



Rachel Gezerseh

PANISH SHEA BOYLE RAVIPUDI

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Using visual evidence to tell compelling stories at trial

BRINGING TOGETHER YOUR DEMONSTRATIVE AND SUBSTANTIVE EVIDENCE AT TRIAL

As trial attorneys, we want to engage the trier of fact. We want our client's story to be so memorable and affecting that the jury is motivated to find in our client's favor. To make such an impact you need to tell a compelling story. To tell a compelling story you need to use imagery – photos, graphics, video.

I know this from my years working as a documentary filmmaker. Long before law school, when I was still a teenager, I began my first documentary film project documenting the story of a friend named Jenny who was struggling with drug addiction. After Jenny passed away from an overdose at 19, I used interviews, family footage and photographs to complete the film. The opening sequence is a home-video clip of a three-year-old Jenny proudly singing a nursery rhyme to her mom. This is followed by images of 18-year-old Jenny lying sick on her parent's bathroom floor convulsing with cramps from heroin withdrawal. I screened the film to hundreds of high school and college students all over the country. After each screening, the students would come up to me in tears and tell me that Jenny was no different from them. All because they saw themselves in her images.

Images are everything

The saying goes that “a picture is worth a thousand words.” And it turns out, from studies done in behavioral science, that is mostly true. It's called the “picture superiority effect” and it means that your jury or finder of fact will remember your words better if you pair them with images.

Early in the case it is important to start thinking about and developing creative graphics and imagery and identifying photos, videos, and other demonstratives to illustrate your case themes. You should use these visual tools as early as possible, in your demand letter or your complaint. Use them in discovery. Use them in mediation. But if you do not resolve the case early and you do get to trial, plan to weave visual imagery in with your substantive proof so that you can appeal to the jury on a visceral level and capture their interest.

Demonstrative vs. substantive evidence

It may seem elementary, but as you are thinking about and planning how to prove your case with visual elements, it is important to differentiate between demonstrative and substantive evidence. Keep in mind that there are many forms of visual evidence that qualify as substantive evidence rather than as a demonstrative. Both categories can be admissible at trial but your strategy for how to get each type of evidence admitted can be very different.

You need to be clear about why you want the evidence admitted. For example, photographs or video of your client's injuries after an accident should be admitted as substantive evidence that directly shows the nature and extent of your client's



injuries. There is ample case law in California where courts have recognized the evidentiary value of such photographs and video. (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 663 [disapproved on other grounds by *Coito v. Superior Ct.* (2012) 54 Cal. 4th 480]; *Lehmuth v. Long Beach Unified School District* (1960) 53 Cal.2d 544, 555.)

In *Rodriguez v. McDonnell Douglas Corp.*, plaintiff, who was struck by a 630-pound pipe while on the job, offered photographs at trial showing the extent of his injuries including scars, wounds and pressure sores. Defendant objected that the photos were too gruesome and argued the photos should not be admitted because the potential prejudice of allowing the jurors to view such photos outweighed any probative value they may have. However, the court found the photographs to be relevant to show the extent of plaintiff's injuries and reasoned the photos should be admitted because they were necessary for the jury to be able to make a fair assessment of adequate compensation.

In *Lehmuth v. Long Beach Unified School District*, plaintiff sought to admit a film taken of her in the hospital after she was injured due to defendant's negligence. The film showed “the existence and use of a tracheotomy (insertion of a tube in a slit in the trachea, the windpipe), the existence and use of a Levin tube for feeding (tube through nostril into stomach), her unconscious flailing of arms and body, flinching and other similar matter.”

The California Supreme Court held that the film was not inflammatory, and the trial judge was correct to admit the film into evidence at trial.

If you have a photograph or videotape of the event at issue, perhaps security camera footage of an assault or bystander video taken of an accident, this, too, should qualify as substantive evidence. In *People v. Gonzalez* (2006) 38 Cal.4th 932, a photograph of the crime scene was held to be admissible even though the location of the photographer was unknown, the detective in the photo standing where the gunman was reported to have stood was taller than the gunman, and the photograph did not actually show the actual lighting conditions.

The court admitted the photograph because it was offered to show where witnesses had said the gunman was standing, and not the height of the gunman or the lighting conditions. Notably, a video offered in the same case to show the lighting conditions at the time of the shooting was not admitted into evidence because the court found that the video lacked foundation and would likely confuse the jury.

By contrast, pure demonstrative evidence such as animations or other visual aids are not substantive evidence but are admitted to help a jury to understand expert testimony or other substantive evidence. (*People v. Duenas* (2012) 55 Cal.4th 1, 20-21; *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1036.)

Requirements for the admission of visual evidence at trial

Visual evidence, whether substantive or demonstrative, must meet three basic requirements to be admissible. First, it must be relevant. (Evid. Code, § 210.) Second, it must be presented through a witness who has personal knowledge of the matter or is qualified to give an expert opinion on the matter. (Evid. Code, §§ 702, 801.) Third, the trial court must be satisfied the evidence will not necessitate an undue consumption of time or create a substantial danger of undue

prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352; *Endicott v. Nissan Motor Corp.* (1977) 73 Cal.App.3d 917, 930-931.)

Substantive visual evidence

For substantive visual evidence, such as videos and photos, “Day in the Life” videos are a good example of how this works in practice. These are videos presented by plaintiff at trial to show the severity of plaintiff’s injuries and the impact those injuries have had on plaintiff’s life. In *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 442 (“*Jones*”), the video showed 20 minutes of plaintiff’s daily activities since being confined to a wheelchair, including plaintiff being bathed, placed in her wheelchair and plaintiff trying to move around in her wheelchair.

“Day in the Life” videos like the one in *Jones* are usually found to be relevant to the issue of damages because the video shows a severely injured plaintiff’s need for medical treatment and helps the jury understand the plaintiff’s daily life for purposes of awarding appropriate compensation for pain and suffering. Only when a “Day in the Life” video has little probative value, is cumulative of other testimony, and is calculated to inflame a jury can an appellate court conclude that its admission was an abuse of discretion under Evidence Code section 352. (*Id.* at p. 443.) In determining whether the probative value of such a video outweighs the possibility of prejudice, a key factor is whether the video “fairly represents the facts with respect to the impact of injuries on the plaintiff’s daily activities.” (*Id.* at p. 444, citing *Bannister v. Town of Noble* (10th Cir. 1987) 812 F.2d 1265, 1270.)

Keep in mind that a 20-minute “Day in the life” video may be expensive to produce and not necessarily in the best interest of your client, depending on circumstances. Another option is to use individual clips of video showing particular moments in the day of your injured client. These clips may be just as powerful as the longer version and better

visual aids to use in conjunction with your medical expert’s testimony about the severity of your client’s injuries.

In *Zastawnik v. Asplundh Construction*, our firm’s client had severe bilateral ankle fractures from a motorcycle crash. Plaintiff’s daughter took video footage with her cellphone of her dad in agony, moaning and crying on the hospital bed that was in their living room. Plaintiff was an avid mountaineer and was extremely fit before the injury. He lost 40 pounds during his recovery because he could not eat and could not move. He withered away and had extreme nerve pain in his lower limbs. We used the daughter’s cell phone video at trial as compelling evidence of plaintiff’s emotional distress and pain.

Demonstrative evidence

For demonstrative evidence, such as animations or graphics, the rules for admission are similar to the rules for substantive evidence, but because demonstratives are used to aid the jury’s understanding of testimony, demonstratives will usually be authenticated by the witness whose testimony is being explained by the demonstrative. (*People v. Kynette* (1940) 15 Cal.2d 731, 755; *St. George v. Superior Court* (1949) 93 Cal.App.2d 815, 816.)

If, for example, you have a medical illustration that will help explain dense medical concepts to your jury through graphic illustrations, you would need your medical expert to testify that the illustrations are a fair representation of the medical injuries and procedures they purportedly illustrate.

Witness testimony is also key for authenticating accident reconstructions. In *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521, the court found that accident reconstruction evidence must meet the following requirements: (1) the [accident re-creation] must be relevant (Evid. Code, §§ 210, 351); (2) the [re-creation] must have been conducted under substantially similar conditions as those of the actual

occurrence; and (3) the evidence of the [accident re-creation] will not consume undue time, confuse the issues or mislead the jury.

The most common objections for demonstrative evidence are based on lack of foundation and Evidence Code, section 352. The judge has discretion to admit or to not admit the exhibit into evidence, and that judge's decision will only be overturned on appeal for an abuse of discretion.

Keep it real, but also engaging

Your visual evidence should arise from and reflect the themes in your case. And of course, it needs to be accurate. Ensuring accuracy means working as early as possible with your experts to refine the concept for the demonstrative.

In a case involving extreme injuries suffered by plaintiff when his motorcycle was T-boned by a pickup truck, the inspiration for visual evidence came from information that attorneys John Shaller and Tom Schultz learned from the emergency room doctor who had treated plaintiff at the hospital. Plaintiff had nearly died due to severe blood loss. He was fortunate to have come to a level one trauma center that had massive blood transfusion capability. The doctor's comments inspired the idea for a demonstrative that would visually explain three things to the jury: (1) the average amount of blood that a person the size of the plaintiff would have in his body; (2) the amount of blood that plaintiff lost due to his injuries from the accident; and (3) the number of bags of blood that were needed for the transfusions to keep plaintiff alive. Early in the case the attorneys began working on the illustration with the experts. The result was an accurate and engaging visual representation showing images of the plaintiff's body next to dozens upon dozens of images of blood donor bags.

Sometimes, it is not just the content of the image that can capture the imagination of the jury, but the size and structure of the image as well. Take another example involving the wrongful

death of a truck driver: the decedent was crushed between two tractor trailers. According to the defense, the defendant did not see decedent because he was standing between the two trailers. The problem was that the decedent was 6 foot 7 inches tall and was wearing a bright orange vest at the time of the accident. Attorneys Spencer Lucas and Erika Contreras used a line-of-sight analysis and reconstruction of the accident and worked with a biomechanic expert and the county coroner to create a 6-foot 7-inch color cutout in the same shape and size of decedent. This demonstrative was used at trial to illustrate the experts' testimony and demonstrate how tall the decedent was so that the jury understood that the decedent must have been visible to the defendant prior to the accident.

Timing is important

You will be more likely to get your visual evidence admitted at trial if you produce it as early as possible in the case. If you have your visual evidence ready, send it with the demand and/or include it in your complaint. If, like the blood and cutout examples above, you will be using your visual evidence to help explain your experts' testimony and theories at trial, you should endeavor to complete the exhibit early and provide it at your expert's deposition. Since the defense will have an opportunity to ask your expert about the visual evidence during the deposition, the defense will find it difficult to argue unfair surprise at trial when you use the same visual evidence. But if you spring the exhibit on the defense right before you plan to use it at trial, you may find that the judge is less inclined to allow you to use it with your witness.

Even when you develop the visual evidence early and provide it early to the defense, you will still likely face a motion in limine to exclude the visual evidence at trial. In the case of the blood demonstrative described above, the attorneys developed the demonstrative very early in the case and used it at various points pre-trial. Just before trial,

the defense filed a motion in limine to exclude the blood demonstrative, arguing that it (along with other proposed medical demonstratives) lacked foundation and was prejudicial. Plaintiff opposed the motion in limine on the grounds that foundation would be established by testimony that the evidence was a fair representation of the expert's testimony and that the blood demonstrative would aid the experts and medical witnesses in presenting their testimony to the jury. The judge denied the defense motion in limine. The case settled soon after.

Even if there is no motion in limine to exclude your visual evidence, you should always be prepared with a pocket brief that sets forth your arguments for why your visual evidence should be admitted into evidence. In the case involving the life-sized color cutout of the decedent, the attorneys prepared a detailed brief that described the cutout, identified the experts they would use it with, and discussed how the life-sized cutout would clarify the testimony of those experts. The pocket brief also set forth the law on admissibility of the cutout as a demonstrative, and informed the judge that plaintiff's biomechanic and medical experts were prepared to testify to lay the proper foundation. As noted above, the cutout was admitted and used to great effect at trial.

Be prepared

I love the quote attributed to Benjamin Franklin, "by failing to prepare, you are preparing to fail." It could not be truer with respect to using visual evidence at trial, mediation, or really any point that you are presenting visual evidence to a live audience. If you are using your visual evidence with a witness to help explain their testimony, make sure that witness is prepared and familiar with the visual evidence so that the presentation of the visual evidence with that witness is seamless. If you are using the kind of demonstrative that the witness will handle or manipulate, then make sure that the witness practices before testifying to avoid

any awkward moments where it appears the witness has no idea what they are doing with the demonstrative.

Likewise, if you are presenting the visual evidence at trial, you must be familiar with the visual evidence and how to best present it. You need to be prepared because things can and will go wrong, especially when it comes to technology. If in this (hopefully) post-pandemic world you are fortunate enough to be back in person in a courtroom for trial, you need to make sure you are prepared to use your visual evidence to your best advantage. Before trial begins, if you know the location of your assigned courtroom, and time permits, you should request access in advance so that you can familiarize yourself with how the

technology in that particular courtroom works.

Or, if there is no technology in the courtroom, or if what is there does not work properly, it would be good for you to know that going into trial so that you can bring your own equipment. You should also sit in the jury box and check the sight lines to figure out the most favorable spot for you to place your physical (non-digital) visual evidence so that all members of the jury can easily see what you are presenting.

Conclusion

Because the majority of what we learn is from what we see, the most powerful proof to use throughout your case and certainly at trial is visual. Visual evidence can be photos, videos,

illustrations, animations, graphics, even life-sized color cutouts. Gathering and conceptualizing your visual evidence early is key to a powerful and persuasive case. So is keeping in line with the rules of evidence while still being creative. Visual evidence requires a lot of work and thought but it is the most effective way to illustrate liability, support your client's damages, and maximize the chances for a fair and substantial recovery for your client.

Rachel Gezerseh received her J.D. from Southwestern Law School and is a trial attorney with Panish Shea Boyle Ravipudi. Her practice focuses on litigating catastrophic personal-injury, wrongful-death and products-liability cases.