How to Lay a Foundation to Get Your Evidence Introduced

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How to Lay a Foundation to Get Your Evidence Introduced

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Essentials of Laying a Foundation

Submitted by John A. Snow

PART I. ESSENTIALS OF LAYING A FOUNDATION

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FOUNDATION FOR EVIDENCE

- Evidentiary "foundation" is required for all evidence, including witness testimony, physical evidence (tangible things, including documents) and demonstrative or illustrative evidence.
- An evidentiary foundation are the required facts to demonstrate that specific proffered evidence, whether witness testimony, tangible evidence or demonstrative evidence, is what it purports be (authentic) and to some extent relevant, can be admitted into evidence.
- Foundation provides the basic "who, what, and why" of the proffered evidence, so that there is a minimum reliability before it is considered by the fact finder.
- Foundation can also assist the fact finder as to the reason the evidence is offered and what it is.

RULES REGARDING FOUNDATION

RULES FOR INTRODUCTION OF EVIDENCE

Rule 104. Preliminary Questions

(a) IN GENERAL. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) RELEVANCE THAT DEPENDS ON A FACT. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) CONDUCTING A HEARING SO THAT THE JURY CANNOT HEAR IT. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if: (1) … involves … a confession; (2) a [criminal] defendant … is a witness and so requests; or (3) justice so requires.

RULES FOR INTRODUCTION OF EVIDENCE

Rule 104. Preliminary Questions (Continued)

(d) CROSS-EXAMINING A DEFENDANT IN A CRIMINAL CASE. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) EVIDENCE RELEVANT TO WEIGHT AND CREDIBILITY. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement— that in fairness ought to be considered at the same time.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 601. Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's Competency regarding a claim or defense for which state law supplies the rule of decision.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 901. Authenticating or Identifying Evidence

(a) IN GENERAL. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) EXAMPLES. The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 901. Authenticating or Identifying Evidence

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 901. Authenticating or Identifying Evidence

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or (B) a purported public record or statement is from the office where items of this kind are kept.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 901. Authenticating or Identifying Evidence

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and (B) a signature purporting to be an execution or attestation.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 902. Evidence That Is Self-Authenticating

(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and (B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents….*

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 902. Evidence That Is Self-Authenticating

(4) *Certified Copies of Public Records.* A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 902. Evidence That Is Self-Authenticating

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 902. Evidence That Is Self-Authenticating

(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

DEMONSTRATIVE EVIDENCE

DEMONSTRATIVE EVIDENCE

Diagrams, maps, models, computer animations, and various other forms of demonstrative evidence can often be admitted into evidence if they are submitted as illustrative or demonstrative evidence and the evidence assists the fact finder to better understand the issue. Considerations of relevance and fairness are primary guides courts use to exercise their discretion in ruling on the admissibility of the evidence.

DEMONSTRATIVE EVIDENCE

People v. Vasquez, 223 Cal. Rptr. 3d 24, 39 (Cal. App. 2017): ("Demonstrative evidence is admissible for the purpose of illustrating and clarifying a witness' testimony' so long as a proper foundation is laid.").

Dayries v. State, 2011 WL 3890388, at *2 (Tex. App.): ("Demonstrative evidence is admissible if it is relevant and material to an issue in the case and is not overly inflammatory….").

DEMONSTRATIVE EVIDENCE

State v. Perea, 322 P.3d 624, 637 (Utah 2013):

Because computer animations are merely a subset of demonstrative evidence, it is not necessary that the testifying witness know how the animation was created in order to satisfy rule 901's authenticity requirement. Rather, it is sufficient that the animation accurately reflects the witness's testimony…. For instance, an expert witness using a plastic model of a human organ is not required to know how the model was created. It is sufficient for the expert to confirm that the model accurately represents the organ about which he is testifying.

DEMONSTRATIVE EVIDENCE

Rayner v. Union P. R.R. Co., 2014 WL 12104888, at *1 (W.D. Okla.):

Having … viewed the video animation and narrative at issue, the Court finds that plaintiff has failed to establish that the animation is a fair representation of the circumstances surrounding the accident at issue in the case at bar…. In order to make his video animation, Mr. Burnham necessarily had to speculate as to when Mr. Rayner looked a particular direction…. If Mr. Burnham had speculated differently as to when Mr. Rayner looked in which direction, the result of the video animation likely may have been different…. Due to the prejudicial nature of the video animation and its likelihood of misleading the jury, the Court finds this video animation, which is based upon speculation, should be stricken and not admitted.

DEMONSTRATIVE EVIDENCE

Photographs are demonstrative evidence. *See e.g. Cmmw. v. Rathmann*, 2017 WL 5985043, at *3 (Pa. Super. 2017) ("The Commonwealth used the photographs as demonstrative evidence to show what the residences looked like and their proximity to each other."); *White v. Davey*, 2016 WL 7404761, at *7 (E.D. Cal. 2016) ("Photographs and videotapes are demonstrative evidence, depicting what the camera sees.").

DEMONSTRATIVE EVIDENCE

Yanello v. Park Fam. Dental, 79 N.E.3d 294, 304–05 (Ill. App. 3d Dist. 2017)

The great value of demonstrative evidence lies in the human factor of understanding better what is seen than what is heard…. The use of demonstrative evidence, therefore, is looked upon favorably by the courts because it allows the trier of fact to have the best possible understanding of the matters before it…. However, the same human factor that makes demonstrative evidence valuable—that people learn and understand better what they see, rather than what they hear—also makes it possible for parties to abuse the use of demonstrative evidence by giving a dramatic effect or undue or misleading emphasis to some issue, at the expense of others. Thus, in ruling upon the admissibility of demonstrative evidence, the trial court must be ever watchful to prevent or eliminate that abuse.

DEMONSTRATIVE EVIDENCE

State v. Pangborn, 836 N.W.2d 790, 803–04 (Neb. 2013)

In addition to jury instructions, there are other safeguards that can be employed to limit the prejudice that will result from allowing the jury to use demonstrative exhibits in deliberations. These safeguards include requiring the proponent of the exhibit to lay foundation for its use outside the presence of the jury, having the individual who prepared the exhibit testify concerning the exhibit, allowing extensive cross-examination of the individual who prepared the exhibit, giving the opponent of the exhibit the opportunity to examine the exhibit prior to its admission and to identify errors, excising prejudicial content prior to submitting the exhibit to the jury, and giving the opposing side the opportunity to present its own exhibit.

DEMONSTRATIVE EVIDENCE

State v. Peterson, 588 N.W.2d 84, 86–87 (Wis. App. 1998)

Other jurisdictions have suggested that the following factors are appropriate for trial courts to consider when determining the admissibility of demonstrative evidence: the degree of accuracy in the recreation of the actual prior conditions; the complexity and duration of the demonstration; other available means of proving the same facts; the risk that the demonstration may impact on the fairness of the trial; and whether the This is not an exhaustive list….

DEMONSTRATIVE EVIDENCE

State v. Pangborn, 836 N.W.2d 790, 803 (Neb. 2013)

Given the possibility for such forms of prejudice, a trial judge must carefully consider the potential prejudice that may arise from the use of demonstrative exhibits during jury deliberations. Each demonstrative exhibit must be considered individually, because both the usefulness of a demonstrative exhibit and the potential prejudice arising from its use will depend on the form and substance of each particular exhibit. We note that a trial court is already required to weigh these considerations before allowing the use of demonstrative exhibits in trial. We now hold that the trial judge must do so again before allowing the jury to use a demonstrative exhibit during deliberations. It is an abuse of discretion for a trial judge to send a demonstrative exhibit to the jury for use in deliberations without first weighing the potential prejudice in allowing such use against the usefulness of the exhibit and employing adequate safeguards to prevent prejudice.

DEMONSTRATIVE EVIDENCE

Christensen v. Cober, 138 P.3d 918, 923 (Or. App. 2006)

There are two types of demonstrative evidence. The first type consists of the display of direct evidence, usually a person or object, in a courtroom…. It conveys a firsthand sense impression to the trier of fact…. That kind of demonstrative evidence is often the best and most direct evidence of a material fact, for example, by showing the nature of an assault on the victim…. As such it often does not involve the use of a tangible exhibit that can be received in evidence and submitted to the jury for use in its deliberations.

A second type of demonstrative evidence involves exemplars, tests, experiments, and the like that do not purport to be direct evidence of an object or event that is at issue in the case but, rather, are intended to simulate or illustrate the object or event…. Again, in some instances evidence of the latter type can be in the form of an exhibit; in other instances it is not.

The decision whether to admit demonstrative evidence is vested in the trial court's discretion…. Regardless of whether an exhibit that is admitted in evidence is designated as demonstrative or not, though, there is no rule of evidence or trial procedure that authorizes the exclusion of such an exhibit from the jury's use and consideration during deliberations.

IN-COURT ISSUES REGARDING FOUNDATION

IN-COURT PROCEDURE FOR FOUNDATION

Tangible Objects:

- What is the exhibit?
- Is the witness familiar with the exhibit?
- How did the witness become familiar with the exhibit?
- Is the exhibit in the same or substantially same condition as when the witness saw at the times relevant to the litigation?
- If signatures are present, does the witness recognize the signature?

IN-COURT PROCEDURE FOR FOUNDATION

Photograph:

- Is the witness familiar with subject of the photograph?
- How is the witness familiar with the subject of the photograph?
- Is the witness familiar with subject of the photograph at the relevant time period?
- Who took the photograph, if known?
- Does the photograph accurately display the subject as it appeared at the relevant time period?

IN-COURT PROCEDURE FOR FOUNDATION

Diagram:

- Is the witness familiar with the subject of the diagram?
- How is the witness familiar with the subject at the relevant time period?
- What is the exhibit?
- Is the subject of diagram similar to the scene on the relevant time?
- Does the diagram assist the witness in explaining information?
- Is the diagram accurate?

PREPARATION FOR FOUNDATION ISSUES

- Anticipate evidentiary issues
  - Motions in Limine
  - In-Trial Brief
  - Supporting case law and Rule
- Anticipate the information and witnesses needed to lay a foundation
- If necessary, subpoena the necessary witnesses
- Address evidentiary issues in the pretrial, i.e stipulate to authenticity or admissibility

How to Authenticate Social Media Posts, Texts, Emails and More

Submitted by Robert J. Kasieta

How to Authenticate Social Media Posts, Texts, Emails and More

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A. How to Collect to Ensure Admission Later On

The many different social media or electronic communications platforms do not always translate easily into an exhibit. Social media websites may change in appearance as they are updated or as data, such as posts or comments, are added, edited, or deleted. A lawyer printing out a post from a Facebook change may face the difficulty of trying to get a witness to admit that this is a true and correct copy of a post that has been changed or no longer exists. One way to avoid this first hurdle is to request the content from the witness him or herself, assuming the witness has access to the content.

Collecting social media evidence through discovery has become a topic of dispute. Many litigants do not expect their social media posts, which they may try to protect with various privacy settings, to be made public through litigation. These platforms often feel very personal, and inspire shock and anger at the fact that they can be discovered by lawyers in litigation. Courts vary in their approach to compelling the discovery of these materials. Courts that take an expansive view of discovery, relevance, and what constitutes a document have sided with litigants requesting production of entire Facebook account histories. *Thompson v. Autoliv ASP, Inc.*, No. 09-cv-01375, 2012 U.S. Dist. LEXIS 85143 (D. Nev. June 20, 2012). In *Thoompson*, the judge ordered the responding party to produce five years' worth of Facebook and MySpace posts, photographs, and other materials. *Id*. Other courts have ordered parties to produce the username and password to opposing counsel so that opposing counsel can inspect and obtain the content themselves. See *Gallion v. Gallion*, No. FA114116955S (Conn. Super. Ct. Sept. 30, 2011), and *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Ct. C.P. Sept. 9, 2010); see also *Romano v. Steelcase Inc.*, 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010) (ordering the plaintiff to give the defendant access to the plaintiff's Facebook account).

Not all courts are willing to allow such broad demands. Some flatly reject demands for complete access to an account because this would grant the requesting party unfettered access into a wealth of personal information that might otherwise be irrelevant and non-discoverable. *Moore v. Wayne Smith Trucking Inc.*, No. Civ. A. 14-1919, 2015 U.S. Dist. LEXIS 143750, 2015 WL 6438913, at *2 (E.D. La. Oct. 22, 2015). In *Moore*, the court limited the request to content made after and related to a fatal motorcycle accident and limited the discovery to four months following the date of the crash. *Id*. at *3. Other courts have required the requesting party to identify specific evidence tending to show that relevant information exists in the social media account. See *Potts v. Dollar Tree Stores*, No. 3:11-cv-01180, 2013 U.S. Dist. LEXIS 38795, 2013 WL 1176504 (M.D. Tenn. Mar. 20, 2013). However, some courts have noted that meeting this prerequisite may be difficult or impossible if the producing party's account is partially or completely protected from public view. *Farley v. Callais & Sons LLC*, No. Civ. A. 14-2550, 2015 U.S. Dist. LEXIS 104533, 2015 WL 4730729, at *4 (E.D. La. Aug. 10, 2015).

Parties seeking social media content or electronic communications should research how their particular jurisdiction has addressed this issue, and be prepared to tailor their requests to relevant evidence, rather than blanket requests for full account history.

B. Authenticating Emails

All jurisdictions have statutes similar to the federal statute requiring best evidence. The federal rule is located at §1002 and states "An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." This means, you cannot produce a copy when the original exists. While seemingly strict, the best evidence rule is rarely applied strictly. The Advisory Committee on Proposed Rules issued a note that reads:

> The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra.*

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick §198; 4 Wigmore §1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. Paradis, The Celluloid Witness, 37 U.Colo.L. Rev. 235, 249–251 (1965).

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic

photograph of bank robber. See *People v. Doggett*, 83 Cal.App.2d 405, 188 P.2d 792 (1948) photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence—Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original. *Daniels v. Iowa City*, 191 Iowa 811, 183 N.W. 415 (1921); *Cellamare v. Third Acc. Transit Corp.*, 273 App.Div. 260, 77 N.Y.S.2d 91 (1948); *Patrick & Tilman v. Matkin*, 154 Okl. 232, 7 P.2d 414 (1932); *Mendoza v. Rivera*, 78 P.R.R. 569 (1955)

It should be noted, however, that Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The reference to Acts of Congress is made in view of such statutory provisions as 26 U.S.C. §7513, photographic reproductions of tax returns and documents, made by authority of the Secretary of the Treasury, treated as originals, and 44 U.S.C. §399(a), photographic copies in National Archives treated as originals.

Ideally, a proponent of the evidence can rely on direct testimony from the creator of the electronic data in question. In many cases, however, that option is not available. In such situations, the testimony of the collector of the electronic evidence "in combination with ***circumstantial indicia*** of authenticity (such as the dates, web addresses, timestamps, metadata…), would support a finding" that the

electronic data is what the proponent asserts. *Perfect 10, Inc. v. Cybernet Ventures, Inc*. (C.D.Cal.2002) 213 F.Supp.2d 1146, 1154. (*See also*, *Lorraine v. Markel American Insurance Company*, 241 F.R.D. 534, 546 (D.Md. May 4, 2007). To avoid the fight, however, it is best to authenticate the evidence with the creator's testimony.

Federal courts have identified circumstances where electronic evidence may be considered as self-authenticating. In *Lorraine v. Markel*, 241 F.R.D. 534, the Court summarized those exceptions as follows:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
>
> (2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies [58] under seal that the signer has the official capacity and that the signature is genuine.
>
> (3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the [550] genuineness of the signature and

official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or [59] permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take [60] acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress. Any signature, document, or other matter declared by Act of Congress to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of regularly conducted activity. The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

[551] (B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice [61] of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) Certified foreign records of regularly conducted activity. In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the [62] record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 585 (D. Md. 2007).

C. How to Lay a Foundation for Facebook, YouTube Videos, Other Internet Records

Attorneys should keep in mind in Federal Rules of Evidence 104 and 901 to apply the long-standing principles articulated in these rules to new social media evidence. Federal Rule of Evidence 104(a) requires the court to decide any preliminary question about whether evidence is admissible and states that in making this decision, the court is not bound by the rules of evidence. Federal Rule of Evidence 901(a) provides the general rule for authenticating or identifying evidence: "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Two pertinent examples of evidence that satisfies this requirement are provided in FRE 901(b):

> (1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.
>
> (4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

In a Maryland criminal case, the courts analyzed the admissibility of a MySpace page based on the state equivalents of these federal rules of evidence. After the trial court admitted into evidence a MySpace page, the Maryand Court of Special Appeals took a liberal view of the rules and upheld the trial court ruling based on the "distinctive characteristics" of the document. *Griffin v. State*, 192 Md. App. 518, 995 A.2d 791, 2010 Md. App. LEXIS 87 (Md. Ct. Spec. App. May 27, 2010). The State produced pages from a MySpace profile purportedly belonging to the defendant's girlfriend to show that she was threatening witnesses who might testify against the defendant. *Id*. at 524. The State attempted to authenticate the MySpace pages by offering the testimony of the officer that printed the pages. *Id*. at 528. The officer testified that, while the profile name did not match that of the defendant's girlfriend, the profile details listed the same birthdate as the

woman, referenced having two children as this woman did, referenced the defendant by his nickname, and contained a profile picture that resembled the woman. *Id*. at 528. Ultimately, though, the officer acknowledged that he could not be sure that the defendant's girlfriend made the subject post, nor could he determine when the post was made. *Id*.

Looking to Maryland's version of FRE 901, the court stated that the authentication requirement is satisfied when there is evidence sufficient to support a finding that the evidence is what the proponent claims. *Id*. at 532. The court furthered that Maryland's rule mirroring FRE 104 posed a "slight" burden of proof for authentication and the court itself did not have to find that the evidence is what the proponent claims, merely that there is sufficient evidence that a jury might do so. *Id*. at 532. Turning to the particular MySpace pages offered, the court noted that:

> "[t]he inherent nature of social networking Web sites encourages members who choose to use pseudonyms to identify themselves by posting profile pictures or descriptions of their physical appearances, personal background information, and lifestyles. This type of individualization may lend itself to authentication of a particular profile page as having been created by the person depicted in it. That is precisely what occurred here."

Id. The court therefore concluded that there were sufficient "distinctive characteristics" to authenticate the MySpace pages the officer personally obtained.

This case was appealed to the Maryland Court of Appeals, which reversed the trial court and the Maryland Court of Special Appeals, and remanded the case for a new trial. *Griffin v. State*, 419 Md. 343, 19 A.3d 415, 2011 Md. LEXIS 226 (Md. Apr. 28, 2011). The high court concluded that the MySpace pages were not properly authenticated pursuant to the equivalent FRE 901. *Id*. at 347. The court raised a concern that is central to authentication: the "possibility for user abuse," or, the "relative ease with which anyone can create fictional personas or gain unauthorized access to another user's profile…" *Id*. at 354. Because the officer's testimony and the distinctive characteristics

he identified could not address this core concern, the court reversed the decisions of the two lower courts and remanded the case for a new trial.

To avoid the authentication problems the state faced in *Griffin* requires a party to offer extrinsic evidence to establish authorship. Authorship can be established through direct or circumstantial evidence. Testimony that a witness had seen the defendant using Facebook and recognized the defendant's Facebook account as well as his manner of communicating was sufficient to authenticate disputed Facebook messages. *United States v. Barnes*, 803 F.3d 209 (5th Cir. 2015). Additionally, the state was able to offer sufficient evidence of authorship to authenticate Facebook pages by using internet protocol addresses to trace the pages and accounts to the defendants' mailing and email addresses. *United States v. Hassan*, 742 F.3d 104, 133, (4th Cir. 2014).

Citing these cases, the Third Circuit held that the state offered sufficient evidence to properly authenticate a series of Facebook "chats" between the defendant and three separate victims. *United States v. Browne*, 834 F.3d 403 *413, 2016 U.S. App. LEXIS 15668, 65 V.I. 425, 101 Fed. R. Evid. Serv. (Callaghan) 264 (3d Cir. V.I. Aug. 25, 2016). Despite the fact that none of the parties to the chats identified the records of those chats at trial, the court held that each of the three victims "offered detailed testimony about the exchanges that she had over Facebook," and that this testimony was consistent with the content of the chats as obtained from the logs of the defendant and the three victims. *Id*. Furthermore, two of the victims met with the defendant in person after engaging in these chats and were able to identify him in court. *Id*. The court concluded that this evidence both established the accuracy of the chat logs and linked them to the defendant. *Id*.

Traditional evidentiary rules and principles apply to electronic communications and can be used to authenticate electronic records including various types of social media. *Tienda v. State*, 358 S.W.3d 633, 638-39 (Tex. Crim. App. 2012). Authentication of these materials requires lawyers to consider the unique ways in which electronic or social media records can be fabricated, manipulated, or corrupted in order to present

evidence sufficient to overcome these concerns. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007)

D. Digital Photographs

Four foundational elements must be satisfied to authenticate traditional photographs:

1. The witness is familiar with the object or the scene;
2. The witness can explain his/her familiarity with the object or the scene;
3. The witness recognizes the object or scene in the photograph; and
4. The photograph is a "fair," "true," "accurate," or "good," depiction of the object or scene at the relevant time.

Imwinkelried, Edward J., Evidentiary Foundations, 6th Ed., §4.09[1], (2005). In addition to these traditional elements, however, attorneys must be ready to identify authentication questions that arise when dealing with digital photographs. "Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be 'enhanced.'" *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 *561, 2007 U.S. Dist. LEXIS 33020, 73 Fed. R. Evid. Serv. (Callaghan) 446 (D. Md. May 4, 2007).

In fact, *Lorraine* recognized three types of digital images that may need to be authenticated: original digital images, digitally converted images, and digitally enhanced images. *Id*. Original digital images may be authenticated by a person with knowledge using traditional foundational elements. *Id*. Authenticating digitally converted images:

> "requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)-the later rule implicating expert

testimony under Rule 702. Alternatively, if there is a witness familiar with the scene depicted who can testify that the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion."

Id. (citations omitted).

The type of evidence required to authenticate digitally enhanced images depends upon the enhancements made to the image. If the image was altered, there may not be a witness able to testify as to how the original object or scene looked. *Id*. Instead, scientific or technical evidence may be needed to demonstrate that any enhancements made to the image produce reliable results. *Id*.

E. Authenticating Texts and Other Smartphone Evidence

Electronic correspondence presents a new frontier for the "reply letter doctrine." The reply letter doctrine is a common-law doctrine which holds that, if a witness sends a letter to a certain person, and later receives a letter that purports to be signed by the intended recipient of the first letter, and the contents of the second letter respond to or refer to the contents of the first, this fact pattern "creates a sufficient circumstantial inference that the second letter is authentic." Imwinkelried, Edward J., Evidentiary Foundations, 6th Ed., §4.02[4], (2005). The foundational elements of this doctrine are:

1. The witness prepared the first letter;
2. The witness placed the letter in an envelope and properly stamped the envelope;
3. The witness addressed the letter to the author;
4. The witness mailed the letter to the author;
5. The witness received a letter;
6. The letter arrived in the due course of mail;
7. The second letter referred to the first letter or was responsive to it;
8. The second letter bore the name of the author;

9. The witness recognizes the exhibit as the second letter;

10. The witness specifies the basis on which he or she recognizes the exhibit.

Id. §4.02[4].

Courts have begun applying the reply letter doctrine to text messages and other electronic communications. See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202, 2011 Neb. LEXIS 67 (Neb. July 15, 2011) ("Evidence that an e-mail is a timely response to an earlier message addressed to the purported sender is proper foundation analogous to the reply letter doctrine.") *Varkonyi v. State*, 276 S.W.3d 27, 2008 Tex. App. LEXIS 3353 (Tex. App. El Paso May 8, 2008) ("Because the reply-letter doctrine has been applied to telegrams, it logically would apply to e-mail communications."). State of New Jersey v. Terri Hannah, 2016 N.J. Super. LEXIS 156 (N.J. App. Div. Dec. 20, 2016) (the fact that a tweet was issued as a part of a series of responses was evidence supporting its authenticity).

In addition to the multiple methods of communications smart phones now offer, these devices frequently host a wealth of other data that attorneys may want to use. Electronic data recorded by these devices, such as call histories, time stamps, GPS coordinates, metadata, and other data recorded by numerous specific applications may offer evidence that attorneys want to use at trial. Furthermore, digital forensic experts offer services to extract this tempting data. Such non-hearsay data can be authenticated with evidence of the sort described FRE 901(b)(9): "Evidence about a Process or System. Evidence describing a process or system and showing that it produces an accurate result." When presenting metadata, this authenticating evidence will likely come in the form of expert testimony from a digital forensics expert.

F. Real-World Demonstrations

Example: Attorney wants to introduce a Facebook message sent by the defendant to another person. The defendant is unwilling to admit that this is a message the

defendant sent. However, the attorney is able to question the suspected recipient of the Facebook message. The attorney might first look for distinctive characteristics consistent with FRE 901(4) such as:

- Does the username bear a resemblance to the defendant's name?
- Did the defendant engage in substantive conduct consistent with the message?
- Did the attorney find this message on the defendant's computer after conducting a search of the defendant's computer?
- Is there an email address associated with the account that is also associated with the defendant?
- Is there an internet protocol address that is associated with the defendant's computer?
- Can a witness recognize the defendant's username?
- Does the message discuss matters that only the defendant, or only the defendant and a few others knew?
- Does the recipient witness recognize the message as written in the defendant's manner of communicating?

Additionally, the attorney might confirm that the witness will testify to receiving this message to offer testimony by a person with knowledge under FRE 901(1).

G. How to Overcome Hearsay Objections

Hearsay issues are pervasive when electronically stored and generated evidence is introduced. "To properly analyze hearsay issues there are five separate questions that must be answered: (1) does the evidence constitute a statement, as defined by Rule 801(a); (2) was the statement made by a "declarant," as defined by Rule 801(b); (3) is the statement being offered to prove the truth of its contents, as provided by Rule 801(c); (4) is the statement excluded from the definition of hearsay by rule 801(d)(1); and (5) if the statement is hearsay, is it covered by one of the exceptions identified at

Rules 803, 804 or 807." It is critical to proper hearsay analysis to consider each of these questions. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 585 (D. Md. 2007).

It is important to keep in mind that a statement may not actually be hearsay, pursuant to FRE 801(d). Many statements may not be hearsay at all of made by party opponents or declarant-witnesses, likely sources of the information at issue. Establishing that a statement is not hearsay does not address foundational questions for authenticating a text, email, or chat message purportedly made by a party opponent, but it addresses a likely objection that lawyers may face after they authenticate a statement made electronically. A statement is not hearsay if it is a qualified admission of a party opponent. A statement is a qualified admission of a party opponent if the statement is offered against an opposing party and:

> (A) was made by the party in an individual or representative capacity;
>
> (B) is one the party manifested that it adopted or believed to be true;
>
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
>
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

FRE 801(d)(2). Whenever social media accounts are requested from an opponent, this rule should be considered.

In electronic information cases, there is often a question of whether the evidence is a "statement" under hearsay analysis. Where the writings are non-assertive, or not made by a "person," courts have held that they do not constitute hearsay, as they are not "statements." *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) ("[N]either the header nor the text of the fax was hearsay. As to the header, '[u]nder FRE 801(a), a statement is something uttered by 'a person,' so nothing 'said' by a machine . . . is hearsay' (second alteration in original)).

H. Rule and Case Law Updates

***United States v. Browne*, 834 F.3d 403 (3d Cir. V.I. Aug. 25, 2016) (supra)**

Tony Jefferson Browne challenged evidence used to obtain his conviction for child pornography and sexual offenses with minors. At trial, the state presented evidence of "Facebook chats" that purportedly took place between Browne and several minors. On appeal, the state argued that these records could be authenticated as "business records" under the hearsay exception.

The court rejected this argument, but found that there was sufficient evidence to authenticate the chats. While the minors did not directly identify the chats at trial, they did offer detailed testimony about the content of the chats. This testimony was consistent with the content of the four Facebook chat accounts – those of Browne and the three minors with whom he corresponded. Additionally, as a result of these messages, two of the three minors met with the defendant, and were accordingly able to identify the defendant at trial. Therefore, the court concluded that these witnesses were able to link the messages to the defendant.

***State of New Jersey v. Terri Hannah*, 2016 N.J. Super. LEXIS 156 (N.J. App. Div. Dec. 20, 2016)**

Defendant Terri Hannah challenged her conviction on the ground that a tweet was improperly admitted into evidence. The defendant was accused of attacking her ex-boyfriend's new girlfriend with her high-heeled shoe. After the assault, the defendant and the girlfriend corresponded about the attack on Twitter. In court, however, the defendant denied attacking the girlfriend or hitting her with her shoe. The state offered a tweet purportedly made by the defendant, which referenced hitting the girlfriend with a shoe, in contradiction of the defendant's in-court testimony.

The girlfriend testified that she recognized the defendant's Twitter account by the defendant's Twitter handle and profile picture. She further testified that the particular tweet offered was part of a series of exchanges on Twitter between the two. Finally, the girlfriend testified that she had taken a screenshot of the tweet.

The court distinguished between the “Maryland approach” stated in *Griffin v. State*, 419 Md. 343 (Md. 2010) (*supra*) and the “Texas approach” articulated in *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012)(*supra*). The New Jersey court concluded that the Maryland approach, which required either testimony from the creator, evidence from the creator’s computer, or evidence from the social media website itself, was too strict, and decided to follow the Texas approach. Thus, the court asked whether the internal content of the social media post "was sufficient circumstantial evidence to establish a prima facie case such that a reasonable juror could have found that [it was] created and maintained by" the defendant. The court concluded that the distinctive characteristics of the Twitter handle and profile picture, the testimony of the girlfriend, and the fact that the tweet took place in a series of responses in accordance with the reply letter doctrine constituted sufficient evidence to authenticate the tweet.

How to Authenticate Social Media Posts (60 Minutes)

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How to Collect to Ensure Admission

- Importance of admission by a person with knowledge
- Discoverability of social media
- Methods of obtaining social media
- Split among courts: full access versus evidence of relevance

Authenticating Emails

- Best evidence rule
- Circumstantial indicia of authenticity
- Self-authenticating evidence
- Don't forget demands to admit

Laying Foundation for Facebook, YouTube, and other Internet Records

- FRE 104 and FRE 901
- Testimony of a Witness with Knowledge
- Distinctive Characteristics
- Debate over sufficient distinctive characteristics: Griffin v. State
- Establishing authorship: United States v. Browne

Authenticating Digital Photographs

- Traditional foundation for photographs
- Specific authenticity risks with digital photographs
- Lorraine v. Markel American Insurance Company: Authentication for the three categories of digital photographs
  - Original Images
  - Digitally Converted Images
  - Enhanced Images

Authenticating Texts and Other Smartphone Evidence

- Applying the reply letter doctrine to text messages, emails, and other electronic communications
- Other useful smartphone data
- Scientific, technical, or expert testimony requirements

Practice Example

- **Example:** Attorney wants to introduce a Facebook message sent by the defendant to another person. The defendant is unwilling to admit that this is a message the defendant sent. However, the attorney is able to question the suspected recipient of the Facebook message.
- Discovery Planning:
  - Authentication by a witness with knowledge
  - Authentication by distinctive characteristics
  - Authentication by admission

Overcoming Hearsay Objections

- Verifying Hearsay Elements
- Data that does not constitute a statement
- Statements that do not constitute hearsay

Case Law Updates

- *United States v. Browne*, 834 F.3d 403 (3d Cir. V.I. Aug. 25, 2016)
- *State of New Jersey v. Terri Hannah*, 2016 N.J. Super. LEXIS 156 (N.J. App. Div. Dec. 20, 2016)

Thank you for your kind attention

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Establishing Foundations for Business Records and Other Documentary Evidence

Submitted by John A. Snow

PART III. ESTABLISHING FOUNDATION FOR DOCUMENTS

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RULES REGARDING FOUNDATION FOR DOCUMENTS

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 1004. Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

PROCEDURE FOR INTRODUCING EVIDENCE

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Writings, Recordings and Photographs

RULE 1008. FUNCTIONS OF THE COURT AND JURY

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines--in accordance with rule 104(b)--any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

BUSINESS RECORDS

HEARSAY AND BUSINESS RECORDS

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

The following definitions apply under this article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

BUSINESS RECORDS - HEARSAY

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: …

(6) ***Records of a Regularly Conducted Activity*****.** A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the opponent does not show that the source of information nor or the method or circumstances of preparation indicate a lack of trustworthiness.

BUSINESS RECORDS - HEARSAY

Oster v. Huntington Bancshares Inc., 2017 WL 2215462, at *9 (S.D. Ohio):

To qualify under the hearsay exception for business records, the document must satisfy four requirements: "(1) it must have been made in the course of a regularly conducted business activity; (2) it must have been kept in the regular course of that business; (3) the regular practice of that business must have been to have made the [record]; and (4) the [record] must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge." ....

BUSINESS RECORDS - HEARSAY

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: …

(7) ***Absence of a Record of a Regularly Conducted Activity*****.** Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the opponent does not show that the possible source of the information nor or other circumstances indicate a lack of trustworthiness.

BUSINESS RECORDS - HEARSAY

Enter. Bank & Tr. v. VanLerberg, 372 P.3d 446 (Kan. App. 2016), review denied (2017):

[A] party alleging that a document is a business record must lay a proper foundation to bring the hearsay evidence within the business records exception by presenting testimony from someone who is " 'qualified by knowledge of the facts.'

BUSINESS RECORDS - HEARSAY

KIF Enterprises, Inc. v. City of Eureka, 2014 WL 1877532, at *6 (N.D. Cal.)

Because KFD has not argued or laid proper foundation for a hearsay exception, the Court cannot consider the documents as though they had been admitted into evidence.

BUSINESS RECORDS - HEARSAY

Quill v. Albert M. Higley Co., 26 N.E.3d 1187, 1197 (Ohio App. 2014)

Appellee attempted to use Raymond Heisey, its employee, to lay the foundation for these documents. We concur with appellants that Heisey could not authenticate the documents and did not have working knowledge of the record keeping system of the other manufacturers. Nor is there evidence that he was familiar with their business operations or how the businesses created, maintained or retrieved technical data.

BUSINESS RECORDS - HEARSAY

U.S. Bank N.A. v. Mattos, 2017 WL 2439437, at *5 (Haw.):

A person can be a 'qualified witness' who can authenticate a document as a record of regularly conducted activity under HRE Rule 803(b)(6) or its federal counterpart even if he or she is not an employee of the business that created the document, or has no direct, personal knowledge of how the document was created. As one leading commentator has noted:

> ... [sic] The phrase 'other qualified witness' is given a very broad interpretation. The witness need only have enough familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business. The witness need not have personal knowledge of the actual creation of the documents or have personally assembled the records. In fact, the witness need not even be an employee of the record-keeping entity as long as the witness understands the entity's record-keeping system.

BUSINESS RECORDS - HEARSAY

U.S. Bank N.A. v. Mattos, 2017 WL 2439437, at *5 (Haw.):

(Cont.) There is no requirement that the records have been prepared by the entity that has custody of them, as long as they were created in the regular course of some entity's business.

The sufficiency of the foundation evidence depends in part on the nature of the documents at issue. Documents that are 'standard records of the type regularly maintained by firms in a particular industry may require less by way of foundation testimony than less conventional documents proffered for admission as business records.'

Thus, an employee of a business that receives records from another business can be a qualified witness who can establish a sufficient foundation for their admission as records of the receiving business under HRE Rule 803(b)(6).

BUSINESS RECORDS - HEARSAY

Bay v. Midland Credit Mgt., Inc., 2016 WL 1226648, at *5 (D. Md.):

Although in attesting to the relevant information respecting Plaintiffs' debts Mr. Hannan relied on some business records that were created by businesses other than Midland Credit or Midland Funding, he explained that such records have been incorporated into Midland's business records "and are relied upon by them in conducting their business." …. Such evidence may properly be considered by the Court under the business records exception to the rule against hearsay.

PHOTOGRAPHS AND VIDEO

PHOTOGRAPHS AND VIDEO

Cmmw. v. Encarnacion, 91 Mass. App. Ct. 1127 (Mass. App. 2017):

Photographs usually are authenticated directly through competent testimony that the scene they show is a fair and accurate representation of something the witness actually saw.

PHOTOGRAPHS AND VIDEO

State v. McNear, 343 S.W.3d 703, 705 (Mo. App. S. Dist. 2011)

The principles governing admission of photographs also apply to videos. One must establish that the video accurately represents what it purports to show and may do so through any witness familiar with the subject matter and competent to testify from personal observation.

PHOTOGRAPHS AND VIDEO

State v. Fields, 2017 WL 3119433, at *4 (Kan. App.):

Violeta Hrgota laid the foundation for the admission of the photograph…. Detective Hrgota … testified that she was present when another officer took the photograph of the credit card on that day. According to Detective Hrgota, the photograph was a true and accurate representation of the credit card that Guerra-Soliz provided to her. Thus, we conclude that the State laid a proper foundation for the admission of the photograph.

PHOTOGRAPHS AND VIDEO

People v. Higgins, 392 N.Y.S.2d 800, 803 (N.Y. Sup. Ct. 1977)

In the absence of a proper foundation exhibiting to court's satisfaction that the movie or video-tape offered is a true, fair and accurate representation of the events, people, or scene depicted, it should be excluded…. The introduction of proof attesting to the authenticity of the proposed video-evidentiary matter may be made by the photographer, or technician or engineer, or by any one who observed the events depicted….

PHOTOGRAPHS AND VIDEO

Blair v. DiGregorio, 17 N.Y.S.3d 543, 544–45 (N.Y. App. Div. 2015):

"A video may be authenticated by a person other than the creator of the video where the testimony of a witness to the recorded events ... [demonstrates] that the videotape accurately represents the subject matter depicted" … and thus the court erred in not admitting the video in evidence on the ground that the mother did not record it.

FOUNDATIONAL ISSUES WITH MEDICAL RECORDS

MEDICAL RECORDS

Poulos v. City of New York, No. 14CV03023LTSBCM, 2018 WL 3750508, at *4 (S.D.N.Y. July 13, 2018), report and recommendation adopted, No. 14 CV 3023-LTS-BCM, 2018 WL 3745661 (S.D.N.Y. Aug. 6, 2018)

Although medical records are hearsay, they "can be admissible under Federal Rule of Evidence 803(6)," governing business records, "provided they are prepared in the regular course of business, near the time of occurrence, by a person with knowledge and are properly authenticated." *Djangmah v. Falcione*, 2013 WL 6388364, at *6 (S.D.N.Y. Dec. 5, 2013) (quoting *Shea v. Royal Enterprises, Inc.*, 2011 WL 2436709 at *6 (S.D.N.Y. June 16, 2011)); *see also Perpall v. Pavetek Corp.*, 2017 WL 1155764, at *8 ("Courts in this Circuit have generally held that medical records are admissible under the business record exception to the hearsay rule, provided that they satisfy the requirements of FRE 803(6).").

MEDICAL RECORDS

Identification

Commonwealth v. Nylander, No. 18-P-1281, 2019 WL 2354925, at *2 (Mass. App. Ct. June 4, 2019)

In any event, our prior decision was correct that there were sufficient facts to identify "Bunting" as the defendant. There was evidence that the defendant's middle name started with a "B," the hospital records included a treatment record of "Isaac Nylander," and they referenced the defendant's wife as an emergency contact. See id. at 792-793. There was therefore sufficient foundation to admit the medical records.

MEDICAL RECORDS

Hearsay Exception is limited:

Johnson v. Mauro, 2019 WL 2336070, at *5 (N.D.N.Y.)

Defendants move to preclude introduction of statements contained within his medical records as to Defendants' fault…. Federal Rule of Evidence 803(4) excludes from the rule against hearsay a statement that "is made for—and is reasonably pertinent to—medical diagnosis or treatment; and ... describes medical history; past and present symptoms or sensations; their inception; or their general cause." [S]tatements that go beyond causation and assign fault for a medical condition are not excepted. So long as the identity of the perpetrator is not disclosed, a patient's statement describing how an injury occurred is pertinent to a physician's diagnosis and treatment. Here, the statements attributing fault to Defendants—e.g. "altercation with police" and "assault victim"—are inadmissible under Federal Rule of Evidence 803(4).

MEDICAL RECORDS

Absence of a notation

Spellers v. Wilkie, 30 Vet. App. 211, 221 (2018):

The Court agrees with the appellant that the Board failed to provide an adequate statement of reasons or bases for its adverse credibility determination. First, the Board relied on the fact that the appellant had not reported side effects at various treatment appointments. But, those records simply did not mention side effects. It is not clear, therefore, that the appellant was asked about side effects at those times or that he did not actively deny side effects. "[T]he Board cannot determine that lay evidence lacks credibility merely because it is unaccompanied by contemporaneous medical evidence." *Buchanan*, 451 F.3d at 1337. Rather, the Board must "first establish a proper foundation for drawing inferences against a claimant from an absence of documentation." *Fountain v. McDonald*, 27 Vet.App. 258, 272 (2015). Here, the Board failed to provide the foundation for relying on the medical records' silence on side effects.

BEST EVIDENCE RULE

Best Evidence Rule

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Best Evidence Rule

Zartman v. Zartman, No. 18A-PL-1071, 2019 WL 2508581, at *2 (Ind. Ct. App.)

Indiana Evidence Rule 1002 provides that an original writing is required in order to prove its content unless the rules of evidence or a statute provide otherwise. In the absence of an original, Rule 1004 states that other evidence of the content of a writing is admissible if all originals are lost or destroyed, and the loss or destruction was not caused by the proponent acting in bad faith. Evidence Rule 1007 allows proof of the content of a writing by the testimony, deposition, or written statement of the party against whom the evidence is offered. Finally, Rule 1008 provides:

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines in accordance with Rule 104(b) any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Best Evidence Rule

Winkler v. Parris, No. 18-5301, 2019 WL 2509298, at *5 (6th Cir. June 18, 2019)

Winkler also asserts that Sherri Turpin Senn's testimony about the voicemail is not the best evidence of the voicemail. We note, however, that the best evidence rule is one of preference, and the original recording is not required if it has been lost, destroyed, or is unobtainable.

Best Evidence Rule

Nicosia v. Amazon.com, Inc.,, No. 14CV4513ILGLB, 2019 WL 2482674, at *9 (E.D.N.Y.)

Other than the Prime sign-up images, which the Court disregards as irrelevant, … the only other evidence pertaining to the 2012 Prime sign-up process is Ressmeyer's description of the process in her declaration.

However, reliance on these statements would contravene the best evidence rule, codified in Federal Rule of Evidence 1002, which provides that "[a]n original writing is required in order to prove its content unless these rules or a federal statute provide otherwise." … Although an exception to the best evidence rule provides that "[a]n original is not required and other evidence of the content of a writing, recording, or photograph is admissible if ... all the originals are lost or destroyed, and not by the proponent acting in bad faith," … Amazon has not provided even the faintest excuse for its failure to produce the 2012 Prime sign-up flow….

Best Evidence Rule

Berenson v. USA Hockey, Inc., 2013 COA 138, ¶ 16, 338 P.3d 379, 381

For these reasons, the best evidence rule does not prohibit a witness from testifying to a fact of which that witness has personal knowledge merely because a written record was also made. *See*Fed.R.Evid. 1002 advisory comm. notes (Fed.R.Evid. 1002 is substantially similar to CRE 1002). If, however, the fact is contained in a written record and a witness tries to prove the fact by stating what he or she read in the written record, the rule applies, and the written record must be produced. *See id.*

Best Evidence Rule

Meadows v. Lee, 175 Cal. App. 3d 475, 490, 221 Cal. Rptr. 22, 30–31 (Ct. App. 1985)

The best evidence rule merely serves to exclude secondary evidence—written or oral—about the *content* of an original document unless and until the absence of the original document is excused…. In effect this rule implements the principle "the document speaks for itself." If a litigant is seeking to introduce evidence of the words contained in a document, then he must introduce the document itself not some copy of the document or someone's verbal recollection of what words were in the document. But the best evidence rule has nothing to do with a situation where, as here, we are seeking to divine the intent with which the document was executed rather than what words are in the document.

Best Evidence Rule

Jones v. Univ. of Memphis, No. 215CV02148JPMCGC, 2016 WL 6123510, at *2 (W.D. Tenn. Sept. 23, 2016), report and recommendation adopted, No. 15-CV-02148-JPM-CGC, 2016 WL 6109407 (W.D. Tenn. Oct. 19, 2016)

The tautological "objection" that the finder of fact can read the document for itself ... is not a legitimate objection but an evasion of the responsibility to either admit or deny a request for admission, unless a legitimate objection can be made or the responding party explains in detail why it can neither admit or deny the request. (citations omitted) It is also a waste of time, since the "objection" that the document speaks for itself does not move the ball an inch down the field and defeats the narrowing of issues in dispute that is the purpose of the rule permitting requests for admission.

If, on the other hand, the request for admission paraphrases a document, the request should be admitted if the paraphrase is accurate and denied if it is not. Again, stating the obvious—one can read the document oneself to see if the paraphrase is accurate—is not a legitimate objection and an equally great waste of time.

Thus, the defendant's objection to the requests on the grounds that the document speaks for itself is a meritless objection and will be overruled.

Laying a Foundation for Expert Witness Testimony

Submitted by Robert J. Kasieta

EXPERT EXAMINATION

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A. REQUIREMENTS FOR SELECTING AND QUALIFYING AN EXPERT WITNESSES

In many jurisdictions, including the federal courts, expert testimony is governed by a qualification process that was first described in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Rule 702 of the Federal Rules of Evidence has attempted to codify the *Daubert* holding into the rules. The federal rule states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert has reliably applied the principles and methods to the facts of the case

In Wisconsin, *Daubert* is codified at Wis. Stat. 907.02, which reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Some states, although the number is dwindling, still use the Frye standard. *Frye* is the evidentiary standard that was first referenced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In that case, the Court wrote:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance* in the particular field in which it belongs.

The *Frye* test has been interpreted as requiring expert testimony to be "generally accepted" by a meaningful segment of the scientific community. This standard was often seen as vague by many legal commentators. *Frye* is no longer the test in most states. Only California, Illinois, Kansas, Maryland, Minnesota, New Jersey, New York, Pennsylvania, and Washington still use the *Frye* test.

When selecting an expert, it is important to begin thinking of possible challenges and litigation strategies at the onset. The following questions should be asked of experts before they are hired to analyze the case:

a. Have you testified in court? Depositions?
b. What methods will you be using?
c. How did you decide on those methods?
d. Are there other methods that could be used?
e. Is the method you will be using an accepted method in the field?
f. What is your educational background?
g. Is your education on-par with others in your field?
h. Is your degree a terminal degree?

In addition, most experts should be able to provide sample reports, deposition transcripts and references.

B. INDEPENDENT MEDICAL EXAMINERS

Independent medical exams are an option for defense counsel in a personal injury action. There is generally no requirement that an independent medical exam occur. The exam is conducted by a physician or chiropractor who is not involved with the case or the patient prior to the exam.

For plaintiff's attorneys, it is wise not to use the word "independent" when discussing the independent medical examination. It is not independent. The person performing the exam works for the insurance company. By accepting the phrasing of the defense counsel, you may be implicitly supporting the notion that the insurance company's doctor is independent. Instead, consider calling the exam an "Insurance exam."

Independent medical examiners should be used selectively by defense counsel. Repeated use of a doctor as an examiner can create the impression of bias. This bias can be supported by a request from plaintiff's counsel for an accounting of a doctor's income stemming from independent medical exams. Doctors who earn significant income from work as an independent medical examiner may be viewed suspiciously by jurors.

C. BIOMECHANICS EXPERTS

Biomechanics experts are necessary in some cases where there is a dispute over whether the force of the accident was sufficient to cause the plaintiff's injuries. This is a specialized form of expert testimony that is not necessary in all cases. Biomechanical engineers will possess training in both physics and human anatomy. Often times, these experts will be PhD's, MD's or both.

Increasingly, biomechanical experts are able to take advantage of sensors in cars that record speed, breaking, and other data. If you suspect your case may require biomechanical testimony, preserve these sensors in a discovery request immediately.

D. VOCATIONAL SPECIALISTS

Vocational specialists are a commonly used expert witness in personal injury cases. A vocational expert is able to testify as to the lost future wages, working ability, and vocational capacity. A vocational rehabilitation expert will often work in conjunction with the plaintiff's doctor to fully understand the plaintiff's limitations.

Vocational specialists are expert witnesses that must pass the evidently test required of other experts. Unlike many expert witnesses, it is generally not required that a vocational rehabilitation expert have an advanced degree.

E. GETTING THE MOST OUT OF DEPOSITIONS

Prior to the deposition, obtain the expert's file. Have a detailed understanding of every source of authority for the expert's opinion. Obtain copies of any books, articles, or media produced by the expert. Use industry resources to obtain previous deposition transcripts from the expert.

F. DIRECT AND CROSS EXAMINATION STRATEGIES

Going into cross examination, you should have a clear understanding of the opposing expert's opinions. This includes an understanding of all foundational information that you will need to impeach the opposing expert at trial. Impeachment is a strong tool to use during cross examination. The opposing expert's deposition testimony should have provided a substantial amount of material that can be used to impeach or box in the expert.

Bias can be shown in several ways. In a personal injury case, for example, the defense doctor has been hired by the insurance company before to provide similar testimony. Your questioning during cross examination should highlight this point. Ask the doctor how many times he has worked for the insurance company, how much he has been paid in the past two years, three years, and whether he truly expects that he would be rehired if he found that plaintiffs were actually injured. The doctor will deny bias, however, the amount of compensation the doctor has received from the insurance company will likely be convincing.

If you are representing a personal injury plaintiff, you almost always can challenge the defense doctor's opportunity to observe. The defense doctor will have only spent several hours with the plaintiff. It is sometimes effective to total up the visits the plaintiff has made to his or her own doctor and ask the defense doctor, "do you believe your one, two hour visit with the plaintiff gave you grater insight into her injuries than

her own doctor who has treated her sixty times over the past two years"? The question puts the expert in an uncomfortable position. He can either answer "yes" and risk the jury not believing him or he can answer "no" and essentially challenge another doctor's credibility.

Specific Approaches to Impeachment

Effective impeachment often requires helpful deposition testimony. One effective tactic is to use a video deposition to impeach the expert. The power of a video tape is much greater than simply reading a transcript. The jurors may react much more strongly to actually seeing the expert contradict himself. Using video testimony requires preparation and technical knowhow. If you are fumbling around with a computer for several minutes in an attempt to show a ten second deposition clip, you have likely lost any shock value that may have existed.

Another effective use of video deposition testimony is to show the experts attitude or behavior during the deposition. If your expert was aggressive, rude, or disrespectful during the deposition, it might be beneficial to play some of that testimony for the jurors. The jurors may question the sincerity of the expert who appears courteous and respectful on the stand, yet, was belligerent during his deposition.

How to Bolster or Attack and Expert's Testimony After Receiving a Daubert Challenge

A *Daubert* challenge can be a frightening event. After putting a great deal of thought and preparation into the selection of one's experts, losing a witness can be devastating to a case. If your expert is qualified, has been prepared, and has not done anything too outlandish, it is certainly possible to bolster the witnesses testimony to prevent a successful challenge.

A good place to begin your work is by re-reading the requirements of *Daubert*. In *Daubert v. Merrell Dow Pharmaceuticals, Inc*., the United States Supreme Court held that the subject of an expert's testimony must be founded upon "scientific knowledge" and that this requirement established a "standard of evidentiary reliability." 509 U.S. 579, 590 (1993) The Supreme Court found that this new standard would require judges to implement a gatekeeping role to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589.

According to the Court, the "scientific knowledge" requirement means that the expert's opinion must be more than a mere subjective belief or unsupported speculation. *Id.* at 590. More importantly, "in order to qualify as 'scientific knowledge,'… [the opinion] must be derived by the scientific method," which is based on "'generating hypotheses and testing them to see if they can be falsified.'" *Id.* at 590, 593.

Courts have developed four factors to be used when testing the reliability of scientific evidence:

1) whether the theory can and has been tested;

2) whether it has been subjected to peer review;

3) the known or expected rate of error; and

4) whether the theory or methodology employed is generally accepted in the relevant scientific community."

Rider v. Sandoz Pharmaceuticals Corp., 295 F.3d 1194, 1197 (11th Cir. 2002).

If receive a Daubert challenge of your own expert, begin to reassess the basic elements of Daubert. Pull together the articles, journals, and other scholarly work that you considered when first hiring the expert.

If you are attacking the opposing expert, you need to disprove the Daubert elements. Begin with the reviewing the opposing experts reports and the support he or she provides for the conclusions. Attack those supporting documents. The best method for attacking an expert is to attack the underlying data or studies he or she relied on.

Setting up the Motion to Strike

1. Timing/Sequence

Consider a motion in limine before trial if you have support. If you must attempt to strike the expert in the courtroom, try to do so before the expert is able to present any

harmful statements. Leading questions are a must and every question should be targeted toward the Daubert challenge.

The sequence of questions should not necessarily conform to the logical order, yet, should be ordered in a manner that supports disqualification. Your goal should be to obtain significant impeaching answers. Questions in this regard should be formed form the expert's deposition testimony.

2. Phrasing

Questions should be phased in a manner that highlights the expert's weaknesses. For example, if the opposing expert has testified for the defense counsel many times, questions should be phrased to show the jury (and the judge) that the expert is not a neutral party. "When you last testified for the insurance company, did you spend more than 45 minutes with the plaintiff?"

If you suspect the opposing expert does not fully understand the facts, try to phrase questions in a way that takes advantage of such ignorance. No one, experts especially, wants to appear unintelligent or misinformed in a courtroom. An expert may agree with the assumed facts of your question in an attempt to appear knowledgeable.

3. Detailed Facts

You must know the facts better than the opposing expert. Have the expert describe how the specific facts of your case fit into the analysis. If the expert cannot point

to the specific data he or she used, there might be a basis for a challenge on that point alone. If the expert is able to explain the question, challenge the expert with an additional, different set of facts. Try to draw the line where the experts analysis turns in your clients favor. That line might very well be arbitrary.

4. Psychological Components

In personal injury and other medically intensive cases, many experts will admit that there could be psychological components to an injury or illness. If the expert did not consider such factors, it could be a powerful tool in having the expert dismissed. Try to obtain an exhaustive list of the factors the expert considered during deposition or early on in the cross-exam. If the psychological factor issue is not discussed (and you have some support for the assertion), you likely have good, impeaching testimony.

5. Preperation

Preparation is key. Learn your case and learn the expert's report. Request prior deposition and trial testimony from the expert. Reach out to your network to obtain testimony the expert has previously offered. If you find a prior admissibility challenge in which the expert was disqualified, talk to the lawyers involved, learn the facts of that case, and attempt to obtain the hearing transcripts.

Making and Responding to Objections

The most basic objection to expert testimony is an objection based on the fact that the expert has not been qualified. This objection would be proper if the expert has begun offering expert testimony before a sufficient foundation has been established.

Once an expert begins testifying, counsel must pay special attention to the substance and form of the questions being asked. Do not let opposing counsel lead their expert's questioning. Leading questions are easy to overlook during direct examination. Failing to catch such a mistake, however, can be devastating.

As the expert renders his opinions, be certain to object if the expert attempts to opine on the ultimate issues of fact. In many jurisdictions, such testimony is not allowed. In Wisconsin, the law is not clear. In Wis. Stat 907.04, the statute states, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Courts have explained this section to require the use of hypothetical facts. In *State v. Elm*, 201 Wis. 2d 452, 459, 549 N.W.2d 471 (Ct. App. 1996) the court found an expert opinion on an ultimate fact is permissible in situations "[w]here evidentiary facts, upon which the fact in issue depends, are in dispute, opinion evidence as to the ultimate fact must be given upon a hypothetical case."

Addressing Hearsay and Relevancy

The cross examination of experts is often wide open. While there are limits placed on the direct examination of experts in terms of relevancy, cross-examination has a much broader scope in most jurisdictions. Consider Wisconsin's rule at Wis. Stat. 906.11(2):

> SCOPE OF CROSS-EXAMINATION. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The case law in Wisconsin has supported the notion of a wide-open cross examination. In *Neely v. State*, 86 Wis. 2d 304, 322 (Wis. Ct. App. 1978), the Supreme Court wrote:

> In *Boller v. Cofrances*, 42 Wis.2d 170, 183-84, 166 N.W.2d 129, 135 (1969), our supreme court specifically adopted the wide-open cross-examination rule now codified in sec. 906.11(2), Stats. Under the wide-open cross-examination rule, the defendant may be cross-examined as *to any issue relevant to the whole of the case*, regardless of what the defendant actually testifies to on direct. *McClelland v. State*, 84 Wis.2d at 155, 267 N.W.2d at 847-48. It is clear that waiver and permissible cross-examination are not determined by what the defendant chooses to discuss during direct examination. *Brown v. United States*, 356 U.S. 148, 154-55 (1958); *Johnson v. United States*, 318 U.S. 189, 195 (1943); *United States v.*

Hearst, 563 F.2d 1331, 1340 (9th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3360 (1978).

In many jurisdictions, experts may be cross examined with hearsay testimony. Consider, for example, Illinois, where an expert can be cross examined with reports that he or she used to form the opinion (even if these documents would otherwise constitute hearsay). Jager v. Libretti, 652 N.E.2d 1120 (1st Dist. 1995).

California courts, as well, allow for such testimony to be admitted. In California's Evidence Code Section 802, it states that an expert witness may state on direct examination both the reasons for his or her opinion and the matters on which it is based. The opinion may be based on matters "perceived by ... the witness ... before the hearing, whether or not admissible" if of a type that experts reasonably rely upon in forming such opinions. (Evidence Code § 801(b); *Catlin*, *Id.* at 137; *People v. Dean,* (2009) 174 CA4th 186, 193.)

Taking full Advantage of Redirect Examination

Redirect is a great time to allow the expert to explain answers previously given. One technique would be: "Doctor you were asked about X, I note you were asked just to give a yes or no answer. It seemed you wanted to put your answer in perspective. Would you please clarify exactly what you meant."

Opposing counsel will not let your expert explain his or her positions to the fullest extent. Redirect is the time do allow this. Your expert should be prepared in advanced to

expect such an opportunity on redirect. This knowledge should prevent the expert from becoming upset with opposing counsel during cross-examination.

Laying Foundation for Expert Witness Testimony (60 minutes)

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Establishing Competency and Qualifications

Use exhibits

- Resume/CV (including prior testimony)
- Treatises (well organized)
- Testimonials (by affidavit)

Verifying an Expert's Methodologies

Scientific method

- Hypothesis
- Test
- Repeat
- General acceptability

Motions in limine: Bringing or Defending Against

Likely bases

- Relevance
- *Daubert*
- Procedural concerns
  - Timeliness of report
  - Availability of raw data
  - Preservation/spoliation

At the Hearing

Direct Exam

- Have a conversation
- Early on, “Why are you here?”
- Deal with “more likely than not” issue, if possible
- Build on exhibits
- Emphasize experience
  - “How many times have you testified to this?”
  - “How many times have you done this analysis?”
  - “How many courts have recognized you as an expert?”

Case Law Review

Revisiting *Daubert* and *Kumho Tire*, *et. seq.*

- More than relevance
- More than strict adherence to scientific method
- *Daubert* factors are not a definitive checklist
  - *Huawei Technologies*, E.D. Texas 2019 WL 2395276
- Nothing in *Daubert* requires the trial court to admit opinion evidence
  - *Ericka Pearson v Wal-Mart Stores, Inc.*, SD Mississippi 2019 WL 2373201

Thank you for your kind attention

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Introducing Physical Evidence at Trial

Submitted by Robert J. Kasieta

Introducing Physical Evidence at Trial

Robert J. Kasieta
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Foundational Requirements for Readily Identifiable Physical Evidence

Physical evidence, unlike demonstrative evidence, has a historical connection with the facts of the case. Imerwinkle, Edward J., Evidentiary Foundations, 6th ed., 2005 §4.08[1]. Physical evidence may have apparent relevance to the case, or relevance based upon what an expert can ascertain about the evidence, such as whether the DNA of blood matches that of a specific person. The lawyer hoping to introduce physical evidence into a case must demonstrate its historical connection with the case.

Imerwinkle distinguishes between two methods for identifying physical evidence based on the characteristics of the evidence. The first method is establishing "ready identifiability" based on the "unique, one-of-a kind characteristic" of the evidence that makes it identifiable. Id. This method of identification falls under FRE 901(b)(4), which allows evidence to be authenticated or identified if the witness can identify distinctive characteristics:

> **(b) Examples.** The following are examples only — not a complete list — of evidence that satisfies the requirement [of authenticating or identifying an item of evidence]:
>
> **(4) *Distinctive Characteristics and the Like*.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

FRE 901(b)(4). The broad category created by FRE 901(b)(4) offers a wide variety of avenues to authenticate evidence, as acknowledged by the Advisory Committee:

> The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus, a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known

peculiarly to him; *Globe Automatic Sprinkler Co. v. Braniff*, 89 Okl. 105, 214 P. 127 (1923); California Evidence Code §1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick §192; California Evidence Code §1420. Language patterns may indicate authenticity or its opposite. *Magnuson v. State*, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, Psycholinguistics and the Confession Dilemma, 56 Colum.L.Rev. 19 (1956).

Notes of Advisory Committee on Proposed Rules, Subdivision (b), Example (4).

Although the techniques for authenticating physical evidence by distinctive characteristics are at least as numerous as the characteristics themselves, there are basic elements that a party must satisfy regardless of the method chosen. To authenticate physical evidence using its distinctive characteristics, a witness must testify that he or she previously observed the identifiable characteristic and recalls that characteristic. Imerwinkle, §4.08[1]. The foundational elements for ready identifiability are:

1. The object has a unique characteristic;
2. The witness observed the characteristic on a previous occasion;
3. The witness identifies the exhibit as the object;
4. The witness rests the identification on his or her present recognition of the characteristic; and
5. As best the witness can tell, the exhibit is in the same condition as it was when he or she initially observed the object.

Imerwinkle, §4.08[2].

Even if a witness can satisfy these elements to admit the evidence, however, it is important to consider how the opposing party may discredit this foundation. The simplest strategy may be to attack the witness's memory. If the witness cannot articulate a clear memory of a distinctive characteristic, or had only limited opportunity with which to become familiar with a subtle feature, such as a small mark on an object, the opponent could prevail in arguing that the witness's memory was created by seeing the object

before trial, not through genuine knowledge. If there is a risk that a witness cannot provide the foundation to authenticate an object by a distinctive characteristic, or that the jury is unlikely to give the object much weight based on the foundation, the offering lawyer should also consider whether it is possible to authenticate the object through a chain of custody.

Introducing Physical Evidence through Chain of Custody

There are many reasons why physical evidence may not be identifiable by distinctive characteristics. The item may not have any distinctive characteristics, or perhaps the witness does not specifically recall noticing a distinctive mark on the item. The attorney offering the evidence might also want to conduct laboratory testing on the item to find information about its condition, which then necessitates testimony that the condition the item was not altered. In circumstances where there is no foundation based on distinctive characteristics, or where distinctive characteristics are insufficient foundation (such as when introducing testimony about laboratory testing performed on the item), the attorney must offer sufficient evidence under FRE 901(b)(1): testimony by a witness with knowledge that an object is what it is claimed to be. Often, there is no one witness with such knowledge, but several witnesses who handled the item at different times. This foundation is commonly referred to as chain of custody.

Imerwinkle raises the distinction between people who have handled an item of evidence, and those who merely had access to the item. Imerwinkle, § 4.08[1]. Only people who physically handled the item are links in the chain. Id. This is an important topic to clarify with witnesses; those who only had access to where it was kept may have made numerous observations of the item, but if they did not actually handle the item, they are not a part of the chain of custody. Id.

Technically, U.S. Postal Service employees who handle an item are custodians in the chain of custody. However, there is often no need to identify these individuals or call them to testify at trial because courts presume that these public officials properly discharge their duties:

> [T]here is a presumption that articles transported by regular United States mail and delivered in the ordinary course of the mails are delivered in substantially the same condition in which they are sent. This presumption is a rebuttable one, but where there is no evidence tending to overcome the presumption it is sufficient to establish the identity of the article mailed and that it is in substantially the same condition as at the time of mailing.

Schacht v. State, 154 Neb. 858, 861, 50 N.W.2d 78, 78 (1951). See also *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 382 (9th Cir.) (presumption of regularity applies to postal employees' handling of vials during shipment); But see *Miller v. State*, 484 So. 2d 1203, 1205 (Ala. Grim. App. 1986) (no presumption of delivery where blood specimen placed in agency's "regular outgoing mail" rather than U.S. mail).

The foundational elements for each witness in the chain of custody are:

1. The witness initially received the item at a certain time and place;
2. The witness safeguarded the object; the witness testifies to circumstances making it unlikely that substitution or tampering occurred. The admissibility standard is lax, since FRE 104(b) governs the adequacy of the proof of safeguarding. However, the proponent would go into more detail if he or she anticipated that the opponent will attack the weight of the evidence by suggesting that the handling of the physical evidence was sloppy;
3. The witness ultimately disposed of the object (retention, destruction, or transfer to another person);
4. As best the witness can tell, the exhibit is the object he or she previously handled; and
5. As best the witness can tell, the exhibit is in the same condition as it was when he or she initially received the object.

Imerwinkle, § 4.08[2].

In addition to witness testimony, lawyers should consider what documentary evidence helps support the chain of custody. When possible, this should be considered as soon after the subject event as possible to not only preserve the chain of custody, but to help document it. Chain of custody evidence can include check-in-out logs, shipping tracking documents, and delivery receipts. These documents or forms record information about the date, time, and location of receipt of delivery, the identity of the person receiving or delivering the evidence, and/or the condition of the evidence. With respect to condition, photographs, videos, or written notes should not be overlooked. These documents can record the location, condition, or distinctive characteristics of an item of physical evidence.

Permissible Break in the Chain of Custody: *United States v. Prieto* and the Presumption of Regularity for Government Officials

A perfect chain of custody is not always required to authenticate physical evidence. “A break in the chain of custody does not necessarily result in the exclusion of the physical evidence." *United States v. Gelzer*, 50 F.3d 1133, 1141 (2d Cir. 1995); see also *United States v. Grant*, 967 F.2d 81, 83 (2d Cir. 1992). "Breaks in the chain of custody do not bear upon the admissibility of the evidence, only the weight of the evidence[.]" *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998).

In *United States v. Prieto*, the court cited similar principles and concluded that “minor gaps” in the chain of custody went to the weight of the offered exhibits rather than their admissibility. *United States v. Prieto*, 549 F.3d 513, 525 (7th Cir. 2008). Prieto objected to the government’s introduction of methamphetamine allegedly obtained from his car on the ground that the government failed to establish a proper chain of custody. *Id*. at 521.

The district court commented that the government’s evidence of the chain of custody was “somewhat sloppy,” but nonetheless admitted the evidence. *Id*. at 521. The district court stated that “a presumption of regularity applied because the drugs had not left police custody,” and that any breaks in the chain of custody went to the weight of the

evidence, not its admissibility. *Id*. Prieto did not produce evidence to overcome that presumption.

Prieto did point out that there were periods of unaccounted time in the government's evidence of the chain of custody. The government did not offer testimony about what happened to the packages of methamphetamine from the time they were removed from Prieto's vehicle to the time the packages were retrieved from the floor of the police garage. *Id*. at 525. Prieto also pointed out that persons other than law enforcement were present near Prieto's vehicle at the time of his arrest. *Id*. He argued that, without testimony about the removal of the drugs, the government had left open the chain of custody to the possibility that another individual might have altered the condition of the drugs. *Id*.

The appellate court upheld the district court's ruling. The court recited the standard for admitting physical exhibits into evidence as follows: "…there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed." *Id*. at 524 (citing *United States v. Lee*, 502 F.3d 691, 697 (7th Cir. 2007)). When government officials are links in the chain of custody, there is a presumption of regularity "that the government officials who had custody of the exhibits discharged their duties properly." *Id*. (citing *United States v. Scott*, 19 F.3d 1238, 1245 (7th Cir. 1994)). The court concluded that it was proper to apply this presumption because the drugs never left police custody. *Id*. at 521.

Insufficient Link in the Chain of Custody: *Phelps v. Frakes*

Despite the lenience that some courts are willing to give when lawyers attempt to authenticate physical evidence through evidence of its chain of custody, a missing link can prove fatal to admissibility. Such was the case in *Phelps v. Frakes*, 2016 U.S. Dist. LEXIS 135817 (D. Neb. Sept. 30, 2016). To support his claim for habeas relief from his conviction under a theory of newly discovered evidence of his innocence, Phelps sought to introduce a handwritten diary that he alleged was authored by Jean Backus, the wife

and accomplice of the person who committed the crime. The trial court ruled that the diary was inadmissible because it was not properly authenticated. *Id*. at *20.

In his attempt to authenticate the diary, Phelps offered testimony from the sheriff who had investigated the events described in the proffered diary pages, but who did not himself believe the diary to be valid. *Id*. at 21-22. Phelps offered his testimony because he argued that several events were corroborated by the descriptions contained in the diary. *Id*. at *21-22.

The purported author denied that the diary was hers. *Id*. at *23. Phelps did not contradict this denial with any handwriting analysis, nor did Phelps argue that a jury might find that the diary was written in the Backus' handwriting. *Id*. at *24.

Phelps also attempted to authenticate the diary through a chain of custody, arguing that an acquaintance of Backus, Douglas Olson, had obtained her diary and later sent it to another, identified individual who had also been charged for committing crimes related to the events described in the diary. However, there was sparse evidence that Olson had in fact sent the diary. Phelps tried to offer proof that Olson was the sender with a series of letters written in handwriting similar to that on the envelope in which the diary was sent to the identified individual. *Id*. at *25. The letters and the envelope did not contain a return address, or Olson's name. *Id*. at *24. Phelps also produced a separate letter written and addressed to the Olson that accused the Olson of having a diary. *Id*. at *26. Phelps argued that the ambiguous language in fact referenced the alleged Backus diary, and that the accusation made to Olson, coupled with the series of letters and the envelope mailed to an identified person established the sender's identity. Again, however, he offered no handwriting analysis linking the handwriting on the envelope containing the diary to Olson. *Id*. at *31.

On review by the state supreme court, the court acknowledged that writings may be authenticated when they can be attributed to a person who is "the only known resident of an isolated and remote area where the writings [are] found," or "by virtue of the fact that they disclose information that is likely known only to the purported author." *Id*. at *29. However, there was no evidence that the diary was ever in a location where the

alleged author had exclusive access. *Id*. at *30. Nor was there evidence linking the author to the person suspected of sending the diary to an identified individual. *Id*. The state supreme court stated that it viewed this evidence because the purported author denied that the diary was hers, and concluded its decision to uphold the trial court's ruling by begging the question why a handwriting analysis was never performed. *Id*. at *31.

On appeal to the federal district court, the court affirmed the analysis of the trial court and the state supreme court and concluded that the diary was not properly authenticated for lack of evidence to support a finding that the diary is what Phelps claimed it was. *Id*. at *42.

Accusations of Tampering to Defeat Chain of Custody Evidence:

Because authenticating physical evidence through a chain of custody requires proof that the evidence remains in the same condition as it was during the relevant time, accusations of tampering are often made to preclude admission of the evidence. In *United States v. Allen*, the defendant argued that a police officer who did not testify at trial had been alone with evidence at periods of time, that persons who did not testify had had access to the evidence, and that the prosecution had not identified person who returned the evidence to the police after the testing was complete. *United States v. Allen*, 106 F.3d 695 *700, 1997 U.S. App. LEXIS 2129, 1997 FED App. 0049P (6th Cir.) (6th Cir. Ky. Feb. 10, 1997). The defendant did not introduce any evidence to support his argument, but merely stated that the prosecution failed to prove that someone did not tamper with the evidence. In response to these accusations, the court summarized the law of authenticating physical evidence with respect to its condition:

> Physical evidence is admissible when the possibilities of misidentification or alteration are "eliminated, not absolutely, but as a matter of reasonable probability." *United States v. McFadden*, 458 F.2d 440, 441 (6th Cir. 1972) (quoting *Gass v. United States*, 135 U.S. App. D.C. 11, 416 F.2d 767, 770 (D.C. Cir. 1969) (footnote omitted)), cert. denied, 410 U.S. 911

> (1973). Merely raising the possibility of tampering is insufficient to render evidence inadmissible. *United States v. Kelly*, 14 F.3d 1169, 1175 (7th Cir. 1994). Where there is no evidence indicating that tampering with the exhibits occurred, courts presume public officers have discharged their duties properly. *United States v. Aviles*, 623 F.2d 1192, 1197-98 (7th Cir. 1980). Absent a clear abuse of discretion, "challenges to the chain of custody go to the weight of the evidence, not its admissibility." *United States v. Levy*, 904 F.2d 1026, 1030 (6th Cir. 1990), cert. denied, 498 U.S. 1091 (1991).

Id. at *700. Therefore, although lawyers should be wary of opportunities to accuse individuals of tampering with evidence, such accusations, without more, are unlikely to defeat the admissibility of physical evidence authenticated through evidence of its chain of custody.

Introducing Physical Evidence At Trial

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Physical Evidence

- Has historical connection to the case, e.g., the weapon used by the criminal, the cell phone a person used while driving, blood found at the scene
- Relevance: readily apparent or through what experts can learn from the evidence

Foundational Requirements for Readily Identifiable Physical Evidence

- FRE 901(b)(4): Distinctive Characteristics
  - The appearance, contents, substance, internal patterns, or other distinctive characteristics of an item, taken together with all the circumstances
- Foundational Elements:
  - Object has a unique characteristic
  - Witness observed the characteristic on a previous occasion
  - Witness identifies the exhibit as the object
  - Witness rests the identification on his/her present recognition of the characteristic; and
  - As best the witness can tell, the exhibit is in the same condition as it was when he/she initially observed the object

When Distinctive Characteristic Foundation Falls Short

- Poor witness memory; uncertain witness likely to lead the jury to give little weight to the evidence
- Witness did not notice the distinctive characteristic before the operative time
- Object does not have distinctive characteristics that uniquely identify it

Authenticating Physical Evidence through a Chain of Custody

- FRE 901(b)(1): testimony by a witness with knowledge that an object is what it is claimed to be
- Often requires linking the testimony of several witnesses
- Access to an item versus handling of an item of evidence
- Transporting items via mail: presumption of regularity for government officials

Foundational Requirements to Establish Chain of Custody

- Elements that apply to *each witness* in the chain of custody:
  - The witness initially received the item at a certain time and place;
  - The witness safeguarded the object; the witness testifies to circumstances making it unlikely that substitution or tampering occurred;
  - The witness ultimately disposed of the object;
  - As best the witness can tell, the exhibit is the object he/she previously handled; and
  - As best the witness can tell, the exhibit is in the same condition as it was when he/she initially received the object

Supporting Documentary Evidence of Chain of Custody

- Chain of Custody Log
- Shipping forms, tracking information
- Delivery receipts
- Photographs or video recordings recording location and/or condition
- Handwritten notes kept by witnesses in the chain of custody

Breaks in the Chain: Presumption of Regularity

- Breaks in the chain not always fatal to admissibility; may go to weight rather than admissibility
- Presumption of Regularity: government officials (law enforcement, postal employees, state crime lab employees, etc.) presumed to properly discharge their duties
  - So long as the evidence remained in the custody of government officials
  - May be rebutted with actual evidence of tampering, not simply bare accusations
- *United States v. Prieto*: minor gaps do not defeat admissibility

Breaks in the Chain: Insufficient Evidence of a Link

- *Phelps v. Frakes*:
  - Evidence viewed in the context of the alleged author of a diary denying its authenticity
  - Identity of a link in the chain uncertain
  - Proof of the identity of a link in the chain weak and uncorroborated through direct or circumstantial evidence
  - Evidence properly excluded for failure to authenticate; not just a question of weight of the evidence

Breaks in the Chain: Tampering with the Condition of Evidence

- Chain of Custody requires evidence not only of the individual persons with custody of the evidence, but also that the condition of the evidence remained unchanged by tampering or testing
- Person offering chain of custody evidence not required to produce evidence eliminating all possibility of misidentification, substitution, or alteration
- Merely raising the accusation of tampering insufficient to render evidence inadmissible
- Potential subject for motions *in limine*

Thank you for your kind attention

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Demonstrative and Illustrative Evidence: Satisfying the Foundation Requirements

Submitted by Robert J. Kasieta

Demonstrative and Illustrative Evidence: Satisfying Foundation (45 minutes)

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Establishing Relevancy

Relevancy: The Test

- FRE 401
  - a) Any tendency to make a fact more or less probable than without the evidence; and
  - b) The fact is of consequence in determining the action

Demonstrative Evidence Relevancy

- Underlying testimony is relevant
- Don't ignore self-authentication of relevant documents
- At least a part of the document must be relevant

Battleground for Demonstrative Evidence: Satisfying the Fairness Requirement

FRE 403

- Fairness test gives court discretion
  - Probative value is substantially outweighed by danger of:
    - Unfair prejudice, confusion, misleading, undue delay, cumulative evidence

FRE 403: Satisfying the fairness requirement

- See advisory committee notes of FRE 403
- Some jurisdictions more precisely define "unfair"
- See local jury instructions on demonstrative evidence

PowerPoints

PowerPoint Evidence

- Counsel cannot sponsor slides
- They might be summaries
- Incorporating photos already admitted
- *State v Walker*, 182 Wn. 2d 463, 341 P.3d 976 (Wash. Jan 22, 2015)
  - 250 slides; "Defendant Walker Guilty"

Computer Simulations and Recreations

Considerations

- Introduce underlying principles
- Make the math/science easy
- Consider:
  - Source
  - Process of collecting
  - Individuals involved
  - Possible data omitted

Minimums for computer simulations

- Witness saw events and simulation fairly and accurately depicts it
- Call the animator to lay foundation
- Imwinkelried 11-step process
  - *Evidentiary Foundations*, Edward J. Imwinkelried
- Demonstrative or substantive?

Handling Numerical Data, Charts, and Graphs

FRE 1006

- Summarize voluminous documents or data "that cannot be conveniently examined in court"
- Be prepared to produce the underlying evidence
- Underlying evidence must also be admissible

Models, Maps, Diagrams

Foundation concerns

- Witness should be familiar with actual object/place and the map/diagram
- Anticipate distortions
- Preserve the record: offer of proof
- Expand meaning once admitted
  - Spatial relationships, measurements, etc.

Photographs and Videos

A picture is worth…

- Foundation
  - A witness familiar with the object or scene and attest that photo accurately and fairly depicts it
  - Imwinkelried shows also "older" nine-part process for videos
    - Judges are typically less strict on it now

Case Law Review

Two cases

- *Hickerson v. Yamaha Motor Corp, USA*
  - Computer simulation as substantive, instead of demonstrative, evidence
- *United States v. Reed*
  - Foundation for maps purporting to show locations of four defendants based on cell phone pings

Thank you for your kind attention

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Legal Ethics of Evidence

Submitted by John A. Snow

PART VII. LEGAL ETHICS OF EVIDENCE

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ELECTRONICALLY STORED INFORMATION

COMPETENCE - TECHNOLOGY

Rule 1.1 Competency: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment. … Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

COMPETENCE - TECHNOLOGY

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

COMPETENCE - TECHNOLOGY

- Primary areas of concern regarding technology is the loss of attorney-client privilege or work product protection (or violate ethical obligations of confidentiality) when sending information electronically through emails or document sharing programs.

- There are also concerns of metadata embedded in sent documents revealing confidential or private information.

Federal Rule of Evidence 502

Rule 502 addresses, 1) Limitations of Scope of Waivers, 2) Protections Against Inadvertent Disclosure, 3) the Effect on State Proceedings and Disclosures Made in State Court, 4) Orders Protecting Privileged Communications Binding on Non-Parties, and 5) Agreements Protecting Privileged Communications Binding on Parties.

Electronic Communications - Confidentiality

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics.

Electronic Communications - Confidentiality

The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The ethical rule of confidentiality is broader.

Electronic Communications - Confidentiality
Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosures is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Electronic Communications - Confidentiality
Rule 1.6. Confidentiality of Information

The confidentiality obligations imposed by Rule 1.6 applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law.

Electronic Communications - Confidentiality
Rule 1.6. Confidentiality of Information

United States v. Merced-Calderon, 2011 U.S. Dist. LEXIS 65718 (E.D. Pa. 2011) ("Confidential information is not limited to information protected under the attorney client privilege. All information relating to the representation of Client #1 is deemed confidential under Rule 1.6.").

(Alt. Minn.) Rule 1.6. Confidentiality of Information

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if: 22

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation; ….

(Alt. NY) Rule 1.6. Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

Electronic Communications - Confidentiality
Rule 1.6. Confidentiality of Information

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Electronic Communications - Confidentiality
Rule 1.6. Confidentiality of Information

Comment 18 states that paragraph (c) requires a lawyer to act "competently" to safeguard information relating to the representation of a client. This requires safeguards against unauthorized access by third parties and against inadvertent or unauthorized disclosure.

Electronic Communications – Confidentiality: Email

Email Inadvertence: Some law firms have disabled email functions such as "reply to all" or included a delay function before an email is actually sent to avoid inadvertent disclosure.

Copy to Client: The "argument" can be made that by copying the client on the email, the attorney has given consent to communicate with the client. Or, the attorney is merely copying the client and anticipates that the receiving attorney will be familiar with Rule 4.2 and not "reply to all." Some ethics opinions suggest that the receiving attorney must have a high degree of certainty that consent has been given before responding to all. *See* e.g. N.C. Ethics Opinion, issued Oct. 25, 2013, titled "Copying Represented Persons on Electronic Communications."

Electronic Communications – Confidentiality
Mobile Devices

- Hundreds of thousands of mobile devices are lost or stolen each year in the United States.
- When not in use, do not leave the device logged into a network.
- Mobile devices should at least be password protected to avoid disclosure.
- Notify the carrier immediately of the loss.
- Obtain remote locking capability.

Electronic Communications - Confidentiality
Meta Data

Essentially every jurisdiction to have addressed the metadata issue has placed an ethical responsibility on sending attorneys to scrub based upon the duty of confidentiality contained in Rule 1.6 ("(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) and (c)."

ETHICS AND TECHNOLOGY- Meta Data

The duty of the receiving attorney is not as clear based in part of a potential violation of the "fairness rules." *See e.g.* Rule 4.4(b), which states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Some opinions have expressed the view that it may be a violation of Rule 1.1 (Competence) and Rule 1.3 (Diligence) not to review the metadata of a document received from another attorney.

Electronic Communications - WiFi

Rule 1.6, Cmt. [18]: The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

PREJUDICIAL EVIDENCE

Rule 3.3 Candor Towards the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Rule 3.3 Candor Towards the Tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Candor Toward the Tribunal

Hester v. Vision Airlines, Inc., 2013 U.S. Dist. LEXIS 33837 (D. Nev. 2013):

Even if Vision's representation of the April 30, 2011 termination date was true, Vision and its attorneys subsequently came to know of its falsity. By failing take reasonable remedial measures, such as correction of the statement or disclosure of the new information to this Court, Vision prevented this Court from adjudicating the whole case on the merits. Vision's self-serving fraud by omission and failure to correct a material statement prevented the Class from fully presenting their case.

Candor Toward the Tribunal

In re Potts, 158 P.3d 418, 424 (Mont. 2007) ("Once Potts made representations to the court in the signed stipulation, the duty of candor to the tribunal as stated in Rule 3.3(a)(2), M.R.P.C., trumped any duty of confidentiality that he owed to his clients.")

DeAngelis v. Countrywide Home Loans, Inc., 437 B.R. 503, 545 (Bankr. W.D. Pa. 2010) ("It appears to the Court that counsel, with knowledge of the misleading Townsend testimony, had a duty to take some remedial action respecting it, even though that could potentially require divulging attorney-client privileged material.")

Rule 3.4 Fairness to Opposing Counsel and Party

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Rule 3.4 Fairness to Opposing Counsel and Party

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or employee or other agent of a client; and,

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

PREJUDICIAL EVIDENCE

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

PREJUDICIAL EVIDENCE

Woods v. Zeluff, 158 P.3d 552, 554 (Utah App. 2007):

Since all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered, prejudice which calls for exclusion is given a more specialized meaning: an undue tendency to suggest decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror.

PREJUDICIAL EVIDENCE

Woods v. Zeluff, 158 P.3d 552, 555 (Utah App. 2007):

The mere fact that evidence possesses a tendency to suggest a decision upon an improper basis does not require exclusion; evidence may be excluded only if the danger of unfair prejudice *substantially outweighs* the probative value of the proffered evidence.

PREJUDICIAL EVIDENCE

K-B Trucking Co. v. Riss Intern. Corp., 763 F.2d 1148, 1155 (10th Cir. 1985)

The exclusion of relevant evidence under Rule 403 is "an extraordinary remedy to be used sparingly

COACHING WITNESSES

What You Must Do And What You Cannot Do

MUST DO

CONTACTING WITNESSES

Attorneys have not only the right but the duty to fully investigate the case and to interview persons who may be witnesses.

CONTACTING WITNESSES

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

CONTACTING WITNESSES

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

CONTACTING WITNESSES

In re Rathbun, 169 P.3d 329, 332 (Kan. 2007):

Lawyers must provide competent representation to their clients. KRPC 1.1. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. " The hearing panel concluded that Rathbun failed to be thorough and prepared and thereby failed to competently represent his client in the criminal case when he failed to interview witnesses to the crime. Accordingly, the hearing panel concluded Rathbun violated KRPC 1.1.

CONTACTING WITNESSES

Atty. Grievance Commn. of Maryland v. Ficker, 706 A.2d 1045, 1057 (Md. 1998)

This practice of waiting until the morning of trial to learn the facts of the case from last-minute courtroom interviews with police officers, prosecutors, or other witnesses, which Allen confirmed was more or less the *modus operandi* with Ficker, does not comport with the requirements of Rule 1.1. That rule requires a lawyer to provide "competent representation" to a client and defines "competent representation" as requiring, among other things, "thoroughness and preparation reasonably necessary for the representation."

CONTACTING WITNESSES

In re Hawver, 339 P.3d 573, 594 (Kan. 2014)

Hawver's investigative efforts failed to meet the standard of competence. Based on his affidavit and testimony at the disciplinary hearing, the panel found Hawver spent approximately 60 hours preparing for Cheatham's trial, failed to investigate a potential alibi witness, failed to interview witnesses, and failed to conduct any penalty-phase investigation. The evidence established these were not reasoned strategic decisions.

CONTACTING WITNESSES

State v. Rogers, 122 P.3d 661, 669 (Utah App. 2005) rev'd, 151 P.3d 171 (Utah 2006):

While one can innocently misplace a file, one does not innocently forget that witnesses need to be prepared if they are to give cogent testimony.

CONTACTING WITNESSES

Matter of Pope, 667 N.E.2d 1117, 1119 (Ind. 1996):

Professional Conduct Rule 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." We find that the respondent's failure to contact the state's witness or otherwise fully investigate the alleged recantation violated Prof. Cond. R. 1.3.

CONTACTING WITNESSES

State v. Wright, 304 P.3d 887, 894 (Utah App. 2013):

[T]he district court determined that counsel "knew of the substance of the testimony" of available defense witnesses and "adequately investigated their potential testimony," although it recognized that counsel "only spent a minimal amount of time preparing" one witness who had information pertinent to the fabrication defense.

CONTACTING WITNESSES

State v. Holbert, 61 P.3d 291, 303 (Utah App. 2002):

Defendant argues that trial counsel failed to prepare witnesses for trial. Defendant points out that one witness had to read material to refresh her memory, one witness had her memory refreshed just prior to her testimony, and one witness could not recall exactly when Defendant worked for him and did not have time to research employment records since he was called "at the spur of the moment." However, Defendant does not offer any evidence of how these witnesses would have testified if trial counsel had prepared them. Because there is no indication that the trial outcome would have been different, Defendant fails to show that he suffered prejudice as a result of trial counsel's actions.

CONTACTING WITNESSES

There are no ethical restraints on preparing a client or witness for trial or deposition testimony that includes:

- Probing the witness' memory.
- Testing or refreshing the recollection of the witness by reference to other facts the attorney has become aware, but, in so doing, not suggesting what the testimony should be.
- Pointing out discrepancies or weaknesses in the witness' story.
- Advise the witness how best to answer.
- Explain how the law applies to the events and testimony
- Review the factual context into which the witness's testimony will fit.
- Reveal other tangible or testimonial evidence to the witness to find out how it affects the witness's story.
- Discuss probable lines of cross-examination.

CONTACTING WITNESSES

Attorneys should work with witnesses in advance of testifying for a number of reasons: (i) Questioning a witness allows the attorney to make judgments as to the witness' credibility, certainty, and accuracy of recollection; (ii) a witness may reveal how his or her testimony has been influenced by outside sources and the passage of time; (iii) explain to the witness what evidence may be inadmissible or prejudicial; (iv) Preparation can alert an attorney to inconsistencies in the witness' testimony; and, (v) attorneys must find out what a witness knows so that they may be armed with meaningful information going into direct or cross examination.

CONTACTING WITNESSES

It is proper for an attorney to prepare his or her witness for trial, to explain the applicable law and to review before trial the attorney's questions and the witness' answers so that the witness will be ready for an appearance in court, will be more at ease because the witness knows what to expect, and will give the testimony in the most effective manner (hopefully). Such preparation promotes a more efficient administration of justice and saves court time.

CONTACTING WITNESSES

Counsel cannot be prohibited from instructing witnesses before their depositions in light of their ethical duty to prepare the witnesses. While examining counsel can ask a witness whether the witness talked with the witness's attorney before the deposition, the content of the communications is protected by the attorney-client privilege.

CANNOT DO

CONTACTING WITNESSES

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

CONTACTING WITNESSES

Rule 3.4. Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; ….

CONTACTING WITNESSES

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice; ….

CONTACTING WITNESSES

Rule 4.1. Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

CONTACTING WITNESSES

Rule 5.3. Responsibilities Regarding Nonlawyer Assistance.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who … possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(c)(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(c)(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

CONTACTING WITNESSES

Perry v. Leeke, 109 S. Ct. 594, 600-01 (U.S.S.C. 1989):

… It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections…. Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer.

CONTACTING WITNESSES

Perry v. Leeke, 109 S. Ct. 594, 601 (U.S.S.C. 1989):

Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way. Permitting a witness, including a criminal defendant, to consult with counsel after direct examination but before cross-examination grants the witness an opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess. This is true even if we assume no deceit on the part of the witness; it is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney.

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