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### Admissibility of planned demonstrative exhibits

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#### Summary

To the extent that demonstrative exhibits qualify as summaries of voluminous underlying documents, recordings, or photographs, they will be admissible as evidence under [FRE 1006](#). As for the remainder, [FRE 611\(a\)](#), at a minimum, permits the use of demonstrative exhibits to assist the jury in understanding the evidence a party has introduced. Although Second Circuit law does not speak with one voice as to whether such exhibits qualify as admitted evidence, **the essential distinction between this kind of exhibit and a Rule 1006 exhibit is that the jury's consideration of a Rule 611(a) exhibit (during the course of the trial and during jury deliberations) must be accompanied by a limiting instruction** that the exhibit should be given weight only to the extent that it accurately represents the underlying evidence that it purports to summarize; whereas, **no such limiting instruction need be given in connection with Rule 1006 exhibits because they are themselves the admissible evidence.**

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#### Mechanisms for Presentation

As for the mechanisms for presenting and authenticating Rule 1006 summaries or charts, much of the work can and should be accomplished prior to trial. That is, **prior to trial, the court should settle questions regarding accuracy, prejudice, and confusion as to the parties' proposed charts and summaries and a stipulation should be entered into by the parties.** This procedure flows in large part from the Rule's requirement that the underlying material must be made available to opposing counsel. If the matter is handled in this manner, no witness-stand authentication should be required. Weinstein's Federal Evidence § 1006.05 [4].

When authentication via witnesses is required, the least problematic situation is one in which the witness himself has prepared the summary or chart. The witness can explain his preparation of the summary, and can be cross-examined thereon. Weinstein's Federal Evidence § 1006.05[3] (citing cases). Where this is not the case, "Courts ... allow[] supervisory personnel to attest to the authenticity and accuracy of charts, summaries, or calculations in situations where many individuals, or possibly computers or other machines are used to prepare the exhibits." *Id.*; see also *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) ("In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation.").

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### **What about summaries prepared by counsel and their agents/employees?**

"It doesn't really matter who actually prepares the exhibit, or even who initially performs the calculations or compiles the data, as long as the witness through whom the exhibit is introduced can personally attest to its accuracy and explain where the information came from. Of course, you should introduce the exhibit through a witness whose expertise is such that it will lend extra credibility and weight to the exhibit's content. In other words, **you can create the evidence yourself as long as your witness can explain that he or she is fully familiar with all the facts and evidence that underlie it and that it is accurate.**" See Paul J.

Fishman, Summary Evidence, 25 No. 3 Litigation, 38, 39 (Spring 1999).

Unfortunately, however, Fishman cites no cases in support of this view.

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Finally, a court's ruling as to the admissibility of a summary or chart under Rule 1006 is subject to abuse of discretion review.

United States v. Walker, 191 F.3d 326, 336 (2d Cir. 1999).

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