

ART-ICULATING THE ANALYSIS: SYSTEMIZING THE DECISION TO USE VISUALS AS LEGAL REASONING

Steve Johansen & Ruth Anne Robbins*

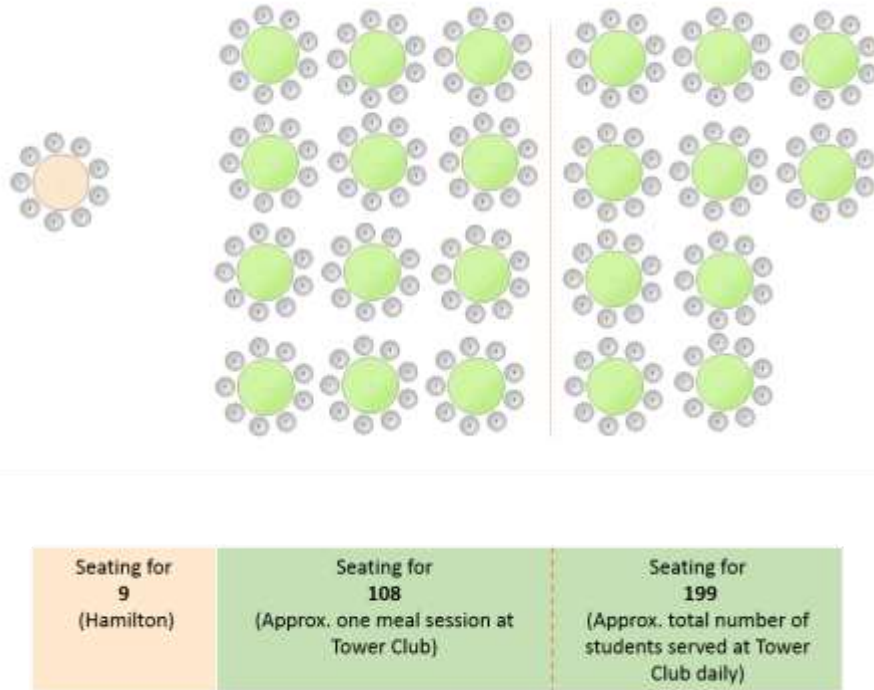
Prologue Sara Cutuli had a brief to file. Her client was a college student. Another student in her client's eating club at Princeton had filed for a restraining order against him. If the court granted the restraining order the consequences were serious. Her client would have this listed on his college records, and could face the possibility that law schools would not accept him or that he might not become a member of the bar. Sara wanted to argue that members of a dining club were not "household members" and hence the relevant statute did not allow for a restraining order in this circumstance. Unfortunately, one of the key on-point cases in New Jersey had held that college students who lived together in a college suite with common shared space were members of the same household.¹ Sara needed to distinguish that case.

As Sara thought about her argument, she focused on a key factual distinction. In the applicable case, nine students presumably dined together in the suite's common space. Her client's eating club at Princeton had 100 to 200 students depending on the time in the

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1. Hamilton v. Ali, 795 A.2d 929 (N.J. Super. Ch. Div. 2001).

academic year. Sara was looking for an effective way to show the impact of this factual distinction. Rather than rely on her written distinction of the authority alone, Sara thought it would be better to make the point visually. After a bit of web searching, she devised this:



* Designed at weddingwire.com

Sara liked the image. She thought it made her point clearly: nine students sitting at a table are a lot more like a “household” than are 200 students in a large dining hall. But she was fairly new to this brief-writing game. Would her audience find the use of an image as part of her argument even appropriate? The image wasn’t in the record; it just captured her thinking about the legal issue. Still, it made the point she wanted to make.

Sara couldn’t find anything in the court or local rules that said she couldn’t include such an image, and so, after considerable thought, she decided to include it in

*the first brief she had ever written . . . for her first-year legal writing class. Sara hoped it would work.*²

It worked.

1.0 Overview: The Power of Visuals in Legal Writing

Recently, an increasing number of students in our legal writing and clinical courses have included insightful and effective visuals in drafts or final versions of their documents.³ These visuals have ranged from reproductions of photographs provided in the record, to visuals available through non-legal research using sources such as Google Earth, to visuals that represent legal analysis. Visuals that explain legal analysis can be particularly persuasive for reasons we explain in this Article. For our students, most of whom are digital natives who have lived their entire lives with computers, relying on technology in general, and imagery in particular, is second nature.⁴ For many lawyers trained in the days of typewriters or early computer processing, however, legal communication is almost exclusively text-based. As legal writing moves towards a more digital medium, it is time for lawyers to incorporate visual persuasion into their documents.⁵

2. This story is adapted from an email sent on May 31, 2014, by Sara Cutuli, a candidate for J.D. 2016, at Rutgers School of Law–Camden.

3. This should not be all that surprising. Many people are visual learners. See M. H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ALWD 27, 34 (2004).

4. By the time our students have reached law school, they have been exposed to billions of visuals in their lives and are accustomed to seeing analysis of data presented visually. Educators at the primary and secondary levels are being encouraged in the Common Core Curriculum to include infographics as a way to make complex topics easier to understand. A series of free websites have been developed for that purpose. See Mark Davis & David Quinn, *Visualizing Text: The New Literacy of Infographics*, READING TODAY, Dec. 2013, at 16.

5. We are not the first or only inside legal practice to make such a call to arms. See, e.g., Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1 (2015). Likewise, a Visual Persuasion Study conducted by the writers of the award-winning Persuasive Litigator Blog concluded that analytical visuals help attorneys persuade, but only when the visuals help complete the cognition rather than when the jurors were asked to look at the visuals as part of an interruption to a narrative flow. Ken Broda-Bahm, *Show, Don't Just Tell: Part 1, Continuity (Persuasion Strategies Visual Persuasion Study)*, http://www.litigationps.com/litigation_postscript_per/2011/07/show-dont-just-tell-continuity.html (July 14, 2011) (study of 1,375 mock jurors).

This Article posits that the lawyers who have started moving in that direction already—seen by this Article’s authors in students—are advancing legal writing in a positive direction, and other lawyers should follow suit by strategically rooting legal arguments in analytical visuals.

Research in neuroscience reveals what we already knew intuitively: visual or graphic representations resonate with readers. The cognitive boost that visuals provide has been noted over thousands of years of observation, and discussed in copious numbers of scientific and social research texts.⁶ Studies have repeatedly found that the general population is approximately 65 percent visual in learning and communicating styles. In contrast, one three-year study reported that 47 percent of attorneys have visual learning and communicating styles.⁷ For good reason, we are drawn to visuals in lawyering when we see them.

1.1 The question of whether we should use visuals in legal writing has been asked and answered

While there is much scholarship devoted to visual persuasion in the courtroom at the trial level and with a jury audience, we expect that some readers might resist the premise of this Article: that visuals similarly belong in persuasive legal writing in which the audience is not a layperson but is a tribunal or another practitioner. Some readers may be skeptical about the reception of visuals by a legal audience—believing that judges and other lawyers aren’t receptive to newfangled or unconventional forms of written communication; judicial displeasure may harm the interests of the client whose lawyer is so reckless as to move away from our text-based traditions of legal communication. To those

6. Simonides (556–448 B.C.E.) supposedly taught people to use imagery as a way to enhance memory. A century later, Aristotle wrote about the role of searching for an image in recollection. ARISTOTLE, *On Memory and Reminiscence*, IN THE BASIC WORKS OF ARISTOTLE 616, ¶ 453-15 (Richard McKeon ed., 1941), available at http://www.sas.upenn.edu/~cavitch/pdf-library/Aristotle_OnMemory.pdf. Visuals aid in our recollection: much of our sensory cortex is devoted to image processing, whereas a much smaller portion of our brain processes words. For an easy summary of the science, see Haig Kouyoumdjian, *Learning Through Visuals*, PSYCHOL. TODAY, July 20, 2012, available at <http://www.psychologytoday.com/blog/get-psyched/201207/learning-through-visuals>.

7. Animators at Law, *Attorney Communication Style Study* (2011) (materials on file with Authors and available for download at http://www.a2lc.com/download-free-court-communication?&_hssc=&_hstc&hsCtaTracking=2794ef02-65d1-43d5-b88a-7ec22407c9a616d41d5f7-306f-4673-a4aa-4e0f92835899) (study included 387 lawyers and 1657 non-lawyers).

distrustful readers, we caution that surveys show that both practitioners and judges are increasingly reading substantive law and documents onscreen.⁸ And, according to the research of Professor Margolis, judges in several of the federal Courts of Appeals also appear to rely on tablets to read briefs.⁹ With the advent of electronic filing, lawyers will need to adapt their documents for an audience reading materials on screens rather than paper.¹⁰ This change will most certainly include incorporating visuals into what have traditionally been text-only documents. Furthermore, judges are increasingly opining that the way lawyers have historically approached document design should not continue. In particular, Judge Posner has also called for more attorneys to use visuals in their briefs.¹¹

It is not only judges who are calling for lawyers to use visuals as a persuasive tool when writing to a legally trained audience. Virtually all scholars who have examined the question conclude that visuals make legal documents more persuasive.¹² Articles about the use of visuals in legal documents have popped up in

8. As of 2014, 49 percent of lawyers report using tablets for lawyering activities such as legal research, reviewing and editing documents, and communications. Tom Mighell, *Mobile Technology*, A.B.A. TECHREPORT (2014), available at <http://www.americanbar.org/publications/techreport/2014/mobile-technology.html>. And somewhere between 65–94 percent of lawyers use mobile technology away from the office, when adding in smartphones and laptops. *Id.*

9. Margolis, *supra* note 5, at 12 n.87.

10. *Id.*

11. Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's View*, 51 DUQ. L. REV. 3, 23 (2013). Judge Posner specifically criticized the intellectual property bar for thinking that “a word is worth a thousand pictures,” particularly when the case turns on visual resemblance. *Id.* Overall, he believes that the hesitancy to use visuals is an example of “the flight from concreteness to abstractness that is such a pronounced feature of the legal professional’s style of thinking and writing.” *Id.* Moreover, one of the Authors of this Article has spoken with the Chief Judge of the Third Circuit Court of Appeals who agrees that attorneys could make use of analytical visuals in briefs. Chief Judge Theodore McKee reports that he has sometimes uses software to create visuals as part of his own note-taking process. Phone conversation of Ruth Anne Robbins with Chief Judge Theodore McKee, Third Circuit Court of Appeals, May 2, 2014 (in follow up to email thread with Professor Ian Gallacher of Syracuse University College of Law about same).

12. See, e.g., Elizabeth Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1694, 1724, 1727 (2014); Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. LEGAL EDUC. 70, 70 (2013).

many places including the *ABA Journal*,¹³ the *Journal of Legal Education*,¹⁴ legal blogs,¹⁵ and the *Columbia Law Review*.¹⁶

Of course, accepting that visuals are effective doesn't make it any easier to figure out how to make them or incorporate them into a text-based document. Historically, new writing technologies have been accompanied by concerns about the loss of writing quality.¹⁷ Coupled with that are the modern anxieties we all have about learning new technology. To those readers who missed the Graphic Design course in law school, we offer comfort. The majority of visuals included in this Article were created by regular folks, using only common and intuitive software. Anyone with a basic understanding of Word or a similar word processing program can incorporate visuals into a document.

Simply put, the question of whether visuals should be used in legal documents has been asked and answered. Since the debate over whether to use visuals in legal documents is over, it is time to turn to the questions of using them most effectively. This Article begins that rhetorical conversation.

1.2 The questions of *what, why, how, and when to use visuals* in legal writing remain open

Before exploring how to incorporate visuals into legal documents, we must first clarify the scope of this Article, which is limited to using visuals in legal documents written for a legal audience to further the legal reasoning itself. We do not examine the science behind visual persuasion. That fascinating discussion continues elsewhere.¹⁸ Nor do we explore the well-developed literature of using visuals in trial practice. Finally, to discuss the legal reasoning purpose of the visuals in this Article, we distinguish

13. Robert Ambrogi, *Vision Quest: Visual Law Services Are Worth a Thousand Words—and Big Money*, 100 A.B.A. J., May 2014, at 34.

14. Rosman, *supra* note 12.

15. One of the best blogs for research about visual persuasion is the Persuasive Litigator Blog, located at <http://www.persuasivelitigator.com/>.

16. Porter, *supra* note 12.

17. Margolis, *supra* note 5, at 2 (citing Lindsey P. Gustafson, *Texting and the Friction of Writing*, 19 LEGAL WRITING 161, 161–62 (2014)).

18. One article that has attempted to capture many of the articles on the topic is Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237, 247–64 (2010).

between visuals that are documentary evidence and those that are analytical. That distinction requires a bit of explanation.

1.2.1 *Distinguishing documentary visuals*

There is a rich and valuable literature about trial attorneys' use of visuals as documentary evidence.¹⁹ Litigators—and judges presiding over trials—are familiar and comfortable with the creation and use of visuals that are introduced as documentary evidence. Beyond photographs, lawyers regularly use charts, maps, graphs, presentations, and videos. Though there are many definitions of documentary evidence, one working definition is that it is evidence, other than testimony, that tends to prove a fact.²⁰ As such, documentary evidence must meet the standards of relevance and reliability as set out in the applicable rules of evidence.²¹

Attorneys are also using documentary evidence outside the courtroom. In practice, we know of attorneys who include documentary evidence—such as, photographs of damaged cars or x-rays of injuries—as part of pre-complaint demand letters.²² Settlement offers sent to opposing attorneys are accompanied by professionally created “A Day in the Life” videos capturing the injured plaintiff's daily challenges.²³ Inserting photographs of damage to property or persons make a powerful point: the damages that resulted from the accident are real. And while these sorts of demand letters don't expressly say so, they imply to the recipient that the fact finder will see these visuals and empathize with the plaintiff. The visuals are evidence—and more powerful evidence

19. See, e.g., WILLIAM S. BAILEY & ROBERT W. BAILEY, *SHOW THE STORY: THE POWER OF VISUAL ADVOCACY* (2011); Jessica Silbey, *Images in/of Law*, 57 N.Y.L. SCH. L. REV. 171 (2012–2013); Shelley Watts, *Technology Creates Winning Visual Evidence*, 36 TRIAL 68 (2000); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and The Power of Analogy*, 10 YALE J.L. & HUMAN. 1 (1998).

20. Some experts distinguish demonstrative evidence from real evidence. For example, a murder weapon is real evidence, while a diagram of how a bullet penetrated the victim's body is demonstrative because it merely represents the bullet path as opposed to introducing the actual body itself. MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 401-2, 534–35 (7th ed. 2012). In any event, for our purposes, the key characteristic of documentary evidence is that it is evidence—its purpose is to prove a *fact* in a legal dispute.

21. See e.g., FED. R. EVID. 401.

22. Settlement letter from Richard Vangelisti, Partner, Vangelisti Law Firm, LLC, to opposing counsel (Feb. 22, 2012) (copy on file with Authors).

23. Interview with Melissa Powers, videographer, In-House Productions, Portland Or. (June 14, 2013).

than a textual description alone. The visuals, quite literally, show rather than tell the reader the facts of the case.

Documentary evidence is sometimes included in briefs, pleadings, and judicial opinions. Federal appellate briefs, for example, may include “photographs, illustrations, and tables” to be reproduced by any method resulting in a “good copy of the original.”²⁴

State appellate and trial level court rules may vary in wording, but we know of no court rule that actively disallows visuals in briefs or motions. Rather, timelines and maps regularly appear as exhibits to filed documents.

1.2.2 *Zeroing in on analytical visuals*

But this Article asks readers to turn to a different form of visual persuasion in written advocacy: an *analytical visual*. Analytical visuals do not attempt to prove what happened in a legal dispute. Rather, they help to explain how that dispute should be resolved by creating a visual understanding of abstract legal analysis, including the following:

- the meaning of statutes, cases, and other authority;
- the application of that authority to the facts; and
- the policy implications of resolving the legal dispute.

As every lawyer knows, legal analysis is hard work. It requires applying abstract legal principles to concrete facts. It requires problem-solving by identifying patterns, making appropriate inferences, and drawing conclusions.²⁵ Analytical visuals make this work easier. They show the patterns, illustrate the inferences, and clarify concepts in ways the reader might not otherwise see. An analytical visual, then, walks the reader through some aspect of legal reasoning with the use of a chart, graph, photograph, or other visual element.

Including visuals at key junctures in legal documents enhances the efficacy of the reasoning itself.²⁶ That idea is not new;

24. FED. R. APP. PROC. 32(a)(1)(C).

25. See generally A COMMITTEE OF COLLEGE AND UNIVERSITY EXAMINERS, TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS: HANDBOOK I, COGNITIVE DOMAIN (Benjamin S. Bloom ed., 1956).

26. See Silbey, *supra* note 19, at 182–83 (calling for new scholarship along other lines).

at least one attorney in the early part of this century modeled a magazine-styled brief,²⁷ the idea of which is now starting to be revisited by some attorneys.²⁸ Thanks, in part, to the 2011 Motion for Summary Judgment filed on behalf of Dallas Mavericks' majority owner Mark Cuban, which relied completely on a photograph for its legal argument,²⁹ and in part on the 2012 "comic book brief,"³⁰ as well as the proliferation of visual media experts advising litigators, lawyers are taking a new look at the visual impact of legal documents filed with the courts or sent to other attorneys.

Across the existing legal scholarship, however, very little conversation has focused solely on when to use visuals to further legal analysis or legal reasoning. Nor is there a taxonomy for the different uses of these visuals. Section 2 of this Article provides that taxonomy and identifies *what* kind of analytical visuals exist. Section 3 examines *why* lawyers should use an analytical visual by considering the persuasive purpose of visuals in legal analysis. Section 4 provides a case study demonstrating *how* analytical visuals were used to develop the lawyers' own understanding of their best legal arguments and the theory of the case in an amicus brief. This leads to Section 5, which provides a systematic method to determine *when* an analytical visual used to develop

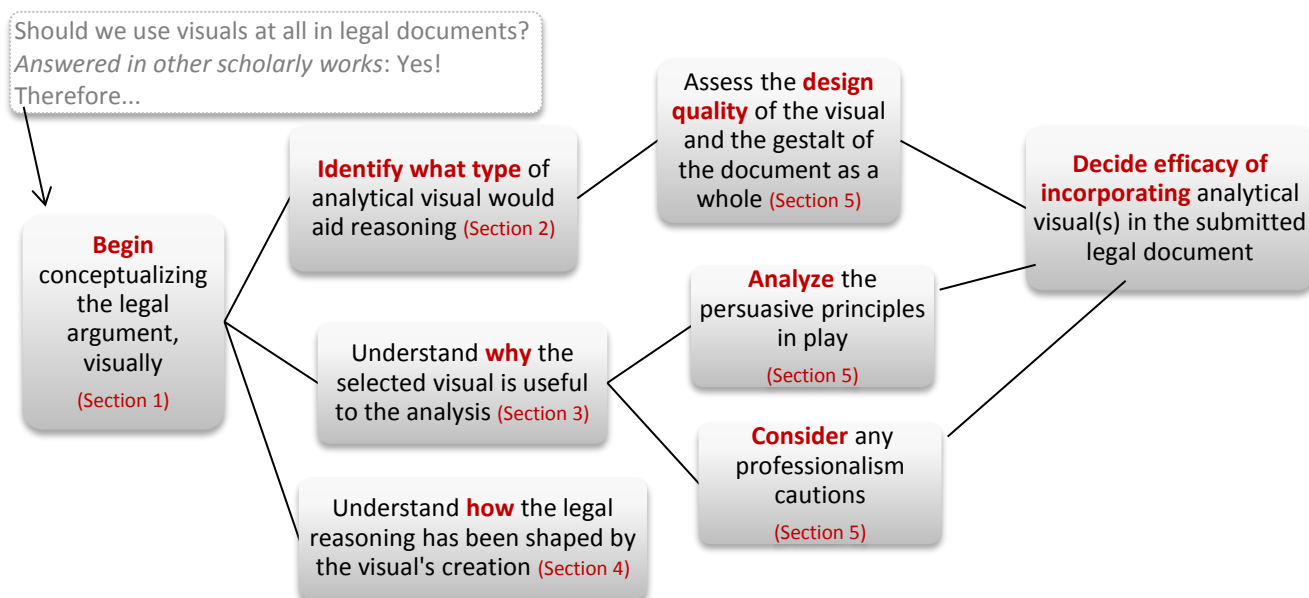
27. The attorney is Peter B. Bensinger, Jr., a partner at Bartlit, Beck, Herman, Palenschar & Scott, LLP. His advice can be found at *Magazine Briefs* (2000), available at http://www.bartlit-beck.com/media/news/10_article_92800.pdf.

28. *E.g.* Rosman, *supra* note 12 (providing examples of visuals that show facts, fact interpretation, and statutory analysis). Mr. Rosman is also a practitioner, the General Counsel of Willis Group Holdings, PLC. *Id.* at 70.

29. World Champion Dallas Mavericks & Radical Mavericks Management's Motion for Summary Judgment, Hillwood Inv. Props. III, Ltd. v. Radical Mavericks Mgmt., LLC, No. 10-05639, 2011 WL 2649590 (Tex. Dist. Ct. June 22, 2011).

30. Brief of Bob Kohn, Amicus Curiae, United States v. Apple, Inc., 889 F. Supp. 2d 623 (S.D.N.Y. 2012), http://media.wix.com/ugd/c526cc_439cb9e2d97049c38c04d5b9b43bf361.pdf (No. 12-cv-2826 (DLC)). The Justice Department was dismissive of the brief in its arguments. Response by Plaintiff, United States to Public Comments on the Proposed Final Judgment as to the Penguin Defendants, § IV(A) (S.D.N.Y. 2013) (No. 12-CV-2826). According to his blog site, Mr. Kohn describes himself as a technology lawyer, entrepreneur, and investor. Bob Kohn, *Tech Attorney—Start-up Entrepreneur—Investor*, <http://www.bobkohn.com/#!about/mainPage> (last visited June 15, 2015). He is the founder of Emusic.com, a music download company started several years prior to iTunes. *Id.* While the comic book brief has earned a role in opening up the discussion of "whether," as a visual itself, these Authors believe it unpersuasive, first because it was disrespectful in its gestalt with respect to the purpose of the judge's page-limit imposition and second, because the information it contained was largely forgettable. Each panel was so similar that no one image was memorable enough to anchor the lawyer's intended argument.

the lawyer's own understanding might be a candidate for inclusion in a legal document itself. Finally, Section 6 provides an example of a traditional legal document redesigned to incorporate the power of analytical visuals to make a more persuasive document.



2.0 **What:** A Taxonomy for Categories of Analytical Visuals

A first step to understanding analytical visuals is to identify the kinds of visuals that exist. The term “visual” encompasses graphs, charts, diagrams, maps, pictures, photographs, as well as syntheses of multiple visuals.³¹ However, rather than sort these visuals by their design, we categorize them by their function. These functions boil down to three main categories of visuals: organizational, interpretive, and representative.

31. LINDA LOHR, *CREATING GRAPHICS FOR LEARNING AND PERFORMANCE: LESSONS IN VISUAL LITERACY* 13, 16–22 (2d ed. 2007). In those pages, Loehr offers five categories of visual images: organizational, interpretive, representative, transformational, and decorative. For reasons we explain below, we believe that as Loehr presents them, transformational and decorative visuals are not types unto themselves, but rather demonstrate the relative usefulness of the other three types.

- **Organizational visuals** present information in a hierarchical way. This bulleted list is an organizational visual. Other examples are common: visually stylized outlines or charts that show levels of relationships. In the legal context, a brief's Table of Contents is an organizational visual.
- **Interpretive visuals** help learners better understand difficult or ambiguous concepts. The flow chart at the end of the previous section is an example, showing the progression of this Article. Other interpretive visuals include infographics that show a progression of facts, graphs showing a relationship between two different factors, pie charts, matrices, and Venn diagrams. By design, interpretive visuals often require some time for the reader to process—the learners are deliberately challenged—so that the learner is able to process the information into long-term memory. But, the import of some interpretive visuals may be instantly discerned. For example, a five-day weather forecast is an interpretive visual that viewers quickly understand.
- **Representative visuals** typically convey the same information that text might, but uses a pictorial or photographic image to anchor the information through what educational psychologists call dual-coding of text and images.³² Photographs incorporated into briefs are often representative. Judge Posner has received some press for his use of representative visuals.³³

As is often the case in legal discourse, these categories are not absolutes. We can certainly design visuals that are both interpretive and representative. However, the categories are useful for

32. A. PAIVIO, *IMAGERY AND VERBAL PROCESSES* (1971).

33. See, e.g., Jonathan Turley, *Judge Posner Spices up Opinions with Web Photos*, RES IPSA LOQUITUR, Jan. 28, 2012, <http://jonathanturley.org/2012/01/28/judge-posner-spices-up-opinions-with-web-photos/>; Debra Cassens Weiss, *Posner Opinion Includes Ostrich Photo to Portray Lawyers Who Ignore Precedent*, A.B.A. J., Nov. 28, 2011, http://www.abajournal.com/news/article/posner_opinion_includes_ostrich_photo_to_portray_lawyers_who_ignore_precede/.

giving us a framework to think about what kind of information we want to convey in the visuals we choose.

3.0 Why: The Purpose of Analytical Visuals Is to Persuade

Like everything else in a persuasive legal document, visuals should help persuade the reader. Persuasion involves the intertwining of the message's substantive content, the *logos*; the mood or tone of the message, the *pathos*; and the credibility of the messenger as well as the message, the *ethos*.³⁴ In legal documents, to enhance the argument's *logos*, *pathos*, and *ethos*, some common persuasion strategies include priming,³⁵ using or countering stock structures,³⁶ incorporating metaphor,³⁷ and creating memorable mental images, which we will call "visual impact moments," that is the take-away moment from a narrative.³⁸

The most effective type of visual in a particular context will depend on the analytical task at hand. A representative image that illustrates the textual content could be useful in priming a reader for the analysis it represents. On the other hand, an interpretive image, perhaps a chart or a heat graph, would be more effective for showing the relationship between components of a factor test, or the logical sequence of a deductive reasoning analysis. Whatever the analytical task, it is important to assess the effectiveness of a visual in light of its ability to persuade.

34. Aristotle, RHETORIC (W. Rhys Roberts trans., 2004).

35. Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213 (2010); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader* 89 OR. L. REV. 305 (2010).

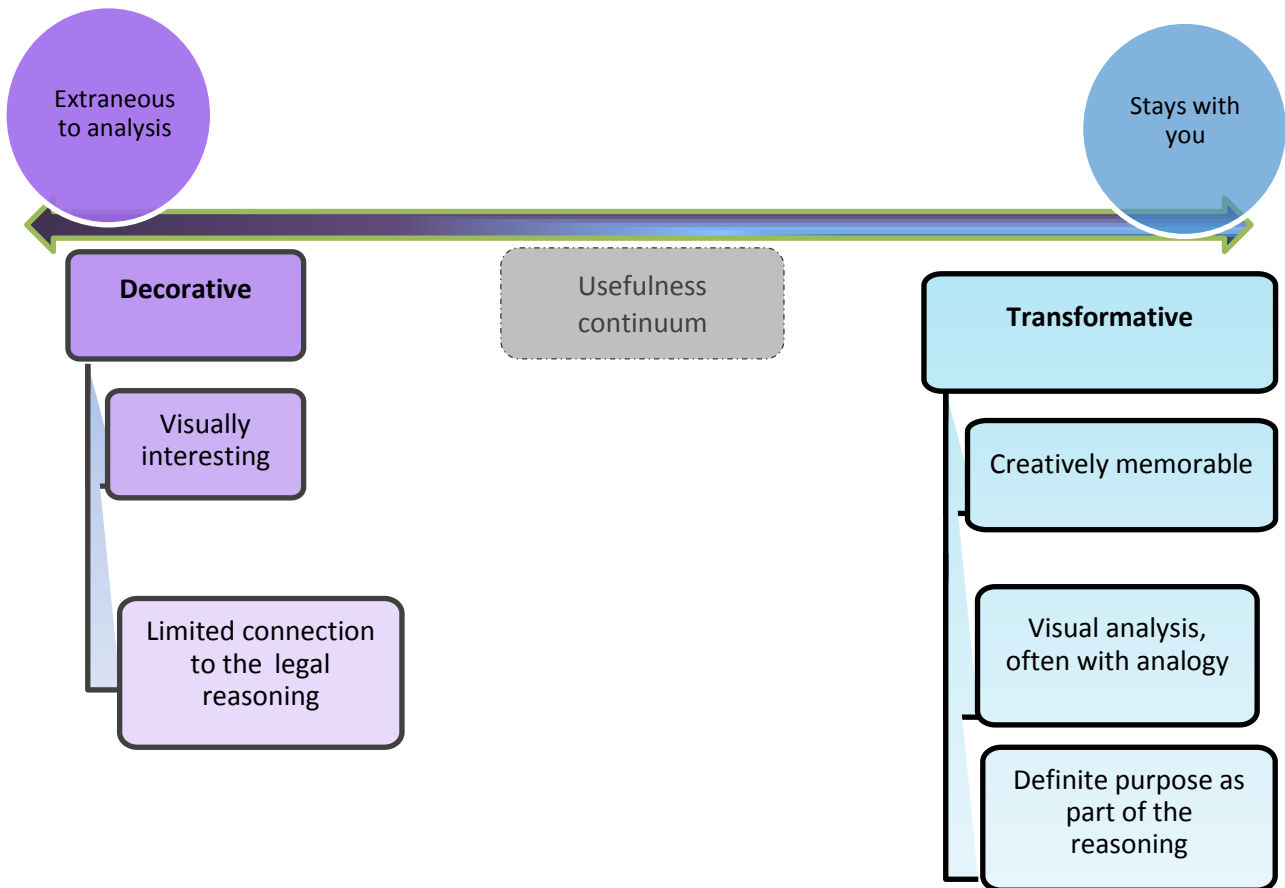
36. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 264–66 (2009); Gerald Parry Lopez, *Lay Lawyering*, 32 U.C.L.A. L. REV. 1, 5–9 (1984); Stephen Paskey, *The Law Is Made of Stories*, 11 LEGAL COMM. & RHETORIC: JALWD 51 (2014).

37. Berger, *supra* note 36, at 262–70; Linda L. Berger, *The Lady or Tiger? Field Guide to Metaphor*, 50 WASHBURN L.J. 275 (2011).

38. For more on the importance and use of finding and using visuals, see Jason Parry Eyster, *The Lawyer as Artist*, 14 LEGAL WRITING 87 (2008). Eyster notes that it may be significant for lawyers that static images are rated as significantly more vivid than active images. *Id.* at 91 n.12 (citing IMAGERY, LANGUAGE, AND VISUO-SPATIAL THINKING 10 (Michel Denis et al. eds., 2001)). For usage in legal writing, see RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, *YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING* 242–45 (2013).

Some visuals may be shocking, funny, or downright bizarre. But if they don't further the legal analysis, they are usually of little use.

Persuasive visuals lie on a continuum of usefulness to the audience's understanding of the author's legal reasoning. At one end of the continuum are those that are merely **decorative**—perhaps interesting, but little help in understanding the legal argument. At the other end are those that are **transformative**. A transformative image fully changes the way the reader perceives an issue. A transformative visual is generally the most useful to the legal writer in helping the audience understand the legal reasoning and argumentation.



Any of the three types of visuals, whether organizational, interpretive, or representative, will fall somewhere on this usefulness continuum. Where they fall depends on the circumstances

and persuasive intent. A representative visual that connects the reader to the narrative thread—the theory of the case—could also be transformative if it enables a reader to understand the narrative in a deeper way than the text alone. A visual of the same type that doesn't help advance the theory of the case but adds only visually interesting material—or that is confusing in its design—will fall further towards the purely decorative end of the continuum.

3.1 Decorative visuals may enhance the document's tone

Decorative visuals serve to make a document more appealing but do not significantly advance the narrative, and therefore don't assist readers in their understanding. Instead, decorative visuals foster merely what Professor Michael R. Smith calls a secondary form of pathos: “medium mood control.”³⁹ While decorative visuals may persuade through this type of pathos, they are less useful compared to visuals that are further to the right on the usefulness continuum.

Decorative visuals may still have a role in a legal document, however. For example, a decorative visual may grab a reader's attention. Of course, when we write to a court, it is fair to expect we have earned our readers' attention without resorting to inserting decorative visuals that do little more than amuse or surprise. Using the unexpected and clever visual can be a valuable persuasive technique. But it is a technique that better serves the writer when the visual also lends itself to conveying the substance of the legal argument.⁴⁰ Still, a well-placed, if essentially decorative, visual may help set an appropriate tone for a legal document, or prime a reader for the analysis that follows. Thus, while a decorative visual may have its place in a legal document, lawyers must be mindful that including a photograph just for the sake of novelty is unlikely to advance the persuasive efforts. Instead, most visuals in legal documents should lie near the other end of the spectrum—those that transform our readers' understanding.

39. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 14 (3d ed. 2013).

40. *Id.* at 233 (describing the usefulness of unexpected metaphors).

3.2 Transformative visuals change the way we think

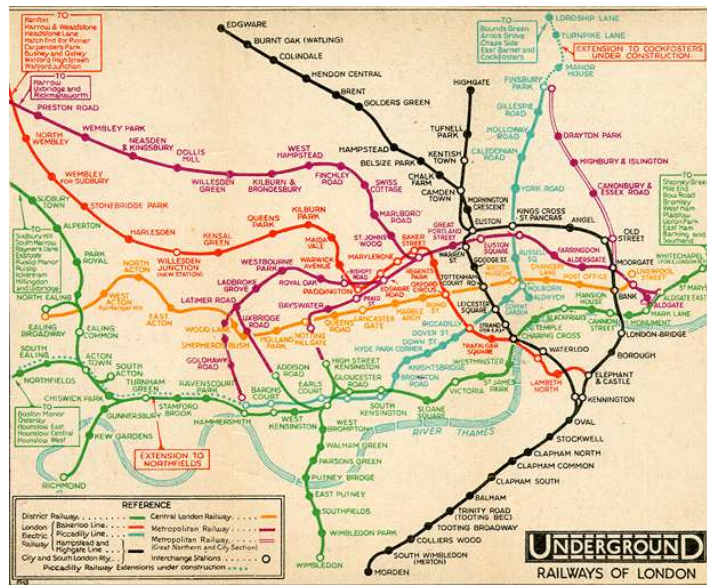
In comparison, truly transformative visuals do more than reinforce our written words; they open our readers to a new perspective, literally allowing them to look at an issue differently than they had before.⁴¹ Of course, such powerful visuals are relatively rare. Most visuals are useful in reinforcing textual analysis, though they may fall short of literally transforming a reader's perspective. To illustrate the power of a transformative visual, we draw upon an example taken not from the law, but from cartography.

In the early Twentieth Century, London was rapidly expanding its subway system.⁴² This made it much easier to get around the city if you were familiar with the ever-expanding system of subway lines and stops. Unfortunately, the growth of the subway made mapping the subway system increasingly complex. In the city's core, there were many stops and they were very close together. As the rail lines moved out to the suburbs, the stations were farther apart. As a result, a map with a scale small enough to show each of the inner-city stops could not easily also show the stations in the suburbs. On the other hand, maps that could show all the outlying stations also had to bunch the inner-city stops so tightly as to become indecipherable.⁴³ A typical subway map of the times looked like this:

41. Some transformational visuals are so elegant as to be worthy of publication. Most famous are those published by Edward R. Tufte. See, e.g., EDWARD R. TUFTE, *THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION* (2d ed. 2001); EDWARD R. TUFTE, *VISUAL EXPLANATIONS: IMAGES AND QUANTITIES, EVIDENCE AND NARRATIVE* (1997). More recently, see also, *The Best American Infographics 2014* (Gareth Cook ed., 2014), and *The Best American Infographics 2013* (Gareth Cook ed., 2013).

42. This story is taken from Ken Garland, *Mr. Beck's Underground Map: A History* (1994).

43. *Id.* at 11.



The map was to scale, accurately showed the path of each line, and became a bit of a maze in the center of town. The outermost stations were merely listed, apparently lying somewhere beyond the known limits of the city.

In 1933, an employee of the London Transportation Department, Harry Beck, changed the way Londoners thought about the subway system when he created the first modern map of the London Underground:



Beck's map made several changes to the traditional concept of maps. First, Beck changed the shape of the subway lines. Earlier maps accurately revealed the bends and turns of each line. On Beck's map, all lines are either vertical, horizontal, or at a 45-degree angle. This change is also reflected in the rather unnatural shape of the Thames River near the bottom of the map.

Second, the map is not to scale. As Beck explained, he used a "convex design" that enlarged the center of the map and condensed the outer features. In addition to making the city center stops easier to see,⁴⁴ this approach also brought the suburbs "closer" to the city—a design choice that some credit with leading to the expansion of London's suburbs as city dwellers now perceived the commute to the suburbs to be less onerous than previously thought.⁴⁵

Beck's design transformed the way Londoners understood subway maps. No longer were the subway lines merely overlaid on a traditional map. Rather, the new design made it easier to see the connections between stations. And those connections made it easier for travelers to plan trips around the city. This came at a cost—the loss of an accurate sense of the distances between stops and a correct sense of the shape of each subway line. However, as those costs had little impact on the effectiveness of the new map, Beck's design became a lasting success.

Few of us will create visuals that will be as transformative as Beck's London Underground map. However, lawyers incorporating visuals into legal documents should remember that legal advocates must be problem solvers. Thinking about how images may transform readers' perception of a legal problem—allowing them to see the problems and potential solutions more clearly—will be more effective in advancing the client's cause.

4.0 Case Study of **How**: Amicus Brief in Support of Certification to State Supreme Court

Legal analysis can be conceptualized visually in any number of ways and this Article merely scratches the surface. But it makes little sense to move forward without showing examples of visualized legal analysis. To do this, we selected two different

44. *Id.* at 17

45. *Id.* at 7.

legal documents: an amicus brief filed in a civil rights case by a public interest organization, and a motion for summary judgment filed in a corporate management dispute. Both are taken from actual cases, although in the second scenario, all but one of the visuals were conceptualized and created after the fact. The first case study examines how the writers used visuals to initially develop their own understanding of the legal issues in the case, and then the process they used to determine which of those visuals to include in the final brief to the court. The second case study examines a brief from the opposite direction—the writers took a completed legal document and added visuals to enhance its persuasive punch.

But most of this 4.0 section concerns the amicus brief surrounding the civil right to counsel in domestic violence restraining order cases. In the spring of 2013, three Rutgers School of Law–Camden 3L law students in the Domestic Violence Clinic began work on an amicus brief in support of a petition to the New Jersey Supreme Court. The petition asked the court to accept review of the issue of whether an indigent party to a civil domestic violence restraining order has a right to court-appointed counsel.

The petitioning party in the case was both a plaintiff, seeking a restraining order, as well as a defendant in a cross-complaint filed by her estranged husband who was also seeking a restraining order. Restraining order hearings are held in family court and are civil actions, although a plaintiff must prove an act of violence as defined by the criminal code.

At the hearing in the family court, the woman had asked the family court judge to stop the proceedings and appoint her an attorney. The family court judge declined, saying there was no right to court-appointed counsel in these types of cases. At the end of the hearing, the family court judge granted the estranged husband's petition, and issued a restraining order against the woman. At the same time, the judge denied the woman's petition for a restraining order against her estranged husband. The mid-level appeals court affirmed the trial court's reasoning that there is no right to counsel in these civil matters.

The clinic students and professors settled on two different arguments, both of which involved visual conceptualizing. The first argument centered on the idea of a unique legal theory in New Jersey, a "consequences of magnitude." In New Jersey an

indigent party has a right to court-appointed counsel when facing “consequences of magnitude,” including things such as custody rights, but also including things such as the suspension of a driver’s license or a fine of \$750.⁴⁶ The second argument was that the complexity of the process required the assistance of legal counsel for both parties.

Much of the amicus brief focused on the relatively high stakes that both plaintiffs and defendants face in these matters—that is, the “consequences of magnitude” at issue. Defendants lose rights to enter their homes, to see their children absent further court order, and to own or carry weapons. The defendant is adjudicated a batterer, a stigmatizing term that carries social as well as legal implications. Plaintiffs have some risk when they file for a restraining order. If they succeed, they secure some safety protections, with the promise of assistance of heightened police intervention if the defendant violates the order. At the same time, a plaintiff bears financial support risks if the defendant does not pay court-ordered support or child-care expenses. If, on the other hand, the court denies the restraining order, the plaintiff is at a vulnerable point vis-à-vis the defendant. In either scenario, the plaintiff may face some criticism from family or community members for bringing the case at all.

Second, domestic violence restraining order hearings operate as summary trials, designed to maximize speed of processing. These hearings are conducted as trials and take within seven to ten days of the date of filing of a complaint. Despite the abbreviated timeline the parties are expected to bring any physical or documentary evidence they may have, call witnesses, cross-examine, object, and argue their cases. In other words, the parties must gather admissible evidence, and to authenticate the evidence, as necessary). The legal tests are not as straightforward as the statute might lead a pro se litigant to assume but involve an analysis of whether there is a history of violence related to the predicate act that brought the parties to court, and whether the

46. “[W]henever the particular nature of the charge [or proceeding]” threatens a “consequence of magnitude,” the indigent litigant “*should* have counsel assigned,” unless the litigant makes the informed decision to proceed pro se. *Rodriguez v. Rosenblatt*, 277 A.2d 216, 223 (N.J. 1971) (emphasis added); *Pasqua v. Council*, 892 A.2d 663, 675 (N.J. 2006); N.J. R. Ct. 7:3-2(b) (“If the court is satisfied that the defendant is indigent and that the defendant faces a consequence of magnitude . . . , the court shall assign the municipal public defender to represent the defendant.”).

judge infers a need for a restraining order based on the circumstances.

To get a better handle on how to present these complicated arguments to the New Jersey Supreme Court, the students turned to visuals that captured the essence of what they wanted to say.

4.1.1 Background or “shadow document” visuals as a thinking and planning step

In the beginning of our legal research and analysis processes, many of us typically use “shadow” documents to help plan and shape our thinking. Shadow documents support and surround the working draft of the “real” document. A synthesis or case chart is an easy and common example—and it is also a visual. It exists as a method towards developing the organization and analysis, but does not appear in the actual legal document itself. Because the shadow document is for the lawyer, and not intended for the court, the shadow document has no boundaries on its creative expression. Lawyers (or in our case, law students) are free to create shadow visuals that are not restrained by the rules of evidence, legal authority, or even good taste.⁴⁷

Just as writing is an act of thinking,⁴⁸ so too is constructing an analytical visual. To begin constructing an analytical visual requires thinking visually during all stages of the analysis and writing process. The aforementioned case synthesis chart is an **organizational visual** that helps the lawyer work towards persuasive legal reasoning. Other organizational examples of shadow documents include lists, flow charts, Venn diagrams, and heat graphs. Lawyers’ notepads are dotted with these things. Large sections of our brain are devoted to processing visual information. Predictably, we often organize our research and drafts of arguments visually.⁴⁹

47. Credit for the idea and initial teaching of the “shadow story” belongs to Victoria L. Chase, Clinical Associate Professor of Law, Rutgers School of Law–Camden. Professor Chase did a presentation at the Second Applied Legal Storytelling Conference, in Portland, Oregon, in July 2009, entitled, “Using Corroborating Narratives in Cross-Examination—An Effective Alternative to Traditional Cross Examination Strategies & Telling the Client’s Story Effectively” (podcast available at <http://lawlib.lclark.edu/podcast/?p=2067>).

48. JOHN C. BEAN, ENGAGING IDEAS ch. 1 (2d. ed. 2011).

49. This assertion is easy to find. We found it here, in statements written by Pulitzer Prize winning infographics creator, Gareth Cook. THE BEST AMERICAN INFOGRAPHICS

Knowing this, lawyers can and should spend some time thinking visually. Within the first stages of planning the substance of the arguments themselves, lawyers also think visually in connecting the ideas of legal reasoning to the client's situation. Some of these types of shadow visuals are sketched for the purposes of organizing the flow of the arguments, developing a theory of the case, or working through a counter-argument. Visuals can help with this thinking process because persuasion, like visuals, is a whole-brain activity.⁵⁰ We are thinking both visually and strategically when we walk through the facts of our client's case from the client's point of view. And when we look for details to show rather than tell facts from precedential cases as part of illustrating rules before comparing those details to our client's, we are actually thinking visually.

In the case of the amicus brief, three visual shadow documents helped lead to the construction of the persuasive arguments themselves. Without the clinic students developing or seeing the visuals first, the theory of the case could not have taken shape.⁵¹ As shown below, these shadow visuals included a Cartesian graph in the form of a heat map that interpreted existing law, a photograph that recreated a potential courtroom scene, and a chart that visually explained the "consequences of magnitude" argument.

4.1.2 Heat maps as interpretive analysis of two interrelated factors or elements to show the complexity of a pro se party conducting a trial

A heat map—the real name of these are choropleth maps of which heat maps are one type—displays data values with visual variables displayed as different shades of color. Readers will already be familiar with many different types of these visuals, even if the sub-nomenclatures remain mysterious. Rather than fright-

2014, *supra* note 41, at ix.

50. The phrase was first coined by William Hermann, and refers to a brain dominance model of analytical, sequential, interpersonal or narrative, and imaginative thinking.

51. A theory of the case, as we define it, is the law-based reason why a particular result is possible or required. A theory of the case runs in parallel with a theme, which is designed to evoke an emotion and to motivate the reader. ROBBINS ET AL., *supra* note 38, at 122. Themes are based on what George Lakoff described as "deep frames" or foundational ideas and values that structure our world. GEORGE LAKOFF, WHOSE FREEDOM? THE BATTLE OVER AMERICA'S MOST IMPORTANT IDEA 12 (2006).

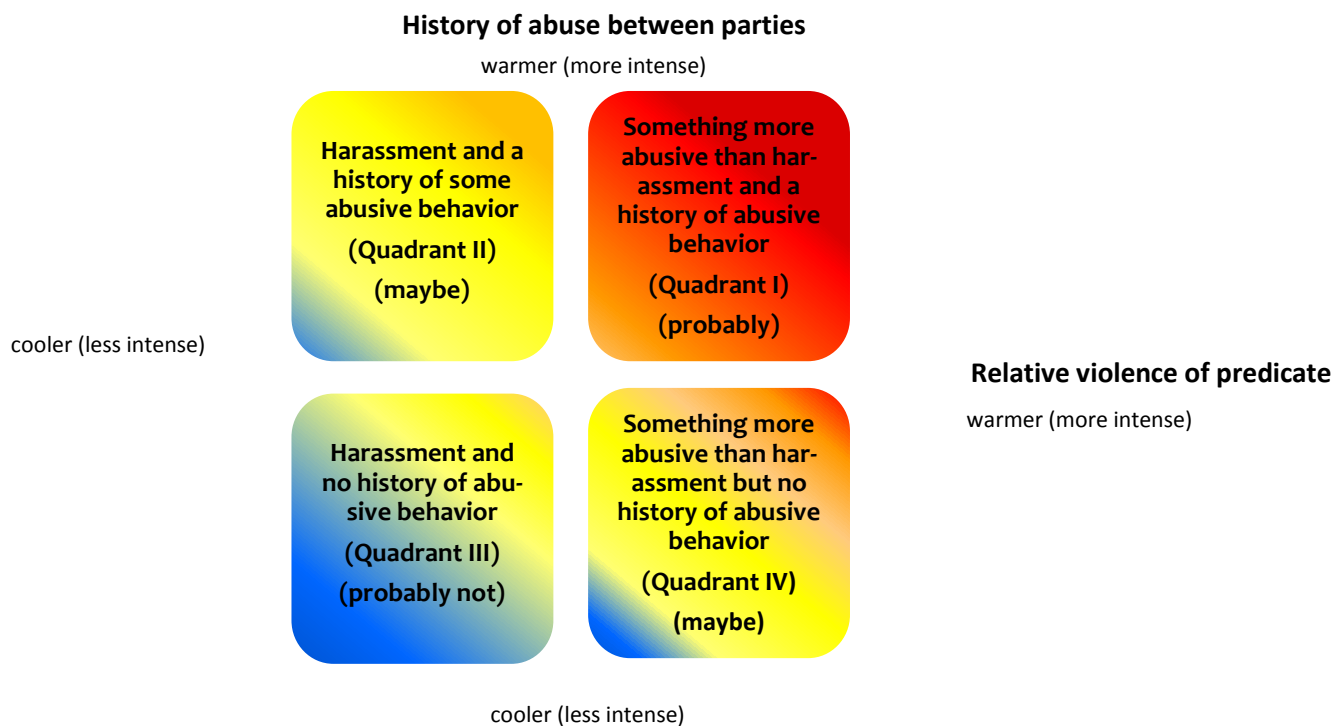
en readers off the rest of this Article, we have chosen to use the most generic term, “heat map” even when we mean the larger category of choropleth map. Heat maps have been used as early as the 1820’s, the recorded date when French mathematician, engineer and politician Charles Dupin created one to show the illiteracy distribution rates across counties in France.⁵² The simplest form of heat maps are the immediately recognizable election-night maps in the United States that show results by color: the red of the Republican Party and blue of the Democratic Party.⁵³ A slightly more complex heat map is something like a body-heat map that correlates numbers and colors in gradients or in tones that move from cool tones to warm tones. A low number corresponds to a cool color (blue or green) and a high number corresponds to a warmer color (typically red as the highest and yellow as mid-level). Recall from section 2 that interpretive visuals provide analysis inside the visual itself and show relationships and relativity when the concepts are difficult or multi-dimensional. A heat map is an interpretive visual for showing the relationship between two seemingly independent ideas by using the cool/warm/hot color scheme to demonstrate interrelationships between two elements or factors in legal analysis. That is, the heat map can be used to demonstrate an interpretation or synthesis not otherwise obvious from the stated rule.

For the amicus brief, the clinic students had to understand the interrelationship between two seemingly separate elements of the law: a predicate act of violence between the parties, and the history of violence between the parties. The New Jersey Prevention of Domestic Violence Act treats these two concepts as distinct elements. In practice, however, the two legal tests operate together, with the intensity of each affecting the outcome. The take-home lesson is captured in the **interpretive visual** of a heat map.

This is the heat map showing the interrelationship between an act of domestic violence and the history of violence in the relationship.

52. *E.g.*, Katy French, *Data Visualization 101: Heat Maps*, VISAGE, <http://visage.co/data-visualization-101-heat-maps/> (Mar. 10, 2015) (the company’s “Data Visualization 101” series covers several different chart types to help the readers understand the different options available).

53. *Id.*



In practice, courts use something like what this graph demonstrates almost as a formula: the need for the evidence of an abusive history increases if the plaintiff pleads a less egregious type of violence, such as harassment.⁵⁴ On the other hand, a more violent predicate act will require less of a history of abuse for the restraining order to be granted. Analyzing the likelihood that a court will rule in favor of the plaintiff is easier to determine when the interrelated factors are seen as a graph. Cases that are in Quadrant I have a higher chance of success than cases that are in the other three quadrants. Cases that are in Quadrants II or IV are the hardest to predict and the most nuanced in terms of trial preparation.

Recalling the difficulty of this lesson for legally-trained persons not personally involved in the proceedings allowed the clinic

54. *Cesare v. Cesare*, 713 A.2d 390, 394 (N.J. 1998) (ruling that while one egregious act of violence with no history may constitute domestic violence, an ambiguous incident may also qualify as domestic violence if there is a finding of violence in the parties' past).

students to spot and develop the arguments about the need for counsel in these restraining order trials. Recall that these parties in these cases have only seven to ten days to prepare for a hearing. The heat map illustrates the argument about the difficult legal tests a pro se party must navigate. It shows just how challenging it might be for a lay person, without assistance of counsel, to figure out even the most basic aspects of a restraining order case.

4.1.3 Using a re-enactment image to visualize the challenge of an unrepresented plaintiff

One of the three clinic students writing the amicus brief organized colleagues to pose for this shadow document photograph to better understand the plaintiff's need for a civil right to counsel for plaintiffs in a restraining order proceeding. While the students could see the importance of counsel for the defendant, it was harder to see the argument for the plaintiff. This re-enactment helped clarify that need.

The photograph re-enacts a visual impact moment for a family court judge in New Jersey, which led that judge to author one of the only three opinions in the country at that time that discussed a civil right to counsel in domestic violence cases. In the recreated photo, the young woman plaintiff appears in court, alone and unrepresented, with only her smart phone, needing to prove that her former boyfriend had smashed her car windshield while she sat in the driver's seat. The young male defendant is represented by counsel. In the actual case that led to this re-enactment photo, the trial judge stopped the proceedings to allow the plaintiff to find pro bono counsel, and then published an opinion on the issue.⁵⁵

55. *J.L. v. G.D.*, 29 A.3d 752 (N.J. Sup. Ct. Ch. Div. 2010) (holding that young plaintiff should have a right to civil counsel in a domestic violence restraining order hearing, to avoid an imbalance of power arising when a plaintiff appeared in court alone while the defendant was represented by experienced counsel).



Because the law clinic is funded by grants from victims' support programs, the clinic brief addressed the right to counsel of both parties and not just the facially easier argument of the right to court-appointed counsel for indigent defendants. Two of the three students initially struggled with the idea of a plaintiff facing the same "consequences of magnitude" in a hearing as a defendant who stood to face over twenty separate consequences. The third student better understood the argument, and he mocked up this picture, which the students enlarged and kept in one of the professors' offices to remind them what to argue, and why they were making that argument.

The picture worked as a shadow document because it set a scene that reminded the brief writers of what the world looks like when plaintiffs are unrepresented in these hearings. As Jack Hart notes, understanding the scene is critical to seeing the whole story: "Scene-setting takes its power from its ability to put us into the story, to let us ride the narrative arc ourselves. We filter the details the writer provides through our own experiences, which is why great storytelling can coax such strong emotions out of us."⁵⁶

The recreated photograph worked as a shadow visual. But did the clinic include it in the amicus brief itself? No.

There were many things to consider about including that image in the amicus brief. It visually captured the *pathos* of the argument. The visual shows the policy argument underscoring the power dynamic of domestic violence itself, portraying a young plaintiff alone in a courtroom while the defendant is surrounded

56. Jack Hart, STORY CRAFT: THE COMPLETE GUIDE TO WRITING NARRATIVE NONFICTION 91 (2012); see also Keith Oatley, *Entering Another's Experience*, <http://www.psychologytoday.com/blog/the-psychology-fiction/201208/entering-anothers-experience> (Aug. 2, 2012).

by the trappings of legal representation. That visual impact is likely more powerful than a textual explanation of the same point. The image, combined with the supporting text, creates a more complete analysis than the text alone. But, including the image would also open up a Pandora's Box. Even though the amicus brief would have used the image as part of a policy argument—that this is what could happen to young plaintiffs if one party had a right to court-appointed counsel and the other did not—the staged scene could easily work against the argument. First, the very nature of a re-enactment may offend some readers. The people in the photograph were not the parties to the actual lawsuit but were volunteers. In addition to concerns about the artificial nature of the image, the authors were also concerned about its content. The characters in the image are all white, young, and well-dressed. They look like they could be law students, and in fact they were. It was possible that the cultural uniformity of the characters could be jarring to readers. It was not too much of a leap to assume that if the details of the image were questionable, then the substance of its purported analysis would also be suspect.

4.1.4 Using an interpretive chart to develop a legal argument about a critical legal term

The third shadow document the clinic students used to organize their legal reasoning turned out to be the simplest, but perhaps also the most profound. It began as two simple **organizational visuals**, two bullet-point lists that compared something already determined to be a “consequence of magnitude” to the consequences a defendant faces when a restraining order is entered. When set down on a table, side-by-side, these two lists became **interpretive**.

The first listed the consequences that attach when a court enters a restraining order against a defendant. Most of those already appear as a numbered list in the relevant statutory section.⁵⁷

The clinic students then analyzed all of the other situations in which the New Jersey courts have recognized a guaranteed right to court-appointed counsel when the outcomes are

57. N.J. STAT. ANN. § 2C:25-29(a) (2015).

“consequences of magnitude.”⁵⁸ While that right to civil counsel attaches in other family law matters such as loss of child custody, those matters did not lend themselves as well to an argument that the consequences of a domestic violence restraining order is more significant than other consequences in other legal situations that do guarantee a right to counsel. Eventually, the students came up with a comparison to the suspension of a driver’s license. The list of potential consequences is much shorter with the suspension:

What’s at stake at a driver’s license suspension hearing (right to counsel guaranteed):

- Suspension or loss of driver’s license
- Fines

What’s at stake at a civil restraining order hearing (no right to counsel guaranteed):

- Order of restraint from contacting victim in any way including through third parties
- Limitation or suspension of parenting time
- Fingerprinting and registry in statewide batterer database
- Compensation to victim for support, health insurance, loss of property
- Mandated batterer counseling
- Restraint from specified places where victim might live or work or be.
- Payment of rent or mortgage even in not living in home
- Loss of personal property including animals or pets
- Police supervised removal of belongings from home
- Prohibition of purchase or possession of firearms, even if part of employment duties
- Mandated psychiatric or drug testing evaluations
- Civil penalties up to \$500
- Separate surcharge for domestic violence fund
- Punitive damages
- Attorney fees for victim
- Order prohibiting contact/stalking of others
- Possible loss or suspension of professional licenses
- Other appropriate relief

58. N.J. Ct. R. 7:3-2, app. to pt. VII (“Guidelines for Determination of Consequence of Magnitude”) (available at https://www.judiciary.state.nj.us/rules/r7-2nd_appendix.htm).

Putting the two lists together becomes less organizational and more **interpretive** because in combination they make a visual argument. The specific items on the list show what is at stake in a restraining order hearing. More important than the content of this list, however, is the visual comparison between what the New Jersey courts already consider a “consequence of magnitude” meriting the right to court-appointed counsel (suspension of a driver’s license) and the consequences of a restraining order. The words themselves are less important—they could be in Ancient Greek and make a similar visual impact:

4.2 Determining whether to include the better shadow visual in the filed brief

As with the re-enactment photo, this chart did not ultimately end up in the brief filed with the court. The *idea* of the visual comparison was not a problem: everyone working on the brief recognized its potential persuasive impact. The chart, however, was based on an analysis that was susceptible to challenge. As drafted, it helped the writers see the theory of the case and move towards strong legal analysis. The visual as shown here, however, was still susceptible to attack. Specifically, the students were concerned that the court might view losing a driver's license as a consequence different in kind (and possibly more consequential) from those at risk in a restraining order hearing. It isn't enough to have a visual that *nearly* works. To move out from the shadow document and into the actual brief, the visual should be precise in conveying an accurate and exacting analysis. This visual evolved into a visual that was used in the brief. How that happened is discussed below.

5.0 A Systematic Way to Determine **When** to Include a Visual in the Submitted Legal Document

It is a difficult task to determine whether a visual that works in a shadow document is also appropriate to use in the final document. A visual that clarifies the writer's thinking may not resonate with the reader for a variety of reasons. It is always difficult to predict how a particular reader will react to a particular visual. However, a systematic approach to assessing the appropriateness of a shadow visual can make that decision considerably less risky.

As a starting point, Professor Michael Smith has suggested a similar process to determine the wisdom of including a specific creative original metaphor or a literary allusion in a piece of legal writing.⁵⁹ The analysis includes looking at whether the metaphor or literary allusion enhances the reader's understanding of the logical substance; whether it is pleasing by being both clever and unexpected in presentation versus cliché or sloppy; and whether

59. SMITH, *supra* note 39, at chs. 9–14.

the reference fits the legal document tonally rather than being forced, disrespectful or otherwise unprofessional towards the other party or attorney, or simply incorrect in the allusion itself.⁶⁰ A similar analysis is appropriate for determining whether to include a visual element as part of the persuasive legal document. The method is best expressed as a chart:

Is the idea of the visual effective at enhancing the reader’s comprehension of the analysis?	Does the visual improve the document’s overall design?	<i>Does the visual meet professionalism norms?</i>	In or out? The verdict.
<p>To do this:</p> <ul style="list-style-type: none"> • Determine where each visual falls on the continuum between decorative and transformative. • Ensure that each visual effectively conveys the <i>precise</i> legal analysis point and that it contributes to the overall theory of the case. 	<ul style="list-style-type: none"> • Look critically at the quality of each visual. • Consider the overall number of visuals—will the reader become overwhelmed? • Assess the gestalt of the document. 	<ul style="list-style-type: none"> • Consider the tone of the visual. • Review ethical and professionalism considerations. 	<ul style="list-style-type: none"> • Does the visual assist in effective advocacy for the client?

5.1 Assessing the substantive effectiveness of an image in enhancing the analysis

The purpose of an analytical visual is to provide a way for the reader to easily and memorably understand the precise nature of the legal argument. A visual survives the first pass of editing if it serves that purpose. It should be presented to inform—and thus persuade—the intended audience. If an image doesn’t make a document more persuasive by making the substance of the legal arguments easier to understand, the lawyer should not include it.

5.1.1 Answering the “so what?” outcome test

Part of assessing the efficacy involves considering the known particulars of the audience and understanding the differences

60. *Id.* at 233–41, 259–64. Professor Smith does not use a chart, however.

between the creator and the audience. To be worthy of consideration at all, the analytical visual will have already helped the lawyer process the legal analysis in some way. But, a visual that may have legitimately helped the lawyer with her own understanding of the legal analysis may be of less use to the audience. It is up to the lawyer to assess the visual with a reader-centered eye.

First, the analytical visual, like any argument, exists to move the audience towards a particular goal. Thus the first step of assessing a visual is to ask, “so what?” The answer to that question must point towards an outcome that fits within the case theory and that is within the decision-makers’ discretion to grant. If a textual argument fails this inquiry, it’s time for the lawyer to revise the language of the argument. Likewise, the same “so what?” test can be applied to analytical visuals. The creating lawyer must assess the draft visual for its effectiveness in accurately capturing the *precise* takeaway point the lawyer wants the audience to remember. The most effective analytical visuals answer the “so what?” question efficiently, accurately, and memorably in a way that furthers the client’s case. Those are the analytical visuals that, when combined with appropriate design elements, are transformative visuals worthy of being included within the body of the legal argument itself.

The corollary is also true. Just because a visual may work does not mean it works as well as it *should*, given the theory of the case. If the analytical visual cannot answer the “so what?” question, the lawyer should choose a different way to make her legal argument. Some statistical visuals may be useful, for example, but so tangential to the main takeaway point that they become visually distracting. Of course, the lawyer may realize that some visuals, while handsome and clever, add little to the substance of the analysis. Just as some of our most beautiful and hard-won sentences end on the editing-room floor, many visuals should probably end there as well.

5.1.2 Revising for precision

Just like written persuasion, the typical analytical visual will go through substantial revising. Moreover, analytical visuals are no different from written arguments when it comes to potential audience resistance to the particular arguments. Writers should

therefore analyze the visual with the same rhetorical considerations as any other legal argument. For example, in the domestic violence brief, the bullet point lists were intended to show that the considerably more significant consequences at stake in a civil restraining order hearing (where there is no right to court-appointed counsel) than in a driver's license suspension hearing (where there is such a right). However, although the visual was powerful, the lawyers who created it worried that its substance was susceptible to challenge. A judge could disagree with the underlying premise that restraining orders are more significant than the suspension of a driver's license. After all, driving can be critical for workers in a state like New Jersey that has limited public transportation.

Thus, the writers decided to modify the visual to show a different comparison. The idea of the visual remained, but the expression of it changed. In the final document, the authors compared the consequences of the restraining order to the consequences of a municipal court conviction that could have happened if either party, in addition to seeking a restraining order, had also filed criminal charges of harassment arising out of the same facts. Although what was being compared changed, the visual impact remains the same: just looking at the image showed the disparity in consequences and implicitly argues that the consequences of the restraining order hearing are significant enough to necessitate legal counsel. By shifting to a comparison of the municipal court hearing, the comparison becomes more parallel and less likely vulnerable to attack:

Applicable penalties in a harassment proceeding	
FRO proceeding	Criminal proceeding
<ul style="list-style-type: none"> • N.J. Stat. Ann. § 2C:25-19a(13) (specifically incorporating N.J. Stat. Ann. § 2C:33-4); • N.J. Stat. Ann. § 2C:25-29(b)(1)–(19) (collectively, “The Prevention of Domestic Violence Act” or “The Act”) 	<ul style="list-style-type: none"> • N.J. Stat. Ann. § 2C:33-4 (in the New Jersey Code of Criminal Justice)
Order of restraint;	Fine up to \$500, plus assessments;
Order granting exclusive possession of the residence to the plaintiff, irrespective of ownership;	Presumption of non-incarceration;
Order restricting parenting time, as necessary;	Forfeiture of public office, as applicable; and
Evaluation by applicable child welfare agencies;	Motor vehicle suspension, but <i>only if</i> a motor vehicle was involved in the underlying act.
Potential suspension of parenting time;	
Monetary compensation to victim;	
Mandated counseling;	
Restraint from victim’s family and specified places;	
Limitations on communication with victim and others;	
Payment of rent or mortgage on residence even if not living there;	
Loss of specified personal property including animals or pets;	
Emergency monetary relief to include punitive damages;	
Temporary loss of custody of a minor child;	
Police-supervised removal of belongings from prior home;	
Other appropriate relief, as requested;	
Monitoring by the intake unit of the Family Part;	
Order prohibiting possession, purchase, or use of firearms;	
Order prohibiting stalking, following or threatening other persons not a party to the FRO action;	
Mandated psychiatric evaluations; and	
Civil penalties ranging from \$50–500;	
Mandated surcharge to fund domestic violence grants, of \$100.	

5.1.3 *Special considerations: visuals without text; visuals that use allusions*

Analytical images are at their best when they supplement a text, to distill or reinforce legal analysis. It should go without saying that only rarely can an analytical image completely substitute for any words whatsoever. An analytical visual typically needs to be introduced to demonstrate its place in the reasoning and the perspective by which the lawyer wishes the audience to view it. The analytical visual cannot perform its persuasive purpose without the cognitive prime of an introductory thesis.

If the analytical visual relies on a literary allusion, visual cue, or cultural reference, the lawyer must assess the likelihood that the audience will share the knowledge of that original literary, visual, or cultural reference. If the audience does know the reference, the visual will tap into their preexisting mental database and allow the audience to draw the intended analogy between the reference and the legal argument.⁶¹ On the other hand, the visual will be of little use if the audience is unfamiliar with the reference that is essential to comprehending its relevance. For example, the lawyer may have relied on shadow visuals based on allusions to *The Faery Queen* to crystallize the arguments for herself. The same allusion might easily be futile or frustrating when presented to an audience unfamiliar with sixteenth century English literature.⁶²

Similarly, an analytical image that the lawyer has had months to create and study could complicate rather than create an easier analysis for the audience. We have all seen an overly complicated graph or flow chart that exhausts us before we can fully comprehend it. As with the introduction of literary allusions or other clever turns of phrase used to enhance the *logos* of an argument, the best way to test for this may be to solicit the input of others as a substitute audience.⁶³

61. See generally NORMAN FAIRCLOUGH, ANALYSING DISCOURSE: TEXTUAL ANALYSIS FOR SOCIAL RESEARCH ch. 3 (2003) (appearing in part I, entitled, "Intertextuality and Assumptions").

62. Just to be clear, such an allusion would certainly be lost on both Authors of this Article.

63. For more discussion about the use of literary allusions as a technique to enhance the reader's understanding of the legal argument's substance, see SMITH, *supra* note 39, at chs. 9–15.

5.2 Decisions of Design

Even when a visual is effective in conveying a substantive idea, and even when the visual has accurately captured the argument, a writer must also carefully consider the design of the visual itself. The gestalt of the analytical visual must be balanced so that the look is professional, pleasing, and informative without being overly complex. These considerations all relate to an overall tone and therefore are part of the *pathos* of the document, and what Professor Michael Smith calls the “medium mood control” of the document.⁶⁴

Lawyers checking the medium mood control of the analytical image should walk through these questions as part of the checklist:

- Is a reproduced image fuzzy or otherwise of poor quality?
- Is a chart or graphic too complex to be easily understood?
- Are the color and design choices in harmony with graphic design principles?⁶⁵
- Does the document include so many visuals that they have become overwhelming or tiresome?
- Does the visual raise questions of cultural bias?

5.2.1 Keeping it simple

While visuals that push the limits of professionalism may undermine a writer’s *ethos*, other considerations may have a bigger impact on the *logos* and *pathos* aspects of the document. A flow chart that is too complicated is unlikely to help a reader understand a statutory scheme. A gruesome photograph may so overpower a reader that it distracts him from the emotional power it is intended to evoke. Even an image that is very effective

64. *Id.* at 14–15.

65. A primer on visual design elements of color and object placement falls outside the scope of this Article. One tip we can give to any newbie: if you are using the OfficeSuite, it is much easier to edit visuals in PowerPoint or Excel than in Word.

as a shadow visual—that is, it helps a writer understand her thesis more clearly—may not be effective in a document intended for an outside audience.

5.2.2 *Avoiding distractions*

As noted above, the clinic ultimately decided to omit the re-enactment photo from the amicus brief. Part of that decision was about its substance. But there were also considerable concerns about its design, including the very fact that it was a re-created image. Even though the photo would not have been offered as documentary evidence, the lawyers had sufficient concern that its nature would distract the court, that the more prudent decision was to limit its use as an analytical tool for drafting purposes only.

6.0 **Second Case Study of *How: Hillwood Investment Properties v. Radical Mavericks Management***

For this case study, we used a Motion for Summary Judgment that is a matter of public record, and worked with a rising second-year law student from Lewis and Clark Law School to create visuals that might have been used in the filed document. Lawyers in the case initially used an analytical visual, which is why we chose this particular case. In 2011, Ross Perot Jr., a minority owner of the Dallas Mavericks basketball team through his corporation, Hillwood Investment Properties, sued the General Partner and majority owner, Mark Cuban (through his corporation, Radical Mavericks). Perot alleged that Cuban had financially mismanaged the team by breaching fiduciary duties and that Cuban's mismanagement threatened the financial stability of the organization. In response, Cuban filed a Motion for Summary Judgment that garnered significant public attention. Here is the essence of Cuban's Motion:⁶⁶

66. The full four-page motion is available at <http://www.scribd.com/doc/58470086/2011-06-22-WC-Mavs-and-Radical-Mavs-Mngt-MSJ>.

II. SUMMARY JUDGMENT EVIDENCE AND ARGUMENT

On June 12, 2011, the World Champion Dallas Mavericks defeated the Miami Heat to claim the franchise's first NBA championship. A true and correct photo of one of the many victory celebrations is incorporated herein:



Under Hillwood's ownership, the team was deemed the "worst franchise" in all of professional sports. Under Cuban's stewardship the Mavericks have become one of the league's most successful teams and are now NBA champions. Accordingly, there can be no genuine

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT – Page 2

This motion received widespread publicity and lawyers and the popular press hailed it as a great piece of lawyering.⁶⁷ It even

67. Articles appeared in multiple news publications including the *Dallas Observer*, the *Am Law Daily*, and the *ABA Journal*. See, e.g., Robert Wilonsky, *Did Mark Cuban's Attorney Just File Greatest Legal Scoreboard Ever in Ross Perot Jr. Case?*, DALLAS OBSERVER BLOGS, June 22, 2011, 10:11 a.m., <http://blogs.dallasobserver.com/unfairpark/2011/06/did-mark-cubans-attorney-just-file-greatest-legal-scoreboard-ever-in-perot-case.php>;

received an award as a “dagger of a brief.”⁶⁸ Lost in all the plaudits for its originality, however, was that it was a lousy legal document. It sought dismissal of the plaintiff’s claims by essentially arguing, “We won the championship, and therefore I could not have mismanaged the finances of the team.” Such an argument is absurd—it failed to address any of the plaintiff’s specific accusations. And, of course, it is a non-sequitur to argue that a championship season proves the team was not financially mismanaged nor near bankruptcy. Apparently, Cuban and his lawyers realized as much. Two months later, they filed an Amended Motion for Summary Judgment that was far more traditional: 22 pages of specific arguments. The amended motion contained no visuals. Not surprisingly, the Amended Motion received virtually no publicity. It was, however, successful on a more important level—the court granted it and dismissed the case.

For this Article’s purposes, the original Motion for Summary Judgment—which for clarity’s sake we refer to as the Visual-Only Motion—is of little interest because we do not suggest that visuals can ever entirely replace text-based reasoning. Undoubtedly the image was in the forefront of the lawyers’ minds because the Dallas Mavericks had won the NBA championship just days before they filed the Visual-Only Motion. It was likely a powerful shadow document influencing them in their case preparation. It was flawed, however, because it failed to properly advance a responsive legal theory. Nevertheless, when Cuban’s lawyers got serious about their *advocacy* they still could have effectively used visuals, including the same photo of the team celebrating its championship that was used in the Visual-Only Motion.

Brian Baxter, *Fish & Richardson, Mark Cuban, and a Trash-Talking Summary Judgment Motion*, AM LAW DAILY, <http://amlawdaily.typepad.com/amlawdaily/2011/06/fish-richardson-cuban.html> (June 22, 2011, 6:19 p.m.); Debra Cassen Weiss, *Are the Dallas Mavericks Mismanaged? Motion Uses Celebration Photo to Refute the Notion*, A.B.A. J., June 23, 2011, http://www.abajournal.com/news/article/are_the_dallas_mavericks_mismanaged_motion_uses_celebration_photo_to_refute/.

68. Rachel M. Zahorsky, *Texas Lawyer Honored for Unconventional Brief*, A.B.A. J., Jan. 5, 2012, http://www.abajournal.com/news/article/texas_lawyer_honored_for_unconventional_brief/. The article reported that *Green Bag Almanac & Reader* would honor the Dallas attorney, Tom Melsheimer, for the motion. The honoree list can be seen at *Exemplary Legal Writing: 2014 Honorees*, http://www.greenbag.org/green_bag_press/almanacs/almanacs.html.

In this case study, we begin with the Mavericks' Amended Motion (the "real" Motion). We asked a rising second-year law student at Lewis and Clark Law School to incorporate visuals into the brief, as well as make formatting changes that would add clarity to the document. We imposed the following three rules:

1. Make no changes to the substance or wording of the Motion. While the student could reformat the Motion, the text could not change.
2. Comply with Texas Rules of Civil Procedure.
3. Use only Microsoft Office programs (Word and Excel) to create the revised Motion.

The Appendix to this Article includes the complete [Revised Version](#) of Mavericks' Amended Motion for Summary Judgment, as created by the rising 2L student. As you view it, please keep in mind that this student had no prior instruction in the law of business organizations but used the visuals she created to teach herself some of that law. In this section, we explore a few of the visuals the student created that reflect considerations that would be relevant to any use of visuals, including the potential to add clarity to the text, the potential professionalism concerns, and the utility of the visuals themselves. The purpose of having a law student work with the existing motion was to see how the upcoming generation of lawyers might handle more visual mediums of legal analysis and to see how well students handle critical analysis when asked to process it in this visual medium. We were not disappointed.⁶⁹

6.1 Visuals that support the textual analysis

As we had hoped, our student found several ways to incorporate visuals to strengthen the text. These included visuals that illustrated the elements of the claim as well as how to parse the relevant statute. In addition, she created an interpretive visual that captured the framework of the legal analysis. Finally,

69. We did not ask the student to make choices in the number of visuals she created and indeed wanted several to choose from for analysis purposes. The result may be a little visually overwhelming in terms of the sheer numbers, but we believe the style is better than what is being used as standard motion practices.

she incorporated representational images, including the photo of the Mavericks celebrating their championship, to add emphasis of key facts developed in the text.

6.1.1 Using organizational visuals strategically to show elements of the claim

Before Cuban's lawyers could refute the claims, they had to identify the elements of each claim. Perot alleged that Cuban, as the General Partner, breached his duty to the minority partners. According to the Texas Business Organizations Code,⁷⁰ there are two duties a general partner owes to the minority partners: the duty of loyalty and the duty of care. The statute further breaks down each of these duties into sub-elements. To easily grasp the scope of these two statutory duties, the student created a shadow document using an **organizational visual**—a simple bulleted list—to identify the elements of each:

Lists allow us to see and understand connections very simply. For example, we can look at these lists and quickly identify the elements of each duty. While this is helpful to a reader, it also carries a danger. Lists invite what Daniel Kahneman calls System 1 thinking.⁷¹ Because the lists are so easy to understand, we may be willing to accept them as is without critical thinking. Elizabeth Porter has noted one danger of visuals is that they may lead to shallow reasoning.⁷² This kind of response may encourage readers to be lulled into citing that list, even when the list no longer reflects the current state of the law.⁷³ The take-home

70. TEX. BUS. ORG. CODE § 152.205 (West, WestlawNext through 2013 3d Sess.) (“Relationship Between Partners and Partnerships”).

71. Daniel Kahneman, THINKING FAST AND SLOW 20 (2011). System 1 thinking is what we do automatically, quickly, intuitively, and effortlessly. System 1 thinking is what helps us get through everyday tasks without having to stop and contemplate each small decision along the way. It works without us realizing it, and it is always set to “on”—our constant stream of thought and our ability to read and interpret language without consciously processing each word. *Id.* System 2 thinking, in comparison, engages our critical analysis and reasoning skills. *Id.* at 21. System 2 processing must be actively turned to the “on” position. *Id.* That act takes a deliberate effort. Kahneman argues that we prefer to be lazy about activating System 2 thinking, and for that reason we try to shift a great deal of thinking into System 1 thinking. *Id.* Shifting too much into System 1 can lead us to make irrational decisions. *Id.*

72. Porter, *supra* note 12, at 1773.

73. One example can be found in *Desiato v. Abbott*, 617 A.2d 678 (N.J. 1992), using a numbered list of six factors to define the term “household member” for the purposes of granting a restraining order under the relevant statute, N.J. Stat. Ann. § 2C:25-19(d) (amended in 1994). The parties in that case were in a dating relationship, a category not

message isn't to avoid creating the list—doing so helps us understand the law better—but to engage in a thorough critical analysis of our own lists. It's fine for readers to use System 1 thinking, so long as a System 2 analysis would come to the same conclusions.

Duty of Loyalty:

A general partner cannot:

- Engage in self-dealing
- Usurp partner opportunities
- Compete with partnership

Duty of Care:

A general partner must act:

- On an informed basis
- In good faith
- In the reasonable belief of the best interest of the partnership

6.1.2 Using organizational visuals to show the controlling statutes

The lawyers preparing the Amended Motion for Summary Judgment would have had the applicable statute available as one of their shadow documents supporting the draft of the Amended Motion. Though the legal argument includes an explanation of the relevant statute, presenting it as a visual could make that explanation clearer or more quickly accessible to the reader. Here is an example our student offered, from page 8 of the Appendix to this Article:

included in the relevant statute at that time. *Desiato*, 617 A.2d at 680. The family court decision nevertheless stretched the definition of household member to include aspects of dating such as casual overnight stays and personal items kept in the other person's home. *Id.* Two years later, the statute was amended to include dating relationships. *See* 1994 N.J. Sess. Law Serv. Ch. 93 (West).

Later the New Jersey Superior Court Appellate Division questioned the continued viability of *Desiato*'s broad definition of household member. *See* *Smith v. Moore*, 689 A.2d 145 (N.J. Super. Ct. App. Div. 1997) (holding that a temporary, part-time vacation housing arrangement among young women friends did not constitute a "household" under the statute). Other cases focused the analysis on the quality of the family-like relationship, but did not use a numbered list. But, perhaps because numbered lists are so visually enticing, the *Desiato* list of factors is sometimes still cited. *S.P. v. Newark Police Dep't.*, 52 A.3d 178, 187 (N.J. Super. Ct. App. Div. 2012). While this is perhaps a lesson to lawyers to be careful, it might also be a lesson to courts to offer a visual in an opinion when changing the scope of factors presented in a list in a previous decision.



The color and design of the visuals are not merely decorative. The different colors allow the reader to instantly recognize that these are distinct duties. The different shapes distinguish the duties from their sub-parts. At a glance, the reader can see the organization of the statute. Of course, the text also explains this organization and provides detail of how the statutory duties apply in this case. The visuals do not attempt to visualize all that is covered in the text. They do, however, orient the reader and reinforce the structure of the discussion.

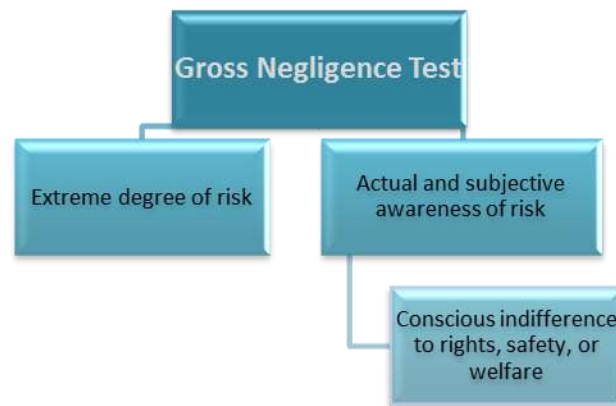
6.1.3 Using an interpretive visual to simplify the analysis structure for the reader

Interpretive visuals provide analysis inside the visual itself. They show relationships and relativity when the concepts are difficult or multi-dimensional. For example, the Amended Motion argued that the Partnership Agreement limited the General Partner's liability to instances of fraud, willful malfeasance, and gross negligence. To show that Perot had no evidence that Cuban acted with gross negligence, the Amended Motion first had to establish the standard for gross negligence. To do so, it quoted a Texas Supreme Court decision:

As for gross negligence, the Texas Supreme Court has established a two-part test: "(1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others."⁷⁴

74. Defendants' Amended Motion for Summary Judgment, Hillwood Inv. Props. III,

This standard for gross negligence is neither novel nor unfamiliar. It is, however, somewhat complex. It has two sub-parts requiring assessing an actor's conduct as well as the actor's state of mind both as to the awareness of risk and his degree of concern for the welfare of others. However, a simple chart can capture the essence of the rule:



Much like the organizational visual, this chart captures the standard for gross negligence at a glance. It shows the connections between the parts and distinguishes the conduct from the state of mind elements. Without the image, a careful reader would have to unpack the text to see these connections. Of course, a legally trained reader could do so, but the interpretive visual does that work for her.

6.1.4 Representative Image: The Mavericks Are World Champions

The photograph that garnered Cuban and Mavericks so much attention for the Visual Motion is an example of a representative image. That is, it represents information presented textually in a way that makes that information more concrete. Used properly, it could be an effective persuasive tool. However, proper use requires using it in conjunction with text that conveys the information it represents. The Mavericks' Amended Motion lays out

Ltd. v. Radical Mavericks Mgmt., LLC, No. 10-05639, 2011 WL 4862623, at *14 (Tex. Dist. Ct. Oct. 3, 2011) (quoting *La.-Pac. Corp. v. Antrade*, 19 S.W.3d 245, 246 (Tex. 1999)).

a Summary of Facts. This section provides several opportunities for using representative images. For example, on page 5, the Amended Motion notes that the team won a championship.⁷⁵ It could highlight this information with the image it used in the Visual-Only Motion:



“More importantly, this past June, Cuban’s strategy of winning a championship paid off—the Dallas Mavericks defeated the Miami Heat on June 12, 2011 to win the franchise’s first World Championship.”⁷⁶

This is just one example of representative images that could be used here. The gist of the section is that having a competitive team will attract more fans to attend games and implicitly, at least, increase the value of the team.

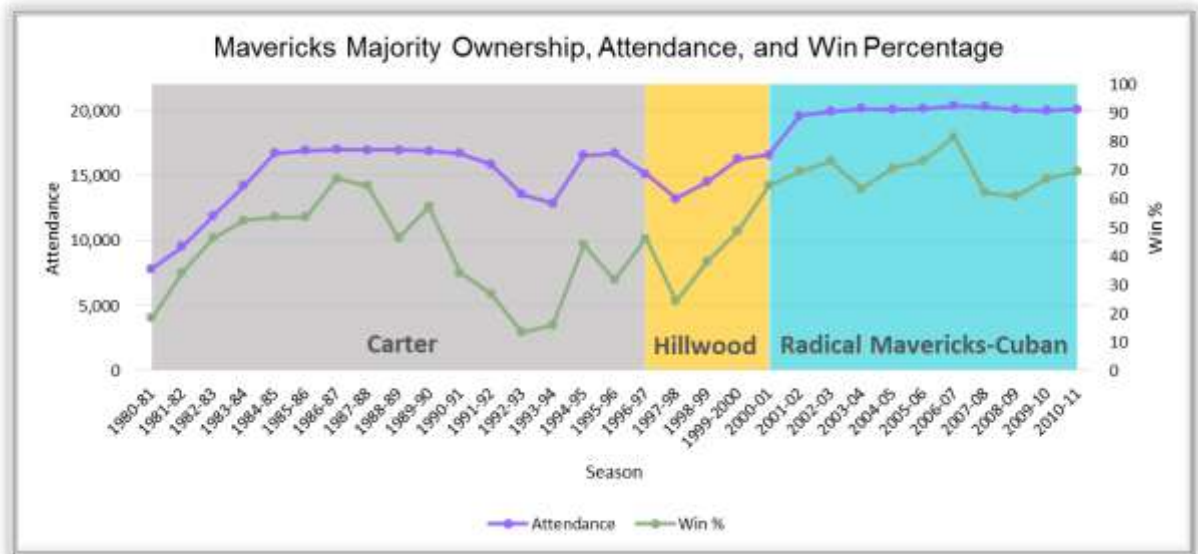
To show that Cuban has indeed created a competitive team, the Amended Motion notes that the Mavericks have won over 50 games for eleven straight years.⁷⁷ The Amended Motion also notes that, under Cuban’s management, the team has the longest sell-

75. *Id.* at *5.

76. *Id.*

77. *Id.*

out streak in the NBA at over 400 games.⁷⁸ Just about any time that numbers are involved in a legal issue, a visual can add clarity. The information about wins and attendance could be illustrated with a graphic image such as the one the student created here:



All of these visuals show connections between ideas: between elements of a legal claim, between distinct but related facts, or between the law and the facts of the case at issue. They may appear to be rather simple representations of equally simple ideas. However, none of these ideas is as easily shown in text as it is in the visual. Of course, the significance of the connections requires a bit more explanation. Thus, the visuals should work in tandem with the text. The visuals prime the reader, orienting her to the textual analysis and thus making that analysis clearer and more accessible.

78. *Id.*

6.1.5 Branding with a Decorative Image

As discussed in Section 2, only rarely should lawyers insert purely decorative visuals into legal documents. However, there may be a place for decorative visuals in setting a tone or, perhaps, establishing one's brand. Our law student added this type of visual to the motion's caption:

Cause no. 10-05639

In the District Court, 192nd Judicial District Court, Dallas County Texas

Hillwood Investment Properties III, Ltd.,
individually and on behalf of
Dallas Basketball Limited d/b/a Dallas Mavericks,
Plaintiff,



v.

Radical Mavericks Management, LLC and
Dallas Basketball Limited d/b/a Dallas Mavericks,
Defendant.

The Mavericks' logo is, of course, largely decorative. It doesn't advance the legal argument and certainly isn't necessary to identify the parties in the lawsuit. On the other hand, this case was filed in Dallas County shortly after the team had won the NBA Championship. The logo may serve as a subtle reflection of the civic pride that goes with winning such a championship, establishing a positive tone for the rest of the Motion.

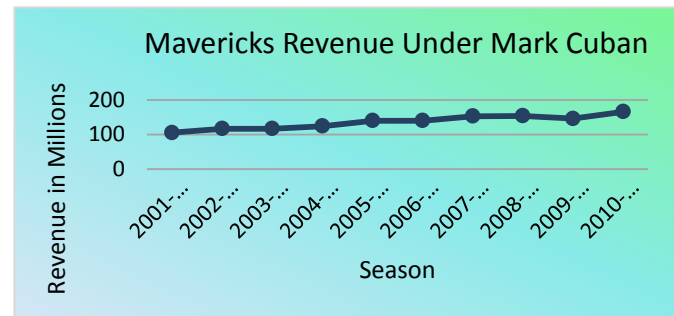
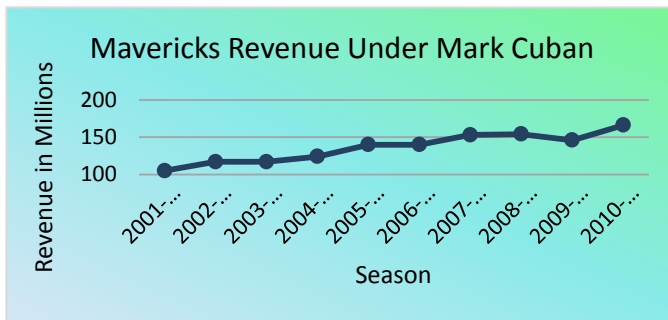
6.2 Keeping an eye on professionalism issues

Most lawyers are familiar with their ethical and professionalism obligations regarding persuasive documents. However, when it comes to visuals, some may feel a bit less certain as to the limits of professional norms. Fortunately, many of the ethical and professionalism issues relating to the use of visuals are similar to the issues relating to text.

Of course, all lawyers know not to lie. And deception, even if done within the limits of ethical rules, may transcend the professionalism norms of the legal community. However, when it

comes to visuals, the line between truthful advocacy and deception is easily blurred.

Cropping an image to eliminate irrelevant material seems no more offensive than carefully (but honestly!) editing a quotation. And of course, it is perfectly consistent with professionalism standards to include visuals that support one's argument without including others that might undermine it. Perhaps increasing the contrast of a photo would be reasonable if it made the photo easier to understand. An image could also be distorted on its face. Anyone who looks closely at it will see the distortion—though the author may be counting on his audience's failure to look closely. One of the most common examples of this are graphs and charts that truncate one axis or the other—that is, starting an axis at an opportune number rather than at the norm of zero. Just as there are acceptable levels of bias—or perspective—permitted in choosing one's words carefully, so too can one choose visuals with a degree of care and bias toward one's position. Here is one example of what might be considered a distorted y-axis graph on the left.



By starting the y-axis at 100 and by ending at 180, the graph appears to show a large increase in revenues. Perhaps larger than should be shown, as indicated by the graph on the right, which has a more traditional y-axis. But, the y-axis on the left may reflect an industry standard and therefore be unobjectionable to some readers. Even so, it presents a distorted visual representation of the increased revenue over time.

Where, then, should we draw the line? Where does selective editing become impermissible distortion? Professor Elizabeth Porter suggests a need for new rules to govern the use of visuals

in documents.⁷⁹ This is an idea worth exploring, though we may be able to draw on our existing professionalism norms as well. Lawyers already know that the more one wants to ignore adverse material, the more one needs to address it. We can apply a similar principle to visuals. If one crops out irrelevant material from a photo, the opposing party is unlikely to object to the cropping. However, if one unfairly distorts an image, opposing counsel is likely to object—and justifiably so. Thus as a rule of thumb, the more one wants the doctoring of an image to remain secret, the more likely it violates professional norms. As with many ethical issues, one shouldn't do in secret what one is unwilling to do in the open.

Conclusion

The question is no longer one of whether visuals have a place in legal writing documents. Rather, it is a question of developing strategies of determining the what, why, how and when to employ this type of persuasive technique. It is our hope that lawyers will begin embracing the idea, and that legal documents—not renowned for their design aesthetics—will begin to persuade with the same type of visual acuity as so many other forms of written communication.

79. Porter, *supra* note 12, at 1775–80.

Appendix:
Redesigning the Dallas Mavericks' [Amended Motion](#)
[for Summary Judgment](#)

Incorporating analytical visuals into legal documents quite naturally leads to questions about design. Even deciding where to place an image on the page can be a challenge. It is only a small step from there to examining the design of the document more broadly. For example, we looked at the Mavericks' real motion—a very traditional text-based document—and explored what it might look like with a few analytical visuals and a design that emphasized visual impact. In the process, we created a document that may be just as noteworthy as the original Visual Motion. Only this time, it also appropriately addresses the issues the court needs to consider to revolve the summary judgment question.

In addition to the analytical visuals, we made several changes to the formatting of the document, all designed to improve its visual impact. Because most judges now read electronic documents rather than paper documents,⁸⁰ we made changes that improve readability on the screen. We also took further advantage of the technology, such as incorporating color and creating links from citations to electronic versions of cited authority. Below is a summary of those changes.

80. Margolis, *supra* note 5, at 12.

- Two columns of text. It is easier to read columns that are keyed to our range of peripheral and central vision—two columns on an American standard piece of paper. That is why magazines and newspapers use columns. In addition, columns create flexibility for incorporating visuals. A visual may be placed in the middle of column of text, without the cumbersome problem of wrapping the text around it; a larger image can span both columns on the page; column-widths can even be adjusted to incorporate an image that is sized differently than the columns.

- Flexibility in typeface. While almost every appellate court has a typeface requirement, many trial-level courts have more forgiving rules. She chose typefaces designed for onscreen reading.

- Use of shadow boxes to highlight supporting text. The student decided to include the complete statutory section at issue because it was referenced in the motion. In a traditional document, this is usually done with a block quote that breaks up the text or in a lengthy

footnote. By placing the text of the statute in a shadow box, the reader can find it easily, it can be adjacent to the relevant text that discusses it, and it need not interrupt the flow of the substantive text.

Shadow boxes are an alternative to textual footnotes, especially really long footnotes. Setting interesting sidebars in shadow boxes allows your reader to consider the aside when she wants to, without the annoying interruption of a footnote.



- Move citations to footnotes. With electronic documents, in-text citations become unnecessary. Rather than break the flow of the text, each citation can be footnoted with a link to the cited document and the reader can simply jump back and forth from the document to the source.

• Electronic documents can also solve one of the most aggravating aspects of footnotes (or worse yet, end notes): the Carolene Products Dilemma. When reading a paper document, if a reader is not interested in checking citations, she still has to glance down at each footnote to make sure she's not missing an interesting aside, clarification, or possibly the whole point of the document. On the other hand, electronic footnotes can be color coded.