

By Joseph P. Moriarty

Plaintiffs and their medical experts should not be permitted to go beyond helping the jury understand complex medical issues to the point of distraction.

Challenging Graphic-Lifelike Medical Illustrations

The advancement in medical-legal artwork by the medical illustration industry, prodded by plaintiffs' attorneys and their medical experts, has raised new questions over the permissible use of custom medical

illustrations as evidence and visual aids at trial. In order to make medical illustrations appear real and lifelike, plaintiffs' attorneys are paying to depict the plaintiff's likeness in a morbid and gruesome manner. These custom medical illustrations go far beyond the legitimate purpose of helping the jury understand the injury or surgical procedure at issue in the case. The only purpose served by using custom medical illustrations, over using traditional medical illustrations that depict the same injury or surgical procedure, is to appeal to the passions and sympathy of the jurors to bolster a potential verdict. These are improper grounds for using custom medical illustrations as evidence or demonstrative visual aids because they distract the jury from understanding the complex medical issues being explained.

This article focuses on arguments for excluding or limiting the use of misleading and offensive custom medical illustrations in favor of the medical illus-

trations actually being used by medical practitioners.

Threshold Questions: Admissibility?

Before a medical illustration may be admitted into evidence, it must be authenticated. Further, the medical illustration must be relevant to the issue in question. Lastly, the court must determine whether the prejudicial aspects of the medical illustration outweigh its probative value. Most plaintiffs try to bypass these standards by offering the custom medical illustration as a demonstrative visual aid without seeking its formal admittance into evidence. However, to be used as a demonstrative visual aid by a testifying medical expert, the custom medical illustration must still meet these minimal evidentiary standards.

Authentication

Before a medical illustration is shown to a jury, proper foundation must be laid to establish the medical illustration is authentic and reliable. The Federal Rules of Evidence require that the evidence "is what its proponent claims." FED. R. EVID. 901. Authentication of a medical illustration requires expert testimony that it accurately depicts the plaintiff's injury or surgical procedure. Courts rarely exclude visual



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aids (as opposed to other admitted evidence) for lack of authenticity. They generally allow visual aids to be used as long as the medical illustrations are substantially similar or the differences can be easily explained to the jury. When a custom medical illustration lacks the requisite degree of similarity, courts typically analyze their ruling in terms of undue prejudice.

Relevance

Relevant evidence is defined by the Federal Rules of Evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401. In other words, evidence is relevant only if it tends to establish the proposition for which it is offered. The Advisory Comments to Rule 401 provide: “Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding.” On the other hand, courts repeatedly hold that evidence of collateral facts, from which no fair inference can be drawn tending to throw light upon particular fact under investigation, are properly excluded. *Seilheimer v. Melville*, 224 Va. 323, 327 (1982) (internal citations omitted); see also *PTS Corp. v. Buckman*, 263 Va. 613, 621 (2002); *Spurlin v. Richardson*, 203 Va. 984, 990 (1962). Accordingly, as irrelevant evidence is inadmissible regardless of unfair prejudice, a custom medical illustration depicting matters not being explained to the jury should be excluded. In the light of the broad definition of relevance, however, courts typically analyze their ruling in terms of unfair prejudice when the background material is overtly prejudicial.

Probative Value vs. Unfair Prejudice

Relevant evidence may be excluded from trial “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403; see, e.g., *Gamache v. Allen*, 268 Va. 222, 227 (2004), citing *Walker v. Com.*, 258 Va. 54, 68 (1999); *Byrd v. Com.*, 30 Va. App. 371, 376 (1999). Judges, within their

sound discretion, have the responsibility of balancing the probative value of the evidence against the disadvantages. FED. R. EVID. 403, Advisory Committee Comment. Generally speaking, the probative value of a medical illustration will be the greatest when it depicts the alleged injury or surgical procedure without distracting the jury from understanding the medical issues being explained by expert testimony.

Unfair Prejudice

Unfair prejudice is the strongest argument for exclusion. This is because plaintiffs’ attorneys and their medical experts cannot help themselves. They take medical illustrations beyond their useful purpose in order to gain sympathy and potential larger verdicts. Courts will be more open to excluding custom medical illustrations if they find them to be inflammatory, shocking or sensational.

It is important to distinguish between prejudice resulting from reasonable persuasive force of evidence and prejudice from excessive emotional or irrational effects that could distort the accuracy and integrity of the fact-finding process. *Westfield Insurance Co. v. Harris*, 134 F.3d 608, 613 (4th Cir. 1998). Courts may exclude medical illustrations, though relevant, if they will arouse undue hostility to the defendant or undue sympathy for the plaintiff. Numerous judges and scholars have commented on the prejudicial effect of demonstrative evidence:

Such evidence often has a dramatic impact upon the jury which may cause it to be given greater weight than it deserves. The evidence may so arouse the passions and prejudices of the jury that objectivity becomes difficult. Often, particularly where illustrative evidence is used, confusion may be caused or collateral issues may be introduced.

Charles E. Friend, *The Law of Evidence in Virginia* §13-3 at p. 525 (6th Ed. 2003); see also *Finley v. Marathon Oil Co.*, 75 F.3d 1225 (7th Cir. 1996) (Posner, J.) (demonstrative evidence is “in some cases too powerful, as we learned in *Julius Caesar* from Antony’s masterful demagogic use of Caesar’s blood-stained toga and slashed body to arouse the Roman mob”); *U.S. v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980) (demonstrative evidence “can be a potent weapon for

harm due to its great persuasiveness”), *cert. denied*, 454 U.S. 844. Given the great weight the jury may give to visual evidence, medical illustrations require particularly careful review for unfair prejudice.

Confusion of Issues and Misleading the Jury

Medical illustrations may be excluded where they are likely to confuse or mislead the jury. Manipulated medical illustrations tend to distract the jury with immaterial side issues. If the plaintiff foregoes using standard medical illustrations in favor of custom characters resembling the plaintiff, then they should be held to a higher standard for accuracy in depicting the plaintiff’s actual injury or surgical procedure. Further, custom medical illustrations containing morbid depictions of the plaintiff’s alleged pain and suffering should be excluded. The permissible use of medical illustrations is to help the jury understand complex medical issues, not to show a fictional account of the plaintiff’s alleged pain and suffering.

Undue Delay, Waste of Time, or Needless Presentation of Cumulative Evidence

Courts will rarely exclude medical illustrations based on undue delay, waste of time or needless presentation of cumulative evidence. In most cases, medical illustrations help streamline the presentation of complex medical issues. At the same time, it is in the courts discretion to prevent the unnecessary repetition of the evidence on the same issue. For example, defense counsel may file a motion *in limine* to limit the number of custom medical illustrations that show substantially the same injury or surgical procedure. This is particularly effective when the plaintiff has produced two or more medical illustrations covering substantially the same medical issue, but one of the medical illustrations does not depict the plaintiff’s likeness. Defense counsel should also move to limit the number of expert witnesses who are permitted to explain the custom medical illustrations to the jury.

Remedy: Redaction or Exclusion

Superfluous portions of custom medical illustrations that are not instructive should **Illustrations**, continued on page 71

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be redacted and, where redactions are not possible, the custom medical illustrations should be excluded. Courts are charged with the authority to require the parties and their experts to use only non-objectionable medical illustrations that are not unfairly prejudicial. *See* FED. R. EVID. 403, Advisory Committee Comment (“The availability of other means of proof may also be an appropriate factor.”); FED. R. EVID. 611(a) (“The court shall exercise reasonable control over the... presentation of evidence so as to... make the presentation effective for the ascertainment of the truth”). As alternative medical illustrations are readily available, such unfair prejudice is substantially unnecessary. To make this point to the court, defense counsel may purchase standard medical illustrations that depict the same injury or surgical procedure. Courts are more likely to exclude custom medical illustrations when provided an alternative medical illustration that serves the legitimate purpose of explaining the medical issues to the jury without the prejudicial aspects.

Conclusion

Medical illustrations are properly used to help the jury understand complex medical issues. Plaintiffs and their medical experts should not be permitted to go beyond this legitimate purpose by distracting the jury from the depicted injury or surgical procedure. Defense counsel should challenge the authentication, relevance and unfair prejudice of custom medical illustrations. A motion *in limine* should be filed to prevent the plaintiff’s counsel from using the objectionable custom medical illustrations during opening statement before the proper foundation is laid.

To lay the groundwork for exclusion at trial, it is important to question the plaintiff’s medical experts during depositions on their participation (or lack thereof) in the development or selection of the custom medical illustrations. This testimony may be used to argue undue surprise and unfair prejudice at trial. Defense counsel should also ask the plaintiff’s medical experts what medical illustrations they use to explain the injury or surgical procedure to their patients outside of litigation. The plaintiff’s medical experts should be asked to explain the dif-

ference between the standard and custom medical illustrations. If a standard medical illustration of the injury or surgical procedure adequately informs the medical expert’s patients outside of litigation, then the court is likely to find the objectionable custom medical illustration unnecessary to explain the medical issue to the jury.

If the court permits the use of custom medical illustrations over defense counsel’s objections, then the court should caution the plaintiff’s attorney and their medical experts not to refer to the character on the illustration as actually being the plaintiff. Defense counsel should also be careful not to validate or take ownership of the plaintiff’s custom medical illustration during cross-examination or during the presentation of the defense experts’ testimony. In some cases, it may be beneficial for defense counsel to purchase custom medical illustrations that support the defense’s medical theory of the case to counter plaintiff’s custom medical illustrations. In the end, the goal is to use a fair medical illustration that will actually help the jury understand the medical issues in the case. 