

# FOUNDATIONS & PREDICATES

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## FOUNDATION:

To provide a judge with the qualifications of a witness, document or other piece of evidence which assures the judge of the qualifications of the witness to testify on a subject or the authenticity of a piece of evidence

## PREDICATE:

To state or affirm an attribute or quality of a piece or pieces of evidence so that a judge can confirm that the evidence complies with the requirements of authenticity so that the evidence is admissible.

# MNEMONIC DEVICE

- H – Hearsay FRE 801 et seq.
- A – Authentic FRE 901 et seq.
- R – Relevancy FRE 401 et seq.
- P – Personal Knowledge FRE 602
- P – Prejudice FRE 403
- O – Original FRE 1001 et seq.

# THE LITANY

1. Pre-Mark Exhibits
2. Request Permission to Approach the Witness
3. Show Exhibit to Opposing Counsel
4. Have Exhibit Marked by the Court Reporter
5. Show Exhibit to the Witness and Say “I show you what has been marked as Plaintiff’s exhibit 1 and ask do you recognize it?”
6. “What is it?”

# THE LITANY

7. “How do you know that it is. . . ?”
8. Any Magic Questions, e.g., “Does this photograph fairly and accurately show the intersection of Kirby and Richmond as it appeared on the evening of November 30, 2004?”
9. “I offer Plaintiff’s Exhibit 1 into evidence.”
10. Wait for Judge’s Ruling
11. Publish

# POINTERS

- Contents of an exhibit cannot be gone into before the exhibit is received in evidence
- Use the exhibit number when referring to the exhibit
- The name of the game is persuasion, not admissibility
- Offer and use exhibits at a point in the testimony when they are relevant to what the witness is saying

# POINTERS

- When exhibits are logically related, offer them as a group
- Less is more
- Think about how an exhibit should be published
- Always check on exhibit placement and visibility
- When publishing do not examine the witness while the judge is looking at the exhibit

# POINTERS

- Sometimes you need more than one witness to establish a foundation
- Before resting, check with the reporter to see if all exhibits have been offered and received
- With the judge's permission, exhibits can be used in the opening statement
- Demonstrative exhibits and illustrative aids can make the complex simple

# OPPOSING THE OFFER

- Does the exhibit hurt your case
- Are the objections curable
- Will objecting make it worse
- Will it appear to the jury that you are hiding information
- Voir Dire versus Cross Examination

# PRESERVING ERROR

- Excluded
  - Make an offer of proof
- Admitted Over Objection
  - Make a timely objection
  - Specific grounds
  - Correct grounds
  - Ruling

# UNIQUE OR RECOGNIZABLE OBJECTS

- The object is unique – it can be distinguished from similar objects
- The witness has previously observed the object at or near the relevant time and is familiar with its uniqueness
- The witness can identify the exhibit as the object by its uniqueness
- The object is in the same, or substantially the same condition, as at the relevant time or any differences can be explained

# DOCUMENTS AND WRITINGS

- Witness Recognizes Document or Writing as Unique
- Circumstantial Evidence
- Expert Testimony
- Comparison by The Trier of Fact
- Witness Recognizes Handwriting

## Elements

\*The witness is familiar with the writer's handwriting

\*The witness recognizes the handwriting

# BUSINESS RECORDS

- The exhibit is a memorandum, report, record, or data compilation, in any form
- The record is of acts, events, conditions, opinions, or diagnoses
- The record was made at or near the time of the acts, events, conditions, opinions or diagnoses
- The record was made by a person with knowledge or from information transmitted by a person with knowledge of the acts, events, conditions, opinions or diagnoses

# BUSINESS RECORDS

- The person with knowledge had a business duty to report the information (this requirement is not explicitly contained in TRE 803(6) but is imposed by case law) or the information being reported falls within some other exception to the Hearsay Rule, such as an admission of a party opponent
- It was the regular practice of the business entity to make the memorandum, report, record or data compilation
- The record was kept in the course of a regularly conducted business activity

# BUSINESS RECORDS

- The record was not prepared in anticipation of litigation (this requirement is not explicitly contained in TRE 803(6) but is imposed by case law)
- The above elements are shown by the testimony of the custodian of record or by affidavit complying with TRE 902(10)
  - \*Note that the witness does not have to have personal knowledge of the making and keeping of the particular record being offered but only of how records of this type are made and kept.

# CHAIN OF CUSTODY

Each witness in the chain must establish

- The time, place and circumstances of taking possession of the object
- The object was safely kept while in the witness's possession
- The time, place and circumstance of how the object was disposed of
- The exhibit looks like the object
- The exhibit is in the same condition as when the witness had possession or any differences are explained

# PHOTOGRAPHS, MAPS & DIAGRAMS

- The witness was previously familiar with the scene at the relevant time
- The witness recognizes the scene depicted in the photograph, map or diagram
- The photograph, map or diagram fairly and accurately depicts the scene at the relevant time
- If a map or diagram, whether it is drawn to scale. It is not necessary for the map or diagram to be drawn to scale; only that the judge knows whether it is

# VOICE IDENTIFICATION

- The witness is familiar with the subject's voice
- The time, place and surrounding circumstances of the statement being offered
- The witness recognized the speaker's voice

# OUTGOING TELEPHONE CALLS

- The call was made to the number assigned by the telephone company to that person or company
- In the case of a person, circumstances, including self-identification, show the person answering to be the one called
- In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone