

The Most Common Foundations for Exhibits

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1. Photographs

- a. Establish familiarity with scene depicted.
- b. Mark and show photo.
- c. Establish that the photo accurately depicts scene. *Shiozawa v. Duke*, UT App 40, ¶ 21 (exact date of photo not needed).
- d. Note: it is *not* necessary to call the photographer to lay the foundation. *See, State v. Purcell*, 731 P.2d 243, 245 (Utah 1985). But there are situations in which the attorney may wish to do so as, for example, where there is an issue on the accuracy of the depiction.
- e. Note: “gruesome” photographs may well be accurate and relevant, but excluded under the balancing test of Rule 403. *State v. Cloud*, 722 P.2d 750 (Utah 1986); *State v. Valdez*, 748 P.2d. 1050 (Utah 1987).

2. Business Records (Medical Records)

- a. Note: much of the foundation on records of a regularly-conducted activity can now be established through a simple declaration of the records custodian under Rules 902(11) (as to authenticity) and 803(6)(D) (as to hearsay):
 - i. Rule 902. 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.
 - ii. Rule 803(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 source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

- b. It is the unusual case where a records custodian needs to be called to establish the correct foundation. If this becomes necessary, these are the steps:
- i. Call the custodian or “other qualified person.”
 - ii. Have the custodian explain his job.
 - iii. Show that he is familiar with the company’s routines on records.
 - iv. Show that the company makes its records at or near the time of the events.
 - v. Have the business record marked and show it to the other side.
 - vi. Have the custodian identify the exhibit as a record of which he has custody.
 - vii. Show that this record was made in the ordinary course of the business.
 - viii. Have custodian explain who provided the information on the exhibit.
 - ix. Have custodian explain that it was that person’s duty to gather the information.
 - x. Offer the exhibit.
- c. See 803(7) for absence of entries.
- d. *Hansen v. Heath*, 852 P.2d 977 (Utah 1993): the treating doctor, who created the

chart entry, was not available to lay foundation under business records exception. However, Rule 803(6) allows *any* qualified witness to lay the foundation, not just the custodian or the person who created the record.

- e. *State v. Bertul*, 664 P.2d 1181 (Utah 1983)- Foundation for business records: kept in regular course of the business, not as part of preparation for litigation.

3. **Business Records Summaries**

- a. The underlying records themselves qualify as “business records” under Rule 803(6).
- b. The records are too voluminous to be “conveniently” examined in court.
- c. The originals are available.
- d. 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 or place. And the court may order the proponent to produce them in court.

- e. *Trolley Square Asso. v Nielson*, 886 P.2d 61 (Ut. App. 1994). Summaries may be admissible under Rule 1006 even if they do not qualify themselves as "business records" but must qualify under Rule 1006 (voluminous/prior notice) *and* the underlying records being summarized must themselves qualify as business records under Rule 803(6). *International Harvester v. Pioneer Tractor*, 626 P.2d 418, 422 (Utah 1981). And they must be made available in advance to opposing party.
- f. A good analysis on the limitations with the use of summaries under Rule 1006 is found in *Sunridge Development v. RB&G Engineering*, 2013 UT App 146, ¶¶ 19-21.

4. **Models, Anatomical Diagrams, Etc.**

- a. Witness could use visual aid to explain testimony.
- b. Aid depicts a certain subject.
- c. Witness familiar with subject.
- d. Aid is an “accurate enough” depiction of the subject.

5. **Non-Representative Exhibits (Charts, Etc.)**

- a. The exhibit will assist the witness in explaining her testimony.
- b. The exhibit is “sufficiently accurate” to illustrate her testimony.

6. **Re-Enactments, Crash Tests, Etc.**

- a. Subject is relevant.
- b. Tests were conducted under conditions “substantially similar” to actual occurrence.
- c. Presentation will not consume undue amounts of time, confuse the issues, or mislead the jury.
- d. *Whitehead v. AMC*, 801 P.2d 920, 923 (Utah 1990).

7. **Police Reports (Civil Cases)**

- a. Call the police officer.
- b. Establish that he made a report.
- c. Have officer explain how and why reports are prepared.
- d. Have the report marked.
- e. Show it to the other side.
- f. Show it to the officer and have him confirm that this is his report.
- g. Offer the report.
- h. Rule 803(8) Public Records. A record or statement of a public office if:
 - (A) it sets out:
 - (i) the office’s activities;
 - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

i. See 803(10) for absence of public record entries.

8. Hearsay Within Hearsay

a. Just because a record qualifies for admission does not mean every entry in the record is admissible.

b. Example: The discharge summary from a hospital was dictated by defendant. It describes the course of events for plaintiff's treatment for her dog bite. But it also contains this statement: "*Shortly after the bite, I had warned her that there was a small chance of rabies infection and suggested the rabies vaccination as an option. She refused.*"

c. Is this admissible? It's hearsay (defendant's out-of-court statement offered to prove the truth of the claim that plaintiff refused a vaccination) within hearsay (the discharge summary). While the discharge summary may come in under 803(6), it's not necessarily true that *this statement* will.

i. It does not fit under 803(4): Statement Made for Medical Diagnosis or Treatment. A statement that: (A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause. [It is not a statement that *plaintiff* made.]

ii. It does not fit under 803(3): *Then-Existing Mental, Emotional, or Physical Condition*. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

iii. Nor does it fit under 803(5): (5) Recorded Recollection. A record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge. If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

- iv. Conclusion: the "warning" statement by defendant may well need to be deleted from the discharge summary before admission.

9. **Further Reading on Foundations**

- a. My favorite books on foundations and objections to them are both published by James Publishing in Costa Mesa:

- ASHLEY S. LIPSON, *IS IT ADMISSIBLE?* (James Publishing, Inc., 2007)

- GORDON P. CLEARY and JOHN A. TARANTINO, *HOW TO LAY AND OPPOSE TRIAL EVIDENCE FOUNDATIONS* (James Publishing, 2011)

- <http://www.jamespublishing.com/>

- b. I'd also recommend a volume on Utah-specific evidence, either Kimball and Boyce's, *UTAH EVIDENCE LAW* (Kimball & Boyce Publishing, 2004) or *MANGRUM AND BENSON ON UTAH EVIDENCE* (Thomson Reuters Westlaw, 2012).
- c. Finally, there's the reliable old standby, Professor Edward J. Imwinkelried's *EVIDENTIARY FOUNDATIONS*, (Matthew Bender, 8th Ed. 2012)

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