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Innovate Your Practice for Success CLE

Images with Impact:

Design and Use of Winning Trial Visuals

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Everything we say to jurors, and everything we show them, should further at least one of three goals: to help jurors understand, believe and remember our message. Studies across disciplines consistently find that adding a visual component to our presentations will go a long way toward accomplishing these goals.

Turning Themes into Pictures

Why it Matters

The jury setting is unique. Jurors face challenges to learning and remembering information that other audiences do not. Some are limitations on jurors, such as their inability to interact with the presenter through real-time questions, and their lack of personal interest in the outcome or subject matter of the case (if a prospective juror has a personal stake in the outcome, he or she is stricken for cause). Other communication challenges in the jury setting are in the form of limitations on the lawyers as presenters, such as evidentiary rules and the contrived courtroom setting. These and other limitations directly impact the effectiveness of our communication in jury trials.

Studies on communication and recall underscore the importance of visual communication. Jurors immediately forget as much as two-thirds of the facts we present to them. See, e.g., Jeffrey R. Boyll, Enhancing Juror Comprehension and Memory Retention, 12 TRIAL DIPLOMACY J. 194-99 (1989). And even when they’re paying attention, the information passes into jurors’ short-term memory—where it lives for only a few seconds, maybe up to a minute. Jurors must consciously try to retain the information into their medium- or long-term memory, or that information won’t be there during deliberations.

Fortunately, research also shows what we can do to help. Studies consistently find improvements in recall, both immediate and over time, when a visual component is added to the information presented. For instance, when information is presented through purely auditory means, people retain only 14-33% of the information, but 85% when the information was also presented visually. See, e.g., id. at 197. And when three days have passed, we remember only 10% of information presented verbally, but 65% of information presented both visually and verbally. See, e.g., John Medina, Brain Rules, www.brainrules.net/ vision; see generally John Medina, BRAIN RULES 42-47 (2d ed. 2014).

Picture Your Theme

We don’t create effective visuals simply by typing the words we intend to speak onto a slide. Instead, think about the visual image—the picture—that comes to mind when you think about a particular trial theme. By showing jurors that picture, we turn our key case facts and themes into memorable visual images.

We go from this…
Jurors might not remember every source from which the doctor in this slide learned information, but they will remember the visual image of many inputs surrounding the doctor, all coming at him simultaneously. Determining which input caused the increase in off-label prescriptions is impossible, and that’s the whole point.

**Tools for Visual Communication**

**Basic Text**

Without question, text will be an essential tool in our jury communication arsenal. But the point of using text—indeed, the point of every element we display to our jurors—should be to aid the jurors, not to aid ourselves. Avoid using text as a crutch, typing a crowded list of bullet points onto a slide simply to help you hold your place in an argument or remember everything you want to cover with a witness. Here are some tips when using text in your visual presentations.

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**Feature one concept per slide**

Presentations filled with text-heavy slides are overwhelming. Everything on the visual takes concentration to sort through and comprehend. Clutter risks distracting the viewer and undermining efforts at effective communication. It doesn’t cost more money or take more time to show three points on three slides than it does to show those same three points on one slide. Unless there’s an affirmative reason why you want or need to fill the slide with text or graphics (see volume builds), present each point on a separate slide. Your message will be easier for the viewer to digest, and viewers who might take notes are more likely to do so when they’re not overwhelmed with content.

**Eliminate extraneous text**

Shorten sentences and use fewer words wherever possible. This, too, encourages jurors to take notes. If there’s too much text on the slide, jurors must either figure out what to write—which means they aren’t listening to you speak—or they don’t bother writing any of it. Less text overall also means there’s less for jurors to comprehend on the slide. They get what they need, hopefully jot it down in their notes, and you don’t waste time with unnecessary distractions.

**Make sure it’s readable**

Select a legible, tone-appropriate font for your slide text, and make sure it’s big enough for all jurors to see it from where it will be displayed. If you show text over a busy background, such as on top of a key exhibit, make the text contrast enough with the exhibit so the two don’t compete with each other. If needed, you can put a solid (or slightly transparent) box of color behind the text to help it stand out from the busy background.
Volume Builds

Sometimes a busy slide—well designed and deliberately presented—can be extraordinarily effective for conveying certain trial themes. You might want to emphasize “a lot” of something, or visually show that a concept is complicated. Busy slides have their place, but be deliberate about how you display them.

Build the visual gradually

When you do use a busy slide, present it with purpose, building the volume gradually and giving the jury time to process each piece. By the end of the build, you’ll be showing the jurors a purposefully full slide to emphasize your thematic point of “a lot” or “complexity.” But your presentation method will allow jurors to absorb the volume theme, rather than just be overwhelmed by an overly-busy slide.

Don’t talk about something else or paraphrase

When visuals are filled with text or graphics, if you talk about something else or paraphrase, you fight with the slide. Jurors must choose whether to comprehend the visual or your spoken message—they can’t do both. Let jurors comprehend the text or images on your slide as you display them.

Consider building with symbols

Where you can replace text entirely with symbols—such as using an image of a phone in place of the word—consider doing so. Particularly with builds, you’ll create a stronger visual memory for the jury if the volume is comprised of substantively meaningful symbols rather than text.

Charts and Graphs

Charts and graphs are visual depictions of data. They help jurors understand information that might not readily lend itself to a verbal description. Charts and graphs let us organize and compare information, dividing it into bite-size pieces. Tables, flowcharts, line and bar graphs, organizational charts, and pie graphs all help identify patterns, highlight comparisons, and visualize relationships.

Eliminate the extraneous

Extraneous elements in your charts and graphs are just as distracting as extraneous words in your textual slides. Every word, number and graphic should be there for a reason. Color changes, graph labels and grid lines should be included purposely, and should be minimized to reduce distractions. What data is critical? Do you need to label every axis interval, or just the ones that matter? Can you shorten your axis labels? Wherever you can eliminate unnecessary elements from your slides, do so.

Avoid a separate key where possible

In a jury trial, the less work jurors have to do to figure out a data display, the better. Try not to force them to cross-reference information to understand it. Place labels directly on, above or next to their corresponding bars, lines or slices of pie.
Use color and labelling strategically

Color contrast is useful for directing the eye, but if everything is a different color, you’re not actually emphasizing anything. When the point of your bar graph is to compare one project to all other projects and the distinction between each project doesn’t matter, then emphasize only the project at issue by making that bar contrast with the rest. The same emphasis can be accomplished through strategic placement and design of labels in your graphs.

Minimize text and ornamentation

As with every other communication tool, minimize the amount of text and unnecessary ornamentation in your timelines. Anchor lines connecting events to the timelines, and boxes surrounding each event (if you need them at all), should be secondary to the substantive message of the slide.

Familiar symbols can add visual interest and aid understanding

When plotting events along a timeline, the visual can quickly become cluttered and overwhelming. Using symbols in place of events can calm the design and help jurors comprehend the overall message. Some symbols are so familiar that they are comprehended instantly and require no explanation. Phone and email icons, traffic symbols, and well-known logos are common examples. Other graphic elements used as symbols—a dot of color, for example—require a brief explanation but can then be used repeatedly in the same slide or presentation without further discussion.

Timelines

Timelines help us visually tell a chronological story, or even multiple stories at once. But think outside the box. By integrating documents, testimony or even other graphics with a timeline, you can walk the viewer through the evidentiary support for each event depicted. You can even use timelines to help put other issues into context when your message itself isn’t grounded in a chronology. Or, you can use timelines instead of line graphs to depict trends when your presentation is otherwise heavy with charts and graphs.
Timelines for context

Where putting one event or action in context with others would effectively convey a trial theme, consider using a timeline even if the theme is not purely chronological. Themes like good faith, correlation vs. causation, and even motive or lack thereof can be emphasized—or even revealed—by depicting the surrounding circumstances chronologically.

Maps

Maps depict “where” by visually displaying location and proximity. Crime or accident scenes, catastrophes, weather events, encounters between people, and routes or paths taken—when location matters, consider using a map. Start by determining what you really need to show, and how zoomed in or out your map must be to show it.

Map symbols can convey substance

Replacing text or numerical data with symbols can aid visual understanding and memory. The width of an arrow, the density of dots, or the size of marking pins can convey substantive meaning such as size, density or quantity. Color, too, is effective for symbolizing quantitative information.

Show only what you need

Every element on the slide takes attention and concentration to comprehend. If you don’t need to label every state, or depict rivers and mountains, or include a compass—don’t. Start designing your map (or really any jury visual) by asking yourself “what’s the point?” What are you really trying to show. Your map should include only that information, and whatever is needed to provide essential context for your primary point.

Photographs as maps

Photographs can work well as maps, particularly when witnesses annotate the map during their testimony. If you cannot take the photograph yourself, Google Maps might be an option. Satellite views and 3-D displays give you significant control over the angle and direction of a view, so a simple screen capture might be all you need.

Photographs

By definition, photographs are visual. In a trial that is otherwise document-heavy, photos stand out. What’s more, our brains are better at identifying and remembering pictures than they are at identifying letters and words. See John Medina, BRIAN RULES 183-97 (2d ed. 2001). When presented appropriately, photographs are extremely effective for helping jurors understand, believe and remember our message.

Use relevant images

If a photograph is irrelevant to the message you’re conveying, the photo will affirmatively distract jurors as they focus on the dissonance and try to resolve it. On the other hand, photographs that are relevant to your substantive message will reinforce it, aiding jurors’ recall of the message.
Consider Federal Rule of Evidence 403 (and state counterparts)

In trial, a photo’s greatest asset can be its greatest liability. The more a photo appeals to emotion and the less direct relevance it has to the case, the bigger the risk of exclusion under Rule 403 for its prejudicial effect outweighing its probative value. To increase your chances of prevailing in a Rule 403 challenge, trust your gut (if you think it’s an emotional photo, it likely is), avoid using people’s faces (which appeal to emotion more than images of things), and consider de-emphasizing the photo on your visual.

Don’t disregard the law

If you wouldn’t be permitted to show the jury something live, don’t show it in a photo. In several cases, for example, courts have reversed convictions and remanded prosecutors for showing a booking photograph of the defendant in prison attire with the word “guilty” printed across the image. See, e.g., State v. Walter, 479 S.W.3d 118 (Mo. 2016 (en banc); State v. Walker, 341 P.2d 976 (Wash. 2015); In re Glasmann, 286 P.3d 673 (Wash 2012).

Graphics, Drawings and Diagrams

Graphics, drawings and diagrams give us tremendous control over what we’re depicting in our visuals. This is particularly helpful when a photograph or data display isn’t an option.

For instance, we might not be able to photograph a process or a method, but we can draw it.

Illustrate context and comparison through graphics

We can’t photograph an impossible view, but we can draw that, too. And when the subject does exist but a photograph would include too much clutter, we can draw or diagram it to our specifications, with as much or as little detail as we need.

Leave background details in the background

Labels and anchor lines are usually critical for an effective diagram, but make sure the explanatory graphics don’t distract too much from the message.
Where possible, eliminate the key

For jury visuals, try to label the diagram directly rather than rely on a key. The less work the jurors must do to comprehend an image and its components, the better.

Using Exhibits

As you show the jury key documents throughout trial, jurors might start developing visual memories of where key information appears on the page. When used with witnesses, you can highlight or otherwise call attention to key text or graphics, and then re-display the same visual during closing argument. And in addition to aiding the jury’s recall, showing the key exhibits during closing will bolster your credibility.

Use callouts and highlights for emphasis and visual memory

Calling out (enlarging) or highlighting key language in a document is an easy and effective way to focus the jury’s attention where you need it. In addition, if they review the document during deliberations, they’ll have a visual memory of where on the page (or within the document) the key language is located.

Combine exhibits with other communication tools to re-prove case

Using real trial exhibits and transcript testimony in combination with timelines, maps, and diagrams can boost credibility tremendously. As visuals build, exhibits can appear on screen to “re-prove” each point you’re making in the visual. The exhibits can then remain on screen or can disappear after you’ve sufficiently addressed them.

Use exhibits and transcripts for comparison and context

Displaying trial exhibits lets us credibly and directly compare evidence. By displaying evidence side by side, we can effectively compare before and after photos, an altered document with the original, or statements in testimony, emails or text messages.
Animations and Simulations

Anything that moves on the slide is an animation, and a simulation is a recreation of an event. Both can be very effective for accomplishing all of our jury goals. Just use them in moderation, and in a relevant way.

Use animation to control focus and aid understanding

When animation is used in a purposeful, relevant way, it can be extraordinarily helpful.

We can use animation to call attention to a location, trace a path, or explain a process. Animation can emphasize changes in an object, or walk jurors through a step-by-step procedure. We can even use animation to depict scientific or mathematical concepts, such as the effects of erosion, parts per billion or a double-blind control experiment.

The potential uses for animation span a broad range, but however you use it, make sure you’re aiming to help jurors understand material or focus their attention on meaningful content.

Don’t compete with motion

If something is moving on your visual, that is where the jury will look and focus their attention. If you talk about something else at the same time, jurors will miss your message. So, when something is moving on the slide, stop talking or talk about what’s moving.

Pay attention to tone

Computer software programs allow us to add animation to our trial visuals both quickly and easily. Fight the instinct to make something bounce or zoom around the screen just because we can. Animation for its own sake does nothing to aid understanding; to the contrary, it cheapens the look and tone of the presentation and could alienate your jurors.

Basics of Graphic Design

Effective visuals require effective design. Before the jury ever gets to the substance of our message, where and how the pieces of the message are placed on the visual impacts how clearly the information is received. If jurors are overwhelmed, confused or frustrated by the design, then even if they remember the image, they won’t remember the message. It’s like remembering a vivid TV commercial, but not what was for sale.

Graphic designers have the training and experience to create powerful, professional, and memorable visuals. Those who have created visuals for jury trials have seen many examples of how lawyers have effectively translated case themes into visual images. Whenever possible, I have a graphic designer on my trial team. But sometimes, you just have to do it yourself. Not having a budget for a graphic designer is never an excuse for having poor visuals or none at all. Consider the following design concepts whenever you’re creating jury visuals, whether high- or low-tech.
**Typography**

Selecting a typeface for your visuals can seem overwhelming. The typeface and text spacing you choose for your presentation impacts its legibility and, therefore, the jury’s overall comprehension and understanding of your message.

**Make sure text is legible**

The process of selecting a typeface, and its attendant characteristics, is an important one. Your selection of font, point size and even color will impact how well your jury is able to read the text on your visuals. Go with your gut. If it looks hard to read, it probably is. Make sure the text color sufficiently contrasts with the background, avoid center-aligning text (it’s the least organized alignment), and avoid using all capital letters, which takes up more space and slows reading comprehension.

**Be consistent with typography**

Select one or two fonts to use throughout your presentation. Frequently changing fonts is unnecessary and distracting. Likewise, mixing a serifed font with a sans-serif font can look out of place. Sometimes a heading in a sans-serif font with body text in a serifed font can work well, but as a general matter, pick one font and stick with it.

**Avoid vertical text**

Unless you’re typing in a language that reads vertically, don’t align your text vertically in your trial visuals. Exhibit numbers, axis labels, witness names (e.g., next to transcripts or emails), and headings should read left to right, the way Western cultures are used to reading.

**Alignment**

Alignment defines how all the elements on your visual are lined up with each other. When elements are placed randomly around the visual, the viewer’s eye must jump around to comprehend everything. Everything need not be aligned along a single line, but when there are multiple elements on your slide, connect each element on at least one side to some other element. Effective alignment organizes the elements and improves the flow of the visual.

Although our default should be to align elements, occasionally breaking alignment can add interest and emotion to the visual and emphasize substantive points. Just use this technique in moderation so it doesn’t lose its impact.

**Proximity**

Proximity is about the spacing between elements on our slides. Intellectually, we assume that items grouped together have some similarity or relationship to each other. Conversely, we assume that items spaced apart are dissimilar or unrelated. The spacing between elements thus impacts jurors’ immediate understanding of their relationships. Knowing jurors will make these relationship assumptions naturally, we can use proximity affirmatively as a communication tool, consciously designing our slides to reflect relationships accurately.

**Contrast**

Contrast is what it sounds like—making things look different from each other. Contrast is perceived almost immediately, and as soon as it’s perceived, it focuses the jurors’ attention by guiding them through the visual. To be effective, contrast must be significant enough to be perceived. At the same time, though, too much contrast will be counter-productive—if everything on the slide is a different color, or all text is bolded or italicized, we’re back to square one. Jurors are overwhelmed and don’t know where to look first.
White Space
Everything on your slide commands some of the jurors’ attention. But in order for the positive elements (headings, graphics, etc.) to stand out, they need to contrast with the rest of the slide. That’s where white space comes in. Also called clear, empty, blank or negative space, white space is the area on your slide that’s not taken up with text or graphics.

Having some blank areas of the slide helps direct the viewer to the positive elements. So when you see white space on your slide, fight the instinct to fill it. That space serves a critical design function that allows viewers to perceive the rest of the message on your visual.

Repetition
Repetition is consistency. We repeat elements all the time without even thinking about it, such as using the same font, text size and heading style throughout a presentation. But we can maximize the effectiveness of our visuals by using repetition purposefully, rather than stumbling into it by accident.

For example, repeating the style of layouts—where information appears from slide to slide—helps the jury process information on a new slide quickly and easily. By using the same design format and structure from one slide to the next, we allow the viewers to learn the design once and then focus their attention on the substantive changes from slide to slide.

Color
Psychologists, advertisers and graphic artists consider color one of the most important design elements there is. It is unique in its ability to attract and hold attention, code information, heighten emotional involvement and help us remember what we have seen. We also sense color broadly and immediately, and we process color faster and at a greater distance than shapes, patterns or words. We must use color strategically in our trial visuals to focus attention, organize our message and substantively emphasize themes.

Selecting a color scheme for a presentation can be daunting, particularly for non-designers. The colors need to contrast enough to be legible, but must also set the right tone and generally “look good” together. One resource for ideas on color palette is the Adobe Color web site (https://color.adobe.com). You can start with a single color, inputting it as a search term or uploading it in an image, and the web site will suggest other colors to use with it. Alternatively, you can search for a theme, such as “industrial” or “greed,” and the site will suggest full palettes to capture the theme. You can even upload an image and select exact colors to match it, then adjust the colors to better capture the tone of your presentation. However you use the site, it’s a great starting point when you’re staring at a blank screen or piece of paper and need some help figuring out colors to use to convey your messages.

Strategic Considerations
Spotting Misleading Visuals
There are many ways to manipulate the visual display of data. For example, pie and bar graphs with three-dimensional elements can optically distort data. Whichever slice or bar appears closer to the viewer is emphasized and takes up more space simply because it’s depicted in three dimensions, and the data it represents may appear larger than it should. Here, the purple slice in each graph represents the same percentage of the pie.
Another common example of a misleading visual is a graph with an unreasonable axis range. Graphics with items or events depicted in the right order but which fail to account for the magnitude of the differences between them is also misleading. Additionally, visuals can mislead when they imply false legal, logical or factual comparisons. Watch out for these tactics, whether they’re presented through high- or low-tech methods.

**Practical Considerations for Creating Visuals**

Creating jury visuals isn’t just a luxury. Planning how to visually depict your case themes is itself trial preparation. Thinking through trial visuals helps you think through your case. As you figure out how to visually break down complex concepts, key trial themes and important facts and evidence, you’re also determining how to best present your case to the jury.

**Start preparing early**

Preparing jury visuals should begin long before you’re preparing for trial. As you work your way through a case, think about how a visual can help explain a concept or solidify a theme. If you find yourself drawing something to understand it better yourself, or to explain it to a colleague, that drawing might make for an effective jury visual down the road. Think about visuals that might be effective during expert and fact witness examinations, as well. If you maintain a file of visual ideas throughout the case, you’ll be well-positioned when it comes time to select and create your final trial slides.

**Carefully proofread the substance of your visuals**

Proofreading for typographical errors is often second nature, but make sure to carefully check your trial visuals for other possible substantive errors. Ensure that any testimony or documents you display are attributed to the correct person or entity. Take a close look at maps, charts and graphs to make sure locations are labeled correctly, the right people are in the right places on organizational charts, and the data looks correct in your graphs. Typos look sloppy and unprofessional, but substantive errors can be fatal to your credibility. Fortunately, they’re easy to avoid.

**Carefully proofread the design of your visuals**

In addition to reviewing the substance of your visuals for errors, look for and correct any design errors. Click through builds to ensure that information appears gradually and in the right order, and that information left up from slide to slide remains identical throughout the build. Make sure documents and call-outs are legible. And make sure you haven’t placed a design element (e.g., a text box) on a slide in a way that it unintentionally obscures another element (e.g., a material portion of a graph).

**Practical Considerations for Using Visuals**

Thanks to high-tech courtrooms, many of our jury visuals will be in the form of slides created with computer software and displayed on screens. But not everything we show the jury needs to be high-tech or shown in a high-tech way. Whiteboards, flip charts, document cameras (ELMOS) and foam board enlargements have tremendous value, and even some significant advantages over high-tech options.
For instance, enlarged boards may allow for interaction with witnesses or the jury; we can approach witnesses with enlarged images to mark key information, and we can walk the enlargement along the jury box during closing argument (all with the court’s permission, of course). With a whiteboard or a blank piece of paper on a document camera, we can create visuals right before the jury’s eyes, breaking up the monotony of trial. Low-tech options can be tremendously effective for capturing and holding the viewers’ interest, especially when they contrast with an otherwise high-tech presentation.

**Learn the equipment in your courtroom and test your visuals**

Whenever you can, visit your courtroom in advance of trial to test the equipment (and learn to use it), and to view your presentation. If you find certain visuals difficult to read in the courtroom lighting, you can improve contrast in your slides or enlarge key text or foam boards to make sure all the jurors can see your visuals from where they’re sitting.

**Considerations for spontaneous visuals**

Document cameras, white boards and flip charts allow us to create visuals spontaneously (or seemingly spontaneously) during witness testimony. When taking this approach, make sure to write legibly, and write enough to make sense later. If note-taking jurors copy down what you’ve written, you’ll want them to remember your point in days, weeks or months when they retire to deliberate. If just writing “false” or “Miller” or “causation”—especially with no heading—might be confusing down the road, make sure to write more on the page.

Additionally, you may need to plan these seemingly “spontaneous” visuals in advance to avoid running out of space, writing something you didn’t mean to write, or creating a freeform map or diagram that confuses more than it clarifies.

**Fill-in-the-blank and “reveal” designs**

Just as we gradually build information displayed on PowerPoint slides, we can build information presented on a preprinted enlargement by revealing one portion of the visual at a time. For example, we can pre-print a complex verdict form onto an enlarged board and cover each question with a strip of poster board. As each piece is removed, another question is revealed. We can then write in the answer after we discuss the question.

Another option is a fill-in-the-blank design. We can fill in damages figures on a chart with an expert witness. We can list the elements of a claim during our opening statement, then re-use the visual in closing, filling in blanks with a “yes” or “no” as we review the evidence. Or if we know several witnesses will testify about their observations—answering questions such as “what color was the car?” or “how many people were in the store?”—we can list key questions down the left side of a chart and witness names across the top, writing in their testimony as we use the visual with each witness.

**Legal Considerations**

With no federal evidentiary rules and only a few state rules that directly define or govern demonstratives, courts analyze the use of jury visuals in various ways. Some allow lawyers tremendous latitude; others do not allow visuals at all. Some permit the jury to review demonstratives during deliberations as a matter of course; others require their admission into evidence before sending jury visuals into the deliberation room.

The propriety of any particular visual will be assessed on a case-by-case basis. Despite the confusion and inconsistency, there are recurring considerations that arise when demonstratives are at issue. The most common of those considerations are discussed below.
Federal Rule of Evidence 403

As with any other exhibit, demonstratives are subject to Rule 403 and its state equivalents. Under the rule, the court may prohibit the use of a demonstrative if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. A court’s decision on exclusion typically comes down to case facts and how the jury is likely to perceive the demonstrative in the larger case context.

Photographs are ripe for Rule 403 challenges in light of their natural tendency to appeal to emotion. And a demonstrative using an emotional but otherwise admissible evidentiary photograph can violate Rule 403 when it is paired with unfairly prejudicial text. See, e.g., Spence v. State, 129 A.3d 212 (Del. 2015) (in closing argument, government showed photo in evidence of victim’s body “splayed and bloodied” with superimposed text stating that the defendant’s “actions led to . . . Terror . . . Fear . . . And to the ultimate crime . . . MURDER”; court held the visual was improper because it “served no purpose other than to attempt to inflame the jury”).

Similarly, as previously noted in the section on photographs as a communication tool, courts have reversed convictions where the government showed a booking photo of the defendant in prison attire (which the defendant could not have been forced to appear in at trial) with the word “guilty” printed across the image. In particular, the image at right was used by the government in State v. Walter, 479 S.W.3d 118 (Mo. 2016 (en banc), and it resulted in a reversed conviction and new trial.

Notice

There are no federal rules governing when or whether we must exchange demonstratives with our opponents, though there are such local rules in some jurisdictions. See, e.g., Metcalf v. Bocho, 200 F. App’x 635, 639 (9th Cir. 2006) (relying on Local Rule 16-2.10 for the Central District of California, which required parties to exchange pedagogical aids at least ten days before trial); Me. R. Evid. 616 (opposing counsel must be given a “reasonable opportunity to object” to illustrative aids). At least four federal jurisdictions have applied the pretrial disclosure requirements of Federal Rule of Civil Procedure 26 to demonstratives used with expert witnesses, with varying outcomes. See Dahlberg v. MCT Transp., LLC, 571 F.App’x 641 (10th Cir. 2014); Lekkas v. Mitsubishi Motors Corp., No. 97 C 6070, 2005 WL 2989899, at *1 (N.D. Ill. Nov. 3, 2005); Bradshaw v. FFE Transp. Servs., Inc., 715 F.3d 1104 (8th Cir. 2013); Estate of Thompson v. Kawasaki Heavy Indus., Ltd., 291 F.R.D. 297 (N.D. Iowa 2013).

Often, courts are willing to defer to parties’ agreements on the timing of any demonstrative exhibit exchange. When that’s the case, think through the practical realities. Consider when you’ll likely finish your visuals, when you really need to see the other side’s visuals, and how late you want to give your opponent your slides, especially if they provide a roadmap to your case or your arguments.

Laying a foundation for a demonstrative exhibit is generally straightforward. If there’s a foundation for the underlying evidence the visual is illustrating, there is usually a foundation for the explanatory visual. Courts tend to require less of a foundation for an illustrative visual than they require for admitting the underlying evidence. But overall, the admissibility—or even use—of a demonstrative in many cases has hinged on whether the proponent of the evidence establishes that it is a true and accurate representation of what it purports to represent. See, e.g., Dahlberg v. MCT Transp., LLC, 571 F. App’x 641, 647 (10th Cir. 2014); Bradshaw v. FFE Transp. Servs., Inc., 715 F.3d 1104, 1109–10 (8th Cir. 2013); Young v. Oury, 827 N.W.2d 561, 565–66 (S.D. Miss. July 27, 2011); Stumbaugh v. Am. Com. Lines LLC, No. 08-1669, 2009 WL 2922312, at *6 (E.D. La. Sept. 9, 2009); State v. Ehrlick, 354 P.3d 462, 475 (Idaho 2015); State v. Williams, 324 P.3d 1078, 1114 (Kan. 2014).

Hearsay

If the substance on a demonstrative is inadmissible hearsay, the evidentiary problem isn’t cured by putting the statement onto a visual and deeming it “illustrative.” The contrary is also true: if a visual just displays information already in evidence, then the visual itself is generally deemed permissible without violating hearsay rules. See, e.g., Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 342 (Tex. 1998). When a demonstrative illustrates information that is not itself in evidence, whether the visual is permissible is case-specific. See, e.g., Diaz v. State, 934 N.W.2d 1089 (Ind. 2010); Hinlicky v. Dreyfuss, 848 N.E.2d 1285 (N.Y. 2006); Baker v. State, 177 S.W.3d 113 (Tex. 2005).