Presented:
State and Federal Appeals

June 4, 2020
Austin, TX

Briefing Beyond Words

How to use visuals to enhance your written advocacy and transform your briefs

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BRIEFING BEYOND WORDS

I. Introduction

From the dawn of written legal advocacy until just a few decades ago, legal briefs were written by a scrivener's pen or by a typewriter or other mechanical writing device—technologies that did not permit effective use of visual images. Even as word processing technology emerged and improved in the late 20th century and early 21st century, tradition and attorney inertia has led to a significant underutilization of photos and other images in legal briefs (the same inertia that still leads some attorneys to conclude their briefs with "Wherefore, premises considered…").[1]

With an influx of a media-savvy generation of younger lawyers into practice, a revolution in digital technology, the enormous proliferation of photographs and images in social and traditional media, and the explosion of tablets and laptops, the age of visual advocacy has arrived. For decades, trial lawyers have understood the importance of visuals in persuading a jury. Now, appellate lawyers are learning that visuals can be just as powerful a tool for a judicial audience.

This paper's use of the word "visual" encompasses most forms of advocacy that go beyond the plain written text, including photographs, images, animations, charts, graphs, tables, maps, and the like.

Before filing any brief in the trial or appellate court, a lawyer should ask herself whether any portion of her argument could be enhanced or simplified through the use of a visual. This paper is intended to help answer this question.

II. Why visuals are effective

The science is undeniable. Using visuals in combination with words provides the target audience with a cognitive boost that aids in the comprehension, retrieval and recollection of the presented information.[2] Studies show that "the average listener retains 10% of information presented in text form; 20% of information presented in audio/verbal form; and 30% of information presented in visual form. When information is presented in both a visual and audio form, the retention rate jumps to 50%."[3] Visually presented information is "more memorable

[1] *See generally* Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1699-1723 (2014) (discussing a few uses of visuals in the pre-word processing era, the lingering barriers to visual use in the digital age, and the forces that are rapidly eroding those barriers).

[2] *See* Haig Kouyoumdjian, *Learning Through Visuals*, PSYCHOL. TODAY, July 20, 2012, *available at* http://www.psychologytoday.com/blog/get-psyched/201207/learning-through-visuals ("The research outcomes on visual learning make complete sense when you consider that our brain is mainly an image processor (much of our sensory cortex is devoted to vision), not a word processor."); *see also infra* note 3 at 247-64.

[3] Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237, 289 (2010) (internal citations omitted).

because it is vivid, defined as 'emotionally interesting, concrete and imagery-provoking, and proximate in a sensory, temporal, or spatial way.'"[4]

Using visuals in briefs also is advantageous because it conforms with how we are consuming information outside the legal setting—in newspapers and magazines, through the Internet, and via social media. "By presenting legal arguments in a multimodal, multisensory format, attorneys present information in the way that we have become accustomed to receiving it."[5]

That is why Judge Richard Posner has urged appellate advocates to "[w]herever possible, use pictures, props (for example, trademarked items in a trademark case), maps, diagrams, and other visual aids, in your brief or at argument. Seeing a case makes it come alive to judges."[6] Legal writing guru Bryan Garner agrees, urging lawyers to "[u]se charts, diagrams, and other visual aids when you can."[7]

III. How to use visuals effectively.

To obtain examples of effective visuals, I surveyed my colleagues at Haynes and Boone, other Texas appellate practitioners and a few appellate judges. I also attempted to find examples via Westlaw or other search engines, with a minimal degree of success. (I would welcome any suggested examples from those reading this paper, which I could include in an "Appendix 2.0").

This survey culminated in the attached appendix, which is organized by category of visual, as explained below. (Appendix items will be referred to by their tab numbers, from Tab A-1 though Tab H-7.) Some of the visuals are more effective than others. Most of these visuals were prepared by lawyers, most of whom lack any type of training in visual presentation or persuasion.[8] Appellate lawyers could learn from their trial lawyer brethren, who often hire professional consultants or companies that specialize in preparing visuals for juries.

In the sections below, I will highlight a few examples of each type of visual and offers some thoughts about in what contexts they might be most helpful. From my survey, I have identified are a few overarching lessons.

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[4] *Id.* at 290 (quoting Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. OF PERSONALITY ASSESSMENT 659 (1985).

[5] *Id.* at 291.

[6] Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views*, 51 DUQ. L. REV. 3, 38 (2013).

[7] BRYAN GARNER, THE WINNING BRIEF 328 (2d ed. 2004).

[8] For lawyers on a tight budget, one author recommends using TrialLine for timelines and Piktochart for other graphics. *See* Joseph Regalia, *An Eye for Legal Writing; Five Ways Visuals Can Transform your Briefs and Motions*, Appellate Advocacy Blog (May 25, 2019), *available at* https://lawprofessors.typepad.com/appellate_advocacy/2019/05/developing-an-eye-for-legal-writing-five-ways-visuals-can-transform-your-briefs.html%20.

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