In Summary of Summaries

By Becky Thorson

Summary trial exhibits can be effective tools for teaching and persuading a jury. Understanding the different types of summaries and evidentiary standards that apply is crucial when preparing for the use of summary exhibits at trial.

Courts recognize three different types of summaries:

- "primary-evidence summaries," which, under Federal Rule of Evidence 1006, are "evidence to be considered by the fact-finder";
- "pedagogical-device summaries," which are illustrative aids and not evidence, and the jury should be so instructed; and
- "secondary-evidence summaries," which combine "primary-evidence" and "pedagogical-device" summaries, and are so accurate and reliable that they are received into evidence (usually with an appropriate instruction) to assist the jury in understanding the evidence.[1]

Whether summaries follow the jury into deliberations or serve to supplement or substitute underlying evidence depends upon the type of summary offered.

Summary Exhibits Under Federal Rule of Evidence 1006

Rule 1006 summaries can be especially powerful, because they are primary evidence, and if admissible, they are likely to follow the jury into deliberations as real evidence. Federal Rule of Evidence 1006 states: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court."

The material on which the chart, summary, or calculation is based must be "voluminous," making the examination of such material in court inconvenient. The comments to Rule 1006 illustrate the practical reality behind the rule: "The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury."[2] Courts have declined to admit summaries under Rule 1006 when the underlying materials are not so voluminous that they cannot be conveniently examined in court.[3]

To satisfy the standards for a Rule 1006 exhibit, the material supporting the summary must also be admissible. However, courts have ruled that underlying materials do not necessarily need to be admitted into evidence at trial separate and apart from the summary itself. Inadmissible hearsay, which is not subject to any exception, may not be used to support a Rule 1006 summary.

Prepared correctly, Rule 1006 summaries can be offered in many different forms. A study conducted at the University of Minnesota in 1986 found that perceptions of the presenter as well as audience attention, comprehension, yielding, and retention are enhanced when presentation support is used compared to when it is not.[4] The study also found that presentations using visual aids were 43 percent more persuasive than unaided presentations.[5]

Thus, trial lawyers can be creative with their summary exhibits. The rule states that the material may be presented in different forms. Lists, numbers, and data—even summarized—can be dull presentation material.[6] Time line charts or summaries presented graphically can help the jury understand and remember key dates and keep them in sequence. Flow charts can help illustrate and communicate a series of events, transactions, a process, or a sequence. Charts and graphs depict numerical data in graphical form. Choosing the right format for a chart or graph is important; so, the purpose of the exhibit should govern the format used: Pie charts show percentages and comparisons as part of a whole; line charts usually illustrate a trend over time; bar charts typically depict comparisons between variables; and organizational charts show various functions of an organization and the relationships between those functions.[7] A comparison of the text presentation of financial sales data (figure 1, next page) with the same data in a chart or a graph (figure 2, next page) illustrates the difference.

Sales Summary

Composite Product	Non Composite Product
2002: $1,000,000	2002: 0
2003: 0	2003: $1,000,000
2004 $1,000,000	2004 0
2005: $3,000,000	2005: $1,000,000
2006: $1,000,000	2006: $2,000,000
2007: $3,000,000	2007: $6,000,000
2008: $9,000,000	2008: 0
2009: $10,000,000	2009: 0

Figure 1

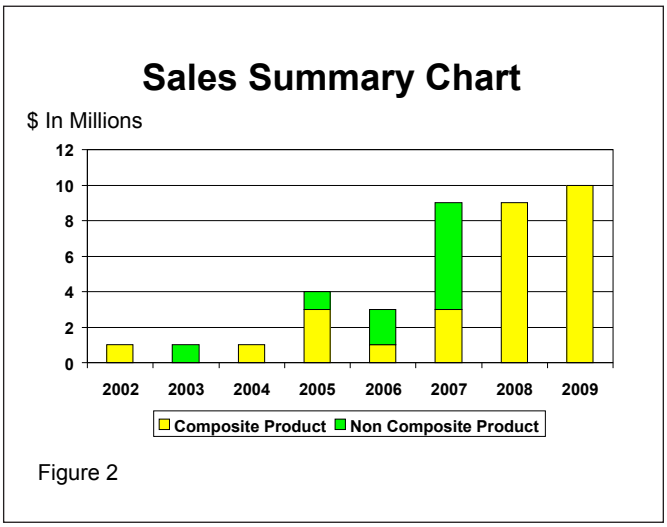

Figure 2

It is commonplace to use business graphics to display numerical data.[8] Figures 1 and 2 present the same data, but figure 2 helps tell a story. The use of a stacked bar chart allows the jury to compare and contrast the sales data. But graphic embellishment or interpretation may raise objections that the summary is not accurate or is argumentative. The chart in figure 2 may not be complete—or accurate—without including the actual sales dollar figures.

Counsel should be sure not to disqualify their Rule 1006 evidence by adding inadmissible arguments to their summaries. Courts will often reject admitting into evidence summaries that are more argumentative than factual.[9] The wording used in headings and classifying titles should be neutral.[10] For example, in ruling on motions in limine, the district court in *United States v. Babajian* ruled that the adjectives "true" or "inflated" had to be removed from the "Sales Price" heading before the summary could be offered.[11] Figure 3 illustrates the addition of conclusory annotations to a summary chart.

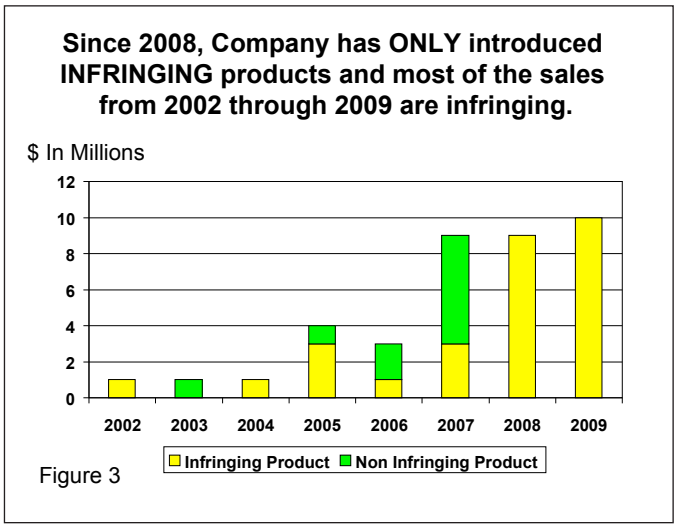

Figure 3

Omitting information from the underlying materials could render the summary inaccurate or misleading. At the very least, the witness testifying about the summary could be subjected to cross-examination that destroys any value of the summary exhibit.

Rule 1006 requires the summarized documents to be available to the opposing party at a "reasonable time." Failure to produce or disclose the materials may be grounds for exclusion.[12] If the underlying documents are made available to the opposing party, they may not need to be produced at the trial. Of course, lawyers should always confirm the law of the applicable circuit as well as trial court preferences or procedures under local rules, scheduling orders, or standing orders.[13] Making the documents available at the trial may be required to establish foundation, but introducing the documents themselves into evidence may undermine counsel's ability to offer the summary under Rule 1006.[14] Courts have rejected Rule 1006 arguments when the exhibits summarized evidence that had already been presented.[15] Again, the very purpose is to avoid burdening the court and the jury with the voluminous materials.

Depending on the case, counsel should probably include their side's Rule 1006 summary exhibits on exhibit lists and identify the underlying documents that are available or have been made available. One way to do this is to list production (or Bates) numbers on the exhibit list or even on the graphical summary itself. Such disclosure permits the opposing party to examine the summary before trial and make objections to which the proponent of the exhibit can respond. Courts may examine the timing of the disclosure along with the other party's resources to examine the materials before trial.[16] The interplay between the disclosure of documents and other disclosure obligations under the Federal Rules of Evidence and Court Scheduling Orders should also be considered; for example, a summary of documents may be excluded if the underlying documents were not produced in a timely manner.[17]

Pedagogical Summaries

A second type of summary is called a "pedagogical-device summary" or illustrative summary. Evidentiary summaries under Rule 1006 are offered into evidence and are based on admissible evidence, whereas pedagogical or illustrative summaries are used to aid the jury's examination

of testimony or documents that have been offered into evidence.[18] The use of such evidence lies within the discretion of the trial judge, and the initial test of the admissibility of the visual aid is whether it will assist the jury in understanding the testimony. Testimony of witnesses—especially complex testimony—can be clarified through illustrative evidence.

How courts treat pedagogical exhibits varies, and attorneys offering or opposing the introduction of such exhibits need to be alert to multiple arguments. In many cases, summaries that are deemed pedagogical aids are not admitted or permitted to go to the jury during deliberations. For example, in *United States v. Buck*, the court found that "[i]t was proper for the diagram to be shown to the jury, to assist in its understanding of testimony and documents that had been produced, but the diagram should not have been admitted as an exhibit or taken to the jury room."[19] In certain circumstances, courts may take a liberal approach and admit pedagogical devices because they are highly relevant, not unfairly prejudicial, and very helpful to the jury. When analyzing these issues, courts have been mindful of the complexities of the case and the realities of the "real-world learning process" when deciding whether or not to permit these exhibits to sometimes follow the jury into deliberations. *See Verizon Directories Corp. v. Yellow Book USA Inc.*, 331 F. Supp. 2d 136 (E.D.N.Y. 2004) (providing a very informative discussion of various pedagogical devices and their uses at trial by Senior District Judge Weinstein).

Hybrid Summaries

Some courts recognize a "hybrid" summary exhibit. Hybrid summaries may not be covered by Rules 1006 but are allowed in evidence under Ruless 611 and 703 when the summary is sufficiently accurate and reliable. For example, summaries that draw conclusions and make assumptions may be permitted as long as the assumptions and conclusions are based on evidence in the record.[20] Charts summarizing evidence already introduced at trial may be admitted into evidence when the witness who prepared the charts is available for cross-examination and a limiting instruction is given to the jury. In *United States v. Bray*, the court found that "the jury should be instructed that the summary is not independent evidence of its subject matter, and is only as valid and reliable as the underlying evidence it summarizes."[21]

As with the format of graphic presentations discussed above, counsel should take into account how summary information can be visualized. A comparison of the simplified presentation of summary data regarding patients' medical history using a narrative format (figure 4) with a graphic presentation of the information (figure 5) demonstrates the difference.

Graphic presentation of information tells a story quickly and clearly. (Of course, counsel always wants to make sure that the graphical interpretation tells the best story for the case; a graphic message can easily backfire.) Adding argument and conclusions, as illustrated in figure 6 may not be allowed—even if presented as a visual aid. Even the use of certain colors can raise objections. It is important to bear in mind that trials are serious business. The graphic presentations counsel uses at trial should not be cute. An effective summary exhibit should balance creativity with content and set an appropriate tone.

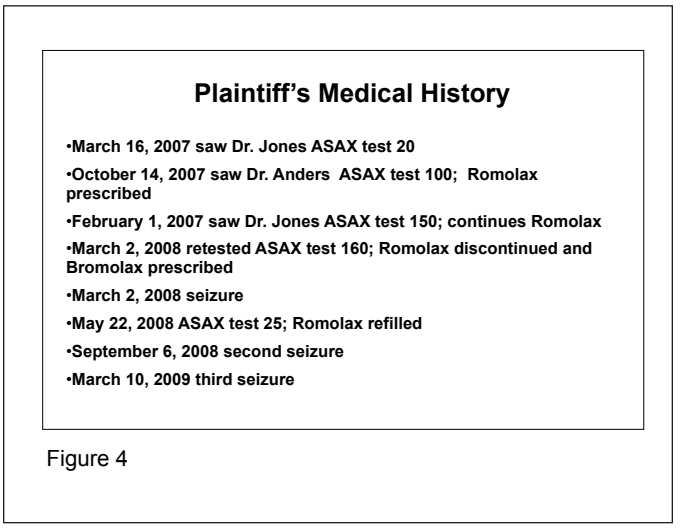

Figure 4

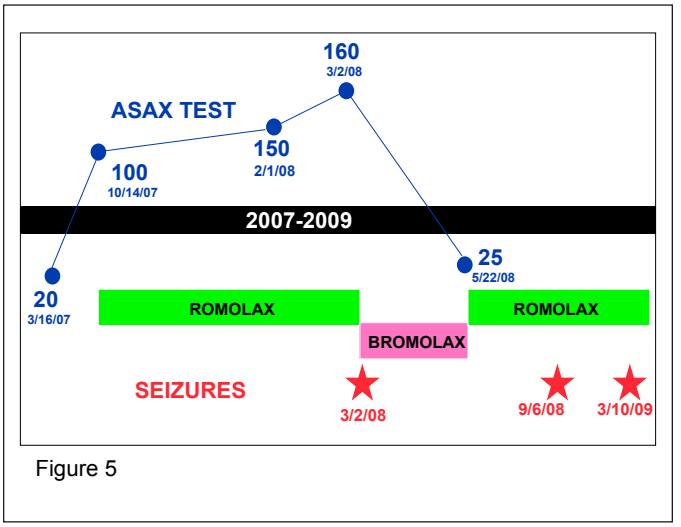

Figure 5

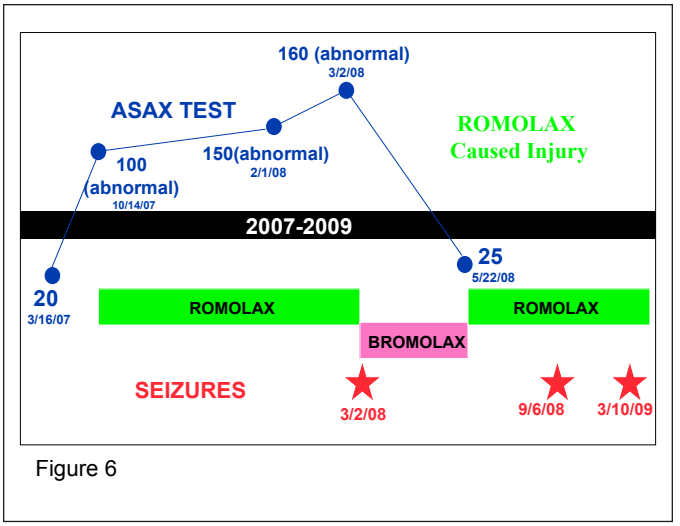

Figure 6

The Trial Court's Discretion in Admitting Summary Evidence

Trial courts have broad discretion to allow or exclude summary evidence and to limit its use by the instruction courts give to the jury.[22] Counsel should distinguish between the use of exhibits as visual aids during trial and the admission of exhibits as evidence. Trial courts typically permit the use of visual aids—including charts, summaries, and calculations—as long as they are relevant and not unfairly prejudicial under Rule 403. The ability to cross-examine on the summary may come into play in the analysis. Evidentiary challenges will also apply, and hearsay issues are common. Certain information or materials may not be even publishable to the jury using an illustrative exhibit, and attorneys in the courtroom should be on their toes so that they can make and respond to objections.

Laying the foundation for basic illustrative exhibits can be relatively straightforward when questioning the witness who prepared the exhibits:

> Q: Can you tell the jury what you were assigned to do in this case?
> A: Yes. I was asked to analyze damages specifically in the form of a reasonable royalty.
> Q: Have you done that?
> A: Yes, I have.
> Q: Now, before we get started on that, have you prepared some slides that cover your analysis?
> A: Yes, I have.
> Q: Have you reviewed them to make sure they are accurate?
> A: Yes, I have.
> Q: Would the slides be helpful to the jury in hearing and understanding your testimony today?
> A: I believe so.

Handling summary exhibits offered to substitute for voluminous documents under Rule 1006 may require additional steps to establish the authenticity and accuracy of the summary and also show that the summary is based on admissible evidence. If expert summaries are offered, foundation may be required to establish reliability of the underlying data under Rule 703. Often, authenticity of the originals or the business record exception to the hearsay rule[23] will have been established before trial through discovery. And, as part of pre-trial work, the parties should meet and confer so that they can agree on the foundation or admissibility of exhibits.

In the next example of an interchange between counsel and the witness, additional background is offered through testimony, even though the exhibit had already been admitted into evidence. This can bolster the value of the exhibit, add credibility, and give the jury a better road map:

> Q: I'm going to call up on the screen here G42, which is factor number 11. Can you tell us about factor number 11 in the *Georgia-Pacific* analysis?
> A: Yes. Factor 11 considers defendants' use of the technology and its value. The information—again, the documents, deposition testimony that we looked at—indicated the products are a growth area. Also, I considered the company's actual sales, which, as I indicated, had grown significantly during this time.
> Q: What did you do to determine what the company's sales were?
> A: I read and analyzed the financial records that they produced.
> Q: A lot of financial records?
> A: There were many produced by them, yes.
> Q: Did you prepare a slide that shows what the company's actual sales were?
> A: Yes, I did.
> Q: I'm going to call up G44 on the projector screen. Can you tell us what you looked at in order to prepare this slide?
> A: Yes. I looked at the financial and business records produced by the company.
> Q: Did you prepare a summary chart that summarized all the financial information before you prepared this graphic?
> A: Yes, I did.
> Q: I'm going to call up Plaintiff's Exhibit Number 152, which is an exhibit already admitted into evidence under Rule 1006. Is this a summary graphic that you created?
> A: Yes, it is.
> Q: Did you prepare the sales chart using the company's own sales information?
> A: Yes.
> Q: What are these numbers at the bottom here in the sales chart?
> A: Those are what are referred to as Bates numbers, or their reference numbers that indicate the record number that is placed on the bottom of the documents that are produced, so it's a way to trace the information back to the source document that we used, and the stamp indicates that it was a document produced by the company.
> Q: Are these the actual numbers that you drew upon when creating your chart?
> A: Yes, they are.

Even though Rule 1006 does not specifically require a witness to testify that the exhibit is an accurate summary of admissible material that is voluminous, that approach may be necessary. Some courts have explicitly required summaries to be introduced by the person who oversaw their preparation.[24] Whether an expert witness needs to testify about the accuracy of the summary exhibit can depend on the nature of the underlying materials.[25] Finally, because a Rule 1006 exhibit is primary evidence, a limiting instruction should not be required,[26] although there can always be special circumstances that may make some instruction appropriate.

Other Practical Considerations

Making the record regarding visual summaries is not always easy. As discussed above, illustrative exhibits are sometimes displayed, but they are not introduced as evidence. Because tracking these visuals in the transcript can be important, a separate numbering system can help. Ref-

erencing an exhibit number in the question will help preserve the record on what was actually displayed at trial.

> Q: Let's go to the next factor you considered and your slide G32. Can you tell us what your analysis was with regard to factor number 2?
> A: Yes. Factor number 2 relates to rates paid by the defendant and licenses that the company has entered into.

Typically, the parties will meet and confer to agree on most of the exhibits and graphics to be offered and used at trial. Parties may seek to obtain pre-trial rulings on summary exhibits. Proponents and opponents of summary exhibits—in any category—need to be prepared to make objections and to respond to them. If objections are not made at trial, the issue may be waived on appeal. Attorneys should be ready to propose limiting instructions for summary exhibits that do not meet Rule 1006 standards but are otherwise admissible.

It may become necessary to edit or modify graphics in response to objections and court rulings to generate visuals that can be used at trial. Therefore, it is a good idea to have computer graphics files accessible in the courtroom for quick revision, printing, or display.

To the extent that the summary is in the category of pedagogical or illustrative exhibits, it is important to consider any court deadlines for the exchange of these exhibits to permit objections prior to use or publication to the jury.

Counsel should be careful about what they ask for in seeking the admission of visual aids—including summary exhibits—because rulings will probably be applied evenhandedly to both parties. For example, if an argumentative summary is admitted and goes back to the jury room, the opponent's summary might be admitted too. How will that influence deliberations and the jury's analysis of the actual evidence?

Finally, as is always the case when presenting any type of exhibit—including graphic presentations of summaries at trial—the presentation medium is a key consideration. If electronic display technology will be used at trial, it should be tested ahead of time. In addition, counsel should have a backup plan if the equipment fails. If poster boards are used, the content must be legible and the poster should be placed where both the jury and the judge can see it. Counsel should find out what presentation mechanisms the court prefers or even requires.[27] Handouts of the graphic material should be available at trial for the other side, the court clerk, or the judge. Programs, such as PowerPoint, should not be overused, because they may take focus away from the attorney or the witness; and too many slides will put everyone to sleep. Visual aids are tools that should be used to bring the testimony to life and to help the judge or jury remember the evidence and arguments made at trial. **TFL**

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Endnotes

[1]*U.S. v. Bray*, 139 F.3d 1104, 1111–12 (6th Cir. 1998). *See also* 6 Jack B. Weinstein and Margaret A. Berger, Weinstein's Federal Evidence § 1006 (2d ed., 2009) (discussing the admission of summaries under Rule 1006).

[2]Fed. R. Evid. 1006, Advisory Committee's note.

[3]*See Quinn-Hunt v. Bennett Enters. Inc.*, 211 F. App'x 452, 458 (6th Cir. 2006).

[4]Douglas R. Vogel et al., *Persuasion and the Role of Visual Presentation Support: The UM/3M Study, ThinkTwice Inc.* (June 1986), available at www.thinktwiceinc.com/olio/articles/persuasion_article.pdf.

[5]*Id.*

[6]District courts also have broad discretion in determining whether to dismiss a juror accused of sleeping. *U.S. v. Greene*, 428 F.3d 1131, 1135 (8th Cir. 2005).

[7]*See generally* Edward R. Tufte, *The Visual Display of Quantitative Information* (2d ed., Graphics Press, 2001).

[8]*See U.S. v. Scales*, 594 F.2d 558, 563 (6th Cir. 1979) (finding that it is not problematic for a witness to perform some calculations in preparing a chart).

[9]*U.S. v. Taylor*, 210 F.3d 311 (5th Cir. 2000); *U.S. v. Nunez*, 658 F. Supp. 828, 838 (D. Colo. 1987).

[10]*Peat Inc. v. Vanguard Research Inc.*, 378 F.3d 1154 (11th Cir. 2004); *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 257–58 (6th Cir. 1986)

[11]*U.S. v. Babajian*, No. CR 07-00755 DDP, 2009 WL 412333 at *10 (C.D. Cal. Feb. 17, 2009).

[12]*See Johnson v. Big Lots Stores Inc.*, 253 F.R.D. 381 (E.D. La. 2008).

[13]*EEOC v. HBE Corp.*, 135 F.3d 543, 553 (8th Cir. 1998). *See also Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 189–90 (4th Cir. 1994); *U.S. v. Bakker*, 925 F.2d 728, 736 (4th Cir. 1991).

[14]*U.S. v. Hemphill*, 514 F.3d 1350 (D.C. Cir. 2008).

[15]*See, e.g., U.S. v. Buck*, 324 F.3d 786 (5th Cir. 2003).

[16]*Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005).

[17]*Johnson v. Big Lots Stores, supra*, n.12.

[18]Fed. R. Evid. 611; Fed. R. Evid. 703.

[19]*U.S. v. Buck, supra*, n.15, 786, 791.

[20]*U.S. v. Wainright*, 351 F.3d 816 (8th Cir. 2003).

[21]*U.S. v. Bray, supra*, n.1, 1104, 1112.

[22]*U.S. v. Massey*, 89 F.3d 1433, 1441 (11th Cir. 1996). *See also U.S. v. Evans*, 910 F.2d 790, 798–800 (11th Cir. 1990), aff'd, 504 U.S. 255 (1992).

[23]Fed. R. Evid. 803(6).

[24]*U.S. v. Van Der Zwaag*, No. 1:08-cr-324, 2009 WL 2584753 at *14 (W.D. Mich. Aug. 19, 2009) (citing *U.S. v. Moon*, 513 F.3d 527, 545 (6th Cir. 2008)).

[25]*U.S. v. Babajian*, *supra*, n.11.

[26]*U.S. v. Bray, supra*, n.1, 1104.

[27]*See, e.g.*, Tunheim, J., Practice Pointers and Preferences, available at www.fedbar.org/minn-tunheim.pdf ("Attorneys must use the technology in the courtroom during all trial proceedings. Any other use of technology, screens, white boards, or foam core boards must be pre-approved.").