Using the Rules to Eliminate the Need for Exhibit Foundations

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Intelligent use of the rules can eliminate the need for laying time-consuming and annoying foundations at trial, through the use of the pretrial disclosure rules, the discovery rules, and the pretrial conference. To a large extent, however, these remain unused because of the Bar's ignorance and the judiciary's lack of forcefulness in enforcing them.

The Pretrial Disclosure Rules

Rule 26(a)(5) of the Utah Rules of Civil Procedure[1] is key:

> (a)(5)(A) A party shall, without waiting for a discovery request, provide to other parties: . . .
>
> (a)(5)(A)(iii) a copy of each exhibit, including charts, summaries and demonstrative exhibits, unless solely for impeachment, separately identifying those which the party will offer and those which the party may offer.
>
> (a)(5)(B) Disclosure required by paragraph (a)(5) shall be made at least 28 days before trial. At least 14 days before trial, a party shall serve and file counter designations of deposition testimony, objections and grounds for the objections to the use of a deposition and to the admissibility of exhibits. **Other than objections under Rules 402 and 403 of the Utah Rules of Evidence, objections not listed are waived unless excused by the court for good cause.** (Emphasis added.)

The federal rule is similar.

The rule's purpose is to eliminate the need for time-consuming and generally unnecessary foundational witnesses. Now the onus is on the opponent to make an objection to things that are routinely waived, like the need for records custodians where the authenticity of the records is not in doubt.

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[1]This applies to cases filed on or after November 1, 2011. For earlier-filed cases, see the former Rule 26(a)(4).

Rule 26(a)(5) requires the identification of exhibits at least **28** days before trial, except for impeachment exhibits. Within **14** days before trial, the opponent must object to any exhibit so identified, or will automatically waive objections to its *admissibility*, except as to objections as to relevance under Rules 402 or 403. **Note that the rule says *admissibility*, not *authenticity*.** In other words, your opponent's failure to object to your exhibits designation means that you should be able to simply offer the exhibit at trial without laying *any* foundation.

Thus, you won't need a records custodian to testify that the records are official business records, or that the medical records are official hospital records. That's all unnecessary now. There's no need to establish the hearsay exception(s) either, as normally would be necessary under Rule 803. Even "hearsay within hearsay" seems to be covered by the broad scope of the Rule 26 waiver.

All you need do is mark, offer, and use the records. The *only* objection that the opponent still has is relevance: either that the exhibit is not relevant to any issue or that its relevance is outweighed by undue prejudice under Rule 403. Otherwise, the exhibit comes in.

On the flip side, Rule 26(a)(5) now makes it necessary for you to predict that an opponent will be able to lay the necessary foundations at trial, not only as to authenticity, but also as to hearsay objections. As I've said, even hearsay objections are waived if not made in writing no later than 14 days from the opponent's exhibit list. The foundation for a hearsay objection may or may not be laid by a witness at trial; therefore, careful lawyering now requires that good-faith objections based on hearsay (and any other non-relevance foundation) be served in writing no later than 14 days before trial.

Here's an example. Plaintiff's counsel identifies the medical bills and treatment records

from his client's hospitalization on his 26(a)(5) exhibit list. The defense counsel fails to file a timely written objection. When the medical bills are offered, defense counsel objects, claiming the records custodian is needed to prove authenticity and also to establish the business-records hearsay objection.[2] The trial judge should point out to defense counsel that he's waived all objections other than relevance by failing to object within 14 days after plaintiffs' counsel served his exhibit list. The same goes for the medical records from the hospital, themselves hearsay, and also potentially containing a harmful hearsay statements. Even more concerning (for the defense), the failure to object to the medical bills' listing as exhibits may also waive all objections to the *reasonableness* and necessity of the care and expenses, if those are considered properly part of the foundation for the exhibit (which may or may not be the case.)

Even though this rule has been in effect for many years, the reality is that some judges seem not to follow it, and will allow "late" objections even in the absence of demonstrated prejudice. And many members of the Bar inexcusably remain ignorant of the fundamental changes in trial procedure that the original amendment contemplated-- and indeed requires.

The Evidence Rules

Amendments to the Utah Rules of Evidence have made unnecessary the need to call records custodians to establish *most* of the foundation for business or medical records. Rule 902 now provides that records of a regularly-conducted activity can be "self-authenticating" through the simple device of a declaration from the records custodian:

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[2]Forget for the moment that the foundation on authenticity and hearsay exception (regularly-conducted activity) could also now be established by a simple declaration of the custodian without live testimony. *See* Rule 803(6)(D) and 902(11).

> 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:
>
> . . .
>
> (11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that must be signed in a manner that, if falsely made, would subject the signer to criminal penalty under the laws where the certification was signed. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

In turn, Rule 803(6) allows the custodian to lay the necessary hearsay-exception foundation:

> Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:
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> (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 source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

In short, it should be the unusual case where you will need to call a records custodian at trial to lay the basic foundation for business or medical records.[3] Please note, however, that

[3]The Federal Rules of Evidence are nearly identical to their Utah equivalents on this issue.

laying the general hearsay exception for a business record does *not* also lay the foundation for "hearsay-within-hearsay" that may be found within the otherwise-admissible document. For example, a medical record may be admissible as a record of a regularly-conducted activity. That does *not* mean that statements within that chart– such as, "Doctor A said that Doctor B really messed up"– necessarily will come into evidence. You'll have establish a separate hearsay exception as to that statement, even though the rest of the chart may be admitted.[4]

The Discovery Rules

It is also (theoretically) possible to establish the foundation for certain exhibits through requests for admission and follow-up interrogatories, although this has proven to be more dream than reality. Here's an example. Suppose plaintiff's counsel wants to use a summary of plaintiff's extensive medical bills as an exhibit, in accordance with Utah Rule of Evidence 1006. He might submit a request for admission to counsel for defendant, along these lines:

> *Request for Admission 1. Admit that, as to the attached summary of medical bills incurred by plaintiff, the following statements are true:*
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> *a) The underlying records themselves, which are attached to the summary, qualify as "business records" under Rule 803(6).*
>
> *b) The records are too voluminous to be conveniently examined in court.*

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[4] *See* Utah Rule of Evidence 805. The "wikibooks" entry on federal rule 805 has this example: about the so-called "food chain" or "telephone" rule: "It is invoked when the declarant makes a statement to a third party, who then retells the statement to the reporter. There can be any number of intermediaries in the chain, so long as each statement between declarant and reporter corresponds to a hearsay exception. For example, a patient complains to their doctor (803(4)), and the doctor writes down the complaint in a medical record (803(6)), which frightens a nurse and causes him to run to tell an orderly (803(2)), who writes another medical record (803(6)), which is introduced as evidence. Since each statement in the chain falls under a hearsay exception, the statement is admissible. **If any one of the above links constituted inadmissible hearsay, the statement would be inadmissible**. **Each witness in the chain must also be competent, and each piece of physical evidence has to be authenticated**." http://en.wikibooks.org/wiki/Federal_Rules_of_Evidence/Hearsay. (Emphasis added.)

c) The originals are available for inspection by defendant.

You'd think this would be easy. Defense counsel, however, being one of those lawyers who likes to make everything as difficult as possible (thinking that makes him an effective advocate), serves this response:

> *Request for Admission 1 is denied. Defendant is not the custodian of the medical bills and has no personal knowledge or qualification that enable him to lay the foundation for these so-called business records. The question of whether the records are too voluminous is also denied; given the time, counsel and the jury could adequately review the records, if they were admitted. (Defendant does not stipulate that they are admissible.) Defendant admits, however, that the records might be available to him for inspection. Otherwise he puts plaintiffs to their proof.*

What then? This is not untypical, and exhibits the sort of nonsense rife in our profession under the guise of "aggressive advocacy." Good lawyers– real professionals– would stipulate to the use of the records summary, as it does not harm their clients and moves the trial along more quickly. They would not even need a request for admission, only a phone call.

And we do have some fairly aggressive rulings from the appellate courts on failure to admit things that ought to be admitted. But obfuscation and extended boilerplate objections to written discovery are routine from some firms, and those tactics are taught to newer lawyers as being "good practice." Nevertheless, I doubt that most trial judges would force this defendant to admit such a request or pay the consequences. I have rarely seen such judicial action in my years of practice. But, I suppose, with a new generation of lawyers– and judges– attempts should continue to be made.

The Final Pretrial Conference

The pretrial conference is another great opportunity to reach stipulations on waiver of foundations, such as the need to call business or medical records custodians. Most experienced

lawyers readily stipulate to waive the need to call records custodians, as they should, because all judges take a dim view of dragging records custodians into court to lay foundations on such things as medical records when there is no issue on their admissibility, except perhaps as to relevance.

Simply raise it with opposing counsel in front of the judge: "Counsel, I assume it will not be necessary for us to drag the records custodians down here to court, or get a declaration from the University Hospital simply to authenticate the records, will it?" Gain a commitment one way or the other, right then, when you have the judge's attention.

Under the Local Federal Rules, the form pretrial order expressly deals with waiver of most foundational requirements:

> (f) Except as otherwise indicated, the authenticity of received exhibits has been stipulated but they have been received subject to objections, if any, by an opposing party at the trial as to their relevancy and materiality. If other exhibits are to be offered, the necessity for which reasonably cannot now be anticipated, they will be submitted to opposing counsel at least _____ days prior to trial.

Dist. Utah Civ. R 16-1(e); app. IV, ¶ 6(f).

Finally, when you stipulate on records, be certain you understand the stipulation: if you are the proponent, you want a stipulation on *authenticity*, the *hearsay exception*, and *admissibility* (except if relevance is truly in issue).[5] See my paper *The Basics of Exhibits at Trial* elsewhere in the materials.

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[5]See *Noffke v Perez*, 178 P.3d 1141 (Alaska 2008) for an illustration of the confusion among the lawyers and the trial judge on what a pretrial stipulation on medical records meant.