A Summary on Admitting Summaries in Federal Court[1]

By: Michael J. Gartland (Copyright ©)
THIS IS AN ADVERTISEMENT

When it is impractical to have the contents of voluminous writings, recordings or photographs examined in federal court, a party may present the same in a summary form, but only after satisfying the requirements of Rule 1006 of the Federal Rules of Evidence. This article is a primer on the admission of summaries in civil and criminal proceedings in federal court, with an emphasis on case law in the Sixth Circuit.

The admissibility of summaries is governed by Rule 1006, which provides:

> 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.

Fed. R. Evid. 1006. The practice of admitting summaries was well established at common law, and was codified in Rule 1006 to streamline the process of admitting evidence concerning voluminous writings, recordings or photographs that cannot be conveniently examined in court. 31 C. Wright & V. Gold, *Federal Practice and Procedure* § 8041 (2000).

Rule 1006 is an exception to the so-called "best evidence rule," which requires the admission into evidence of the original of a writing, recording or photograph. *Martin v. Funtime, Inc.*, 963 F.2d 110, 116 (6th Cir. 1992); 31 C. Wright & V. Gold, *Federal Practice and Procedure* at § 8042. The best evidence rule is set forth in Rule 1002 of the Federal Rules of Evidence, which provides: "To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or act of Congress." Fed. R. Evid. 1002.

The Sixth Circuit has interpreted Rule 1006 as imposing five requirements for the admission of an evidentiary summary of documents:

> (1) the underlying documents must be so voluminous that they cannot be conveniently examined in court, (2) the proponent of the summary must have made the documents available for examination or copying at a reasonable time and place, (3) the underlying documents must be

[1] This article is a service for friends and clients of DelCotto Law Group, PLLC. The opinions expressed in this article are intended for general guidance only and not as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. We are a debt relief agency. We help people file for bankruptcy relief.

> admissible in evidence, (4) the summary must be accurate and nonprejudicial, and (5) the summary must be properly introduced through the testimony of a witness who supervised its preparation.

United States v. Modena, 302 F.3d 626, 633 (6th Cir. 2002) (citing *United States v. Bray*, 139 F.3d 1104, 1109-10 (6th Cir. 1998)). Rule 1006 acts independently of the discovery rules, meaning that irrespective of the failure of the non-proponent to request to examine or copy the underlying documents, the proponent must "state when and where" such documents can be viewed. *Modena*, 302 F.3d at 633 (citing *Air Safety, Inc. v. Roman Catholic Archbishop of Boston*, 94 F.3d 1, 8 (1st Cir. 1996)). In a federal civil action, the most opportune time to advise opposing parties of when and where the writings, recordings or photographs underlying a summary may be examined and copied is at the time that the parties are required to disclose and exchange trial exhibits.

In a criminal case, the government cannot condition the defendant's right to examine or copy the documents underlying a summary upon the defendant permitting the government to examine materials which the defendant plans on introducing at trial. *Modena*, 302 F.3d at 633. In other words, the non-proponent of a summary has the "absolute right" to examine the records underlying a summary. *Id.* (citing *Air Safety*, 94 F.3d at 8). Rule 1006 does not, however, require the government to provide a defendant with a copy of a summary or copies of the underlying materials. *United States v. Jamieson*, 427 F.3d 394, 409 (6th Cir. 2005).

It is critical to keep in mind that all materials underlying a summary must be admissible in evidence. *Jamieson*, 427 F.3d at 411 ("We have held that all documents underlying a Rule 1006 summary must be admissible into evidence, but have placed no further restrictions on the admissibility of the underlying documents.") (citing *Funtime*, 963 F.2d at 116). If the underlying documents contain hearsay and fail to qualify as admissible under one of the exceptions to the hearsay rule, a summary created utilizing such documents will also be inadmissible. *Funtime*, 963 F.2d at 116 (citing cases decided by the Ninth, Fifth and Second Circuits). If the underlying materials are inadmissible for any other reason, such as irrelevance, unfair prejudice, or lack of authenticity, the summary is likewise inadmissible. *Bray*, 139 F.2d at 1110. This is so because a summary admitted under Rule 1006 is itself evidence that the trier of fact should consider when deciding a case. *Id.* (citing 2 *McCormick on Evidence* § 233 (4th ed. 1992)).

Some cases state in a conclusive manner that the underlying documents are not voluminous without ever discussing the actual number involved. *See, e.g., Quinn-Hunt v. Bennett Enterprises, Inc.*, 211 Fed.Appx. 452, 458, 2006 WL 3780309, *6 (6th Cir. Dec. 21, 2006) (finding that the district court did not abuse its discretion in finding that timecards dating back to 1993 were not so voluminous that they could not be conveniently examined in court without any discussion of the actual number of timecards involved). In one case, the Sixth Circuit assumed that as many as 600 underlying documents satisfied the voluminous requirement of Rule 1006. *Bray*, 139 F.3d at 1110

(assuming, without deciding, that 600 forms satisfied the voluminous requirement under Rule 1006 because the issue was not raised on appeal).

On appeal, the standard of review with regard to any evidentiary determination by a district court is abuse of discretion. *United States v. Moon*, 513 F.3d 527, 544 (6th Cir. 2008). The decision whether to admit a summary into evidence is "committed to the sound discretion of the trial court." *Funtime*, 963 F.3d at 115 (quoting *United States v. Campbell*, 845 F.2d 1374, 1381 (6th Cir.), *cert. denied*, 488 U.S. 908 (1988)). Under Rule 1006, the summary must be "accurate, authentic and properly introduced before it may be admitted into evidence." *United States v. Scales*, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979)). Rule 1006 requires that a summary be introduced through the testimony of a witness who supervised its preparation.

Hopefully, this short primer on summary evidence under Rule 1006 will assist the reader in admitting such evidence in federal court. For more information about this topic or any other litigation matter, please contact Mike Gartland or any of the other attorneys at DelCotto Law Group at 859-231-5800 or visit our website, www.dlgfirm.com.