

Practice Tip: Alternative Ways To Admit Charts Or Summaries When Rule 1006 Is Unavailable

Under *FRE 1006*, charts, summaries or calculations may be used to present the contents of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. Rule 1006 allows summary evidence as an exception to *FRE 1002*, which establishes a general presumption that the original should be admitted to prove the contents of a writing, recording or photograph. When *FRE 1006* is unavailable to secure admission of such charts or summaries, three alternative approaches can be used to justify their admission into evidence.



❖ *United States v. Buck*, 324 F.3d 786, 790-91 (5th Cir. 2003) (diagram showing defendant's connection to misapplied payments was a pedagogical aid and should not have been admitted as an exhibit or allowed into the jury room; Pedagogical charts not admitted under Rule 1006 may be presented to the jury (though not admitted into evidence) under Rule 611 if they are consistent with the evidence and not misleading)

Alternative Approaches

At least three alternatives for Federal Rules of Evidence 1006 may apply, depending on the facts of the case:

1. Presentation Of Evidences As A Testimonial Or Illustrative Aid (*FRE 611(A)*)

Is the chart or summary evidence offered as a testimonial or illustrative aid to the jury, and not introduced as substantive evidence? If so, Federal Rule of Evidence 611(a) provides the trial court with "reasonable control over the mode and order of interrogating witnesses and presenting evidence," so that it may be admitted as a testimonial aid.

Examples of the Rule 611(a) Alternative:

❖ *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004) (noting summary charts under Rule 1006 are distinguished from "pedagogical" devices which "are used merely to aid the jury in its understanding of the evidence that has already been admitted"; "Whenever pedagogical charts are employed [under *FRE 611*], however, the court should make clear to the jury that the charts are not evidence themselves, but are displayed to assist the jury's understanding of the evidence. *FRE 1006* charts, by contrast, are admitted into evidence as a surrogate for voluminous writings that are otherwise admissible.")

❖ *United States v. Baker*, 10 F.3d 1374, 1411-12 (9th Cir. 1993) (while certified public accountant's summary testimonial evidence was inadmissible under Rule 1006 and Rule 702, it was admissible under Rule 611(a) particularly since limiting instructions were provided), *cert. denied*, 513 U.S. 934 (1994), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000)

❖ *United States v. Gardner*, 611 F.2d 770, 776 n.3 (9th Cir. 1980) (in income tax evasion case, chart summarizing assets, liabilities and expenditures which was used as a testimonial aid under Rule 611(a), "contributed to the clarity of the presentation to the jury, avoided needless consumption of time and was a reasonable method of presenting the evidence"; chart was a summary of facts in evidence and defense had full opportunity to challenge underlying bases)

2. Opinion Testimony By Lay Witnesses (*FRE 701*)

If a party has a lay witness who can offer testimony that interprets or provides an opinion about a matter of relevance to the case, one option might be to introduce the summary evidence by offering lay opinion about the matter.

Example of the Rule 701 Alternative:

❖ *State Office Systems, Inc. v. Olivetti Corp. of America*, 762 F.2d 843, 845-46 (10th Cir. 1985) (in breach of warranty and contract, and fraud action against computer manufacturer, projections of future lost profits, while “not legitimately admissible as summaries under Rule 1006, since they are interpretations of past data and projections of future events,” were admissible as opinion testimony under Rule 701 and Rule 702)

3. Testimony By Experts (FRE 702)

If a party has an expert witness who can offer testimony that interprets or provides an opinion about a matter of relevance to the case, one option might be to introduce the summary evidence by offering expert opinion about the matter.

Examples of the Rule 702 Alternative:

❖ *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004) (“[T]he opinion of expert witnesses can be summarized on pedagogical charts, subject to regulation under Rule 611(a). And these charts may draw on authority granted under Federal Rules of Evidence 703 and 705, summarizing data on which experts in the case have relied or summarizing the expert’s opinions. See Fed. R. Evid. 703; Fed. R. Evid. 705.”)

❖ *State Office Systems, Inc. v. Olivetti Corp. of America*, 762 F.2d 843, 845-46 (10th Cir. 1985) (in breach of warranty and contract, and fraud action against computer manufacturer, projections of future lost profits, while “not legitimately admissible as summaries under Rule 1006, since they are interpretations of past data and projections of future events,” summaries were admissible as opinion testimony under Rule 701 and Rule 702)

Importance of Alternative Grounds

Identifying alternative grounds for admitting or excluding evidence are important for two reasons:

❖ First, before evidence is admitted or excluded at trial (particularly on close trial evidence questions), counsel may wish to have a backup basis to ensure admission or exclusion of the evidence.

❖ Second on appeal, if any errors were made at trial, alternative grounds may be necessary to determine whether the trial court can be affirmed on another basis which finds support in the record. 🏛️

