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ARTICLES & ESSAYS

**Old Habits: Sister Bernadette and the Potential Revival
of Sentence Diagramming in Written Legal Advocacy**

Lisa Eichhorn

Old Habits

Sister Bernadette and the Potential Revival of Sentence Diagramming in Written Legal Advocacy

Lisa Eichhorn*

Of course, we're all guilty of venial syntactical sins.¹

I. Introduction

The factual history in *United States v. Rentz* concerned “a split second in time” during which Philbert Rentz fired a single bullet in Indian Territory that passed through the body of one victim and then struck and killed a second.² As a result, the federal government charged Mr. Rentz with assaulting one person and murdering another.³ Mr. Rentz also received two separate, additional, charges of using a firearm to commit a violent crime: one firearm charge stemming from the assault and the other stemming from the murder.⁴

In 2015, the Tenth Circuit, en banc, addressed whether Mr. Rentz’s single-shot scenario could indeed support two separate firearm charges under 18 U.S.C. section 924(c), which is violated by “any person who, during and in relation to any crime of violence . . . uses or carries a firearm.”⁵ For Mr. Rentz, the difference between one and two convictions under section 924(c) would mean the difference between receiving and not receiving an additional mandatory, nonconsecutive sentence of twenty-five years to life.⁶ In the end, the en banc court held that a single use of a firearm can support only one charge of violating the statute, even if that single use involves more than one additional crime.⁷ Thus, the court

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¹ *United States v. Rosales-Garcia*, 667 F.3d 1348, 1355 (10th Cir. 2012) (Gorsuch, J., dissenting).

² 735 F.3d 1245, 1247 (10th Cir. 2013), *vacated en banc*, 777 F.3d 1105 (10th Cir. 2015).

³ *Id.*

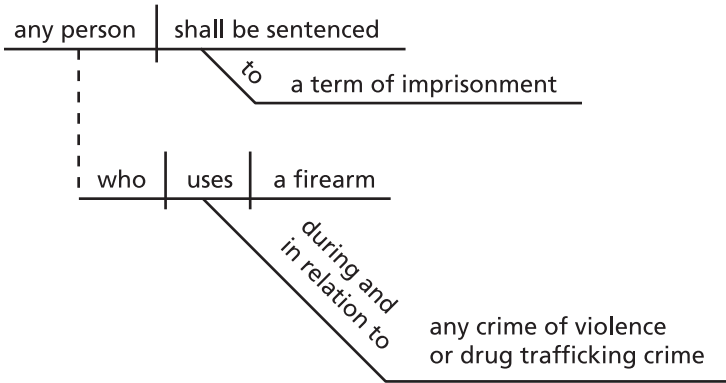
⁴ *Id.*

⁵ *United States v. Rentz*, 777 F.3d 1105, 1106–07 (10th Cir. 2015) (en banc) (quoting 18 U.S.C. § 924(c)(1)(A)).

⁶ *Id.* at 1107.

affirmed the district court’s dismissal of one of Mr. Rentz’s two firearm charges under section 924(c).⁸

As a veteran teacher of legal writing, what drew me to the *Rentz* case was neither the tragic and improbable fact scenario nor the high-stakes complexities of section 924(c). Instead, what really grabbed me was the illustration, in the en banc opinion, of the statutory language in an old-fashioned sentence diagram:



“Visualized this way,” wrote Judge Neil Gorsuch for the majority, “it’s hard to see how the total number of charges might ever exceed the number of uses . . . [Y]ou cannot *use* a firearm *during and in relation to crimes of violence* more than the total number of times you have *used* a firearm.”⁹

Judge Gorsuch’s illustration follows a sentence-diagramming pattern once commonly taught in many American schools but now largely abandoned.¹⁰ This nearly lost art is recalled with fondness by author Kitty Burns Florey in *Sister Bernadette’s Barking Dog*, her ode to the “distinctly unsexy”¹¹ art of representing the grammatical relationships in a sentence using horizontal, vertical, and slanted lines, as taught to her sixth-grade Catholic-school class in the 1950s by Sister Bernadette: “It was a bit like art, a bit like mathematics. It was much more than words uttered, or words written on a piece of paper: it was a picture of language.”¹²

⁷ *Id.* at 1115.

⁸ *Id.*

⁹ *Id.* at 1110 (emphasis in original).

¹⁰ See KITTY BURNS FLOREY, *SISTER BERNADETTE’S BARKING DOG* 152 (2006) (“Diagramming isn’t dead—it’s

just resting. The practice is in the process of recovering from the steep slide into marginality that began in the 1960s.”). This article takes no position on whether students should learn traditional sentence diagramming in schools.

¹¹ *Id.* at 24.

¹² *Id.* at 14–15.

Given the rise of e-filing and of software that makes it easier than ever to create images and insert them into documents, this lost art may be due for a revival in written legal advocacy. After all, if an en banc federal appellate court can use the lowly sentence diagram to explain, or perhaps justify,¹³ its interpretation of a statute, then there should be at least an occasional place for sentence diagrams of various styles in legal briefs that make statutory-interpretation arguments.

Indeed, a small number of briefs, some quite recent, have included sentence diagrams to buttress arguments related to the interpretation of statutes.¹⁴ Drawing on a study of both *Rentz* and of several twenty-first-century federal appellate briefs that include such diagrams, this article posits that while sentence diagrams can, in a limited set of cases, add to the persuasive force of a statutory-interpretation argument,¹⁵ the diagrams

13 See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 8 (1993) (arguing that, in difficult cases, “linguistic analysis [is] especially tempting for judges to use as justification for their decisions, even in cases where the judge is motivated by a very different agenda”).

14 I found briefs containing sentence diagrams primarily by searching WestlawNext for references to “sentence diagram” and various combinations of those two words within four words of each other. Of course, the search results included judicial opinions or briefs that referred to the concept of diagramming a sentence but did not contain an actual diagram. Other results were opinions or briefs that allowed me to confirm the existence of an actual sentence diagram in the record.

Even where a judicial opinion confirmed that the record somewhere contained a sentence diagram, the WestlawNext database did not always include the diagram-containing brief itself. Even when WestlawNext contained the brief, the PDF of the brief in the database did not necessarily include the actual diagram (as opposed to WestlawNext’s notice that “tabular or graphic material is not displayable”). The lack of a PDF on WestlawNext was especially common with respect to older cases and state—as opposed to federal—cases. For some federal cases, I was able to find the PDF of the diagram-containing brief on PACER, even if WestlawNext did not include the same PDF.

Using this method, I was able to confirm the existence of diagram-containing briefs in about twenty cases, in fora ranging from the Fifth Circuit to the Oregon Workers’ Compensation Board. The majority of these briefs date from 2005 onward—indeed, eight range from 2009 to 2014—perhaps because advances in word processing have made it easier to create diagrams in recent years.

My research thus turned up only some unknown percentage of all of the diagram-containing briefs that have ever been filed across the country. First, some briefs no doubt have included a diagram but have not used a phrase like “sentence diagram” in the text. For example, a brief may introduce a diagram with words like, “We may think of the provision as illustrated below.” If that brief led to a judicial opinion, the opinion may not have referred to the diagram at all, or it may have referred to the diagram without using phrases like “sentence diagram.” My research would have missed such cases. Second, even if a brief used the phrase “sentence diagram” in introducing such a diagram, WestlawNext may not contain the brief, especially if it was filed at the trial-court level or if the brief is more than a couple of decades old. If the brief did not lead to a judicial opinion on WestlawNext, or if the resulting opinion did not refer to the diagram or referred to it with words other than “sentence” and “diagram,” my research would have missed the diagram-containing brief. In sum, because no database allows one to search for sentence diagrams in briefs directly, it is impossible to know how many diagram-containing briefs the legal databases may harbor, let alone how many such briefs have not been picked up by the databases.

At any rate, while the number of diagram-containing briefs is no doubt small when compared to the sheer number of briefs filed each week in fora across the country, these briefs do exist, and this article will examine what lessons, if any, we may draw from them.

15 Because this article analyzes the use of sentence diagrams to illustrate only issues of statutory interpretation, it does not discuss issues related to fact-finding and evidence that may arise with respect to diagrams illustrating issues of contract interpretation. Sentence diagrams can be and have been used in briefs to illustrate contract-interpretation arguments. See, e.g., Brief for Appellant at 19, 23, *Allison v. Nationwide Mut. Ins. Co.*, 964 F.2d 291 (3d Cir. 1991) (No. 91-3579) (diagramming language in insurance policy). But the interpretation of a contract is normally an issue of fact, resolved through the presentation of evidence to a factfinder, whether judge or jury. See Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?*, 66 TENN. L. REV. 1167, 1170 (1999). Thus, the creation and use of a sentence diagram to prove a particular interpretation of a contract potentially raises issues of evidence law: for example, whether a diagram is admissible as evidence, or

themselves are less compelling than attorneys may believe them to be, and diagrams cannot elucidate all types of interpretive issues. Like an analogy, a sentence diagram can illustrate an argument aptly—or ineptly—and counsel’s ability to come up with an illustrative analogy or a diagram is no guarantee that the illustrated argument has merit.

This article first explains the nature of sentence diagrams and then discusses their potential utility in briefs. It then describes two cases where the inclusion of diagrams in briefs was less useful, or even counterproductive. In closing, it offers some concrete advice to attorneys on the use of sentence diagrams in written legal advocacy.

II. The Nature of Sentence Diagrams

A sentence diagram is simply an illustration of the grammatical relationship of the words, phrases, and clauses in a sentence.¹⁶ A very simple way to display such relationships is through tabulation. Thus, for example, in the sentence “Stephanie and Michelle bought coffee and donuts,” the following tabulation scheme shows that “Stephanie” and “Michelle” have similar roles (as subjects of the sentence), that “bought” has a differing role (as the verb), and that “coffee” and “donuts” each have a third role (as direct objects):

Stephanie and Michelle	bought	coffee and donuts.
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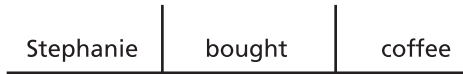
In the United States, teachers have used more graphic means of displaying these types of grammatical relationships to students since the mid-nineteenth century.¹⁷ Building on the work of earlier educators,

whether a linguist who created a diagram and testifies about it may qualify as an expert witness. *See id.* at 1183–89 (discussing linguists as expert witnesses). In contrast, statutory interpretation is a purely legal inquiry, not a factual one. *See id.* at 1170. Therefore, in briefs that make statutory-interpretation arguments, sentence diagrams would not normally be considered evidence or raise evidentiary issues.

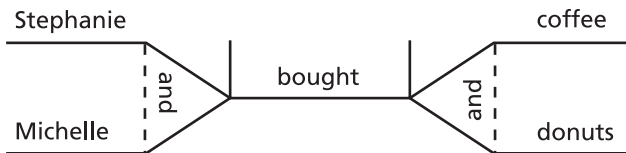
¹⁶ *See* STEVEN PINKER, *THE SENSE OF STYLE* 81–83 (2014) (demonstrating three different ways of displaying the grammatical relationships within a sentence, one using branching lines, one using braces and brackets, and one using Venn-style ellipses).

¹⁷ *See* FLOREY, *supra* note 10, at 29–43 (describing the history of graphical sentence-diagramming, beginning in 1860); Juana Summers, *A Picture of Language: The Fading Art of Diagramming Sentences*, NPR Ed (Aug. 22, 2014 5:25 PM), <http://www.npr.org/sections/ed/2014/08/22/341898975/a-picture-of-language-the-fading-art-of-diagramming-sentences>.

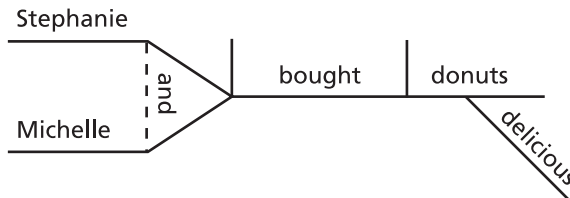
Alonzo Reed and Brainerd Kellogg in 1877 introduced a diagramming method, built on a straight horizontal line, that “swept through American public schools like the measles.”¹⁸ Their method, introduced in their textbook *Higher Lessons in English*¹⁹ and refined by later teachers,²⁰ instructs students to place a sentence’s subject, verb, and object along a horizontal line, separated by shorter vertical lines. ²¹ Thus, “Stephanie bought coffee” is rendered as follows:



Compound subjects or objects are represented thus:



Modifying words and phrases are visually linked to the words they modify through slanted lines:



What has come to be known as the Reed-Kellogg method of sentence diagramming also includes rules for representing prepositional phrases, relative clauses, interjections, and just about every other aspect of traditional sentence grammar.²² Judge Gorsuch’s diagram in the *Rentz* opinion

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¹⁸ FLOREY, *supra* note 10, at 13.

¹⁹ The manuscript of *Higher Lessons* was copyrighted by Reed and Kellogg in 1877, and the book was published in 1880 by Clark and Maynard Publishers. An electronic copy of the original is accessible for free through the nonprofit Internet Archive at <https://archive.org/details/higherlessons09kellgoog>.

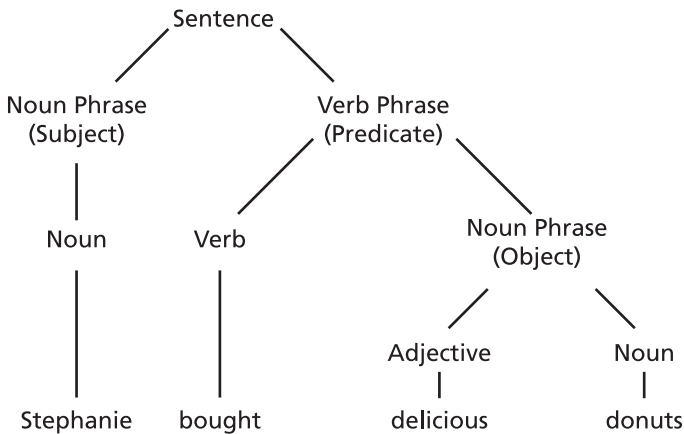
²⁰ Professors Homer C. House and Susan Emolyn Harman expanded upon the diagramming method of Reed and Kellogg in their own twentieth-century textbook, see HOMER C. HOUSE & SUSAN EMOLYN HARMON, *DESCRIPTIVE ENGLISH GRAMMAR* vi (2d ed. 1950). According to Kitty Burns Florey, “their book was a best-seller.” FLOREY, *supra* note 10, at 57 n.10.

²¹ See FLOREY, *supra* note 10, at 52–56 (describing Reed-Kellogg diagrams). For comprehensive, contemporary instruction in the Reed-Kellogg method, see EUGENE R. MOUTOUX, *DIAGRAMMING STEP BY STEP: ONE HUNDRED AND FIFTY-FIVE STEPS TO EXCELLENCE IN SENTENCE-DIAGRAMMING* (2013).

²² See generally MOUTOUX, *supra* note 21. But see PINKER, *supra* note 16, at 88 (explaining that “modern grammarians have sorted words into grammatical categories that sometimes differ from the traditional pigeonholes” and criticizing traditional grammarians for failing to distinguish word categories, such as noun or verb, from word functions).

follows the Reed-Kellogg method, and Kitty Burns Florey's *Sister Bernadette's Barking Dog* offers numerous examples and explanations of complex Reed-Kellogg diagrams,²³ as do other sources.²⁴ Indeed, although the teaching of traditional diagramming has waned considerably since the mid-twentieth century,²⁵ one still can find textbooks,²⁶ websites,²⁷ YouTube videos,²⁸ and even diagram-generating apps²⁹ intended to help people understand and create classic Reed-Kellogg sentence diagrams.

Among academic linguists, various types of tree diagrams have replaced Reed-Kellogg diagrams as a way to display the grammatical design of a sentence.³⁰ Tree diagrams have the virtue of displaying words in the same left-to-right sequence as the original sentence, and these diagrams can also include labels indicating both categories and functions of words and phrases:



²³ See FLOREY, *supra* note 10, at 14–21, 82–110.

²⁴ See generally, e.g., Elizabeth Ruiz Frost, *The Upside of Diagramming Sentences*, 75 OR. ST. BAR BULL. 13 (June 2015) (including and explaining six Reed-Kellogg diagrams); Writer's Relief Staff, *This Old Grammar Trick Still Works! How to Diagram a Sentence*, Huffington Post (Oct. 1, 2014 9:17 AM), http://www.huffingtonpost.com/2014/10/01/diagram-sentence-grammar_n_5908462.html (including and explaining eight diagrams).

²⁵ See FLOREY, *supra* note 10, at 137.

²⁶ See, e.g., DEBORAH WHITE BROADWATER, *DIAGRAMMING SENTENCES* (2004); MARYE HEFTY ET AL., *SENTENCE DIAGRAMMING: A STEP-BY-STEP APPROACH TO LEARNING GRAMMAR THROUGH DIAGRAMMING* (2007); MOUTOUX, *supra* note 21; ELIZABETH O'BRIEN, *SENTENCE DIAGRAMMING EXERCISES: AN INTRODUCTION TO SENTENCE DIAGRAMMING* (2012).

²⁷ See, e.g., Grammar Revolution: Grammar the Easy Way, <http://www.english-grammar-revolution.com> (last visited Mar. 11, 2016).

²⁸ See, e.g., Diagrammar, Sentence Diagramming Forms, (Aug. 29, 2010) www.youtube.com/watch?v=SqHPqdmIjwM.

²⁹ I found one website, sponsored by a mysterious entity called 1Aiway, offering a diagramming app for download, at <http://1aiway.com/>. I make no representations as to 1Aiway or the quality of its software.

Tree diagrams also reflect a more sophisticated and more empirically tested understanding of English grammar.³¹

Nevertheless, when it comes to sentence-diagramming in legal opinions and briefs, the Reed-Kellogg horizontal line still rules,³² probably because the lawyers and judges most likely to consider the option of including diagrams in the first place are those who became familiar with traditional diagramming in grade school. My research did, however, uncover a few briefs containing intuitive forms of diagrams that used tabulation or combinations of arrows, boxes, or circles, indicating that the brief writers either were unfamiliar with the Reed-Kellogg method or had consciously abandoned it in favor of a more self-explanatory form. I have yet to find a legal opinion or brief containing a tree diagram, likely because most lawyers have not had occasion to learn the terminology and diagramming style of modern academic linguists.

III. The Potential Power and Utility of Sentence Diagrams in Briefs

A. The Power of Diagrams and the New Receptivity to Images in Litigation Documents

When it comes to explaining ideas, words and images are often more effective than words alone.³³ One theory posits that learners build a verbal mental model of a concept from text and a pictorial mental model of the

30 MOUTOUX, *supra* note 21, at 215; FLOREY, *supra* note 10, at 137–38. Steven Pinker, for example, has called Reed-Kellogg notation “just one way to display syntax on a page, and not a particularly good one, with user-unfriendly features such as scrambled word order and arbitrary graphical conventions.” PINKER, *supra* note 16, at 78. Gene Moutoux has included a substantial section on tree-diagramming in his sentence-diagramming textbook and notes that “[n]o matter how convinced you are of the merits of Reed & Kellogg diagramming, I think you will agree with me that we can learn much from modern linguists’ syntactical analyses and from their presentation of these analyses in tree diagrams.” MOUTOUX, *supra* note 21, at 215. For a particularly lucid explanation of one type of tree diagram, see PINKER, *supra* note 16, at 81–89.

31 As Steven Pinker explains,

[I]t’s essential to keep an open mind about how to diagram a sentence rather than assuming that everything you need to know about grammar was figured out before you were born. Categories, functions, and meanings have to be ascertained empirically, by running little experiments such as substituting a phrase whose category you don’t know for one you do know and seeing whether the sentence still works. Based on these mini-experiments, modern grammarians have sorted words into grammatical categories that sometimes differ from the traditional pigeonholes.

PINKER, *supra* note 16, at 88.

32 Please pardon the pun.

33 See RICHARD E. MAYER, MULTIMEDIA LEARNING 232–36 (2d ed. 2009) (summarizing multiple empirical studies, all of which indicate that “adding pictures to words resulted in improvements in students’ understanding of the explanation”); Kirsten R. Butcher, *The Multimedia Principle*, in THE CAMBRIDGE HANDBOOK OF MULTIMEDIA LEARNING 174, 175 (Richard E. Mayer ed., 2d ed. 2014) (citing studies and noting that “there is consistent evidence that learners in general (not individuals with a specific learning style) are better supported by combinations of visual and verbal information than by text alone”). *But see* Wolfgang Schnotz, *Integrated Model of Text and Picture Comprehension* (describing studies indicating that learners with high prior knowledge may not benefit, and may even learn less, when pictures are added to text because the pictures are redundant for these learners, who lose time and mental effort in processing this redundant information), in THE CAMBRIDGE HANDBOOK OF MULTIMEDIA LEARNING, *supra*, at 72, 88–89.

same concept from an accompanying image and then hold both models in working memory while building connections between the two; this building of connections is believed to be “an important step in conceptual understanding.”³⁴ Another theory holds that learners build a single mental model from a passage of text and an accompanying image by relying initially and primarily on the text and then using the image as “some scaffolding of the initial mental model.”³⁵ In either case, the research literature supports the idea that adding images, including diagrams, to text can significantly enhance learning,³⁶ especially when the images appear immediately before the relevant text,³⁷ the images are appropriately and not overly detailed,³⁸ and the learner has enough background knowledge of the concept to follow the complexity of the images.³⁹

Despite this research, the legal profession has been historically wary with respect to the inclusion of images—whether diagrams, photographs, or other illustrations—in written briefs and opinions.⁴⁰ Nevertheless, we appear to be at the start of a belated visual revolution in written legal advocacy and adjudication. In 2014, scholar Elizabeth Porter noted “a broad shift toward the visual in our conception and practice of written law.”⁴¹ Citing, among other developments, the rise of electronic court-filing, the ease with which images may now be inserted into electronic documents, and the increasing tendency of judges to read briefs on tablets and other computer screens, Porter declared that “[i]mage-driven written persuasion is here.”⁴²

Porter has not been alone in calling attention to the persuasive potential of images in written legal advocacy. A 2012 article by an experienced practitioner advised that “[w]ell-crafted images—charts, diagrams, photographs—can make . . . briefs more interesting and persuasive.”⁴³ Judge Richard Posner of the Seventh Circuit has called for

34 MAYER, *supra* note 33, at 229 (explaining “the cognitive theory of multimedia learning”).

35 See Schnotz, *supra* note 33, at 93 (explaining the author’s integrative model of text-and-picture comprehension, or “ITCP”).

36 Butcher, *supra* note 33, at 175.

37 See Schnotz, *supra* note 33, at 91–92 (noting that “if the picture is presented after the text, the picture will most likely interfere with the previously text-based constructed mental model” and that “[s]uch interference is avoided when the picture is presented before the text even if the learner looks only briefly at the picture to benefit from its mental model scaffolding function”).

38 See Butcher, *supra* note 33, at 182.

39 See *id.* (describing a study indicating that learners with low prior knowledge benefitted from the addition of simple, but not complex, diagrams to text, while learners with high prior knowledge learned equally well from additions of simple diagrams and complex diagrams).

40 Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1698 (2014) (noting “law’s historical and current resistance to visual communication”). See also *id.* at 1699–717 (explaining why legal writing has remained relatively free of images, despite technological developments).

41 *Id.* at 1723.

42 See *id.* at 1721–23.

43 Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. LEGAL EDUC. 70, 70 (2013).

increased use of images in briefs,⁴⁴ and Chief Judge Theodore McKee of the Third Circuit has noted that “attorneys could make use of analytical visuals” in their filings with his court.⁴⁵ Scholars and teachers of legal writing have similarly begun to promote the use of digital imagery in briefs.⁴⁶

Ironically, this very new openness to digital imagery in brief writing, coupled with recent technological developments, may reinvigorate Sister Bernadette’s nearly lost art, at least among lawyers and judges. Sentence diagrams of all types are easier than ever to create, whether with the drawing tools built into Microsoft Word or with new, specialized software.⁴⁷ Further, to the extent that judges may occasionally use a sentence diagram in an opinion, those diagrams are now more visible to researchers. For example, one can now view Judge Gorsuch’s sentence diagram in *Rentz* simply by pulling up the case on WestlawNext, without having to print or download the opinion. Both Westlaw and Lexis now display images as parts of judicial opinions, at least some of the time.⁴⁸ Once lawyers can see that judges are occasionally using diagrams as “analytical” visual imagery, to “walk[] the reader through some aspect of legal reasoning,”⁴⁹ those lawyers can also see the utility of offering diagrams up to the court in the first place, in their briefs.

44 Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge’s Views*, 51 DUQ. L. REV. 3, 12 (2013).

45 See Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals As Legal Reasoning*, 20 LEGAL WRITING: THE JOURNAL OF THE LEGAL WRITING INSTITUTE 57, 61 n.11 (2015) (paraphrasing telephone interview of Judge McKee by Professor Robbins).

46 See, e.g., *id.* at 60 (noting that attorneys who have begun to incorporate analytical visual imagery into their briefs “are advancing legal writing in a positive direction, and other lawyers should follow suit”); Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 25 (2015) (“If legal writing does not change to incorporate images, it will become increasingly out of step with readers’ expectations of digital documents.”).

47 The drawing tools in Microsoft Word, for example, allow for the creation of solid or dotted lines at various angles with the insertion of text boxes, making it possible to draw Reed-Kellogg diagrams, tree diagrams, and other types of line- or shape-based diagrams of the creator’s choosing. In addition, specialized software such as Toolbox for Writers Sentence Diagrammer Plus, see <http://toolboxforwriters.com/software-products/sentence-diagramming-software/>, and the University of Central Florida’s SenDraw, see <http://sendraw.ucf.edu/>, are designed specifically for the creation of Reed-Kellogg diagrams.

48 This information is based on a report from Reference Librarian Rebekah Maxwell of the Coleman Karesh Law Library at the University of South Carolina School of Law. Ms. Maxwell spoke with customer-service representatives from both Westlaw and Lexis on July 27, 2015. See email from Rebekah Maxwell, Assoc. Dir., Coleman Karesh Law Library, to Lisa Eichhorn, Professor, Univ. of S.C. School of Law (July 27, 2015, 12:38 p.m. EST) (on file with author). The increasing display by Westlaw and Lexis of images in judicial opinions begins to remedy, belatedly, a problem raised in 1997 by Hampton Dellinger regarding the Supreme Court’s use of photos and other graphics: “By using more than words, the Court denies to some readers, both now and in the future, access to some parts of certain opinions.” *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV. 1704, 1709 (1997).

49 See Johansen & Robbins, *supra* note 45, at 64.

B. Some Specific Examples of Persuasive Sentence Diagrams in Statutory-Interpretation Cases

Statutory-interpretation issues can cry out for illustration through sentence diagramming. A former Chief Justice of the Michigan Supreme Court has explained that members of her court “often” created their own sentence diagrams to help themselves interpret statutory language.⁵⁰ Scholar Lawrence Solan found himself using a tree diagram to help explain his critique of the California Court of Appeals’ interpretation of a statute.⁵¹ In his *Rentz* opinion, Judge Gorsuch’s sentence diagram neatly encapsulates a preceding 96-word-long, less-than-riveting verbal explanation of the structure of the statutory sentence whose interpretation was at issue.⁵²

A close examination of *Rentz* and of another recent case,⁵³ in which the Department of Justice filed a brief containing a sentence diagram, reveals the unique way in which sentence diagrams can persuade with respect to specific statutory-interpretation issues.

1. *Rentz*

Rentz offers a good example of an interpretive issue that could have lent itself to a persuasive sentence diagram at the briefing stage. Again, at issue was whether a defendant who fired only a single shot from a firearm—which caused both an assault and a murder—could receive two separate charges under a statute covering “any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.”⁵⁴ Another way of stating this issue is whether the statute’s “unit of prosecution” is using a firearm—which Mr. *Rentz* did once—or committing a violent or drug-trafficking crime by use of a firearm—which Mr. *Rentz* did twice.⁵⁵

For convenience, Judge Gorsuch’s diagram⁵⁶ is repeated on the facing page.

⁵⁰ Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 TEX. REV. OF L. & POL. 261, 266 (2004).

⁵¹ See SOLAN, *supra* note 13, at 34–36 (critiquing *Bd. of Trustees v. Judge*, 123 Cal. Rptr. 830 (Ct. App. 1975)).

⁵² That textual explanation reads as follows:

[T]he statute prohibits using or carrying a gun *during and in relation to any crime of violence or drug trafficking crime*, or possessing a gun *in furtherance of any such crime*. These adverbial prepositional phrases modify the verbs uses, carries, and possesses. See *The Chicago Manual of Style*, *supra*, §§ 5.143, 5.166; Bryan A. Garner, *Garner’s Modern American Usage* 879, 911 (3d ed. 2009). They tell us *which* acts of using, carrying, or possessing Congress sought to punish—explaining that the statute doesn’t seek to make illegal all such acts, only the narrower subset the phrases specify.

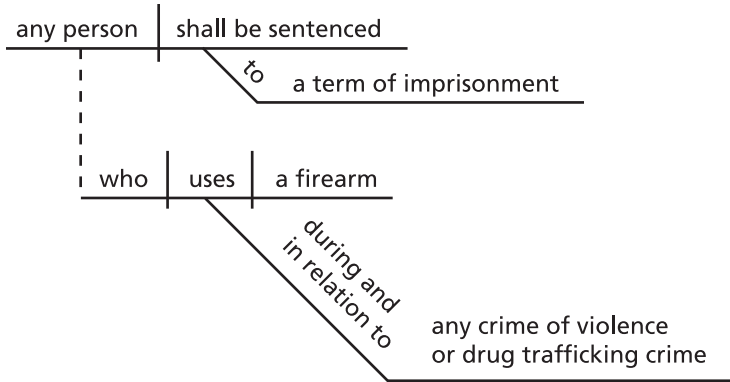
United States v. Rentz, 777 F.3d 1105, 1109 (10th Cir. 2015) (en banc) (analyzing 18 U.S.C. § 924(c)(1)(A)).

⁵³ *United States v. Catalan*, 701 F.3d 331 (9th Cir. 2012) (per curiam).

⁵⁴ *Rentz*, 777 F.3d at 1106 (quoting 18 U.S.C. § 924(c)(1)(A)).

⁵⁵ *Id.* at 1107.

⁵⁶ *Id.* at 1110.



The diagram emphasizes the primacy of the verb “uses” by placing it on a Reed-Kellogg horizontal line with its subject and direct object: “who uses a firearm.” This aspect of the diagram also recalls the opinion’s preceding point that “[w]hen seeking a statute’s unit of prosecution . . . the feature that naturally draws our immediate attention is the statute’s verb.”⁵⁷ The diagram also subordinates the idea of the other crimes committed during the firearm’s use by placing the phrase “during and in relation to any crime of violence or drug trafficking crime” on a slanting line running downward from the verb “uses.”

Thus, according to the opinion, and as illustrated by the diagram, the statute’s unit of prosecution is “using” the firearm, and the reference to other crimes simply limits the kind of using that can lead to a charge of violating the statute. Indeed, the words immediately following the diagram in the opinion are “*Visualized this way, it’s hard to see* how the total number of charges might ever exceed the number of uses.”⁵⁸ Imagine the persuasive force this same diagram could have had in the defendant’s brief. What purpose has a brief, if not to make it “hard to see” how an opponent’s position is more meritorious than one’s own?

The diagram’s visual power even infuses the majority’s description of the government’s opposing argument, which the court rejected in visual terms:

Under the government’s reading, an act of using . . . is part of the government’s burden for the first conviction. The statute’s verb counts then. But the government would have us ignore that requirement for any additional charges. In later charges our focus would be limited *myopically* to the sentence’s adverbial phrases *without even a stolen glance* at the verb[] those phrases modify. A sort of *appearing and then*

57 *Id.* at 1109.

58 *Rentz*, 777 F.3d at 1110 (emphasis added).

disappearing elemental burden, a world in which *verbs vanish but their modifiers float freely and commandingly alone*.⁵⁹

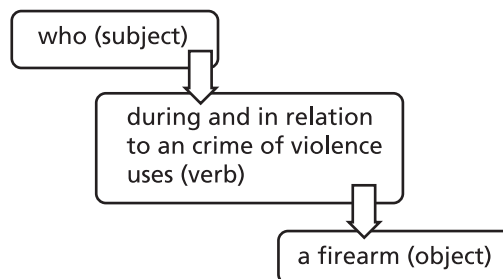
One look at the sentence diagram shows the reader that modifiers cannot float freely alone; they are part of an integrated Reed-Kellogg road system and, in this case, veer gently off the verb “uses” at forty-five degrees.

Of course, the diagram does not definitively settle the legal issue in *Rentz*. Even Judge Gorsuch’s opinion allows that “in the business of statutory interpretation, we do not always bow to linguistic rules,”⁶⁰ and the court offers several additional justifications for its ultimate holding.⁶¹ Nevertheless, the diagram has a uniquely persuasive force that differs qualitatively from the force of the other, purely verbal, explanations in the opinion. It would have had the same force in a brief filed to the court.

Why does the diagram work well in the *Rentz* opinion, and why would it work so well in a brief? Much of the answer lies in the nature of the statutory-interpretation issue before the court. The issue did not concern the scope of a single statutory word,⁶² but rather the meaning to be derived from the relationship between two parts of the sentence: “uses” and “during or in relation to any crime of violence or drug trafficking crime.” And the purpose of sentence diagrams is to display such relationships within a sentence.

The one dissenter in *Rentz* argued that the statute’s unit of prosecution was not the using of a firearm but “the *combination* of the conduct identified in [the statute].”⁶³ He explained that the case involved two separate “combination crimes”: “(1) second-degree murder (crime of violence) facilitated by a gun and (2) assault causing serious bodily injury (crime of violence) also facilitated by a gun.”⁶⁴

In making this argument, the government could have included in its brief a different type of diagram, displaying only the part of the statutory sentence at issue and showing the “any crime of violence” language working in combination with the verb “uses”—perhaps something like this:



Because the arguments on either side concern the meaning to be made from synthesizing the parts of the sentence, they lend themselves naturally to illustration through diagram, in addition to explanation through text. A sentence diagram has utility in a brief not because it represents the only way to synthesize the parts of a statutory sentence or because it replaces (what is often somewhat tedious) textual explanation of the synthesis, but because it can persuasively and interestingly sum up a point made in textual argument.

2. Catalan

A 2012 Department of Justice brief⁶⁵ filed in a Ninth Circuit case, *United States v. Catalan*,⁶⁶ contains an old-school Reed-Kellogg diagram that effectively illustrates the point of the government’s argument regarding the interpretation of a Sentencing Guideline. While the argument did not win the day,⁶⁷ the diagram communicates the government’s interpretation of the Guideline’s language in a way the prose in the brief cannot.

The defendant in the case, Moises Vasquez Catalan, was convicted in California of drug trafficking and sentenced to a 180-day jail term to be followed by probation for 36 months.⁶⁸ Upon completing his jail time, he was deported to Mexico and subsequently entered the United States illegally.⁶⁹ While still on probation for his drug offense, Mr. Catalan was convicted in California again, this time of giving a false name to police.⁷⁰ While he served a 60-day jail sentence for this second offense, the state court rescinded his probation and replaced it with an additional 360-day jail sentence for his earlier drug crime.⁷¹ After serving this sentence, Mr. Catalan was released into federal custody and pleaded guilty to the federal crime of illegally re-entering the United States.⁷²

Thus, before his deportation, Mr. Catalan had received a sentence for a drug offense of about six months in jail plus probation. But after his

59 *Id.* at 1111 (emphasis added).

60 *Id.* at 1109.

61 *See id.* at 1108–14 (discussing the broader context of the statute, its legislative history and apparent underlying policies, and the rule of lenity).

62 As scholar Lawrence Solan explains, “most legal battles over language are battles over the meanings of words: Did the defendant’s state of mind constitute ‘scienter’? Is an arson ring an ‘enterprise’ as defined by RICO, the racketeering statute? Does a college’s promise to use a donation for certain purposes constitute ‘consideration?’” SOLAN, *supra* note 13, at 139.

63 777 F.3d at 1131 (Kelly, J., dissenting).

64 *Id.*

65 Government’s Answering Brief, *United States v. Catalan*, 701 F.3d 331 (9th Cir. 2012) (No. 11-50318).

66 701 F.3d 331 (9th Cir. 2012) (per curiam).

67 *See id.* at 333.

68 *Id.* at 332.

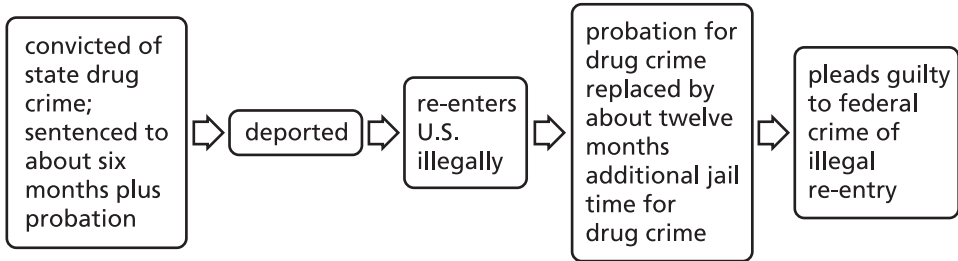
69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

deportation, the sentence for that drug offense increased by almost twelve months to a total of almost eighteen months:



A federal Sentencing Guideline applied to his conviction for illegal re-entry. A part of that Guideline would add a certain enhancement to his sentence for that crime if

the defendant previously was deported . . . after . . . a conviction for a felony that is . . . a drug trafficking offense for which the sentence imposed exceeded 13 months.⁷³

Mr. Catalan appealed the application of this enhancement to him, arguing that the “grouping” of certain words together in the above Guideline text meant that the enhancement would apply only if a defendant had been *both convicted* of a drug-trafficking felony *and actually sentenced* to a term exceeding thirteen months *before* he was deported.⁷⁴

In responding to this word-grouping argument, the government’s brief, in about forty lines of text, emphasized that the only operative words that were grouped together in the Guideline were “previously deported” and “after a conviction.”⁷⁵ The language regarding the length of the “sentence” for that conviction was far away from the reference to deportation, suggesting that later additions to the sentence should count in the “exceeds 13 months” calculation, regardless of the relative timing of the sentence additions and the deportation.⁷⁶

In addition, to illustrate the distance between the “previously deported” language and the “sentence imposed exceeded 13 months”

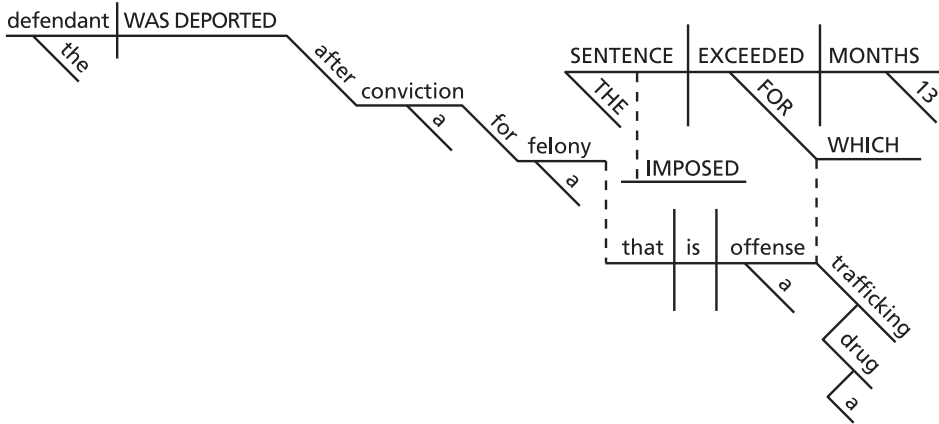
⁷³ *Id.* at 332 (quoting U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A)).

⁷⁴ Appellant’s Opening Brief at 15–16, *United States v. Catalan*, 701 F.3d 331 (9th Cir. 2012) (No. 11-50318).

⁷⁵ Government’s Answering Brief at 18–20, *United States v. Catalan*, 701 F.3d 331 (9th Cir. 2012) (No. 11-50318).

⁷⁶ *Id.* at 19–20.

language, the brief included the following Reed-Kellogg sentence diagram:⁷⁷



This diagram emphasizes the distance between the deportation concept and the duration-of-sentence concept in a way that the brief’s textual explanation cannot. It also gives the appearance of being much more concrete and precise than the vague reference to word-grouping in the opposing brief. The diagram thus bolstered the government’s argument that the Guideline was, at best, ambiguous as to whether the time added to Mr. Catalan’s drug-trafficking sentence should count in the determination of whether the sentence “exceeded thirteen months.” And even if the Guideline itself was ambiguous, the government argued, an Application Note to the Guideline indicated that the added time should count toward the thirteen-month requirement.⁷⁸

In the end, the United States Sentencing Commission itself recognized the need to clarify how the Guideline was intended to apply in a case like Mr. Catalan’s. The Commission amended the Guideline—after the briefs were filed but before the Ninth Circuit decided Mr. Catalan’s case—to clarify that post-deportation additions to a defendant’s sentence should not count in the “exceeds 13 months” calculation.⁷⁹ Applying this amendment, the Ninth Circuit held that Mr. Catalan’s sentence for illegal entry had been excessively enhanced, and the court remanded his case for

⁷⁷ See *id.* at 20. The original diagram in the brief displayed the words “was previously deported” in green, the words “for which the sentence imposed exceeded 13 months” in red, and the remaining words in black. This scheme emphasized the distance between the two colored phrases. Because this journal is printed only in black and white, I have used uppercase rather than red and black for those two phrases in an attempt to produce a similar visual effect.

⁷⁸ See *id.* at 20 (citing U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(A) [app. n.1(B)(vii)]).

⁷⁹ See 701 F.3d at 333.

resentencing.⁸⁰ However, the fact that the government’s argument did not prevail does not detract from the effectiveness of the sentence diagram in conveying that argument clearly and forcefully. Because the argument concerned the contested relation of the parts of a complicated textual sentence, the diagram could enhance the mere “word authority”⁸¹ of the brief’s verbal explanation.

IV. The Limits and Misuses of Sentence Diagrams in Briefs

A. The Limitations of Diagrams in Statutory-Interpretation Arguments

Of course, statutory interpretation involves more than grammatical parsing of sentences. In the absence of controlling precedent, courts routinely look to a statute’s broader context for clues to the meaning of an individual provision.⁸² A statute’s evolution through amendments may provide additional insights.⁸³ And, depending on a court’s philosophy, it may consider evidence of legislative intent and the general purpose of the statutory scheme.⁸⁴ Various substantive canons, such as the rule of lenity in criminal cases, may also factor into a court’s interpretive process.⁸⁵

Further, the majority of statutory-interpretation cases involve the scope of a single statutory word or phrase, rather than the syntactic relations of various parts of a statutory sentence.⁸⁶ Only in the latter category of cases—those involving syntactical ambiguity—are sentence diagrams potentially useful. And even then, when the parties are fighting, for example, over whether the phrase “involving moral turpitude” modifies both “felony” and “any crime” in the phrase “conviction of a felony or of any crime involving moral turpitude,” a diagram cannot resolve the syntactic ambiguity; it can only illustrate one possible interpretation.⁸⁷

⁸⁰ *Id.*

⁸¹ See EDWARD R. TUFTÉ, *THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION* 191 (2d ed. 2001) (“[W]ord authority can dominate our vision, and we may come to see only through the lenses of word authority rather than with our own eyes”).

⁸² See, e.g., *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . .”).

⁸³ See WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 276–77 (2d ed. 2006).

⁸⁴ *Id.* at 249–51 (discussing “how statutory interpretation has customarily been done in this century by the U.S. Supreme Court”).

⁸⁵ See *id.* at 360–82 (discussing three substantive canons, including the rule of lenity). See also SOLAN, *supra* note 13, at 66 (arguing that courts apply substantive canons “in a manner that leads the careful observer to develop serious questions about the predictability, and perhaps even the sincerity, of their application in particular cases”).

⁸⁶ See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES* 40 (2010) (noting that “battles over statutory meaning are nearly always about the ‘wordlike’ aspects of the statute’s language rather than the syntactic, rulelike aspects of the statute”).

⁸⁷ See SOLAN, *supra* note 13, at 34–36.

Nevertheless, lawyers risk over-investing in the power of sentence diagrams, and of grammar in general, to settle statutory-interpretation issues. Our childhood exposure to a language allows us to develop a “generative grammar” that “specifies in detail how to put together well-formed sentences, and tells us a good deal about how they may and may not be interpreted.”⁸⁸ This generative grammar allows all English speakers to agree that the sentence “James saw a cat” means that James did the seeing and the cat was seen. As lawyers, we want our legal arguments to be met with the same kind of automatic agreement, so in legal briefs a resort to grammar, and to diagrammatic illustrations of grammar, is very tempting.⁸⁹

But neither our generative grammar nor the rules of English grammar can eliminate all semantic ambiguity.⁹⁰ For example, neither tells us whether in the sentence “He saw a man and a woman with a child,” the child was with both adults or only with the woman. An accurate diagram would show us that “He” is the subject, “saw” the verb, and “a man and a woman” the direct object, but that’s where the grammatical certainty ends and the possibility of differing diagrams begins. And if the diagrammer, like many these days, lacks some basic grammatical knowledge,⁹¹ we may not even get that far. But like the viewer who may naively assume that a photograph accurately represents a single truth,⁹² an attorney viewing his or her own sentence diagram can easily overestimate its applicability to the real issue before the court, or its persuasive force, or both. These problems are evident in the two briefs filed in the federal appellate cases analyzed below.

⁸⁸ See *id.* at 21 (referring to Noam Chomsky’s concept of generative grammar).

⁸⁹ Lawrence Solan similarly observes that various pressures can cause a court to cite “neutral linguistic principles as justification for a decision” when the “real reasons” for the decision lie elsewhere. *Id.* at 27.

⁹⁰ *Id.* at 21.

⁹¹ See Aida M. Alaka, *The Grammar Wars Come to Law School*, 59 J. LEGAL EDUC. 343, 345–51 (2010) (describing a general decline in the teaching of formal grammar in K–12 beginning in the 1980s and noting a lack of knowledge of grammar and punctuation rules among law students); Catherine H. Finn & Claudia Diamond, *Are We Listening?: Here’s How the Profession Can Advocate for Reforms in Legal Writing Education*, WASH. LAW. (Jan. 2015), <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/january-2015-taking-the-stand.cfm> (reporting that attorneys and judges in the Baltimore–Washington region responded to a survey by ranking “grammar/usage” as the problem seen most often in recent law graduates’ written work and by commenting frequently that “students are not graduating law school with satisfactory grammar and syntax skills”).

⁹² See Porter, *supra* note 40, at 1756 (defining “naïve realism” as “the tendency to believe that images are transparent conveyors of a single truth”).

B. Examples of Problematic Uses of Sentence Diagrams in Briefs

1. *Kehoe*

The root of the dispute in *Kehoe v. Fidelity Bank & Trust*⁹³ was a poorly drafted statute. Specifically, a provision of the federal Driver's Privacy Protection Act (DPPA) grants a motorist a cause of action against people who obtain, disclose, or use the motorist's personal information from motor vehicle records for unpermitted purposes.⁹⁴ The DPPA's remedies provision lists four specific types of relief the court may award, including punitive damages and attorney's fees; the first of the four listed items is "(1) actual damages, but not less than liquidated damages in the amount of \$2,500."⁹⁵

Of course, actual damages and liquidated damages are two different and mutually exclusive types of damages; actual damages cannot logically be described as liquidated damages above or below any amount.⁹⁶ Therefore, the literal wording of the provision does not make sense. Presumably, Congress intended to allow a court to award liquidated damages of \$2500, or actual damages, whichever is greater.

James Kehoe filed a class-action complaint seeking relief under the DPPA against Fidelity Bank, which had purchased over half a million records from the Florida DMV and used Kehoe's and other motorists' addresses to solicit them via a mass mailing.⁹⁷ The relief Kehoe sought included liquidated damages "in the amount of \$2,500.00 for each instance in which [Fidelity] obtained or used personal information concerning [Kehoe] and members of the Class."⁹⁸ Fidelity admitted that it had obtained and used the motorists' personal information for purposes not permitted by the DPPA,⁹⁹ but, on summary judgment, Kehoe failed to produce any evidence of actual damage resulting from Fidelity's conduct.¹⁰⁰

After the district court granted summary judgment against Kehoe on the ground that he had failed to show any actual damages, Kehoe appealed to the Eleventh Circuit, arguing that a plaintiff need not prove actual damages before he or she may recover liquidated damages under the DPPA.¹⁰¹

Fidelity, of course, argued on appeal that proof of actual damages is a prerequisite to an award of liquidated damages under the DPPA, and its

⁹³ 421 F.3d 1209 (11th Cir. 2005).

⁹⁴ 18 U.S.C. § 2724(a), quoted in *Kehoe v. Fidelity Bank & Trust*, 421 F.3d 1209, 1212 (11th Cir. 2005).

⁹⁵ *Id.* § 2724(b), quoted in *Kehoe*, 421 F.3d at 1213.

⁹⁶ See *Kehoe*, 421 F.3d at 1213 (discussing the difference between actual damages and liquidated damages).

⁹⁷ *Id.* at 1210–11.

⁹⁸ *Id.* at 1211 (quoting complaint) (brackets in *Kehoe*).

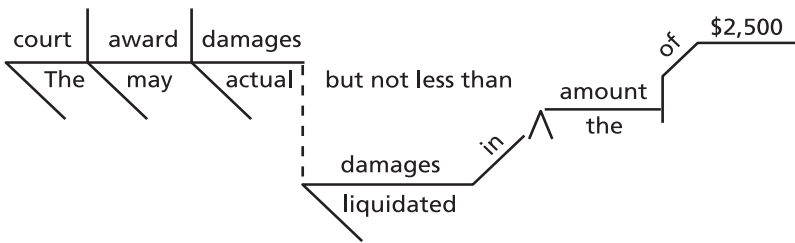
⁹⁹ *Id.* at 1212.

¹⁰⁰ *Id.* at 1211.

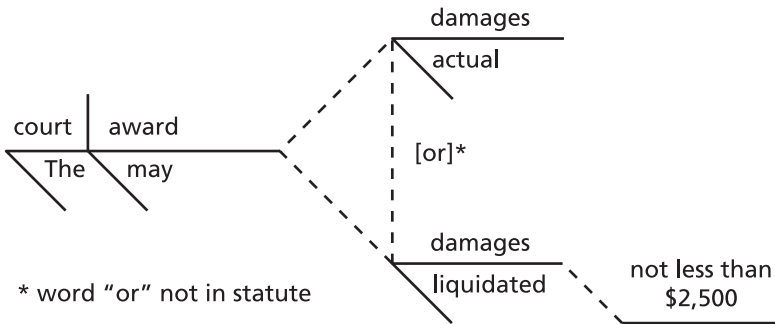
¹⁰¹ *Id.*

brief attempted to parse the unfortunately drafted provision allowing courts to award “actual damages, but not less than liquidated damages in the amount of \$2,500.”¹⁰² In doing so, it presented two opposing sentence diagrams in its brief, one representing Fidelity’s proposed interpretation of the statutory language (labeled “Statutory Language of DPPA”), and the other representing Kehoe’s interpretation (labeled “Plaintiff’s Interpretation of DPPA”¹⁰³):

Statutory Language of DPPA



Plaintiff’s Interpretation of DPPA



The use of these sentence diagrams—or any sentence diagram—to support Fidelity’s argument was fundamentally flawed. As explained above, no solid or dotted line in a diagram can make the phrase “not less than liquidated damages in the amount of \$2,500” logically modify “actual damages,” given that actual damages and liquidated damages are mutually exclusive. Tellingly, the brief introduces the diagrams with the mistaken notion that “[f]or generations, school aged children learned to diagram sentences to determine the sentence’s [sic] meaning.”¹⁰⁴ In fact, no diagram can reveal meaning to the diagrammer; at best, it’s the other way around: “One diagrams according to one’s understanding of the sentence. . . . Meaning does not spring magically from a diagram.”¹⁰⁵

¹⁰² Brief of Appellee at 14, *Kehoe v. Fidelity Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005) (No. 04-13306).
¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.*
¹⁰⁵ See FLOREY, *supra* note 10, at 141 (quoting author Gene Moutoux).

Further, even a diagram based on a thorough understanding of a sentence's grammar will not reveal the semantic meaning of a sentence. Noam Chomsky's famous example of a grammatically clear but semantically impenetrable sentence—"Colorless green ideas sleep furiously"—is perfectly diagrammable, but no diagram will reveal its definitive meaning.¹⁰⁶ In *Kehoe*, the issue on appeal did not concern the grammatical relation of the phrase "actual damages" to the phrase "but not less than liquidated damages in the amount of \$2,500" but instead concerned the phrases' intended semantic relation, given that the literal language as drafted simply did not make sense.

The textual explanation of the diagrams in Fidelity's brief sent the credibility of its argument sliding a bit further: "The dependent clause ('liquidated damages in the amount of \$2,500') modifies the independent clause ('The Court may award actual damages'). As a grammatical matter (and a matter of logic), the recovery of liquidated damages is thus dependent upon a demonstration of actual damages."¹⁰⁷ In fact, as a matter of grammar, "liquidated damages in the amount of \$2,500" is not a clause because a clause requires both a subject and verb. The brief also mistakenly labeled the word "but" as a "subordinating" conjunction, in an apparent attempt to subordinate or downplay the "but not less than liquidated damages in the amount of \$2,500" language. Unfortunately for Fidelity, "but" is not a subordinating conjunction, and, as a matter of legal doctrine, liquidated damages awards do not depend on proof of actual damages but instead allow for relief when actual damages are unmeasurable or uncertain.¹⁰⁸

Thus, in the end, Fidelity's brief used a diagram to do work that a diagram simply cannot do and revealed a misunderstanding of some technical grammatical principles in the process. Not surprisingly, the Eleventh Circuit noted the logical problem inherent in the "actual damages, but not less than liquidated damages" language and focused on Congress' apparently intended meaning rather than on the grammatical relationships of the statutory words and phrases:

Since liquidated damages are an appropriate substitute for the potentially uncertain and unmeasurable actual damages of a privacy violation, it follows that proof of actual damages is not necessary for an award of

106 See STEVEN PINKER, *THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE* 79 (2007) (noting that "[s]entences can make no sense but can still be recognized as grammatical" and that "syntax and sense can be independent of each other").

107 Brief of Appellee at 17, *Kehoe v. Fidelity Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005) (No. 04-13306).

108 See *Kehoe*, 421 F.3d at 1213.

liquidated damages. To us, the plain meaning of the statute is clear—a plaintiff need not prove actual damages to be awarded liquidated damages.¹⁰⁹

Thus, the court found the statutory language “plain” after identifying the only logical way that the concept of actual damages could mesh with the concept of liquidated damages in this provision, despite the provision’s literal wording and Fidelity’s parsing of that literal wording.

2. Waco

The interpretive issue in *Waco International, Inc. v. KHK Scaffolding Houston, Inc.*¹¹⁰ concerned the scope of a single statutory word, rather than the relations of parts of a statutory sentence. As a result, an extensive tabulation-style sentence diagram in KHK’s brief to the Fifth Circuit¹¹¹ added nothing to its (prevailing) argument about the word at issue, and a clearer and shorter diagram in Waco’s brief¹¹² failed to persuade the court to interpret the key word as Waco urged.

The case turned on Waco’s assertions that KHK had sold scaffolds by misrepresenting them as having been manufactured by Waco.¹¹³ After filing suit for trademark infringement and unfair competition under the Lanham Act, Waco obtained *ex parte* a seizure order under the Act and seized scaffolds and business records from KHK.¹¹⁴ KHK was able to get the seizure order dissolved after post-seizure hearings on the ground that the scaffolds did not carry any counterfeit mark.¹¹⁵ It then asserted a counterclaim for wrongful seizure in Waco’s lawsuit.¹¹⁶

A jury eventually found that KHK had neither infringed Waco’s trademark nor competed unfairly and that Waco had wrongfully seized KHK’s goods and records in bad faith.¹¹⁷ It awarded KHK over \$730,000 in attorney fees, \$185,000 in costs, and \$250,000 in punitive damages, but it found that KHK had suffered no lost profits and no loss of goodwill from the seizure.¹¹⁸

On appeal, Waco argued that the Lanham Act, which defines the cause of action for wrongful seizure, does not permit a litigant to recover attorney fees or punitive damages for wrongful seizure unless the litigant

109 See *id.* **113** *Waco*, 278 F.3d at 526–27.

110 278 F.3d 523 (5th Cir. 2002). **114** *Id.* at 527.

111 Brief of Appellees/Cross-Appellants at 49–50, *Waco Int’l, Inc. v. KHK Scaffolding Houston, Inc.*, 278 F.3d 523 (5th Cir. 2002) (No. 00-20741) [hereinafter KHK Brief]. **115** *Id.*

112 Brief of Cross-Appellee and Reply Brief of Appellant at 28, *Waco Int’l v. KHK Scaffolding Houston*, 278 F.3d 523 (5th Cir. 2002) (No. 00-20741) [hereinafter Waco Brief]. **116** *Id.*

117 *Id.* at 528.

118 *Id.*

has proved actual damages such as lost profits or loss of goodwill.¹¹⁹ Waco's argument turned on the following language in the Lanham Act:

A person who suffers damages by reason of a wrongful seizure under this subsection has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to recover such relief as may be appropriate, including damages for lost profits, cost of materials, loss of good will, and punitive damages in instances where the seizure was sought in bad faith, and, unless the court finds extenuating circumstances, to recover a reasonable attorney's fee.¹²⁰

More specifically, Waco argued that before being eligible for any of the relief described above, a claimant first had to prove that he or she was a "person who suffers damages by reason of a wrongful seizure," and that KHK had failed to do so because it had shown no actual damage resulting from the seizure of its scaffolds and records.¹²¹

KHK countered this argument by pointing out that even a business that suffers no lost profits or loss of goodwill from a seizure must still pay attorneys to get the seizure dissolved and that this expense constitutes "damages" suffered because of the seizure.¹²² In other words, it argued that the word "damages" in the phrase "person who suffers damages by reason of a wrongful seizure" could include fees paid to attorneys who manage to get a wrongful seizure order dissolved in post-seizure hearings.¹²³

The Fifth Circuit agreed with this argument, quoting *McCarthy on Trademarks*, which explained that "a reasonable attorney fee" was an "element[] of actual damage" that could result from a wrongful seizure.¹²⁴ It thus upheld the award of attorney fees, punitive damages, and costs that the jury had awarded to KHK.¹²⁵

What the Fifth Circuit did not cite, and surely did not benefit from, was a lengthy, confusing, tabulation-style diagram in KHK's brief of the entire statutory sentence describing the wrongful-seizure cause of action and remedies:

119 See Waco Brief at 27–29.

120 15 U.S.C. § 1116(d)(11).

121 See Waco Brief at 27–29.

122 See KHK Brief at 53.

123 *Id.* at 47 (explaining that the victim of a brief wrongful seizure may incur only attorney fees and related costs as losses resulting from the seizure, but that "[t]he plain meaning of the statute and the legislative history indicate that the victim of a wrongful seizure should be fully compensated" and that "[t]his compensation includes attorneys' fees as damages arising out of a wrongful seizure").

124 *Waco*, 278 F.3d at 535 (quoting MCCARTHY ON TRADEMARKS § 30:44).

125 *Id.* at 536–37.

The subject: *A person*

Adjective modifier: *who suffers damages*

“Damage” modified by: *by a wrongful seizure*

Seizure modified by: *under the subsection*

The verb: *has*

The object: *a cause of action*

The object modified by the prepositional phrase: *against the applicant*

“Applicant” modified by: *for the order*

“Order” modified by: *under which the seizure is made and*

(joins the compound/complex sentence)

The subject: *A person* (with the above adjectival modifiers)

The verb: *shall be entitled to recover*

The object: *such relief*

“Relief” modified by: *as may be appropriate*

Which is modified by: *including damages*

Modified by the prepositional phrase: *for*

lost profits

cost of materials

loss of goodwill

and punitive damages

Which is modified by the prepositional phrase: *in*

Instances where the seizure was sought in bad faith

and (joining the second part of the compound/complex

sentence)

The verb: *to recover*

The object: *attorney’s fee*

Modified by the adjective: *reasonable*

Qualified by the conjunctive phrase: *unless*

The subject: *the court*

The verb: *finds*

The object: *circumstances*

Modified by the adjective: *extenuating*.¹²⁶

Compounding the confusing nature of the diagram is the lack of any real explanation, in the text following the diagram, of how exactly it supports KHK’s argument. Instead, only a single, conclusory sentence follows the diagram in the subsection of the brief in which the diagram appears: “Therefore, distilled to its essence, the legislation provides that in

the context of a wrongful seizure, a person shall be entitled to recover a reasonable attorney's fee as damages unless the district court finds extenuating circumstances."¹²⁷ Indeed, the diagram does not even support the conclusion stated in the sentence; nowhere does the text of the diagrammed sentence or the diagram itself label attorney's fees as "damages." KHK's misplaced confidence in the explanatory power of its diagram is also evident in the subheading of this part of its brief: "2. It's a Matter of Grammar: Diagraming the Sentence."¹²⁸

An even more significant problem with the sentence diagram is that the nature of the issue being argued concerns only the scope of a single statutory word—"damages," in the phrase "A person who suffers damages"—making the diagram entirely unnecessary. In the two sentences preceding the diagram, KHK addresses the real issue, explaining that Waco interprets the phrase "A person who suffers damages by reason of a wrongful seizure" to mean a person who suffers *actual* damages (such as lost profits) from a seizure, but that the statutory language instead refers simply to suffering "damages" and not "actual damages."¹²⁹ At that point in KHK's brief, it does not require a two-page tabulated diagram of the statutory sentence to show that the word "actual" does not appear between "suffers" and "damages."

A tabulated sentence diagram in Waco's brief strips out much of the uncontested statutory language, but, for the same reason, is no more illuminating of the single-word interpretive issue presented to the court:

A person *who suffers damage* by reason of a wrongful seizure

is entitled *to recover* relief . . . including *damages* for lost profits, cost of materials, loss of good will . . .

and

[is entitled] *to recover* a reasonable *attorney's fee*.¹³⁰

Again, because the only issue for the court concerned whether having to pay a lawyer to get a wrongful seizure dissolved constituted "damages" suffered by reason of a wrongful seizure, the structure of the rest of the sentence is irrelevant. Waco's diagram may demonstrate an accurate

127 *Id.* at 51.

128 *Id.* at 48.

129 *See id.*

130 Waco Brief at 28.

understanding of overall syntax of the sentence, but it gives the court no insight into why someone who has paid an attorney to get a seizure dissolved has not suffered “damage” from the seizure.¹³¹

V. Specific Advice Regarding the Use of Sentence Diagrams in Briefs

As noted above,¹³² a resort to grammar, and to sentence diagramming, may be a very tempting argumentative tack when statutory interpretation is at issue, but brief writers need to keep certain caveats in mind.

First, as both *Kehoe* and *Waco* illustrate, unless the court must determine how the various grammatical components of a statutory sentence relate to each other, a sentence diagram has no persuasive utility. And even when syntax is at issue, attorneys should consider whether a diagram will add anything of value to a textual explanation of the argument. If the brief can explain the grammatical point in two or three clear sentences, then a diagram may serve only to distract the reader from the logic of the brief’s text.¹³³ At their best, diagrams should clarify unavoidably complex textual arguments that readers may find difficult to follow.

Second, even when a diagram is worth including, an attorney should consider whether it is necessary to diagram the entirety of a statutory sentence. If some words in the sentence are not at issue and their omission would not change the grammatical relation of those that remain, then the diagram need not include them. For example, Judge Gorsuch chose to include in his *Rentz* diagram only 27 of the 165 words in the statutory sentence¹³⁴ being interpreted—just enough to allow the reader to see the words at issue in a coherent grammatical context without getting bogged down in irrelevant details.

131 Lawrence Solan deftly explains this difference between syntactical understanding and semantic understanding. He notes that if we read the words “the snake crawled into the hole,” we know from childhood, without formal training, that the sentence is telling us about a subject (the snake), what it did (crawled), and where it did so (into the hole). See SOLAN, *supra* note 13, at 94–95. However, this knowledge gets us nowhere in answering questions regarding the exact range of creatures that may qualify technically as snakes. See *id.* at 97.

132 See *supra* notes 88–89 and accompanying text.

133 This advice coincides with research indicating that learners who have some prior understanding of the information to be illustrated by a diagram may not benefit from the addition of a diagram to a textual explanation. See, e.g., Schnotz, *supra* note 33; Jodi L. Davenport et al., *When Do Diagrams Enhance Learning? A Framework for Designing Relevant Representations in 1* Proceedings of the 8th International Conference for the Learning Sciences, 191, 196–97 (2008), available at https://scholar.google.com/citations?view_op=view_citation&hl=en&user=VrE-bH4AAAAJ&citation_for_view=VrE-bH4AAAAJ:9yKSN-GCB0IC (reporting study results showing that diagrams “offered no additional learning benefit for high-performing students” and speculating that these students “may have [had] the prior knowledge or metacognitive skills to spontaneously create expert-like mental models from information in the text-base[d] instruction”).

134 See 18 U.S.C. § 924(c) (2012); *Rentz*, 777 F.3d at 1110.

Third, the style of the diagram in the brief will make a difference. Given that Reed-Kellogg diagramming has not been widely taught for decades, many clerks and judges may be unfamiliar with its non-self-explanatory format. And even those who may remember Reed-Kellogg diagramming may not recall it fully or fondly.¹³⁵ For these reasons, a simpler diagram that includes labels for parts of speech, such as a modern tree diagram¹³⁶ or one consisting of boxed text and labels,¹³⁷ may be more effective. Of course, the brief writer would need to understand common grammatical terms in order to insert appropriate labels in the diagram, so it may be necessary to consult a good reference book on grammar to confirm or refresh one's knowledge of the subject.¹³⁸

Fourth, the position of the diagram within the brief will also make a difference. Research indicates that diagrams function best when they appear near,¹³⁹ and ideally above,¹⁴⁰ the relevant explanatory text, so a diagram will serve little purpose if relegated to an appendix. To avoid the effect of a diagram coming out of left field, the brief writer could include a prefatory sentence above the diagram (“This interpretation is buttressed by the grammatical structure of the statutory text, as shown in the diagram below.”) and then explain, in sentences below the diagram, how the diagrammed syntax supports the brief writer's position.

Fifth, an attorney should consult local court rules to determine how the insertion of a diagram may count toward a court's word-limitation for briefs. I have yet to find any local rules that specifically address this issue, and the word-count function of Word 2010 skipped right over all of the diagram-embedded words in this manuscript. However, if the use of images that include words eventually becomes common in briefs, courts may start limiting the permitted amount of images, or words within images, or both.

135 At least two attorneys have gone on the record in local bar journals regarding their uneasy relationship with sentence diagramming. See Anthony Abear, *Guidance from Those That Came Before Me*, 21 DUPAGE CTY. BAR ASS'N BRIEF 9, 9 (Oct. 2008) (“I feared that [my eighth-grade English teacher] would call on me for an answer. I feared even more with dread that I might be called before the class to stand up at the chalk board and diagram a sentence. Yikes.”); Maureen B. Collins, *Back to the Basics of Grammar and Style*, 91 ILL. B.J. 91, 91 (Feb. 2003) (“Does the mention of the word ‘grammar’ bring back frightful images of nuns with diagrammed sentences? Me too.”).

136 See *supra* notes 30–31 and accompanying text.

137 An example appears above in the discussion of the *Rentz* case. See *supra* section III.B.1.

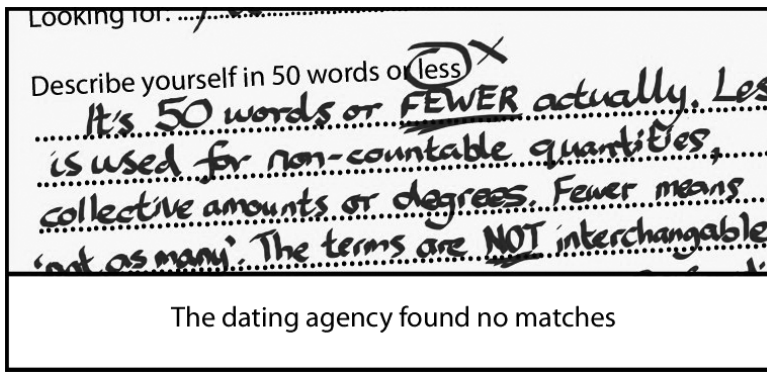
138 An excellent reference is chapter 8 OF ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* (4th ed. 2013).

139 See Richard E. Mayer & Logan Fiorella, *Principles for Reducing Extraneous Processing in Multimedia Learning: Coherence, Signaling, Redundancy, Spatial Contiguity, and Temporal Contiguity Principles* (reviewing multiple studies indicating that placing images near or next to related explanatory text increases learning), in *THE CAMBRIDGE HANDBOOK OF MULTIMEDIA LEARNING*, *supra* note 33, at 279, 300–04.

140 See Schnotz, *supra* note 33, at 90–91.

Last, and perhaps most important, attorneys must remember that grammar isn't everything when it comes to statutory interpretation.¹⁴¹ If a proposed interpretation cuts against the larger context of the statutory text¹⁴² or leads to an absurd result,¹⁴³ a court will be unlikely to adopt the interpretation, however diagrammable it may be. Indeed, a misplaced emphasis on grammar may cause the brief writer to come across like the understandably single subject of the Luke Surl cartoon below.¹⁴⁴

© Luke Surl 2008



On the other hand, when statutory syntax coincides with other reasons supporting a given interpretation, a brief-writer may further his or her suit on occasion through the inclusion of a well-designed sentence diagram.

¹⁴¹ See *supra* notes 82–85 and accompanying text.

¹⁴² See, e.g., *Peterson v. Midwest Sec. Ins. Co.*, 636 N.W.2d 727, 732 n.7 (Wis. 2001) (“The rules of grammar and punctuation should not be applied at the expense of a natural, reasonable reading of the statutory language (taking into account the context in which it appears and the purpose of the statute), or when the result is an expansion or contraction of the statute contrary to its terms.”).

¹⁴³ See, e.g., *U.S. v. Turkette*, 452 U.S. 576, 580 (1981) (noting that, in statutory interpretation, “absurd results are to be avoided”). Of course, what is or is not absurd may itself be subject to debate. See Solan, *supra* note 13, at 51 (critiquing a federal court’s labeling of a particular statutory interpretation as absurd).

¹⁴⁴ Reprinted here under Creative Commons Attribution-non-Commercial-ShareAlike 2.0 UK: England & Wales License, available at www.lukesurl.com.