

Visual Impact Before Trial
Using Electronic Briefs for Mediation and PreTrial Litigation

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Lawyers miss many opportunities by waiting until trial to roll out their audio-visual armory. The raw material (videotaped depositions, exhibits, photographs) can be packaged just as effectively for a mediator or judge before the trial ever begins. In fact, given how often cases are resolved without a trial, visual presentations before trial can become the most cost-effective and useful part of a litigation practice.

I. Pre-Trial Motions

"The next time you're sitting in your chambers, minding your own business, when a large stack of motion papers arrives, just hope it's accompanied by an electronic version." Hon. Steven Leben, "A Brief Article on Electronic Briefs," Court Review 45 (Winter 2001).

"CD-ROM submissions that hyperlink briefs to relevant sections of the appellate record are more versatile, more useful, and considerably more expensive." Phansalkar v. Andersen, Weinroth & Co., L.P., 356 F3d. 188, 190 (2d Cir. 2004).

A new technology that is getting the attention of judges and law clerks, and therefore the attention of computer-savvy litigators, is the digital brief on CD-ROM. Electronic briefs, quickly becoming popular in appellate cases, also offer exciting new prospects for pretrial practice.

Types of Digital Briefs: Electronic briefs essentially are digital versions of your pleadings that you file in addition to the normal hard copies. The simplest such briefs are merely converted from your word processing program to PDF (Portable Document Format), readable with the free Adobe Acrobat® Reader®. Most federal courts, in fact, are starting to require attorneys to file a PDF copy of every brief.

The more exciting development has been the addition of hyperlinks to electronic briefs. Hyperlinks allow the court to use one mouse-click to access the exhibits and case law that the brief cites. The briefs usually are presented on a CD-ROM that

includes digital versions of the appendix and any relevant case law. Attorneys can create hyperlinks from their brief to any media that can be digitized, such as photographs, audio, or even videotaped depositions.

Benefits of Digital Briefs: Most courts that have received hyperlinked briefs have been very enthusiastic about the practice. As the Tax Court noted recently,

The record, which includes a trial transcript of approximately 3,500 pages memorializing the testimony of 21 fact witnesses and 7 expert witnesses, consists of 43 "red" files and more than 10,000 pages of exhibits. . . . The written briefs, inclusive of their proposed findings of fact and objections to the other party's proposed findings of fact, totaled more than 3,300 pages. **The copies of the briefs on CD-ROM were very helpful to the Court.**"

BankOne Corp. v. Comm'r of Internal Revenue, 120 T.C. 174; 2003 U.S. Tax Ct. LEXIS 13, **23 (U.S. Tax Ct. 2003) (emphasis added).

At the trial level, hyperlinked briefs are very useful for complicated motions, such as motions for summary judgment. Hyperlinks are perfect for helping the judge navigate through a large factual record or legal argument.

Another significant advantage of hyperlinked briefs in pretrial practice is the ability to show the court video or audio. Kansas state court Judge Stephen Leben says, "Videotape excerpts, I can tell you, *do* make a more vivid impression than the cold transcripts do." Leben, "A Brief Article on Electronic Briefs," [Court Review](#), p. 45 (Winter 2001). With ordinary paper briefs, the only way to get videotapes before the court is to file the VHS cassettes, and then hope the judge (1) tracks down a television and video player, (2) is willing to search for the section that you are citing, and (3) manages to find it. With an electronic brief, the clip is as easy to locate as the transcript itself.

Also remember the educational function of pretrial motions. Some attorneys use electronic briefs in motions *in limine* to exclude expert witnesses, for example, specifically because the video clips let the judge preview the expert's testimony. Their

hope is that, even if they lose the motion, by the time of trial the judge will be as irritated with the expert as the attorneys are.

Misconceptions About Digital Briefs: The most common misconception about electronic briefs is that you have to file them by the deadline for your briefs. For courts that require electronic filing, it is true that you will have to file simple PDF versions by the deadline. Hyperlinked briefs, however, can be filed one or more weeks after the paper copy. Even those courts with rules specifically governing hyperlinked briefs, such as the [First Circuit](#) and [Federal](#) Courts of Appeals, set the deadline for those briefs at least a week after the ordinary brief deadlines. Courts with no specific rules about hyperlinked briefs generally accept a second filing at any time, treating them as courtesy copies.

Another misconception is that electronic briefs are prohibitively expensive. That fact was true when the technology was new, and may still be true for some companies. One recent court case described a simple appellate brief on CD-ROM that cost \$16,000.00. *Phansalkar v. Andersen, Weinroth & Co., L.P.*, 356 F.3d 188 (2nd Cir. 2004). As the technology has grown, however, the cost has fallen, and it is possible to find companies that charge less than \$100 per page to digitize and add hyperlinks to appellate briefs.

Because PDF technology is relatively simple, some firms do their hyperlinked briefs in-house. Digitizing video requires more complicated hardware and editing software that few law firms possess. That technology, however, is extremely competitive, so it is possible to find reasonable prices for the service.

The Court: Cutting-edge technology is useless if the judge never turns on his or her computer. Fortunately, judicial clerks, particularly recent law school graduates, generally appreciate hyperlinked briefs. All federal districts courts, therefore, are good venues for electronic briefs. State trial courts vary more widely.

Also check with the clerk's office. Few courts have rules specifically addressing hyperlinked briefs, but most courts nevertheless accept them. Make clear that you will be filing hard copies of your motion and brief according to the normal procedure, and then filing a supplemental digital version. If you use the term "courtesy copy" when explaining electronic briefs, the clerks are likely to accept them with little difficulty.

The Trial Schedule: When on a tight schedule, with trial looming, lawyers tend to avoid new technology in favor of basic trial preparation. Tight deadlines, however, are the perfect time for electronic briefs. If the court is running short of time to consider all of your motions, it is very tempting for the judge to just send everything to the jury. A hyperlinked brief, by providing a clear and time-saving map of the case, will increase your chances of winning the motion or, at the very least, winning an evidentiary point during trial.

How To File: The technology for hyperlinked briefs is not terribly complicated, but the process is labor-intensive. You can lower costs by following a few simple rules:

(1) Plan ahead. Early warning is important, particularly for video clips. Creating hyperlinks generally can be done in less than a week, but scanning a voluminous record may take more time. Digitizing video and creating clips can take several weeks, particularly if you want the video synchronized to a transcript

(2) Look for legal knowledge. Try to find a vendor with some level of legal expertise. Technical people understand the software, but they may not recognize pinpoint cites and rarely will catch a typographical error. It never hurts to have a knowledgeable person taking one last look at your brief.

(3) Ask about bells & whistles. Vendors can add numerous features to hyperlinked briefs, some of which you may not want. Decide ahead of time, for example, whether you want the hyperlinks from a pinpoint cite to call up that specific page of the case law or just the first page. You also can ask the vendor to highlight a quotation in

the case law, or the lines of the transcript that you cite. These features may cost you extra money, so talk to the vendor ahead of time.

One feature that you should insist on for video clips is having the video synchronized to the transcript. Not all courts have sound cards in their computers, so those courts will not be able to hear the audio in a deposition clip. Having the transcript tracking the video, therefore, is indispensable. Proprietary software, such as Summation or Trial Director, will not work for electronic briefs because PDF documents cannot call up clips from those programs. There are several free video players that will work with PDF, but not all of them support text synchronization. Be sure that your vendor knows which software to use, and includes on the CD an installer for that program so that the court can view the video.

II. Mediation

Hyperlinked briefs work equally well for mediation, allowing you to present to the mediator a great deal of information in a neat and compact package. Also consider putting your PowerPoint presentation on CD-ROM and sending it to the mediator ahead of time. If you have a Macintosh, Keynote will allow you to export your presentation as a QuickTime movie that the mediator can play with the free QuickTime Player software.

III. Appeal

Once you have spent all the time and energy preparing a visual presentation for trial, don't waste it when time comes for the appeal. Hyperlinked briefs are becoming common in appellate practice, and generally are the easiest briefs to digitize. The record already has been set, and the issues narrowed down. Federal courts have been at the forefront of the e-filing trend, and the Court of Appeals for the Federal Circuit

reportedly was the [first court](#) to accept a hyperlinked brief. Not surprisingly, that court also has specific rules governing hyperlinked briefs.

Even courts without specific rules are learning about, and becoming fans, of hyperlinked briefs. Judge Frank Easterbrook of the Seventh Circuit Court of Appeals recently explained in an [interview](#) on the popular weblog, *How Appealing*, one significant advantage of electronic briefs:

Of our 11 active judges, only 6 have principal chambers in Chicago. (Two of four senior judges who continue to hear cases also are located away from the headquarters.) Moreover, even the judges with principal chambers in Chicago often prepare elsewhere--at home, in Michigan, in Paris, or in my case in Alaska, where I escape to relax and work. Counsel must file briefs and appendices electronically, see Circuit Rule 31(e), so that judges can read wherever they find themselves. Electrons are *much* easier to tote around than those heavy protons and neutrons that constitute paper!

Hyperlinked briefs offer the same benefits on appeal as they offer for pretrial practice. A CD-ROM gives the court instant access to exhibits and case law. If you prepared digital exhibits for trial, you can present those exhibits to the appellate court in the digital format rather than having to rely on a lesser-quality paper copy. Most importantly, the court will be inclined to work from a compact CD rather than a stack of paper.

IV. Conclusion

Lawyers have become used to visual presentations to juries. Good visual presentations are just as important when your audience is a mediator or a judge. Present your arguments and exhibits in the best possible light, and use their computer to your advantage.

Deborah A. Ausburn has almost two decades experience as a lawyer, and has been enamored of computer technology the entire time. She received her J.D. from the University of Georgia School of Law, graduating *magna cum laude* in 1986. She clerked for Judge Edmondson, now Chief Judge, of the Eleventh Circuit Court of Appeals. A few years after entering private practice, she successfully argued before the United States Supreme Court in the case of *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993).

From 1992 to 1999, Debbie was a federal prosecutor in western North Carolina, where she prosecuted crimes ranging from drug trafficking to child abuse on the Cherokee Indian Reservation. Both in that job and since her return to private practice in Atlanta, Georgia, she has used computer technology extensively in pre-trial, trial, and appellate practice.

Debbie practices with Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, in Atlanta, Georgia, concentrating on professional liability cases, including mental health, child care, and youth services providers. She also serves as a consultant to TGL Media, Inc., in Atlanta, her brother's litigation support company ("TGL" stands for "Two Geeks and a Lawyer"), which creates hyperlinked electronic briefs on CD-ROM.

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