



Visual Storytelling

December 2019



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I. Why Use Visual Storytelling?

Visuals can be invaluable in helping decisionmakers not only understand your case, but understand it exactly the way you want. This is because about 75% of what we learn is information that the brain receives from the eyes.¹ Knowing this, you can help your decisionmakers make better, informed decisions by putting on your case in a format that is more conducive to their learning, understanding, and recollection of information. Effective visuals help facilitate that learning, understanding, and recollection and do more than simply display information.

Without the visuals you provide, decisionmakers will create their own visuals in their minds, and those creations may not be favorable to your case. So, control the narrative — an important aspect of putting on your case — by helping the decisionmakers through use of visual storytelling — from start to finish, from opening to closing — with images that develop and show your theme throughout your case.

Visuals will help with retention, which is especially important in lengthy trials. After three days, jurors remember only *ten percent* of information delivered only verbally. That number jumps to *twenty percent* for information delivered only visually. For information delivered both verbally and visually, the number increases to *sixty five percent*.² That makes information delivered both verbally and visually much more impactful than information delivered solely verbally. Visuals, therefore, can help decisionmakers actually remember what you deem to be the

¹ David A. Peoples, *Presentations Plus: David Peoples' Proven Technique* (New York: John Wiley & Sons, 1988) cited in J. Ric Gass and Dr. David Faust, "Trying Cases Visually: Understanding the Effective Use of Visual Communications in Your Legal Practice," *Ziskin's Coping with Psychiatric and Psychological Testimony* (6 ed.) (Oxford, Oxford University Press).

² Presier, Stanley E. (1980), "Demonstrative Evidence in Criminal Cases," *Trial Diplomacy Journal*, 4 pp30-32; Wiess-McGrath Report by McGraw Hill, cited in J. Ric Gass and Dr. David Faust, "Trying Cases Visually: Understanding the Effective Use of Visual Communications in Your Legal Practice," *Ziskin's Coping with Psychiatric and Psychological Testimony* (6 ed.) (Oxford, Oxford University Press).

most important.

Sometimes you can more effectively communicate (facts, evidence, burdens of proof, ideas, attitudes, inferences, emotions, conclusions, arguments, and so much more) with visuals. For example, a picture of the company's logo can evoke warm, comfortable, and even nostalgic feelings, ultimately beneficial to your case. Visually displaying the attempts an employer made to work with an employee will stick with the decisionmakers when they are trying to determine if the attempts to accommodate were reasonable.³ A picture of an allegedly disabled claimant engaged in an activity inconsistent with the purported disability can speak volumes and impact credibility without a word being uttered. These are all things that you could *tell* decisionmakers, but *showing* them while you tell them will convey much more than mere words, no matter how cleverly selected and delivered.

Visuals can make the decision-making process easy and point it in the direction favorable to your case when the visuals are organized and informative. For instance: if a witness for an insurance company testifies about all of the many and different attempts to contact a claimant, the decisionmakers might zone out or get lost in the number, quality, and kind of contacts. But if you display or build (bullet point by bullet point, slide by slide, object by object) a visual while the witness is testifying, and have the witness verify its accuracy, the decisionmakers can better understand just how many attempts were made as well as the frequency, nature, and quality of those attempts.⁴ In a case where the timing of events is crucial, even just using a visual stating "January, 2018" (when a witness is testifying about the events of that month) and stating "March, 2018" " (when a witness is testifying about the events of that month) can assist in following the

³ See section IV *infra* for an example of a visual.

⁴ See section IV *infra* for an example of a visual.

story and creating a storyline and a timeline of events. You also can show that a witness is trying to wiggle out of a contractual provision by displaying the provision during cross-examination so that the jury can see the exact language now being denied by the witness who previously read and signed the contract.

We live in a world heavy with visual media. Decisionmakers are constantly bombarded by media of all types. Even before the trial starts at 9 a.m., the decisionmakers probably will have already seen numerous advertisements, watched interesting videos, read articles with several pictures, and so much more. Without visuals, decisionmaker attention could be lost during trial. Cutting through all the media clutter that is taking up mental space is not easy, but visuals can help.

II. Visual Storytelling And The Federal Rules Of Evidence

“It is hard to imagine an issue on which a trial judge enjoys more discretion than as to whether summary exhibits will be helpful.” *Fraser v. Major League Soccer*, 284 F.3d 47, 67 (1st Cir. 2002). That theme is how federal courts handle issues involving demonstratives — for the most part, if the trial court thinks the visual will help the jury better understand your case, you can use it. It, therefore, is important to know Federal Rule of Evidence 611 and Federal Rule of Evidence Rule 1006 (as well as their state counterparts).

A. Federal Rule of Evidence 611.

Federal Rule of Evidence 611(a) states:

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) **make those procedures effective for determining the truth;**
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

Fed. Rules Evid. R. 611(a) (emphasis added). The Advisory notes to Rule 611(a)(1) state:

Item (1) restates in broad terms the power and obligation of the judge as developed

under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, **the use of demonstrative evidence**, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

(emphasis added). Courts have consistently held that Rule 611 allows the use of non-evidentiary visuals at trial.

Courts tend to start from the premise that trial courts have “broad discretion to determine the mode by which evidence is presented to the jury [under Rule 611].” *Castaldi v. Land Rover N. Am., Inc.*, 363 Fed. Appx. 761, 762 (2nd Cir. 2009). That discretion includes allowing the use of demonstratives to assist the jury. *Id.* In *Castaldi*, the Second Circuit held that the trial court did not abuse its discretion when it allowed a party to use a chart titled “Facts of the Incident” even though the chart “may have unduly emphasized the otherwise inadmissible factual material relied upon by the expert in reaching his opinion” because any prejudice that might have arisen from such emphasis was balanced by the trial court’s jury instruction that the chart was merely demonstrative, and not evidence. *Id.*; see also *United States v. Kaley*, 760 Fed. Appx. 667, 681-82 (11th Cir. 2019) (using a chart summarizing witness testimony during closing argument was permissible under Rule 611).

Visuals used under Rule 611 should not be admitted into evidence and should not go into the jury room unless both parties consent. *United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006). Further, the trial court should instruct the jury that Rule 611 visuals are not evidence and are to be used only as an aid in evaluating evidence. *Id.* In *Harms*, the Government offered a time-line under Rule 1006 before trial, and Harms objected to its admission into evidence, but not its demonstrative use. *Id.* at 376. Later, the trial court instructed that the jury “that certain charts and summaries were demonstrative. Charts and summaries are valid only to the extent that they

accurately reflect the underlying supporting evidence.” *Id.* The time-line itself never entered the jury room and when the jury asked to use it, the trial court said that it was not in evidence. *Id.* The Fifth Circuit held that the lower court did not abuse its discretion in allowing the timeline to be used at trial and allowing a witness to testify about it.

What if the trial court allows Rule 611 visuals to go into the jury room? Sometimes it is harmless error, and other times it is cause for a new trial. *United States v. Munar*, 419 Fed. Appx. 600 (6th Cir. 2011), involved bank fraud. Exhibit 577 — a chart created by the Government summarizing the “links” in the case — was at issue on appeal. *Id.* at 606. Not only did the trial court allow the Government to use Exhibit 577 during trial, but it also allowed Exhibit 577 to go into the jury room during deliberations along with a limiting instruction that included the following language: “Charts are not evidence but are only aids in evaluating the evidence. The charts and summaries you were shown may help explain the evidence. That is their only purpose; to help explain the evidence. They are not themselves evidence.” *Id.* at 607. The Sixth Circuit held that the trial court erred in allowing Exhibit 577 into the jury room; however, the fact that the trial court gave a limiting instruction and changed the chart’s title to “Government’s Contention of the Common Links Between Operators” was enough to balance any danger of the jury relying on the chart as fact. *Id.* at 609.

Conversely, in *Baugh v. Cuprum S.A. De C.V.*, 730 F.3d 701, 705 (7th Cir. 2013), the trial court granted the jury’s request to have an exemplar ladder brought into the jury room during deliberations. The Seventh Circuit held that allowing the ladder to be used as a demonstrative during trial was permissible under Rule 611. Allowing it into the jury room during deliberations, however, constituted error that necessitated a new trial. *Id.* at 709-711.

The above cases illustrate that using demonstratives is widely accepted by courts so long

as that is what they are used for — demonstrating. Issues may arise when demonstratives are purported to be (or characterized as) evidence or when they are allowed into the jury room.

B. Federal Rule of Evidence 1006.

Federal Rule of Evidence 1006 states:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Fed. Rules Evid. R. 1006.⁵

Under Rule 1006, summaries, charts, and calculations are admissible if: “(1) the charts fairly summarize voluminous trial evidence; (2) they assist the jury in understanding the testimony already introduced; and (3) the witness who prepared the charts is subject to cross-examination with all documents used to prepare the summary.” *United States v. Needham*, 852 F.3d 830, 837 (8th Cir. 2017) (citations omitted). For example, in *Needham*, the Eighth Circuit held that the Government’s Exhibit 51 — a chart of information collected by a special agent during his investigation — was admissible under Rule 1006 because it consisted “mostly of admitted evidence contained elsewhere in the record.” *Id.* at 838; *see also United States v. Anieze-Smith*, 770 Fed. Appx. 342, 345 (9th Cir. 2019) (admitting, under Rule 1006, charts summarizing thousands of pages of relevant documents).

While a lot of storytelling will be done with demonstrative evidence used under Rule 611,

⁵ *See also* the Advisory Committee Note to Federal Rule of Evidence 401, which states:

Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. **Charts, photographs, views of real estate**, murder weapons, and many other items of evidence fall in this category.

(emphasis added).

summaries, charts, and calculations admitted under Rule 1006 are very useful visuals that can streamline and organize information for decisionmakers, especially in complicated cases. Most importantly, Rule 1006 submissions are evidence.

C. Interplay Between Federal Rules of Evidence 611 and 1006.

Because both Rules 611 and 1006 involve “demonstratives”, there can be some confusion as to which rule applies to a visual that is to be admitted evidence. However, even if a visual is admitted under the wrong rule, that does not mean there should be a new trial. In *United States v. Oloyede*, 933 F.3d 302, 310 (4th Cir. 2019), the trial court admitted charts summarizing bank deposits under Rule 1006. The Fourth Circuit held that the charts were not being used to summarize data, as is required by Rule 1006, but instead were being used to demonstrate a pattern of suspicious activity. *Id.* at 311. Despite this error, the Fourth Circuit did not order a new trial because it was “confident that the error did not affect the defendants’ substantive rights, particularly as the same information in the same form could have been shown to the jury under Rule 611(a).” *Id.*

These cases illustrate that while it is important to understand and identify which rule you are relying upon, making a mistake is not fatal. It is also not fatal if you submit your evidentiary visual under the correct rule and the trial court admits it under the incorrect rule.

Finally, sometimes courts admit summary charts without citing either Rule 611 or Rule 1006. In *United States v. Lee*, 660 Fed. Appx. 8, 19 (2nd Cir. 2016), the Government sought admission of two charts summarizing various phone calls. The District Court admitted only the first chart. *Id.* During closing arguments, the prosecutor used both charts. *Id.* at 19-20. The Second Circuit held that such use was permissible because the District Court also gave an instruction to the jury that the chart was an aid in helping them understand the evidence, it was not evidence, and that they could request any evidence relating to the chart if they wished. *Id.* at 20.

III. Some Key Components Of Visual Storytelling

While there are many aspects to visual storytelling, some important aspects are using professional visuals, developing and working with your visuals in advance, and not forgetting other perceptible, tangible, and concrete storytelling items. Doing so, gives you a better opportunity to be very effective at visual storytelling.

A. Use Professional Visuals

You want the decisionmakers to see you as the professional you are. The bumbling “relatable,” *Columbo*-like attorney is not a character trope who wins the day. Professional visuals that are typed, not handwritten, and can be efficiently and clearly displayed by way of technology.

When it is important and natural, visuals should be in color. As mentioned earlier, in their personal lives, decisionmakers, most likely, are constantly bombarded with countless, colorful media images. You have to compete with that in order to get and keep their attention and help them learn, understand, and recollect your case. Black and white images, unless important to your case and unless natural to the image, may not compete very well with everything else vying for their attention and so you may quickly lose their focus. Of course, visuals have to be a carefully planned and balanced because visuals that are too busy, too colorful, and over the top will distract from your case and theme. Simple lines with clean colors not only grab attention, but also keep that attention once you have it.

One way to be professional is to use technology like advanced trial presentation software. Using technology can help show your decisionmakers that you are more professional and more prepared than your opponent, and also will make your visual presentation go more effortlessly. For example, to effectively use trial presentation software, you must keep it simple. That means

no wild animations and using limited text per slide. It is better to have three slides with limited text than one with a block of text.

Do not be afraid to allow your screen to go blank, occasionally. Visuals are helpful, but so is the contrast of a lack of visuals. That contrast can refocus your decisionmakers on your witnesses. Finally, remember that your visuals are communicating more than just words and information. They are communicating emotions. Keeping that in mind, your visuals will be much more effective.

B. Develop And Work With Your Visuals, In Advance.

As with all aspects of trial, you need to be completely prepared with your visuals. First, create the theme of your case and story, determine what aspects are most important, then determine what visuals you need during each juncture. Do not create a theme around the visuals. The visuals are your aids to help show your case to the decisionmakers and you do not need a visual for everything.

Once you have decided on your visuals, it is important to work with them as you would any other aspect of your trial presentation. Focus groups are a great tool for accomplishing this task. Their feedback can help you decide which visuals are effective, which need to be modified, and which need to be scrapped, entirely.

Of course, inspect the courtroom. You will then know exactly how each visual is going to work, what the lighting looks like and if you need to request a lighting change, where to place the visuals so that your decisionmakers can see them, and how witnesses will interact with the visuals. You may even want a pre-trial conference with the judge to discuss your use of visuals and any accommodations you may need.

Finally, your visuals need to have some flexibility. For example, you may need to make adjustments once your decisionmakers are picked. You may decide that you want to change

something or even create new visuals.

C. Other Perceptible, Tangible, And Concrete Items (And The Absence Thereof).

Needless to say, lots of perceptible, tangible, and concrete items also can play a role in visual storytelling. They include the way you and your clients physically dress, sit, and interact with each other and others as well, the clutter/streamlined nature of your counsel table, and the actual “thing” at issue (e.g., the label, medical device, text messages, photographs, stack and stacks of disciplinary notices issued to the discharged employee, etc.).

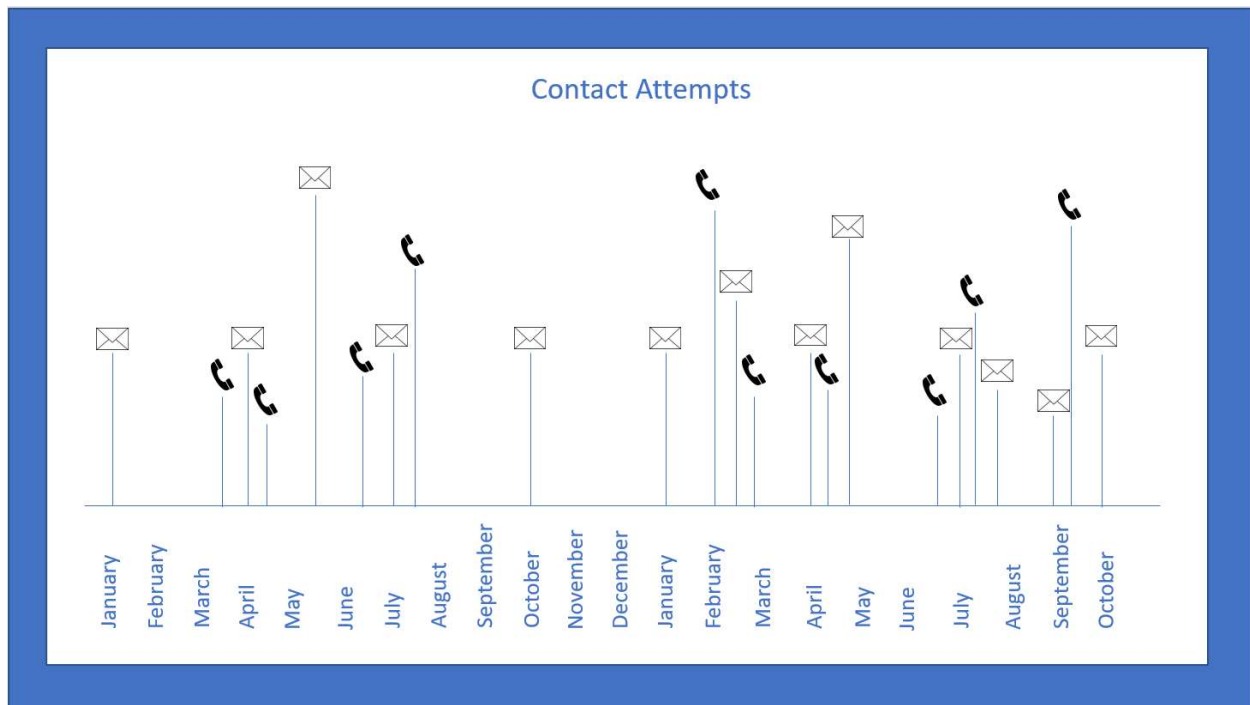
Even calling attention to the absence of the visuals not presented by your opponent is an interesting visual storytelling technique. Where is the actual injector supposedly used by the decedent? Here is an exemplar of what should have been found, your witness tells the jury, if the event happened the way your opponent contends. Yet, no such device was found anywhere — neither near the decedent, not in the decedent’s car or abode, nor among the decedent’s possessions. The absence of that visual, depending upon your case, may help persuade decisionmakers that it is more likely than not the claimant never used your client’s product in the first place.

IV. Illustrations

There are many different ways to use visuals. For instance, during witness examinations you can use visual call outs (displayed on a screen or individual screens) viewed by the decisionmakers) of select portions of deposition testimony or even documents. Doing so can be very effective on cross-examination of difficult witnesses who may made pretrial statements critical to your case. While you are cross-examining the witnesses, the decisionmakers can see and hone in on the exact statements and/or applicable portions of critical documents.

Timelines are another type of incredibly helpful visual that can show important events in a

case. For example, the visual below shows the number of times an insurance company attempted to contact a claimant over the relevant time period. Displaying this image — while the insurance adjuster is testifying about all of the phone calls and letters sent to the claimant — will help the jury understand just how many times the insurance company tried to contact the claimant and the different methods used to do so. Asking the adjuster “Is this an accurate representation of your



attempts to contact the claimant?” (along with other foundational questions) can be enough to allow you to display it because you are not trying to admit it as evidence. It is simply a tool to help the jury better under the adjuster’s testimony. The adjuster’s testimony is the evidence. Of course, you also can seek to admit a summary, and thereby multiply the impact of your case presentation through: (1) admissible testimony; (2) inadmissible visuals; (3) an admissible Rule 1006 summary; and (4) other admitted evidentiary.

Another example, in a products liability context, could be repeatedly showing the decisionmakers a picture of the warning label, at critical junctures of the trial and also while

witnesses are testifying to the label's various cautionary components. Doing so can be an effective way to help the decisionmakers think: "The label has multiple, clear cautionary statements. I would have obeyed that label and acted differently."

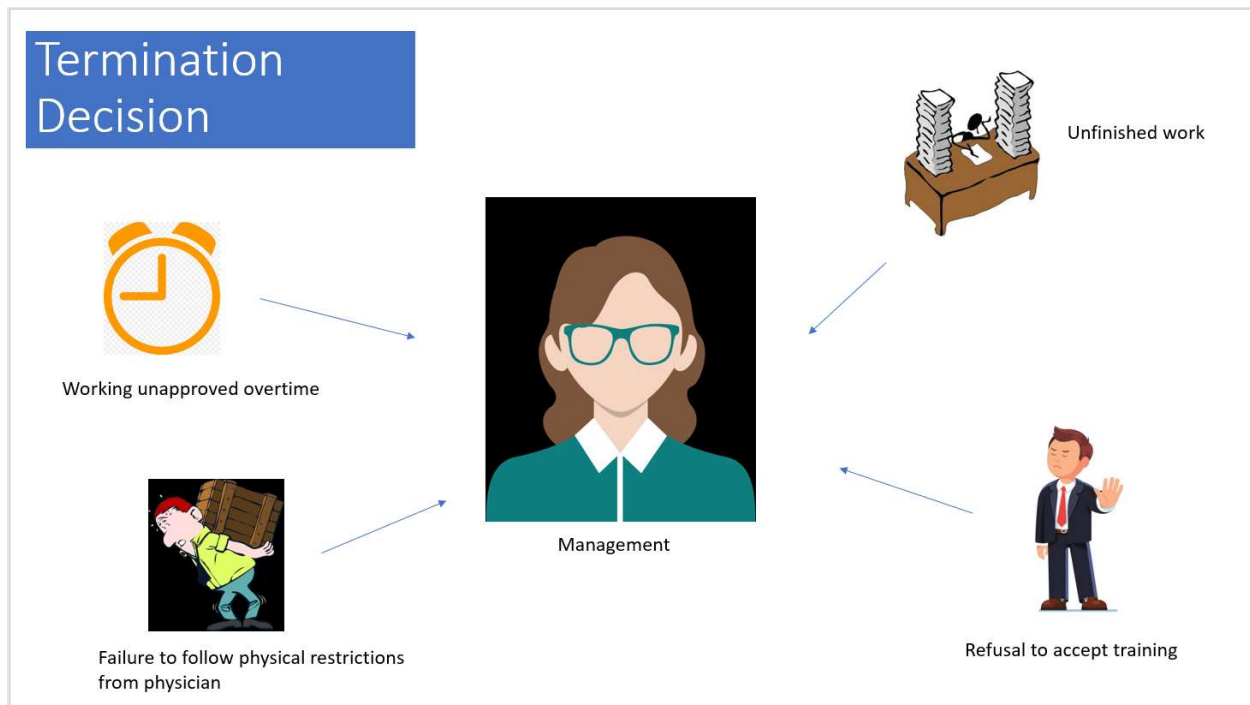


In a different case, perhaps someone made an employment termination decision based on several factors. Then, you could present a slide with text detailing those factors.

Factors
Relating to
Termination

- Plaintiff struggled to complete inventory tasks in a timely manner.
- Plaintiff refused to use new efficiency software for inventory after being provided training.
- Plaintiff continued to work overtime despite being counseled repeatedly not to.
- Plaintiff failed to abide by physical restrictions relating to a work injury.

Or, you even could present the information in a visually different way.



While displaying either visual, your witness also can tell the decisionmakers about the details of each reason for the termination. Later, during deliberations, the decisionmakers may not remember each and every reason given for the termination, but they will remember (consciously or subconsciously) the image of a woman thinking about a lot of reasons and hopefully decide in favor of your client.

Another effective way to use visuals is to use a series of visuals that build on each other. For instance, if you are trying to show that an employer did everything possible to accommodate an employee on leave, it may more make sense to *show* and tell the jury that, rather than just telling them.

Employer Did Everything Possible to Accommodate Plaintiff



March 20, 2017

- Plaintiff requests 12 weeks of leave starting March 20.
- Employer grants leave.
- Plaintiff scheduled to return to work on June 12.



March 20, 2017

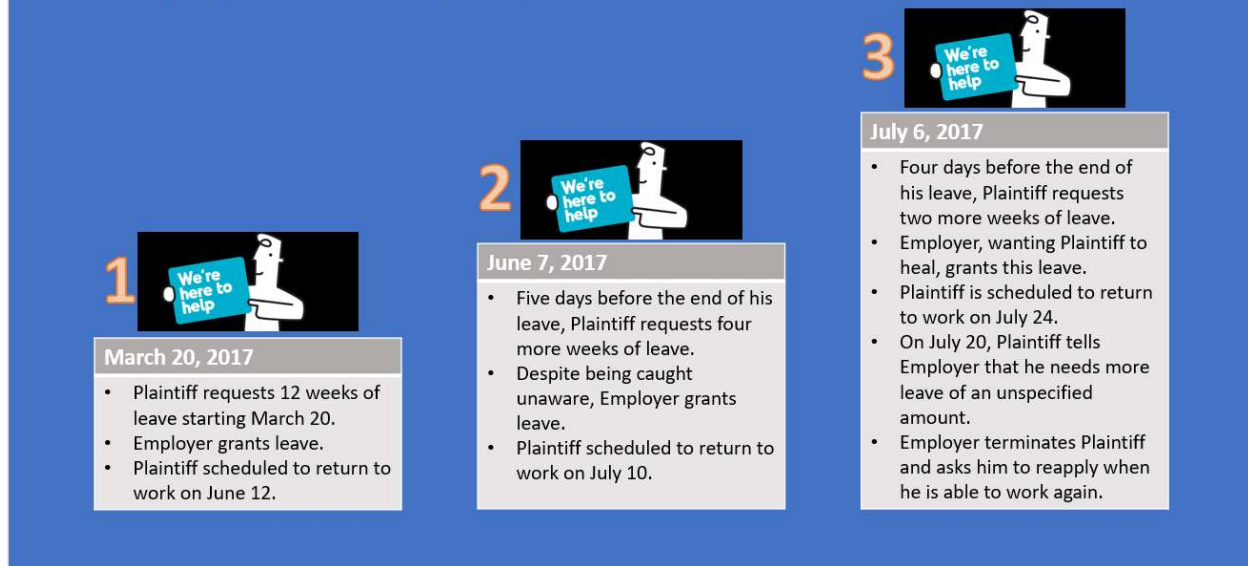
- Plaintiff requests 12 weeks of leave starting March 20.
- Employer grants leave.
- Plaintiff scheduled to return to work on June 12.



June 7, 2017

- Five days before the end of his leave, Plaintiff requests four more weeks of leave.
- Despite being caught unaware, Employer grants leave.
- Plaintiff scheduled to return to work on July 10.

Employer Did Everything Possible to Accommodate Plaintiff



Now, the above images are a bit text heavy, however, in this particular case they are effective because they build on one another. Each slide and each bullet point on slide can appear at different times as the witness testifies about and details the underlying information. Simply putting up the final slide, without the buildup, may be too much for the jury. By building the slides and information — piece by piece, bullet point by bullet point — the jury can more easily digest and understand the information and better remember it.

V. Conclusion

When using visuals (evidentiary and non-evidentiary) you are visually putting our your case through “show and tell” in order to help the decisionmakers not only understand your case, but also remember it. Effective, visual storytelling increases retention and helps make information easily understood. Of course, visuals are not a substitute for excellent lawyering. Rather, visuals can help emphasize your case in a way that mere words simply cannot.