

Visual and Expert Evidence: Rhetorical Connections and Invisible Affinities
Jennifer L. Mnookin*

Abstract/Introduction

"Expert evidence" and "visual evidence" are not typically thought to have a great deal in common. Under the Federal Rules of Evidence or most states' equivalents, there are quite specialized and well-developed rules for handling the admissibility of expert evidence. Determining whether expert evidence is admissible within the U.S. trial process requires assessing the expert's qualifications; establishing whether the substance of the expert testimony is adequately reliable to meet the Daubert test (or in those states that still use Frye, whether the substance is "generally accepted" by the relevant scientific community), and deciding that the expertise will both be helpful to the jury, and generally speaking, that is outside of the range of what jurors already know. When expert evidence is admissible, experts have certain privileges not permitted ordinary witnesses. They may give opinions and conclusions, and are exempted from the rather Lockean conception that pervades the evidence rules overall, under which witnesses are expected to stay as close to direct sensory impressions as is reasonably possible. These opinions and conclusions may even be based on otherwise inadmissible evidence, so long as that evidence is of a kind generally relied upon by experts in their field. Experts may (usually) even speak about the ultimate issue about which the jury must make a determination. Experts, therefore, are rather special witnesses: they must fulfill certain conditions precedent that do not apply to ordinary eyewitnesses, but they are also granted unusual privileges in regard to the scope of their testimony. In addition, there is an extremely voluminous and fairly well-developed case law regarding expert admissibility and appropriate methods for assessing expert evidence -- the Supreme Court's Daubert trilogy both reflected and increased this judicial (and academic) focus on the topic. And it is no exaggeration to remark that whole scholarly careers have been devoted to the subject as well.

By contrast, visual evidence in the courtroom has not received nearly so much focused attention, not from scholars, nor, for that matter, from courts. Visual displays, from simple hand-drawn charts to extremely elaborate, technologically-produced visual presentations like computer-generated animations and simulations, all must be adequately authenticated before they can be deemed admissible, this much is doctrinally clear. But the precise purposes of and limits to the use of visual materials in court have not, at least until very recently, received much careful scrutiny by legal scholars, nor has there been much careful appellate judicial analysis, nor any attention whatever from the august Supreme Court. The admissibility of visual evidence is, quite frankly, largely a matter of trial court's discretion, and besides some rather vague rules of thumb, trial judges are not given a great deal of guidance for making their analyses. In some circumstances the very evidentiary status of these visual display in court is in fact uncertain: Is it a piece of demonstrative evidence, the witness's testimony rendered visually, having no independent evidentiary substance or authority, meaningful only insofar as it ties back to the

* Professor of Law, UCLA School of Law.

authenticating witness and what he wishes to describe in pictures rather than words? Or is it in fact a piece of substantive evidence on its own, with evidentiary weight separate from and going beyond the testimony of the authenticating witness? Is this even a distinction that ought to make a difference – does it affect, for example, the degree of scrutiny that a court ought to give the evidence?

I would certainly argue that visual evidence as an evidentiary category deserves far more sustained study – both descriptively, to establish how it functions, in what ways and through what mechanisms visual displays can affect our understanding, move us affectively, and persuade us that we know something, and normatively, to establish how courts ought to evaluate and assess the evidentiary significance and legitimacy of various kinds of visual evidence. But this is not my primary purpose today. Rather, what I want to do is to spend a few minutes thinking about expert evidence and visual evidence together. While I in no way want to discount the many significant differences between the categories, I do want to suggest that it may be interesting to think about them in conjunction. Are there ways in which they do serve a similar function in the courtroom, or perhaps more precisely, is there a way in which they reflect two different answers to the same question, or to the same hope or aspiration? And what rhetorical and functional role does visual evidence serve for experts who wield it?

Essentially, I want to suggest today two things. First, that both expert evidence and visual evidence do in fact share something important in common: They are methods through which litigants attempt to present evidence in a form that lays claim to more epistemic authority than the lay eyewitness. They both offer a certain kind of glittering promise, although one, to be sure, that is often not realized in practice: the promise of evidence that may offer more certain knowledge than the fallible, lay eyewitness. Visual evidence, especially when it is generated through a mechanized or technological process, has a certain ‘speak for itself’ quality that can give it particular authority and purchase. And at least in theory, experts too may make a claim to heightened or more accurate knowledge of the natural world than ‘mere’ ordinary witnesses.

Second, I want to suggest the visual evidence is extremely important tool or technique for experts themselves. Visual evidence often serves to shore up and reinforce an expert's authority. For many kinds of expertise, the output of a visual instrument accompanying the expert helps to make the expert's testimony not only more vivid but more authoritative. These visual displays, I want to suggest, serve both an important and an importantly ambiguous role for the expert. At times, they seem to be nothing more than an illustration, a way for the experts to translate his or her specialized knowledge into a form more comprehensible for a lay jury. On other occasions these visual displays seem almost to **be** the evidence, and the expert's role appears to be the interpretation of the visual evidence. In other words sometimes the actual evidence, so to speak, is provided by the expert's words, and the visual display is claimed to be simply a rhetorical choice, a demonstrative tool to make the expert's testimony clearer, more comprehensible, perhaps more vivid and lively. On other occasions, by contrast, the visual display truly seems to **be** the evidence, and the expert's purpose becomes to be an explicator; because this visual display is the product of sophisticated technologies or reveals matters outside the common knowledge of the jury, it can only be made legible, fully comprehensible, with the assistance of the expert interpreter. Sometimes the visual image is handmaiden to the expert, and other times it is the expert who is the

handmaiden. Moreover, at times, experts may keep their role purposefully or tactically unclear, shifting the locus of 'the evidence' from their words to the visual depiction and back again, depending on which better suits their purposes.

In what follows, I will explore these questions with examples from the history of evidence law, focusing primarily on the legal reception of handwriting identification expertise, x-ray evidence and fingerprinting. While these examples all come from nearly a century ago, I think some of the dynamics they illustrate are still with us today, when we use as legal evidence techniques ranging from visual imaging techniques like MRI's and PET scans, or the early reception of DNA profiling when RFLP and visual autorads were used; or when we use computer-generated simulations, just to name a few examples.