

Texas Appellate Law Podcast: Mark Trachtenberg Discusses Importance of Strong Visuals in Appellate Briefs

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PRACTICES Appellate

Haynes Boone Partner [Mark Trachtenberg](#) was recently interviewed on the Texas Appellate Law Podcast about how effective visual aids can transform appellate briefs.

On the podcast, the hosts Todd Smith and Jody Sanders interview Trachtenberg about his paper, "[Briefing Beyond Words](#)," which he recently presented at a University of Texas School of Law appellate seminar. On the podcast, he explains how visuals such as photographs, images, animations, charts, graphs, tables, and maps can enhance legal briefing in appellate court cases.

"We have first-hand accounts of how effective visuals can make a huge difference in the outcome of Texas Supreme Court cases," Trachtenberg says, describing several cases. He also discusses the possibility of embedding video and audio files, 360-degree panoramas, and other graphics in briefs in the future.

"Video can really have a powerful impact on the justices," he says. "The technology is there where you can embed a body cam, police dashboard cam, a medical professional camera during a medical procedure, security videos – you can embed those right into the heart of your brief instead of just citing a video that was played as an appendix item. The same is true with audio files."

Trachtenberg is recognized as one of the *Best Lawyers in America*, 2020, (Woodward/White) in appellate law and commercial litigation.

Here is an excerpt of the podcast:

Q. Tell us a little about your background. A lot of people in Texas appellate practice will know you, but where do you come from? What's your background?

I grew up in Southwest Houston. I went Northeast for college and law school, Penn for undergrad and Yale for law school. I had enough of the winters up there and was ready to get back. I came back and did a clerkship for Judge Rosenthal in '98-99. That was a great experience. After that, I was at a firm called Mayor Day Caldwell & Keeton for about a year and a half before I figured out that I wanted to do appellate work. Once I came to that realization, I looked around and got an opportunity to come to Haynes Boone, Houston in March 2001, and I've been there ever since.

Q: You transitioned over and joined Haynes Boone, which has a great appellate section and always has.

Lynne Liberato and Alene Levy were the partners at the time in the group, and Kent Rutter was a Senior Associate. I was fortunate to get a spot there. I was really fortunate that during my first week at Haynes Boone, I discovered that they were on the cusp of filing the school finance lawsuit in

Dallas. Coincidentally, I had written in law school a lengthy paper on the history of Texas school finance litigation that had gotten published by the Yale Law & Policy Review. The folks in Dallas at Haynes Boone who were getting ready to file this lawsuit had used that paper to prepare the lawsuit and figure out what claims they wanted to assert. In that first week, somebody in Dallas figured out that I was the same Mark Trachtenberg that had written the paper.

The next thing I know, I get a call from George Bramblett who, if there was a third name in Haynes Boone, it would be his, asking me to join the school finance team. By joining, he meant running point on this lawsuit. I was still a very baby lawyer. It took off from there. That was the beginning of my involvement in the West Orange-Cove school finance case, which went up to the Supreme Court twice and culminated in a victory in 2005. It was a great coincidence that I joined Haynes Boone at the time this case was about to take off.

Q: One of the things I know you've been up to lately, you presented a paper at the UT Law Appellate Seminar and the title of the paper is Briefing Beyond Words. You focus on the paper on using visuals to enhance written advocacy. You've picked up on, and certainly, we all have seen a trend of using visuals in briefing. My feeble efforts have not been nearly as sophisticated as some of the ones that appear in your paper. It's a fascinating topic. What got you interested in that topic?

I'll have to say that I became convinced of the power of visuals in a products liability case many years ago. I was part of a team representing Whirlpool Corporation. The plaintiffs in that case had alleged that a design defect in Whirlpool's dryer had caused a fatal fire. I was the associate working on the brief. The crucial piece of evidence at trial was an exemplar dryer, a copy of the one that burned in the fire. The exemplar dryer was in front of the jury. All the trial lawyers had been referring to various parts of the dryer—the lint transport tube, the heating element, the lint screen, the blower housing.

Reading the cold record, it was very difficult to decipher what they were talking about because the lawyers were pointing to different parts of the dryer in front of the jury. We knew the Supreme Court wasn't going to have the dryer in front of it. The pictures that we had in the record were not fully adequate to explain the Daubert concepts that were at the heart of our appellate argument. We needed to explain how the air flowed through the dryer, what the various parts are, why it was scientifically impossible for the fire to have it started in the way that the plaintiffs theorized. Our solution was to hire a company that developed interactive animations of the dryer.

One of them showed all the parts of the dryer. You could literally press a button that would take the back cover off the dryer and had all the parts listed. You would hover over any of those parts and the part would light up in green so you could easily identify what the parts of the dryer were. There was a separate animation that showed how air flowed through the dryer. This was still the era of paper filing. We filed our brief with a footnote that said, "We anticipate filing an electronic brief with animations that will help illustrate our point." We sought and obtained leave to file an e-brief that had these animations embedded. They were powerful animations and helped illustrate why we should win.

In fact, we did win a unanimous opinion, reversing the judgment in that case. Justice Phil Johnson wrote the opinion and has remarked, both privately to Lynne and me, as well as in various CLE forums, how helpful the visuals were to the court's adjudication of the case. If you look up the opinion, in the appendix, Justice Johnson included a picture of the dryer with all the labels of the various parts that was clearly constructed from our animation. Long story short, we have a firsthand

account of how effective visuals can make a huge difference in the outcome of a Texas Supreme Court case.

To listen to the full 39-minute podcast, click [here](#). To read an article about the podcast, click [here](#).