Four Rules to Establish That Your Evidence Is Legit

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For very young (and sometimes seasoned and highly experienced) trial lawyers, the anxiety and fear of not being able to introduce a key exhibit, be it drugs, a gun, a cell phone, computer data, a recording, or a business record, cannot be overstated. I must confess that worries (large and small) about establishing the "foundation" for the admissibility of evidence have never left my mind over more than 30 years of preparing for trials.

The Federal Rules of Evidence

There are many gifts to help you navigate the turbulent trial waters. Where can you find those precious gifts to keep your pulse and blood pressure at reasonable levels? The Federal Rules of Evidence, which, in my humble view, are written with a slant toward allowing evidence to be presented to a jury.

The biggest gift of all, and something that I stressed to hundreds of baby prosecutors whom I had the honor and privilege to train during my close to 30 years with the U.S. Justice Department, is Rule 1101(d). That rule states that the Federal Rules of Evidence—"except for those on privileges—do not apply to . . . the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility." Under Rule 1101(d), there are numerous circumstances when a trial attorney can safely say to the court that it does not need to pay particular care about the Rules of Evidence. Subsection (d) can be liberating for prosecutors in particular, because it allows hearsay and otherwise inadmissible evidence to be considered in grand jury, bond, preliminary, sentencing, and probation revocation hearings, and in affidavits in support of arrest and search warrants.

When a court puts on its admissibility hat, curious questions are in order. I have always been amazed, if not befuddled, that in light of subsection (d), why did I care to take an evidence class in law school? When there are *so many matters* to which the rules do not apply, why is evidence even on the bar exam? My skepticism is somewhat exaggerated, of course. However, subsection (d) often reminds me of the famous quote by Ralph Waldo Emerson: "A foolish consistency is the hobgoblin of little minds."

The referenced Rule 104(a) states in part:

> 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 privileges.

For trial attorneys, subsection (a) is the evidentiary life raft of all life rafts. If the court properly follows the permissiveness of (a), then establishing the *foundations* for the admissibility of evidence should be far less than a Herculean task. In my

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experience, challenges to foundation have been much easier to overcome because of subsection (a). More important hurdles to overcome in presenting evidence loom in Rules 401 (relevancy) and 403 (unfair prejudice) than in establishing foundation. With Rules 104(a) and 1101(d) establishing the basic ground rules, we confront the specific seminal rules for establishing the foundations for evidence: Rules 901 (authentication) and 902 (self-authentication).

Rule 901(a) states in part: "To satisfy the requirement of authenticating an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 901(b)(1), Testimony of a Witness with Knowledge, is one example of many from an incomplete list of what constitutes sufficient authentication evidence: "Testimony that an item is what it is claimed to be."

The text of subsection (a) and the simple example of subsection (b)(1) are missing a key ingredient: What is the burden of proof necessary for a court to make a "finding" about the item that the proponent seeks to introduce? The federal cases that discuss a precise, detailed, and clear burden of proof under Rule 901(a) are meager at best. Nonetheless, in *United States v. Brewer*, 630 F.2d 795 (10th Cir. 1980), the Tenth Circuit set forth its test for the authentication of physical evidence, narcotics in that case: "This preliminary issue of admissibility is for the court to decide—it must ascertain whether there is a reasonable probability that the evidence has not been altered in any material aspect since the time of the crime. . . ." To insert more confusion about the precise test under subsection (a), the Ninth Circuit has opined, "The question of whether the authenticity of a document has been sufficiently proved *prima facie* to justify its admission in evidence rests in the sound discretion of the trial judge." *Arena v. United States*, 226 F.2d 227 (9th Cir. 1955). In that case, the court found sufficient evidence that the defendant's handwritten illegal gambling "book" was a business record.

At the state level and indicative of possibly more circumlocution about the quantum of evidence needed to support a court's finding, look at *Irwin Industrial Tool Co. v. Pifer*, 276 A.3d 533 (Md. 2021), which analyzes a state rule of evidence identical to Rule 901(a): "[A]uthentication of evidence under Maryland Rule 5-901 depends on a showing that a reasonable juror could find by a preponderance of the evidence that the item at issue is what it is claimed to be, *i.e.*, that there was sufficient evidence of a reasonable probability to establish that the item is what it purports to be." Well, that clears it up!

Illustration by Jimmy Holder

Whether the Rule 901(a) test is preponderance, reasonable probability, or prima facie, a litigator should be prepared to meet a high standard. In my many years of litigation, I have *never* heard a jurist describe what the precise burden was under this rule. The courts just rule. Regardless, you should be prepared to argue that you have met this mysterious burden. One thing is indeed clear: No court has ever required a reasonable doubt or clear and convincing burden under subsection (a).

What happens when your bank's business record was prepared 40 years before by employees who have all passed away?

As a former assistant U.S. attorney (AUSA) in the so-called Rocket Docket of the Eastern District of Virginia, I tried or supervised hundreds of drug prosecutions. In nearly every case, there is a narcotic (cocaine, crack, heroin, or illegally obtained pain pills) that has been seized, whether during the execution of a search warrant, from an undercover (police) or controlled (cooperator) purchase from a suspect, or from a search incident to arrest. The narcotic seized by a person (agent or cooperator) may be given to another person, who immediately seals the substance in a plastic package. The package is later delivered to a chemist for testing. The seized drug will likely have a frustratingly long "chain of custody," under which multiple persons will have possessed or tested the drug before trial. You would be amazed at how many persons may have come into contact with the drug.

The purpose of proving a chain of custody, which can also apply in civil matters for non-drug evidence, is to avoid allegations of tampering and alteration by those who have come in contact with the evidence. The goal is to show to the jurist that the drug seized is in substantially the same condition in the courtroom as when it was confiscated. In addition to chain of custody, the proponent should show that steps were taken at each link in the chain to preserve the integrity of the evidence, such as storage in a secure evidence room or lockbox.

If an AUSA attempts to introduce the highly relevant drug into evidence at the preliminary hearing or trial, does she have to call all 10 persons who may have placed their hands on the drug? No. Pursuant to Rule 1101(d), when the court puts on its Rule 104(a) hat to make the finding required in Rule 901(a), the AUSA has the flexibility to call just enough witnesses (and surely not all 10) to persuade the court that the drug is what the proponent claims it is. The prosecutor may need to call only three witnesses: the agent who found and seized the drug during the search, the agent who drove the drug to and from the chemist who tested it, and the chemist. In response to defense objections on foundation grounds, prosecutors commonly assert that chain of custody goes to "weight and not to admissibility." In other words, the court should allow the drug to be admitted and let the defense try to argue to a jury that the substance that was admitted is not the drug seized.

For those who are concerned that a particular judge may require the seizing agent, who may be unavailable at trial, to testify for chain-of-custody purposes, one remedy is to file an offensive motion in limine, asking the court to hold a pretrial hearing to determine if the testimony of the packaging agent, who *observed* the seizure, would be enough to satisfy the foundation for admissibility. I filed such a motion in one of my drug cases; the court made a finding that did not require the unavailable agent to testify and jawboned the defense counsel into a stipulation at the hearing as to chain of custody. Problem solved.

Stipulations

A pretrial stipulation is a good avenue to allay fears that a court will fail to admit evidence. In most cases, attorneys are able to work out stipulations because Rule 901(a) issues are rarely successful grounds for appeal. Plus, jurists and juries do not enjoy needless haggling among litigants over foundation. The stipulations help streamline a prosecutor's case; and the defense can claim before the jury that they are being reasonable and focusing on the true issues. The same principles apply in civil cases.

Always try to avoid oral stipulations. A stipulation should be in writing, marked as an exhibit, and read or summarized to a jury, but only after the court has allowed the stipulation into evidence. By marking the stipulation as an exhibit, the parties create a very clean trial record for post-trial motions and appeals.

Business Records

One of the more common types of documents offered in a trial is business records, which are, of course, allowed as a classic hearsay exception, pursuant to Rule 803(6), Records of a Regularly Conducted Activity. To illustrate, the business records exception invokes subsections of each of the four key evidence rules on foundation: Rules 104(a), 901(a), 902(11), and 1101(d). The business record exception requires that the record must have been made *at or near the time* by—or from information transmitted

by—*someone with knowledge*. The foundation for this exception can be proven by a custodian of records or another qualified witness. It screams out for blatant hearsay within hearsay.

First, what happens when your bank's business record was prepared 40 years before by employees who have all passed away? Second, what if your custodian was just hired by the bank within the last year before the custodian's testimony in your trial? The amount of hearsay involved to prove that the record was kept in the ordinary "course of a regularly conducted activity" is enormous. However, Rules 104(a) and 1101(d) are there to help you. When you have your rookie custodian on the stand, you should be allowed some leeway on leading questions. The custodian will understandably have relied on multiple layers of training by others, who also relied on hearsay in what they conveyed to the rookie about the 40-year-old documents, how they were kept, and who kept them. Thus, for purposes of Rule 901(a), you should have little difficulty in proving the foundational facts for admissibility of the business records, regardless of whether the court employs a preponderance, reasonable probability, or prima facie test.

Another extraordinary foundation life raft is Rule 902. I cannot stress enough that a trial attorney should strive at all times to use self-authentication to satisfy foundation. First, the proponent removes the stress of preparing and calling a witness. Second, the court and the jury will appreciate the efforts to move the case along. Third, there will be no issue on appeal. Conversely, there may be times when you actually want witness testimony on a business record to add flavor to a transaction or to explain codes and data. Years ago, I had an AUSA colleague who insisted on calling custodians of record because he believed that the witnesses always added some interesting point to his cases. Conversely, there are those who use self-authentication almost religiously.

For a business record, self-authentication has a booby trap that I fell into in a passport fraud jury trial, which occurred a couple of years after Rule 902(11), Certified Domestic Records of a Regularly Conducted Activity, was implemented in 2000. I stood up before the court, tried to introduce my certified business record (a passport application), and was prohibited from introducing the record. Why? I had given the defense counsel, who read the new rule to the court, only a *belated oral notice* of my intent to use the exhibit. Rule 902(11) requires *reasonable written notice*. At the end of the day, I had to call the State Department's custodian of records; this witness actually added significant flair to the trial. Note that subsections (12), (13), and (14) of Rule 902 also require written notice of intent to use.

Another lesson about self-authentication is always to subpoena the custodian of records, have that person on call, and inform the court of such subpoena. Having the witness ready to be called will greatly enhance your chances of getting the self-authenticated record admitted.

In 1998, in a jury trial on a habitual driving offender charge, a court denied admission of a traffic judgment and conviction from the clerk of a county court in Virginia. This case was simple: The defendant was driving after a court order not to. We offered the judgment and conviction pursuant to Rule 902(2)(A), Domestic Public Documents That Are Not Sealed but Are Signed and Certified. The judgment and conviction were three pages long, yet the *unsubpoenaed* clerk certified only the last page; pages 1 and 2 had no markings from the clerk, who had informed us that this is how it was done in that county. Well, the federal judge did not accept our allocution and denied the admission of pages 1 and 2 because our clerk had not been subpoenaed. Remarkably, the jury took five hours to deliberate before acquitting, notwithstanding that the operative language about not being allowed to drive anymore was confined to pages 1 and 2, which the jury did not have before it. Lesson learned long ago.

Conclusion

In my career with the Department of Justice, I have tried 30 civil and criminal tax matters before judges and juries. Pursuant to Rule 902(4), I relied heavily on self-authenticated tax returns and information obtained from the Internal Revenue Service. The blue cover pages, which contained gold certified seals and a fancy blue ribbon, were the foundation equivalent of a Picasso painting. In only one trial did I draw an objection to the exhibit. On that occasion, the court applied Rules 901 and 902 to summarily reject the taxpayer's argument that the seal was not official enough.

Be mindful of the extra hurdles that are imposed on a proponent under Rule 902(3), Foreign Public Documents. In one case, we needed to obtain a judgment and conviction from a foreign country. Subsection (3) requires the document to have a signature or attestation from a foreign authorized person. The signed or attested document also must be accompanied by a final certification, which may be done by a U.S. embassy secretary, consul general, and the like. Equally important, the proponent of the exhibit must provide the other side a "reasonable opportunity to investigate the document's authenticity and accuracy." In other words, do not wait until the last minute before your trial to disclose this exhibit. If the document is crucial, Rule 902(3) is one instance, among many, where you may want to file an offensive motion in limine to get the court to rule before trial on admissibility.

When you are losing hours of sleep to anxiety over the rough seas of evidentiary challenges ahead, calm those trial nerves a bit. You do not need to swim without assistance. Remember that you have those four life rafts of Rules 104, 901, 902, and 1101 to support you. ■