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## **Briefing Visually**

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## Table of Contents

Summary .....	3
It is time to start using visuals in briefs .....	3
Five ways to use visuals in briefs .....	4
1. Photos as argument .....	4
2. Photos as useful context.....	8
3. Charts and graphs to simplify complex relationships and processes.....	9
4. Timelines .....	11
5. Charts to visualize legal reasoning .....	12
Eight tips for using visuals in written argument .....	13
1. Brainstorm possibilities for visuals. ....	13
2. Use visuals that simplify, not complicate. ....	13
3. Don't be cheesy. ....	13
4. Visuals should be accurate and honest. ....	14
5. When needed, provide record support. ....	14
6. For simple charts and graphs, learn to use the SmartArt function in MS Word.....	14
7. Put visuals in the text of the brief rather than attaching as exhibits. ....	15
8. Seek professional help. ....	15
Conclusion .....	16

## Summary

For some types of information and legal arguments, visual images can inform and persuade judges more effectively and persuasively than the written word. This paper illustrates different ways in which visuals can be used in appellate briefs. And it offers tips for creating effective visuals.

### It is time to start using visuals in briefs

Much has been written about the importance of visual images in persuading juries. And most trial lawyers use visuals during trial. But little has been written about using visuals in appellate briefs or other written argument to persuade courts. And rare is the brief that actually uses them.

Why have lawyers hesitated to use visuals in appellate briefs and other written argument?

One reason is that briefs must rely largely on words, sentences, and paragraphs. Our law—statutes, rules, and court opinions—consists of words. It is difficult to explain a legal rule without resorting to the language of the rule itself.

A second reason has to do with technology. For decades, legal filings were prepared on typewriters. In typewritten documents, it was difficult to insert and manipulate visuals. Nor did this change for the first 20 years or so years that computers and word processing were used in legal offices. Programs such as MS Word and Word Perfect did not allow most computer users to insert images until the last decade or so. Since then, we have had the technology to use images in our filings, but it has not occurred to most lawyers to use them. Or they have been held back by a long tradition of relying solely on words to create briefs.

The third reason is tradition. Lawyers have always relied exclusively on words. And they continue to do so. Professor Elizabeth Porter explains:

Litigants, scholars, and courts have been rebooting the same formalist templates for over a century—templates that were formed before widespread use of the camera, never mind the computer. Outside of trial, where image-driven advocacy has a long history, legal practice begins and ends with text.

Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1687 (2014).

It is time to re-think our exclusive reliance on words in legal argument. Visual information is a key component of persuasion. Images grab our attention. The effect of an effective image can be almost immediate—unlike words and sentences which require time and energy to read and process. Plus, an effective image can stick in a judge’s mind much longer than even a well-crafted sentence.

Additionally, as law is applied to a more complex, data-driven world, words alone are often inadequate. Complex information such as elaborate relationships or statistical analysis can often be better understood when it is represented visually rather than through words.

Consider how we receive information online. Most websites devote as much space to images as they do to words in order to inform and persuade. That is because web designers have studied website users and learned that visuals are often required to communicate.

Even judges have begun to complain about the reluctance of lawyers to use visuals in briefs. For instance, as Seventh Circuit Judge Richard Posner observes, “Yet so disfavored are pictures, maps, objects, and diagrams in appellate briefs ... that I’ve said some lawyers think a word is worth a thousand pictures.” Richard A. Posner, *REFLECTIONS ON JUDGING* 143 (2013). Judge Posner, who may use more images in his opinions than any other American judge, encourages lawyers to do the same.

The question is no longer whether to start using visuals in legal briefs, but how to use images in briefs. Legal writing books and lectures have largely ignored the question. “Even now, only a few commentators have taken genuine interest in visual persuasion outside of trial.” Porter, *supra* p. 1, at 1715. This paper seeks to explore ways to effectively use visuals in briefs.

## **Five ways to use visuals in briefs**

Incorporating visuals into a brief is now easy with computer technology. To use images effectively, it helps to know how they can be used to convey ideas in place of words. The following are some illustrations of effective ways to use visuals in legal argument.

### **1. Photos as argument**

A photo can be the most effective argument appeal. As Bryan Garner puts it, “A picture can be worth . . . well, it can help win a lawsuit.” Bryan Garner, *The Winning Brief* 328 (2d ed. 2004).

I learned this lesson in 2007 when I realized words just would not describe the scene of an accident in a premises-liability case. My client had been riding a motorcycle on a commercial motorcycle track when he was impaled on a tree stump just on the other side of a raised turn in the track. The issue was whether the stump on the other side of the turn was an inherently dangerous condition.

The record contained testimony that the stump was on the other side of the turn, and that riders frequently crashed, falling at the edge of that turn. But the testimony did not describe the stump well. Nor did the testimony provide much support for the argument that the stump was inherently dangerous.

Fortunately, the record contained a photograph of the sharp stump, which immediately gave me a visceral reaction. I knew the argument of the brief depended, not on writing about the stump, but on *showing* the court that stump. But because my word-processing program could not

incorporate external image files, I had to do it manually. I left a large space in the argument, cut a copy of the photo of the stump with scissors, and taped it into the brief.



Similarly, in a recent suit against Apple Inc., the FTC effectively used color images in its complaint in order to demonstrate that Apple was marketing in-app purchase to young children. Complaint at 3, 6, *In re Apple Inc.*, FTC File NO. 112-3108, C-444 (F.T.C. Mar. 25, 2014), available at <https://www.ftc.gov/system/files/documents/cases/140327applecmpt.pdf>.



Given these images, any argument by Apple that it was not marketing the app to young children “would seem not only discordant, but disingenuous.” Porter, *supra* p. 1, at 1726.

If photographic evidence is worth citing, it is worth pasting it directly into a brief. Today’s word processing programs make it easy to copy any photo from the digital record into the brief. If a photo may be important, don’t relegate it to an appendix or a record cite.

What about photos that are not in the record? Generally, an appellate court cannot consider evidence that is not in the record. *Siefkas v. Siefkas*, 902 S.W.2d 72, 74 (Tex. App.—El Paso 1995, no writ). Yet there are at least a few situations in which photos not introduced as evidence may be proper in an appellate brief.

First, photos that do not concern the facts and circumstances of a case may be proper as a rhetorical tool. Advocates and courts have long cited literature and other arts to make rhetorical points. For instance, Justice Pope of the Texas Supreme Court in one opinion quoted Shakespeare, John Milton, William Wordsworth, Lord Byron, Hendry David Thoreau, among other authors to make a point about exaggeration. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 842 & n.1 (Tex. 1979). Similarly, Justice Willett in a concurring and dissenting opinion cited a YouTube video clip from *The Pink Panther Strikes Again* to make a rhetorical point about the danger of departing from plain language. *FKM Partnership, Ltd. v. Board of Regents*, 255 S.W.3d 619, 639 n.7 (2008).

Photos can be used the same way. When photos are used rhetorically, they are not evidence and their factual accuracy is not important. Instead, photos used rhetorically are intended to persuade, usually with regard to the correct application of the law rather than a decision about the facts.

Second, like some other evidence, some photos may be properly used for the purpose of judicial notice for the first time on appeal. The Texas Rules of Evidence allow courts to take judicial notice for the first time on appeal. Rule 201 governs “judicial notice of adjudicative facts” – the type of facts that typically are decided by the trier of facts. TEX. R. EVID. 201(a). The rule expressly provides, “Judicial notice may be taken at any stage of the proceeding.” TEX. R. EVID. 201(f). In other words, judicial notice can, and should, be taken for the first time on appeal. *Office of Pub. Util. Counsel v. Public Util. Comm’n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994) (holding that court of appeals erred by refusing to take judicial notice of a PUC order). Some photos may be so well known that they qualify for judicial notice.

For instance, Judge Posner used an iconic photo of Bob Marley to make a point about the facts in an appeal. In a prisoner-rights case regarding the forcible shearing of dreadlocks, Posner argued that “[d]readlocks can attain a formidable length and density” and can be used to hide weapons. *Grayson v. Schuler*, 666 F.3d 450, 452 (7th Cir. 2012). Most legal readers might not immediately agree with that argument as written. But most legal readers are aware of this iconic photo of Bob Marley that Posner copied from the Internet and included in his opinion:



*Id.* This photo shows, much better than words can explain, how thick dreadlocks can grow and how they might be used to conceal weapons.

Whether a photo is in the record, or when a photo outside the record is properly used, it helps make the argument more persuasively than mere words could. The photo of the sharp stump near the motorcycle track demonstrates an inherently dangerous condition as the viewer imagines a rider falling on it. And the photo of dreadlocks demonstrates that they can be thick enough to conceal a knife. In both cases, the reader can see the truth of the argument almost immediately.



## 2. Photos as useful context

Even when the argument does not turn on a photo, it can help provide useful context to the court. A photo can be the best tool to help the court *see* the scene or context of an event.

Judge Posner used an aerial photo in a Section 1983 case where the plaintiff had been arrested for criminal trespass while walking across a police parking lot. The defendant testified that he had walked through the parking lot because it was the quickest way to get from the train station, where he had arrived, to the police station. But that was hard to understand without seeing the area layout:



*Sroga v. Weiglen*, 649 F.3d 604, 608 (7th Cir. 2011). As Judge Posner explained, “Without the aerial photo, it would have been difficult to understand how the plaintiff could have thought it permissible to walk through the police parking lot.” POSNER, REFLECTIONS ON JUDGING at 143.

Similarly, I used a photo from the record to describe a scene in an insurance coverage case involving hurricane damage to a shallow-water oil and gas facility off the coast of Louisiana. Witness testimony focused on leaking tanks and oil spills. But the photos showed a different scene:





The argument did not turn on the photo. But the photo provided useful context because my client's position had been that post-hurricane work at the site was wreckage removal work, which my client's policy did not cover, rather than pollution clean-up costs, which the policy did cover. The photo of the wreckage made the point by showing the wreckage rather than leaking tanks.

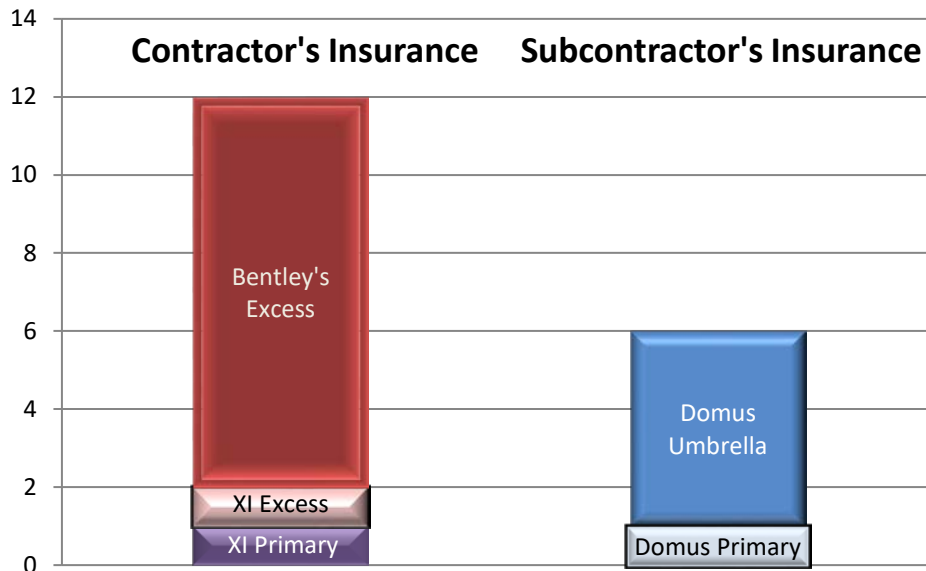
### **3. Charts and graphs to simplify complex relationships and processes**

Some types of complex information are easier to *see* than *read*. As statistician Edward Tufte explains, "Often the most effective way to describe, explore, and summarize a set of numbers—even a very large set—is to look at pictures of those numbers." EDWARD R. TUFTE, *THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION* (2d ed. 2013).

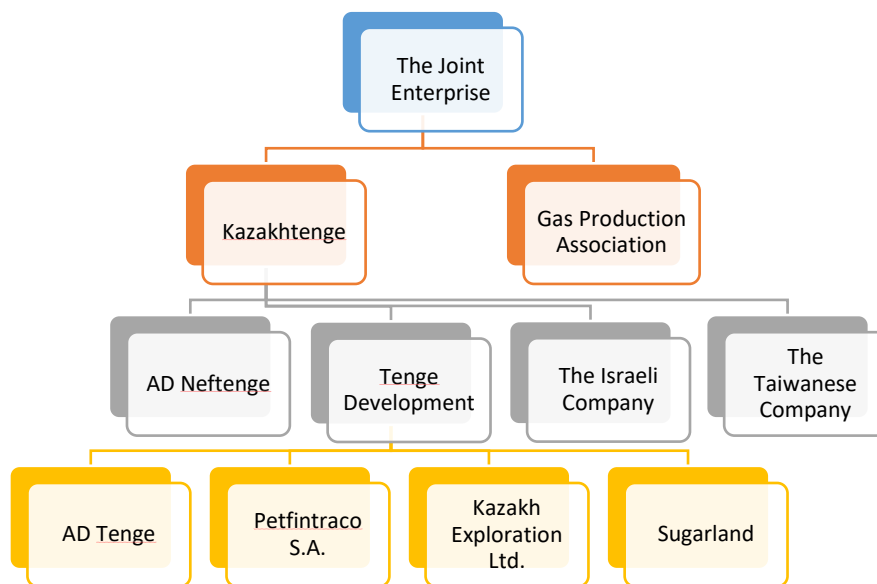
I once struggled to explain a complicated insurance structure that applied to a catastrophic accident. The defendant was insured by two towers of insurance with multiple layers of coverage, as I tried to explain—not very clearly—in writing:

The Contractor's tower of insurance included three policies. The first is the XI Primary Policy, which required Contractor to pay a self-insured retention for the first \$500,000 in losses. After the \$500,000 self-insured retention, the XI Primary Policy provided \$500,000 in coverage, but it also had a \$500,000 deductible. The second was the XI Excess Policy, which provided \$1 million of excess coverage. This coverage was for losses in excess of the XI Primary Policy, and it followed the terms and conditions of the Primary Policy. The third is the Bentley Excess Policy, which provided \$10 million of excess coverage. This coverage was not for losses in excess of any particular underlying policy, but instead was excess of the underlying amount of \$2 million. The Subcontractor had two policies with Domus, a \$1 million primary policy and a \$5 million umbrella policy.

This was much easier to show with a graph:



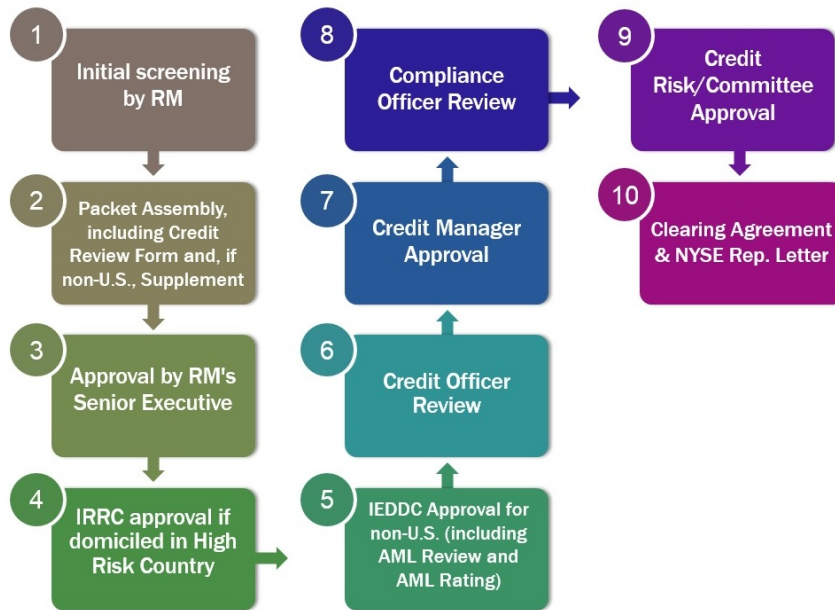
Similarly, written language often fails to communicate effectively a complex set of relationships, such as a corporate organizational structure. In one opinion, Justice Frost of the Fourteenth Court of Appeals solved the problem with a graphic:



*See Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C.*, 207 S.W.3d 801, 805 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (the graphics have been modified slightly for this paper).

Graphics also can help explain a complex process. For instance:

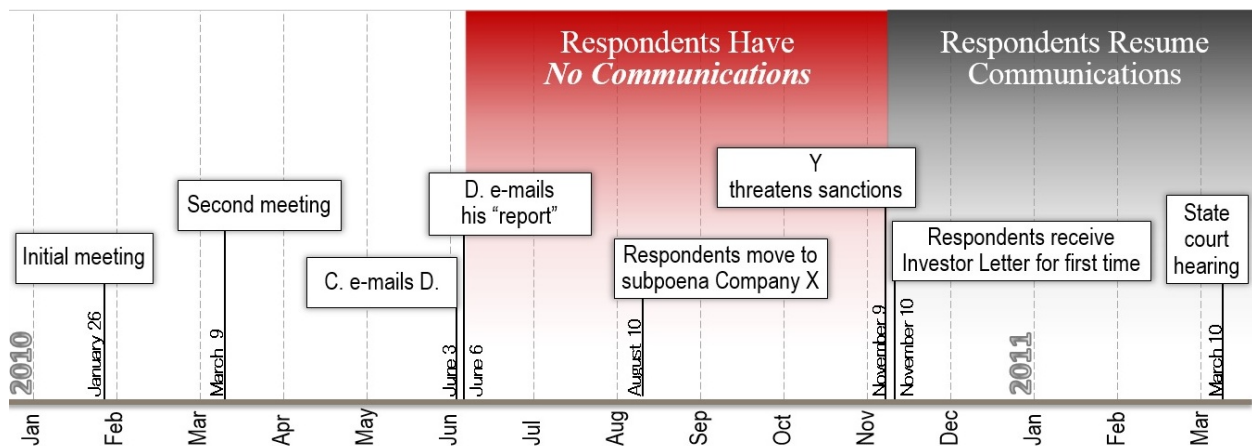
## IBD Approval Process



Graphic courtesy of Francesca Cerrato, Legal Media Inc., Houston.

### 4. Timelines

In almost every complex commercial trial, at least one party uses a graphic timeline. Yet, in briefs, most appellate lawyers forgo the graphics and try to give the chronology with words, each sentence beginning with a date (“In May 2010...”). This is a mistake. Judges benefit from the graphic timeline as much as jurors.



Graphic courtesy of Francesca Cerrato, Legal Media Inc., Houston.

Unlike written dates, a timeline helps the reader to see the duration between events, and to compare short durations to longer ones.

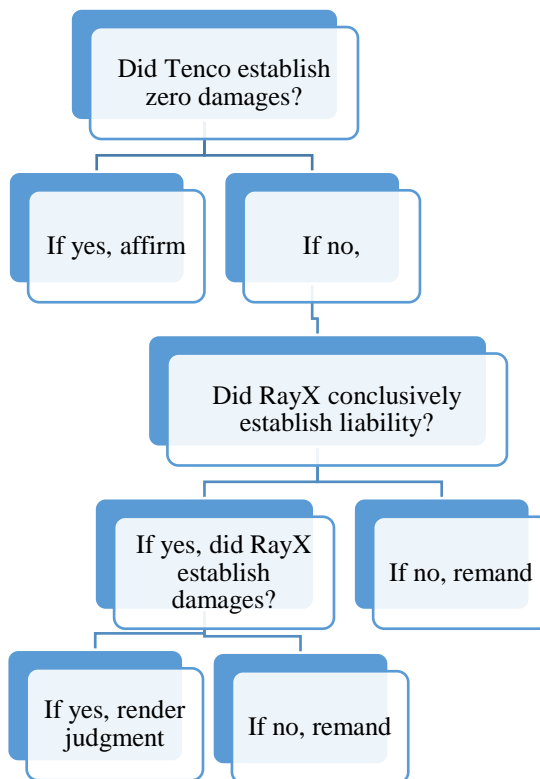
## 5. Charts to visualize legal reasoning

In some instances, legal reasoning can be more effectively conveyed with a visual. For instance, a table can show how courts apply a multi-factor legal test.

	<i>Hampton v. Cospro</i>	<i>Weiker v. Allmart</i>	<i>Rosner v. Mostate</i>	This case
Factor 1		√	√	√
Factor 2		√	√	√
Factor 3			√	√
Result	Plaintiff's verdict upheld	Defendant prevails as matter of law	Defendant prevails as matter of law	?

Even before learning about the three factors and the three cases used as examples, a reader can *see* that this case is much similar to the *Rosner* case than the *Hampton* case. The reader can see what the result should be before studying the details of the case law.

Another useful tool in cases involving complex legal analysis is the decision tree. The decision can show the order in which issues should be decided by the court:



These five categories of visuals are intended only as examples, not an exhaustive list of ways to use visuals. The type of visuals that can aid legal argument are limited only by your imagination.

### Eight tips for using visuals in written argument

**1. Brainstorm possibilities for visuals.** The best way to overcome the habit of relying on words is to approach each brief with the question, “Will this brief benefit from visuals?” Consider whether the argument involves decision trees, timelines, complex relationships, analysis of data, or comparisons of information or legal factors. All of those subjects are good candidates for visuals.

I also ask trial lawyers to send me a copy of all demonstrative visuals they used at trial. Often the same demonstrative visuals can be used just as effectively in a brief.

**2. Use visuals that simplify, not complicate.** The purpose of visuals in briefs typically should be to make information or arguments easier to understand than words. If a visual makes the information *more* complex, it fails that purpose.

For instance, this “markup” of an insurance policy provision tries to do too many things at once:

In the event the Assured becomes legally liable in a court of competent jurisdiction for an amount greater than their proportionate ownership interest, Underwriters hereon agree to provide coverage to the Assured to the extent the legal liability increases the Assured's working interest percentage liability. *If the Assured becomes legally liable for a greater percentage than their ownership interest*, the liability of Underwriters shall be the combination of the Assured's working interest percentage ownership and the additional percentage(s) for which the Assured becomes legally liable.

Rather than making the provision easier to understand, this markup raises too many questions in a reader's mind: What is the significance of the red, blue, and black ink? What is meant by underlining, italics, and highlighting? What do the circles and lines show? This example raises more questions than it answers.

A more effective visual would use fewer tools for emphasis. And in a more effective visual, the role of each tool of emphasis would be more immediately intuitive.

**3. Don't be cheesy.** Too often, in PowerPoint presentations, speakers use stock images that add nothing to the persuasiveness of the argument or the reader's comprehension. Avoid making the same mistake by using stock photos in briefs as “persuasive images” that add nothing to the argument, such as this clichéd stock photo used to represent a contract:

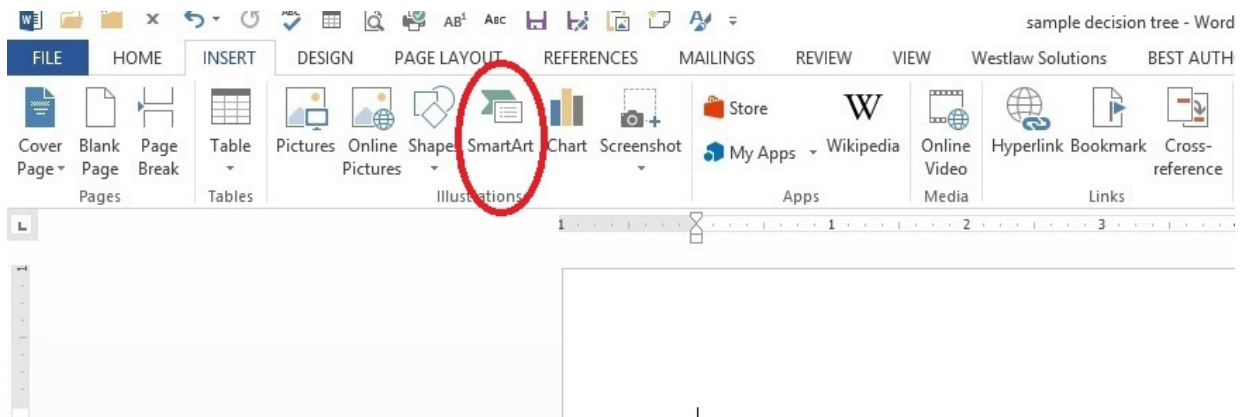


**4. Visuals should be accurate and honest.** Honesty is critical in appellate brief writing. You can lose credibility with the court by using an inaccurate characterization of facts or a legal citation. Honesty is equally important with using visuals in a brief. If your chart or graph is based on an assumption that is unsupported by the evidence, the other side may be able to capitalize on that lack of support to turn the image against you. Similarly, if the other side points out significant inaccuracies in photos, such as changes in an accident scene after the accident, the effect of using the photo can backfire.

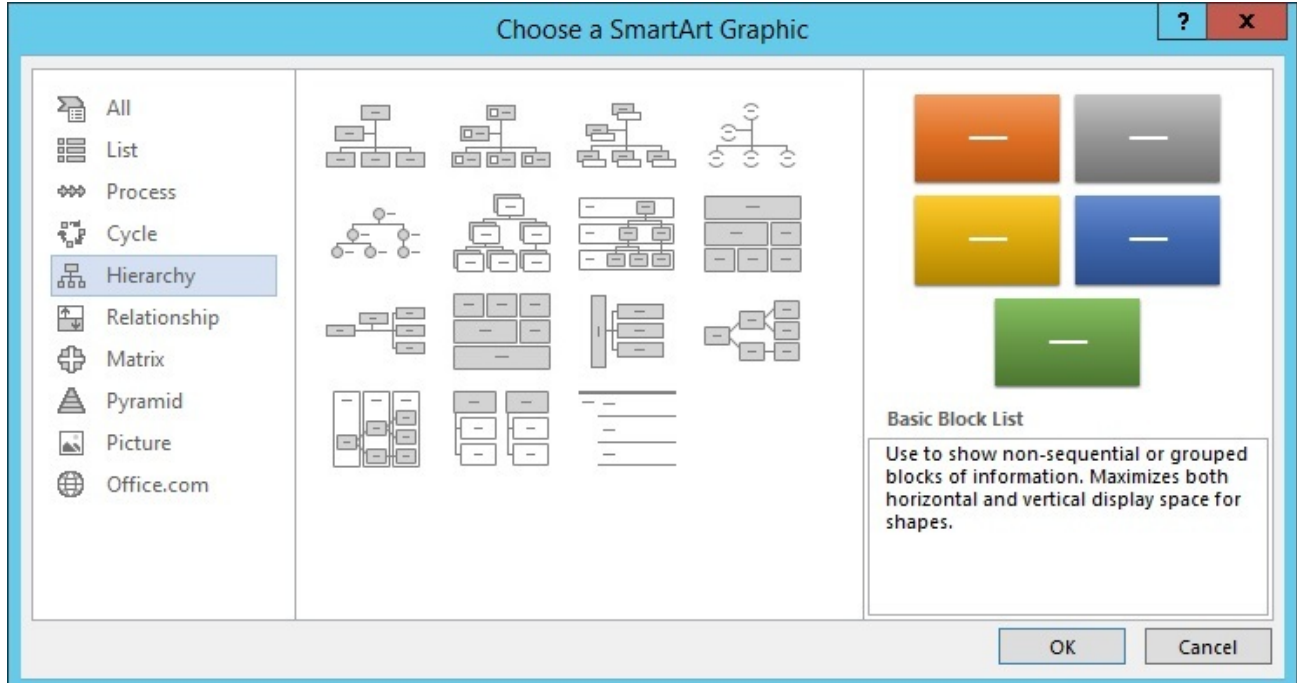
**5. When needed, provide record support.** In some instances, visuals will be actual evidence. Or they will be representations of facts in evidence. When attaching a photo from the record, include a record cite for the photo.

In other instances, you may create a new visual based other evidence in the record. When taking this approach, cite all necessary evidence to support the information in the visual. Critically, make sure the visual accurately reflects the evidence in the record.

**6. For simple charts and graphs, learn to use the SmartArt function in MS Word.** SmartArt is a function in MS Word that was used to create the graphics at the bottom of page 5 and at the top of pages 7 and 8 of this paper. The SmartArt function is found at the Insert tab:



SmartArt creates templates for a number of different types of standard images:



SmartArt is an easy function to learn and use, and is especially helpful for graphics that show relationships and functions. Tutorial information may be found at: <https://support.office.com/en-us/article/Create-a-SmartArt-graphic-fac94c93-500b-4a0a-97af-124040594842> and <http://www.gcflearnfree.org/word2013/28>.

**7. Put visuals in the text of the brief rather than attaching as exhibits.** Some lawyers feel compelled to place visuals in the appendix, as if they were mere exhibits, rather than incorporate them into the body of the brief. Remember that visuals can be the most important part of the argument, not just peripheral support. Judges reading an argument may never see the visuals if they are attached as exhibits or in an appendix. So it makes more sense to place visuals in a location where they can deliver the most immediate impact—inside the text of the written argument itself.

**8. Seek professional help.** Although lawyers can create their own basic visuals by cutting and pasting images from the record or Internet or creating simple graphs and flow charts using the SmartArt function in MS Word, some types of images require greater expertise. Legal media professionals can help make more effective visuals than I can by:

- Analyzing complex data and information in order to convey it visually;
- envisioning effective ways to communicate data visually; and
- designing cleaner, more professional-looking graphics.



## **Conclusion**

Effective visuals should be a key part of appellate briefs. Despite the linguistic nature of legal rules and precedent, visuals can make facts, relationships, processes, and certain types of reasoning easier to see and understand than words. Appellate lawyers should approach every brief by asking whether visuals might make the argument easier to understand or more persuasive.