

Foundations for the introduction of evidence in a court proceeding

TO PROVE FOUNDATION FOR A PHOTOGRAPH

Goals:

- ▶ To show relevance of photo
- ▶ To show that photo is a fair and accurate representation of what it purports to represent
- ▶ Not necessary for the witness to have witnessed the scene as it is depicted in the photo

Sample foundation questions:

- ▶ I show you what has been marked for the purpose of identification as Exhibit No. ____.
- ▶ Do you recognize this exhibit?
- ▶ How are you able to do so?
- ▶ Here the witness can explain that he/she recognizes the scenes as those he/she photographed, that he/she either developed film and made the prints himself/herself or that this was done at his/her directions and the he/she marked or initialed the prints.
- ▶ OR, the witness can explain how the photograph is a fair and accurate representation of a scene with which the witness is familiar.
- ▶ When was the photograph marked Exhibit No. ____ taken by you?
- ▶ Does this photograph fairly and accurately depict the scene [as it appeared on the day that it was taken — or as you recall the scene]?
- ▶ Are there any material alterations or deletions from the photograph?
- ▶ Was the photograph posed?
- ▶ Are you familiar with the way the scene depicted in the photo appeared on [date], the day of the abuse [or ____ days after the abuse]?
- ▶ Were there any material differences between the way the scene appeared on that day and the day on which the photo was taken?
- ▶ The plaintiff offers Exhibit No. ____ for admission into evidence, your Honor.

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TO PROVE FOUNDATION FOR MEDICAL RECORDS

Hospital/clinic records (hospital/clinic personnel)

Goals:

- ▶ Records were made in the normal course of business for the patient
 - ▶ Entries were made by doctors, nurses, or medical technicians
 - ▶ Authenticity of the records
 - ▶ Custodian of the records can describe how they were made
- [*Note:* Hospital records are hearsay, and a proper foundation must be laid in order for them to be admissible.]

Sample foundation questions:

- ▶ Please state your name.
 - ▶ Do you have an official title?
 - ▶ Where are you employed?
 - ▶ What is the position you hold?
 - ▶ Did you receive a subpoena duces tecum for certain hospital/clinic records?
 - ▶ Did you bring the records?
 - ▶ Can you identify these hospital/clinic records?
 - ▶ Did you retrieve these hospital/clinic records yourself?
 - ▶ What was the mode of preparation of these hospital/clinic records? [Did the medical personnel personally fill out the records, or direct that they be filled out?]
 - ▶ Is this hospital/clinic record maintained under your care, custody and control?
 - ▶ Was this hospital/clinic record made in the regular course of business?
 - ▶ Was this hospital/clinic record made at the time the act, condition or event occurred or transpired?
 - ▶ Is the hospital/clinic record regularly kept or maintained?
- [Tender the witness for voir dire on records.]
[Move exhibit into evidence.]

TO REFRESH RECOLLECTION**Goals:**

- ▶ To refresh the witness's own recollection (i.e., witness must have no recollection of information sought)
- ▶ Not to introduce the underlying document

Sample foundation questions:

- ▶ Can you recall [the pertinent topic]?
- ▶ Do you know of anything that will refresh your recollection?
- ▶ I will show you Exhibit No. ____ and ask you if that is [the thing mentioned that would refresh the witness's recollection]?
- ▶ Can you now recall [the pertinent topic]?
- ▶ Can you tell us [the information sought]?

TO PROVE FOUNDATION FOR A PAST RECOLLECTION RECORDED**Goals:**

- ▶ To introduce underlying document
- ▶ Admissible if made contemporaneously and witness knew contents were true at the time

Sample foundation questions:

- ▶ Can you recall [the pertinent topic]?
- ▶ Do you know of anything that will refresh your recollection?
- ▶ I will show you Exhibit No. ____ and ask you if that is [the thing mentioned that would refresh the witness's recollection]?
- ▶ Who prepared that [exhibit]?
- ▶ Was it written by you?
- ▶ Was it true and correct at the time that you wrote it?

TO PROVE FOUNDATION FOR A DIAGRAM**Goals:**

- ▶ To show the accuracy of the map
- ▶ To eliminate unrelated or imprecise notations
- ▶ To illustrate or clarify the testimony

Sample foundation questions:

- ▶ I show you what has been marked for purposes of identification as Exhibit No. ____.
 - ▶ Do you recognize this exhibit?
 - ▶ How are you able to do so?
 - ▶ When and where was that exhibit prepared by you?
 - ▶ How was it prepared?
 - ▶ Is it drawn to scale?
 - ▶ Does it accurately reflect the relationship of the objects shown to each other?
 - ▶ Are distances and directions shown?
 - ▶ Is this exhibit in substantially the same condition as when you originally prepared it?
 - ▶ Are there any material alterations or deletions?
- [Offer the exhibit.]

TO PROVE FOUNDATION OF A WRITTEN DOCUMENT

This can be used for such matters as testimony by a witness with knowledge about the document; nonexpert testimony on handwriting; comparison by the factfinder or the expert witness; distinctive characteristics; voice identification; telephone conversations, public records or reports, ancient documents or data compilation; process or system.

Goal:

- ▶ To show the authenticity of the document

Sample foundation questions:

- ▶ Witness, do you recognize this document?
- ▶ Did you sign the document or see someone sign the document?

TO PROVE FOUNDATION FOR A CERTIFIED COPY OF A COURT DOCUMENT**Goal:**

- ▶ To show the authenticity of the document

Sample foundation questions:

- ▶ Clerk of court called to witness stand.
- ▶ Name, occupation, title, how long, business address, duties?
- ▶ Pursuant to subpoena, did you bring with you Court File No. ____?
- ▶ Mark for identification.
- ▶ Are you responsible for the maintenance of that file and its contents?
- ▶ Are you responsible for the custody of that file and its contents?
- ▶ Do you have charge of the file and its contents?
- ▶ Is the file kept and maintained as the official record of the court in this county?
- ▶ Do the contents contain the seal of the Court of Record of this county?
- ▶ Move admission of the document.

TO PROVE FOUNDATION FOR A PHOTOCOPY OF A DOCUMENT**Goal:**

- ▶ To show that the copy is an authentic copy of the original.

Sample foundation questions:

- ▶ Are you familiar with the appearance of [the original of the photocopied document]?
- ▶ Will you describe it?
- ▶ Is the original of that document in existence? [If so, describe where, who has custody, etc.]
- ▶ I show you Exhibit No. ____ for identification, purporting to be a photocopy of the original [document], and ask you whether it is a true and correct representation and picture of that [document]?
- ▶ Your Honor, the plaintiff offers Exhibit No. ____ in evidence and tenders the witness for cross-examination as to the admissibility of the exhibit.

TO PROVE A BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE**Goals:**

- ▶ To show the document was made in the regular course of business
- ▶ To show that it was made contemporaneously
- ▶ To show the source of the information
- ▶ To show how the writing was prepared

Sample foundation questions:

- ▶ Please state your name, residence, occupation (how long)?
 - ▶ Do you have an official title in the company?
 - ▶ Are you acquainted with _____, the plaintiff?
 - ▶ How long?
 - ▶ Has the plaintiff [or defendant] done business with your company?
 - ▶ Over what period of time?
 - ▶ What does your office force consist of?
 - ▶ Among your duties, do you have supervision and preservation of the bookkeeping?
 - ▶ Do you personally keep the books?
 - ▶ Is it done under your supervision? [witness may be a supervisor, not entrant, so long as witness can state that the record is correct]
 - ▶ Do you have in your custody the records of the company?
 - ▶ When a customer [conducts the business in question], what record is made of the transaction?
 - ▶ Is that record made at or near the time of the transaction?
 - ▶ Who makes that record? Does that person have personal knowledge of the transaction?
 - ▶ Is that the initial record of the transaction?
 - ▶ When is the first permanent record made?
 - ▶ What is it made up from? Are those records accurate?
 - ▶ Does the customer sign that invoice?
 - ▶ Are there any copies of that invoice?
 - ▶ What becomes of the original? the copies?
 - ▶ How are those invoices (or other permanent records) kept?
 - ▶ Are they a part of the permanent record of your company?
 - ▶ Are these invoices and the entries shown on them regular entries in the course of business?
 - ▶ Are these records a correct and accurate reflection of the transaction?
 - ▶ Can you refer to those records and tell [the particulars of the business transaction]?
 - ▶ Do you have with you the Business records] covering the transactions during the month of _____, 19__?
 - ▶ Do you have [business record], dated _____, 19__?
[Have clerk mark for identification.]
 - ▶ I hand you Exhibit No. _____, and ask you to identify it.
 - ▶ Is this the original record of the transaction? [Or, is this the first permanent record of the transaction?]
 - ▶ Is it a true and correct record of such transaction?
 - ▶ Have there been any alterations or changes made on it since the time it was made?
[Hand the exhibit to opposing counsel for examination and then state to the Court: "We offer Exhibit No. _____ in evidence."]
- [Note: With a properly noticed, authenticated and notarized affidavit, you need not have a custodian of records to admit business records.]

TO PROVE A TAPE RECORDED TELEPHONE CALL

Goals:

- ▶ To show the authenticity of the conversation
- ▶ To show that no violation of the law occurred in taping the conversation

Sample foundation questions:

- ▶ Directing your attention to [date], did a telephonic conversation take place that you recorded?
- ▶ Where was this conversation held?
- ▶ Who was present?
- ▶ On what days were these recordings?
- ▶ What time of day or night did these [or this] telephone conversation take place?
- ▶ What did you do in order to preserve the telephone conversation you have described? [A tape recorder in operation that recorded everything?]
- ▶ Were you a participant in this conversation? [Or, did one the parties to the conversation consent to the recording?]
- ▶ Was the entire conversation recorded by the tape recorder that you've described?
- ▶ Was the tape recording mechanical device that you had in operation capable of taping the conversation so that it could be played back later?
- ▶ How do you know this? [I have tape recorded with it before and played it back.]
- ▶ What experience have you had in operating a recording device of this kind? [Previously successful experience at recording and playing back.]
- ▶ Have you ever had any trouble in operating the recorder?
[Have exhibit marked for identification.]
- ▶ I show you Exhibit No. ____ for identification and ask you to state what it is, if you know?
- ▶ Does this recording, marked as Exhibit No. ____, contain an authentic and correct recording of the telephone conversation held between _____ and _____ on [date]?
- ▶ How do you know? Did you check the recording? [Because I've played the recording back]
- ▶ Now, have there been any changes, additions or deletions on that recording since the time that it was used to record the conversation?
- ▶ How do you know? Did you mark it in any way?
- ▶ And when did you see the envelope [or tape] again?
- ▶ At that time what was the condition of the envelope [or tape]? [Same as when I had it last]
- ▶ And who has had custody of this tape?
- ▶ Is it basically in the same original condition?
- ▶ Are there any deletions, corrections or alterations?
- ▶ Do you know whose voices were recorded on the tape?
- ▶ Do you have with you a tape player that could play this tape?
- ▶ Your Honor, the plaintiff now offers Exhibit No. ____ for identification as Exhibit No. ____ in evidence.
- ▶ Would you step down and play the tape recording which has been marked as Exhibit No. ____?

Predicate for voice identification:

- ▶ Do you, Witness, know the defendant?
- ▶ How long?
- ▶ Have you ever spoken to him?
- ▶ About how many times? When and where and who was present?
- ▶ On [date] did you have [or hear] a telephone conversation between the defendant and _____?
- ▶ Did you recognize the voice(s) in that conversation?
- ▶ Whose voice(s) did you recognize?
[Tell us the conversation, or play the tape.]

TO LAY THE FOUNDATION FOR A VIDEOTAPE**Goal:**

- ▶ To show the accuracy and trustworthiness of the recording

Sample foundation questions:

- ▶ Have you had occasion to operate a video tape camera?
- ▶ How many times?
- ▶ Were the results of these uses accurate?
- ▶ Were you operating a videotape camera on [date]?
- ▶ What type of camera was it?
- ▶ Describe its physical appearance, i.e., size, weight, etc.?
- ▶ How was it powered?
- ▶ Was it portable?
- ▶ Had you used the same or similar camera before?
- ▶ How many times?
- ▶ Did you examine that camera prior to operating it on that date?
- ▶ Was the camera operational?
- ▶ Is the tape placed in the camera or a separate unit?
- ▶ Was a video tape film placed into the unit?
- ▶ By whom?
- ▶ Is that tape blank when a picture is recorded on it? How?
- ▶ On the date and time in question, were you able to view the subject matter through the camera view finder?
- ▶ Does that camera operate so that you are seeing the scene through the lens?
- ▶ In relation to your testimony concerning the events which took place on that time and date, when did you begin operating the camera?
- ▶ From what location?
- ▶ What distance was that from the subject matter?
- ▶ What were the lighting conditions?
- ▶ Was any type of special lens used on the camera? Filter?
- ▶ How long did you tape the subject matter?
- ▶ Was the tape later removed from the unit?
- ▶ Please examine Exhibit No. ____ for identification purposes. Can you identify it?
- ▶ What was done with the tape after its removal from the unit?
- ▶ Has it been constantly in the care, custody and control of yourself [or someone else]?
- ▶ How was it brought to court today?
- ▶ Since the time that you taped this sequence of events, have you viewed this videotape?
- ▶ How many times?
- ▶ Is that video tape a fair and accurate representation of the actual events you observed on that date and time?
- ▶ Is it an actual recording of the events or is it a reconstruction of what you saw?
- ▶ Have you operated this videotape player in the past? How many occasions?
- ▶ Please place Exhibit No. ____ in the tape player and display it to the court.
[View tape.]
- ▶ Is that videotape a fair and accurate representation of the actual scene you observed and which this tape purports to reproduce from that date and time?
- ▶ Has this tape been altered or edited in any way since you removed it from the camera?
[Submit into evidence.]

TO IMPEACH WITH A PRIOR INCONSISTENT STATEMENT**Goal:**

- ▶ To illustrate a prior statement is inconsistent with present testimony

Sample foundation questions (written statement):

- ▶ Witness, within the last [time period] have you ever said [the inconsistent statement]?
- ▶ I am handing you a document and direct your attention to [the inconsistent statement].
[If witness signed the document, ask them to verify the signature.]
- ▶ What does that document say?

Sample foundation questions (oral statements):

- ▶ Witness, within the last [time period] have you ever said [the inconsistent statement]?
- ▶ Did you tell [source] something different from what you are telling this Court today?

TO LAY A FOUNDATION FOR PRIOR STATEMENTS UNDER OATH SUBJECT TO CROSS-EXAMINATION**Goals:**

- ▶ To show the current testimony is inconsistent with prior testimony
- ▶ To show that the current testimony is not a recent fabrication, by showing prior testimony
- ▶ To show identification

Sample foundation questions:

- ▶ Witness, did you testify under oath on [date, time]?
- ▶ Were you subjected to cross-examination on that date?
- ▶ I hand you Exhibit No. ____, which is a transcript of your prior testimony. Please read to the court lines ____ on pages ____.

To qualify a court reporter:

- ▶ What is your name and where do you live?
- ▶ What is your business or profession?
- ▶ How many years have you been a court reporter?
- ▶ How many years have you been a court reporter in the State Court?
- ▶ You understand the method of transcribing your notes, don't you?
- ▶ What method of transcribing do you use?
- ▶ Did you take the testimony in the [proceeding] of [name of case] on [date]?
- ▶ At my request, have you transcribed that portion of said trial which related to the [subject matter]?
- ▶ Are they a true, correct and accurate transcription of your notes taken at trial?
- ▶ Do you have them in your possession?
- ▶ Will you please identify each specifically?

[Have them marked and introduced into evidence. Once admitted, read or have read the document or portions of the document to the court.]

TO LAY A FOUNDATION TO SHOW THE COMPETENCY OF A CHILD WITNESS**Goals:**

- ▶ To show that the child (person under age 14) is mentally capable of understanding questions posed
- ▶ To show that the child can formulate intelligent answers
- ▶ To show that the child can communicate relevant impressions and recollections
- ▶ To show that the child understands the responsibility to tell the truth

Sample foundation questions:

- ▶ What is your name?
- ▶ How old are you?
- ▶ When is your birthday?
- ▶ Do you go to school?
- ▶ What school?
- ▶ What grade are you in?
- ▶ Who was your teacher last year?
- ▶ Where do you live?
- ▶ Who lives with you now?
- ▶ Do you know what a lie is?
- ▶ If I said that your hair was green, would that be the truth or a lie?
- ▶ Is it right or wrong to lie?
- ▶ If I said that you have three arms, would that be the truth, or would it be a lie?
- ▶ Is it right or wrong to lie?
- ▶ Have you seen me before you came to court today?
- ▶ When was that?
- ▶ Who else was there?
- ▶ Do you remember me asking you anything?
- ▶ What did I ask you?
- ▶ Did I tell you what happened, or did you tell me what happened?
- ▶ Did I tell you what to say?
- ▶ Did I tell you to tell the truth?

TO LAY A FOUNDATION FOR CALLING A HOSTILE WITNESS

It is my opinion as attorney for the plaintiff, made in good faith, that Witness may testify falsely to certain material facts and may attempt to conceal certain material facts bearing upon the issues to be determined here, to the detriment of the plaintiff.

Since the time of the abuse alleged here, said Witness has made contradictory and inconsistent statements, under oath, and otherwise, to me and in my presence, if called as a witness by the Plaintiff, the said Witness may prove to be a hostile witness to the interest of the Plaintiff. I, as attorney for the Plaintiff, do not wish to assume the responsibility of jeopardizing the plaintiff's cause by calling Witness as a witness for the plaintiff, thereby vouching for the truthfulness of the testimony, when to my own personal knowledge, the Witness has made inconsistent and contradictory statements relative to the facts in this case. I do not feel that the Plaintiff should be, necessarily bound by this testimony.

Therefore, and for the reasons so stated, I now ask that Witness be called as a witness by the Court, to be questioned by the court, and examined and cross-examined by the Plaintiff and defense counsel. But not as a witness for either the Plaintiff or Defendant.

COMMON OBJECTIONS

Form of the question:

- ▶ Leading
- ▶ Repetitious
- ▶ Argumentative
- ▶ Irrelevant [*Note: immaterial is no longer a valid objection.*]
- ▶ Misleading [to the witness or to the court]
- ▶ Too general — opens too great a field — or calls for a narrative
- ▶ Indefinite — fails to fix time or place
- ▶ Multifarious
- ▶ Inflammatory or prejudicial
- ▶ Misquoting a witness

Subject matter of the question:

- ▶ An attempt of impeach on a matter too remote
- ▶ Witness is disqualified to testify because witness has violated the rule regarding communicating with other witnesses

Substance of the answer sought is objectionable:

- ▶ Hearsay
- ▶ Non-hearsay
- ▶ Prior statement by a witness
- ▶ Admission by party-opponent
- ▶ Exceptions
- ▶ Present sense impression
- ▶ Excited utterance
- ▶ Then existing mental, emotional or physical condition
- ▶ Statements for purposes of medical diagnosis and treatment
- ▶ Recorded recollection
- ▶ Records of regularly conducted activity
- ▶ Absence of entry in records kept in accordance with the provisions of paragraph 6
- ▶ Public records and reports
- ▶ Records of vital statistics:
- ▶ Absence of public record or entry

- ▶ Records of religious organizations
- ▶ Marriage, baptismal and similar certificates
- ▶ Family records
- ▶ Records of documents affecting an interest in property
- ▶ Statements in documents affecting an interest in property
- ▶ Statements in ancient documents
- ▶ Market reports, commercial publications
- ▶ Learned treatises
- ▶ Reputation concerning personal or family history
- ▶ Reputation concerning boundaries or general history
- ▶ Reputation as to character
- ▶ Judgment of previous conviction
- ▶ Judgment as to person, family or general history
- ▶ Other exceptions
- ▶ Collateral, which tend to mislead, confuse and prejudice the factfinder
- ▶ Matters on which the witness is incompetent to testify
- ▶ Repetitious
- ▶ Not the best evidence
- ▶ Self-serving
- ▶ Calls for evidence of witness's prior sexual behavior

Incompetence of the witness to answer a specific question:

- ▶ Not qualified to answer about a special area of expertise
- ▶ Lacks capacity

Failure to lay proper foundation**Impropriety of proposed exhibit (too prejudicial)****Miscellaneous objections:**

- ▶ Prompting the witness
- ▶ Attempting to intimidate or badger the witness
- ▶ Side-bar remarks
- ▶ Arguing with the witness
- ▶ Attorney is testifying for witness
- ▶ Abusive language
- ▶ Failing to maintain proper place at the bar

MOTIONS TO STRIKE**Proper to:**

- ▶ Exclude an answer made by a witness before the objection is made and the court has ruled.
- ▶ Exclude statements otherwise volunteered by the witness.
- ▶ Exclude a non-responsive answer.
- ▶ Exclude testimony conditionally admitted when counsel promised to connect the testimony and failed to do so.
- ▶ Exclude testimony of a witness who fails to submit to cross-examination.