I'd rather see a sermon than hear one any day; I'd rather one should walk with me than merely tell the way. The eye's a better pupil and more willing than the ear, Fine counsel is confusing, but example's always clear.

Edgar Guest

I'd Rather See a Sermon. . .

BY ROBIN FRAZER CLARK

We live in a visual age now. Jurors now, more than ever, expect to see something rather than just hear it. Wired.com reports that millions of people now use YouTube.com as their first source of information rather than a plain Google word search. According to the Wired.com article, "the average YouTube mobile session is 40 minutes and … YouTube now reaches more 18-to-49-year-olds than any single US cable network." In May of last year, Google released statistics that showed searches related to

"how-to" on YouTube were growing 70 percent year over year, with more than 100 million hours of how-to content watched in North America just between January and May of 2015.[1] Many of those searches were "How to" find the video you are looking for more easily. Educators are incorporating video in the classroom, as video "captures attention, engages your audience and improves later recall."[2]

We have thought for years that people learn differently, i.e., some people are visual learners, who learn by seeing, some are auditory learners, who learn by hearing and some are kinesthetic learners, who learn by touch. Some may be all three. That is why when I have a witness discussing a document, I show the jury the document on a large screen TV while we are talking about it. If there is physical evidence a juror may touch, I will ask the court to permit that. There are hundreds of articles about neuroscience and learning, and recently, the long-held theory that people learn differently has been debunked by several neuroscientists. In "The concept of different "learning styles" is one of the greatest neuroscience myths,'" an article on Quartz.com, researchers posited that the theory of different learning styles was actually a "neuromyth," and that all individuals learn in essentially the same way. It may be too early to jettison entirely the concept of different learning styles; regardless, we can't ignore the prevalence and significance of videos and photographs in our everyday lives compared to the pre-internet days. If you think about it, it is not the easiest thing to ***write*** an article about how to ***show*** something. With that in mind, let's explore ways to make the most of demonstrative evidence in your cases.

VIDEOS AND PHOTOGRAPHS ARE WORTH A THOUSAND WORDS

If you are lucky enough to have a video of the incident that is the basis of your case, you have a potential gold mine. Check all potential sources for surveillance video of your incident. Go in person to any business near the scene of your incident and ask for any surveillance video they may have. You can't count on investigating police officers to obtain that as part of their normal investigation. Remember to send spoliation letters immediately upon being retained for potential defendants to preserve all surveillance video. If the video confirms your client's side of the story, (keeping your fingers crossed that it does), it may be all you need to win the case. For example, in a case I had in which a large overhead door in an office building parking garage in Atlanta fell on my client, the surveillance video ended any discussion that she was somehow contributorily negligent. It also showed the undeniable impact of a 10,000-pound steel door falling on her. In defeating a motion for summary judgment, I showed the court the video that showed my client being violently struck by the overhead door while two security guards stood there and looked on. I feel strongly that after the trial judge saw the video, there was no way he was going to grant summary judgment to any defendant. Also, once the main defense partner saw the video at the hearing, rather than just relying on his associate's description of it and the case, I felt certain there was no way he was going to let a jury see that video. The case settled shortly after the MSJ hearing.

If you are lucky enough to have a video of the incident that is the basis of your case, you have a potential gold mine.

Speaking of those "How To" videos on YouTube.com, search YouTube.com for any video you might be able to use in any of your cases. Don't just talk about a herniated disc at C6-7, **show** one. For example, for any medical procedure in your case, whether it might be an anterior cervical discectomy and fusion or laparoscopic hernia surgery, chances are good you'll find a relevant, accurate video of the procedure on YouTube.com. Just try a search in YouTube.com such as "How to intubate a patient," or "How to perform a laparoscopic anterior cervical discectomy." You will find hundreds of examples of demonstrative videos. I recommend you find several different videos of the relevant procedure, share each with you expert and ask your expert whether any one of them accurately depicts the procedure performed on your client. With our new evidence rules, little more by way of foundation needs to occur before you can use the video, and if you don't want to admit it into evidence, just indicate to your judge it is for demonstrative evidence only (most of which gets in these days) and have your expert testify it will facilitate his testimony. Then you can show it to the jury as your expert talks about what was done. There are both videos of actual live surgery and there are videos done with medical illustrations. Keep in mind an actual surgery may be too graphic for your jury. You can find videos done in medical illustrations both on YouTube.com and also on the websites of many medical providers. They are easy to find. Just verify with your expert witness the video is accurate and helpful.

I did this with a medical malpractice case involving an ilioinguinal laparoscopic surgery case. My expert simply described the surgery as the jury watched it happen. One of the issues with this laparoscopic surgery was whether the surgeon could see the ilioinguinal nerve in his limited surgical field. My expert had testified it was fairly large and easy to see and identify for any surgeon trained well. He also testified the ilioinguinal nerve was about the size of a piece of spaghetti. The defense attorney asked him "cooked or uncooked." My expert testified "cooked." So, of course I brought a piece of cooked spaghetti with me as a demonstrative aid for my expert's testimony. And when you compare a piece of cooked spaghetti to a piece of uncooked spaghetti, you realize a piece of cooked spaghetti is really quite large. Go ahead, try this sometime at home!

Use everyday items to show the jury what is meant by scientific terms, industry-specific items or unfamiliar measurements. For example, in a medical malpractice trial that I tried with Jeff Gerwurtz, in which our client had a brain aneurysm that measured 2.9 CM, we used a golf ball (also about 2.9 CM in diameter) to show the jury how big that is. And I showed them an actual golf ball during closing. A golf ball-sized brain aneurysm seems unbelievably large; a 2.9 CM size brain aneurysm does not.

2.9 CM aneurysm on MRI.

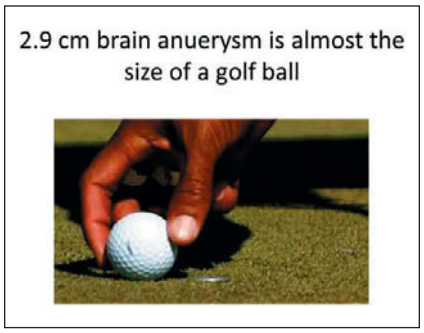


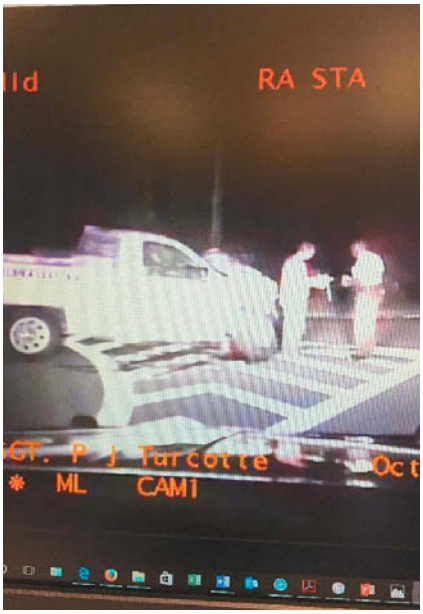
Illustration showing 2.9 CM. Aneurysm is the size of a golf ball.

If your expert does anything in your case other than review records, film it. Then use the video to show the jury what your expert has done in the case. It lends instant credibility to your expert for him to have examined your client, for example, himself, rather than relying on a history and exam in the medical records. For a negligent intubation case in which the primary issue was whether the defendant doctors had performed a proper airway examination on my client pre-intubation, I had my expert witness perform his own airway examination on my client and I filmed it. After my expert's own independent airway examination, he reached the opinion that any airway examination performed by the defendants had to have been inadequate. Now when he testifies at trial he will be able to testify he performed his own examination that yielded completely different results than what was indicated in the medical records.

You can also find quick graphics on Google Images, such as the airway illustration shown above.

Dash cam video from the investigating police officers or troopers should be obtained (along with the 911 calls) immediately after you have been retained through an Open Records Act Request. In telling a story, nothing can make it more dramatic than dash cam video and 911 calls. They can recreate the trauma your client endured, they can show weather and lighting conditions at the scene, they can identify eyewitnesses, and they can eliminate defenses, among other things. Below is a photograph of the scene of a car wreck in which a crucial issue is the city of Atlanta's failure to have several newly installed light posts on Peachtree Street energized and working before opening the road to motoring traffic. This shows the undisputable lack of lighting on the street as the only lighting in the photo is the camera's flash and the fire truck headlights. It also shows the glare of the rain and the confusing placement of overhead signs.

Photo of scene showing lack of adequate lighting.

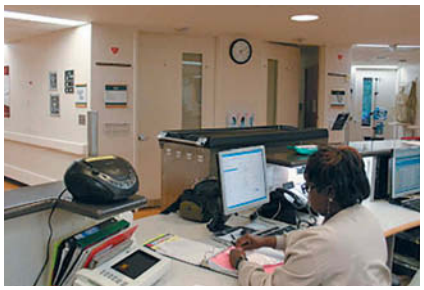


State Trooper's Dash Cam Video of Defendant.

You can get a wealth of information from the dash cam videos. Not only do they place your juror at the scene and deliver the drama you want to make your story interesting, you can also get valuable information from them. For example, in the dash cam video above taken from a state trooper's patrol car at the scene of a bad crash, a phone number is displayed on the side of the truck being driven by the at-fault driver. One of the defenses asserted in this case is that driver was not on-the-job for an AAA wrecker at the time of the subject wreck. Yet that phone number on the side of his truck is the telephone number for the AAA wreck service. Also, the video shows the at-fault driver making several telephone calls on his cell phone while still at the scene, and when the trooper asks him to come into his patrol car for questioning, the driver says, "OK, I'm on the phone with my boss." Why would he be calling his boss from the scene of the wreck he just caused if he wasn't on-the-job at the time? We were able to use this and other evidence to prove he was, in fact, on-the-job at the time of the wreck, putting into play his employer's Commercial General Liability policy in addition to his own personal coverage.

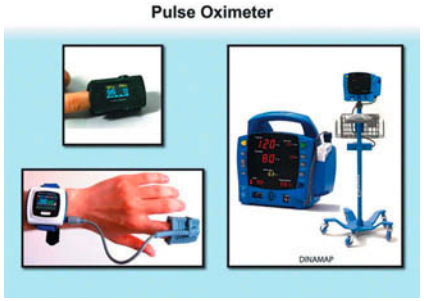
The setting of the incident your case is about can be important. Consider asking for an "inspection" of the premises to permit photographing and videoing. You can do this in any type of case, premises liability, negligent security and even medical malpractice, not just car wreck cases. For example, in a medical malpractice case I tried with Adam Malone, the issue was lack of monitoring a patient who was post-operative on heavy pain medication (IV Dilaudid) and who had sleep apnea. The nurse administered IV Dilaudid, failed to put on his CPAP which helped him with his sleep apnea, and went to lunch. While she was at lunch, the patient coded and died, despite resuscitation efforts. The defendant hospital claimed he was "closely monitored," especially since his room was right in front of the nurses' station. I went to the hospital and photographed and videotaped it myself. I moved the trash can that was holding back the door to the room and the door closed on its own. Two photographs showed the door closed and there was no way the nurses were "closely monitoring" this patient as they claimed. They couldn't even see him in his room. The video also showed the nurses chit-chatting and talking about what they were doing that evening, not whether they were closely monitoring their patient who was about to go into cardiac arrest.

Trash can holding door open.



Door closes when trash can is removed.

In this case, the issue of availability of a Dynamap or a pulse oximeter to monitor the patient was disputed. While our expert witnesses were talking about how easy it is to wheel a Dynamap from room to room, we had this image available to show the jury what a Dynamap is. We purchased an actual pulse oximeter and a BiPap machine on EBay for our witnesses to use in explaining how they are used.



Pulse oximeter and Dynamap board.

Images can be used to explain what Obstructive Sleep Apnea (OSA) is and what morphologically happens when a patient obstructs, or has his airway blocked, due to OSA.

In that same case, Adam used the analogy of frying chicken to monitoring a patient with obstructive sleep apnea, and that if you leave either unwatched too long, you will have a bad outcome. Either the house will burn down or the patient will die. Adam used an image similar to this one in his closing argument.

Adam's Chicken Frying in a Pan.

Always use demonstrative aids in any oral argument, including appellate arguments. Both the Georgia Court of Appeals and the Georgia Supreme Court are technically well-equipped with any audio-visual connection, and everything you use is shown on each judge or justice individual's monitor.

We have also purchased a mannequin on EBay to use in a medical malpractice case involving improper intubation. During the defendant physician's deposition, being videotaped, I asked the doctor to demonstrate how she typically intubates a patient using our mannequin.

Mannequin purchased on Ebay to show how to intubate a patient correctly.

Ask your focus groups what they would want to see to demonstrate key aspects of your case. Key questions I typically ask my focus groups before trial: "How should I show this? What can I use to explain this? What analogy best describes this situation? If you had to demonstrate this to other people, what would you use to do it?" You will get quite a bit of good ideas from your focus group members. Also, consider asking some teenagers how they would show the jury what your case is about. Young people have grown up in and live in a totally different world then we do. They are geared toward seeing something, not just hearing it. Young people do not first read a news article about an event on the news, they pull up the video and watch it. They offer astute, visually keen guidance. Fortunately, my children are 22 and 19 years old, and I run every case by them. Their input is invaluable. And if you need something to spark your creative juices, just Google whatever your case is about, e.g., "motorcycle crash," click on "images" and I am sure what you see will inspire you. By the way, just a friendly warning, Google images of "motorcycle crash" are some of the most graphic you'll ever see.

Always use demonstrative aids in any oral argument, including appellate arguments. Both the Georgia Court of Appeals and the Georgia Supreme Court are technically well-equipped with any audio-visual connection, and everything you use is shown on each judge or justice individual's monitor. You have a captive audience. Visual aids enhance everything you say and make it more persuasive. For example, in a products liability appeal involving the failure of a seat belt in a Jeep rollover, *Key Safety Systems v. Bruner,* 334 Ga. App. 717 (2016) one of the issues on appeal was whether a video shown by the plaintiff at trial, which defendant argued should not have been allowed because it was a "reenactment," should have been allowed to be shown at trial. I found the video in Box 4 out of 4 in the appellate record. It was not part of any brief and based upon the record checkout sheet, it did not appear as if any judge on our panel had checked this box out during their review. Perhaps the judges had watched this video, but I wasn't certain. I was confident that once they viewed it, they would agree it was not possibly a "reenactment" of the rollover (a reenactment has a much higher standard for use at trial than simply a demonstrative video). I played the video of our demonstration, just a few seconds of it was enough, during my oral argument. No judge agreed with the defense that it was a reenactment after seeing it. See above for stills from the video clips to show you what it looked like.

Also, in *Bruner,* I used photos of the actual seatbelt involved to demonstrate

TIPS FOR USING VISUAL AIDS

#1
Some people are visual learners, who learn by seeing, some are auditory learners, who learn by hearing and some are kinesthetic learners, who learn by touch. Some may be all three.

#2
If you are lucky enough to have a video of the incident that is the basis of your case, you have a potential gold mine. Check all potential sources for surveillance video of your incident.

#3
Keep in mind an actual surgery may be too graphic for your jury. You can find videos done in medical illustrations both on YouTube.com and also on the websites of many medical providers. They are easy to find. Just verify with your expert witness the video is accurate and helpful.

#4
Use everyday items to show the jury what is meant by scientific terms, industry-specific items or unfamiliar measurements. A golf ball-sized brain aneurysm seems unbelievably large; a 2.9 CM size brain aneurysm does not.

#5
In telling a story, nothing can make it more dramatic than dash cam video and 911 calls. They can recreate the trauma your client endured, they can show weather and lighting conditions at the scene, they can identify eyewitnesses, and they can eliminate defenses, among other things.

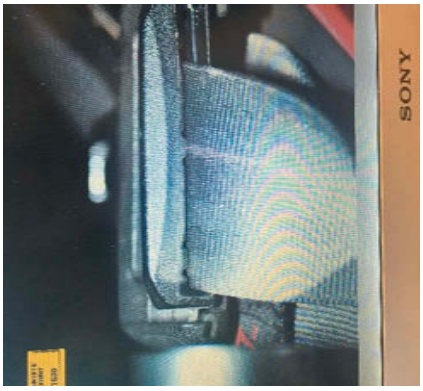
#6
While our expert witnesses were talking about how easy it is to wheel a Dynamap from room to room, we had this image available to show the jury what a Dynamap is. We purchased an actual pulse oximeter and a BiPap machine on EBay for our witnesses to use in explaining how they are used.

#7
We have purchased a mannequin on EBay to use in a medical malpractice case involving improper intubation. During the defendant physician's deposition, being videotaped, I asked the doctor to demonstrate how she typically intubates a patient using our mannequin.

#8
Ask your focus groups what they would want to see to demonstrate key aspects of your case. Key questions I typically ask my focus groups before trial: "How should I show this? What can I use to explain this? What analogy best describes this situation? If you had to demonstrate this to other people, what would you use to do it?" You will get quite a bit of good ideas from your focus group members.

#9
Also, consider asking some teenagers how they would show the jury what your case is about. Young people have grown up in and live in a totally different world then we do. They are geared toward seeing something, not just hearing it. Young people do not first read a news article about an event on the news, they pull up the video and watch it. They offer astute, visually keen guidance.

#10
Always use demonstrative aids in any oral argument, including appellate arguments. Both the Georgia Court of Appeals and the Georgia Supreme Court are technically well-equipped with any audio-visual connection, and everything you use is shown on each judge or justice individual's monitor. You have a captive audience.



Actual seatbelt involved in Jeep Rollover in Bruner v. Key Safety Systems.

how reliable our expert's testimony was in relying on the markings left on the seatbelt during the rollover. You cannot presume your appellate judges have had time to look at all of the compelling evidence in the record in your case. Yes, they have read the briefs and probably much of the case law involved, but you cannot expect they have had the time before oral argument to review every piece of persuasive evidence in your case. Use your last opportunity to persuade them by showing that compelling evidence as you argue your case. I think they will appreciate it.

I shared the Edgar Guest poem above with you because I think it sums up the point of demonstrative evidence pretty succinctly: "I'd rather see a sermon than hear one any day." Put that into the context of a trial or oral argument: "I'd rather see a case than hear one any day." Sounds about right. Good luck and remember, a rising tide lifts all boats. ●

ABOUT THE AUTHOR

Robin Frazer Clark *is the owner and founder of the law firm of Robin Frazer Clark, P.C., and has practiced law for 28 years. Ms. Clark devotes her practice exclusively to plaintiff's personal injury. She is a Past President of the Georgia Trial Lawyers Association and was also the Fiftieth President of the State Bar of Georgia where she was only the second woman to hold each of these positions. Her motto is "A Rising Tide Lifts All Boats." Robin can be reached at robinclark@gatriallawyers.net.*

FOOTNOTES

1. Searchengineland.com.
2. Blog.edynco.com.