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I. Introduction

In 1927, Fred R. Barnard introduced the foundation of one of the world's most famous sayings, “a picture is worth a thousand words,” into our collective lexicon. That saying could not be truer than when it comes to preparing to persuade an audience in litigation. Whether you are trying to win over your opponent, a mediator, an arbitrator, a judge, or a jury you must get visual. The reason is simple: most of us are visual learners. In fact, research from the University Of Alabama School Of Medicine has shown that 65% of the population absorbs information most effectively via visual demonstratives. And we live in an age in which visual communication is the norm. For example, most of us communicate with each other via text, tweet, instant message, Snapchat, or emojis and memes rather than simply a phone call. Although the reasoning behind visual communication is simple the execution of it can be more difficult. Making an impact visually on your audience involves more than just creating pretty pictures and interesting special effects. It requires strategy, willingness to think and step outside of the box, and understanding your audience's needs and expectations. In this paper we will discuss some of the basics of effective visual communication in litigation, as well as discuss some of the pitfalls into which attorneys can fall while using graphics and, most importantly, how to avoid them.

II. The Language and Power of Visual Communication

Effective visual presentations at mediations, arbitrations, and at trial entail more than merely using computer software to access exhibits. A trial lawyer's visual communication strategy must become part of his or her overall trial plan. Graphical presentations are the trial lawyer's opportunity to communicate to jurors in a way that is familiar to them and in a way that jurors have come to expect to receive such information.

Trial lawyers can easily fall into the trap of using the same old tools at trial. While posters, PowerPoint, and generic litigation software can be helpful at trial (when used properly and sparingly), they are not the most effective tools for developing persuasive presentations. One reason is that PowerPoint is linear in nature (with limited interactivity and animation capabilities). Linearity can be limiting because good stories often aren't linear; points sometimes need to be revisited or made out of a prescribed sequence to give the audience what it needs to hear when it needs to hear it. Another reason is that generic litigation software packages, while helpful for certain types of cases, simply do not effectively assist today's advocates to visually communicate. Trial software packages are built to allow a trial lawyer immediate access to information (like documents and video clips); but they do not inherently help the trial lawyer to become a better storyteller.

For visuals to be powerful, they must help the trial lawyer tell a better, more persuasive, story. Effective custom-made trial graphics transform the complexities of the facts and details of the case into a simple, easily digestible and visible presentation. Great trial graphics clarify the facts, are focused on single points that build upon each other and link important story elements together, and make distinctions between the two competing theories of the case, while simultaneously allowing the trial lawyer flexibility to access information in a non-linear fashion.

Most cases involve interactions between persons or things. To properly comprehend those events and to test the credibility of witnesses, maps, diagrams, photographs, videos and custom-made visuals are among the most helpful tools. Technology today permits those visuals to be developed rather quickly and precisely.
using interactivity, 2D animation and 3D animation, providing the trial lawyer with unprecedented power in examining witnesses, explaining details, and showing relationships in a way that not very long ago was impossible.

To use high-tech visuals effectively whether at a mediation, arbitration or trial, a lawyer must become familiar with the language of visual communication. Trial lawyers no longer can rely solely on their outstanding oratory skills. Understanding how to communicate effectively with visual information and how to undermine your opponent’s visual presentations are critical to winning a case. The combination of interactivity, focused custom visuals, and a well-prepared lawyer who is fluent in visual communication and the needs of the audience is the basis for effective lawyering today. Visual communication in litigation, done right, is not only powerful but on occasion it can be devastating.

III. The Difference Between Visual Evidence and Visualizing Your Evidence

Many times, lawyers think of their trial visuals only in terms of the evidence that is visual by its nature (e.g., surveillance camera video evidence or photographic evidence). But all evidence (whether by its nature it is visual or not) can be visualized. This is especially true for evidence that seems, dry, complex, unintelligible and boring (e.g., evidence in patent litigation and contract disputes). Indeed, evidence of that nature is most benefited by turning it into interesting, clear, graphics that transform the information from uninspiring to riveting.

In addition, even evidence that is inherently visual can be enhanced by making it even more visually persuasive. For instance, surveillance video is visual in nature, but it can be very difficult to understand what is happening in several video clips without possibly the use of an interactive timeline or a map showing where the different exhibits of camera footage had been recorded.

Once a lawyer becomes fluent in visual communication, the goal no longer is to simply show evidence that is visual but rather to visualize all of your evidence. By doing so, we create an anchor for the audience (opponent, mediator, arbitrator, jury, or judge) to be able to understand the various exhibits in a proper context. By putting together an interactive timeline, a chart summarizing data found in reams of documentary evidence, or a map of the photographic evidence, the trial lawyer allows the audience (opponent, mediator, arbitrator, jury, or judge) to see the case exactly as he or she sees it. If there are gaps in the data, they will be visualized and highlighted. If there are critical timing issues of who knew what when, then they will be identified and highlighted. By visualizing the data, the trial lawyer can build a solid foundation upon which the entire case rests. And seeing is believing.

IV. The Goals of Graphics for Litigation

There are five basic purposes for employing visual aids in litigation:

i. The first is to clarify the facts by organizing and anchoring your evidence. When you visualize your evidence by drawing out the relationships between disparate pieces of information you convert what once was vague and unclear into concrete and (theoretically) indisputable. Doing so puts every audience member on the same page, literally, and makes their decision-making easier. For example, jurors may struggle with recalling important spatial information, such as whether there were too many distractions for a truck driver to see an obstruction, in deciding a wrongful death case; or, they may have difficulty understanding a difficult concept, such as how the change in a tax status changes the liabilities of the parties in a contract case; or how the
electrical circuitry could still be “live” since it had been shut off from the main power source in a product liability case. Each of the answers to these questions can and should be visualized. If they are not, then the vague nature of the spoken word may create just enough confusion in each of these situations to prevent the jury from properly understanding the facts of the case, and worse, lead the jury to conclude that your client is liable. But well-designed visuals that answer the questions on jurors’ minds and link the evidence in a way that helps jurors answer the questions they have to decide in the case can provide sufficient clarity and credibility to the theory of your client’s case. At a minimum, it forces everyone to “see it” as you see it.

ii. The second reason for using visual aids in litigation is to help the trial lawyer distinguish between the two competing theories of the case. By drawing out not just your theory of the case, but your opponent’s theory of the case also – on the same exact background – the audience (mediator, arbitrator, judge or jury) can directly compare and contrast the two competing theories. By developing a well-thought-out and well-designed custom made visual, each of your points/arguments as to why your position is correct can easily and clearly be contrasted with why your opponent’s position is flawed.

iii. The third reason for using visuals is to persuasively narrate your story. By using visuals and giving context to evidence through graphics, the events can be told in the order that they need to be explained. By visually revealing facts in a specific way, whether the organization of the facts is rhetorical or chronological, the lawyer has full control over the audience’s understanding of the story.

iv. The fourth reason for using visuals is to arm your supporters for deliberations. Trial is a battle and the ultimate goal is to win. And in order to win you have to have jurors (or judges in a bench trial) who will be willing to fight for your client during deliberations. In order to fight, these jurors need “ammunition” to counter arguments that opposing jurors will levy against them. As such, it is important to create graphics that jurors can use to fight for you. Graphics need to be easy to understand, remember and repeat when you are no longer there to explain your case.

v. The fifth reason for using visuals is to deconstruct and undermine your opponent’s attempts at visual communication. When you receive visuals from one’s opponent, the trial lawyer needs to identify flaws in the details, or any aspects of the graphics that lie (see http://news.nationalgeographic.com/2015/06/150619-data-points-five-ways-to-lie-with-charts/). Any flaws, inaccuracies or lies can be exploited in cross-examination of the witness who authenticated the graphic in question. A prepared trial lawyer will develop a second visual to dismantle the original flawed visual aid. That second visual would incorporate the flawed visual and highlight the various flaws, undermining the visual, the witness, and possibly opposing counsel.

V. The Inspiration for Graphics: The Role of Jury Research

While it is certainly important to consider how you display information and evidence to your audience—e.g., should you use PowerPoint, animation, interactive, 3-D design, or even a low-tech poster or flip chart drawing to convey your point?—it is most critical to consider what information you need to share with your audience (e.g., the jury). It can be overwhelming to decide which evidence to show and which deposition clips to play in the sea of documents to consider during discovery and in preparation for trial. And it can be a huge waste of money, time and effort if you pick the wrong things to turn into graphics. So a key question that needs to be answered long before entering the courtroom is how do you decide what information is important to jurors? The answer is to ask them through jury research.
When conducted correctly, jury research can be an important tool to help the trial attorney understand how jurors think about a case, which can often be very different than the way the trial team or the client thinks about the case. Jurors often reveal hidden vulnerabilities in the case and highlight points in the case story that need to be communicated visually. One such example in which jury research is helpful for informing the trial team about what kinds of graphics to use is in a patent case. Patent cases are notorious for being complex and it is tempting to believe that the jury needs numerous, complex graphics to help them understand the patent. A lesson learned from jurors in a patent case is that what jurors needed most was a simple graphic which outlined the basic story of the case boiled down to a few key points:

- Mr. Smith did the work.
- Mr. Smith got the patent.
- The Jones Corporation is using Mr. Smith’s invention without paying for a license.
- It is fair for the Jones Corporation to compensate Mr. Smith for the use of his technology.

The resulting bullet-point graphic that came from this learning was simple, but very effective. And importantly, it “grounded” jurors and gave them a way to organize the array of complex details they observed throughout the trial. The bottom line here is to understand what your audience needs and use that information to guide decisions about graphics. As best-selling author James Patterson put it, “if you want to write for yourself, get a diary. If you want to write for your friends, get a blog. But if you want to write for a lot of people, think about them a little bit.” Attorneys are “writing” trial stories for a broad audience not only in what they say but in also what they show, and data from jury research gives you a tool to help you think about and understand that audience.

VI. Understanding The Law of Visual Evidence—Five Reasons for Admissibility (and Permissibility) of Visuals

There are five reasons for allowing visual aids before a jury from a legal standpoint. They are:

i. **As a display device** – to simply display something on a screen so that all of the jurors and the court can witness it at the very same time in the exact same way. An example of this is putting a physical object on a document camera so that everyone in the courtroom can see it better as the trial lawyer points to a specific part of the object. Another example is using PowerPoint to display photographs. See *Arizona v. Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003) (Although a computer was used in the presentation, the actual presentation did not include any computer simulation or other similar evidence; rather, it was essentially a slide show of photographic exhibits. The photographs included in the presentation were the same ones disclosed to defendant during pretrial discovery and later admitted into evidence at trial. Moreover, even though the photographs included superimposed descriptive words and labels, the words and labels simply tracked the subject matter of the prosecutor’s opening statement to the jury, and defendant made no objection to any of the content or substance of the actual opening statement. We conclude, therefore, that there was no abuse of discretion by the trial court in permitting the State’s use of the “PowerPoint” presentation. See *People v. Green*, 302 P.2d 307, 312 (Cal. 1956) (holding trial court had discretion to permit use of motion picture and photographs later admitted into evidence during opening statement), disapproved on other grounds in *People v. Morse*, 388 P.2d 33 (Cal 1964).)

ii. **As a “chalk”** – any graphic that will assist the jury to understand the testimony of a witness should be able to be shown to the jury as an illustrative aid. Graphics used as illustrative aids
typically will not be allowed into the jury deliberations room as an exhibit. See Everson v. Casualty Company of America, 208 Mass. 214 (1911) (chalk defined).

iii. **As a “fair and accurate” presentation** of what it purports to be. If a witness can testify that a graphic is “fair and accurate,” then the graphic should come into evidence and be used in jury deliberations, unless there is a concern about its admissibility (e.g., its prejudicial effect substantially outweighs its probative value). See e.g., People v. McHugh, 476 NYS.2d 721, 722 (Sup. Ct. 1984) (A computer is not a gimmick and the court should not be shy about its use, when proper. Computers are simply mechanical tools – receiving information and acting on instructions at lightning speed. When the results are useful, they should be accepted, when confusing, they should be rejected. What is important is that the presentation be relevant . . . that it fairly and accurately reflect the oral testimony offered and that it be an aid to the jury’s understanding of the issues in the case.); see also Hinkle v. City of Clarksburg, 81 E3d 416, 424-25 (4th Cir. 1996) (Although there is a fine distinction between a recreation and an illustration, the practical distinction is the difference between a jury believing that they are seeing a recreation of the actual event and a jury understanding that they are seeing an illustration of someone else’s opinion about what happened. Knowing this there was no reason for the jury to credit the illustration more than they credit the underlying opinion.). See also Pennsylvania v. Serge, S.Ct. J-37-2005 (Penn. April 25, 2006). This case addresses many issues that trial lawyers must consider when developing an animation for a case that may end up at trial. The superior court judge (Nealon, J,) originally drafted an informative decision that explained the definition of animations and simulations and explored the distinguishing aspects of the two methods. The Supreme Court of Pennsylvania held “that a [Computer Generated Animation (CGA)] is potentially admissible as demonstrative evidence, as long as the animation is properly authenticated, it is relevant, and its probative value outweighs the danger of unfair prejudice or confusion.” Tarquino v. Diglio, 394 A.2d 198 (Conn. 1978) (Photo not admissible because could not prove it was fair and accurate; that the skid marks depicted were those of this accident).

iv. **As “scientific evidence.”** – When a computer is being used to testify as in a car crash simulation where the data is input into a computer and a simulation of the car crash is output by the computer, the expert in that case is not the testifying witness, but rather the actual computer output. When graphics are developed in this way, then the credibility of that particular science is at issue and a Frye / Daubert style analysis needs to take place. See Schaeffer v. General Motors Corporation, 372 Mass. 171 (1977) (Computer simulation science must be generally accepted by the scientific community.); Commercial Union Insurance Company v. Boston Edison, 412 Mass. 545 (1992) (simulation). See also Lally v. Volkswagon, 45 Mass. App. Ct. 317 (1998) (Regardless of the characterization of the computer animation, either as a simulation or as a representation, the computer animation was cumulative of other evidence in the case. In determining whether such an animation is admissible, “a trial court must consider ‘whether the evidence is relevant, the extent to which the test conditions are similar to the circumstances surrounding the accident, and whether the [experiment, demonstration, or reenactment] will confuse or mislead the jury.’ Calvanese v. W.W. Babcock Co., 10 Mass. App. Ct. 726 (1980).” The test here was “‘similar enough to allow the jury to infer ‘something material,’ i.e., how the occupants would have moved inside the vehicle and what parts of the interior they would likely have struck if they moved in the direction posited by the defendant’s experts.’”); State v. Swinton, 847 A.2d 921 (Conn. 2004) (foundation for work done in Photoshop not properly laid).
v. To “marshal the evidence” during closing argument. When exhibits that are in evidence are combined to create new visual for the closing argument, they are allowed as long as each part of the presentation was admitted into evidence independently. See State v. Skakel, No. 16844, 2006 WL 89928 (Conn. Jan. 24, 2006). In that case, by juxtaposing the photographs of the victim with the defendant's statements, the state's attorney sought to convey to the jury in graphic form what the State believed was the real reason for the defendant's panic, that is, that he had killed the victim.

VII. The “Wild West” of Litigation: The Intersection of Preparation of Visuals, Disclosure, and Work Product

The application of technological advancements in graphics development are the “wild west” in litigation today. Some issues that never used to be relevant because graphics could not be easily custom-made on a computer desktop overnight during trial now are becoming relevant. Today, with these technological advances, high quality graphics, 2D animations, and 3D animations are able to be developed rather speedily. This raises questions of how such visuals should be handled in discovery. What actually is discoverable? Is it just the video of the 3D animation that the proponent must hand over? Or is it the 3D model itself that must be disclosed in discovery? Is the model part of the attorney work product and therefore protected from discovery? Should a trial lawyer (who can create graphics on the fly) be prevented from preparing cross-examination graphics overnight in response to a witness's testimony because of antiquated discovery rules that require all graphics to be shown to the other side in advance of trial?

We are at the early stages of custom-made on-demand visual communication in litigation, but these questions are ones that will increase in frequency with the continued increase in use of desktop graphics development.

VIII. When Graphics Go Wrong: The Seven “Deadly Sins” of Using Visuals

While visual communication in litigation can be extremely helpful in simplifying the complexities of your case, there are risks that need to be avoided when designing and using visuals:

i. There is a risk of underestimating the power of visual communication – either by choosing not to develop graphics for points the trial lawyer assumes are obvious or by relying too much on the importance of a graphic. While the trial lawyer has spent years working on the case in preparation for trial, the jury spends jam-packed content-filled days (or weeks) attempting to learn the same information. Graphics are powerful because they can help catch jurors up – bringing them quickly to the understanding of the case that the trial lawyer possesses. Therefore, visuals should not be the last thing a trial lawyer considers in preparation of the case for trial. In fact, throughout trial preparation, the trial lawyer should use graphics to learn and explain the case – and then, some of those graphics should be used to explain the case to the jury during trial. Even the best litigation graphics, however, still may need verbal explanations in order for the jury to fully understand the information contained within the graphic.

ii. Overestimating your own talents as an expert in visual communication. If the trial lawyer hasn't studied graphic design, visual communication or the proper display of information then he or she is not going to be as effective as someone who has. So it is important that the trial lawyer hire a professional, when feasible, to help visually communicate the evidence in the most
effective way possible. When budgets don't permit, then the intern with the visual arts background will suffice.

iii. Inaccuracies in custom visuals can damage the case presentation. Allowing any inaccuracies to exist in the visual (including typos) will not only undermine the visual, but possibly the testifying witness and possibly the trial lawyer’s credibility. Therefore, check for visuals that can negatively impact the case either because of errors in accuracy or because of substantive errors in the underlying data. When designing graphics, the trial lawyer must critically analyze how each specific graphic can support or undermine the case themes, theories and arguments.

iv. Accepting an opponent’s visuals as completely accurate is a risk. The unsuspecting trial lawyer oftentimes will not review the opponent's visuals with a trained critical eye because the trial lawyer is not fluent in the language of visual communication and therefore cannot see the flaws in the opponent's visuals.

v. There is a risk in not properly protecting the work-product within a graphic. Some graphics are actually work product (in and of themselves) and should never be shown to the opponent until used on cross-examination of the opponent's witness, or be held until closing argument. The risk is that a judge will require the disclosure of the visual before trial through pre-trial discovery rulings. A motion-in-limine should be used to protect the value of the image so as to not lose the power of the effect (surprise) of the visual impact on the jury.

vi. There is a risk in not knowing what you are offering into evidence. If the trial lawyer is not fully aware of precisely what is being offered into evidence and why, it will be very hard to defend the graphic when questioned by a judge at a sidebar conference. Are you offering the visual as a simulation, an animation, or an illustration? What is the backup request if the judge rules against you? The well-prepared trial lawyer will know why the visual is being offered and will have several back-up options in how to persuade the Court to admit the graphic.

vii. Forgetting your audience. Arguably, the biggest “sin” of all is failing to give jurors what they need. It is easy to focus so much on what you want to communicate that you forget that it may not be what the jury wants and needs to hear in order to find for your client.

IX. Tips for Avoiding Pitfalls and Using Graphics More Effectively at Trial, Mediation and Arbitration

Here are some tips for avoiding some of the pitfalls lawyers can encounter while using visuals at trial:

i. Always keep your audience focused on the big picture. While facts, objections and protecting the record are important for a trial lawyer to address, the story of the case can get lost in the details. Remember that the audience/listener (the client, trial team, opponent,, mediator, arbitrator, judge or jury) often is hearing the information for the first time. You want the audience to always be thinking about the next piece of evidence in the context of the entire story.

ii. Every graphic should be focused on conveying just one main message. To avoid confusion, don't try to communicate every aspect of your case in a single graphic.

iii. Don't leave visual communication to the last minute. You must think critically about the information, visualize it, get it onto the computer (or paper), and think about it critically again until the graphic represents the message that you intend to convey. The creation process is iterative and so there will be new thoughts and ideas that appear as the creation process continues.
iv. **Use visual technologies and techniques as part of your preparation routine.** In other words, don’t just think of graphics for use only during trial. During case preparation—even during discovery—graphics can improve the trial team’s understanding of the case, keep everyone on the same page, and can help in developing the theory of the case by allowing the lawyers to see their case/evidence in a new way.

v. **Use graphics to visualize the evidence and the relationships between different pieces of evidence and different theories.** One of the best ways to do this is by using the contrast principle. Persuasive graphics show what actually happened versus what should have happened (or versus what was planned).

vi. **Use graphics to link key facts to the verdict questions.** It is a mistake to believe that jurors understand the case the way the trial team does. As such, jurors may not always know how to link key evidence and arguments to the issues they have to decide in the case. Graphics can be used to “tie up loose ends” for jurors and help them to see the link between evidence and the verdict questions.

vii. **Use powerful visuals during trial negotiations to convince the opposition of the strength of your position and of your overall readiness to try the case.**

viii. **Graphics developed for motions hearings can clarify difficult legal principles and make nuanced arguments clearer to the judge.**

ix. **Stay on top of what new technologies exist to help you improve the way to tell your story.** Today, interactive multimedia technologies allow for combining many facts, details, and pieces of digital evidence into a custom-made comprehensive visual presentation. Have you explored the use of virtual reality, interactive timelines, or 3D animation?

x. **Consider that non-visual evidence can be visualized.** Each major part of your story should have at least one witness and one main graphic.

xii. **Don’t assume that because your evidence or issues in the dispute are boring and dry that your case is not visual.** Many lawyers don’t use visual technology (when they should) because the lawyer can’t imagine how it could help in a particular case. Many times the most effective visuals are ones where the visual engages the audience by clarifying dry, routine data.

xiii. **Visuals can build on each other.** Building visuals one fact at a time is educational, increasing the jury’s interest, focus, and attention. It allows the trial lawyer to pace the speed at which the information is presented to the jury. It permits full exploration of each fact without distraction of the learning process by the other facts (or other distractions). Finally, it creates mystery and suspense.

xiv. **Use only visuals that help.** Design visuals that employ proper theories of graphic design and information display principles in order to ensure the professionalism and effectiveness of the presentation. Beware of the message of the graphics that you create. Is the graphic communicating what you expected/intended? Or did you unwittingly reveal a gaping hole in your evidence?

xv. **Do not overemphasize the graphics.** You are the advocate; the presentation should not upstage you. You will be persuasive using the visual presentation as a supporting tool. The technology is simply there to help you tell your best story.

xvi. **Use graphics strategically and sparingly.** It is easy to go to the extreme of making too many graphics (including putting every word of an opening or closing statement on a PowerPoint

slide). This is a quick way to overload jurors and cause them to lose the message you want them to remember. Be memorable to jurors by using graphics sparingly.

xvii. **Sometimes, less is more.** High technology graphics certainly have their place, but don’t dismiss the power of a simple demonstrative. Sometimes writing something on a flipchart can get the message across as effectively—or more so—than a sophisticated graphic.

**X. Conclusion**

Prevailing in litigation is not simply a matter of overwhelming jurors with evidence and visual information. True success comes from being able to meet the expectations of your audience. A big part of meeting jurors’ expectations is using graphics strategically to clarify and organize the story of your case, distinguish between competing case stories, and dismantle your opponent’s visuals and their story. By considering how jurors are likely to see your cases, respecting their values and beliefs, and developing a visual communication strategy that embraces what matters to the audience corporate defendants will improve their chances of jurors being willing to listen to their side of the story at trial.