



Trials and Tribulations

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By D. Alan Thomas and Cameron N. Rentschler



Because you only have one chance
to explain the facts.



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Season's Greetings

Wishing All Members of the DRI Litigation Skills Committee a Safe and Prosperous 2020!



Feature Article

Demonstrative Trial Exhibit Communication: Or “A Day at the Improv”

By D. Alan Thomas and Cameron N. Rentschler



What is the difference between a trial exhibit and a demonstrative trial exhibit? A demonstrative tells a story. The goal is to communicate effectively when there isn't a

big budget, or when a judge doesn't allow you to use your expensive exhibits. In these scenarios, having a strategy in place to create convincing trial exhibits at low cost is key to being successful. Starting with the fundamentals helps to create effective, low cost exhibits at every trial:

- Determine what you are trying to communicate
- Define themes – and not 10 of them
- Simple exhibits – good 😊
- Complex exhibits – bad 😞
- Understand your audience
- Tell, Show, Teach

- No unlimited budget? No Problem
- Avoid Death by PowerPoint
- Slick is not always better – Mix Media
- Be competent with technology
- Use common objects to teach

Demonstrative trial exhibits are one of the best tools that help explain complex issues to juries in a memorable,



time-efficient way. Part of what makes them so important is that it is an opportunity to communicate visually. While some time spent in front of the jury will involve vocal presentation of materials, demonstratives are a visual method of communication and shift the focus from the speaker to the materials being conveyed. However, effective exhibits require more than just putting photographs and graphics in front of the jury. Time and

opportunities to present materials to the jury are limited, so

it is important to make your demonstratives impactful and clear.

Determine What You Are Trying to Communicate

An important first step in creating an effective exhibit is to identify what your goal is in presenting that exhibit: What are you trying to teach the jury? Because a single photograph or graphic may have a number of different interpretations and uses, identification of your goal in presenting it can help tailor the presentation and use of the exhibit to further that goal. What does the exhibit show? How does it support your themes? What facts does it prove? What witness is it most effective to use with? How does it fit in with other exhibits that you want to use? Answering these types of questions prior to trial will ensure that the exhibit is an effective communication device, rather than a distraction.

If you haven't determined what you are trying to say and mean, your trial exhibits won't do that for you. Trial exhibits are most effective when you have a goal for their use.

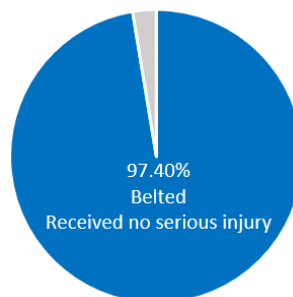
Define Themes—and Not 10 of Them

Defining themes is a broader form of determining what you want to communicate. While deciding what an exhibit is used for is important, an additional step is needed to ensure that it fits within the overall point being made at trial. And, more importantly, what takeaways the jury will have.

Just because a piece of evidence or an exhibit is "good" for your case overall doesn't mean that it is going to be a focal point or a theme. Broad themes are effective in part because they are limited in number. The more themes that you have, the less impactful each of them is individually. If an exhibit doesn't directly support any of your themes, why spend valuable and limited time on it?

Simple Trial Exhibits—Good 😊

Rollover Crashes

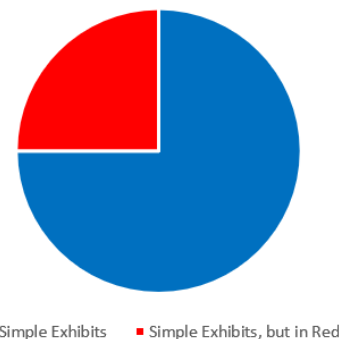


Individuals on the jury can be "lost" for many reasons. Sometimes an exhibit that you think clarifies something actually confuses some jurors. What looks cool and innovative to you may look sloppy and distracting to a juror. If any member of your jury doesn't understand, or is confused by your exhibit, it isn't simplified enough. Your exhibits need to appeal to, and educate, any jury member that you may have.

Simple exhibits are effective exhibits because they convey messages in a non-distracting, easy to understand way.

Simple exhibits help to ensure that an exhibit appeals and makes sense to a broad group of people. Simple exhibits make it less likely that a jury member is "lost."

What Juries Like

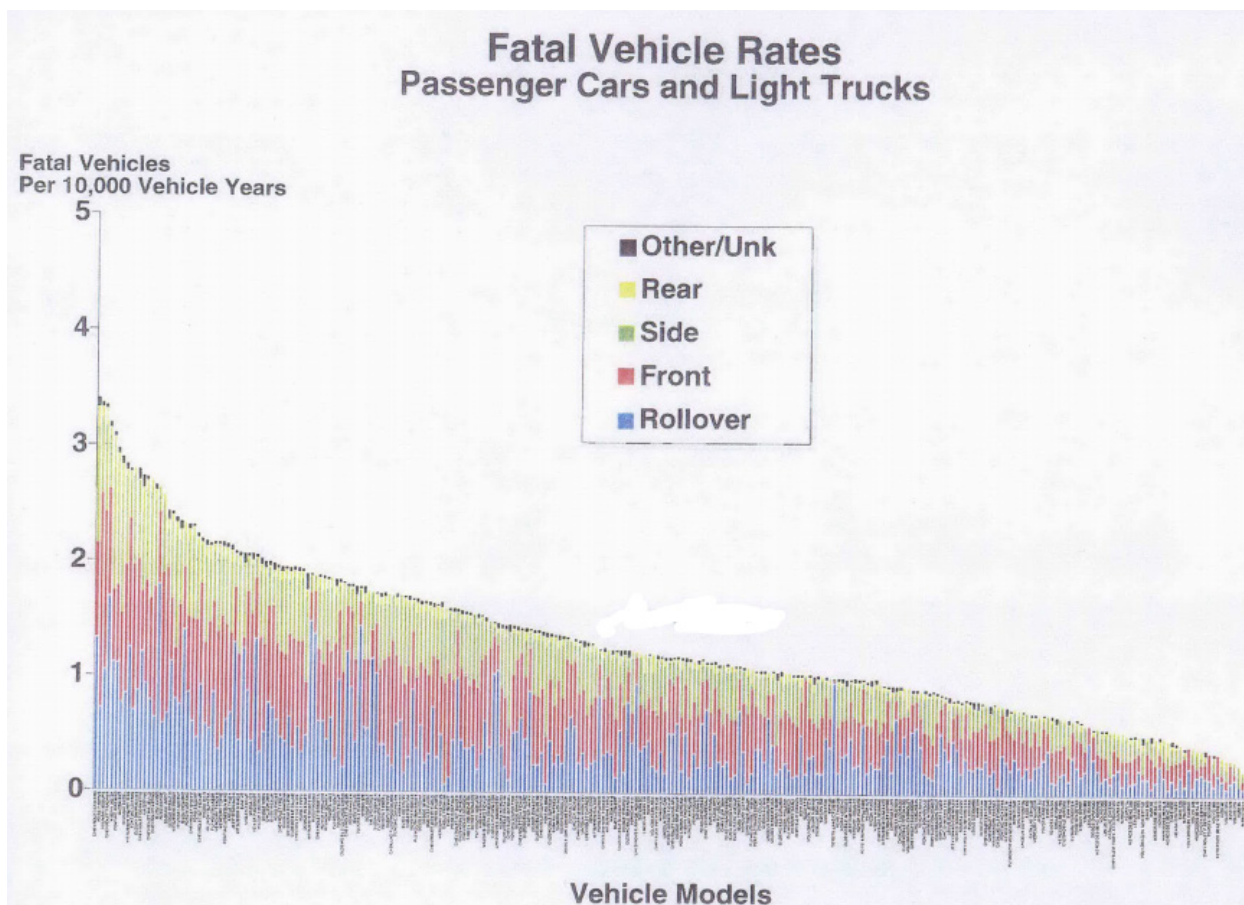


Juries have limited attention spans with which to hear, comprehend, and remember information that they have never heard before, on topics they know little about and likely aren't all that interested in. Simple exhibits help to deal with this problem. Effective exhibits hold the interest of the jury for longer periods of time. Visuals help jurors to remember key concepts by providing a second method of communication to reinforce what is being said. Good visuals will help to make complex issues more manageable to the jury by breaking down the issue into smaller portions that are easier to comprehend.

Complicated Trial Exhibits ☹️

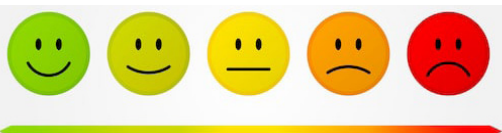
There are several pitfalls that attorneys make in creating trial exhibits. First, poorly made demonstratives. Demonstratives that contain errors or appear to be cheaply made will impact the credibility of the attorney who is presenting them. Second, bad delivery of exhibits. Things like a display board not being level or having exhibits out of order can have a big impact on the jury's impression of the attorney presenting the material. Third, confusing exhibits. Most of the time if an exhibit is confusing, it isn't necessarily that

the exhibit itself wasn't good, but rather that the attorney presenting the exhibit hasn't used it effectively. Here timing can be very important. A demonstrative displayed too early can cause the jury to focus on the exhibit rather than what is being said by a witness. Rather than listening, the jury is trying to figure out what is happening in the demonstrative. The exhibit itself can also be confusing. Exhibits should help to simplify the material being presented, but overly technical exhibits, or overcrowded exhibits can have the opposite effect.



Understand Your Audience

Effective communication requires understanding the members of the jury and how they are likely to view evidence and exhibits. Doing this effectively means being flexible enough to tailor your message and delivery to appeal to all different types of people and to communicate to each of them. It can be helpful in doing this to identify and use touchstones of multi-



ple generations—things that connect well with a particular group of people—to personalize your message to that specific group of jurors.

Tell, Show, Teach

Breaking complex topics down into manageable portions can be essential to helping the jury understand what you are trying to communicate. Exhibits provide the means to show a snapshot of a complex theory. An effective method of using an exhibit is to first tell the jury what they are going to see, then showing them the exhibit, and

then using the exhibit to *teach* the jury the story that you are telling. Exhibits bridge the gap between telling and teaching by providing a tool to explain a complex idea.

Often juries have a hard time comprehending the passage of time or the distance between two objects. If a jury hears “8 years,” the amount of time that the number entails isn’t always fully appreciated. This is where demonstrations can be helpful. Something that can be effective is to use a tape measure to demonstrate passage of time. Have the tape stretched out in front of the jury and have each inch represent a week (or any other unit of time: month, year). Simple objects like this can help teach the jury and are affordable and easy to use.

~70
Feet



In addition to helping visualize a distance or an amount of time, it can be helpful to reframe these issues in the context of familiar distances: Saying that a vehicle travelled three football fields can be more impactful than saying that it travelled 900 feet. Most members of the jury have no scale for what 900 feet looks like, whereas most will be familiar with how long a football field is. Similarly, while most jury members may not know that each floor or story on a building is about 14 feet, they are familiar visually with what that type of space looks like. If the distance of 70 feet is “translated” into floors on a building, the jury is much more likely to be able to understand and grasp the distance from the ground to the top of a five story building. These examples can be taken a step further by actually showing a picture of a building, like the courthouse in which the trial is taking place, in order to help the jury to see a familiar place.

This visual method can also be used to demonstrate distance. As an example, if there was a vehicle that went over an embankment and flew through the air fifty feet, that number could be difficult for the jury to grasp. The number can be used repeatedly during the trial, but the idea may not be effectively conveyed until it is demonstrated. One

way to do this would be to measure the distance from the jury box to a point on the opposite side of the courtroom—assuming that you aren’t in a small courtroom. Then during an examination, while explaining what happened through a witness, the distance can be demonstrated by standing at that point that you measured to. If the car flew a distance in the air, and you have an estimate of how high

it was in the air, this can be easily and affordably demonstrated: a PVC pipe measured and cut to the height that the car was flying. This way, the jury can see what you are talking about.

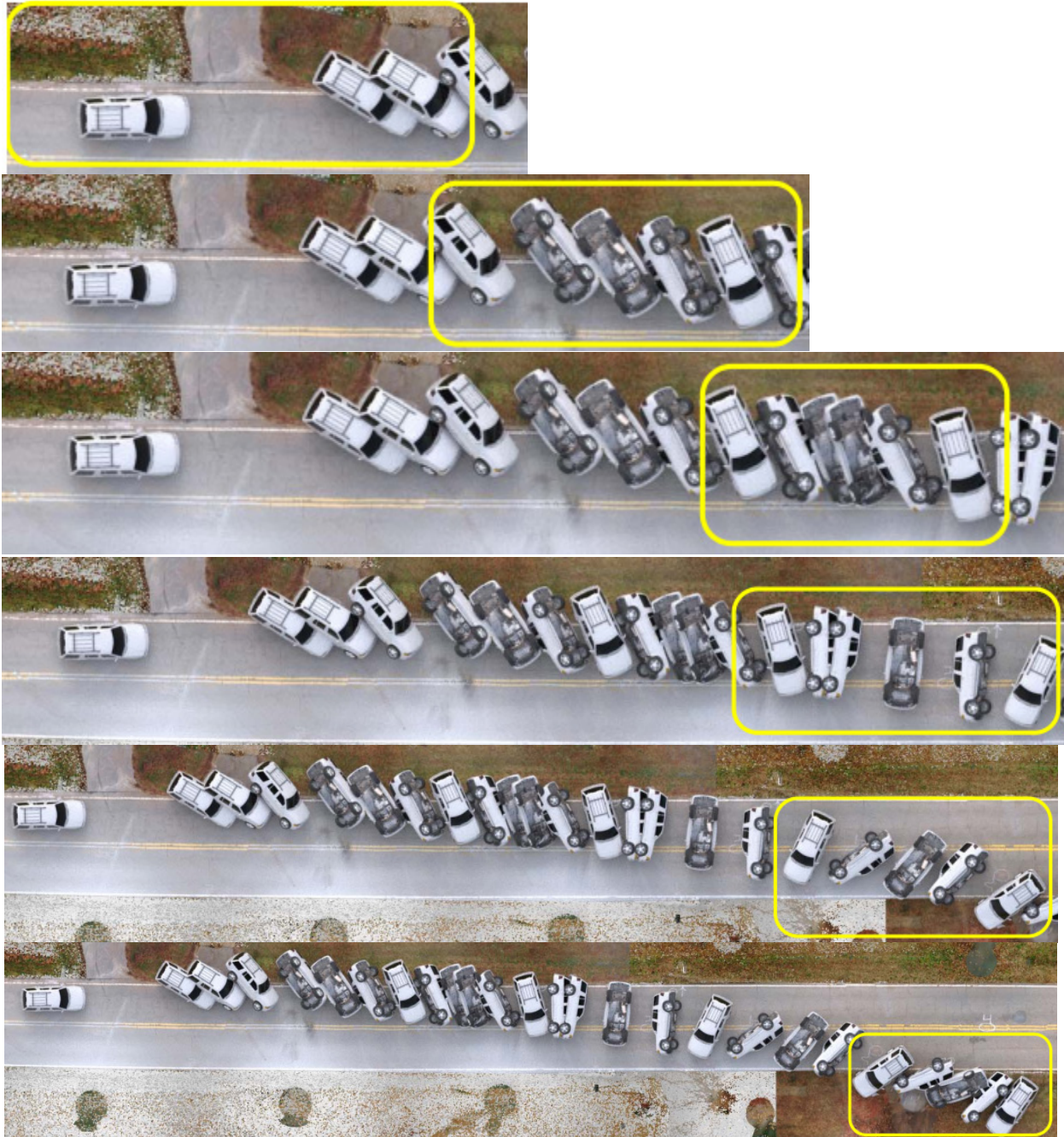
Progressive Reveal

One concept that is particularly helpful in teaching a jury is the progressive reveal. That is, using an exhibit to tell the story of what happened step by step. Instead of showing a completed picture, a progressive reveal slowly integrates more information into a scenario. Jury members are better able to process the entire picture, because they’ve seen it each step of the way. This is helpful in two ways.

First, this method controls the focus of the jury. If the jury is shown a complete exhibit, all at once, the jury decides what is most important. Each member may come up with a different key take-away or focus on a different part of an exhibit. Jury members may miss key portions of the exhibit and form an opinion before the exhibit is explained. However, a progressive reveal allows the presenter to draw the attention of the jury to the most important pieces of information. Presenting an idea in stages controls the focus of the jury and can be used to highlight facts that are impactful, while allowing the jury to minimize portions that don’t add to your case. With multiple exhibits, and a progressive reveal, you can emphasize each of the facts that are important to teaching the jury.

Second, this method builds suspense. The jury likely has heard the story from Plaintiff's opening, but you are retelling the story and they are waiting to hear what makes

your version different. Each step that you take—revealing a bit more of the picture—brings them closer to hearing what the key takeaway is.



Exhibits like these can also help to break up the monotony of a trial with materials that are different, unique, and entertaining. A panoramic photograph of an incident scene

set up on multiple displays rather than just having single pictures not only provides information in a more complete way, but also does so in a novel and entertaining way.

Use Exemplar Products

In a lawsuit that involves a product, the jury should be shown that product. In most cases, an exemplar of the product, or a portion of that product, can be brought into

the courtroom to show the jury. This approach is significantly better than merely showing the jury a picture of the product. If the case involves an internal defect, a cutaway version of the product should be brought to trial so the jury can see.



Using an exemplar of the product at issue effectively requires that the attorney demonstrate he knows how the product works. This is especially true when the product or component, or the theory about that product, is complex. Becoming your own expert in how that product operates is the only way to be able to teach the jury how it works, and why it wasn't defective.

Slick Is Not Always Better—Mix Media

Even when there is a big budget for trial, that doesn't mean that other methods of communication should be abandoned in favor of exclusively high tech, high performance-value trial exhibits. High tech trial exhibits can be effective on their own but focusing too heavily on any single type of communicative device will eventually desensitize the jury. Rather than being a tool with which to

teach the jury, high tech, big budget exhibits can become a crutch when overused.

Mixing the types of media being displayed maximizes the impact of expensive, high-tech exhibits. Rather than just showing a fancy 3D model, integrating that presentation with use of traditional exhibits amplifies the impact of the technology.

Jury perceptions of technology, like technology itself, are constantly changing. One of those changes is that use of technology has become the expectation rather than a distinguishing feature. Merely showing pictures or videos in a slideshow presentation doesn't have the same impact as it may have had 10 or 15 years ago. The practical change for attorneys presenting to these juries is that technology must be used rather than just shown.

Be Competent with Technology

However, avoiding slick-looking exhibits cannot be done at the expense of appearing to be competent using technology. Jurors – especially younger ones – want to see that you know how to use technology. To many jurors, effective use of technology builds credibility. Likewise, not being able to work basic, everyday devices makes an attorney look out of touch. For a time, it was acceptable, even sometimes endearing for trial lawyers to fumble through technology. But that time has long passed, with most jurors

having had access to computers and smartphones and knowing how to use them effectively. Now trial lawyers are expected to be able to run the technology that they bring with them or the equipment the court is using.

Technology in the courtroom can provide a big advantage. 3D touchscreens that allow you to display and manipulate or move objects around on the screen allow you to show juries your story in a way that hasn't been available until recently. This technology lets you draw a picture like you would on a traditional whiteboard, but then print the drawing to preserve it. This can work great in situations where a judge has precluded a professionally made graphic or diagram. Most judges will allow you to draw, or better yet, have an expert draw a diagram at trial, in front of the jury on a touchscreen. 3D models and simulations also provide a great tool in teaching a jury. Something that can be helpful in product liability litigation is a 3D printed, clear component in order to let a jury “see inside” a product.

All of these great technological innovations provide you with an opportunity not just to teach the jury, but to look competent and credible while you do it.

Avoid Death by PowerPoint

Poor use of PowerPoint distracts from the information being presented. PowerPoint slides that are a wall of text—without breaks, photographs, or graphics—keep the

What happened in the crash

- Blown tire on right rear tire while vehicle was traveling southbound on I-20 at mile marker 34. The driver lost control when the tire blew, causing the driver to steer the vehicle trying to avoid an accident.
- The vehicle eventually began rolling along the highway and rolled three and a half times before leaving the roadway.
- Once the vehicle left the roadway the vehicle hit a tree, causing more damage to the vehicle.
- Had the right rear tire on the vehicle not blown, the driver wouldn't have lost control and been involved in the accident.
- The weather was clear at the time of the accident and it was sunny, so weather conditions didn't have an impact on the accident. The road conditions were also good at the time of the wreck.

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presentation from being effective. A small number of bullet points (three to four), with short sentences, allows the jury

Crash Details

- Tread separation – right, rear tire
- Passenger side leading roll – 3 ½ rolls
- Impact with tree on passenger's side"

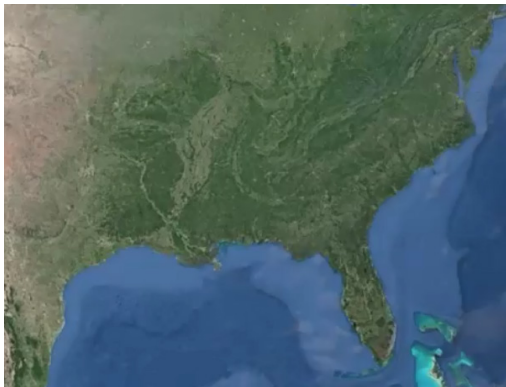


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to focus on what is important. In addition, it keeps the jury from getting ahead of you.

No Unlimited Budget? No Problem

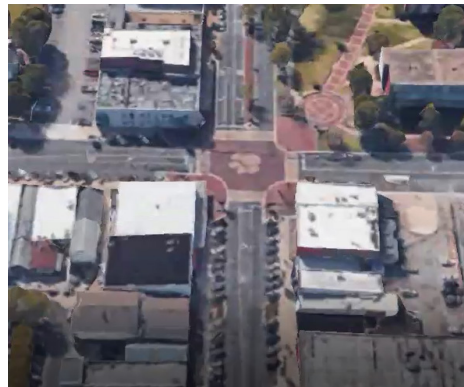
While some technology is generally available (PowerPoint), others, like 3D models and touchscreens are expensive, and you won't always have a big budget for trial. In these situations, you can still create effective exhibits that look professional and that are effective teaching tools.



These videos help to give the jury a feeling of where they are when you are talking about an incident. Often you will be trying the case near where an incident happened, so showing the exact location, from the beginning, can help to focus the jury on the case.



An additional feature that is helpful to use is the historic photos that street view keeps. While you can go take pictures of the street as it is on the day of the trial, often the scene that you are photographing is considerably different from when an incident happened. Street view



Google street view is another free resource that can be helpful to show a jury an incident scene. Street view allows you to walk the jury through key locations during a crash. Street view can give you multiple angles to supplement the photographs that you already have of a crash scene.



stores previous photographs of roads. These older photos can show key information, and evidence that no longer exists. They can show old speed limit or caution signs, or where a road has been repaved. Below is an older picture of the same road as above.



This second photograph can tell an entirely different story. In this case it is just a repaved road with an added fog strip. In other cases, it can be a stop sign, or rumble strips, or a ditch on the side of the road. This information is helpful regardless of budget size because it cannot be accessed with the help of an investigator going to the scene. Instead, this information is free and available at any time.

Improvisation at trial is often a requirement for a successful outcome. Even if you have a perfect exhibit, you may not be able to use that exhibit at trial if the judge decides your exhibit should be limited or kept out entirely.

Sometimes those expensive, high tech exhibits become targets for exclusion. This is where improvisation becomes key. For example, a 3D reconstruction of an accident that is excluded can be replaced by paper pictures of a vehicle printed out and pasted onto portions of an overhead view of a crash scene.

Being able to improvise requires that you are able to create simple, easy to re-create exhibits. When you are improvising, keeping things simple is the key. If your improvised exhibit has a lot of moving parts and pieces, or requires precise setup, the chances that you make a mistake while presenting the exhibit increase.

Use Common Objects to Teach

Creating effective trial exhibits on a budget goes further than just using free resources. This is where using everyday items can be very effective. Examples of exhibits could be items like basketballs, footballs, a slinky, playdoh, and twinkies. These simple, everyday items are familiar to jurors and so can be used effectively.

As an example, Plaintiff's lawyers often will use something called the safety design hierarchy. In its simple form that means:

1. Eliminating a hazard through design,
2. Guarding against the hazard, and
3. Warning against the hazard

Often, these principles sound reasonable to jurors and it becomes necessary to show that designing a product this

way doesn't work. This is where a common object, like a hammer becomes helpful. How do you design a hammer that you can't hit your thumb with? If you make a hammer head that is sufficiently soft that it doesn't injure a finger that you hit it with, your hammer isn't going to be useful at driving a nail. In the same way, putting some sort of guarding device on the hammer head would make the hammer useless. Here a warning, "do not hit your finger," doesn't actually help to reduce risk because the problem isn't that people don't know that hitting their finger with a hammer will hurt. This example of trying to design a harmless hammer sounds silly, but it is something the jury can relate to, and enjoy, and because the example is silly, it makes the Plaintiff's theory sound silly too.

Common, everyday objects appeal to a jury because they are familiar with them—it gives the jury something that they don't have to think about for the first time—they already know what the object is and how it works.

At the End of the Day

At the beginning, we talked about communication. We've looked at different ways that demonstrative trial exhibits can communicate themes, ideas, and concepts. Taking complex concepts and turning them into teachable moments is the goal. Bottom line: We want juries to remember the things that matter. And more important than anything else—have fun.

***D. Alan Thomas** with Huie Fernambucq & Stewart LLP in Birmingham, Alabama, has more than three decades of trial experience on behalf of large automobile manufacturers, successfully defending them in cases involving every form of product liability in State and Federal courts. Mr. Thomas regularly serves as lead trial counsel and coordinating counsel throughout the Southeast and across the country.*

***Cameron N. Rentschler** joined Huie after successfully completing the firm's summer associate program. He now focuses his full-time law practice in the areas of automotive litigation, product liability, trucking litigation and insurance defense.*