

Foundation

By Sandi Johnson, SLCO Deputy District Attorney

Definitions

- a. Admission of any type of testimony requires the laying of proper foundation to qualify the witness to give the particular testimony sought to be elicited. Utah Dept. of Transp. v. Jones, 694 P.2d 1031, 1036 (Utah 1984)
- b. Case law development v. Rule of Foundation (Does Not Exist in Rules of Evidence)
- c. Bottom Line: **HOW DO YOU KNOW**

Rules of Evidence and Annotations from the Utah Rules of Evidence

I. Rule 104 Preliminary Questions

- a. Admission of any type of testimony requires the laying of proper foundation to qualify the witness to give the particular testimony sought to be elicited. City of Hildale v. Cooke, 2001, 28 P.3d 697, 424 Utah Adv. Rep. 55, 2001 UT 56; Utah Dept. of Transp. v. Jones, 1984, 694 P.2d 1031.
- b. Proponent of evidence offered to show bias of witness must lay foundation for evidence in order for it to be admissible. State v. Cox, 1992, 826 P.2d 656
- c. However test is formulated for determining admissibility of new scientific evidence, foundation establishing reliability of new scientific evidence must be established for it to be admissible. Kofford v. Flora, 1987, 744 P.2d 1343.
- d. Admission of county treasurer's testimony as to value of lands, without showing his knowledge thereof except shown by assessment rolls, held erroneous. Littledike v. Wood, 1927, 69 Utah 323, 255 P. 172.
- e. Unavailable mother's deposition was inadmissible in State's action against putative father to collect child support from putative father, in absence of evidence that mother was in fact unavailable. State By and Through Utah State Dept. of Social Services v. Ruschetta, 1987, 742 P.2d 114.

II. Rule 402 General Admissibility of Relevant Evidence

- a. For evidence relevant only to credibility of victim and not to any elements of crime committed by defendant to be admissible, party offering evidence must lay sufficient foundation to show evidence is relevant. State v. Finlayson, 1998, 956 P.2d 283, 340 Utah Adv. Rep. 21, rehearing denied, certiorari granted 982 P.2d 87, affirmed but criticized 994 P.2d 1243, 386 Utah Adv. Rep. 57, 2000 UT 10.
- b. For evidence of witness' mental disorder to be admissible for purposes of attacking witness' credibility, party seeking to introduce such evidence must lay sufficient foundation to show that evidence is relevant, requiring evidence of two facts: first, party must show that witness' mental condition is such that it affects witness' ability to accurately perceive, recall, and relate events; and, second, party must demonstrate that mental disorder existed either at time of event regarding which witness has been called to testify or at time testimony is given. State v. Stewart, 1996, 925 P.2d 598.

- c. Trial court did not abuse discretion in excluding testimony of two witnesses who could neither establish adequate foundation for their testimony nor verify its relevancy and reliability. State v. Peterson, 1994, 881 P.2d 965, certiorari denied 890 P.2d 1034.
- III. Rule 405 Methods of Proving Character
- a. High school principal on Indian reservation who knew the defendants personally and had contact with the defendants throughout the three-year period that he resided in the community had a proper foundation to testify as to defendants' character for truth and veracity, even though he lived on the school compound and even though he did not speak the Navajo language of the defendants. U.S. v. Bedonie, 1990, 913 F.2d 782, certiorari denied 111 S.Ct. 2895, 501 U.S. 1253, 115 L.Ed.2d 1059.
 - b. Defendant did not lay necessary foundation for admission of documents demonstrating that prosecution witness was charged with felony and pled to a misdemeanor, where defendant did not offer documents until close of his case, after he had completed cross-examining the witness, and defendant did not attempt to recall him. State v. Cox, 1992, 826 P.2d 656.
 - c. Patient was appropriately prevented from cross-examining nurse as to the length of a fellow nurse's shift, in medical malpractice action where patient could establish no foundation concerning the basis of nurse's knowledge of the matters addressed in the question. Turner v. University of Utah Hosp., 2011 UT App 431.
- IV. Rule 611 Mode and Order of Examining Witnesses and Presenting Evidence
- a. Qualified and knowledgeable witnesses may give their opinion or estimate of value of property taken by eminent domain, but to have probative value, an opinion or estimate must be founded upon substantial data, not mere conjecture, speculation or unwarranted assumption, and must have a rational foundation. U.S. v. Sowards, 1966, 370 F.2d 87.
 - b. While landowners may testify as to a proposed use of condemned land, the steps taken to realize a transformation in use, and the lack of conjecture or speculation, they may not testify to the highest and best use of the property itself unless a foundation is laid establishing their expertise. City of Hildale v. Cooke, 2001 UT 56
 - c. Trial court in condemnation proceeding properly refused to admit owner's opinion as to what the "highest and best use" of his property was, in that no foundation was laid or sought to be laid regarding his qualifications to testify in that regard and his ownership of land alone would not qualify him to give such an opinion. Utah Dept. of Transp. v. Jones, 1984, 694 P.2d 1031.

V. Rule 702 Testimony by Experts

- a. In view of the importance of the function entrusted to the expert witness, it is of great importance that a court carefully scrutinize his qualifications to guard against being led astray by the pseudo learned or charlatan who may purvey erroneous or too positive opinions without necessary foundation. Webb v. Olin Mathieson Chemical Corp., 342 P.2d 1094 (Utah 1959)
- b. To make threshold showing of inherent reliability of scientific evidence, proponent may either show general acceptance of principle or technique in relevant scientific community, in which case court may take judicial notice, or proffer sufficient foundation to demonstrate inherent reliability of underlying principles and techniques; foundational showing must explore with careful precision such questions as correctness of scientific principles underlying testimony, accuracy and reliability of techniques utilized, and qualifications of those actually gathering data and analyzing it. State v. Brown, 948 P.2d 337 (1997)
- c. Once an expert witness renders an opinion, he must be allowed to explain the foundation for that opinion. Green v. Louder, 2001, 29 P.3d 638, 426 Utah Adv. Rep. 25, 2001 UT 62.
- d. In rape prosecution, where it appeared to trial court that there was reasonable foundation for opinion of doctor as to whether or not prosecutrix had been forcibly attacked, it was within its discretion to admit opinion and to allow any frailties therein to be exposed by cross-examination. State v. Ward, 1959, 10 Utah 2d 34, 347 P.2d 865.
- e. An expert witness belonging to one school may testify against a member of another school once the expert provides sufficient foundation to show that the method of treatment at issue is common to both schools or that the expert is knowledgeable about the standard of care of the other school. Neurosurgeon was competent to testify where he provided foundation that standard of such care of spinal injuries is same for neurosurgeon or physiatrist. Boice ex rel. Boice v. Marble, 1999, 982 P.2d 565, 366 Utah Adv. Rep. 17, 1999 UT 71, rehearing denied.

VI. Rule 703 Bases of an Expert's Opinion Testimony

- a. Evidence of living and sleeping arrangements at residence of mother, who was a lesbian, and mother's limited contact with her children since the divorce constituted sufficient foundation for psychologist to evaluate advisability of proposed expanded visitation arrangements with respect to welfare of the children; psychologist's testimony, therefore, would not exceed limits placed on expert testimony in form of opinions. Kallas v. Kallas, 1980, 614 P.2d 641.
- b. Dental expert's hearsay testimony as to diagnoses of nontestifying specialists he consulted in his diagnosis and treatment of severe dental injuries sustained by motorist in automobile collision was admissible to establish foundation for his own expert opinion, where information from specialists was of type dental expert would reasonably rely on to diagnose and treat such injuries. Patey v. Lainhart, 1999, 977 P.2d 1193, 366 Utah Adv. Rep. 21, 1999 UT 31.

- c. Testimony of toxicologist as to level of intoxication of defendant, who asserted voluntary intoxication defense, was properly excluded in prosecution for second degree murder and aggravated assault due to insufficient foundation as to amount of alcohol defendant consumed prior to beating of victim, as defendant was able to testify at trial only generally as to how much he had to drink on night in question. State v. Cabututan, 1993, 861 P.2d 408
 - d. Expert testimony concerning defendant's level of intoxication at time of his arrest for burglary and theft was admissible where defendant raised issue of his state of mind and expert was called to rebut defense testimony concerning amount of alcohol consumed by defendant; sufficient foundation existed for expert rebuttal testimony. State v. Tennyson, 1993, 850 P.2d 461.
 - e. Expert testimony as to effect multiple drugs consumed by murder defendant would have had upon his ability to form requisite mental state was properly excluded for lack of foundation; while there was testimony as to types and total amounts of drugs in possession of defendant and victim on date of crime, there was insufficient evidence as to actual amounts consumed by defendant, timing of consumption, purity of drugs, or defendant's tolerance level. State v. Pendergrass, 1990, 803 P.2d 1261.
- VII. Rule 704 Opinion on Ultimate Issue
 - a. Testimony of expert witness opining that victim had been sexually abused, for which testimony foundation had been established and appeared in record, was admissible. State v. Suarez, 1987, 736 P.2d 1040.
- VIII. Rule 801 Definitions of Hearsay and Exclusions From Hearsay
 - a. Testimony by witnesses as to conversations between themselves and defendant relating to the business operation which gave rise to charges of theft by deception constituted admissions by the defendant concerning his criminal intent, and were admissible under the admissions of a party exception to the hearsay rule; thus they were not subject to the foundation requirements of rule admitting hearsay statements of coconspirators made in the course of a conspiracy. State v. Kerekes, 1980, 622 P.2d 1161.
- IX. Utah Rules of Evidence, Rule 802 Rule Against Hearsay
 - a. Intoxilyzer testing affidavits contained sufficient foundation to be admissible in prosecution for driving while under the influence of alcohol, where facts stated in affidavits were based upon affiant's personal knowledge and observations, rather than upon someone else's hearsay information. Layton City v. Bennett, 1987, 741 P.2d 965, certiorari denied 765 P.2d 1277.

- X. Rule 803 Exceptions to Hearsay Regardless of Unavailability
- a. Trial court acted within its discretion at trial for murder and assault in concluding that defendant did not provide an adequate foundation to establish that eyewitness's statement to witness about shooting qualified as exception to hearsay rule for excited utterances, even though witness testified that he spoke to eyewitness by phone minutes after incident and that eyewitness was startled, stuttering, screaming, and yelling; no evidence was presented to show that eyewitness did not have time for reasoned reflection during period after shooting but before he took occasion to place a phone call and made declaration. State v. Tiliaia, 2006, 153 P.3d 757, 566 Utah Adv. Rep. 32, 2006 UT App 474, certiorari denied 168 P.3d 339.
 - b. Under the "regular entry rule", regular entries made in the course of business are admissible in evidence when a proper foundation is laid. State v. Davie, 1952, 121 Utah 189, 240 P.2d 265.
 - c. Foundation required to establish that copy of letter notifying Utah Department of Transportation (UDOT) of claim for additional compensation under highway construction contract was admissible under business record exception to hearsay rule was satisfied by custodian's testimony that he spoke with letter's author concerning letter, that normal business procedure was used to maintain record, that copy of letter was in "job notebook" with other letters that had been written and mailed to UDOT in connection with same project. Procon Corp. v. Utah Dept. of Transp., 1994, 876 P.2d 890.
 - d. Where testimony in juvenile court was that fingerprint record was made during the regular course of business, filed and ultimately removed from the file and identified by the witness at the time of trial, which was the showing required by rule for admissibility of a business record as an exception to the hearsay rule, trial court did not abuse discretion in determining that sufficient foundation was laid for admission of the record in evidence. State in Interest of Marquez, 1977, 560 P.2d 342.
 - e. In action in which suspension of driver's license was reinstated, trial court's decision that Chief Driver's License Examiner's testimony that computer was kept in basement of capitol building, that certain operators entered records of conviction under Code as soon as they were received, that entries were verified and audited by another clerk for accuracy, and that whole process of receiving and storing driving convictions was done under such witness' control and supervision established sufficient foundation for admission of computer printouts for purposes of showing driver's accumulated point totals was not abuse of discretion. Barney v. Cox, 1978, 588 P.2d 696.
 - f. Possession by credit card company's investigator of sales slips which had been fed to him but which he had absolutely nothing to do with custodially did not satisfy exception to hearsay rule as to admissibility of business records, and reception of such slips without proper foundation, in prosecution for allegedly unlawfully obtaining goods by misrepresentation through use of unauthorized credit card, was reversible error. State v. Cobb, 1962, 13 Utah 2d 376, 374 P.2d 844.

- g. Under the “regular entry rule”, if the person who made the records cannot be obtained as a witness to identify the records, other employees who know the facts can do so. State v. Davie, 1952, 121 Utah 189, 240 P.2d 265.
 - h. Even fingerprint records of defendant are admissible as business records if proper foundation is laid. Rules of Evid., Rule 63(13). State v. Bertul, 1983, 664 P.2d 1181.
 - i. Breathalyzer test result did not come within business records exception to hearsay rule absent affidavit establishing proper maintenance of breathalyzer machine or that test was administered by qualified operator; affidavits were required to lay foundation for admission of operational checklist which was, in turn, required as foundation for admission of breathalyzer test result. Kehl v. Schwendiman, 1987, 735 P.2d 413.
- XI. Rule 804 Exceptions to Hearsay When Declarant is Unavailable
- a. Statements made by rape and kidnapping victim at preliminary hearing were admissible under exception to hearsay rule, and could provide proper foundation for admission of certain evidence in hands of police; witness was unavailable at time of trial, and had been subject to cross-examination at hearing concerning items of clothing she had worn on night of crimes and had given to police. State v. Lovell, 1988, 758 P.2d 909.
 - b. Where investigations as to location of witnesses who had testified in prior trial tended to show that witnesses had left state and had taken up residences out of state, sufficient foundation had been laid for permitting their testimony in prior trial to be read into record of second trial. State v. Poe, 1970, 24 Utah 2d 355, 471 P.2d 870.
- XII. Rule 901 Authenticating or Identifying Evidence
- a. To establish the requisite foundation for admissibility of a audiotape recording, the proponent of the recording must produce evidence sufficient to persuade the district court that the recording is accurate, authentic, and generally trustworthy. Chen v. Stewart, 2005, 123 P.3d 416, 537 Utah Adv. Rep. 9, 2005 UT 68.
 - b. State laid adequate foundation for admission of surveillance video in aggravated robbery prosecution though testimony of officer; although officer lacked personal knowledge as to the actual events as they occurred, the videotape was the same one the officer received on the night of the incident, the video image was consistent with the way officer found the scene when he arrived, officer used diagram to show where the surveillance cameras were located, and witnesses did not claim that video was not an accurate representation of what happened. State v. Bloomfield, 2003, 63 P.3d 110, 464 Utah Adv. Rep. 26, 2003 UT App 3.
 - c. Adequacy of foundation for admissibility of photographs depicting stolen furniture which was seized from defendant was not undermined by minor discrepancies in testimony which went only to details of time and place pictures were taken and which were not material to purpose for which evidence was introduced, where several competent witnesses unequivocally testified that photographs depicted furniture belonging to corporation and seized from defendant and that pictures were taken after seizure. State v. Purcell, 1985, 711 P.2d 243.

- d. In manslaughter prosecution, exhibits consisting of bullets and photographs of bullet holes and blood stains were properly admitted on sufficient foundation, except as to bullet fragment, admission of which did not have substantial influence on verdict. State v. Butler, 1977, 560 P.2d 1136.
- e. Voice identification testimony is permissible under the rule which requires authentication or identification to establish a foundation for evidence as a precursor to admitting audio recordings where there exists any basis for identifying the voice, leaving all questions of weight and credibility for the jury. Testimony of undercover police officer, that he recognized defendant's voice based on three face-to-face conversations and various exchanges via telephone, was adequate to authenticate defendant's voice as that of alleged drug dealer for purposes of admissibility under rule which required authentication or identification to establish foundation for evidence as precursor to admitting audio recordings, in defendant's trial on drug charges U.S. v. Bush, 2005, 405 F.3d 909

XIII. Rule 1006 Summaries to Prove Content

- a. In order for summary of business records to be admissible, there must be testimony providing necessary foundation for business record exception for documents being summarized, and there must be adequate foundation for admission of summary itself. Trolley Square Associates v. Nielson, 1994, 886 P.2d 61, rehearing denied.
- b. Testimony which was given by plaintiff's expert in suit for alleged negligence in causing loss of a conjugate of a complex laboratory serum and which concerned an itemization of the costs to reproduce the conjugate based on company records as to costs incurred should not have been admitted under the exception to the hearsay rule where plaintiff not only failed to lay a foundation as to the cumbersomeness or unavailability of its books, but also failed to make its original records available for examination by the defendant. Gull Laboratories, Inc. v. Louis A. Roser Co., 1978, 589 P.2d 756.

XIV. Rule 1102 Reliable Hearsay in Criminal Preliminary Examinations

- a. (b)(3) evidence establishing the foundation for or the authenticity of any exhibit;
- b. Subparagraph (b)(3) permits the admission of exhibits in preliminary hearings even though the necessary foundation for admissibility is by hearsay only. For example, proving the chain of custody for controlled substances may be accomplished under this section without calling the witnesses in the chain.
- c. Subparagraphs (b)(4) and (b)(5) permit the specified types of reports and records to be admitted without the testimony of the person who prepared the report or record or the custodian of the record. If there is special reason for exploring foundation or authenticity, subparagraph (c) gives the magistrate power to require additional evidence after a continuance.
- d. Subparagraph (b)(9) provides catchall admissibility for other forms of hearsay of similar reliability, not unlike U.R.E. Rules 803(24) and 804(5) provide under existing hearsay exceptions. Unlike U.R.E. Rules 803(24) and 804(5), there is no requirement that advance notice be given to the adverse party of evidence offered under subparagraph (b)(9). If there is special reason for exploring foundation or authenticity, subparagraph (c) gives the magistrate power to require additional evidence after a continuance.