causing the jury to give it too much weight.⁶³ These courts rely on the procedural safeguards surrounding admission to protect the validity of the evidence.

The third argument for refusing to allow demonstrative evidence into deliberations is that the evidence will “take on a life of its own” in the jury room.⁶⁴ Courts fear that demonstrative evidence may take on a different meaning independent of the evidence which gave rise to the demonstrative.⁶⁵ For example, numerical figures and computations presented on a chart may be used in a manner inconsistent with the way they were used during trial.⁶⁶ This could allow the jury to essentially create new evidence outside of the protection of the court.⁶⁷ The Supreme Court recognized this danger in discussing the “net worth method,” which requires assumptions in calculations and is used to prove that a defendant willfully attempted to defeat and evade income taxes.⁶⁸ The Court stated that allowing a jury to have the figures during deliberations posed a great danger because “bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.”⁶⁹ The court was concerned that the jurors might use demonstrative evidence to create new evidence.⁷⁰

These rationales for prohibiting demonstrative evidence from being in the jury room all assume that such evidence will unfairly prejudice or improperly influence the jury. Psychological research about the ways in which people process new information shows that the potentially prejudicial effects of demonstrative material may be overstated.

63. See *Hobbs*, 969 S.W.2d. at 326. The court continued that allowing a jury to hear a repetition of a witness’s testimony would “invade a juror’s duty to solely determine the fact according to their memory.” *Id.* at 326.

64. See *Holland v. United States*, 348 U.S. 121, 128 (1954), *reh’g denied*, 348 U.S. 932 (1955).

65. See *id.*

66. See *id.*

67. E.g., *Modelski v. Navistar Int’l Trans. Corp.*, 707 N.E.2d 239 (Ill. App. Ct. 1999). In *Modelski*, the jury was permitted to view and use a tractor seat assembly used as demonstrative evidence during trial. *Id.* The appeals court determined that it was improper to allow the jury access to the seat assembly because the jury was able to conduct their own experiments outside the protection of the trial court and attorneys in determining the likelihood that the bolt assembly of the seat was faulty thereby causing the user to fall off. *Id.*

68. *Holland*, 348 U.S. at 124.

69. *Id.* at 127-28.

70. See generally *id.*

III. Why Demonstrative Evidence Should Be Sent To The Jury Room

Jurors, like other people, are active processors of information.⁷¹ Jurors bring their expectations and biases with them to the courtroom and search for reasonable and causal explanations to make sense of the events described.⁷² In this search for explanation, jurors process information to fill in gaps, they reject information that is inconsistent with their beliefs and expectations,⁷³ and they link testimony in ways that strongly influence their decisions before they even reach the jury room.⁷⁴

As complex, active thinkers, jurors are processing and evaluating evidence—whether substantive or demonstrative—during trial. Demonstrative evidence is presented to help jurors comprehend the information presented. This same demonstrative evidence, if allowed into the jury room, could serve as a memory aid for the jurors as they discuss all of the relevant materials before reaching a final decision.

A. Information Processing

One model of human learning developed and tested by cognitive and social psychology is the schema. A schema is a general knowledge structure used for understanding.⁷⁵ People use schemas to help place and relate certain facts. A specific schema consists of a general frame with slots for particular information.⁷⁶ Schemas help the information processor understand and remember how actions take place.⁷⁷ For example, people have a basic general framework for meeting new people. This framework is a schema that could be represented as:

71. Dann, *supra* note 10, at 1242; Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1861 (2001); Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 7 (2003).

72. See Diamond & Vidmar, *supra* note 71, at 1860.

73. See Diamond & Vidmar, *supra* note 71, at 1861 citing multiple studies supporting the notion that jurors are active decisions makers. *Id.* at 1861 nn.12-14 and accompanying discussion. Specifically, these studies demonstrate that jurors find it easier to remember information that is consistent with their theory than information that is inconsistent with their theory, and they tend to interpret ambiguous information as consistent with their previously constructed theory. *Id.*

74. Diamond & Vidmar, *supra* note 71, at 1860.

75. Douglas L. Medin et al., *Cognitive Psychology* 254 (3d ed. 2001).

76. *Id.*

77. *Id.* at 256.

Person: _____
 Job/Position: _____
 Role: _____
 Who he relates to: _____
 Purpose: _____

This basic schema of person, job, role, who he relates to, and purpose is a general framework for learning new information that is used by a person whenever he needs to learn about a new person, whether in the context of a cocktail party or a court room. The blank slots represent information that the person will fill in to better understand the new person. Jurors use many schemas during the trial process. Jurors use the general schema above to learn about new people at trial. When applied in a courtroom setting, this schema might look like this:

Person: Mr. Jones
 Job: Lawyer for the plaintiff
 Role: Speak for plaintiff
 Who he relates to: The judge and us (jury)
 Purpose: Win case by getting money from defendant

This basic schema is filled in with general assumptions about a trial—such as the assumption that the person wearing a robe behind the bench is the judge. The juror does not need to know much information to come to this conclusion and can use this general assumption until proven wrong. Jurors may use basic schemas to learn the small details of court, like the lawyer's names and roles. They use larger, more complex schemas when attempting to comprehend the entire case.

The Story Model of jury deliberations, pioneered by Pennington and Hastie, describes a larger, more complex mental framework for jurors' information processing.⁷⁸ The Story Model posits that jurors use the mental framework of a story to process the information presented at trial and to assign meaning to events that take place during trial and to those described in the evidence.⁷⁹ This approach enables jurors to organize material that is presented in disjointed question and answer ses-

78. Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992).

79. See *id.*

sions that are distinctly different from the normal human learning environment.⁸⁰ Jurors attempt to assign meaning to the confusing and new events that are occurring during the trial.⁸¹ They begin to construct a story of what happened, starting with a bare outline—much as an outline at the beginning of a text book describes the text within.⁸² As the trial progresses, jurors fill in blanks in the story either with information presented during the trial or by inference based on their experience of how the world works.⁸³

Demonstratives are intended to help jurors fill in the blanks. For example, a timeline gives jurors an outline for organizing the events the parties are arguing about and lets them place other information in context, such as where a person was on a particular day or the surrounding circumstances of an event. Likewise, charts, graphs or illustrations presented to the jury during a witness's testimony can help jurors recall and understand information already presented. These tools can help jurors to organize and understand new information.

By the end of a trial many jurors have constructed tentative stories of the events discussed during the trial. In the jury room the jurors work together as a group to construct the story that they believe best reflects the evidence presented at trial. Allowing jurors to have in the jury room summary demonstrative evidence that was presented to them during testimony or argument can help them in constructing a story that conforms to the evidence presented during the trial.

B. Allowing Jurors to Have Summary Demonstrative Evidence in the Jury Room

Scholars have argued for changes in the trial system aimed at helping jurors better understand the information they receive at trial.⁸⁴ The American Bar Association has adopted *Principles*

80. Keith Broyles, *Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases*, 64 GEO. WASH. L. REV. 714 (1996). Broyles presents a hypothetical contrasting the question and answer method of the modern trial with a normal learning setting of a classroom. See *id.* at 714-15.

81. See Pennington & Hastie, *supra* note 78, at 189-90.

82. See Diamond & Vidmar, *supra* note 71, at 1862.

83. *Id.*

84. See generally Dann, *supra* note 10, at 1247-61 (listing and summarizing suggestions of multiple authors for changing the judicial system to accommodate the knowledge that jurors are active processors of information). See JURY TRIAL

for *Juries and Jury Trials* that incorporate many of these recommendations, including: giving jurors substantive preliminary instructions at the outset of a trial, allowing jurors to take notes and, in civil cases, to submit written questions, providing jury instructions in plain English, and in written form for each individual juror to follow along while the charge is being given and for use in deliberations.⁸⁵

Empirical research has recently shown that these recommended changes may actually help jurors reach better decisions. For example, a 2003 study examined the effect of pre-instructions, note taking, providing trial transcripts, and jury size on juror comprehension of evidence and outcomes.⁸⁶ The study found that “jurors provided with certain cognitive aids render more legally appropriate decisions than making decisions without aids.”⁸⁷ These aids enabled jurors to better understand and recall trial evidence, which led to better deliberations and, therefore, better decisions.⁸⁸ Another study found “that use of multiple innovations” (including an exhibit notebook, note taking and a technical checklist) improved juror comprehension of complex mtDNA evidence.⁸⁹

Sending demonstrative evidence to the jury room is in line with these recommendations. Summary demonstrative evidence such as charts, timelines, outlines, and illustrations can help jurors better understand and more easily recall the information presented during trial. Allowing the jury to use, during deliberations, demonstrative evidence that was presented during witnesses’ testimony can help guard against juror confusion.

Summary demonstrative evidence can help clarify information presented and minimize juror confusion. By recognizing

INNOVATIONS (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 2d ed. 2006).

85. AMERICAN BAR ASSOCIATION, *PRINCIPLES FOR JURIES AND JURY TRIALS* 7, 8, 17-21 (2005), http://www.abanet.org/jury/pdf/final%20Commentary_july_1205.pdf.

86. Lynne ForsterLee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 *JUDICATURE* 184, 186 (2003).

87. *Id.* at 190.

88. *See id.*

89. B. Michael Dann, Valerie P. Hans, and David H. Kaye, *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?* 255 *NIJ JOURNAL* 2, 6 (2005), available at <http://www.ncjrs.gov/pdffiles1/nij/jr000255.pdf>.

that jurors are active processors of information and allowing summary demonstrative evidence to go to the jury room during deliberations the judicial system can maximize the benefits of the jury system.

IV. How to Allow Summary Demonstrative Evidence into the Jury Room

A. Witness Summaries

Summary demonstratives used by witnesses during their testimony are arguably the least controversial form of summary demonstrative evidence. The witness's testimony has already been deemed admissible; the summary was already shown to the jury (presumably as a tool to aid in comprehension). Allowing such summary evidence into the jury room during deliberations would give juries a memory aid (similar to their own notes or the written copy of the judge's charge).

Such summary demonstrative evidence should be presented to the opposing party for review before the trial court is asked to exercise its discretion and send the demonstrative to the deliberating jury. Summary demonstratives approved by both the opposing party and the judge may be allowed into the jury room during deliberations as long as they are not overly repetitive.⁹⁰ The jury must be admonished that summary demonstrative evidence is not substantive evidence and, like jurors' notes, is to be used only as a memory aid.

Here is a hypothetical demonstrating how this might work. In a civil case involving allegations of price-fixing, the president of the plaintiff company would likely testify about his experience dealing with the defendant company and how the prices he paid changed over time. This testimony might be lengthy and complex, covering the nature of the business, its business model, how the company made purchases, the president's qualifications and past experience, and his experience in this case, among other information relevant to the case. During the testimony, illustrative charts might be used to help the jury

90. See FED. R. EVID. 403. The probative value of summary demonstrative evidence is to help the jurors understand complex testimony and prevent confusion. See *supra* Section I.

understand how the business is structured and operates. After the testimony, the plaintiff's attorney would review the summary demonstratives used during the testimony to make sure that everything included in the charts or illustrations, including information elicited by cross-examination, was actually covered in the testimony. The plaintiff's attorney would present the demonstratives to the opposing party, who would check for accuracy. If there were no objections, these demonstratives would then be submitted to the court with a request that they be supplied to the jury during deliberations.

B. Attorneys' Summaries

Attorney summary demonstratives would typically be prepared for use in an opening statement or closing argument. For example, an attorney's summary demonstrative might present an outline of damages the plaintiff is seeking broken down by category, including brief summaries of the testimony supporting each amount and the witness who testified to that information.⁹¹ The plaintiff's attorney in the hypothetical price-fixing case might prepare a request for damages outlining the details of the price-fixing agreement, including the purchases, prices, and years of the alleged agreement as testified to by the com-

91. See *Allison v. Stalter*, 621 N.E.2d 977 (Ill. App. Ct. 1993); *Lester v. Sayles*, 850 S.W.2d 858 (Mo. 1993)(en banc); *C.T. Taylor Co., Inc. v. Melcher*, 468 N.E.2d 323 (Ohio Ct. App. 1983). In *Taylor*, the "exhibit was a sheet of white paper, 26" x 32", upon which plaintiff's counsel wrote:

*Damages	
1. Mis-order panels	1,468.00
2. Freight	154.16
3. Track Covers + Voltage	900.00
4. Mis-order Insulation	286.25
...	
11. Add motel costs	1,699.02
12. Add transportation costs	800.00
13. IRS penalty & Interest	2,850.00
	<hr/>
	31,246.34
Dollars paid to Melcher	137,400.00
Pd. Out	-76,332.33
	<hr/>
	61,067.67
Melcher	-25,000.00
	<hr/>
Unaccounted for	36,067.67
Total	\$67,314.01.'''

Taylor 468 N.E.2d at 324 n.1. The jury awarded damages in the amount of \$52,701.75. *Id.* at 323.

pany's president and other witnesses called by the plaintiff. Unlike the company president's summary, this summary would be written by the plaintiff's attorney to provide a more complete picture of the case by covering testimony of multiple witnesses and summarizing much of the evidence presented at trial.

Demonstratives used during attorney argument are more problematic than those presented by witnesses. A demonstrative prepared solely for presentation during attorney argument is obviously more likely to be designed to incorporate adversarial themes and rhetoric. However, if properly controlled, even demonstratives presented during attorney argument should still be allowed to go to the jury room.

Attorney demonstratives representing information already testified to during trial can be as helpful to jurors as are witnesses' summary demonstratives. Using the damages example above, the attorney's summary demonstrative might be an annotated version of a damage expert's summary demonstrative. The attorney might include quotes from the expert's testimony supporting each piece of information on the chart.

For summaries of evidence, attorneys should be able to prepare charts or timelines for the jury that are shortened representations of information already presented. Like witnesses' summaries, these charts should be presented to and approved by opposing counsel before submission to the trial court. As with witness summaries, the judge reviews the attorney summary to ensure that it fairly and accurately represents information already admitted into evidence or testified to.

At least two arguments can be raised for hesitating to allow attorney demonstratives to go to the jury during deliberations. First, in a damage summary, as an example, not all evidence presented will be concrete.⁹² The court can require attorneys to differentiate information concretely presented during trial from that presented through argument. Different colors could be used on a chart with a key denoting which color was

92. Unlike with lost wages, a punitive damage request is usually not for a specific amount and may not be based on a specific mathematical formulation. However, when a plaintiff presents economic evidence supporting a claim for punitive damages—such as a company's net worth, or its sales or profits—that evidence might be included as part of a damage summary.

concrete and which was not. Alternatively, argument could be set off by an asterisk or other marking feature to separate it in the jurors' minds. As with witness summaries, the trial court could admonish the jury that the demonstrative is not evidence. Second, production of charts can be expensive and might advantage a wealthier party. Where there is a disparity in resources, the trial court can require parties to conform to formatting guidelines that are financially feasible for both parties. While attorney summary demonstratives have the potential to be prejudicial, the opportunity to allow the jurors to make a properly informed decision in complex cases may outweigh the prejudicial potential.

C. Relief Requests

The essence of any attorney argument is the desired outcome. When jurors retire to the jury room, they are asked to make a factual finding that determines which side prevails. In order to accomplish this function, jurors must understand what the attorneys are asking the jury to do.

Therefore, a narrow category of information that is part of attorney argument should be reduced to summary form and allowed to go to the jury room to prevent confusion and improve jury decision making. A clear statement of the relief sought by each side should be sent to the jury room during deliberations.

There are two approaches to providing summary relief requests to the jury. Courts could develop and require a standardized form for such relief requests. The form would allow the attorney to present a bare-bones outline of the argument, similar to any other outline. It would include a section for the requested relief and a section for summarizing evidence supporting the request. In practice this form would look similar to attorney summary demonstratives discussed above, but the specific format would be created by the court. Alternatively courts could provide attorneys with specific guidelines for preparing written summary relief requests to be made available to the jury during deliberations. Both sides would follow the same guidelines. Submission of such relief requests to the court can accompany other pre-deliberation submissions such as proposed jury instructions. Accordingly such submissions can fit seamlessly into existing trial procedures. Whether parties are

provided with a court-prepared form or court-prepared guidelines, the resulting product will improve jurors' ability to use their own judgment to weigh each party's relief requests in light of the evidence presented.

D. Procedural Matters

The judge has discretion to decide whether admitted summary demonstrative evidence should be allowed to go to the jury room.⁹³ To aid the judge in making this decision, all of these suggestions require additional procedural safeguards. First, before submitting summary demonstrative evidence to the jury, both sides' demonstratives must be reviewed and approved by the trial court. The court assures that any demonstrative evidence that goes to the jury is factually supported, reflects information actually presented at trial, and is not prejudicial or argumentative.⁹⁴ Second, before summary demonstrative evidence will be made available to the jury during deliberations, the trial court can admonish the jury that the summaries are just that, summaries. They are provided as memory aids and they should not be given the same weight as substantive evidence provided during trial.⁹⁵ An admonish-

93. A small number of courts allow unadmitted evidence into jury room, but they are the exception, not the rule. See *supra* Section I.B.

94. See *Williams v. First Security Bank of Searcy*, 738 S.W.2d 99 (Ark. 1987) (stating the determining factor is "if the items is an accurate reflection of the testimony"). See also *Conford v. United States*, 336 F.2d 285 (10th Cir. 1964) (stating the court should be "satisfied [the summaries] accurately reflect other evidence in the case before sending them to the jury room."); *Marsillett v. State*, 495 N.E.2d 699 (Ind. 1986) (stating "whether any party will be unduly prejudiced by the submission of the material" as a criteria to be considered before sending items to the jury room.); *Weule v. Cigna Property and Casualty Co.*, 877 S.W.2d 202 (Mo. Ct. App. 1994) (stating exhibits should be "marked identified, dated, and their contents testified to"); *State v. Jensen*, 432 N.W.2d 913 (Wis. 1988) (stating a court should consider "whether a party will be unduly prejudiced by submission of the exhibit" before sending an exhibit to the jury room.").

95. A potential jury warning might read:

The [State] [Plaintiff] [Defendant] has introduced (a) demonstrative exhibit(s) in the form of [a chart, summary, calculation, etc.]. This information is presented:

1. to assist you as an aid in your understanding of (a witness') testimony here in court; and/or
2. to help explain the facts disclosed by the books, records, and other documents that are evidence in the case.

This [chart, summary, calculation, etc.] is intended to assist you in remembering what the [document, witness] said. If the [chart, summary, calculation, etc.] is not consistent with the facts or figures shown by the evidence in this case, as you find them, you should disregard the [chart, summary, cal-

ment would properly characterize the summary demonstratives for the jury and frame how they should be utilized during deliberations.⁹⁶ Third, by requiring, or at least allowing, both parties equal opportunity to present summaries, the jury should not be unduly prejudiced by one party. These procedural safeguards should allow the jury to use summaries without being unduly prejudiced.⁹⁷

These suggestions are predicated on the idea that the jurors' comprehension of the information presented is vital in making a responsible decision. If demonstrative evidence will not be sent to the jury room, the court should warn the jurors before the trial begins that they may see demonstratives, charts, or diagrams that will not be sent to the jury room and they should pay close attention to the exhibits as they are presented or write in their notes the information they consider vital. A brief instruction would prime the jurors to pay acute attention during the course of the trial and would also prevent confusion when the jury finds out the exhibits they relied upon are not allowed in the jury room.⁹⁸

ulation, etc.] and determine the facts from the underlying evidence. *Adapted from* 10 Minn. Prac., Jury Instr. Guides, Criminal Jury Instruction 3.26.

Alternatively if the demonstrative evidence has been admitted into evidence the jury warning might read:

During the trial the (State) (plaintiff) (defendant) used [(a) chart(s), (a) summary(y)ies) (or) (a) calculation(s)]

1. as an aid to your understanding of (a witness') testimony; and/or
2. to help explain the facts disclosed by the books, records, and other documents that are evidence in the case.

[(Charts), (summaries) (or) (calculations)] are based on the underlying supporting material. You should, therefore, give them only such weight as you think the underlying material deserves.

Adapted from 10 Minn. Prac., Jury Instr. Guides, Criminal Jury Instruction 3.27.

96. Some empirical research has shown that jurors do not understand or recall some admonitions or instructions. See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L. 589 (1997); Reid Hastie et al., *A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages*, 22 LAW & HUM. BEHAV. 287 (1998). However, poor comprehension or recall is not a reason not to instruct, but a reminder to improve clarity when instruction is given.

97. A similar procedure has been approved by at least one appellate court. See *Swallow v. United States*, 307 F.2d 81, 84 (10th Cir. 1962).

98. The following exchange shows what happens when jurors find out that information they considered important is not allowed in the jury room:

Juror #6: That's it? Everything on the chair?

Bailiff: Yeah, that's all that was admitted.

Juror #7: The . . . books of depositions weren't?

Conclusion

Allowing jurors to have summary demonstrative evidence while they are deliberating can maximize their ability to be reasonable fact finders. Courts, therefore, should allow jurors to review all three categories of summary demonstrative evidence discussed here—summary demonstratives presented during witness testimony; summary demonstratives presented during attorney argument; and, summary relief requests—during deliberations because they allow the jurors to consistently apply their common sense in reaching a decision. If proper procedural safeguards are employed, allowing summary demonstrative evidence into the jury room enhances jury comprehension of trial information, thus contributing to the fairness of jury trials.

Bailiff: Yeah. I guess that's not something you guys get to . . . look through.

Juror #7: Wow. That's pretty important

Juror #6: I was picturing a big pile [of exhibits].

...

Juror #3: I tried to write it down as best I could, but that board had the tiny, tiny stuff [writing]. They didn't leave it up long enough for me to write all the stuff in.

The above exchange happened in a trial that was included in the Arizona Filming Project in which deliberations were videotaped. The discussion occurred at the beginning of deliberations when jurors first received the exhibits from the court. The transcript was provided by Professor Shari Seidman Diamond and is on file with the author. For a complete description of the Arizona Filming Project, see Diamond, et al. *supra* note 71. Other publications drawing on data from the Arizona Project include, for example, Diamond & Vidmar, *supra* note 71; Shari Seidman Diamond et al., *Inside the Jury Room: Evaluating Juror Discussions During Trial*, 87 JUDICATURE 54 (2003); Shari Seidman Diamond, *Truth, Justice, and the Jury*, 26 HARV. J.L. & PUB. POL'Y 143 (2003); Shari Seidman Diamond, Mary R. Rose, & Beth Murphy, *Jurors' Unanswered Questions*, 41 CT. REV. 20 (2004); Shari Seidman Diamond, Mary R. Rose, & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927 (2006).