Show and Tell

Applying Simplicity to Communicate Complex Medical Information to Juries

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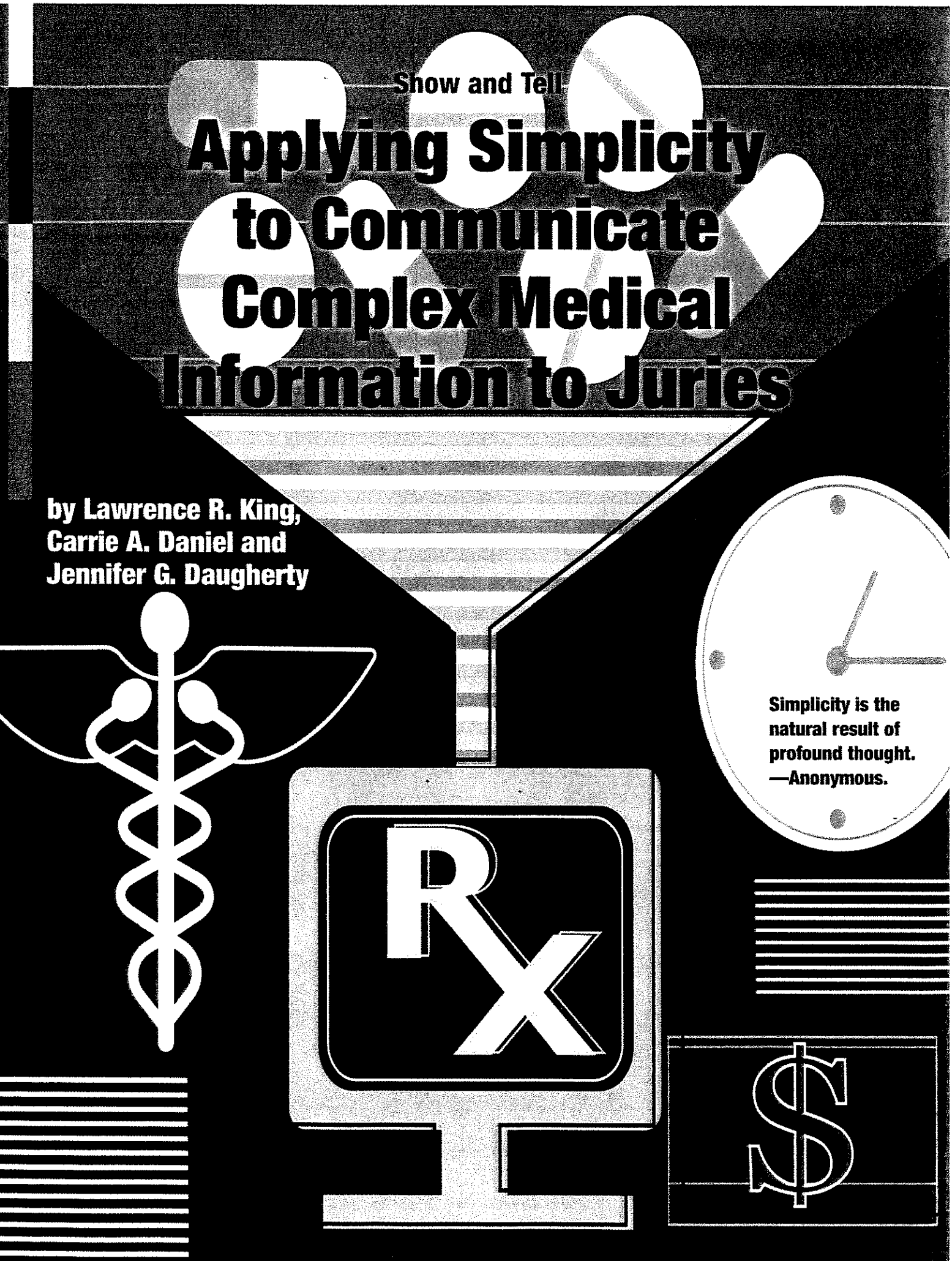

Simplicity is the natural result of profound thought.
—Anonymous.

The legal profession is grounded in complexity—from the laws attorneys read, the cases they follow, to the way they talk. "Legalese" is its own language, and many of the concepts with which attorneys deal every day are esoteric by nature. Thus, stepping away from such complexity and regressing back to the language of the layperson is challenging for the legalese-fluent attorney. In none of these situations is it more important to focus on simplicity in communication than in the jury trial. Justice Sandra Day O'Connor commented on the communication gap present in such trials:

> Too often, jurors are allowed to do nothing but listen passively to the testimony, without any idea what the legal issues are in the case, without permission to take notes or participate in any way, finally to be read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began.

Sandra Day O'Connor, *Juries: They May Be Broke, But We Can Fix Them*, Fed. Law., 20, 22 (1997).

In medical cases, the problem of effectively communicating with jurors is heightened by the scientific and complex nature of the information. Lawyers are not, for the vast majority, members of the medical profession. However, medical issues arise in many trials, and the question of how to equip lawyers with the skills needed to relate such complex information to juries is of utmost importance. *See, e.g., Soliman v. Philip Morris, Inc.*, 311 F.3d 966 (9th Cir. 2002) (tobacco litigation); *Wilson v. Merrell Dow Pharm., Inc.*, 160 F.3d 625 (10th Cir. 1998) (Bendectin litigation); *Elsroth v. Johnson & Johnson*, 700 F.Supp. 151 (S.D.N.Y. 1988) (Cyanide-laced Tylenol capsules litigation). One word suffices to summarize the level of communication and presentation needed to handle such a task: simplicity.

Why Focus on the Way Complex Medical Information is Communicated to Juries

Most trial lawyers recognize that the truly objective juror—one who leaves all prejudices at home, and who also hears, sees, and remembers everything that occurs in a trial—is a myth. Jurors will not hear every word of a doctor's testimony, will not see all of the live reactions occurring in the courtroom, and most importantly, will not remember even half of it. *See* G. Marc Whitehead, *Jury Trial Innovations: Making the Courtroom a Better Place to Teach and Learn*, SE89 ALI-ABA 203, 205 (2000). Jurors retain only a small portion of what they hear in court—possibly only 10 to 20 percent. *See* Murray Ogborn, *Bringing the Case to Life: Use Communication Concepts Like Information Channeling and the Rule of Three to Help Jurors Interpret and Understand the Plaintiff's Story*, 38 Trial 57 (January 2002); Charles L. Babcock, *Getting Your Message Across: Visual Aids and Demonstrative Exhibits in the Courtroom*, 27 Litigation 41 (2001); Trina L. Davis, *What Makes Juries Tune in to Scientific, Technical, or Otherwise Boring Evidence*, SE21 ALI-ABA 305, 311 (1999). However, research shows that in the courtroom, the retention rate rises to approximately 60 percent when jurors see something, and 80 percent when jurors simultaneously hear and see something. *See* Babcock, *supra*. Once a juror does retain information, it is not stored as objective and accurate recordings of what he/she perceived, but it is molded with feelings, impressions, and examples that result in that person's own interpretation of the events. *See* Whitehead, *supra* at 206. This interpretation is also molded by an individual's personal beliefs, attitudes, and experiences. Therefore, the retained information is in a sense distorted.

A control on this distortion may be organizing and filtering information through structure. *Id.* at 205. In the courtroom, this structure is most commonly provided in the form of a story by counsel or a theory of the case in general. Jurors will be able to listen to a story, follow its structure, and evaluate whether the story makes sense to them. If it does—and this is the hope for trial lawyers—the juror will be more receptive and likely will have an easier time understanding the course of events, the evidence, and testimony presented.

In light of this, it becomes apparent that lawyers must step back and realize that jurors are not likely to understand, grasp, or remember every complex concept introduced at trial. Not only will jurors perceive evidence and testimony differently, but they will likely only fully comprehend the evidence if it is conveyed to them through a structured medium. This is where the "how" comes in—*how* to convey such complex medical material to juries.

How to Effectively Communicate Complex Medical Information to Juries

Once again, the basic notion underlying this discussion about how lawyers should communicate to jurors in complex medical trials is simplicity. Simplicity is often forgotten as lawyers become swept up in the complexity and linguistics of a particular concept and consequently fall short of conveying the intended message to jurors. Thus, as difficult as it is to put aside the legalese or medical nuances associated with describing a particular injury, condition, or procedure, lawyers must do so to effectively communicate medical information to juries.



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First and Foremost: Find a Theme

The development and utilization of a theme is a tool with which all trial lawyers are familiar. The theme serves as a thread that weaves facts, witnesses, and proposed conclusions together. Themes are present everywhere—in briefs, in legal articles, and in everyday life. When someone asks how you liked a movie, you do not recite the dialogue between the characters, but instead relay the overriding themes that were present in the screenplay. The same goes for jurors. Jurors are not likely to remember facts, but will remember themes.

Themes are used every day by trial attorneys, but many misunderstand or forget what a theme should entail. A theme must be something that is easy to remember, something that can be brought up naturally in *voir dire* through closing arguments, and something that appeals to moral force or a sense of righteousness. An effective theme appeals to a juror's sense of justice and fairness and often entails a catchy "tag line" to remind jurors of the theme throughout the trial. *See* Steven Lubet, *Story Framing*, 74 Temp. L. Rev. 59 (2001); Barbara Kacir, *Using Jury Research to Understand, Structure, and Present Your Case*, 1 Sedona Conf. J. 19 (2000). Defense themes such as the "Rule of Three," the plaintiff did not mitigate damages, and exaggeration of injuries are examples of basic concepts that the lawyer can weave throughout phases of the trial. Examples of effective tag lines include "No one put a gun to his head; plaintiff chose to smoke" or Johnnie Cochran's "If it doesn't fit, you must acquit" in the O.J. Simpson trial. *See, e.g.*, Kacir, *supra* at 21; Davis, *supra* at 309.

This being said, a "theme" to remember about developing themes is, once again, simplicity. It is wise to convey no more than three themes to jurors, or they likely will not remember even one of them. If a trial lawyer attempts to create a theme for each witness testifying, or each group of sequence of events, the themes will get lost in the shuffle along with the factual information that jurors are likely to forget.

Another key for defense lawyers to remember is to relate the theme(s) being used to convey complex medical information to the other themes presented in the defense. The themes will build on top of each other, making it easier for the lawyer to get his or her points across, and also, and more importantly, to assist the jurors in remembering the overriding themes of the defense. Thus, although medical information is complex, and encompasses a wide variety of areas, the trial lawyer should still be able to develop clear, simple themes through which to convey the information to jurors.

An effective theme appeals to a juror's sense of justice and fairness.

Understand the Jurors' Perspective

Stepping into someone else's shoes, *i.e.*, empathizing, provides some sort of insight into how or why the individual is thinking or feeling a certain way. It is not necessary to agree with that person's perspective, nor is it even necessary to understand it. What is important, though, is the ability of a lawyer to take a step back and consider how he or she, as a juror, would want complex information conveyed.

Lawyers should remember that to a juror, they are speaking a foreign language throughout the trial. The process of a trial by jury in itself is foreign, as are all the rigid procedures and legal language. Next, consider this: on top of all that, a lawyer is now trying to convey complex medical information to a handful of people who, for the vast majority, have no understanding of or any connection to the material of which the lawyer is speaking. This presents yet another foreign language. The trial lawyer's role thus becomes one of a translator: he or she must translate the information into a language that the jurors can understand. *See* Nancy L. Neufer, *Complex Evidence and Communication: The Good, the Bad, and the Ugly*, SG095 ALI-ABA 301, 303 (2002).

A lawyer's understanding of this new role is a huge step toward more effectively communicating complex medical material to jurors. The awareness of a juror's needs is an important insight that will better equip a lawyer to take a more understandable approach to presenting complex information.

Clearly and Concisely Present the Information

The ability to convey complex medical information effectively to jurors also depends on the simple clarity and conciseness of a lawyer's presentation. A lawyer should explain a medical procedure or condition in the easiest way possible; he or she should avoid using unfamiliar medical terminology if able to do so. Additionally, he or she should try to only explain what is absolutely necessary to describe a concept.

Moreover, it is essential for a lawyer to proceed efficiently when working toward a proposed conclusion. If a lawyer must use too many building blocks to reach the end point, the point is not worth making. As mentioned previously, jurors usually do not have the attention span or the interest to follow the lawyer through a convoluted summary of the events, injuries, and resulting condition. A lawyer must clearly present the information in a short amount of time.

Another communication tool that provides clarity is to use analogies in presenting complex medical material. Analogies help bridge the communication gap by relating difficult medical concepts to concepts with which jurors are familiar and can mentally grasp. The more personal and real the analogies are to jurors, the more real the concept that a lawyer is trying to convey becomes. The defense attorney must strike a balance between not insulting jurors' intelligence by using an elementary comparison and finding a concept to which they can all relate.

Select Effective Communicators to Present Information to the Jury

In communicating complex medical information to juries, the "how" is as important as "what." In order to understand the "what"—the information presented—jurors must first be able to understand and relate to the medium that is presenting the information.

This concern frequently arises in the context of live medical expert testimony. In selecting an expert to testify, the defense lawyer should be cognizant of how the expert communicates. Studies have shown that juries place in-

tegrity and professionalism of the expert witness *before* the evaluation of the content. *See* Linda S. Crawford, *What Do Decision Makers Think of Experts?* 19 Med. Malpractice L. & Strategy 1 (2002). Furthermore, research reveals that when an expert presents jurors with complex information in less complex language, the credentials of the expert become unimportant. *Id.* In other words, jurors do not learn unless the information is presented in a way they can understand, no matter what the expert's credentials are. *Id.*

A defense lawyer will almost always be able to find more than one expert to testify on her client's behalf. The distinguishing features among these experts are their communication skills, personality, and demeanor. In light of the above research and commonsense understanding, it is apparent that jurors will relate well to an expert who can effectively translate medical terminology into everyday language. Also important is the expert who engages the jury, appears interested, considerate, kind, is well-mannered, and speaks clearly and loudly. Although these factors are important in selecting expert witnesses in any case, they are extremely significant in a case involving complex medical information.

Use Demonstratives to Communicate Complex Medical Information

> Evidence from which the trier of fact may derive his own perceptions, rather than evidence consisting of the reported perceptions of others, possesses unusual force.

2 Charles Tilford McCormick *et al.*, McCormick on Evidence (4th ed.) §212, at 4 (4th ed. 2001).

Studies have shown that people learn 75 percent of what they know through the sense of sight. *See* Weiss-McGrath Report for McGraw-Hill. "It is said that [demonstrative evidence's] great value lies in the human factor of understanding better what is seen than what is heard." *Smith v. Ohio Oil Co.*, 134 N.E.2d 526, 530 (Ill. App. Ct. 1956) (citing Wigmore on Evidence). Hence, a logical conclusion is that people learn and understand better with the eyes as opposed to the ears. *Id.* at 530–31.

In light of this, it is evident that the most effective way for a lawyer to communicate information to a jury is through the use of visual presentations and demonstratives. Many lawyers, however, still rely on verbal communication as their main tool to relay material to the jury. In cases involving complex medical information, this traditional practice can prove troublesome for a defense lawyer trying to relate such scientific evidence to the jury. After 72 hours, individuals on average retain only 20 percent of what they saw and 10 percent of what they heard. *See* Harold Weiss & J.B. McGrath, Jr., Technically Speaking: Oral Communication for Engineers, Scientists, and Technical Personnel (McGraw-Hill 1963) (known as the "Weiss-McGrath Report for McGraw-Hill"). However, as mentioned previously, studies have shown that the retention rate rises to nearly 80 percent when individuals simultaneously hear and see facts described. *See* Babcock, *supra*, at 41. Thus, it is apparent that using demonstratives has the potential to have great impact on jurors and likely the outcome of the trial.

Demonstratives also make the trial more interesting for jurors, and in effect, allow the witness to relay information twice to jurors—once through verbal testimony, and again through the accompanying demonstrative. Thus, visual demonstratives are a key tool in a defense lawyer's attempt to communicate complex medical information to juries.

Types of Visual Demonstratives

Visual presentations enable jurors to retain the information more clearly and for a longer period of time. *See* Weiss-McGrath Report for McGraw-Hill. "Moreover, research shows that using color instead of black and white on visual aids increases the attention value 130 percent, and increases the retention value 235 percent." *Id.*

In medical cases, it is common for lawyers to use demonstratives to assist a witness in describing a particular medical concept. Keeping the above numbers in mind, it would be wise for a lawyer to thoroughly consider which types of demonstrative aids would be most effective and useful in communicating to a jury. A lawyer should consider various types of multimedia before settling on one particular type of visual presentation:

- Anatomical models: The tangible and flexible nature of the model is a great advantage—jurors can touch and move the model in order to better understand how the components interact. As long as the model is substantially similar to the original, courts are likely to admit it into evidence. *See Preston v. Simmons*, 747 N.E.2d 1059, 1071 (Ill. App. Ct. 2001) (holding skeletal model admissible despite certain characteristic and scale differences; any substantial differences go to the weight of the evidence, not to its admissibility).
- Computer animation: The animation allows jurors to visualize a certain procedure or medical concept. Computer animation is also easily viewable and understandable.
- Photographs: The old adage, "a picture is worth a thousand words" says it all. However, defense counsel will want to be careful when considering showing graphic photographs. The unpleasant sight and nature of very graphic depictions will be uncomfortable for some jurors, so an alternative would be using black and white print for such images. Evidentiary issues may also arise regarding the prejudicial effect of graphic photographs (see *infra*: "Possible Reverse Effect of Demonstratives"). However, the mere fact that photographs are gruesome does not render them inadmissible, *e.g.*, *In re C.J.F.*, 134 S.W.3d 343 (Tex. App. 2003). States generally find photographs admissible if their authenticity and accuracy is proven. *See, e.g., McFadden v. Winters and Merchant, Inc.*, 603 N.W.2d 31, 41 (Neb. 1999) (holding photographs admissible to supplement witness's spoken description of events); *Darling II v. Charleston Cmty. Mem'l Hosp.*, 200 N.E.2d 149, 183 (Ill. App. Ct. 1964) (finding that if a photograph is accurate, properly identified, and relevant, the fact that it may have a prejudicial tendency is not sufficient to justify its inadmissibility).
- Charts/graphs: These tools are mostly educational; they help jurors organize the sequence of events or assist in describing a statistical probability. Jurors likely will more be interested in focusing on a colorful chart or graph as compared to one that is printed in black and white.
- Enlargements: Enlargements are great

tools for presenting minute, complex medical parts of a larger body of evidence. Both photographs and medical records are presented well when enlarged, and are generally admissible. *See Smelko III v. Brinton*, 740 P.2d 591, 595 (Kan. 1987) (holding blow-up of heating pad warning admissible because it related to the issue of liability and damages and provided an easily readable alternative for the jury).

- Videotapes: Television is a natural attention-grabber and the jurors can visually perceive the evidence. Disadvantages include the concern that there is no live interaction, so jurors may become bored or disinterested. Many state courts hold that videotapes are generally admissible to illustrate certain principles, but not for the purpose of recreating the event in question. *See Kudlacek v. Fiat*, 509 N.W.2d 603 (Neb. 1994).
- Actual medical appliances and surgical tools: Bring them to court to show the jury what was used in a particular medical procedure. These tools are extremely beneficial to show how a procedure is performed if it would be too uncomfortable to watch a videotape recording of the procedure.
- Medical chronologies: Chronologies are helpful to navigate the jury through a complex medical trial. They are helpful to chart a timeline of events, document a certain medical history, or recount physical therapy sessions. Generally, chronologies are inherently simple; they rescue jurors by tying together the events in an orderly and understandable way.

A simple Internet search will lead an attorney to a multitude of company websites that specialize in creating demonstrative evidence for use at trials.

Presentation of Demonstrative Evidence

A lawyer should give significant thought to selecting the type of demonstrative that is most appropriate to convey certain material to the jury. A demonstrative possesses "an immediacy and reality which endow it with particularly persuasive effect," and therefore, a lawyer's choice of what type of visual to use could have great impact on the trial. *See Monlux v. General Motors Corp.*, 714 P.2d 930 (Haw. 1986). For instance, an anatomical model is very useful to visualize the human spine and vertebrae, a medical chronology is helpful in creating a timeline of events leading to the injury, and graphs are useful in explaining overriding themes and trends. It also may be wise to consult the testifying expert to see what type of demonstrative he or she would prefer and to ensure the expert is familiar with and understands the visual presentation. Jeffrey J. Kroll, *Using Technology to Enhance Medical Demonstrative Evidence*, 12 Prac. Litigator 7, 14–15 (2001).

In considering which types of visuals to present to the jury, a lawyer should not limit herself to simply using one or two types of demonstratives throughout the trial. Utilizing a variety of visual aids offers many ways to present different types of evidence, and holds jurors' attention. If a particular juror does not relate well to graphic enlargements, he might better understand charts or graphs. By mixing up visual aids, the lawyer alleviates the risk of losing jurors who do not respond favorably to one type of demonstrative evidence.

In spite of the advantages of variety, the lawyer should still be conscious of not overdoing it. All demonstrative evidence should have a purpose—it should all add something to the trial. A lawyer would be wise to avoid using a visual just for the sake of using it. Thus, simplicity must still be a focus. Although this seems contradictory and incompatible with presenting complex medical information to juries, it is a must. When creating visual aids for jurors, a lawyer should only include the most essential components. The very idea supporting the use of demonstratives is to simplify things for jurors; employing a complicated model, chart, or enlargement flies in the face of the ultimate goal. It is possible to simplify such information by only including the minimum information necessary to effectively communicate to the jurors.

Visual demonstratives should also be appealing to the eye, and of adequate size, for jurors to appreciate them. This seems like an obvious concern, and relates to the previous point of being conscious of graphic images that might be uncomfortable for some jurors. The demonstratives should be visually appealing, whether that means in color or black and white, the extent of detail provided, or the texture of tangible models.

The title of the demonstrative is also significant. The title should be the conclusion of the demonstrative. *See* Nancy L. Neufer, *Jurors' Inclinations in Medical Malpractice Cases: Will the Themes Fit the Inclinations?* SG095 ALI-ABA 313, 323 (2002). It must be something that makes only one point, is brief, and is easy to understand. For instance, a photograph of a plaintiff's heart post-surgery could be entitled "Successful Triple Bypass Operation"; a chart or graph showing another plaintiff's increasing unnecessary expenses could be entitled "Plaintiff Did Not Mitigate Damages."

The actual presentation itself is also very important. If the lawyer is not technologically adept, it would also be wise to have an assistant work the video or set up the computer animation. Moreover, the lawyer should view the courtroom and plan where the demonstratives will be used, taking into account the accessibility of electrical outlets, lighting, and placement of the presentation so it will be easily viewable.

Evidentiary Issues

Admissibility of Demonstratives

A major consideration in deciding how, when, and which demonstratives to use is the evidentiary issues that may arise. A defense lawyer must be well-versed with the applicable rules of procedure, local court rules, and the local judge when contemplating which type of demonstrative to utilize.

Substantive vs. Demonstrative Evidence

A lawyer must be aware of the difference between substantive and demonstrative evidence regarding admissibility. Substantive evidence is that "adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness... or corroborating his testimony." Steven C. Marks, *The Admissibility and Use of Demonstrative Aids*, 32 Brief 24, 25 (2003). Computer simulations of an accident that are based on the application of scientific principles and mathematical calculations are examples of substantive evidence. *Id.* A simulation is different from an animation because the latter is merely a depiction of the witness's testimony, whereas in the former,

the validity of the result depends on the application of scientific principles. *Id.* at 25–26. Under Federal Rule of Evidence 401, for substantive evidence to be admissible, it must make a fact of consequence more or less probable than it would be without the evidence. Fed. R. Evid. 401.

Demonstrative evidence is that which is "addressed directly to the senses without intervention of testimony" and has no independent probative value. Marks, *supra*, at 25; *Schuler v. Mid-Central Cardiology*, 729 N.E.2d 536, 545 (Ill. App. Ct. 2000); *Smith v. Ohio Oil Co.*, 134 N.E.2d 526, 530 (Ill. App. Ct. 1956) (stating that demonstrative evidence has no probative value in itself). Real objects such as charts, graphs, anatomical models, photographs, and computer animation are types of demonstrative evidence. Essentially, demonstrative evidence is defined by its purpose: to illustrate or explain substantive evidence and act as a visual aid for the jury. *Schuler*, 729 N.E.2d at 545; *Smith*, 134 N.E.2d at 530. Generally, courts look favorably upon its use because it helps the jury understand verbal testimony and the issues raised at trial. *Preston*, 747 N.E.2d at 1071. Since the function of a demonstrative is to make underlying proof more understandable or believable, the foundation elements for the use of such evidence are: 1) the demonstrative relates to a piece of admissible substantive proof and it fairly and accurately reflects that proof; and 2) the demonstrative aids the trier of fact in understanding or evaluating the substantive evidence. *Smith*, 134 N.E.2d at 530.

Federal Evidentiary Standards for Demonstrative Evidence

A trial court has broad discretion to determine the relevancy and, hence, admissibility of demonstrative evidence. *See, e.g., Rogers v. Raymark Indus.*, 922 F.2d 1426, 1429 (9th Cir. 1991) ("The admissibility of demonstrative evidence lies largely within the discretion of the trial court."); *Bury v. Marietta Dodge*, 692 F.2d 1335, 1338 (11th Cir. 1983) (same); *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613, 624 (8th Cir. 1983) (same); *Wright v. Redman Mobile Homes, Inc.*, 541 F.2d 1096, 1097–98 (5th Cir. 1976) (same); Marks, *supra*, at 26. Some types of demonstrative evidence, such as computer animation, require closer scrutiny because of their inherent potential to mislead the jury. Marks, 32-SUM Brief at 26. In federal court, the demonstrative must be authenticated under Federal Rules of Evidence 901 and 902 in addition to the general admissibility standards of Rules 401, 402, and fairness under 403. *Id.*; *see also, e.g., Cooper v. Eagle River Mem'l Hosp., Inc.*, 270 F.3d 456, 463–64 (7th Cir. 2001).

The trial lawyer's role thus becomes one of a translator.

In federal court, FRE 403 is likely the most common objection to the use of demonstratives. *See, e.g., Roland v. Langlois*, 945 F.2d 956, 963 (7th Cir. 1991); *Rogers*, 922 F.2d at 1429–30; *Cooper*, 270 F.3d at 463. The Rule gives the trial court broad discretionary power, stating that relevant evidence may be excluded "only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Courts have further stated that there is no requirement that demonstrative evidence be completely accurate, as long as any perceived inaccuracies are pointed out to the jury. *See Roland*, 945 F.2d at 963. If a witness relies on a live test demonstration, substantial similarity between the experimental and actual conditions is required, since perfect identity is not attainable. *See Kehm*, 724 F.2d at 624. Federal Rule of Evidence 402 simply states that evidence must be relevant to be admissible, and Rule 401 provides that such evidence is any that has a tendency to make the existence of any fact of consequence in the action more or less probable. Fed. R. Evid. 401, 402.

Timely disclosure to opposing counsel is vital to admissibility. Marks, *supra*, at 26. Laying a proper foundation to establish authenticity of the demonstrative is also essential, but this requirement is not difficult to fulfill, since the demonstrative merely illustrates a witness's testimony. *Id.* In accord with this is the concept that Federal Rule 702, concerning expert testimony, is not implicated if the demonstrative is otherwise authenticated. *Id.* at 27; *see also* Fed. R. Evid. 702. Many courts have held that *Daubert* factors and Rule 702 considerations are not implicated because a demonstrative merely illustrates and is based on an expert's testimony, instead of science and mathematical calculations. Marks, *supra*, at 27.

State Approaches to Admissibility

Many states have adopted rules of evidence similar to or based on the Federal Rules of Evidence. For this reason, the standards for admissibility of demonstrative evidence are relatively similar amongst the states and federal courts.

The South Carolina Supreme Court has articulated its standard for admissibility of a computer-generated video animation. *Clark v. Cantrell*, 529 S.E.2d 528 (S.C. 2000). Such demonstrative evidence will be admissible if: 1) it is authenticated; 2) relevant; 3) a fair and accurate representation; and 4) its probative value substantially outweighs the danger of unfair prejudice. *Id.* at 536. The seminal case cited in Florida for admissibility of demonstrative evidence is *Alston v. Shiver*. The Florida Supreme Court in *Alston* stated that such evidence is admissible only when it is relevant to the issues in a case, and therefore essential, and that the object must be in substantially the same condition or a replica of the object must be a reasonable replication. *Alston v. Shiver*, 105 So.2d 785, 791 (Fla. 1958). The proponent introducing the evidence must offer a good reason for its admissibility, and this is especially true in the case of a replica of the original object. *Id.*

Other courts simply stress the demonstrative's relevancy and apply the probative/prejudicial balancing test articulated in the Federal Rules of Evidence. *See, e.g., In re C.J.F.*, 134 S.W. 343 (Tex. Crim. App. 1910) (holding that demonstrative evidence can be excluded if its prejudicial effect outweighs its probative value); *Behlke v. Conwed Corp.*, 474 N.W.2d 351, 358 (Minn. Ct. App. 1991) (same); *Sommervold v. Grevlos*, 518 N.W.2d

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733, 737 (S.D. 1994) (same); *Cowles v. Sheeline*, 855 P.2d 93, 100 (Mont. 1993) (concluding that demonstrative exhibits are admissible if they are more probative than prejudicial, and also, if they supplement the testimony and clarify some issue in the case); *Preston*, 747 N.E.2d at 1071 (holding that relevancy and fairness are prime considerations in admitting demonstrative evidence). Although many courts agree that the demonstrative does not have to be an exact accurate replication, most agree that it must be "substantially similar" to the features being illustrated. *See Behlke*, 474 N.W.2d at 358–59; *Sommervold*, 518 N.W.2d at 737 (finding that demonstrative evidence must be nearly identical, but not duplicated exactly). However, a large number of courts hold that the lack of similarity relates to the weight of the demonstrative evidence, not its admissibility. *See, e.g., Kudlacek*, 509 N.W.2d at 613.

If demonstrative evidence was used at trial simply for dramatic effect or emotional appeal, rather than for factual explanation that would be useful for the jury, it would be regarded as reversible error. *Smith*, 134 N.E.2d at 531. One realm in which this concern has arisen is in regard to the admissibility of prosthetic devices. On the whole, courts find such devices admissible, provided they are not unduly offensive, inflammatory, and do not unjustly create sympathy for or prejudice against a party. *Brown v. Billy Marlar Chevrolet*, 381 So.2d 191, 193 (Ala. 1980); *Bridges v. Clements*, 580 So.2d 1346, 1348 (Ala. 1991) (citing *Billy Marlar Chevrolet*). One court even held the demonstration of the stump of an amputated leg admissible, stating that even though it might be an unpleasant and gruesome sight, such evidence would not be excluded unless it can be shown that the purpose of it was to inflame and impassion the jury. *Darling II*, 200 N.E.2d at 184.

Possible Reverse Effect of Demonstratives

Along with general admissibility concerns lies the potential that the demonstrative will have a reverse effect on the jury. When considering the evidentiary standards for admissibility, the defense lawyer should also contemplate the possibility that the demonstrative may impact the jury in unforeseen harmful ways. Research has suggested that only one out of any three exhibits will likely have the desired effect on jurors. *See* Roberto Aron *et al.*, Trial Communication Skills §28:19 (2d ed. 2003).

This undesired consequence may be the result of graphic visual evidence that offends jurors, or the fact that the attorney blunders in offering a demonstrative into evidence. Since jurors all bring personal experiences, attitudes, and feelings into the courtroom, a lawyer should thoroughly consider the impact that each demonstrative may have on them. An example of such borderline demonstrative evidence is an early case in which a court held admissible the demonstration of removing and replacing an artificial eye in front of the jury to illustrate a condition resulting from an injury. *Shell Petroleum Corp. v. Perrin*, 64 P.2d 309 (Okla. 1937). Although this act was held admissible as demonstrative evidence, some jurors may have been uncomfortable and negatively impacted by such a graphic presentation. Another example is the showing of fragments of bones taken from an individual's head to show a condition resulting from an injury. *St. Louis & S.F.R. Co. v. Mathis*, 107 S.W. 530 (Tex. 1908). Again, even though the court held such demonstrative evidence admissible, it may have made some jurors uneasy and uncomfortable.

The general conclusion of this discussion is that a lawyer should simply stop and think about what type of demonstrative evidence she wants to introduce, and whether it could

have a substantial negative impact on the juror. The lawyer should think twice about introducing potentially borderline demonstratives into evidence, since it may hurt the lawyer's case instead of helping it.

Conclusion

Communicating complex medical information to juries is a skill that few trial lawyers have mastered. Keeping the message simple when communicating complex information to jurors is a key to mastering the skill. It is much more likely that jurors will comprehend complex material presented to them if it is conveyed in terms and ideas that the juror can mentally grasp and own. "Simplicity is the natural result of profound thought." FD

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- Never rely on your computer's spell-check program. The computer does not know the difference between a "trial" and a "trail," or a "contact" and a "contract."
- Is the formatting consistent throughout the document? Are all of your paragraphs justified in the same manner?

Level IV: Rule Compliance

How frustrating would it be to edit a document only to have it rejected by the court for failure to comply with a rule? Check all court rules that apply to the document, and make sure you follow each rule. These include required sections (for instance, Fed. R. App. P. 28 requirements), word count and page limitations, font requirements, and compliance with the Bluebook or other applicable citation guides.

Conclusion

In his book *Winning on Appeal* (§21.1, 2d Ed. NITA, 2003), Judge Ruggero J. Aldisert emphasizes, "There is no such thing as good writing; there is only good rewriting." Effective editing is a necessary component of good rewriting, and these guidelines should help you produce a good document. FD