

PRESENTED AT

26th Annual Conference on State and Federal Appeals

June 9-10, 2016
Austin, Texas

Briefing Visually

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Summary

For some types of information and legal arguments, visual images can inform and persuade judges more effectively and persuasively than the written word. This paper illustrates different ways in which visuals can be used in appellate briefs. And it offers tips for creating effective visuals.

It is time to start using visuals in briefs

Much has been written about the importance of visual images in persuading juries. And most trial lawyers use visuals during trial. But little has been written about using visuals in appellate briefs or other written argument to persuade courts. And rare is the brief that actually uses them.

Why have lawyers hesitated to use visuals in appellate briefs and other written argument?

One reason is that briefs must rely largely on words, sentences, and paragraphs. Our law—statutes, rules, and court opinions—consists of words. It is difficult to explain a legal rule without resorting to the language of the rule itself.

A second reason has to do with technology. For decades, legal filings were prepared on typewriters. In typewritten documents, it was difficult to insert and manipulate visuals. Nor did this change for the first 20 years or so years that computers and word processing were used in legal offices. Programs such as MS Word and Word Perfect did not allow most computer users to insert images until the last decade or so. Since then, we have had the technology to use images in our filings, but it has not occurred to most lawyers to use them. Or they have been held back by a long tradition of relying solely on words to create briefs.

The third reason is tradition. Lawyers have always relied exclusively on words. And they continue to do so. Professor Elizabeth Porter explains:

Litigants, scholars, and courts have been rebooting the same formalist templates for over a century—templates that were formed before widespread use of the camera, never mind the computer. Outside of trial, where image-driven advocacy has a long history, legal practice begins and ends with text.

Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1687 (2014).

It is time to re-think our exclusive reliance on words in legal argument. Visual information is a key component of persuasion. Images grab our attention. The effect of an effective image can be almost immediate—unlike words and sentences which require time and energy to read and process. Plus, an effective image can stick in a judge's mind much longer than even a well-crafted sentence.

Additionally, as law is applied to a more complex, data-driven world, words alone are often inadequate. Complex information such as elaborate relationships or statistical analysis can often be better understood when it is represented visually rather than through words.

Consider how we receive information online. Most websites devote as much space to images as they do to words in order to inform and persuade. That is because web designers have studied website users and learned that visuals are often required to communicate.

Even judges have begun to complain about the reluctance of lawyers to use visuals in briefs. For instance, as Seventh Circuit Judge Richard Posner observes, “Yet so disfavored are pictures, maps, objects, and diagrams in appellate briefs ... that I’ve said some lawyers think a word is worth a thousand pictures.” Richard A. Posner, REFLECTIONS ON JUDGING 143 (2013). Judge Posner, who may use more images in his opinions than any other American judge, encourages lawyers to do the same.

The question is no longer whether to start using visuals in legal briefs, but how to use images in briefs. Legal writing books and lectures have largely ignored the question. “Even now, only a few commentators have taken genuine interest in visual persuasion outside of trial.” Porter, *supra* p. 1, at 1715. This paper seeks to explore ways to effectively use visuals in briefs.

Five ways to use visuals in briefs

Incorporating visuals into a brief is now easy with computer technology. To use images effectively, it helps to know how they can be used to convey ideas in place of words. The following are some illustrations of effective ways to use visuals in legal argument.

1. Photos as argument

A photo can be the most effective argument appeal. As Bryan Garner puts it, “A picture can be worth . . . well, it can help win a lawsuit.” Bryan Garner, *The Winning Brief* 328 (2d ed. 2004).

I learned this lesson in 2007 when I realized words just would not describe the scene of an accident in a premises-liability case. My client had been riding a motorcycle on a commercial motorcycle track when he was impaled on a tree stump just on the other side of a raised turn in the track. The issue was whether the stump on the other side of the turn was an inherently dangerous condition.

The record contained testimony that the stump was on the other side of the turn, and that riders frequently crashed, falling at the edge of that turn. But the testimony did not describe the stump well. Nor did the testimony provide much support for the argument that the stump was inherently dangerous.

Fortunately, the record contained a photograph of the sharp stump, which immediately gave me a visceral reaction. I knew the argument of the brief depended, not on writing about the stump, but on *showing* the court that stump. But because my word-processing program could not

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First appeared as part of the conference materials for the
26th Annual Conference on State and Federal Appeals session
"Briefing Visually"