2019 NFJE Symposium

Message from the President

By L. Gino Marchetti, Jr.

“President Ronald Reagan used to speak of the Soviet Constitution and he noted that it purported to grant wonderful rights of all sorts to people. But those rights were empty promises, because that system did not have an independent judiciary to uphold the rule of law and enforce those rights.”

That Reagan comment from Chief Justice John Roberts perfectly captures the role and goals of the NFJE.

Under the leadership of the 2018 Symposium Program Chair Scott Burnett Smith, our program, “Judicial Excellence in the Twenty-first Century,” received stellar reviews and comments from over 128 attending appellate judges from 30 states. The program included a broad range of speakers including a popular podcast on the U.S. Supreme Court with a review and preview of High Court precedent in the new fast-paced format discussions on innovations in judicial administration in American appellate courts, ways to improve oral argument and how internet resources intersect with judicial ethics and decision making.

With an almost 90 percent response rate on a survey from those attending the 2018 symposium, I gleaned a few of the comments which are as follows:
1. I have attended previous NFJE symposiums and all have proven excellent, but this year’s topics, speakers and discussions rank at the top. Well done.

2. Strong speakers who were well-chosen. Loved the speakers regarding oral argument.

3. This was my seventh year, I think. The faculty continues to be first-rate.

The 2019 symposium to be held July 19 and 20 in Chicago and chaired by William Ray promises to fulfill the NFJE’s commitment to excellence in maintaining an independent and informed appellate judiciary. This year’s program entitled “The Science of Deciding: Using Nobel Prize-Winning Science to Understand, Evaluate and Improve Decisions of Appellate Courts,” features the keynote address by Jeffrey Rachlinski of the Cornell Law School. Professor Rachlinski is the undisputed thought leader in studying the social science of decision making by judges. The NFJE is also very fortunate to have Decision Quest’s commitment to perform real-time polling of the audience and analysis of results in a unique way. The program committee is including judicial consultants to ensure the questioning is pertinent and respectful of the audience. All the judges consulted about the concept and details of the program expressed great enthusiasm.

While William Ray has fulfilled the first mission of the NFJE to present a quality program, Tom Ganucheau, Chair of the Development Committee, has exceeded expectations. To fund the NFJE symposium, approximately $400,000 is needed annually. In a sense, we are a victim of our success since the more judges who attend, a priority of the NFJE, the more expense is incurred. With the help of Vice President Dan Kohane, and under the leadership of Tom Segalla, we have a new Insurance Initiative Committee, which is committed to secure additional funding so that the NFJE can continue its record of excellence in presenting these symposiums.

Finally, I have had the privilege of serving as president in this, the 15th year of the NFJE. While my name may appear at the top of the letterhead listing, it would not be there without the support and very capable efforts of many, including an outstanding board of directors with its excellent committees, faculty as well as the support of many attorneys, judges, foundations and organizations throughout the United States. This support will allow President Reagan’s words to be just as true a hundred years from now as they were when he first spoke them.

Gino Marchetti is managing partner of Taylor Pigue Marchetti & Blair in Nashville, and has been with the firm since 1977. Gino’s primary areas of practice include commercial and business litigation, employment law, bankruptcy and creditors’ rights, and tax-exempt entities. Mr. Marchetti is admitted to practice before all state and federal courts in Tennessee as well as the United States Court of Appeals for the Sixth Circuit. Gino received his undergraduate degree from Vanderbilt University and J.D. from the University of Tennessee. Gino is active in numerous national and international organizations, including DRI (Board of Directors, 2006–09), the International Association of Defense Counsel (President, 2007–08), Lawyers for Civil Justice (President, 2011–12), and ABOTA Roundtable (2006–08). He is the president of the National Foundation for Judicial Excellence.
The Science of Deciding

Using Nobel Prize-Winning Social Science to Understand, Evaluate, and Improve Decisions of Appellate Courts

By William F. Ray

For fifteen years, state-court appellate judges from across the country have convened at the NFJE’s annual symposium to hear from leading scholars, and to share their own knowledge and insights, with the goal of promoting judicial excellence. This year’s symposium is titled “The Science of Deciding: Using Nobel Prize-Winning Social Science to Understand, Evaluate, and Improve Decisions of Appellate Courts.” The program is based on fascinating studies of “heuristics”—the mental shortcuts of the mind—and processes that steer subconscious human decisions.

From the groundbreaking research of behavioral economists Amos Tversky and Nobel Laureate Daniel Kahneman popularized in Michael Lewis’s The Undoing Project, to twenty-first century jury science research, psychologists, economists, and other behavioral scientists have learned that human beings are—at least sometimes—far less rational than they seem. Studies indicate that judges are usually better than other people at filtering subconscious influences from their decisions. However, even experienced judges occasionally rely on mental shortcuts.

Although behavioral economists like Tversky and Kahneman began publishing their findings over 50 years ago, scientific studies of judicial decision-making processes were almost non-existent until recent years. In 2001, the Cornell Law Review published Inside the Judicial Mind, a ground-breaking and thought-provoking report on tests conducted with 167 United States Magistrate Judges.

We tested for the influence of: anchoring (making estimates based on irrelevant starting points); framing (treating economically equivalent gains and losses differently); hindsight bias (perceiving past events to have been more predictable than they actually were); the representativeness heuristic (ignoring important background statistical information in favor of individuating information)... We found that each of these cognitive illusions influenced the decision-making processes of the judges in our study. Although the judges displayed less vulnerability to two of the five illusions than other experts and laypersons, the results demonstrate that under certain circumstances judges rely on heuristics that can lead to systematically erroneous judgments.

The results of our research raise questions for judges, litigants, and the justice system as a whole. For example: What steps, if any, can judges take to improve their decision making? Should they take these steps? Does judicial susceptibility to cognitive illusions affect the optimal allocation of decision-making responsibility between judges and juries? Should courts or legislatures adopt rules of civil procedure, rules of evidence, or substantive legal standards designed to minimize the adverse effects of cognitive illusions on the quality of judicial decision making? Have they done so already?

Two of the authors of *Inside the Judicial Mind* are on the faculty of the 2019 NFJE Symposium: Keynote speaker Prof. Jeffrey Rachlinski of Cornell Law School, and Magistrate Judge Andrew Wistrich of the U.S. District Court for the Central District of California. They, and other faculty members, have continued their leadership roles in studying, and describing, the effects of subconscious processes in judicial decisions.


In addition to scholarly lectures and audience participation and commentary, the symposium will include a unique element: Real-time demonstrations with active participation by our audience of appellate judges. Along with our other faculty, Dr. Daniel Wolfe and his colleagues from DecisionQuest will invite the entire audience to respond to test questions and scenarios that will demonstrate classic social science experiments and “heuristic” processes. Using modern polling technology, they will present on-the-spot analyses of the audience’s responses. As always at NFJE programs, audience participation and insights will be a key part of the experience.

This year’s program will include a joint session with the DRI Appellate Advocacy Seminar. All NFJE attendees are invited to attend the Appellate Advocacy Seminar, with complimentary registration. On Friday afternoon, before the NFJE keynote address, the DRI Appellate Advocacy Committee and NFJE will present a joint session titled “Judicial Ethics: Disqualification and Recusal,” with James J. Alfini of the South Texas College of Law, Judge Eliot Prescott of the Connecticut Court of Appeals, and Judge Beth Andrus of the Washington Court of Appeals. For more information, see the Appellate Advocacy Seminar brochure at dri.org or by clicking here.

NFJE believes that this year’s symposium will provide unprecedented insights into judicial decision-making processes. We hope those insights can be applied by the judicial participants in reviewing the decisions of trial courts, in guiding their own courts’ decisions, and in furthering the goal of judicial excellence.

Please join us with your peers from state appellate courts throughout the country at the 2019 NFJE Symposium.

William F. Ray is a member of Watkins & Eager PLLC in Jackson, Mississippi. He is a former member of the DRI Board of Directors and a past chair of both the DRI Law Institute and the DRI Commercial Litigation Committee. A member of the NFJE Board of Directors, Mr. Ray is the chair for the 2019 NFJE Symposium.
A Picture Can Save a Thousand Words

The Case for Using Images in Appellate Briefs

By Emily Hamm Huseth and Michael F. Rafferty

Thomas Jefferson said, “A lawyer without words would be like a workman without tools.” For 250 years, Jefferson (who knew something about the effective use of words) has been right. Appellate briefs filed in 2018 looked strikingly similar to briefs filed two centuries earlier—an arid sea of words uninterrupted by images, bullet points, or anything more visually interesting than the occasional block quote. But with technological advances making it easier than ever to incorporate pictures and other visuals into electronic briefs, it is time for lawyers to adapt to the times and get some new tools.

The dominant medium for reading has shifted from print to electronic screens, transforming the way that we read, analyze, and experience text. Electronic documents are interactive. Many contain hyperlinks allowing the reader immediate access to a source citation or a related article or posting. Text-searchable PDFs make it easier than ever to jump around a document to find a specific word or phrase. Web pages, as well as newspapers and magazines, combine text with colorful graphics, banners, and headlines. And while we are viewing these pages or documents, we are constantly receiving notifications from at least one device alerting us to a new email or text message, news update, or social media post. See Nicholas Carr, The Shallows: What the Internet Is Doing to Our Brains 90–91 (2010).

As a result, we have become more impatient readers; instead of deep reading, we are more inclined to browse, scan, or keyword-spot, especially when faced with long, uninterrupted blocks of text. Id. at 138.

Some judges may decry these effects. See Raymond M. Kethledge & Michael S. Erwin, Lead Yourself First: Inspiring Leadership Through Solitude (2017). But courts are not immune from these changes in reading habits. According to a 2012 study, 58 percent of federal judges were using iPads to do court work, with the rate even higher for bankruptcy judges, at 70 percent. See David Nuffer, Judges + iPads = Perfect Fit?, Three Geeks and a Law Blog (June 12, 2012)(summarizing study of iPad usage by federal judges). These percentages will have only grown in the ensuing six years.


In light of these trends, it is not surprising that judges increasingly report a desire to see more pictures, maps, and diagrams in briefs to help them better understand cases. Ross Guberman, Judges Speaking Softly: What They Long for When They Read, 44 Litig. 2 (Summer 2018). Retired Judge Richard Posner colorfully advocated for using images in briefs, commenting in one opinion, “This case illustrates the curious and deplorable aversion of many lawyers to visual evidence... even when vastly more informative than a verbal description. We have noted this aversion in previous cases—once remarking that some lawyers think a word is worth a thousand pictures.” Coffey v. Ne. Ill. Reg’l Commuter R.R. Corp., 479 F.3d 472, 478 (7th Cir. 2007).

Using images in appellate briefs can be an effective tool both for catching and keeping the attention of a “wired” judge or clerk and for increasing the persuasive force of your legal argument. Images, pictures, charts, graphs, and maps should no longer be presented to a court merely as citations to the record or to an appendix; they should be placed in the body of the brief.

Images Comply with the Rules

Few rules govern the use of images in appellate briefs, and debate over them is virtually nonexistent. Porter, supra, at 1695. The Federal Rules of Civil Procedure are broadly permissive with minimal guidance except as related to the quality of the copy: “Photographs, illustrations, and tables may be reproduced by any method that results in a good
copy of the original; a glossy finish is acceptable if the original is glossy.” Fed. R. Civ. P. 32(a)(1)(C) (2018). To date, there are no cases that interpret this rule. No local rules of any circuit impose any additional restrictions on the use of images in briefs.

Briefs that incorporate pictures, maps, and charts typically take these images directly from the record. Images that are part of the proof going toward the merits of a case certainly should have been presented first to the trial court. But there is no prohibition on using demonstratives such as flow charts and timelines for the first time on appeal to illustrate a fact pattern or argument as long as they do not introduce any new matters. Indeed, in one case, an appellant created a chart summarizing the procedural history of a case for her brief, the opposing party raised no objection, and one Third Circuit judge even thanked counsel during oral argument for including it. See discussion of Huertero v. United States, below.

Images can also help an advocate comply with other rules while enhancing his or her argument. Federal courts (and many state courts) impose type-volume limits on appellate briefs. See Fed. R. Civ. P. 32(a)(7)(B). Because neither the Federal Rules of Appellate Procedure nor any circuit local rules explicitly count images toward those limits, a picture truly can be worth a thousand words. This was literally the case in the Supreme Court’s opinion in PPL Montana, LLC v. Montana, 565 U.S. 576 (2012). Justice Kennedy used over 1,500 words and 29 source citations to describe the flow of three rivers. Stephen R. Miller, The Visual and the Law of the Cities, 33 Pace L. Rev. 183, 188 (2013). These same rivers were depicted in a single map included in the respondent’s briefing. See Figure 1. Brief of Respondent, app. 1a, PPL Montana, LLC v. Montana, 565 U.S. 576 (2012) (No. 10-218).

**Images Improve Retention and Focus**

Combining images with textual argument offers many cognitive benefits. Our brains use different channels to process different types of information. The verbal channel processes auditory and textual information while the visual channel processes images. Hillary Burgess, Deepening the Discourse Using the Legal Mind’s Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning, 29 Quinnipiac L. Rev. 1, 25 (2011). Relying on text exclusively to convey information risks overtaxing a reader’s verbal channel, which, in turn, can hinder the reader’s ability to remember the material. By incorporating visuals with the text, information can be spread across both the verbal channel and the visual channel, improving both comprehension and retention. Id. at 47–48. Indeed, research consistently supports a “pictorial superiority effect,” which results in people remembering visual images “more accurately, more quickly, and for a longer period of time than they remember words.” Id. at 47.

Judges have acknowledged these benefits. One recent survey of over 1,000 federal and state judges revealed that “looks do matter.” “Long, uninterrupted blocks of text” are “out,” and “timelines, maps, graphs, diagrams, tables, headings and subheadings, and generous margins” are “in.” Guberman, supra, at 2. As one survey respondent commented, “The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact (who undoubtedly was permitted to see an exhibit while it was discussed).” Id. Images can offer a mental respite from the pages of textual argument, highlight an important point or argument, and avoid the disruption of having to jump or scroll to an appendix to see the

![Figure 1](image_url)

Justice Kennedy used over 1,500 words and 29 source citations to describe the flow of three rivers. These same rivers were depicted in a single map included in the respondent’s briefing.
Images Illustrate

A visual argument can be left flat if it is made exclusively in text, but with the right image, the reader may, to paraphrase Judge Learned Hand, understand it when he or she sees it.

The Supreme Court granted certiorari in *Star Athletica, LLC v. Varsity Brands, Inc.*, to resolve a circuit split on the proper test for determining when the design features of a useful article are sufficiently separate from the article’s utilitarian aspects to warrant copyright protection. At issue were the stripes, chevrons, and zigzags in five cheerleading uniform designs. See Figure 2. Brief for Petitioner 4–5, *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866).

The parties, the Solicitor General, and numerous amici filed briefs loaded with images. The petitioner argued the garment could not be recognized as a cheerleading uniform without the stripes and lines. *Id.* at 47. On one side on a page in the petitioner’s brief was a cheerleading uniform; on the other, a little black dress. See Figure 3. The respondent countered, claiming that cheerleading uniforms could exist without these design elements. See Figure 4.

Images Persuade

Images efficiently convey information because they are intuitive: “We go through a complex educational process to learn to read, whereas ‘we are all assumed to require no training in order to see and consume the visual.’” Porter, supra, at 1753. We also “read” images differently than text, viewing them in a single glance as a whole rather than by parsing them into their constituent parts. *Id.* And inserted
directly in a brief rather than described with a citation to the record, they can be a powerful advocate.

In *Cullinane v. Uber Technologies*, the plaintiffs challenged the enforceability of an arbitration clause in an online adhesion contract. Under the applicable law, notice of the existence of the contract must be reasonably conspicuous, and the consumer must unambiguously manifest his or her assent to the contract terms. The “conspicuous” element required that the contract be written, displayed, or presented in such a way that a reasonable consumer should have noticed it.

The district court found that by placing the phrase “[b]y creating an Uber account, you agree to the Terms of Service & Privacy Policy” on the final screen of the account registration process, Uber had given reasonable notice of the existence of the contract to the plaintiffs. *Cullinane v. Uber Techs., Inc.*, No. 1:14-cv-14750, 2016 U.S. Dist. LEXIS 89540, at *20 (D. Mass July 11, 2016). So on appeal, the plaintiffs incorporated a screen shot from Uber’s registration process in their “Statement of the Case” section and in the body of their “Argument”. Brief of Appellants 34, *Cullinane v. Uber Techs., Inc.*, 895 F.3d 53 (1st Cir. 2018) (No. 16-2023). Uber’s response brief included this same image in its “Statement of the Case,” but in its “Argument” section, merely described the message on the screen. See Figure 5. Brief of Respondent 21, *Cullinane*, 895 F.3d 53 (No. 16-2023).

The First Circuit reversed, finding that Uber’s registration process did not reasonably notify the plaintiffs of the contract. *Cullinane*, 895 F.3d at 62. Noting that the screen could not be “read in a vacuum,” the court included the screen shot images in the body of its opinion. *Id.* at 58. After describing the image, the court found that the “Terms of Service & Privacy Policy” hyperlink did not have the common appearance of a hyperlink, raising the question of whether a reasonable user would know it was a hyperlink. The “Terms of Service & Privacy Policy” hyperlink was also inconspicuous when compared to the terms “scan your card” and “enter promo code,” which were written in a similar size and font, and to the term “LINK CARD,” which was written in the largest font of any other text on the screen and capitalized. The design of the screen, not the mere text appearing on the screen, convinced the court that the “Terms of Service & Privacy Policy” hyperlink was not conspicuous, illustrating how an image can support a case. *Id.*

**Images Simplify**

In cases with a complex factual or procedural history, a chart or timeline can sometimes give a more effective explanation than lengthy paragraphs—and make it easier to highlight the important events.

This point is well demonstrated in *Huertero v. United States*, which involved a question of when a savings statute had begun to run on a plaintiff’s Federal Tort Claims Act (FTCA) claim. Its facts were, to quote one of the reviewing judges, “messy.”

To summarize textually, the FTCA requires that a claim against a federal government employee be presented to the applicable federal agency within two years after accrual. If the agency denies the claim, the plaintiff must then file an action in federal district court within six months after the denial. See 28 U.S.C. §2401(b). However, the Westfall Act creates a safeguard for claimants who mistakenly file a FTCA claim in state court. First, the Attor-
ney General removes the case to the federal district court, the United States is substituted as the proper defendant, and the case is dismissed for failure to exhaust administrative remedies. After that, the claimant may pursue his or her claim anew as long as (1) the claim would have been timely if it had been correctly presented to the agency on the date that the claimant erroneously filed suit in state court, and (2) the claim is presented to the appropriate agency within 60 days of the dismissal of the erroneous action. See 28 U.S.C. §2679(d).

In *Huertero*, the plaintiff filed suit in state court the day before the two-year statute of limitations would have expired to present her claim to the agency. Some time later, she learned that the individual named as the defendant was a federal employee and that the claim was governed by the FTCA. Rather than waiting for the Westfall Act process to occur, the plaintiff filed an agency administrative claim, even though, by that time, more than two years had passed since the claim had accrued. The agency summarily dismissed the claim.

Meanwhile, the state court action was removed to federal court and a motion to dismiss was filed. But the order granting the motion to dismiss was not entered until after six months had passed from the denial of the administrative claim, and the plaintiff had not filed a second federal lawsuit in the interim. Once the first federal lawsuit had been dismissed, the plaintiff filed a second federal lawsuit, which was dismissed because the underlying claim had not been presented to the Department of Health and Human Services (HHS) within the two-year statute of limitations and because the lawsuit was filed more than six months after the HHS denied the claim.

On appeal, acknowledging “the procedural history is a bit dense,” the plaintiff appellant included a graphic timeline of the key events in her brief.

**Figure 6**

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<thead>
<tr>
<th>Court Actions [In Blue]</th>
<th>Administrative Actions [In Black]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Plaintiffs file Complaint in State Court</strong> 8/24/12</td>
<td><strong>Defendants’ Removal to Federal Court and First Motion to Dismiss (Unopposed)</strong> 8/27/12</td>
</tr>
<tr>
<td><strong>Plaintiffs learn Dr. Repole is deemed to be federal employee</strong> 2/14/12</td>
<td><strong>District Court’s First Dismissal</strong> 1/1/13</td>
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<tr>
<td><strong>Defendants’ Second Motion to Dismiss</strong> 6/17/13</td>
<td><strong>District Court’s Second Dismissal</strong> 4/30/14</td>
</tr>
<tr>
<td><strong>Plaintiffs File Complaint in Federal Court</strong> 3/7/13</td>
<td></td>
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<tr>
<td><strong>Plaintiffs have 6 months within which to file administrative claim</strong> 3/8/13</td>
<td></td>
</tr>
<tr>
<td><strong>End of 6-month period within which to file federal suit</strong> 4/12/13</td>
<td></td>
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<tr>
<td><strong>Plaintiffs have 60 days within which to file federal suit</strong> 4/17/13</td>
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<tr>
<td><strong>Plaintiffs have 6 months within which to file federal suit</strong> 5/9/12</td>
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<tr>
<td><strong>HHS First Denial</strong> 5/23/12</td>
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<td><strong>Plaintiffs’ Motion for Reconsideration</strong> 6/13/12</td>
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<tr>
<td><strong>HHS Denies Motion for Reconsideration</strong> 7/11/12</td>
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<td><strong>Plaintiffs’ Second Administrative Claim</strong> 3/8/13</td>
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<td><strong>HHS Returns Second Claim</strong> 4/12/13</td>
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<tr>
<td><strong>Plaintiffs’ Letter to HHS Requesting Final Determination (no response)</strong> 4/17/13</td>
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*For the reasons explained in the brief, appellants should not be charged with the expiration of this six-month period.*
In sum, this fact pattern presents two competing timelines (the first federal lawsuit and the administrative process), a two-part statute of limitations (two years to agency, then six months to district court), and a two-pronged tolling inquiry (timeliness of original action and 60 days for dismissal of subsequent administrative review).


But on appeal, acknowledging “the procedural history is a bit dense,” the plaintiff appellant included a graphic timeline of the key events in her brief. See Figure 6. Brief of Appellant 5, Huertero v. United States, 601 Fed. App’x 169 (3d Cir. 2015) (No. 14-2861).

During the oral argument, Judge Theodore McKee commented:

I want to start by commending your brief... As complicated as this case is... the facts are messy. Your chart—you caused me to do something I hadn’t done in years—you caused me to print something out and whoever’s idea that was to put that chart in the brief I really want to commend you. It is a very, very helpful chart.


The Third Circuit ultimately reversed the district court, succinctly concluding:

Here, at the time Huertero filed her first HHS claim, the Westfall Act’s savings clause was not yet implicated. The Government had not substituted itself as a party, the case had not been removed to federal court, the Government had not moved to dismiss for failure to exhaust adminis-

trative remedies, and the District Court had not dismissed the case. Rather, the savings clause was triggered with the District Court finally dismissed the wrongfully filed state court claim on March 7, 2013, and Huertero presented her (second) HHS claim the next day.


Conclusion

Technology has handed appellate advocates an array of new tools, inviting creativity and expanding ways to persuade. Judicious use of these tools should, in turn, open the advocate’s mind to make more compelling arguments in new ways, sometimes capturing complex concepts in images, photographs, or charts. Not only are these non-textual devices compelling, they are economical in terms of space, avoiding word-count limitations. If there truly is a “picture superiority effect,” appellate counsel should look to incorporate these memorable devices in their briefs.

Emily Hamm Huseth is an associate with Harris Shelton Hanover Walsh PLLC in Memphis, Tennessee. She focuses her practice on commercial and health-care litigation, with an emphasis on appellate advocacy. Michael F. Rafferty is a partner with Harris Shelton Hanover Walsh PLLC in Memphis, Tennessee, where he focuses his practice on commercial litigation and civil appeals, including contract, employment, intellectual property, trade secrets, and business tort disputes as well as defense of professional liability claims. Clayton Jackson, J.D. candidate at the University of Memphis, who will be clerking for U.S. Magistrate Judge Diane K. Vescovo in 2019, assisted in the research and preparation for this article.
A Detailed Demonstration

Effectively Using Visual Aids During Oral Arguments

By Amie Sivon

When preparing for your next appellate oral argument, consider using visual aids to enhance your oral presentation. While some appellate attorneys have written articles discouraging the use of visual aids, I disagree. Certainly, some oral arguments do not lend themselves to visual aids, and some appellate courts or panels might be known to dislike visual aids. However, in other situations, visual aids used effectively can enhance your oral argument and even be critical to your argument. Visual aids can make complex concepts and facts easier to understand.

Other articles discussing oral arguments suggest giving consideration to using visual aids in your oral argument but do not give suggestions on how to use visual aids. This article demonstrates in detail how to use visual aids effectively in your oral arguments and provides examples.

Applicable Rules

First, let’s discuss some of the procedures involving the use of visual aids at appellate oral argument before discussing how to use visual aids during oral argument. The most important procedure is to check your court’s rules and the general information provided by the court or bar association regarding oral argument procedures and available technology. Find out if visual aids are allowed or recommended. Some courts have information regarding visual aids on their website with general information about oral arguments and the courtroom, including the technology available for visual aids. Also, always contact the clerk’s office and speak to a clerk for additional information and recommendations.

Many courts do not have any rules addressing visual aids in oral argument. The Federal Rules of Appellate Procedure merely state that any physical exhibits other than documents must be placed in the courtroom the day of the argument before court convenes, and they must be removed afterward unless the court directs otherwise. Fed. R. App. P. 34(g). However, the Local Rules for the Court of Appeals for the Federal Circuit specifically address visual aids in oral arguments. Federal Circuit Rule 34 states:

1. Visual Aids Used at a Trial or Administrative Hearing; Notice. If counsel intends to use at oral argument a visual aid that was not used at a trial or administrative hearing, counsel must advise the clerk through CM/ECF no later than 14 days before argument of the proposed visual aid.

2. Visual Aids Not Used at a Trial or Administrative Hearing; Notice. If counsel intends to use at oral argument a visual aid that was not used at a trial or administrative hearing, counsel must give notice to opposing counsel and notify the clerk of court by letter through CM/ECF no later than 21 days before the oral argument.

3. Objection to the Use of Visual Aids. An objection to the proposed use of a visual aid at oral argument must be submitted through CM/ECF as a letter and filed no later than 7 days before the oral argument. If a party objects, the parties’ submissions will be treated as a motion and response and will be referred to the panel.

4. Scope. This rule does not preclude use of a chalkboard or equivalent during oral argument.

5. Disposition. The clerk of court may dispose of visual aids not removed by the parties.

Fed. Cir. Rule 34(c) (emphasis added).

The Court of Appeals for the Fourth Circuit’s policy states that counsel may not use physical or electronic exhibits in the oral argument presentation without a prior motion and leave of court. The motion should include whether or not opposing counsel has any objections. Further, the Fourth Circuit’s courtroom protocol information states that enlarging documents for reference is generally unnecessary because the panel can view the documents in the appendix. The court does not have any technology system available but can provide an easel for use with visual aids, though it is not often used.

In the Practitioner’s Guide to the U.S. Court of Appeals for the Fifth Circuit, the guide notes that some judges do not find visual aids helpful and some will only allow visual aids of something that is already in the record. The guide suggests that paper copies be distributed to the courtroom deputy for the judges in addition to or in lieu of large, poster-size visual aids.

The Supreme Court of Georgia and the North Carolina Court of Appeals make it known that they allow visual aids at oral argument and have the technology available for a
PowerPoint presentation or similar presentation and that they also have ELMO projection systems. The Supreme Court of Georgia also has a DVD player available at the lectern.

The Supreme Court of Texas allows exhibits to be used during oral argument, but they must be filed no later than the day before the oral argument. There is an associated filing fee. The court also allows large exhibits to be displayed beside the lectern, and a computer may be set up with its presentation equipment if one day’s notice is given.

A review of some other courts’ rules and website information indicates that many courts do not address visual aids, including what type of notice is required. When a jurisdiction does not address whether advance notice must be given to use visual aids at oral argument, I suggest that professional courtesy requires notice to the opposing party at least 24 hours before oral argument of the visual aids that you intend to use if the visual aids are not already part of the record. If you are using something that is a part of the record, then I would suggest informing opposing counsel before the start of oral arguments (even the morning of) that you plan to use X and Y pages of the record in your oral argument. You do not want your limited oral argument time to be taken up by an objection from the other side regarding your use of visual aids during the presentation. If you are ever in doubt about whether and how to use visual aids in a specific court, call the clerk’s office for assistance.

When to Use
For every oral argument, consider whether visual aids should be used. The visual aids might be exhibits from the record, something that you already created and included in your brief, or something that you will create specifically for oral argument. Typical occasions when visual aids would be helpful are when there is an issue that is hard to describe verbally, when reviewing an image would provide clarity, or when dealing with a complex set of facts or issues. Consider how using visual aids can emphasize the most important points in your case. There are many different types of visual aids and ways in which they could be used to enhance your oral argument. Oral advocates should take the time to reflect on which types of visual aids would be useful in each oral argument.

Audience
Keep in mind who your audience is when you use visual aids for an appellate argument. Your exhibits are to aid the judges in deciding the legal issues in the case. Your appellate presentation is extremely different from a presentation before a jury. Appellate judges have no interest in visual aids that are made with the goal of swaying a jury. The judges do not want cute exhibits or exhibits created with the intent of pulling on emotions.

Instead, think of what would aid your colleagues, someone learned in the law but not in the trenches of the case, in understanding and deciding the issues in your case. If showing something would be helpful in explaining your argument to your colleagues, or persuading them why the law is in your favor, then it likely will also be helpful to your appellate panel.

Ways to Present Visual Aids
The four primary ways to show visual aids during oral argument are (1) PowerPoint; (2) a foam board or similar exhibit; (3) paper copy handouts; or (4) an ELMO projector or something similar.

PowerPoint
A PowerPoint presentation should not track your argument, include the text of your argument, be a synopsis of your argument, or be a crutch for your argument. A PowerPoint should not be used as it frequently is used for CLE presentations. Instead, PowerPoint slides should be an enhancement to a particular aspect of your argument to show visually what you really need the court to see and understand versus only hearing the argument. Use PowerPoint to show the same type of information that you would on a foam board, only display the information on the screen instead of on the foam board on an easel.

If you decide to use PowerPoint, you want to make the presentation simple, clean, and direct. Only put a small amount of information on each slide. Confirm the font is large enough to be seen, and make sure the background color does not interfere with legibility. The presentation should go straight to the visual you want to show and not include any introductory slides. I recommend not using any “fancy” features such as bold transitions, colorful background templates, or animations.

You should practice giving your oral argument with the PowerPoint, and you should also try out your PowerPoint ahead of time in the courtroom where the oral argument will be held. When I have used PowerPoint, my team has either visited the court in advance or arrived very early the day of argument to see how the PowerPoint presentation will work with the court’s technology. Arrange your visit in advance so you can make sure that you will have access to the courtroom you will be using. Take the computer and
flash drive you plan to use the day of the argument and test it on the court’s system. Do not rely on an internet connection for your presentation; have the presentation on your hard drive or flash drive.

Also, the computer that is being used should have a neutral background and no other images, documents, or document names should appear. Close all applications, programs, and email systems. Turn the sound off, and verify that no “pop ups” will display on your screen during the PowerPoint presentation. You should bring an extension cord with you. Have the battery fully charged ahead of time in case there is not an available electrical outlet. When you arrive the day of your argument, arrive early and test your presentation before court begins, even if you have already made a visit previously to test out the PowerPoint.

I suggest having a colleague who is familiar with the case and your argument run the PowerPoint. Discuss ahead of time the prompts that will indicate when you will want a slide shown. The person running the PowerPoint should be an attorney, not an assistant, just to avoid any issues about who is sitting at the counsel table. If you are using a clicker, put in new batteries and check to verify that the clicker works. Only have the PowerPoint on when referring to a specific slide; otherwise have the monitor off.

Of course with PowerPoint, you have the potential that the slideshow will malfunction and not work. As back-up methods for your PowerPoint, have a paper copy of the presentation available to show on an ELMO or to provide as handouts. If the PowerPoint does not work within a couple minutes, move on.

**Foam Boards**

If you are making a foam board, work with your technology vendor to ensure the exhibit is of the upmost quality. Discuss beforehand with the clerk or marshal just where you will be allowed to place the easel in the courtroom. Review the board by viewing it from the same distance that the judges will be viewing it, and confirm that it can be easily read. If it cannot be seen clearly, either do not use a foam board or magnify the demonstrative so that it can actually be read. You also need to coordinate with the bailiff and a colleague regarding how the easel can be moved in to place and back out of place so that it can be done quickly and smoothly. Additionally, make sure the board fits well on the easel and is secure because you do not want the board to fall. If you want to write on the visual aid, make sure to have a readable marker with you and write in large, clear handwriting. You could even have a whiteboard for writing on during your argument when appropriate. The main point to remember with an easel is that if what is showing on the easel cannot be read or is unclear, your visual aid is a waste of time.

If you will need to point at the foam board, verify that the court will allow you to stand and present where the easel will be, have the easel beside you, or use a laser pointer that you have tried out beforehand. If you have to walk away from the microphone to the easel, you will need to make sure to keep your voice loud enough to be heard. When you are finished using the visual aid, smoothly and swiftly move back to the lectern.

**Paper Copies**

Another way to use visual aids is to pass out paper copies to the appellate judges and opposing counsel before your argument. Again, you will need to consult with the clerk or marshal regarding the logistics of when and how the court prefers the document be distributed.

While paper copies can be good as a backup, I would recommend considering a different planned presentation method. I think that a paper copy is the least effective visual aid option. If you hand out paper, the panel necessarily is looking down at the paper and not at you. Plus, you are not able to interact with this type of visual aid. If you do use paper copies and have multiple pages, put the pages in a small binder or staple the pages together and label them as A, B, C. That way the documents are together and will not be lost. Also, if you are unable to present the pages in the order you planned, you can easily refer the panel to the assigned letter. You should limit the number of pages that you hand out. Too many pages will not be effective and will be distracting.

**Projector System**

I personally like using a projector system, such as an ELMO, when using visual aids at oral argument. Many appellate courts have such a system in the courtroom available, often right by the podium, ready for your use. With an ELMO, you can use a regular piece of paper, put it on the projector, enlarge as needed, and point to or highlight anything on the document. Then you can take the document off the ELMO and put on a second visual aid right where you are delivering your oral argument. Again, limit the number of pages you intend to use during argument to the bare minimum. You should turn the ELMO off when you are not using it.
Hopefully, the courtroom is set up so that the judges have their own monitor or an easily viewable large screen. With a projector system, you do not have to deal with the stress of hoping that your PowerPoint works as planned and you do not have to worry about the visual acumen of the judges as with a foam board. Again, bring paper copies to distribute as a backup or if the court requests to have a copy.

**Examples of Visual Aids Used in Oral Arguments**

Following are some examples of the types of visual aids that could be used during appellate oral arguments and some real-life examples of their use.

**Diagram or Chart**

If the relationship of the parties or the event at issue is either important or confusing, or both, consider creating a diagram so that the judges can visually see and understand what you are explaining. A chart is also a concise way to show a lot of information in a way that can be easily digested. Cases involving calculations or data can also be shown in chart form. If the timeline of events is important to your argument, display a timeline during your oral argument.

In a case involving complex parachute and bonus provisions in an employment contract, we included charts in our brief showing the applicable calculations and put the same calculations on foam boards, which were displayed during the corresponding time in the argument. See Figure 1.

In another case, I used a visual aid at oral argument to show the relationship of the parties. The issue was whether an owner of land was strictly liable to an employee of a blasting company injured by a blast.

Through the diagram, I visually showed how the employee of the blasting company was in a different position than an innocent other, who if injured from a blast could hold the developer strictly liable. See Figure 2.

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**Figure 1**

Employee Phantom Interest Share \( \times \) “sale price”

\[
= \text{Employee Phantom Interest Share} \times (\text{sale price} - \text{all other assets})
\]

“Interest Component” = \( \text{Employee Phantom Interest Share} \times 7,000,000 \) compounded annually at 6%

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**Figure 2**

In another case, I used a visual aid at oral argument to show the relationship of the parties. The issue was whether an owner of land was strictly liable to an employee of a blasting company injured by a blast. Through the diagram, I visually showed how the employee of the blasting company was in a different position than an innocent other, who if injured from a blast could hold the developer strictly liable.
**Photograph or Map**

Sometimes actually showing a photograph, map, or diagram can be very helpful to the judges to conceptually understand the facts at issue.

A photograph should not be used in the appellate courts to generate empathy or for shock effect. But if a photograph aids in understanding your argument, it could be helpful to the panel. For example, in a medical malpractice case, an X-ray or diagram of the body part at issue could be helpful for the judges to understand medical information and terminology that is inherent to the issues in the case. A diagram showing the parts of a complex machine could be helpful to a panel when understanding the mechanics is related to the issue on appeal.

In any kind of case involving maps, real property borders, or other issues regarding real property, actually showing a legible, enlarged map and pointing to items on the map or having items highlighted can be very beneficial to the judges and your case. If there are several maps at issue, only show the ones you need to make your point, not all the maps that might be part of the record. However, it might be helpful to reference in your argument that there are other maps in the record. Also, even if you do not use it, be prepared with a copy of any map that supports the other side so that you can effectively answer any questions from the appellate judges.

For example, in another appellate case our team had, the issue was who owned land related to oceanfront properties: the landowners to whom the land attached, or the homeowners association as part of the association’s commonly owned areas. It was very helpful during the oral argument to show the maps of the property, which areas the developer had marked as common ownership, and how this specific part of the property was depicted on the recorded maps differently than other areas. These documents were part of the record, and both sides used the maps in their oral arguments. Figure 3 shows one of the maps that was highlighted before the oral argument and referred to during it.

**Key Parts of Statutes, Regulations, or Contracts**

When what is at issue is the meaning of a statute, regulation, or contract clause, it is helpful to have the exact language being considered displayed during your argument so that the judges can easily review and contemplate the language during your argument. Obviously, the language is quoted in the brief, but it is helpful to have the language displayed as you are discussing and dissecting it. This type of visual aid can easily be created. Consider adding color to parts of the statute to enhance the interpretation that you are advocating. Again, just confirm the font can be seen from the judges’ vantage point.

For example, I had a case involving the statutory interpretation of an old and new version of a statute, the meaning of the statute, and whether the trial judge used the wrong version of the statute. The case was not given oral arguments, but if it had, we would have made visual aids of the two different statutes with color to emphasize the arguments we were making. See Figure 4.
Quote from Precedential Case

Sometimes it can even be helpful to have quotes from cases to emphasize why your argument wins or where the issue involves the analysis of prior cases.

For example, in another of our cases, the issue was which choice of law test was the rule in North Carolina. We contended the trial judge should have used the lex loci delicti (place of injury) test. The matter involved a business dispute, not a physical injury. What was important to highlight for the judges was the exact language from the few North Carolina cases addressing the choice of law issue in the context of an unfair and deceptive trade practices claim by a business, even though in our case the claims were negligence-based.

We made a PowerPoint with quotes from two precedential cases to show the choice of law language from those cases. It was important to have these quotes presented visually to show the actual language used in these cases and then apply the facts in our case to that test. Another slide included a list of facts from the record that supported our view of where the injury occurred (the corporation’s nerve center) and why. The court heavily leaned on the cases that we cited in the PowerPoint in its opinion and agreed that the trial court had used the wrong test. The court further held that the injury occurred where we suggested it occurred and then applied that state’s law to the choice of law rule. See Figure 5.

Be Strategic in Using Visual Aids

While I do suggest considering the use of visual aids during oral argument, you must properly strategize to determine which type and how many visual aids to use. Be selective in choosing the type and style of your visual aids so that you can easily and smoothly transition to them.

Even if you had the forethought to include visual aids, such as a chart, in your brief, then you still might want to use the visual aids in your oral argument. That way the information is readily available to explain to the court. You should
keep the visual aids the same or very similar to how they were presented in your brief.

Be sure that the visual aids are minimalistic, easy to follow, and without mistakes. Too much information on a visual aid will cloud and distract from your main points. The visual aids need to be clear and have a simple design. Use colors to make the information stand out. With all visual aids, have multiple persons review and proof the visual aids to ensure they are as effective as possible and free from any errors.

I generally suggest only using one to three visual aids in an appellate oral argument. But how many will be best will depend on the case and the purpose for using the visual aids. Too many visuals will clutter your argument and potentially confuse the panel. Furthermore, if you are not sure how your use of visual aids will be received by your panel, it is better to use visual aids sparingly. On the other hand, if you practice in a jurisdiction where visual aids are widely used or encouraged, then that should weigh in on your determination of how many visual aids to include.

Another reason to use only a few visual aids is that you do not have much time during an oral argument, and of course, the judges’ questions could throw off any planned structure. Rehearse your argument with only reaching one or two visuals, even if you have more, so that you can are comfortable with how to transition to your most important visual aids. Have any visual aids prepared before presenting any mock oral argument.

Again, you should discuss the procedures for using visual aids with the clerk or bailiff well in advance and also arrange to preview your visual aids in the courtroom. Always have letter or legal size copies of all visual aids for each of the judges and opposing counsel available to give the clerk or bailiff on request.

Conclusion

Visual aids can be used smartly and effectively in appellate oral arguments. The above are only a few examples of ways visual aids can be used in oral arguments. The primary goal with using visual aids is that they enhance what you are orally communicating. Why not consider how the old adage “a picture is worth a thousand words” might assist you in winning your next appellate oral argument?

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