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Getting Visual

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Getting Visual

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Getting VISUAL

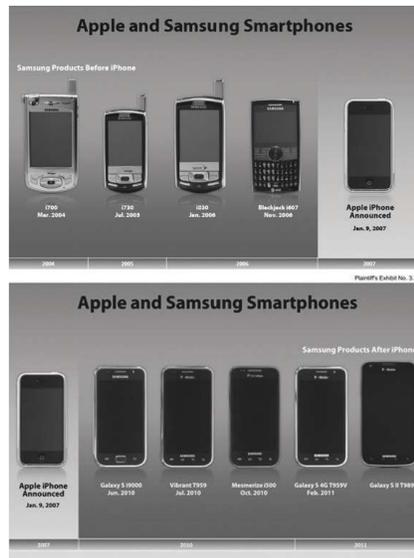
BY: MICHAEL D. MURRAY UNIVERSITY OF KENTUCKY COLLEGE OF LAW

Now or in the very near future, legal briefs and office memoranda will use color, graphics, photographs, embedded videos, active links, depictions, and diagrammatical elements. In other words, the instruments of legal practice will be highly visual.¹

An attorney or counselor at law can supplement or even replace several pages of narrative or legal reasoning with a graphical visualization of the communication—a photograph, a cartoon, a painting, a model, or another form of visual or graphical rendering—and in so doing, improve the document’s communicative and persuasive potential.³

How does a visual improve the communication or the argument? Because visual imagery is not only faster than words, it is better than words. Visual images possess nearly instantaneous cognitive and communicative power.⁷ Visual devices work at microsecond-level speed to communicate ideas and attain the audience’s adherence to the meaning and truth of the ideas communicated, and thus are able to persuade the audience of the truth and propriety of the speaker’s communication faster than verbal media. Brain science demonstrates that images allow greater perception, comprehension, and retention of information.⁸

The power of visual media works both offensively and defensively when attorneys are designing effective visuals for advancing their cases and raising objections to or attempting to counter the rhetorical effects of an opponent’s submission.⁹ As a result, the use of visual images as tools of rhetoric and narrativity in litigation carries with it an enormous responsibility not to abuse the



Exhibits used as legal argument regarding allegedly infringing cell phone designs in *Apple v. Samsung*.²

Images and video can be used substantively and argumentatively, to prove facts or strengthen a legal argument.





power of images. The power of visual rhetorical devices in legal discourse requires a careful attention to the author's ethical and professional responsibilities not to use the power to confuse, mislead, or overwhelm the reasoning power of the audience.¹⁰

In conclusion, visual devices are a powerful and even recommended form of legal communication if they are used to construct knowledge and understanding of the meaning and message of the communication and do not mislead or prejudice the audience's reception or understanding of the communication.

ABOUT THE AUTHOR

MICHAEL D. MURRAY was appointed in 2018 as an Assistant Professor of Legal Research and Writing at the University of Kentucky College of Law. Professor Murray graduated from Loyola College in Maryland and from Columbia Law School. He clerked for United States District Judge John F. Nangle of the Eastern District of Missouri, and practiced commercial, intellectual property, and products liability litigation for seven years at Bryan Cave law firm in St. Louis. His 20 years of law teaching experience have taken him to the law schools of Saint Louis University, University of Illinois, Valparaiso University, University of Michigan, and University of Massachusetts. Professor Murray currently has published 27 books and numerous law review articles on advocacy, legal research and writing, rhetoric, copyright, art law, right of publicity, and other topics.



ENDOTES

1. Michael D. Murray, *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 *LEGAL WRITING* 185, 185-86 (2016) ("The recognition that visual rhetoric is rapid, efficient, constructive, and persuasive reveals the potential of visual rhetorical devices to serve as topics and tropes in legal discourse to construct meaning and to inform and persuade legal audiences."); Elizabeth G. Porter, *Taking Images Seriously*, 114 *COLUM. L. REV.* 1687, 1722 (2014). For further reading, see Michael D. Murray, *The Sharpest Tool in the Toolbox: Visual Legal Rhetoric*, ___ *J. Legal Educ.* ___ (forthcoming, 2018), available at <https://ssrn.com/abstract=3040952>; Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 *LEGAL COMM. & RHETORIC: JALWD* 107 (2016); Michael D. Murray, *Leaping Language and Cultural Barriers with Visual Legal Rhetoric*, 49 *U.S.F.L. REV.* 61 (2015).
2. Apple (left) and Samsung (right) Trial Exhibits used in *Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 12-CV-00630-LHK (N.D. Cal. Apr. 15, 2011), available at <http://arstechnica.com/tech-policy/2012/08/apples-case-that-samsung-copied-the-iphone-and-ipad-in-pictures/>. The rhetorical use of these images is critiqued in Murray, *Ethics of Visual Legal Rhetoric*, *supra* note 1, at 133-36. Apple attempted to show that Samsung's phone designs looked nothing like the iPhone before the iPhone came out, but Samsung's phones started to look like the iPhone when it came out. Samsung countered by showing that several of its designs before the iPhone resembled the iPhone, while many of its phone designs before and after the iPhone looked nothing like the iPhone. *Id.*
3. See generally Porter, *supra* note 1 at 1695-99; Richard K. Sherwin et al., *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 *B.U. J. SCI. & TECH. L.* 227, 243 (2006) (citing STEPHEN M. KOSSLYN, *ELEMENTS OF GRAPH DESIGN* 10 (1994)).
4. Images of exhibits relating to (clockwise from top): *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003); *Mattel, Inc. v. Goldberger Doll Mfg. Co.*, 365 F.3d 133 (2d Cir. 2004); *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship*, 34 F.3d 410 (7th Cir. 1994); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).
5. Single Frame of Police Dashcam Video of Fatal Shooting of Laquan McDonald (Oct. 20, 2014).
6. Single Frame of Jason Van Dyke Defense Team Animation of Fatal Shooting of Laquan McDonald from Officer's Perspective (Sep. 25, 2018). Van Dyke's counsel created an alternative video, albeit an animation, in order to attempt to show the scene from the perspective of Van Dyke, the police officer who shot McDonald.
7. See generally David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 *B.Y.U. L. REV.* 1275; 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, 237, 252 (2010) (instantaneous communicative power of visuals); Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 *LEGAL WRITING* 57, 86-93 (2015); Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 *LEGAL COMM. & RHETORIC* 1, 25-27 (2015); Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 *FEMINIST STUD.* 263 (1987); Nadia N. Sawicki, *Compelling Images: The Constitutionality of Emotionally Persuasive Health Campaigns*, 73 *MD. L. REV.* 458 (2014).
8. See generally Stephen M. Kosslyn et al., *Visual Images Preserve Metric Spatial Information: Evidence from Studies of Image Scanning*, 4 *J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE* 47, 57-59 (1978) (perception of images mentally is as fast as perception of actual visual objects in the world); Carrie Leonetti & Jeremy Bailenson, *High-Tech View: The Use of Immersive Virtual Environments in Jury Trials*, 93 *MARQ. L. REV.* 1073, 1074-75 & n.18 (2010); ELIZABETH F. LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (5th ed. 2015) (visual evidence, eyewitness testimony, and perception); ELIZABETH LOFTUS & KATHERINE KETCHAM, *WITNESS FOR THE DEFENSE* 14-30 (1991) (visuals and the "Magic of the Mind"); *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* 272 (Gary L. Wells & Elizabeth Loftus eds., 1984) (word choice and the use of images affect juror perception).
9. Observers have noted that uses of adversarial visual rhetoric often are one-sided, with one party in litigation exploiting the power and effectiveness of visual media, and the other side responding with nothing. See, e.g., Jewel, *Through a Glass Darkly*, *supra* note 7, at 281, 295 ("The ability to recognize and attack logical fallacies in text-based arguments has always been a part of effective advocacy; now, attorneys must learn how to apply that skill to visual arguments. . . . Most of the cases involving improprieties in visual advocacy have also contained grievous imbalances in the deployment of visual arguments.").
10. Murray, *Ethics of Visual Legal Rhetoric*, *supra* note 1, at 126.