

## 10.11. Exception for Summary of Voluminous Material

**The content of voluminous writings, recordings, or photographs may be proved by the use of a summary, chart, or calculation of the contents, provided the writings, recordings, or photographs are accurate, otherwise admissible, and cannot be conveniently examined in court. The party offering such evidence must make the originals available for examination, copying, or both, by other parties at a reasonable time and place. The party against whom the item is being offered must be given an opportunity to challenge its admission. And, the court may order the offering party to produce the underlying originals in court.**

### Note

This rule restates New York's "voluminous writings" exception to the best evidence rule by permitting the contents of a large number of writings, recordings, or photographs to be admitted in the form of a chart, summary, or calculation of their contents (*e.g. Ed Guth Realty v Gingold*, 34 NY2d 440, 451-452 [1974]; *Von Sachs v Kretz*, 72 NY 548, 552 [1878]). As stated by the First Department in *Public Operating Corp. v Weingart* (257 App Div 379, 382 [1st Dept 1939]):

"When documents introduced in evidence at a trial are voluminous and of such a character as to render it difficult for the jury to comprehend material facts without schedules containing abstracts thereof, it is within the discretion of the judge to admit such schedules provided they are based on facts in evidence, verified by the testimony of the person by whom they were prepared, and provided that the adverse party is permitted to examine them to test their correctness and to cross-examine upon them before the case is submitted to the jury."

The rule has four requirements before it can be invoked:

First, the original writings, recordings, or photographs must be too voluminous for convenient examination in court, a determination committed to the sound discretion of the court (*see Von Sachs*, 72 NY at 552 ["It would not have been error for the referee to have allowed a witness, with the books before him, to give a summary of their contents; but this was a question of convenience simply, and a matter within his discretion"]; *People v Potter*, 255 AD2d 763, 767 [3d Dept 1998]; *People v Weinberg*, 183 AD2d 932, 934 [2d Dept 1992]). In exercising that discretion, the court can consider the number of originals involved

and their complexity (*Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 228 [1st Dept 1996]; see *Fagiola v National Gypsum Co. AC & S., Inc.*, 906 F2d 53, 57-59 [2d Cir 1990]).

Second, the rule requires that the originals on which the chart, summary, or calculation is based be admissible (*Matter of Thomma*, 232 AD2d 422, 422-423 [2d Dept 1996]; *Weinberg*, 183 AD2d at 934; *Matter of Dunn Garden Apts. v Commissioner of Assessment & Taxation of City of Troy*, 11 AD2d 879, 880 [3d Dept 1960]).

Third, the proponent of the chart, summary or calculation must establish that the summary is an accurate representation of the originals (see *Public Operating Corp.*, 257 App Div at 382).

Fourth, the party against whom the chart, summary, or calculation is being offered must be given an opportunity to challenge its accuracy (*People v Case*, 114 AD3d 1308, 1309 [4th Dept 2014] [summary exhibits were improperly admitted under the voluminous writings exception to the best evidence rule inasmuch as defendant was not provided with the data underlying those exhibits before trial]; *Weinberg*, 183 AD2d at 934; *Public Operating Corp.*, 257 App Div at 383). In this connection, the court may also order the originals to be produced in court.

Where the chart, summary or calculation is used only for demonstrative purposes, this rule does not apply (see *Sager Spuck Statewide Supply Co. v Meyer*, 298 AD2d 794, 795 [3d Dept 2002] [summary of plaintiff's sales while not admissible as business record was properly admitted for the limited purpose of aiding the jury in understanding the voluminous data already admitted]; *Lauro v Bradley*, 265 AD2d 875, 875 [4th Dept 1999] ["A witness testifying concerning hundreds of items may use a list of those items, and after the witness has testified the list may be admitted in evidence, 'not as proving anything of itself, but as a detailed statement of the items testified to by the witness' "]; *Potter*, 255 AD2d at 767 ["visual aids"]).