

BRIEFING BEYOND WORDS

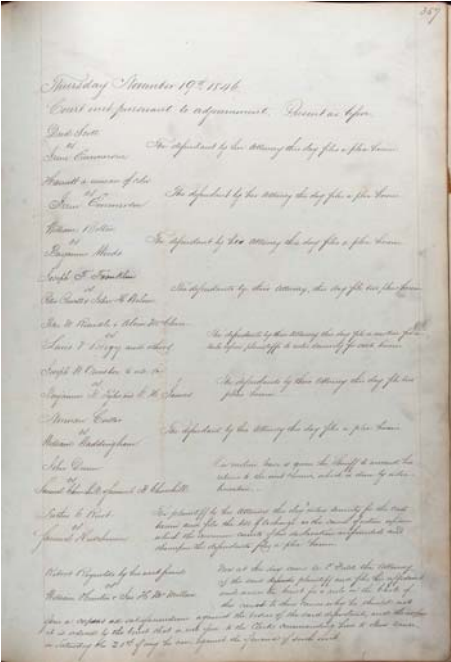
Mark Trachtenberg

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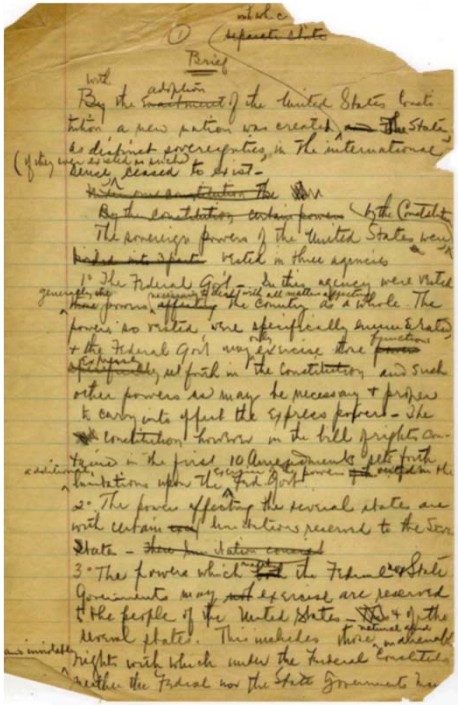
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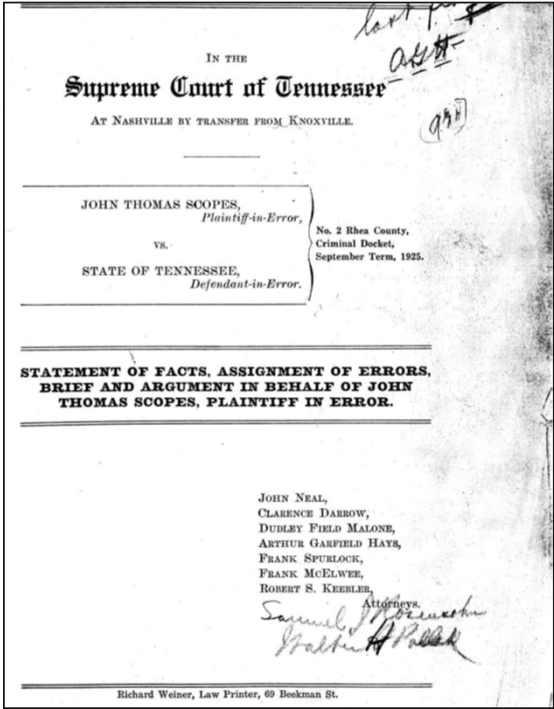
Briefing with Just Words



Dred Scott complaint



Trial brief in Scopes Monkey case



Tennessee Supreme Court brief in Scopes Monkey case

510 The Yale Law Journal [Vol. 109: 507]

crime for two different reasons: a greater sensitivity to harm and a greater likelihood of becoming a victim. Individuals who fall into the former category may be labeled "extra-sensitive victims," and individuals who belong to the latter may be called "high-risk victims."

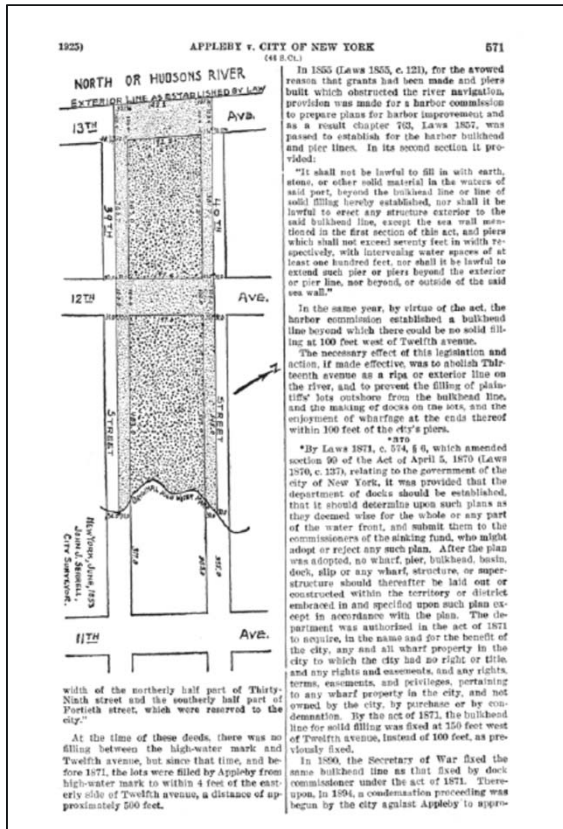
A state may address the problem of vulnerable victims in one of two ways. First, it may impose harsher sanctions on those who commit crimes against vulnerable victims. Second, it may devote more resources to identifying and prosecuting individuals who attack such victims. While both strategies are likely to discourage attacks on vulnerable victims and thereby to provide them with greater protection, the latter strategy may sometimes be infeasible or too costly. Therefore, equalizing protection through the imposition of harsher sanctions may sometimes be the only way by which the state can provide vulnerable victims with more protection and consequently equalize their vulnerability to that of other potential victims.

Yet the principle of equalizing protection against crime should be constrained in certain ways. The fair distribution of protection does not require absolute equality of the expected costs of crime. Under a radical interpretation, equal protection against crime might be understood to require the state to equalize the expected costs of crime for all potential victims. This view of equality would imply a duty on the part of the state to address any vulnerability to crime, regardless of its source or reason, and to place all of its citizens on equal footing in terms of their exposure to crime. But such a radically egalitarian view cannot provide a solid basis for understanding the nature of criminal law; nor can it be morally justified. Vulnerability to crime is a function of myriad factors such as wealth, age, attitude toward risk, life experience, and physical and intellectual prowess. Not all of these factors should be taken into account by the state. Some disparities in the vulnerability to crime depend on the investment in precautions by the victim herself. Other disparities may be grounded in luck and other factors that do not mandate interference by the state. The state cannot be reasonably expected to annul all of the disparities in the vulnerability of different potential victims of crime.

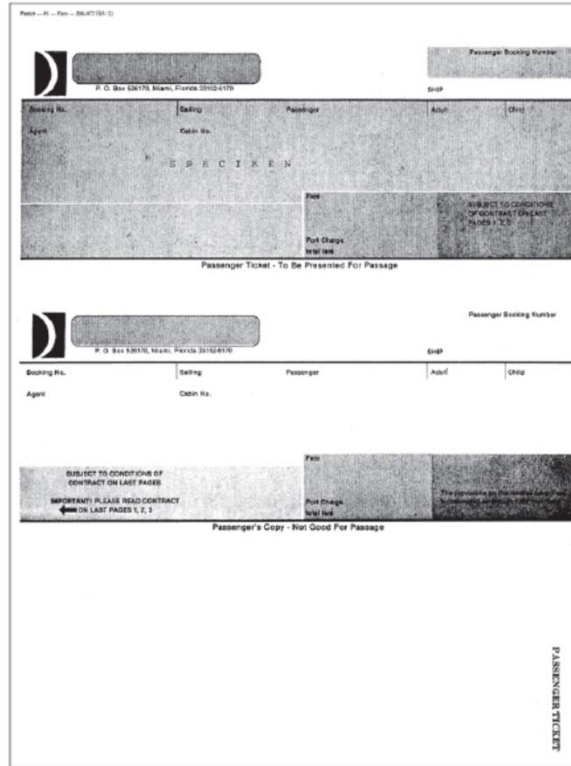
The implausibility of the radical egalitarian view should not, however, prod one to endorse the radically inegalitarian view, namely, the view that the state should be blind to differences in vulnerability among victims. In fact, the state's failure to redress some of the differences in the expected costs of crime among different potential victims is intolerable and unjust. This Essay argues, therefore, for an intermediate position, one which requires the state to annul certain disparities in the vulnerability of different victims while allowing other disparities to remain. More specifically, we take the position that, at a minimum, a liberal state must redress disparities in vulnerability to crime that result from certain immutable personal characteristics of the victim.

Every law journal article ever...

SCOTUS Visuals in the Pre-digital Age



Appleby v. City of NY (1926)



Carnival Cruise Lines, Inc. v. Schute (1991)



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Podcasts

Video

ENGLISH ESPAÑOL 中文

The New York Times

Wednesday, May 27, 2020

World U.S. Politics N.Y. Business Opinion Tech Science Health Sports Arts Books Style Food Travel Magazine T Magazine Real Estate **Video**

The Daily Listen to 'The Daily' Can the Postal Service survive the pandemic?

DealBook In the 'DealBook' Newsletter One giant leap for SpaceX.

The Book Review Podcast Jia Lynn Yang talks about "One Mighty and Irresistible Tide."

S&P 500 +0.95% ↑
Dow +1.46% ↑
Nasdaq +0.41% ↑

82°F
83° 64°
Dallas, TX

California Becomes Fourth State With 100,000 Known Cases

- Other parts of the country also reported an increasing number of infections as the nation approached 100,000 deaths from the coronavirus.
- The uptick of infections came as California's governor, Gavin Newsom, made moves to loosen restrictions in some areas. Here's the latest.

Live 25m ago 186 comments



Feature World Cases U.S. Cases Markets

Live Updates a few seconds ago

Global

- An aid package for its worst crisis could make the E.U. look more like a central government than ever.
- France is no longer allowing hydroxychloroquine as a treatment.
- As frustration with lockdown mounts, Merkel's control over an orderly reopening appears to be slipping.

Economy

- Disney World will begin to reopen in July.
- Boeing will lay off 6,700 workers, part of a plan to cut 10 percent of its work force.
- One giant leap for the private space business.

New York

- Cuomo met with Trump in Washington.
- New Jersey is ramping up testing and contact tracing.
- A giant mural will honor health care workers and virus victims.

Photos

An 'Avalanche of Evictions' Could Be Bearing Down on America's Renters

The economic downturn is shaping up to be particularly devastating for renters, who are more likely to be lower-income and work hourly jobs cut during the pandemic.

5h ago 547 comments

Companies Are Struggling, So Why Is Wall St. Soaring?

Wall Street analysts are pessimistic about the outlook for corporate profits, even as investors have pushed markets steadily higher.

May 27 349 comments



DeVos Demands Public Schools Share Pandemic Aid With Private Institutions

Education Secretary Betsy DeVos says she will force public school superintendents to share coronavirus rescue funds with private schools.

3m ago

Is child care a public good? Some Democrats have argued that it is, and that it should be funded accordingly.

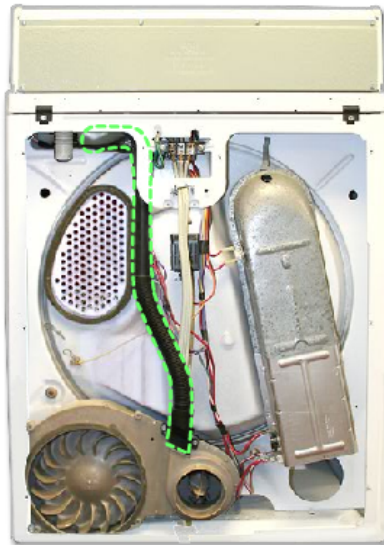
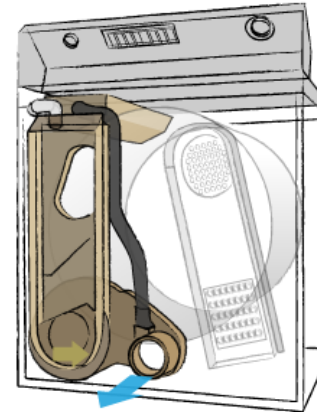
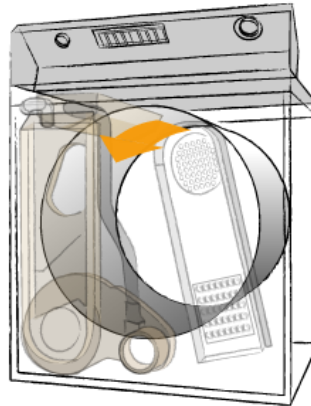
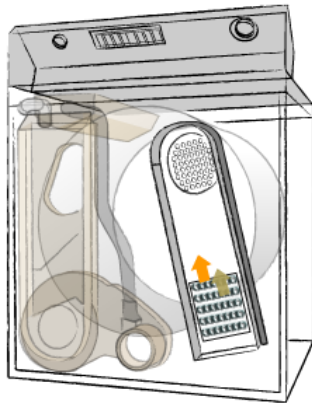
6h ago 73 comments



Interactive data & charts

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Whirlpool v. Camacho



Top Of Dryer

Back Of Dryer

Heating Element

Drum Inlet Grill

Lint Chute

Blower Housing

Blower Scroll

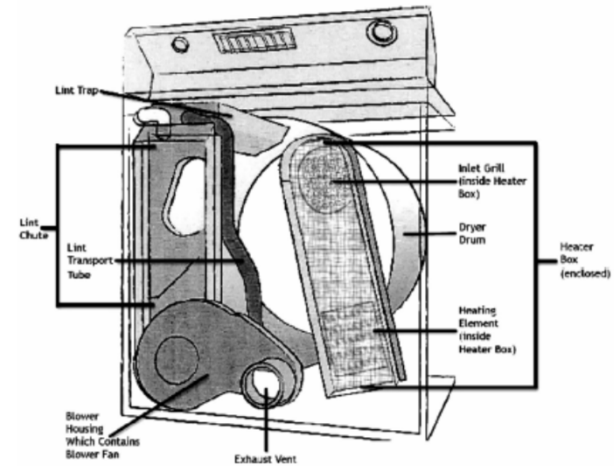
Lint Transport

Recirculation Tube

Exhaust Air

Replace Back

APPENDIX A



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How to Use Visuals Effectively

- Craft with care and consider different alternatives

Lygren Disregarded the Facts

- **Assumption** – Assumed 19% annual growth rate in sales from 2011 to 2020, and 67% increase in sales from 2010 to 2011.

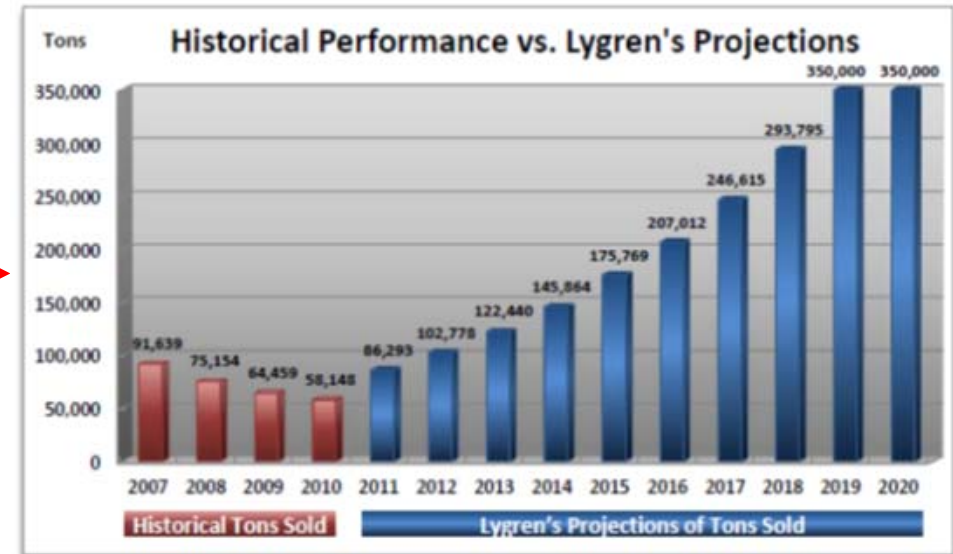
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Tons	86,293	102,778	122,440	145,864	175,769	207,012	246,615	293,795	350,000	350,000

(4/30 Tr. at 304-06)

- **Fact** – Sales had *declined* every year since 2007.

	2007	2008	2009	2010
Tons	91,639	75,154	64,459	58,148

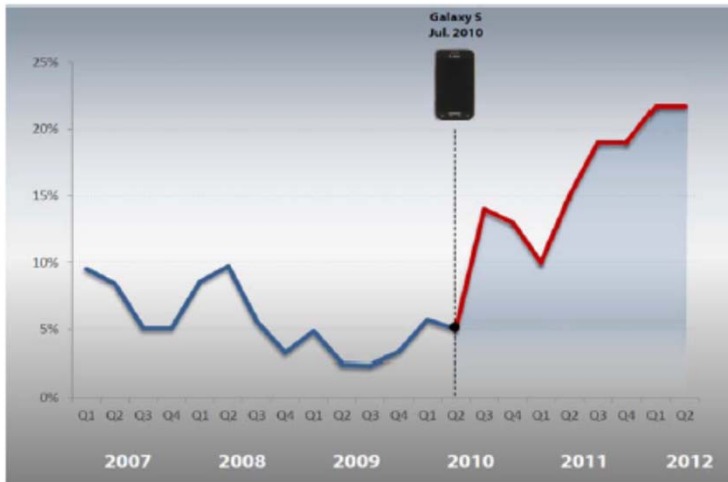
(4/25 Tr. at 82-84)



How to Use Visuals Effectively (con't)

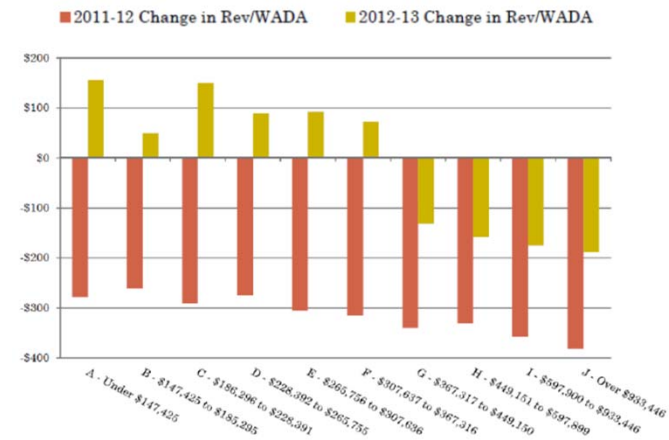
- Frame the significance of the visual in the preceding text

Samsung's strategy worked. Samsung's share of the smartphone market swung "abrupt[ly] upward" following its copying, CAJA42050-42052—jumping from 5% to 20% in just two years—while Apple's market share fell, as the jury saw:



CAJA90104.
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The following chart summarizes the impact of the cuts on property-wealthy and property-poor districts in the first and second years of the biennium. The chart depicts year-to-year changes in revenue per WADA for districts based on their property wealth. (Ex.5654:135 (referencing Ex.5653:152).) The orange bars show that the cuts impacted all districts in 2011-12, including property-wealthy districts. In 2012-13, however, as indicated by the yellow bars, funding for property-wealthy districts dropped even more, while funding for property-poor districts was partially restored.



How to Use Visuals Effectively (con't)

- Visuals should simplify your argument
- Embed the visual in the text of your brief, not the appendix
- Use color to break up long, monotonous blocks of black and white text
- Remember that you are still addressing an appellate court, not a jury

Overview of Visual Categories

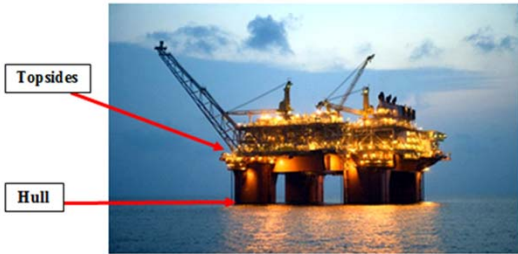
- Photos, images, and animations
- Maps
- Timelines
- Graphs and charts
- Tables
- Flowcharts
- Diagrams to show relationships
- Images of documentary evidence

Photos, Images, Animations and Other Recreations

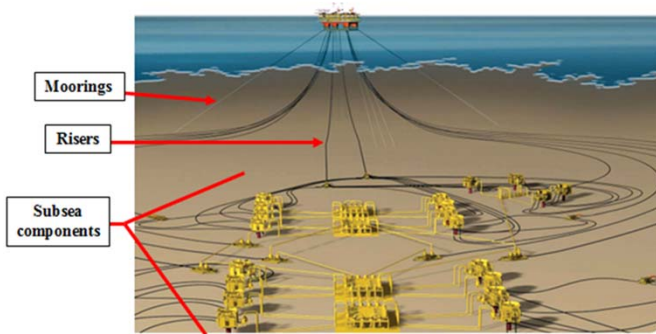
Photographs, images, and animations can...

- Help orient the reader to the matter in issue
- Visualize an accident scene
- Make a key comparison
- Assist with understanding the factual narrative in a more memorable or powerful way

Photos and Images: Products



Atlantis also has subsea equipment that facilitates the flow of production from the reservoirs beneath the seafloor through wells and pipelines to a point on the seafloor below Atlantis. (ROA.24854; ROA.6118.) There, the production enters "risers" that carry it up to the platform, where it is processed and measured before entering export pipelines for delivery to shore. (ROA.24853; ROA.5370.)



The Lift is Designed For Portability With a Small Base and High Reach
Genie makes a wide variety of lifts. See **Tab E** (PX-38: Genie brochure).
This case involves the AWP-40S model, which stands for "Aerial Work Platform—40' SuperSeries."



Photos and Images: IP Cases

Rather than innovate, Samsung copied. *E.g.*, CA-JA25487, 41414-41416. Before the iPhone, Samsung's mobile phones resembled walkie-talkie-like boxes with bulky antennas and keyboards, as the following trial demonstrative showed:



CAJA24679. After Apple announced the iPhone, Samsung's phones transformed—in only “three months” of design, CAJA42538-42539—into sleek, streamlined, narrow rectangles that mimicked the iPhone's distinctive appearance:



CAJA24681.

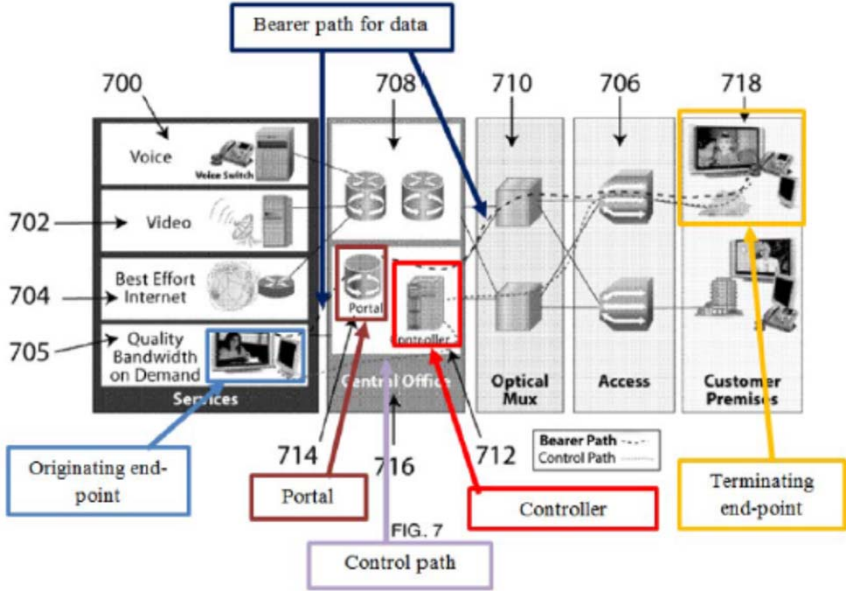


CAJA90143. As Apple's design expert testified, these similarities were “beyond coincidental,” CAJA41409—they were intentional copying. This was confirmed at

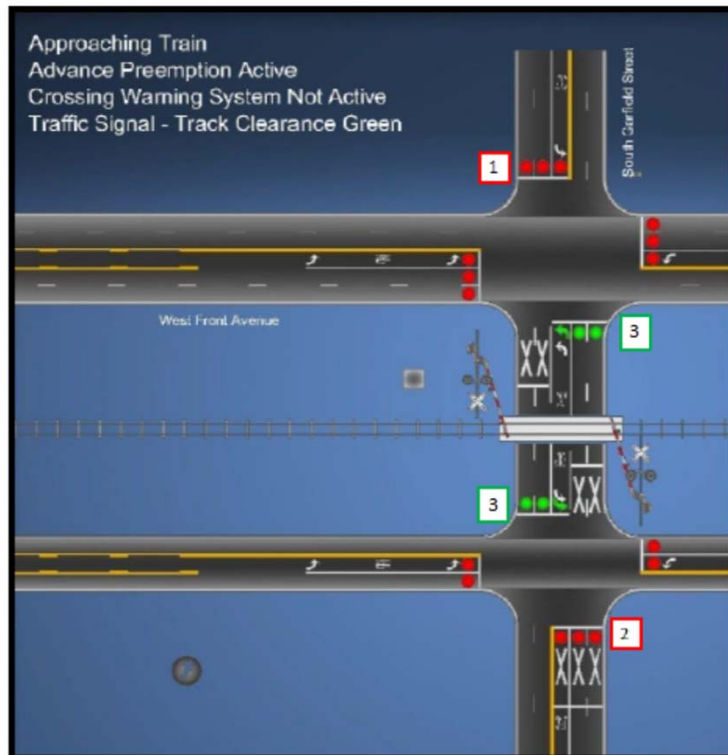
Photos and Images: IP cases



An example of the architecture disclosed in the patents is shown in Figure 7 as annotated by Ericsson's expert, Dr. Narasimha Reddy.



Photos and Images: Accident Scene



Garfield crossing, showing traffic signals as a train approaches

weather was clear and Hayden had an unobstructed view extending a half-mile to a mile down the tracks:



View from South Garfield Street, looking west

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Photos and Images: Enhancing Factual Narratives



On another day, the video shows Williams working on the “monster wheels” of his lifted truck. RR5:77. This footage tends to show that Williams, who had previously worked as a car mechanic, could still do this type of work. RR6:137.



The boots that Gutierrez wore at the time of the accident were admitted into evidence, and it is undisputed that they had no mud on them, only rocks. (RR3:485-86; RR4:836-37, 884; RR15:DX48, Tab H.) The boots had been



(RR15:DX48, Tab H.)

Photos and Images: Scoring Rhetorical Points

For example, in the Main Reading Room of the Library of Congress stands a large bronze statue of Moses holding the Ten Commandments:

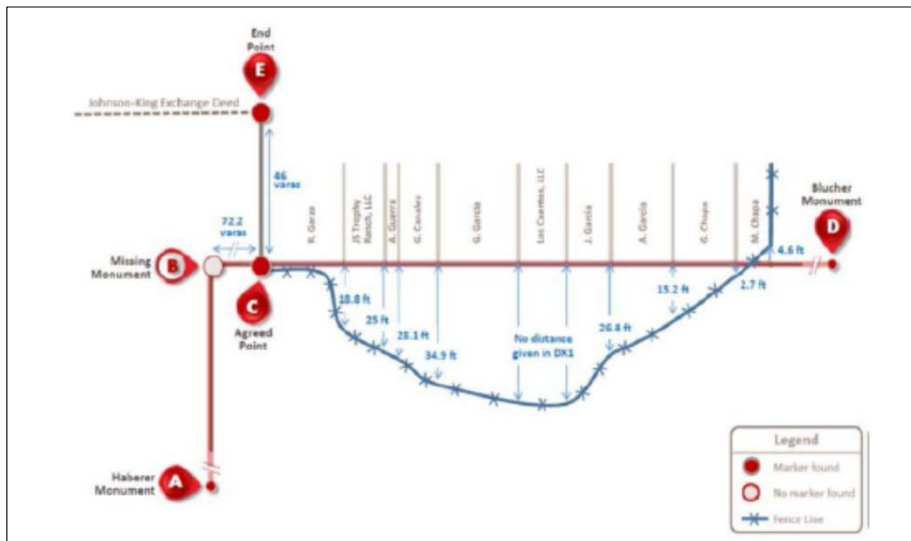


Indeed, Decalogue imagery graces the homes of all three Branches of our federal government. Moses and the Ten Commandments appear on both the south frieze of the courtroom in which this Court sits and the pediment of the Court's building:



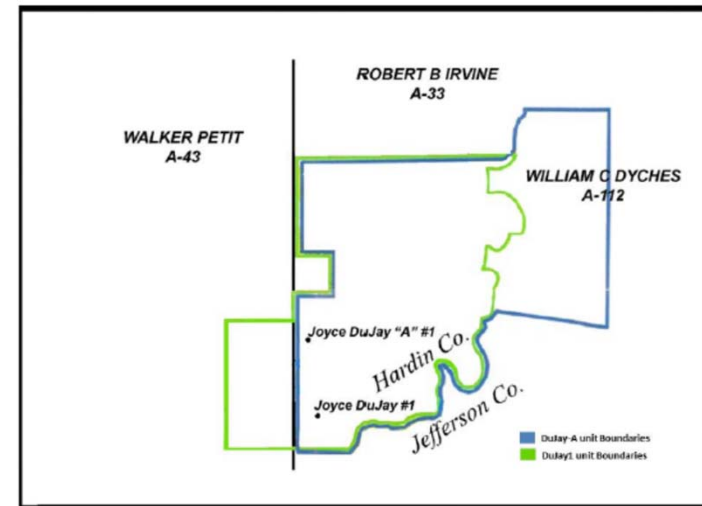
Maps

Maps can be used to convey spatial or locational points.



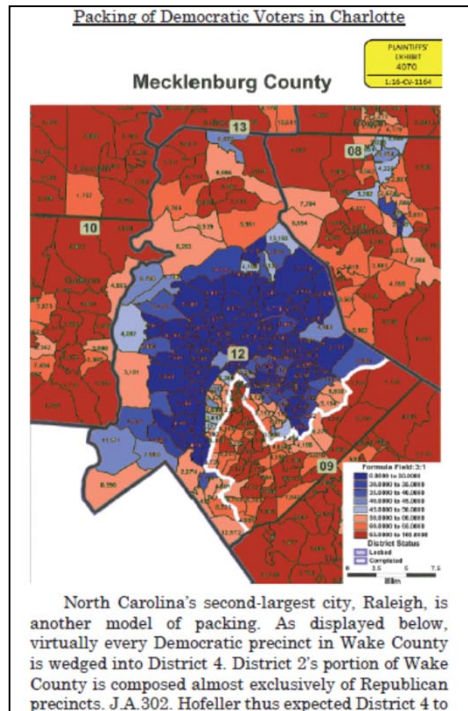
Boundary disputes

A schematic of the two units at issue in this petition shows that neither well was drilled on the Reed Lease and both were a considerable distance from that lease:

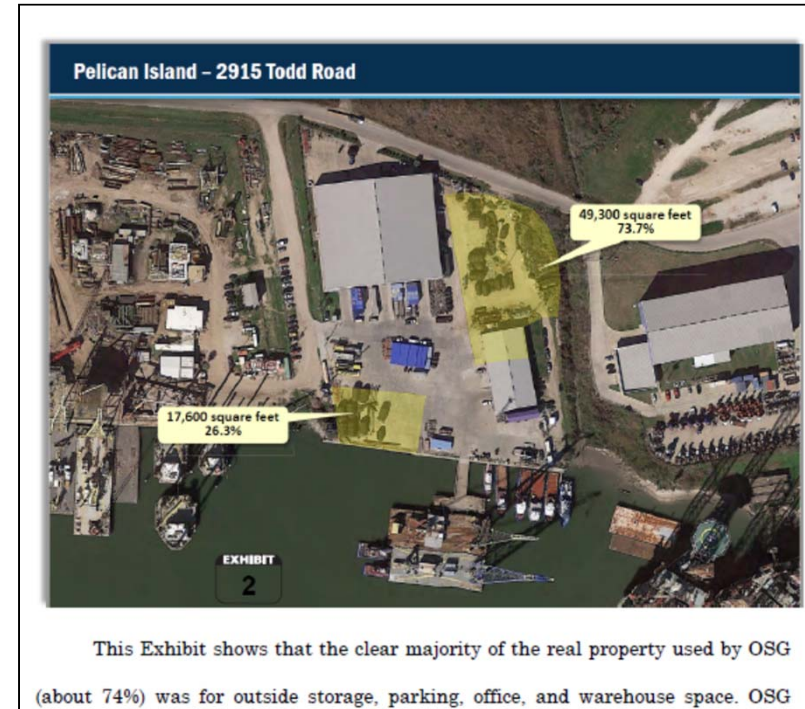


Oil & gas disputes

Maps

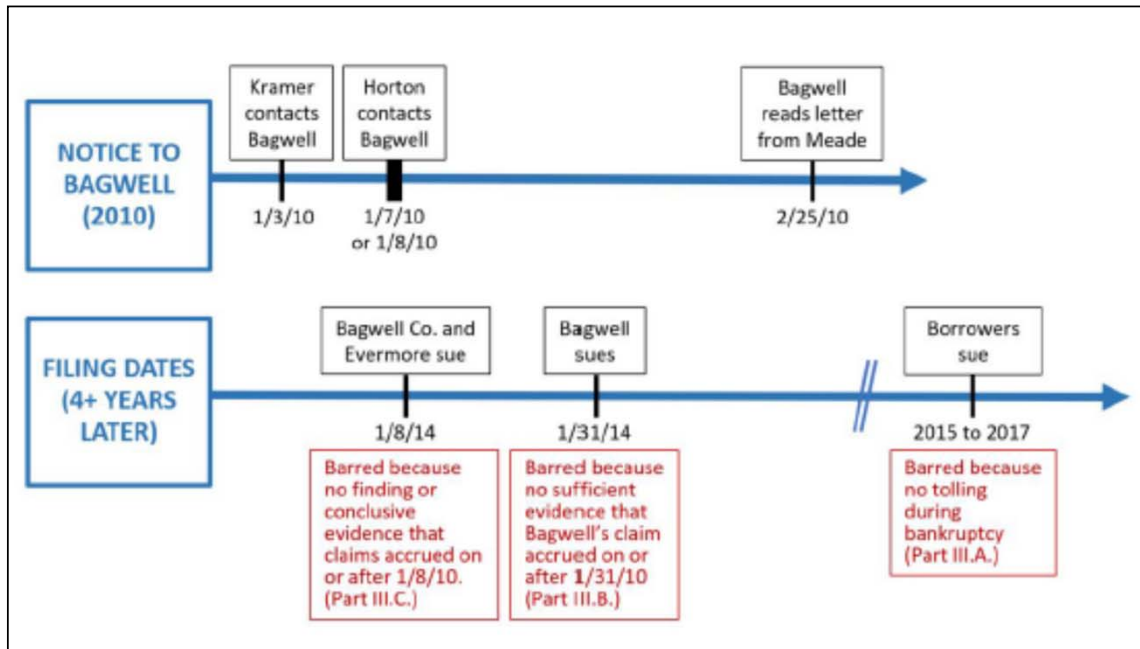


Challenges to the drawing of political districts



Dispute over whether a lease agreement was maritime in nature

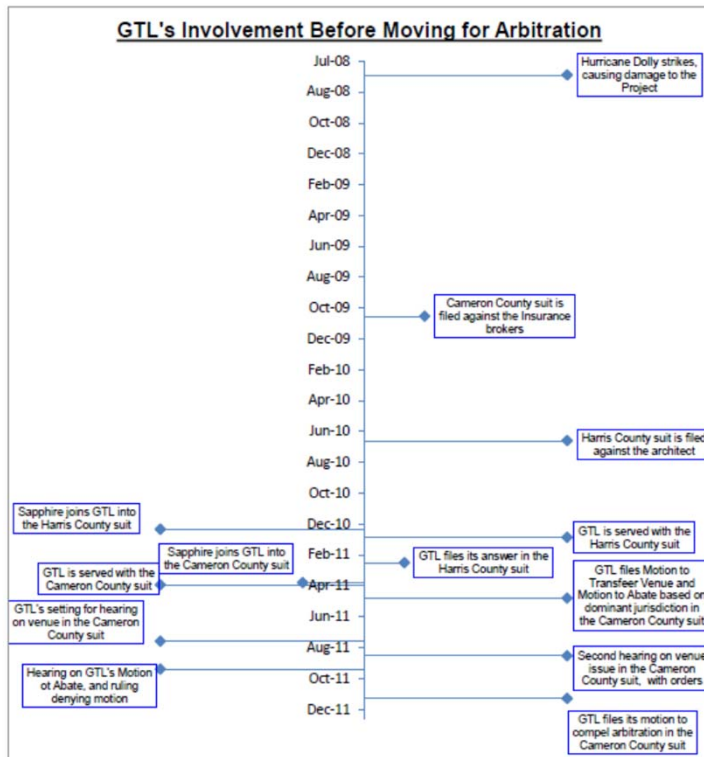
Timelines



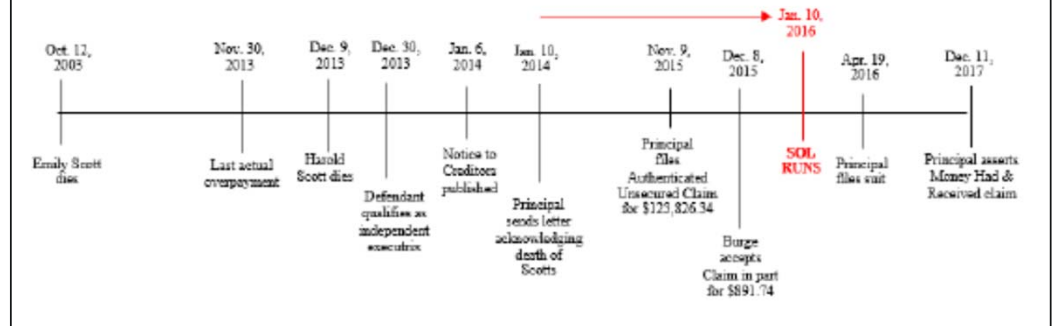
Timelines can be a helpful visual device to explain **complex chronology of events.**

Timelines

The following table provides a timeline of GTL's involvement in these cases up to the filing of its Motion to Compel Arbitration:



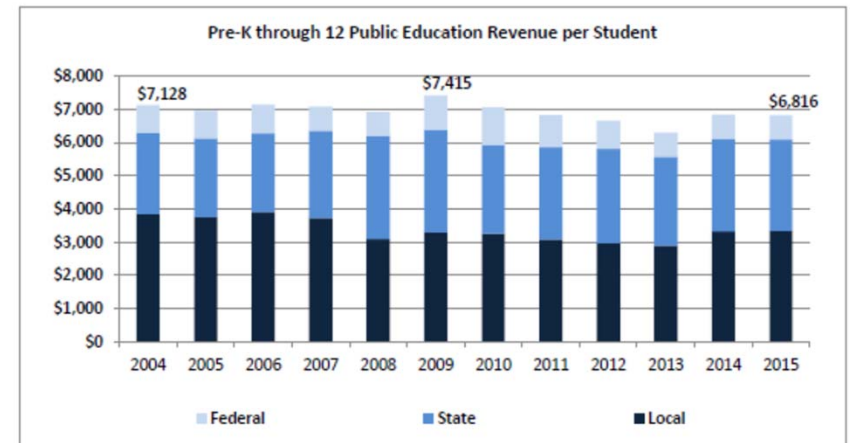
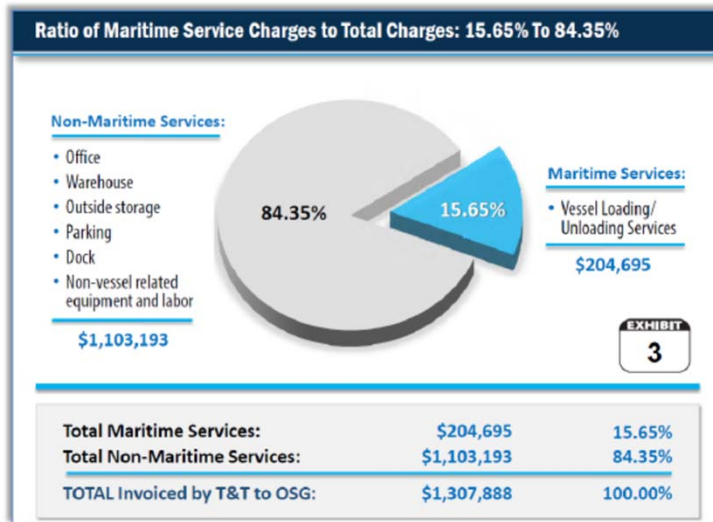
not commence until January 10, 2014⁷⁷). Principal did not add that claim until December 2017, or just shy of two years too late. See CR 185 ¶¶ 29-30.⁷



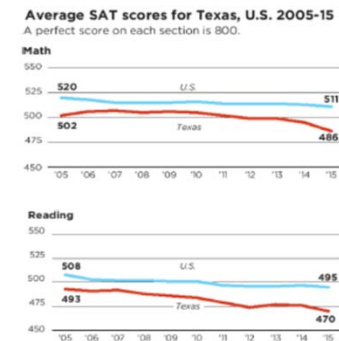
Graphs and Charts

Graphs and charts can...

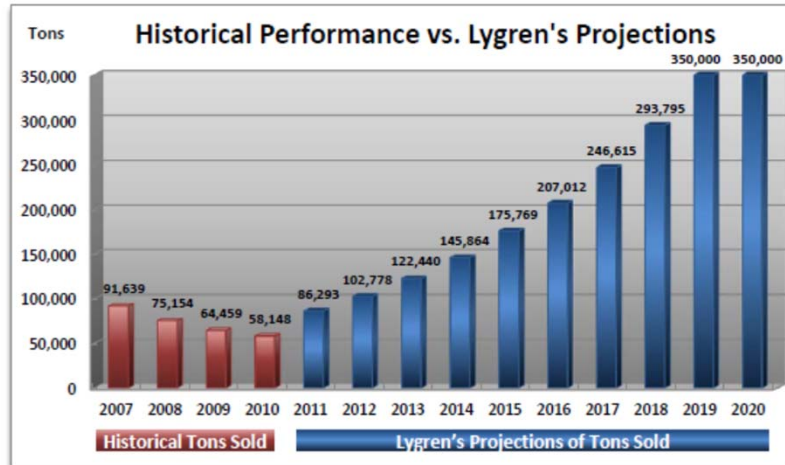
- Organize information
- Show patterns and relationships between variables of space and time



This data shows that the gap between Texas and the national average continues to grow, as it has over the past decade.



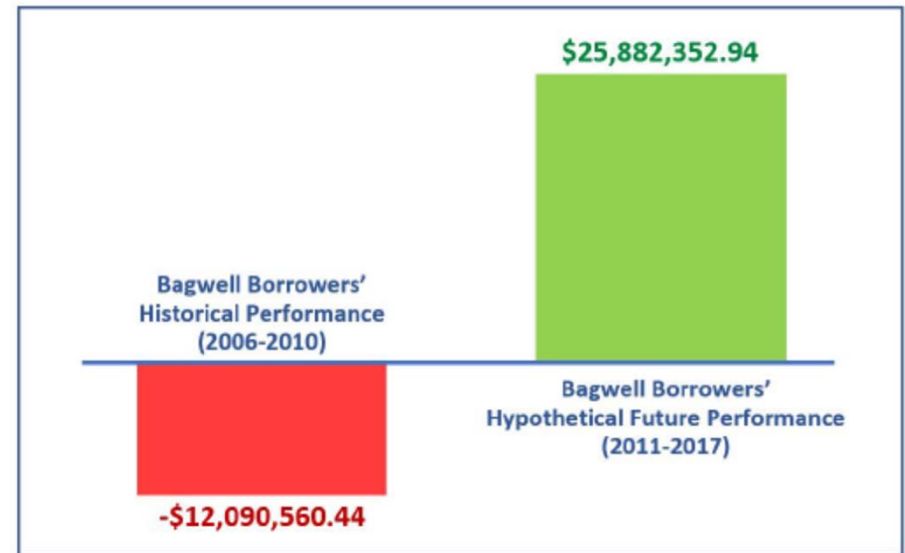
Graphs and Charts: Damages Cases



The red bars on the left reflect EMC Products' historical performance. At the time of the May 2011 foreclosure (the date on which EMC Products' "lost value" must be calculated), EMC Products:

- had declining sales (RR13:83-85, 87);
- had never earned a profit (RR13:120; RR16:207; RR17:29);
- had liabilities that exceeded assets by \$1.4 million (RR17:32);

Bagwell does not dispute that he presented no evidence of historical profitability that could support the \$11 million award that assumes future, hypothetical profits. Just the opposite:



Tables

Tables can be **effective** and **flexible tools** for appellate advocates in a wide variety of contexts.

For example, they can be used to summarize or contrast the relevant caselaw...

The two courts reached conflicting decisions in interpreting substantively identical retained acreage clauses, as the following chart makes clear:¹⁵

	<i>Endeavor v. Discovery Operating</i>	<i>XOG v. Chesapeake</i>
Key language in retained acreage clause	"lease shall automatically terminate as to all lands... save and except those lands ... located within a governmental proration unit assigned to a well"	"Said lease shall revert to Assignor, save and except that portion of said lease <i>included within</i> the proration or pooled unit of each well"
Court Holding	The leases terminated as to all acreage that was not included in certified proration plats (P-15) filed with the Commission.	The majority concluded that Chesapeake retained the maximum acreage allowed to be included within proration units (320 acres per well), irrespective of what Chesapeake actually designated on its P-15 filings.

Other Texas appellate courts examine the factual allegations in a pleading to determine whether the pleading asserts a legal action that starts the running of the 60-day period to file a TCPA motion:

Case	Holding
<i>Campone v. Kline</i> , 2018 WL 3652231, at *6 (Tex. App.—Austin 2018, no pet.).	An amended petition "reset" the deadline for filing a TCPA motion because the amended petition "added <u>new factual allegations</u> about instances of alleged defamation." (emphasis added)
<i>Montelongo v. Abrea</i> , 2019 WL 5927742, at *4 (Tex. App.—San Antonio 2019, no pet. h.).	Under the TCPA, litigants must "consider the <u>factual allegations</u> that have been asserted against them and decide, within the TCPA's 60-day timeline, whether those allegations are 'based on' or 'in response to' the exercise of rights protected by the TCPA." (emphasis added)
<i>Jordan v. Hall</i> , 510 S.W.3d 194, 197 (Tex. App.—Houston [1st Dist.] 2016, no pet.).	"An amended petition asserting claims based upon <u>new factual allegations</u> may reset a TCPA deadline as to the newly-added substance." (emphasis added)

Tables

To guide an appellate court in a complex case...

<i>VHSC/Pike Appellate Arguments</i> ↓	Claim: Breach of Management Agreement against Pike \$1M	Claim: Tortious Interference with Management Agreement against VHSC \$ 7M	Claim: Trade Secret Misappropriation against VHSC/Pike \$ 1.5M	Permanent Injunction
No standing (Part I.A)	R/R	R/R		
Acquired rights (Part I.A-B)	R/R	R/R	R/R	R/R
No competent evidence of damages ¹ (Part II.A)	R/R	R/R	R/R	
No evidence of causation (Part II.B)	R/R	R/R	R/R	R/R
Failure to appeal trade secret damage ruling (Part II.C)			R/R	
One-Satisfaction Rule ² (Part II.D)	R/R	R/R	R/R	
No protectable trade secret (Part III.A)			R/R	R/R
Dispositive trial court findings of no imminent harm/cannot presume harm (Part III.B)				R/R
Adequate remedy at law (Part III.C)				R/R

Tables

To make substantive arguments...

Feature	Arrows Up's pre-NDA Jumbo BTS bin	SandBox	Arrows Up's post-Settlement Agreement Jumbo bin
<i>Dimensions</i>	96" cube	117.75" x 96" x 114"	117.75" x 100" x 114"
<i>Weight Capacity</i>	16,000 lbs.	48,000 lbs.	48,000 lbs.
<i>Roof Hatch</i>	2' x 4'	91" x 19"	84" x 20"
<i>Gasket Material</i>	Plastic brush	Felt	Felt
<i>Stacking Cones</i>	None	Welded to ISO Corners	Welded to Corner with ISO Spacing
<i>Tubular Forklift Pocket</i>	No	Yes	Yes
<i>Funnel Angles</i>	30° x 30° or 50° x 50°	31° x 37°	30° x 36°
<i>Detachable Ladder</i>	No	Yes	Yes

Third, if “admitted” were redefined to mean “admitted as an inpatient,” the incongruous result would be that a lien would be available to every medical-care provider from the EMT to follow-up physicians—*but not* the hospital that provided the emergency care:

Provider/Stage of Care	Lien	Property Code Provision
EMT services and ambulance ride	✓	§§ 55.002(c), 55.004(f)-(g) ⁷
Physicians' charges for emergency hospital care	✓	§ 55.004(c)
Hospital providing emergency care only	✗	No lien, according to Plaintiffs
Hospital providing inpatient care	✓	§ 55.002(a)
Transfer-destination hospitals	✓	§ 55.002(b)

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Tables

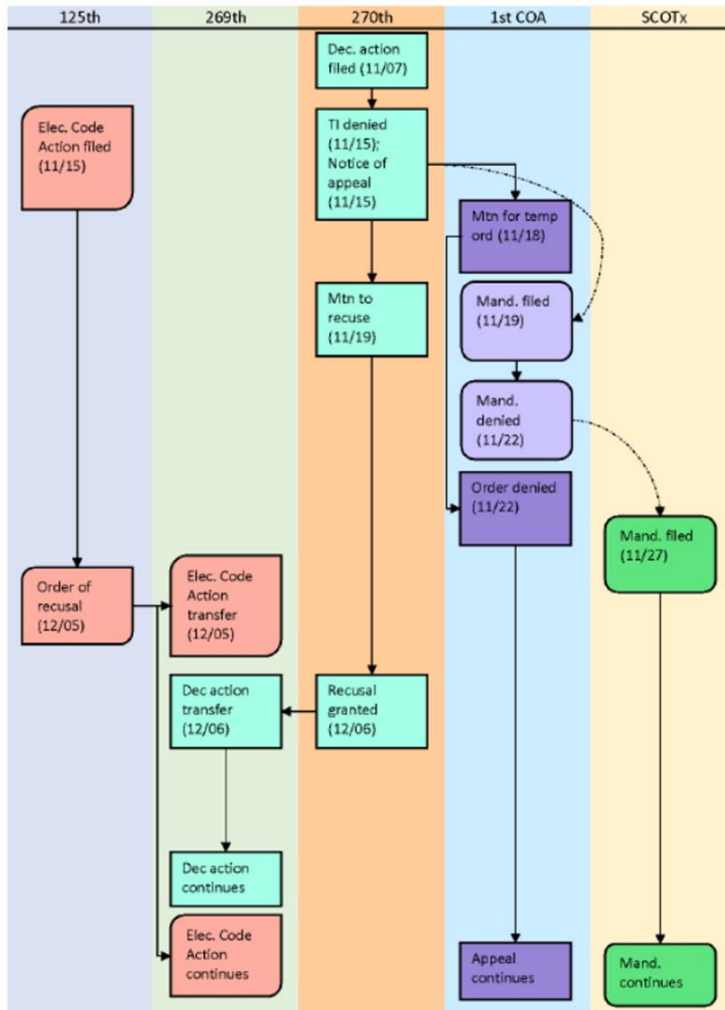
To present large amounts of data by category...

Figure F-17. M&O Tax Rates for Texas School Districts 2007-08 and 2012-13

M&O Tax Rate	# Districts 2007-08	% Districts	2007-08 ADA	% ADA	# Districts 2012-13	% Districts	2012-13 ADA	% ADA
<\$1.00	98	9.55	165,709	3.92	54	5.29	80,452	1.78
\$1.00 to <\$1.04	108	10.53	994,860	23.52	39	3.82	292,556	6.46
\$1.04	699	68.13	2,680,939	63.38	607	59.45	3,046,938	67.29
\$1.04 to <\$1.17	24	2.34	217,130	5.13	74	7.25	505,855	11.17
\$1.17 and Above	97	9.49	171,294	4.05	247	24.19	602,429	13.30
Total	1,026	100	4,229,933	100	1,021	100	4,528,231	100

STAAR EOC Tests	% Failing to Meet Level II Final Standard
Eng. I Reading Econ. Disadvantaged*	70%
Eng. I Reading Non-econ. Disadvantaged*	39%
Eng. I Writing Econ. Disadvantaged*	82%
Eng. I Writing Non-econ. Disadvantaged*	54%
Biology Econ. Disadvantaged*	67%
Biology Non-econ. Disadvantaged*	37%
Algebra I Econ. Disadvantaged*	75%
Algebra I Non-econ. Disadvantaged*	50%
Eng. II Reading Econ. Disadvantaged*	49%
Eng. II Reading Non-econ. Disadvantaged*	23%
Eng. II Writing Econ. Disadvantaged*	82%
Eng. II Writing Non-econ. Disadvantaged*	58%
World History (Proxy) Econ. Disadvantaged*	77%
World History (Proxy) Non-econ. Disadvantaged*	52%
All Tests Taken. Econ. Disadvantaged – Graduation Tests Only^	87%
All Tests Taken. Non-econ. Disadvantaged – Graduation Tests Only^	64%

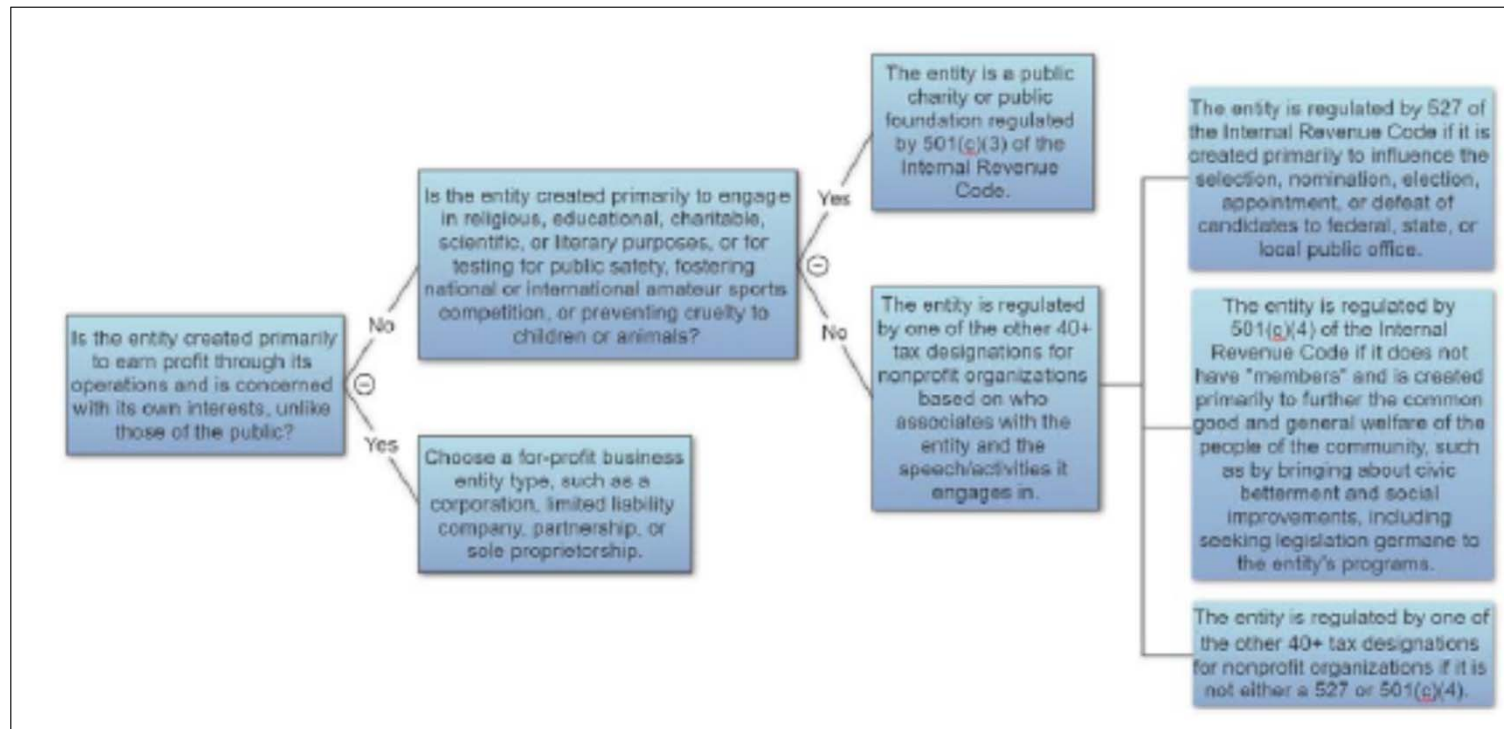
Flowcharts



Flowcharts can be effective to illustrate a complicated procedural history...

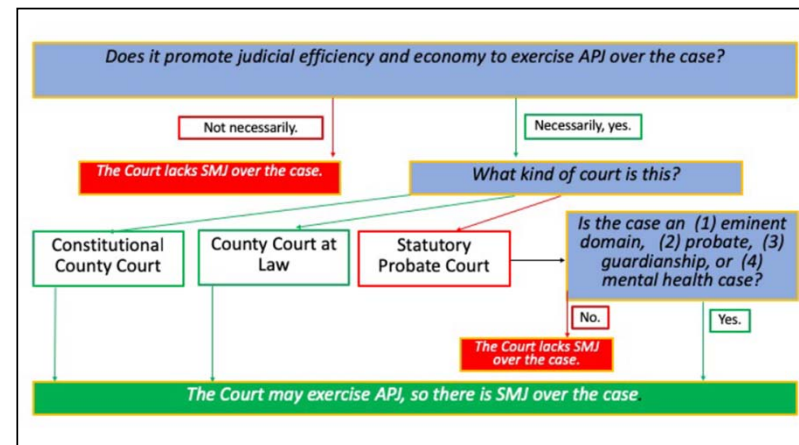
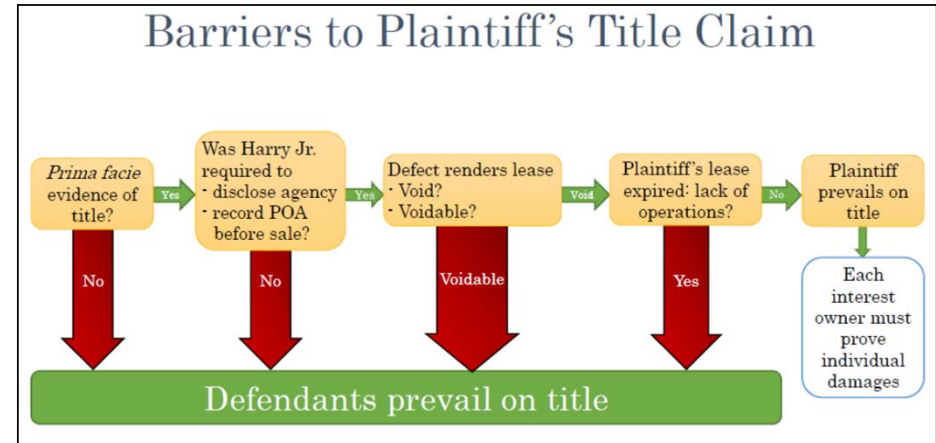
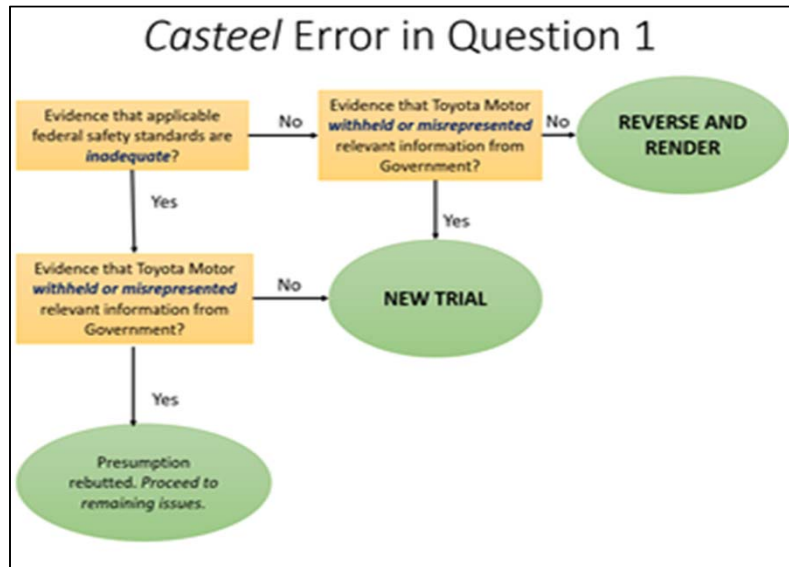
Flowcharts

To explain the workings of a complicated statute or regulation...

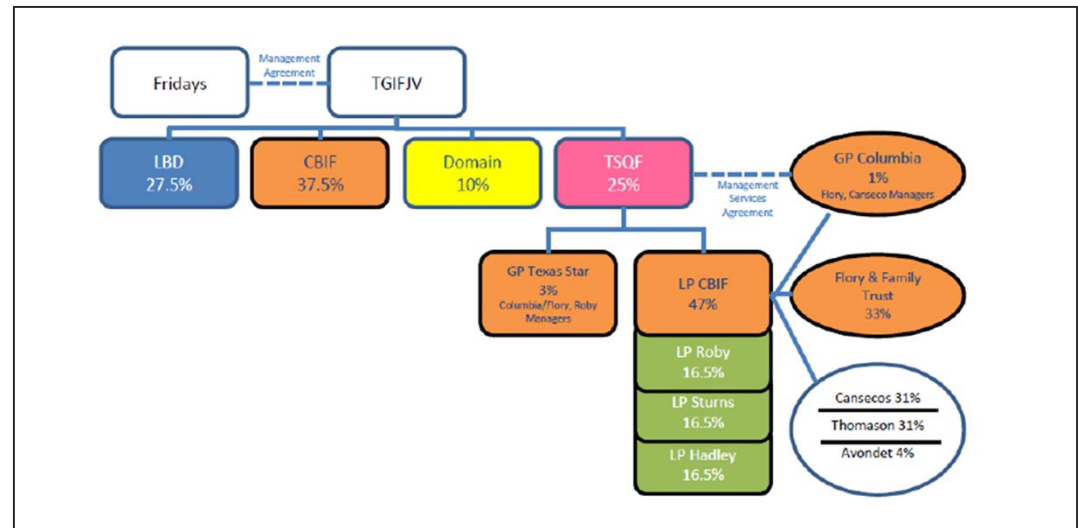
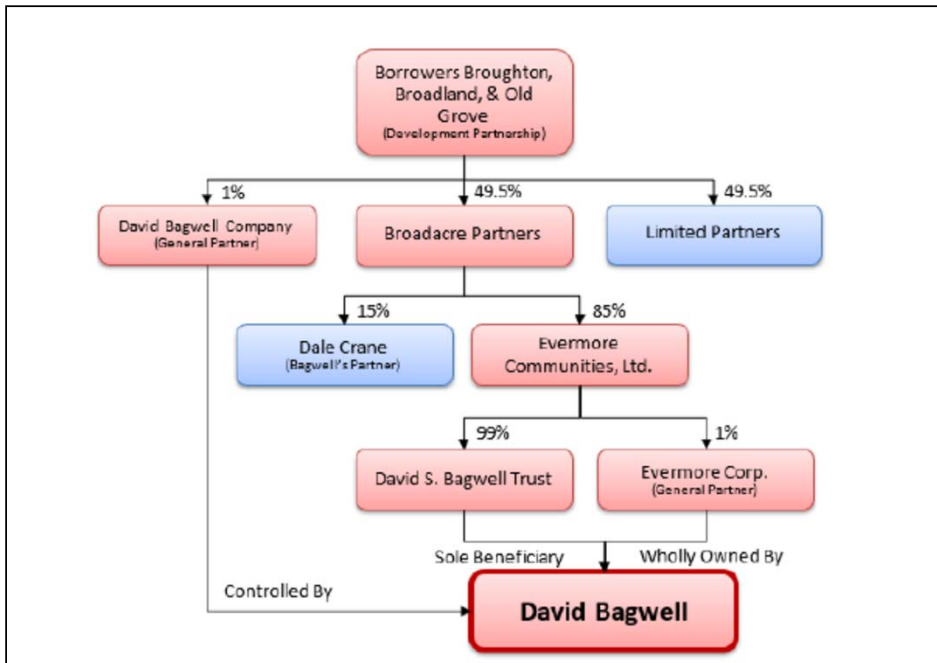


Flowcharts

To provide a decision tree to help a court work through your arguments...



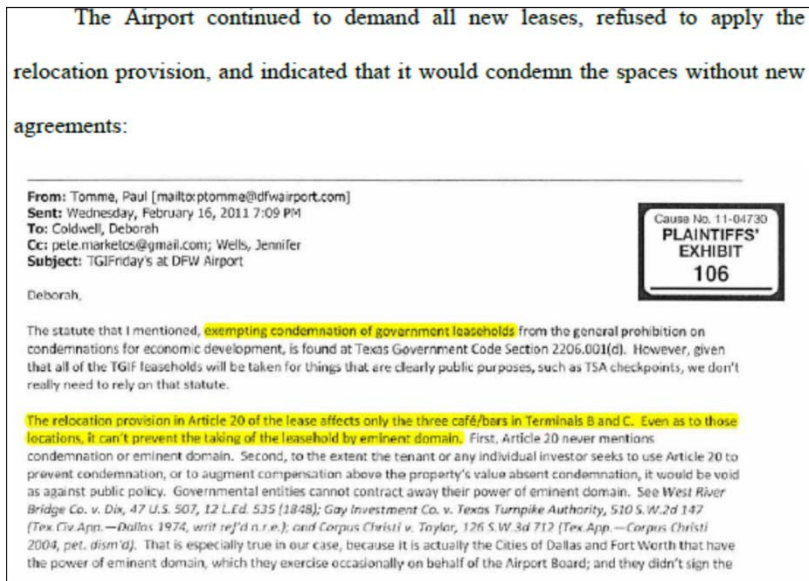
Diagrams Explaining the Parties' Relationship



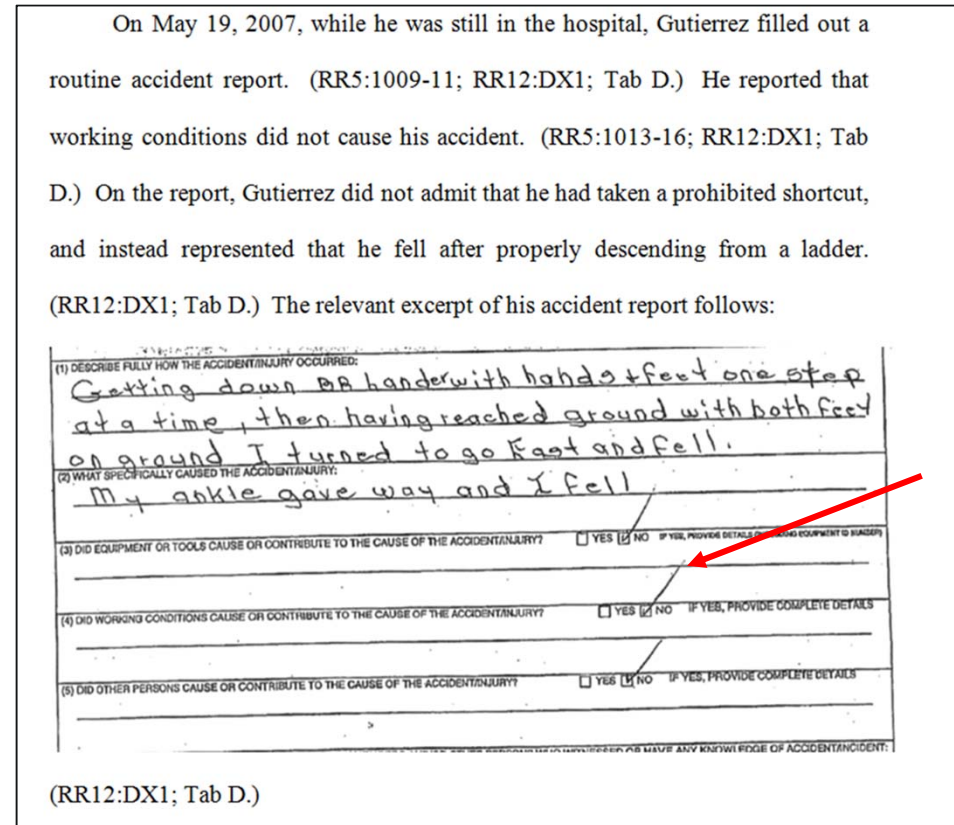
Images of Documentary Evidence

Advocates regularly embed images of...

- Emails, Contracts, Plats, Accident Reports, etc....



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What Does the Future Hold?

- Embedded video and audio
- Animations
- GIFS
- 360-degree panoramas (of accident scenes, etc.)
- PowerPoint decks that would allow the viewer to scroll through a slideshow composed of images, graphics, or other information
- Rollover/hover states, which would display new information over the existing text or graphic when the cursor hovers over it
- E-Pub format

Cautionary Considerations

- Emotional appeals > logic

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

Cautionary Considerations

- Will visuals alter the traditional allocation of decision-making power between juries and trial courts and between trial and appellate courts?
 - See *Scott v. Harris*, 550 U.S. 372 (2007) (“The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.”)



Scott v. Harris sample judgement video #1

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