



BRIEFLY

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Beauty is in the eye of the beholder

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This column has often considered the impact of technology on the written aspect of appellate advocacy. The best font choice, use of white space, and what is a “real” double space have all been discussed, sometimes in great detail. See, e.g., Eric J. Magnuson and Katherine Barrett Wiik, *Briefly: Right-sizing your appellate brief in the digital age*. Minn. Lawyer (Dec. 15, 2016); Luke Hasskamp and Ryan Marth, *Briefly: Preparing an appealing brief in the digital age*. Minn. Lawyer (Aug. 17, 2017). As William Pollard once said, “Those who initiate change will have a better opportunity to manage the change that is inevitable.” As technological advances continue to reshape the legal profession, the best appellate advocates will seize upon every related advantage.

While those prior *Briefly* articles raise important issues for consideration when submitting appellate briefs, they are by no means an exhaustive analysis of how technology is changing the way lawyers and judges do their work. We recently came upon Joseph Epstein’s November 2018 essay *The Bookish Life: How to Read and Why*, which started us thinking along slightly different lines—specifically, how the medium in which judges review our work (electronically or in print) may affect the outcome of a case. In his essay, Epstein considers whether there is a meaningful difference between reading on an electronic screen (computers and tablets) and reading words in print (books and magazines for those who can remember them). Epstein writes:

“I have come to believe that there is a mysterious but quite real difference between words on pixel and words in print. For reasons that perhaps one day brain science will reveal to us, print has more weight, a more substantial feel, makes greater demand on one’s attention, than does the pixel. One tends not to note a writer’s style as clearly in pixels as one does in print. Presented with a thirty- or forty-paragraph piece of writing in pixels, one wants to skim after fifteen or twenty paragraphs in a way that one doesn’t ordinarily wish to do in print. Pixels for information and convenience, then, print for knowledge and pleasure is my sense of the difference between the two.”

We have brushed up against this idea—noting a decided “pro-print” bent—over the course of preparing submissions in our appellate practice as well as in various articles. Indeed, there is even research to support that gut feeling—shared by our colleagues and learned authors and essayists like Mr. Epstein—that the human mind and the human eye react differently to things on the screen and things on paper. That

research reveals that printed formats are preferred for more involved analysis. See, e.g., Maria Gilje Torheim, *Do we read differently on paper than on a screen?* (Sept. 21, 2017), available at <https://phys.org/news/2017-09-differently-paper-screen.html> (“When reading long, linear, continuous texts over multiple pages that require a certain amount of concentration, referred to as ‘Deep Reading,’ the reader often experiences better concentration and greater overview when reading from a printed medium compared to a screen.”). One article, calling for more research in the area, indicates that even touching a work in print leads to comprehension that is lacking when the same is viewed electronically. See Anne Mangan and Adriaan van der Weel, *The evolution of reading in the age of digitization: an interactive framework for reading research*. *Literacy* Vol. 50, No. 3, at 117 (Sept. 2016) (“Studies in experimental psychology and neuroscience show that object manipulation provides spatial information which is crucial for building coherent mental representations of the manipulated object.”).

There appears to be some consensus that how materials are consumed—whether electronically or in print—alters a reader’s perception and includes both physical and psychological components.

Physical

Technology itself plays a substantial part in how the written word is consumed. For example, older monitors and low-resolution screens have the “screen door effect” (space between pixels) which makes reading for long intervals difficult. And that fatigue, of course, affects cognition and retention. Newer products, such as high-resolution screens with high-density dot pitch (e.g., retina screens on the new iPad), represent progress toward eliminating that problem.

But there are other issues that are not so apparent. Backlighting on tablets such as the iPad (as opposed to reflected light on newer Kindle models) is problematic for those looking to read in a deep and comprehensive manner. And although the Kindle does not suffer this shortcoming, judges and lawyers can’t read briefs on Kindles. (Even if we could, annotation and highlighting on Kindles is a clunky and tiresome ordeal, so we’re stuck with backlit options.)

And as outlined in the Mangan and van der Weel study, even touching a manuscript in print can help readers analyze and comprehend the content (from as basic a level as recalling where they are in a brief or on what section of a page meaningful content is located).

Psychological

There is a psychological aspect as well, as the print-versus-electronic debate involves more than the

technology used to present the written word (paper and ink or screen and pixel). We are now predisposed to read in print differently than we read in electronic formats, and that works against the appellate lawyer whose brief is reviewed on a screen.

We’ve been reading on the internet for more than two decades, and nearly all of the information we consume (on Facebook and Twitter and elsewhere) is insignificant. We skim and forget without consequence. And, in so doing, we have developed bad habits. We look for highlights and then move on to the next item in an unlimited textual buffet. When we read a brief on a screen, that mindset—quick to revert to a skim and dash analysis—stays with us. But unlike missing your nephew’s most recent Facebook shenanigans, overlooking key facts in a brief poses significant consequences.

So what does this all mean? In the end, we can’t change how judges and their clerks are going to read the briefs we submit (even though we want them to read in paper as opposed to on a screen, no matter how large and well-pixelated). By and large judges are going to continue reading appellate submissions on electronic screens, be it laptops, desktop monitors, or tablets. But—as we have said before—the fact that we can’t change how our message is accessed does not mean we are without influence. Always review the applicable local rules governing paper submissions. When courts ask for paper briefs, be sure to submit them in a timely fashion and formatted as requested so they are not overlooked or discarded. Short of showing up with copies to drop on the judge’s desk, do everything you can to ensure a pleasing and helpful print copy of your work is available to the decision makers in your cases.

In the end, whether presented on paper, a computer screen, or a billboard by the highway, good writing is good writing. Our first goal should always be to deliver the message with clarity, simplicity, and force. That said, even the best writing will benefit from some careful consideration of the way that the reader is going to get the message. Focus on both how your brief looks internally (font, white space, format) and how your brief will be read (electronically or in print). Success in appellate advocacy centers on taking advantage of every opportunity, no matter how trivial.

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