Federal Evidence Parts I and II

Hon. Robert E. Larsen
U.S. Magistrate Court (W.D. Mo.); Kansas City

MIDWEST BANKRUPTCY INSTITUTE
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KANSAS CITY, MISSOURI

EVIDENTIARY QUESTIONS FOR THE ADMISSION OF EXHIBITS

Judge Robert E. Larsen

A. Real Evidence

[Option #1: Unique Object]

First, hand the exhibit to the witness and ask whether he or she has seen the item before trial;

Second, ask when, where and under what circumstances the witness first observed the exhibit;

Third, ask whether the witness now recalls anything unusual or unique about the exhibit when it was first observed;

Fourth, ask the witness to point out the unusual or unique characteristic of the exhibit to the judge and jury;

Fifth, ask the witness whether the exhibit appears to be or is the same item seen earlier;

Sixth, ask the witness whether the exhibit is or appears to be in the same condition as when first observed; and

Seventh, offer the exhibit into evidence.[1]

[Option #2: Chain of Custody Object]

First, a witness, who initially took possession of the exhibit at a specific time and place relevant to the lawsuit, is called and testifies–

- The witness made no changes or alterations to the exhibit and, at a specific time and place, the witness deposited it into a secure location for safekeeping pending trial.
- The exhibit produced in court appears to be the same exhibit taken into possession earlier by the witness.
- The exhibit produced in court appears to be in the same condition as when the witness initially took possession of it.

[1] Imwinkelried, Evidentiary Foundations 4-83 to 4-84 (5th ed. 2002).

Second, a witness (perhaps the same witness or someone else), who took custody of the exhibit at a specific time and place and retained it for safekeeping pending trial under conditions designed to insure the integrity of the exhibit, is called and testifies–

- At a specific time and place, the witness retrieved the exhibit for production in court.
- The witness made no changes or alterations to the exhibit or, if changes or alterations were made, describes those changes and alterations (e.g., drug analysis).

Third, a witness (perhaps the same witness or someone else), who has retrieved the exhibit at a specific time and place from safekeeping and is producing it at trial, is called and testifies–

- The witness made no changes or alterations to the exhibit.

Fourth, offer the exhibit into evidence.[2]

B. Photograph

First, ask whether the witness is familiar with the object, person or site relevant to the lawsuit;

Second, ask the witness to look at the object, person or site depicted in the photograph;

Third, ask the witness whether the photograph "is a fair and accurate depiction of" or "is the same as" or "is a true representation of" or "is a correct representation of" the object, person, or site at the time relevant to the lawsuit; and

Fourth, offer the exhibit into evidence.[3]

C. Present Recollection Refreshed

First, ask whether the witness had personal knowledge of a act or event at some point in the past;

Second, confirm that the witness cannot now recall the act or event;

Third, ask the witness whether an item will help him or her recall the act or event;

Fourth, produce the item, marked as an exhibit for identification, for the witness's review (if a writing, the witness should read it to himself or herself and, if an object, the witness should study the object to himself or herself);

[2] Id. at 4-84.
[3] Id. at 4-88 to 4-89.

Fifth, ask the witness whether the item has restored his or her recollection of the act or event; and

Sixth, if memory is restored, question the witness about the act or event.[4]

D. Past Recollection Recorded

First, ask whether the witness had direct and personal knowledge of an act or event at some point in the past;

Second, establish that the witness has no present recollection of the act or event;

Third, ask whether at a time when the witness did recall the fact or event, the witness prepared or adopted an accurate and complete record of the act or event;

Fourth, ask the witness to review the record (which should be marked for identification as an exhibit);

Fifth, establish that the witness cannot recall, either partially or completely, the act or event; and

Sixth, read the exhibit into evidence as past recollection recorded.[5]

E. Tape

First, ask the operator of the machine about his or her experience and training in operating the tape recorder at the time;

Second, ask the operator whether the tape recorder employed was designed to record conversations and properly functioning at the time;

Third, ask the operator about the time and location of the recorded conversation;

Fourth, ask the operator about the procedures used to record the conversation;

Fifth, ask the operator (or someone who was either a party to or eavesdropped on the conversation) whether he or she has reviewed the original tape and is it a complete and accurate reproduction of the original conversation;

Sixth, ask the operator (and other witnesses in the chain of custody) to account for the custody of the original tape from the time of the recording to the present and to confirm that the tape has not been altered, changed or edited in any way; and

Seventh, offer the exhibit into evidence.[6]

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[4] Id. at 10-49 to 10-50.
[5] Id. at 10-46 to 10-47.

F. Business Record

[Witness or Certification]

First, ask or request that the custodian (or someone with knowledge of the business records) produce and identify the document;

Second, ask the custodian to testify or certify that the document records acts, events, conditions, opinions or diagnoses at or near the time of their occurrence at the business;

Third, ask the custodian to testify or certify that the entries in the document were made or transmitted by a person or persons at the business with knowledge;

Fourth, ask the custodian to testify or certify that the document was prepared and maintained in the ordinary course of the business;

Fifth, ask the custodian to testify or certify that at the time of the preparation of the document, it was a regular part of the business's practice to make the document; and

Sixth, offer the exhibit into evidence.[7]

G. Summary

First, ask whether the witness has reviewed the exhibits, recordings or photographs;

Second, whether the witness has summarized the contents of the exhibits, recordings or photographs;

Third, hand the summary to the witness and him or her to identify it;

Fourth, ask whether the summary fairly and accurately reflects the contents of the exhibits, recordings or photographs;

Fifth, ask whether the summary and its supporting exhibits, records or photographs have been made available to opposing counsel for examination in advance of their production in court; and

Sixth, offer the summary into evidence.

H. Prior Inconsistent Statement

First, commit or "lock in" the witness to the new statement made during the direct examination;

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[6] Id. at 4-72 to 4-73.
[7] Id. at 10-37 to 10-38.

Second, ask whether the witness made an earlier statement at a specific time and place;

Third, ask the witness whether the earlier statement was made in front of a specific person or group of persons (e.g., a court reporter, the witness's attorney, a police officer, a notary public, any third party, etc.);

Fourth, ask the witness whether the earlier statement was of a particular nature or format (e.g., a written and notarized statement, a letter, a deposition, prior sworn testimony at a hearing or trial, etc.);

Fifth, if the earlier statement was written, show it to opposing counsel [See FED. R. EVID. 613(a)]; and

Sixth, ask whether at that particular time and place, and in the presence of the other person or group of persons, the witness made the earlier inconsistent statement (i.e., the statement that is inconsistent with today's testimony).

- [If the witness concedes making the earlier statement, there is no need for any additional evidence.]

- [If the witness denies or equivocates about making the earlier statement, offer the statement into evidence by using a self-authenticating document or calling a person who heard the statement as a witness.][8]

I. Prior Consistent Statement

First, direct the witness's attention to the prior inconsistent statement that was the subject of cross-examination;

Second, direct the witness's attention to the consistent statement made before the inconsistent statement either by handing the witness a copy of the statement or briefly identifying it;

Third, ask the witness when and where the statement was made and who was present; and

Fourth, ask the witness to testify about the substance of the consistent statement.[9]

J. Prior Conviction

First, ask whether the witness was convicted of a criminal offense;

Second, ask whether the conviction was for a specific crime (i.e., one recognized as a proper subject for impeachment);

[8] Id. at 5-24.
[9] Id. at 5-40.

Third, whether the conviction occurred at a specific time or whether the sentence imposed concluded at a specific time (i.e., one that falls within the time limitation); and

Fourth, if the witness denies the conviction, offer the certified copy of the conviction and identifying information (e.g., print pack) into evidence.[10]

[10] Id. at 5-32.

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EVIDENTIARY FOUNDATIONS FOR WITNESSES AND EXHIBITS

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I. RELEVANCE AND ITS LIMITS

1. *RELEVANCE*

✔ Tendency to make a fact of consequence more or less probable

- Fed. R. Evid. 401, Definition of "Relevant Evidence"

✔ Relevant evidence is admissible and irrelevant evidence is inadmissible

- Fed. R. Evid. 402, Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

2. *LIMITATIONS*

✔ Relevant evidence may be excluded when it is more *unfairly* prejudicial than probative, results in confusion of issues, misleads the jury, or may cause undue delay, waste of time, or needless presentation of cumulative evidence

- Fed. R. Evid. 403, Exclusion of Relevant on Grounds or Prejudice, Confusion, or Waste of Time

II. WITNESSES

1. *LAY WITNESSES*

✔ Oath or affirmation

- Fed. R. Evid. 603, Oath or Affirmation

✔ Perception

- Fed. R. Evid. 602, Lack of Person Knowledge

✔ Recollection

✔ Communication

- Fed. R. Evid. 604, Interpreters

2. *LAY-OPINION WITNESSES*

✔ Oath or affirmation

- Fed. R. Evid. 603, Oath or Affirmation

✔ Perception

- Fed. R. Evid. 602, Lack of Person Knowledge

✔ Opinion based on perception

- Fed. R. Evid. 701, Opinion Testimony by Lay Witnesses (testimony based on perception; helpful to a clear understanding of issues; and not based on scientific, technical, or other specialized knowledge within Rule 702)

✔ Recollection

✔ Communication

- Fed. R. Evid. 604, Interpreters

3. *EXPERT WITNESSES*

✔ Oath or affirmation

- Fed. R. Evid. 603, Oath or Affirmation

✔ Disclosures

- Fed. R. Crim. P. 16(a)(1)(G), Discovery and Inspection, Expert witnesses
- Fed. R. Civ. P. 26(a)(2)(A), Disclosure of Expert Testimony
- Fed. R. Civ. P. 26(a)(2)(B), Disclosure of Expert Testimony (specially-retained expert report)
- Fed. R. Civ. P. 26(a)(2)(C), Disclosure of Expert Testimony (non-retained expert's summary of facts and opinions)

✔ Expertise

- Fed. R. Evid. 702, Testimony by Experts

✔ Facts or data relied upon

- Fed. R. Evid. 703, Bases of Opinion Testimony by Experts

✔ Reliable methodology

- Fed. R. Evid. 702, Testimony by Experts

✔ Reliable application

- Fed. R. Evid. 702, Testimony by Experts

✔ Certainty of opinion in diversity cases

- Fed. R. Evid. 601, General Rules of Competency

✔ Communication

- Fed. R. Evid. 604, Interpreters

4. *SUMMARY WITNESSES*

✔ Oath or affirmation

- Fed. R. Evid. 603, Oath or Affirmation

✔ Review of voluminous exhibits (real, demonstrative, testimonial, documentary)

- Fed. R. Evid. 1006, Summaries

✔ Disclosure of summary and underlying exhibits

- Fed. R. Evid. 1006, Summaries

✔ Fair and accurate summary

✔ Communication

- Fed. R. Evid. 604, Interpreters

III. EXHIBITS

1. *REAL EXHIBITS*

✔ Chain of custody
- Fed. R. Evid. 901, Requirement of Authentication or Identification

✔ Uniqueness

- Fed. R. Evid. 901(a), Requirement of Authentication or Identification

- Fed. R. Evid. 901(b)(4), Distinctive characteristics and the like

2. *DEMONSTRATIVE EXHIBITS*

✔ Fair and accurate depiction

- Fed. R. Evid. 901, Requirement of Authentication or Identification

- Fed. R. Evid. 1002, Requirement of Original (best-evidence rule generally inapplicable unless contents are in dispute)

3. *TESTIMONIAL EXHIBITS*

✔ Refreshing recollection

- Fed. R. Evid. 612, Writing Used to Refresh Recollection

✔ Past recollection recorded

- Fed. R. Evid. 803(5), Recorded recollection (statement read into evidence)

✔ Prior inconsistent statement

- Fed. R. Evid. 613, Prior Statements of Witnesses (impeachment)

- Fed. R. Evid. 801(d)(1)(A), Definitions, Statements which are not hearsay, prior statement by witness (substantive evidence)

✔ Prior consistent statement

- Fed. R. Evid. 801(d)(1)(B), Definitions, Statements which are not hearsay, prior statement by witness (substantive evidence)

- Federal common law for rehabilitation

4. *DOCUMENTARY EXHIBITS*

✔ Business records

- Fed. R. Evid. 803(6), Records of regularly conducted activity

- Fed. R. Evid. 803(7), Absence of entry in records kept in accordance with the provisions of paragraph (6)

- Fed. R. Evid. 902(11), Certified Domestic Records of Regularly Conducted Activity (notice to adverse party and production before trial)

✔ Public records

- Fed. R. Evid. 803(8), Public records and reports

- Fed. R. Evid. 803(9), Records of vital statistics

- Fed. R. Evid. 803(10), Absence of public record or entry

- Fed. R. Evid. 902(1), Self-authentication, Domestic public documents under seal

- Fed. R. Evid. 902(2), Self-authentication, Domestic public documents not under seal

5. *SUMMARY EXHIBITS*

✔ Disclosure of summary and supporting exhibits

- Fed. R. Evid. 1006, Summaries

✔ Fair and accurate summary

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THE TRIAL JUDGE'S DUEL ROLES IN PREVENTING THE ADMISSION OF ERRONOUS EVIDENCE DURING A JURY TRIAL

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One of the trial judge's core functions is to determine the admissibility of evidence (testimony and exhibits) at a jury trial. Federal Rule of Evidence 104(a) grants the judge authority to make preliminary determinations including whether a witness is competent to testify,[1] whether an expert is competent to testify, whether a privilege precludes the admission of evidence, and whether the evidentiary foundation for an exhibit has been made. However, once the testimony or exhibit is admitted, the jury decides the weight to be given to the evidence. The trial judge does not have the authority to exclude evidence merely because he or she does not believe it credible.

In making these preliminary determinations of admissibility, the trial judge is not bound by the rules of evidence except those dealing with privilege.[2] However, as a practical matter, most of these determinations are based on admissible evidence because, ultimately, the judge must decide whether there is sufficient evidence to allow a reasonable juror to conclude that the evidence is what its proponent purports it to be.[3]

Sometimes, the admissibility of evidence is contingent upon the *jury* making a finding a fact. When this occurs, Federal Rule of Evidence 104(b) directs that the trial judge tentatively rule the admissibility of the evidence, but reserve the final determination of admissibility for the jury. In deciding the preliminary question of contingent admissibility, the judge considers whether a reasonable jury could make the requisite finding of fact based on the evidence before it. If so, the evidence is presented in court but the jury ultimately decides whether it is, in fact, admissible.

A magistrate judge, when discussing the admissibility of electronically stored information (ESI), described the difference between Rule 104(a) and 104(b) as follows:

> . . . there is a significant difference between the way that Rule 104(a) and 104(b) operate. Because, under Rule 104(b), the jury, not the court, makes the factual findings that determine admissibility, the facts introduced must be admissible

[1]The trial judge's responsibility under Federal Rule of Evidence 104(a) to ensure that a *lay witness* is qualified to testify is largely rendered moot by Federal Rule of Evidence 601, which states, in part, that "[e]very person is competent to be a witness unless these rules provide otherwise."

[2]See Fed. R. Evid. 104(a).

[3]Fed. R. Evid. 901(a); U.S. v. Safavian, 435 F. Supp. 2d 36, 38 (D. D.C. 2006).

> under the rules of evidence. It is important to understand this relationship when seeking to admit ESI. For example, if an e-mail is offered into evidence, the determination of whether it is authentic would be for the jury to decide under Rule 104(b), and the facts that they consider in making this determination must be admissible into evidence. In contrast, if the ruling on whether the e-mail is an admission by a party opponent or a business record turns on contested facts, the admissibility of those facts will be determined by the judge under 104(a), and the Federal Rules of Evidence, except for privilege, are inapplicable.[4]

Another judge succinctly described the difference between subsections (a) and (b) as follows: "[Rule 104] [ ] adopts the orthodox position that the judge alone decides preliminary questions which relate to the competence of evidence, and the jury decides preliminary questions as to the conditional relevancy of the evidence."[5]

Fed. R. Evid. 104(a) Examples – Judge's Decisions on Admissibility:

- Hearsay under Rules 801, 802, and 803
- Exceptions to Hearsay under Rules 803 and 804
- Privileges under Rules 501 and 502
- Witness competency under Rule 601
- Legal relevance under Rule 403
- Unfair prejudice under Rule 403
- Lay-opinion testimony under Rule 701
- Expert opinion testimony under Rule 702

Fed. R. Evid. 104(b) Examples – Jury's Decisions on Admissibility:

- Other-act evidence under Rule 404(b)
- The personal knowledge of witnesses under Rule 602
- Authenticity of evidence under Rule 901
- Best evidence under Rule 1008

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[4]Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 540 (D. Md. 2007) (internal footnote omitted).

[5]U.S. v. James, 590 F.2d 575, 579 (5th Cir. 1979) (en banc).

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SUMMARY OF FEDERAL RULE OF EVIDENCE 104

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Summarizing, Fed. R. Evid. 104 and the relevant decisional law provide the following:

1. In General

- Rule 104 generally deals with the admissibility of evidence - witness testimony and exhibits - in both civil and criminal cases.
- Rule 104(a) provides that the judge is responsible for deciding preliminary questions dealing with the competence of evidence, i.e., whether a witness is competent, whether a privilege exists, and whether an exhibit is admissible. In answering these questions, the judge is not bound by the Federal Rules of Evidence, except those dealing with privilege (e.g., the Fifth Amendment, attorney-client and work-product privileges, and the like).
- Rule 104(b) provides that when the relevance of evidence - either testimony or an exhibit - depends upon whether a particular fact is proven, the proponent of the evidence must also produce sufficient evidence that the required fact actually exists. In these instances, the judge conditionally admits the testimony or exhibit, subject to additional proof that the required fact exists and, if the evidence is in fact "connected up," the jury then makes a factual determination regarding authenticity/probative value.

2. Rule 104(a)

- The judge makes the preliminary determination, both legally and factually, about the competency of evidence.
- In making the preliminary determination, the judge weighs the evidence, both pro and con, and decides whether it is sufficient to allow a reasonable juror to believe that the evidence is what it purports to be. If so, the evidence is admitted.
- Preponderance of the evidence is the standard of proof the judge employs when deciding whether the evidence is admitted or excluded. This burden is unrelated to the burden of proof on substantive questions in either civil and criminal cases.[1]
- Once the evidence is admitted, the judge's decision about the adequacy of the

[1] Bourjaily v. U.S., 483 U.S. 171, 175 (1987).

evidentiary foundation is not revisited by the jury. However, the jury is entitled to consider the adequacy of the foundation when it decides how much weight to give the evidence.

3. Rule 104(b)

- This subsection is designed to deal with situations where the relevance, or probative value, of evidence depends upon the existence of another fact - one in addition to the usual facts required to establish the evidentiary foundation for testimony or an exhibit.
- The proponent of the testimony or exhibit has the burden to produce "evidence sufficient to support a finding of the fulfillment of the condition."[2]
- The judge neither weighs the evidence nor makes a finding that the proponent has proved the conditional fact by a preponderance of the evidence. The judge simply examines the evidence and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence.[3]
- If the judge conditionally admits the evidence and the conditional fact ultimately goes unproven, the judge should strike the evidence and, upon request, instruct the jury to disregard it.
- If the judge conditionally admits the evidence and the additional fact is proven, the jury must then decide whether the proponent has proven the conditional fact by a preponderance of the evidence (i.e., more likely true than not true). If so, the jury may consider the evidence; if not, the jury must disregard the evidence.
- The judge may give a limiting instruction to the effect that the jury should consider the evidence only if the conditional fact has been proven by a preponderance of the evidence.
- Fed. R. Evid. 901(b), authentication and identification, provides a number of examples of when evidence may be conditionally admitted: a telephone conversation in which the speaker's voice needs to be identified; a signed document in which the signatory needs to be identified; and a handwritten document in which the writer needs to be identified.
- Other examples of when evidence may be conditionally admitted include: other act evidence under Fed. R. Evid. 404(b) in which there must be additional proof that the implicated party actually did the other act; evidence of false statements and representations by others where there must be proof that the implicated party actually had notice or otherwise knew about the false statements and representations; and the chain of custody for real exhibits where there is a question of authenticity.

[2] Fed. R. Evid. 104(b).
[3] Huddleston v. U.S., 485 U.S. 681, 690 (1988).