

New Tool for the Litigator's Arsenal

BY MIKE TONSING, ESQ.

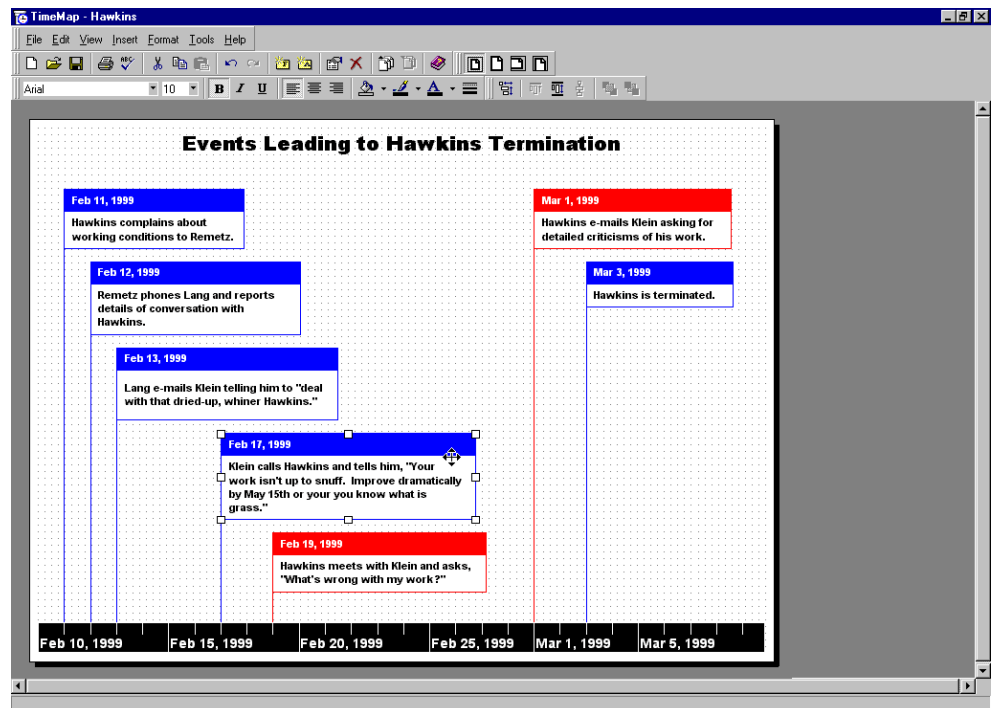
Run, don't walk to the CaseSoft Web site, www.casesoft.com, and download a "demo" copy of TimeMap, by CaseSoft. This innovative software company's latest offering effortlessly creates case-winning timelines for litigators.

Am I exaggerating when I say that timelines win cases? Hardly. If one picture is worth 1,000 words, what is a timeline worth? It is worth plenty! That is especially so if the timeline can get into the jury room. The power of such demonstrative evidence is, well, demonstrable, if it is not self-evident.

A good timeline can portray chronological links between crucial case events in a few eloquent strokes, strokes that lead inexorably to one conclusion. It can create inferences as to motives that are virtually irresistible for the trier of fact. It can enable a skillful advocate to begin arguing the case to the jury before closing argument begins, by having the chronology itself leap off the chart and do the arguing.

A Brief Review of the Federal Rules and Decisions Affecting Timelines and Summaries

The power of timeline-type evidence has been repeatedly recognized by the courts, especially in the context of



TimeMap makes it a cinch to create chronology visuals for use during hearings and trials. And now, a CaseMap 3.1 Update Utility available on the CaseSoft Web site allows CaseMap and TimeMap to work together.

criminal cases. For example, in *U.S. v. Conlin*, 551 F.2d 534, 539 (2nd Cir. 1977), the court cautioned that charts must be fairly used, since, by their arrangement and use, they are "an argument to the jury during the course of the trial."

The *Conlin* court paid great homage to the power of timelines and summary charts when it observed that, "A chart which for any reason presents an unfair picture can be a potent weapon for harm, and permitting the jury to consider it is error," citing *Steele v. United States*, 222 F.2d 628, 630 (5th Cir.

1955), cert. denied, 355 U.S. 828, 78 S.Ct. 39, 2 L.Ed.2d 41 (1957) and *Holland v. United States*, 348 U.S. 121, 127-28, 75 S.Ct. 127, 99 L.Ed. 150 (1954).

Under FRCP1006, summaries are admissible to prove the existence or nonexistence of a disputed fact if the underlying materials are relevant to an issue in the case, properly authenticated and not otherwise inadmissible under an exclusionary rule (e.g., hearsay). *Fagiola v. National Gypsum Co. AC & S., Inc.* (2nd Cir. 1990) 906 F.2d 53, 58. As will be obvious soon, a

shrewd litigator will try to posture any timeline evidence in such a way as to maximize the likelihood that it will be admitted into evidence under Rule 1006.

Rule 1006 requires that the proponent of the summary establish that the underlying records are independently admissible. Thus, if the underlying documents are hearsay and not admissible under any exception, a chart or other summary based on those documents is likewise inadmissible. *United States v. Johnson* (9th Cir. 1979) 594 F.2d 1253, 1256; *Martin v. Funtime, Inc.* (6th Cir. 1992) 963 F.2d 110, 115. (However, the opposite is also the case. That is why it is not necessary that the underlying records be admitted into the evidentiary record, since Rule 1006 summaries are admitted instead of (rather than in addition to) the materials being summarized. *United States v. Bakker* (4th Cir. 1991) 925 F.2d 728, 736-737; *United States v. Grajales-Montoya* (8th Cir. 1997) 117 F.3d 356, 361.)

It is strategically crucial to understand that, because the proponent must first establish the admissibility of the underlying records, Rule 1006 summaries are treated as substantive evidence (meaning that they are admitted into evidence and can be sent to the jury room during deliberations). *United States v. Smyth* (5th Cir. 1977) 556 F.2d 1179, 1184.

Rule 1006 summaries are distinguishable from summary charts or diagrams merely used as visual aids, in that the latter are generally not admitted into evidence or allowed in the jury room. *United States v. Wood, supra*, 943 F.2d at 1053; *United States v. Grajales-Montoya* (8th Cir. 1997) 117 F.3d 356, 361; *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.* (6th Cir. 1986) 803 F.2d 250, 257; *United*

States v. Johnson (4th Cir. 1995) 54 F.3d 1150, 1153.

The litigator who succeeds in establishing the foundation necessary to get a timeline admitted into evidence under Rule 1006 has the most powerful form of evidence, evidence that can actually be taken into the jury room. Such evidence can be devastating.

All of the considerations described above are pointless, of course, unless an accurate timeline based on admissible evidence can be efficiently produced. Prior to the advent of TimeMap, the best method was to hire Barnabas the Scrivener and hope for the best. Not anymore.

TimeMap Puts a Powerful Weapon in a Litigator's Arsenal

You must try out this tool yourself. Doing so is easy. Downloading the necessary files took me just a few minutes with a 56K modem. Installation was painless. Right away, I began experimenting and easily created a simple chart that colorfully depicted my colorful, and sometimes nefarious, family's history. I cheerfully pumped in both my parents' birthdays, their wedding date, my own birthday, my especially nefarious brother's birthday, and so on. That chart would be admissible in court under Rule 1006 in many situations. Fantastic!

TimeMap enables even a technologically challenged litigator to create powerful chronology visuals for use during hearings and trials.

And, because TimeMap makes it possible to create chronology graphs in a matter of minutes, TimeMap can be used as a tool to promote rigorous thinking. TimeMap. Visuals will, without question, help litigators explore time-based relationships between and among key case events long before it

is time to prepare the demonstrative evidence for purposes of the pretrial hearing.

As a litigator enters facts, TimeMap automatically generates a proportional time scale and positions fact boxes above the dates on which the facts occurred. If a lawyer has more boxes than fit comfortably on one page, he or she can change the number of pages and TimeMap automatically generates a revised time scale and repositions the fact boxes. Neat!

TimeMap also makes it easy to customize chronology visuals. One can add text boxes to emphasize points or to serve as a key. One can set the color and line weight of the fact and text boxes, and can set the style, size, color, and alignment of fact box and text box fonts.

This is indeed a "great equalizer" that every federal litigator should have in their arsenal. And, it is amazingly inexpensive and intuitive. Who could ask for more? First they gave us CaseMap (reviewed in two earlier columns.) Now this. What will the folks at CaseSoft (www.casesoft.com) do to top TimeMap? Pretty hard act to follow, I'd say.

See you again next month in Cyberia.

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