

## Hot Tip: Presenting the Financial Picture on Appeal

Scott Bassett

scott@scottbassett.com

www.divorceappeals.com

**Introduction:** The first thing to consider when contemplating an appeal is the record created at trial. There are many great issues that cannot be successfully litigated on appeal because the trial record contains gaps that preclude briefing those issues. If it isn't in the trial court record, it can't be used on appeal. Enlarging of the record beyond what was presented at trial is strictly prohibited. *Michigan AFSCME Council 25 v Woodhaven-Brownstown School District*, 293 Mich App 143; 809 NW2d 444 (2011).

This means that trial counsel must be diligent in creating a record that appellate counsel can work with. This is easier said than done. It is no secret that trial time is precious commodity. You do neither yourself nor your client any favors if you alienate the trial judge by repeatedly gilding the lily. You need to develop the ability to recognize when you have preserved an issue for appellate review with sufficient evidence. At that point, but never short of that point, your job as trial counsel is done.

Going beyond that point also has its risks. Obviously, it is far better to win at trial than to win on appeal. Most cases are not appealed and your victory at trial goes unchallenged much of the time. Even if the other side appeals, the best predictor of who will win that appeal is who won at trial. I have yet to see an appeal where the chances of reversal are 50%. In most cases, the chances are far less, perhaps in the 0% to 20% range. The more complete the trial court record, the better the chances of reversal.

I always ask prospective appeal clients if they are happy with the evidence that was presented at trial. Most have some reservation about whether their case was fully presented. The statement, "I gave that information to my attorney, but she decided not to present it because she didn't want to p--s-off the judge" is one I hear regularly. It is good not to alienate the judge who will make the most important decisions in your case. On the other hand, it is also good to give appellate counsel enough of a record to work with that there is a meaningful chance to succeed on appeal. I don't envy trial counsel's difficult balancing act when deciding what evidence to present and what evidence to discard when preparing for trial.

The most difficult balancing act of all is deciding how to present complex financial data in a divorce case. The dilemma is not just *what* to present, but *how* to present it in a way that will not only be persuasive to the trial judge, but will translate well on appeal to enable the reviewing court to adequately understand the meaning of the data. Dozens of pages of spreadsheets admitted as exhibits or the submission of lengthy trial briefs with stupefying columns of numbers will not work well at trial - or on appeal.

Moreover, today your decision of how to present information, particularly on appeal, is colored by the new reality that appellate judges in Michigan are most likely reading your briefs and viewing exhibits on computer or tablet screens, not paper. Marshall McLuhan was right, the medium is the message. At the very least, the medium will influence how the message is perceived. Appellate lawyers, and increasingly trial lawyers in those counties accepting e-filing of litigation documents, need to write for screen readers, not for paper readers. This is an added complexity in an already complex range of decisions.

**II. Don't Just Write (or Speak) the Words, Paint the Picture:** Business valuations, hidden income analysis, growth projections, and other financial data in complex divorce cases can be presented in text format. But should it? Clearly, the answer is no. While you need to have the underlying data in the form of financial statements, spreadsheets, bank and brokerage statements, etc., introduced into evidence as part of the underlying record, that underlying data will quickly make any jurists eyes glaze over. A long list of number is nothing more than a long list of numbers. It has no reference point. If it doesn't grab the judge's attention, it isn't going to be persuasive.

Most of us, including judges, are visual in nature. Charts, graphs, and photos convey information better than lists or tables containing only numbers and text. Lists and numbers do not lend themselves well to critical thinking and examination. It is particularly hard to determine trends or visualize flaws in the data when using just text and numbers. The information must be presented visually.

Fortunately, we live in an age with wondrous technology that is also amazingly inexpensive. That cheap technology gives us the tools we need to paint an evidentiary picture that will persuade both the trial judge and the reviewing appellate panel. For example, every attorney has access Microsoft PowerPoint or its equivalent as part of widely available office suites. Several of those suites, including the newly updated LibreOffice 4 ([www.libreoffice.org](http://www.libreoffice.org)) are free Internet downloads.

Before you set out to create your PowerPoint or similar presentation for use in court, read the book Beyond Bullet Points by litigation technology consultant Cliff Atkinson. It is available on Amazon in Paperback for around \$18 or in a Kindle edition that can be read on a Kindle, iPad, Android tablet, or computer for around \$13. Better yet, you can borrow it from the State Bar of Michigan's online lending library. The book will teach you how to present your ideas visually with much greater impact than the typical bullet point-ridden PowerPoint presentation.

Also available to every attorney is Microsoft Excel or its equivalent. Excel allows complex information to be entered into a spreadsheet and then converted into a variety of charts and graphs. Fortunately, there is an Excel equivalent called Calc in the free LibreOffice suite. These charts and graphs can be printed, inserted into PowerPoint (or equivalent) presentations, and also displayed in the courtroom using a projector and a laptop computer, or better yet (in terms of ease of use and mobility), from an iPad to an Apple TV unit connected to a projector. The iPad will run a huge variety of office suite and presentation apps that includes the ability to display PowerPoint (or Apple's Keynote) presentations, graphs, and charts.

**III. Painting the Picture:** Not all graphs and charts are created equally, or work equally well at conveying certain types of information. Think about the type of information you are trying to convey to the court. If it is important to show trends over time, such as an analysis of business earnings or personal income, choose a line chart. If you are comparing one set of data points with another, say a year to year comparison or a comparison of one business to another, use a bar chart. If you are making a relative comparison, such as how much of the whole any given category of income, assets, etc., makes up, use a pie chart.

Once you have selected the right type of chart for the information you want to convey, don't try to present too much data in a single chart or graph. Doing so will quickly become confusing. Be concise so that each chart conveys only one or two key points. Use multiple charts or graphs if there is too much data to include on a single chart or graph. Multiple simple charts serve as building blocks that, when combined, convey understanding and lead the court to the conclusion that favors your client's position.

If the data you need to present is particularly complex, it may be necessary to use summary charts in addition to charts making individual data statements. If your expert witness (typically the source of the data in the charts) is viewed as credible, the judge may not need to look beyond the summary charts in order to reach that conclusion you are advocating on behalf of your client.

Avoid going overboard on colors. Use the minimum number of colors that are necessary to distinguish between sets or points of data. Too many colors will be distracting. Select high contrast colors and colors that will display well over a projector if you plan to use such a system during trial. Primary colors display best on most projectors. Pastels not so much.

Each chart must be able to stand on its own without reference to data from any other chart or to information from elsewhere in a PowerPoint presentation. That means the chart should be complete with a title and proper labeling of all data. Proper labeling means that currency, dates, percentages and other data are identified clearly. All units of measure must be specified.

Each chart should be tied to the chart before and after it. The charts should present data in a logical way that, if followed by the court, will logically lead to the conclusion you favor. Charts should also be internally logical. People read from left to right and from top to bottom. The data in the chart should follow the same natural flow. Data that leads to the conclusion will usually be on the top or left of the chart while the conclusion itself will be on the bottom or the right.

Remember the rule of significant figures. The figure \$2.1 Million is more readily understood than the figure \$2,097,143.23. While your chart should accurately reflect your expert's report and testimony, you may want to work with your expert in advance before his/her numbers are finalized to encourage rounding valuation numbers to significant figures. Given that business valuation is rarely an exact "to the penny" science, using significant figures does little damage to either truth or accuracy, but it does make it easier to tell your client's story.

Speaking of accuracy, before presenting any chart or graph to the court, double-check all calculations to be sure that your finished product is accurate. If you become so buried in detail while preparing your charts and graphs, you may forget that it is the big picture that counts. Nothing harms the big picture more than errors in your (or your expert's) calculations.

**IV. Formatting Briefs for Screen Readers:** Every Michigan Court of Appeals judge has an Apple iPad issued by the Court. If you have attended oral argument in the last year, you have seen many judges using their iPads on the bench during oral argument. On that slim device they have access to the briefs and much of the rest of the case file. In many cases, they have read the briefs using only their Court-issued iPad or on a

computer screen at the Court. Reading paper versions of briefs, exhibits, transcript, etc., is becoming less common and may someday disappear altogether.

Research shows that reading on screen is different than reading on paper. The information must be formatted differently in order to be properly understood. Only if information is understood will it be persuasive. Pioneering research by Houston, TX, appellate attorney Robert B. Dubose, tells us that people who read information on screen tend to skim rather than read word-for-word, line-by-line. They move through text quickly trying to gather important information without reading the entire text. If you want to learn more about Dubose's research, his book, Legal Writing for the Re-Wired Brain: Persuading Readers in a Paperless World is available for order at [www.lawcatalog.com](http://www.lawcatalog.com).

The unique process of screen reading is verified by eye-tracking studies that use cameras to record eye movement while readers read on computer screens. These studies conclude that screen readers skim pages in a particular F-shaped pattern. They first read a few lines across the top of the page for clues as to what the rest of the page will cover. So it is important to summarize your points in the first few lines of each page.

Next, screen readers read headings or, if there are no headings, the first sentences of each paragraph. If you write pages that are paragraph after paragraph without headings, you may not retain the attention of a screen reader as well as a writer who uses headings. If your opposing counsel uses headings and you don't, you may be at a disadvantage even if your content and arguments are more compelling.

Finally, a screen reader will skim down the left side of the page in a vertical movement looking for useful information. According to Dubose, the overall pattern looks like this (see next page):

XX

XXXXXXXXXXXXXXXXXX

X

X

X

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

X

X

X

X

Dubose concludes that screen readers such as our appellate judges are likely to:

1. Look for headings and summaries of content.
2. Read the first paragraph of a text more carefully than the rest of the text.
3. Read the first sentence of a paragraph, but only skim the rest of the paragraph.
4. Look for structure cues down the left side of the page.

There are other findings from Dubose's research that are important for us to remember when writing for our judges who are screen readers. First, screen readers do not read text in the order it was intended to be read – from beginning to end. Instead, they jump around the page looking for important information. For lawyers, that means structuring our writing, and formatting the page, so that the most important information is easy to locate and can't be missed.

Dubose found that screen readers are also more impatient than paper readers. They want information NOW! Screen readers become frustrated with text that slows their reading speed or requires them to think more than is necessary. For legal writing, that

means that long briefs or long compilations of financial data that might take hours to read are going to be a challenge for screen readers. There needs to be an “executive summary” that enables the screen reader to get to the key points of the document in a matter of minutes.

Screen readers also don't want to work too hard to get the information you are trying to convey. Sentence structure must be simple enough that it can be understood on first reading. A complex sentence that must be read a second or third time to fully understand will frustrate a screen reader.

Dubose also found that screen reading promotes breadth of information, but not depth. For this, we can blame Google. Screen readers tend to be Internet savvy. If they have a question and want the answer quickly (we all want answers quickly, don't we?), they will “Google” it. While Google will give us the basic answer, that answer will often be devoid of the depth or understanding we would acquire if we researched the question in a more systematic way. In that way, screen reading judges are not interested in become fully immersed in our legal writing for hours in order to absorb it fully. Instead, they want us to get to the point, and get to it quickly, without making them spend too much time or work too hard.

**V. Conclusion:** What is described above may overstate of the impact of screen reading on the appellate process. There is a countervailing affect that comes directly from how lawyers and judges are trained. We read differently than lay persons. We are used to reading long and complex documents. We are, by profession, deep readers.

But we are also full participants in the Internet age of screen readers. Dubose suspects that most lawyers and judges will blend their deep reading habits with modern screen reading skimming to form a hybrid way of reading. Still, if your goal is to allow an appellate judge to fully understand the complex financial information you are presenting in your brief, it makes sense to take into account the rapid increase in screen reading by our appellate judges. Write simply, put your important information up front, and design your documents to take advantage of the F-pattern eye movements common to screen readers.

Because we know that screen readers don't like to hunt around for information, imbed your charts and graphs directly into your brief rather than attaching them as exhibits. If the judge has to deviate from the page on which you make your brilliant argument for rejection of the trial court's valuation findings to flip (or more likely scroll) to a chart

attached as exhibit H to your brief, your point could be lost. Having that chart on the page just above or below (or next to) the text-based argument will make your point that much more persuasive. Yes, you will lose some of your space in your allotted 50 pages that would otherwise be available for your brilliant writing. But remember that old adage – a picture (or chart) is worth a thousand words.