I was standing in the second floor hallway of the Tenth Circuit Courthouse, going over a few last points with Susan Victor. I had won a defense verdict in an age discrimination case, but the plaintiff had appealed. Based on my recommendation, the client had hired Susan to handle the appeal, and she had done a great job on the briefs. Today we were the second case on the morning's docket for oral argument. Susan was calm and well-prepared as always, but I couldn't resist giving her my last minute thoughts.

A commotion at the far end of the hallway caught my attention. It appear that a large white board was rapidly making its way toward us, causing attorneys and onlookers to scatter. As the board came closer, I could see fingers gripping each side, and a pair of legs below. The board was plainly blocking the view of whoever was carrying it.

As he approached, he called out blindly, "Excuse me. Watch out. Coming through." Susan and I stepped to one side. "Oops, sorry," the board's bearer said, as he stepped on the highly-polished toe of an attorney who was not fast enough.

As the board passed, I saw that its owner was Tim Flegleman, who was carrying not just one board but a stack of six boards of similar size. A laptop computer hung from one shoulder, and a projector hung from the other. Slung across his back, like a quiver of arrows, was a large projection screen case lashed to a folded easel.

Flegleman stopped when he saw he had passed the door to our courtroom, backed up three steps, and then stormed inside. Susan and I followed, curious to see what Flegleman planned to do with all that equipment.

This was Courtroom 4 in the Byron White U.S. Courthouse. It was a tiny gem of a courtroom, lined with bookcases and paneled in dark wood. It looked like a library, which was not surprising because it actually was a library before being refurbished as an appellate courtroom. While it had sufficient room for the necessary furnishings—the bench, two small counsel tables, a podium, and a few rows of benches for spectators—there was space for almost nothing else.

Flegleman proceeded directly to the appellant's counsel table and dropped his burdens in a heap. He assembled the easel, erected the projection screen, and turned on the laptop and projector. Flegleman rubbed his hands with obvious satisfaction and then carried the easel from one spot to another, looking for a suitable position. After a few minutes' experimentation, he reluctantly placed the easel directly in
Flegleman's next challenge was the projection screen, which he managed to erect at the far right side of the courtroom. He aimed and focused the projector, shuffled his exhibit boards, and then sat down to wait for his case to be called.

He did not have long to wait. As the bailiff announced "All rise," the three members of the panel entered and took their seats. Flegleman stood respectfully, but his view of the court was completely blocked by the easel and display boards. The panel's senior judge, Alicia Gonzales, invited us to be seated and then peered inquisitively at the easel and display boards.

"I see counsel for the appellee is present at counsel table, but may I ask whether counsel for the appellant is present? My view is blocked by these—" here she paused and searched for the right word "—exhibits," she finally decided.

Flegleman leaped to his feet and leaned out from behind the boards. "Sorry, you honor," he said. "Timothy Flegleman for the appellant."

"Very well, Mr. Flegleman, please proceed with number 00-983, Navajo Tribe v. Kramer, Inc."

Flegleman brought a yellow pad to the podium and began his argument. The case seemed to be a complex dispute between the Indian tribe and a pipeline company that had constructed a gas transmission line across Navajo lands. The amounts owed to the tribe were to be calculated by a complicated formula, and disputes had arisen.

As Flegleman finished his introduction and began his first argument, he referred to one of his display boards. "Your honor, the diagram on my first exhibit demonstrates—"

Judge Gonzales interrupted: "Excuse me counsel. The board facing me does not contain a diagram."

Flegleman attempted to squeeze between the podium and his counsel table to reach the easel, but the courtroom was too small and the tables were set only inches from the podium. Despite turning sideways and inhaling, he could not squeeze through. Flegleman extracted himself as gracefully as he could, walked all the way around the table until he finally reached the easel, and the shuffled the boards until he found the right one. He circumnavigated the table again on his return voyage to the podium and resumed his argument.

He had spoken for no more than a few seconds when his opponent, Sherman Sharpe, suddenly said, "Excuse me, but I have never seen this diagram before. I don't believe it is in the appendices, and appellant's counsel did not move for permission to use it in oral argument."

"I was supposed to file a motion?" Flegleman said.

Judge Gonzales sighed. "Yes, Mr. Flegleman, you were supposed to file a motion. To avoid wasting
any more time, we will let you proceed. You would be well-advised to review the *Tenth Circuit Practitioner's Guide* before your next oral argument."

"I will, your honor. Thank you."

Flegleman resumed his argument, but after no more than thirty seconds Judge Gonzales changed the subject.

"What about the *force majeure* clause, counsel" she inquired.

"As you can see from the text of paragraph 7.1.3 of the contract, which I have reproduced on my second board —"

"Excuse me again, counsel," Judge Gonzales interrupted wearily. "You still have the diagram on the easel."

"Oh, I'm sorry," Flegleman said. He again marched around the table, found the right board on the fourth try, and walked back to the podium.

"As you can see from paragraph 7.1.3, which is now up on the easel —"

Judge Harvey Evans was next to interrupt. "I'm afraid these old eyes can't read the small print in your exhibit. Would you remind us what this paragraph says?"

"Oh, certainly your honor," Flegleman responded. He again circled the counsel table to reach the easel. Slowly and carefully, he read to the court the text of the exhibit.

In the audience, Susan Victor leaned over and whispered into my ear, "Seven minutes gone and he has yet to make a single substantive point. I can't wait to see what he plans to do with the screen and projector."

"To illustrate my next point," said Flegleman, who had returned to the podium, I want to use the projector." He bent over the laptop computer and selected a slide. He began to walk back to the podium, but stopped as he looked up at the screen. "Sorry, wrong slide," he said, returning to the laptop. Judge Evans was impatiently drumming his fingers on the bench. Flegleman squinted at the screen for several seconds, found the slide he wanted, and walked back to the podium.

When Flegleman's case finally ended, he scuttled out of the courtroom. The court called our appeal. Susan Victor gave her usual polished presentation. The judges perked up and enjoyed the give-and-take without the distraction of visual aids. We left the courtroom and, as we walked down the second floor hallway, found Flegleman sitting disconsolately on a bench. We stopped and Victor sat down next to him.

"I'm sorry, Tim," she said. "I'm sure that wasn't how you envisioned your argument."
"It seemed like such a good idea when I was preparing," he said. "The case is really complicated, with lots of different contract clauses and a maze of parties. I thought blowups of the key provisions and a few diagrams would be just what I needed. I used the same exhibits and the same PowerPoint slides at trial, and it worked fine there."

"I know, but effective use of visual aids during an appellate argument presents different challenges. You have only fifteen minutes in the Tenth Circuit, and you can't afford to waste a second. The first thing you must know is the layout of the courtroom and whether it offers a feasible location to set up a display. Remember, the screen or easel has to be located where you, your adversary, and the court can see it easily. If it's an easel with multiple boards, it has to be within two steps of the podium so you can change boards without interrupting your argument. If you don't know the layout of the courtroom you will have to visit in advance. You may have to bring the easel or screen and actually set it up to make sure it works.

"While you're there, measure the distance from the display to the bench. Most lawyers overlook this simple problem. You have to make the text on your oversize exhibits big enough for the judges to read from the bench. But how big is big enough? The only way to be sure is to set up your exhibits, stand the actual distance away, and see if you can read it easily. Most lawyers make the lettering far too small."

"That was one of my problems today," Flegleman said morosely.

"Another thing," Victor continued, "if you're going to use multiple exhibits on the same easel, you have to mark them on the edges so you can instantly pick the one you need. Then, you have to practice with the boards so you can select and position the right exhibit without pausing in your argument. You don't want the court to be distracted while you are fumbling with your visual aids."

"How about computer slides, Susan?" Flegleman asked. "I thought that part of my presentation went pretty well."

"I have an ironclad rule," Victor responded. "You can run the computer yourself at trial, where you have plenty of time. But during an appellate argument you have to have a colleague select the slides. Also, you can't pause every minute or two to tell your colleague which slide to show. That invariably sounds like, 'Give me the slide with the quotation from the Jones case. No, not that one I think it's two slides farther on. That's it. Thank you.' Then, thirty seconds later, you go through the same routine. You have to practice with your colleague until she can put up the right slide as you move through your argument, without any prompting by you."

"That sounds like a lot of work before the argument," Flegleman said doubtfully.

"It is. And if you're not willing to do the preparation then forget about the visual aids. In certain appeals, exhibits during oral argument can be highly effective, but they must be handled flawlessly. Clumsy use of visual aids will distract the judges and ruin your opportunity to make a persuasive argument."
"I can confirm that from personal experience."

"Oh, and Tim?" Victor said, raising her eyebrows. "Some appellate courts, like the Tenth Circuit, require a motion in advance for permission to use visual aids during argument. You should check with your adversary and state his position in the motion."

We helped Flegleman carry his gear downstairs and said goodbye at the top of the broad marble steps outside the courthouse. As Flegleman descended, the folded easel slung over his back came loose from its knots and slipped lower and lower, tapping against the steps as he slowly lugged his equipment back to his office.