

Visual Litigation

Visual Communication Strategies and Today's Technology

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This book is (and we are) dedicated to our families.

*To Nancy, Brady, Soojin, Malachi, Riley,
Clancy, Kara, Beatrice, Samuel,
Colby, and Darren—my family.
Ronald H. Clark*

*To Alyse, Ashlyn, Mom (the teacher), and Dad (the police officer)
My family and motivation for all I do.
Patrick M. Muscat*

*To my wife, mother and father, sister and brothers,
and Harry Hood, and in memory of
Thomas Griffin and Robert Sargent.
Thomas M. O'Toole*

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About the Authors

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Thomas O'Toole, Ph.D., has practiced across the nation for fifteen years in nearly every litigation type. He has consulted on matters as small as low-exposure medical malpractice and as large as "bet-the company" MDL class actions and billion-dollar environmental claims. His cases have been featured in the *New York Times*, *Wall Street Journal*, and *Washington Post*, and have been the subject of feature films and documentaries. He co-authored the book *Jury Selection Handbook*, published by Carolina Academic Press, and is the host of the popular podcast, *The Sniper Defense*. Tom received his Ph.D. in litigation psychology and communication at the University of Kansas.

Chapter I

Introduction to Book and Online Supplement

- A. Visual Litigation—Ocular Proof
- B. Book Overview
- C. Visual Litigation Online Supplement

“Be sure of it; give me the ocular proof.”

William Shakespeare (1564-1616),
Othello, act 3 scene 3

A. Visual Litigation—Ocular Proof

We live in a visual culture. Since the dawn of humanity, we have been making judgments with our eyes. The earliest incarnations of humans made simply visual decisions about the safety and security of their surroundings. Logic, rationality, and all of our other thoughts processes evolved long after our sense of visual judgment. From this evolutionary standpoint, our eyes have always been the predominant force in our decision-making. While we have evolved from our caveman days, research has consistently shown the influence of visual communication. Consider a study on information recall, which showed that people remember only 10 percent of what they hear three days after hearing it, compared to remembering 50 percent of what they saw and heard three days after seeing it.¹ Technology, social media, and the emergence of the millennials and Gen Zers have only compounded this reality.

1. Dale, Edgar, *Audio-Visual Methods in Teaching*, 3rd ed., Holt, Rinehart & Winston, New York, 1969, p. 108.

This has important implications for trial attorneys. Successful litigators rely on visuals to persuade during both pretrial and trial. Today's jurors receive information over the television and the Internet. The millennial generation that makes up over 40 percent of the jury pool nationally grew up with information being delivered to them visually through pictures and videos on their phones, tablets, and laptops. Members of the Z Generation, who have begun to enter jury pools across the country, have been raised on visuals at least equally if not more than millennials. Consequently, jurors are not only visual learners but also are receptive to information being delivered to them visually, and they expect that trial lawyers will communicate information to them visually with the aid of modern technology. To be a successful litigator you need to know: how to communicate visually; how to create visuals; what software and hardware can produce the desired results; and what visuals are persuasive. In fact, research has shown that visual communication increases retention, comprehension, and overall persuasiveness.

A Cornell Law Review article entitled "What Jurors Really Think" describes the importance of technology in today's trial work based upon a study of 500 jurors in federal district court trials in Chicago, Illinois, from 2011 to 2017:

Just as technology has become a mainstay in almost every area of modern American life, it has also become a mainstay in the courtroom. Jurors expect attorneys to use technology to aid their trial presentation. This is no surprise, given the ever-increasing prevalence of technology as a learning tool both in classrooms and in the workplace. Many jurors are accustomed to learning through technology, and technologically enhanced presentations present an ideal platform to summarize and connect the dots between the evidence presented at trial and the applicable law in a way that is especially useful for visual learners.²

In fact, the value of visual communication in the courtroom is not limited to jurors. Judges are also influenced by visual communication, which has led many of the nation's top litigators to incorporate visuals, such as photographs, graphics (such as timelines of events), and visual tutorials on complex subjects, into pleadings and briefs.

Modern technology enables a lawyer to create and display electronic and conventional visuals faster and in ways that were only dreamed about a few years ago. *Visual Litigation: Visual Communication Strategies and Today's Technology* examines the potentials for today's visual advocacy and technology. The book's instructions for operating the software programs, such as PowerPoint, Sanction, and TrialPad, and the necessary hardware are written so that even if you do not have a background in working with technology, you can easily understand them.

2. Honorable Amy J. St. Eve & Gretchen Scavo, *What Jurors Really Think*, 103 Cornell Law Review, 149, 169 (2018).

This book is not confined to just the creation and displaying of electronic visuals; it examines four other essential and related subjects. First, it discusses how in today's digital world, lawyers can use technology, such as Sanction and TrialPad, to bring the full case file (exhibits, witness statements, depositions, visuals, and so on) to court with only a tablet or laptop. Gone are the days when it was necessary to cart loads of three-ringed binders to a mediation or to court. Second, it explores all types of visuals that a lawyer can call upon to prove a case, including: animations; simulations; courtroom demonstrations; video depositions; diagrams; summary charts; and more. Third, the book explains how lawyers use visuals during alternative dispute resolution (settlement negotiation, mediation, and arbitration). Fourth, *Visual Litigation* discusses other types of technology that a lawyer can rely upon to assist in pretrial and trial advocacy.

B. Book Overview

Because effective pretrial and trial advocacy depends upon the use of visuals and accompanying technology, today's litigators must have a working knowledge of them. With this knowledge, a lawyer can create visuals and effectively operate the needed technology and do so at a minimal cost. Even if the lawyer is working a large case with a substantial budget that allows for the employment of a litigation consulting company to create and display the visuals in an alternative dispute resolution (ADR) setting and/or in trial, the lawyer is still ultimately responsible for the what visuals are to be developed and how they are displayed. This means that the lawyer should know the critical information that this book provides.

This book is designed for litigators from beginners to veterans, as well as law students. It is also a resource for technicians who could be either a paralegal, associate, professional technician, or any other person who is responsible for operating the technology or creating the visuals. Unquestionably, every litigator and law student who is inclined to become a litigator should learn about litigation technology and visual communication because they are integral parts of modern litigation practice.

This book can be utilized for professional development continuing legal education (CLE) seminars and law school litigation technology, pretrial advocacy, and trial advocacy courses as well as clinics. With this book, any lawyer, law student, or technician can learn the fundamentals of the technology needed for visual advocacy. Even veteran litigators can revisit this book for new ideas for litigation visuals and technology as they prepare the next case.

The best way to create and display persuasive visuals is to learn from successful trial lawyers and by observing the visuals that have worked well for them. *Visual Litigation: Visual Communication Strategies and Today's Technology* draws on the work of other trial lawyers, providing examples of their visuals and explaining how

they were used in ADR and trial. You will be able to apply their strategies and techniques for preparing and using visuals in your cases. And, you can modify the types of visuals they used so that they apply to your case. Great trial lawyers are those who take from other great trial lawyers.

Some of the examples of trial visuals are from famous trials, such as the Dr. Conrad Murray's Michael Jackson manslaughter trial, the Paul Manafort tax and bank fraud trial, and the Michael Peterson murder trial (featured in the documentary movie *The Staircase*). Other examples of visuals are either from carefully selected civil and criminal cases or are hypothetical illustrations created by the authors. Credits for the visuals shown in the text are listed at the end of the book. Our choices of visuals for this book are motivated by a desire to offer you the best in litigation visuals.

Visual Litigation begins with Chapter 2 that explains what visuals can offer to persuasively communicate your case theory. It provides an orientation to currently available software that can be used to create and display electronic visuals. Also, the chapter describes the hardware that will be needed in a pretrial venue or in the courtroom to retrieve and display visuals.

The next four chapters are devoted to discussions and illustrations of effective electronic and conventional visuals for stages of trial as follows: Chapter 3, "Opening Statement Visuals"; Chapter 4, "Closing Argument Visuals"; Chapter 5, "Direct Examination Visuals"; and Chapter 6, "Cross-Examination Visuals." Chapter 7 explores how visuals can play an important role pretrial, particularly in your pleadings and ADR.

In order to introduce any visual into evidence, the trial lawyer must lay an evidentiary foundation. Chapter 8 both explains how to lay evidentiary predicate and offers case examples of those evidentiary foundations.

Chapter 9 explores software that can be used to create demonstrative and illustrative exhibits. While a litigation consultant can prepare demonstrative and illustrative exhibits, doing so can be expensive, and the case budget may not allow it. When the budget does not permit a vendor to be hired, that does not mean that the party cannot have persuasive litigation visuals. Either counsel or a member of the litigation team can create visuals with ease and without artistic talent. PowerPoint is a dynamic platform that allows attorneys to go beyond bullet-points and template backgrounds to create sophisticated animations and graphics. Programs such as SmartDraw software and others like it are relatively inexpensive. SmartDraw can be used to produce graphics including floor plans, landscapes, crime scene diagrams, as well as timelines. Also, in Chapter 9, we explore software that can be used to record, edit, and create video evidence.

Chapter 10 is devoted to ethical and legal challenges to the use and display of visuals as well as discovery and preservation issues.

Chapter 11 concentrates on how to get the most out of the services that a litigation communication expert can provide to a trial lawyer, such as creating trial visuals and sitting in during trial to operate the courtroom technology that will retrieve and display the visuals.

The next two chapters discuss presentation software programs. In Chapter 12 we discuss today's nonlinear software programs, including Sanction TrialDirector, ExhibitView, and OnCue that can be utilized to create, store, retrieve, and/or display visuals. Also, this chapter explores how these software programs facilitate pre-trial preparation. Chapter 13 explains how to make the most out of linear software programs, such as PowerPoint and Keynote.

Chapter 14 examines how to use a tablet and applications in litigation. For example, TrialPad is an application made for an iPad. Visuals, documents, and other exhibits can be stored in its database. With this relatively inexpensive application on your tablet, an Apple TV, and a wireless courtroom, you can deliver an effective presentation.

Chapter 15 covers what you need to know about hardware and the six prerequisites that must be fulfilled in order to display visuals in a courtroom.

Chapter 16 offers exercises in working with litigation visuals and technology. These exercises provide experiential learning for professional training CLE workshops and law school classes and clinics. The chapter provides summaries of both a civil and a criminal case followed by assignments for assignments that will give the participants experience in creating demonstrative exhibits and in working with litigation visuals, linear and nonlinear software, and technology. The participants can draw on case files for the civil and criminal cases to perform the assignments. The case files contain legal documents, visuals, witness statements, jury instructions, and so on.

A Teacher's Manual is provided to instructors of professional development workshops and law professors. Also, instructors will receive an Actors' Guide that contains instructions for the actors who will play the roles of witnesses for the assignments.

While the book focuses on using visuals as a means of communicating with jurors, obviously visuals come into play during a bench trial. For a bench trial you should gauge how many visuals and the type of visuals you will offer based upon your assessment of how receptive your judge will be to them. For example, you could decide that you do not need to offer a summary chart of the contents of bank records to the judge although the chart would be critical to proving your case in a jury trial.

Finally, throughout the book, we use the Federal Rules of Evidence and the American Bar Association's Model Rules of Professional Conduct because most states have adopted them or adopted versions of them.

C. Visual Litigation Online Supplement

Visual Litigation comes with a robust companion website <http://www.fastcase.com/visuallitigation>. A supplement that is periodically updated is particularly important to the subject of technology because of how rapidly technology changes. The website supplement also contains the case files for both the criminal and civil cases. As previously mentioned, these online case files provide the information needed to perform the assignment exercises. Also, most of the visuals in this book are featured on the website in color.