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Appellate Practice in the Digital Age

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Appellate Practice in the Digital Age by Rosa Theofanis

As tech journalist Kara Swisher starkly put it, “Everything that can be digitized will be digitized. And it will happen before you know it.”¹ A corollary for the legal practitioner might be, “digital writing and reading are here to stay and ... written legal analysis must adapt.”²

This paper highlights ten applications of digital media for lawyers and identifies useful tools for enhancing and expanding a text, as well as potential areas for caution in their use.

1. **Bookmarks.** Electronic bookmarks can be inserted into digital files like pdfs to mark sections of a brief, typically those that would be part of the table of contents. The bookmarks serve as visual “tabs” as well as a navigation panel in the document and depict the structure of the document. Structure is generally less obvious in electronic documents than in traditional paper documents, and bookmarks permit the user to access key areas quickly and accurately.³

2. **Hyperlinks.** A hyperlink is a link from an electronic document to another file or document, usually activated by clicking on a highlighted word or image on the screen. Many legal practitioners have begun to link within their appellate briefs to legal citations, record citations, or appendices containing caselaw or exhibits.

¹ Kara Swisher, *Opinion: Another Big Step Toward Digitizing Our Lives*, New York Times, March 19, 2021, <https://www.nytimes.com/2021/03/19/opinion/NFTs-beeple-crypto.html> (last visited April 16, 2021).

² Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 J. ALWD 1, 28 (2015).

³ Blake Hawthorne, the Clerk of the Texas Supreme Court, has created a guide to creating electronic briefs, including instructions on how to make electronic bookmarks. It can be accessed on the Texas Courts website at <https://www.txcourts.gov/media/1443805/guide-to-creating-electronic-appellate-briefs-2019-adobe-acrobat-pro-dc.pdf> (last visited April 16, 2021).

However, “studies have found that when people read digital content with embedded hyperlinks, they retain less information than those who read the same material in printed form[, e]ven when readers don’t click the embedded links.”⁴ This finding suggests caution in the use of hyperlinks, such as by limiting them to areas where they bring key value to the analysis.

3. **Typography.** Typography is the “style, arrangement, or appearance of typeset matter.”⁵ The relative ease in changing the style and appearance of digital print allows for legal writers to use typography in new ways such as for emphasis or to simplify and condense an argument. For instance, in *Stouffer v. Union Pac. R.R. Co.*, a petitioner seeking review in the Texas Supreme Court used red colored text and strikethrough in a section quoting a regulatory statute to argue that the court of appeals, through its interpretation of the statute, had judicially rewritten the statute to omit the red, stricken part.⁶

4. **Charts and Graphs.** Charts and graphs have long been used to demonstrate relationships between data in fields including in the

⁴ Mark Yates, *Text is Still a Noun: Preserving Linear Text-Based Literacy in an E-Literate World*, 18 LEGAL WRITING 119, 126 (2010).

⁵ “Typography.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/typography> (last visited April 16, 2021).

⁶ *Stouffer v. Union Pac. R.R. Co.*, No. 17-0845, 2019 Tex. LEXIS 553 (Tex. May 31, 2019), Petitioner’s Br. at 44 (available at website for Texas Supreme Court). The use of red print in a brief potentially violates Texas Rule of Appellate Procedure 9.4(a) which requires printing by a process that “produces a distinct black image”—a reminder that creative users of digital media should familiarize themselves with the rules governing appellate filings and adhere to them where they apply. See TEX. R. APP. P. 9.4(a). Additionally, there are Statewide Rules Governing Electronic Filing in Criminal Cases that set out requirements for electronically filed documents. See e.g., TEX. R. CRIM. CASES GOV. ELEC. FIL’G 2.2.

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