

Dynamic Visual Strategy in Patent Litigation

Improving Juror Understanding & Retention

By Douglas Filter with Guy Joubert

Why visual aids?

Just a short three decades ago, before personal computers, smart phones and tie-optional work environments, lawyers relied on superb oratory to out-think, out-talk and out-maneuver their opponents. Esteemed experts – Doctors, scientists, engineers and highly educated individuals expounded on the idiosyncrasies of the case, and later, the other side put up experts who contradicted the original witnesses with their rich descriptions, full of technical terms and many syllables. The problem was, the jurors may have been impressed, but they were often lost.

Little by little, courts began admitting graphics; maps, charts, illustrations, even computer generated animations to depict dynamic situations. Suddenly, several breakthroughs occurred; Jurors began understanding and remembering the case facts. They started paying attention to the details. They began learning the technologies so they could intelligently discuss them in the jury room. In short, the fact finders became empowered by embracing the same media that spoke to them in their everyday lives.

Today, visual aids are commonplace in nearly every kind of litigation. While law school traditionally taught future lawyers to think in an auditory way – creating brilliant writers and speakers, it is now implementing visual learning techniques simply because society learns, remembers and persuades in multiple media.

Dozens of studies have been made to determine the effectiveness of visual aids in presentations. The University of Michigan/3M study in 1986 discovered ¹ that by using pictures along with words, we increase the recall of key facts by multitudes over the term of a trial. We have discovered that 65% of people depend on visual stimuli to learn, that 35% of people are auditory learners, and 10% are kinesthetic learners, who remember when they can touch an object. What 3M researchers discovered, however, is that by combining ‘telling’ and ‘showing’, recall jumps over the use of one or the other stimuli alone.

One of the conclusion of this report stated; “Perceptions of the presenter as well as audience attention, comprehension, yielding and retention are enhanced when presentation support is used compared to when it is not. Presentations using visual aids were found to be 43% more effective than unaided presentations.

Of course, that was 24 years ago and our visual media exposure and expectations have increased dramatically.

¹ Persuasion and the Role of Visual Presentation Support: The UM/3M Study, June 1986, D.R. Vogel, G.W. Dickson and J.A. Lehman, University of Michigan Management Information Systems Research Center.


More recently, in 2010, Harvard Business Review featured a story called “The Visualization Trap”² In it, researchers looked at the difference between static images and animated recreations of an accident. There are a couple of points from this. One, the authors point out that “by creating a picture of one possibility, [animations] make others seem less likely. From another perspective, the more realistic the images, the more persuasive. Why? Because people, rightly or wrongly, BELIEVE IN PICTURES. The point is that memory biases impact judgment and good demonstratives can be useful in capitalizing on or ameliorating those biases.

There are plenty of goals for demonstratives but here are three to focus on for the purposes of this seminar; Good demonstratives 1) enhance the narrative; 2) organize the information and 3) are memorable.

Enhancing the Narrative

In many trials, you will now see deposition testimony called out to reference. On the left is a good example. It accurately presents a clip pulled out of the transcript of a typical question and answer.

On the right is the same content with a few changes; 1) use a title that tells the jurors the point we are trying to make (that they took our experts testimony out of context and applied it to the patent) 2) highlight the key language that supports the point, and 3) show them the expert who was deposed. Believe it or not, jurors feel that even the simple inclusion of a photo on a demonstrative like this makes it more authentic and convincing

Deposition of Dr. David Wagner	Plaintiff's Mischaracterize Dr. Wagner's Testimony
<p>Q. Would a person of ordinary skill in the art in July 1992, putting aside his or her reading of the '728 patent have an understanding of the term mean particle size?</p> <p>* * *</p> <p>A. Ignoring the patent there are several ways of calculating a mean particle size.</p>	 <p>Q. Would a person of ordinary skill in the art in July 1992, putting aside his or her reading of the '728 patent have an understanding of the term mean particle size?</p> <p>* * *</p> <p>A. Ignoring the patent there are several ways of calculating a mean particle size.</p>

Those simple changes, make this demonstrative more memorable and complementary of the oral presentation.

Here is another example of a typical infringement chart showing how a claim limitation reads on the manufacturing diagram of an accused product. We've labeled the parts to match the limitation

² “The Visualization Trap”, Harvard Law Review, Neil Rouse and Kathleen Vohs, 88(5), 26

'050 Patent – Claim 1

'050 Patent – Claim 1 recites:

a circular spring metal adaptor surrounding said leading end of said electrical connector which has a leading end, a trailing end, and an intermediate body;

leading end
intermediate body
trailing end

'050 Patent – Claim 1

a circular spring metal adaptor surrounding said leading end of said electrical connector which has a leading end, a trailing end, and an intermediate body;

Figure 6 of the Patent	Defendant's Infringing Product
<p>FIG. 6</p>	

On the right is another approach that is more memorable:

1. Since there is a series of these slides, the information is organized – claim language up top, patent figure on the left, accused product on the right.
2. In this case, the similarity of the patent figure made it easy to draw a visual similarity to the design of the invention
3. Using a photo of the actual product is more convincing
4. Finally, the color coding does the work of tying claim language to the photo of the accused product

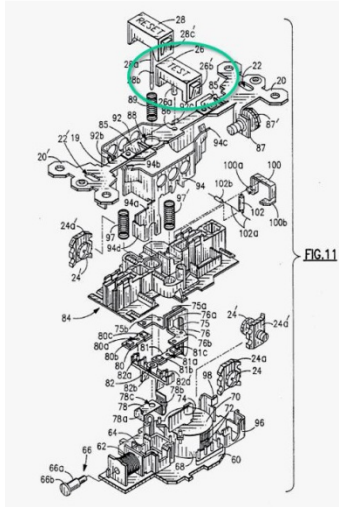
Organizing the Information

Most patents come with figures, and it is an easy call to ask for an enlargement of a patent Figure to be used in trial, however, these figures were drawn in a specific way for a very specialized audience and seldom communicate well to a lay jury member.

Here is an example of a technical figure from a patent, depicting a confusing array of components.

While it is true that the component in question is one of those elements shown in the patent Figure, adding a color circle may not explain its function, relationship or how it was copied in an infringing mechanism.

By crating assemblies of components not at issue, and highlighting the part in question, the expert can now use this illustration to more completely describe why that part is critical to the issues.



Technology Tutorial

GFCI Technology - Construction Inside

- Line, load and face outlets
- Control circuit
 - Toroids , Sensing Circuit , Actuation
- Contact arms and mating contacts on face outlets
- ▶ **Reset button stem and spring**
- Latch
- Support for contact arms
- Solenoid and armature

CDX-1

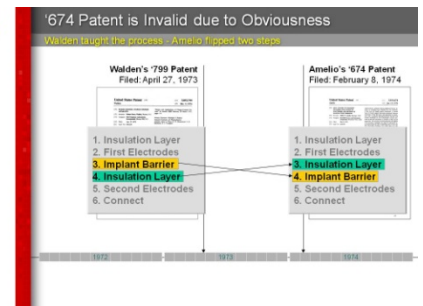
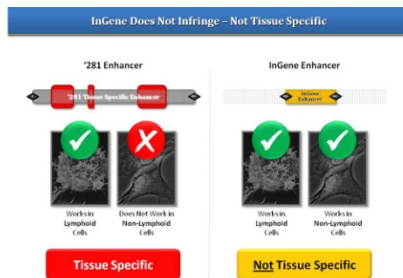
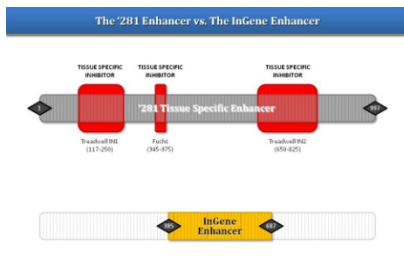
Exhibits that are Memorable

Aside from using visuals in the first place, jurors demonstrate strong preferences for visuals that include more detailed representations. The selective use of illustrations, images, photos, and color can influence the perceived credibility of evidence and improve recall.

Following are some key strategies for enhancing your visual persuasions in Intellectual Property litigation

1) Simplify the Issues

By boiling down the facts to the simplest parts, you can create some powerful images that put simple truths in front of the fact-finders. If you can create a stand-alone image or series of images that show, as the first two examples do, that the technology is very different, and that there are key elements to that difference, you will create billboards on the road to your eventual success. Key exhibits like these remain in the minds of the jurors, are easy to remember, and take precedence over more complicated arguments, exhibits or testimony when the jurors begin to deliberate. A stunning simplification, like depicting the infringing formula as an exact match to the original patent process, like the simple comparison on the right, can give lay people the conviction to stay with arguments they understand and feel good about.



- 2) **Consolidate information** - If you want to show infringement, color code patent language, illustrations and key technologies and show how the other side contains the same elements in order. If, however, you want to prove non-infringement, make key technologies as different as possible. Use contrasting colors and highlight differences.

roadmap – Phillips hierarchy

term

commentary on the evidence

The specification makes clear that depending on the final thickness desired, the hot-rolled sheet may be cold-rolled prior to coating

The subject of the invention is a **hot-rolled steel sheet**, which then **can be cold-rolled**, coated, the steel in the sheet

'905 patent, 1:47-48

The sheet according to the invention which derives, by reason of its processing, **from a hot-rolling mill**, possibly **may be cold-rolled** again depending on the **final thickness desired**. It then is coated with an aluminum-based coating

'905 patent, 2:36-39

impurities inherent in processing, is processed in the form of a **hot-rolled and possibly cold-rolled** sheet to obtain the **desired thickness**. The steel sheet then is

'905 patent, 3:6-8

supporting evidence

term

construction

claim

relevant claim language

Claim Construction

"heat conductively connected" connected to a path of low thermal resistance

'902 - Claim 1

a lead frame having a carrier part, external connections, and a connection part disposed at a distance from said chip carrier part, at least three of said external connections being heat-conductively connected to said chip carrier part;

an optoelectronic chip heat-conductively connected to said chip carrier part of said lead frame.

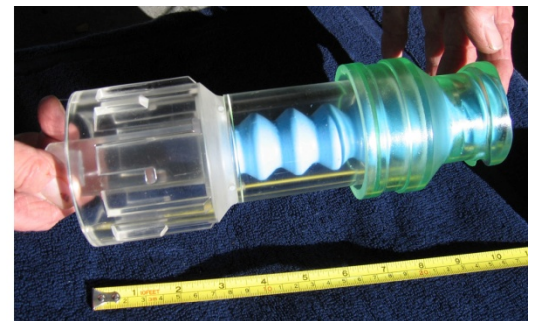
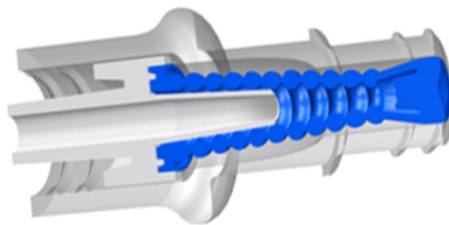
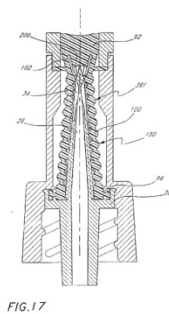
FIG 1 A

External connections 4, 5, and 6 are connected by a path of low thermal resistance to the chip and chip carrier part

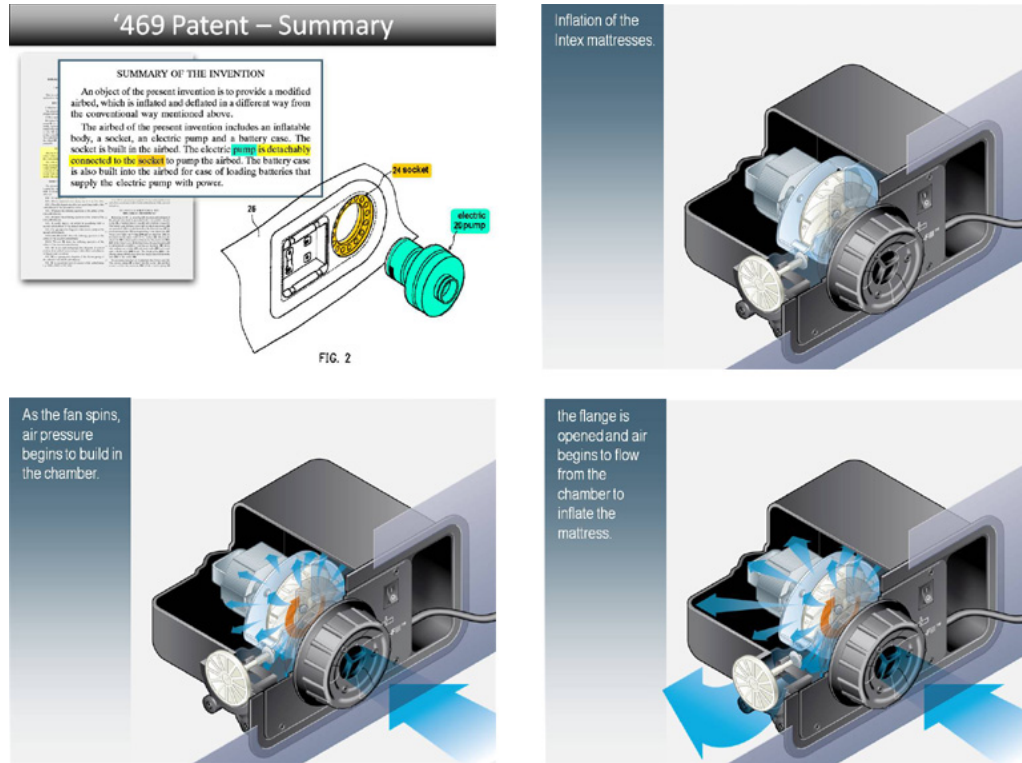
support in specification

explanation

- 3) **Use multi-media to its advantage** – easel exhibits, slide shows, electronic presentation of documentary evidence, photography, models, and animations; each media has a use. In the days of PowerPoint presentations with key documents, quotes, charts and visuals all projected in order; consider that these images are voluminous and fleeting. Even though the fact finders may see them again in the case in chief or have them explained in expert testimony, some images should be produced in such a way that they can be around for much longer than a slide on a screen. Enlarging key visuals and displaying them on an easel gives lasting power to a key argument, and can be referred to often. The use of 3D models, as the medical implement shown here, enlarged to super size so that the expert can operate the features in front of the jury is fascinating and a relief from stills on a screen. By showing the patent drawings, an animation, still frames and then using a real model, you have used each media to its strength, and seared the technical features in the minds of the fact finders.



- 4) **Use builds** to show complex technologies one part at a time. Using the patent illustration, color coded to the claim language accomplishes one aspect of explaining how a patent is innovative, but creating a series of storyboard illustrations or even an animation can – in a few minutes – completely explain how a device works and why it is innovative.

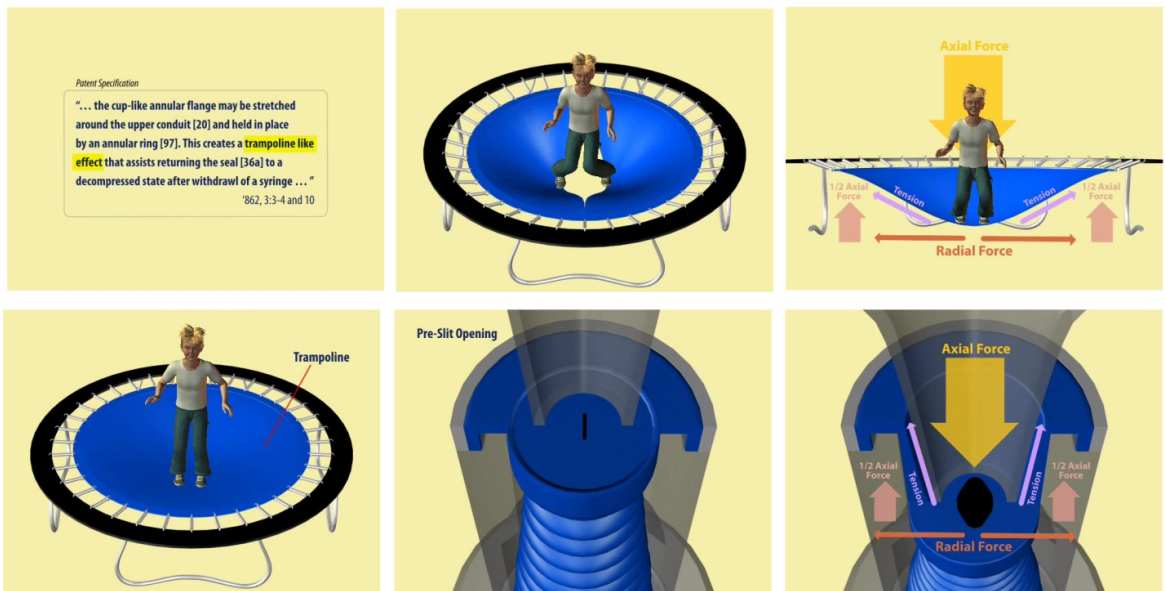


- 5) Charts and graphs can be tied to key points, testimony or chronological facts to enhance their understanding of how they relate to the case. By utilizing charts or tables that build on facts, like your case, and create anticipation in the eyes of the viewers, you can almost present an interactive sequence that pounds nails into the other side's coffin.

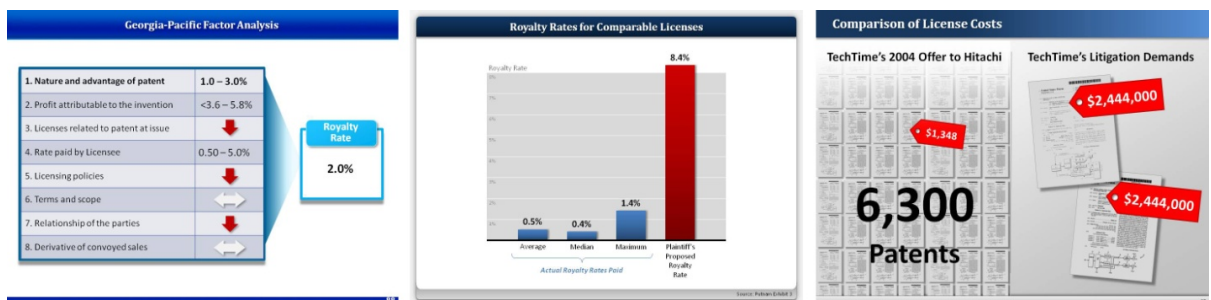
Infringement Analysis: Claim 1 of ACS '133 Patent		Validity Analysis	
ACS '133 Patent Claim 1	Accused Medtronic Products S7, Driver, MicroDriver, Racer, GFX, GFX2, GFX2.5, SS40, S660, S670, BeStent2	ACS's Invention	Schatz '984
1. A longitudinally flexible stent , comprising:	<input checked="" type="checkbox"/>	Longitudinally Flexible Stent	NO.
a plurality of interconnected cylindrical elements aligned along a stent longitudinal axis.	<input type="checkbox"/>	Cylindrical Elements	NO.
each cylindrical element having a shape configured to enable the cylindrical element to expand with the inflation of an expandable member disposed therein.	<input type="checkbox"/>	<2.5 mm Rings	NO.
wherein each of the cylindrical elements has a diameter and a length, the length of each cylindrical element being less than the diameter of the cylindrical element upon inflation of the expandable member; and	<input type="checkbox"/>	Projecting Edges	NO.
the cylindrical elements having a length less than 2.5 mm.	<input type="checkbox"/>	L<D Unexpanded & Uncrimped	NO.
		No Appreciable Shortening	NO.

- 6) **Use analogies** to relate real world experience into technical, scientific or physical explanations. In the following series, the patent lexicon described a rubber flange that, when stretched,

opened an orifice to allow liquids to pass. They called it a ‘Trampoline like effect’. We then depicted a boy on a trampoline, described the physical characteristics of that action, and then introduced the device to show how it used the same physics. Since almost all jurors had either been on a trampoline or seen one in action, they understood the invention instantly, and then learned about the scientific properties that described the action. This made the patent issues easier to understand.



7) **Damages should be shown.** If the case goes to a damages phase, charts and graphs can still be useful in either showing the proposal of a fair license fee, or highlight the other side’s unfair proposals.



8) Finally, **trouble shoot** your graphics, Make certain that the visual story has no holes - leaving out markers for key points allows the other side to provide their own explanations for your unexplained items or may allow juries to fill in the blanks with their own experiences, right or wrong, when they begin to deliberate. Make sure your bases are covered. Look at the exhibits as if you were your opponent (or get a partner in your firm to do that with fresh eyes. Make certain the visuals cannot be turned against you because of an error, and assumption or an opening to opposing arguments.