

**Evidentiary Foundations:  
Testimony & Exhibits**

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**Overview: Evidentiary Foundations**

- One of the most necessary aspects of litigation
- Think through foundational issues beforehand
- Laying the proper foundation begins from the very beginning, long before trial
- Foresight is the new hindsight
- Preserve issues for appeal by objecting to lack of foundation
- Confidence is great, but a solid strategy is essential

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**“Lay a Foundation”**

- The process of demonstrating that the evidence offered is what the proponent claims it is
- The party offering the evidence bears the burden of laying the foundation
- Lack of foundation may result in the evidence being excluded
- Although laying a foundation is a necessary step to admitting evidence, a proper foundation does not guarantee that evidence will ultimately be admitted.
- The evidence may still be excluded if, for example, it is irrelevant, hearsay, or will unduly prejudice the jury.

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### Foundation for Oral Testimony: Lay Witness

- Rule 602 – Need for Personal Knowledge
- Elicit from the witness the particular circumstances which would lead the witness to notice, observe, or remember the fact
- Establishing a witness' personal knowledge is an opportunity to persuade; it is an opportunity to build the witness' credibility with the jury and to tell a story.
- Should include a series of questions and answers that paints a picture for the jury about what the witness remembered, as well as how and why the witness is able to recall certain facts. Such testimony is more memorable and less vulnerable to cross-examination.
- Contrast from interview style of open-ended narrative questions



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### Foundation for Oral Testimony: Expert Witness

- Rules 702 and 703
- Several foundational layers, may vary depending on particular case
- Scientific, technical, or specialized knowledge that will assist the trier of fact to understand the evidence or 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
- Opinion must be based on facts or data reasonably relied upon by experts in the particular field
- Other statutory requirements may dictate additional foundation



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### Specific Types of Evidence

- Physical or Illustrative Evidence
  - Tangible objects, photographs, videos
- Demonstrative Evidence
  - No independent probative value – requires witness testimony
  - Diagrams, charts, graphs
- Documentary Evidence
  - Used to prove a fact that is included within the document



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## Authenticity

- Challenge is to authenticate the document, such as an email
  - Consider requesting a stipulation as to authenticity
  - Some evidence is self-authenticating – Rule 902
- Simplest method is testimony from the author or recipient – Rule 901(b)(1)
- Failing that, authentication by “distinctive characteristics” – Rule 901(b)(4)
- Hearsay considerations
  - If it is authored by opposing party, likely party admission
  - If it is authored by the proponent, may be a business record



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## Exhibits

### Mechanical Process

- Mark exhibit if it is not pre-marked
- Show opposing counsel
- Ask permission to approach the witness
- Lay foundation
- Ask that exhibit be admitted



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## Exhibit Foundation

- Must accomplish 3 things:
  - Familiarity with the document
    - Have you seen this before?
  - Authentication of the document
    - What is this document?
    - How do you know?
  - Document is what it purports to be
    - Is this a true and correct copy of \_\_\_\_\_?



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### Particular Types of Foundation

- Type of foundation can vary for different kinds of documents:
- Idaho Rule of Evidence 901
  - **(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
    - ...



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### Specific Types of Documents: Website Posting

- Likely will not be treated like other corporate documents:
  - “While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation...Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time.” *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S. D. Tex. 1999).



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### Website Postings, cont’d

- Generally, not self-authenticating under Rule 902
- Method of authentication is Rule 901(b)(1), which permits authentication through the testimony of a “witness with knowledge”
- Authenticate through website owner or witness who personally visited website
- Make sure website pages contain internet domain address and date on which it was printed
- If the website belongs to a government agency, it may be authenticated under Rule 901(b)(5)



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### Other Considerations

- Hearsay considerations:
  - Is the information posted on the website offered to prove the truth of the matter asserted, or simply the fact that it is was posted?
  - Consider party admission, public record, and business record
- Business record may be most commonly used exception
- Best evidence rule
- Common misconception: Even when a document is produced by the opposing party, a foundation must still be laid
  - [PLAINTIFF'S COUNSEL]: I apologize. It's Defendant's exhibit.
  - THE COURT: You still ... [need to lay a foundation].



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### Objection: Lack of Foundation

- Party has not shown why the witness is qualified to answer the question
  - Lacking adequate factual or legal basis for allowing the testimony or document into evidence
  - Who, What, When, Where, Why, How
    - These types of questions are your building blocks for the foundation of each particular circumstance
- Closely related objections
  - Assumes facts not in evidence
  - Calls for speculation



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### Lack of Foundation Objection: Deposition

- Deposition Transcript Example:
  - Q: And then you filed a claim with the EEOC through your counsel, correct?
  - A: Uh-huh
  - Q: And then you received your notice of right to sue on December 21, 2020, correct?
  - [Counsel]: Objection. Foundation.
  - Q: Go ahead. It's got to be audibly. I'm sorry.
  - A: Yes.



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### Lack of Foundation Objection: Upheld

- “The objection to the question asked on the grounds of foundation is well-taken. Defendant’s attorney did not ask any follow up questions to clarify what he meant by this initial question. For instance, he did not ask whether Plaintiff received a verbal notification, e-mail notification, or other form of notice from her attorney or from someone else, which could have been the case given the manner in which the question was phrased. Nor did Defendant’s attorney clarify whether the “notification” Plaintiff acknowledged receiving was by U.S. Mail, either from her attorney or the EEOC, or whether she in fact received a physical copy of the EEOC letter on any particular date.”
- Motion for summary judgment Denied.



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### Responding to a Lack of Foundation Objection

- Simple problem to fix
- Take a breath, slow down, back up, and ask all necessary questions to lay the proper foundation
- Demonstrate that the witness has personal knowledge on the topic that qualifies them to answer the question posed
- Break questions down, resort back to the building block questions
  - Who, What, When, Where, Why, How



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Thank you!



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