I. **Essentials of Laying a Foundation**[1]

9:00 - 9:45, Christopher G. Otten

A. Procedures for Introducing Exhibits at Trial

So you want to use exhibits at your trial? The first question you will have to ask is whether you want to merely use an exhibit demonstratively for the jury / judge, or if you want to admit the exhibit into evidence. Generally speaking, the bar for the latter is far higher than that for the former. Why should you use demonstrative exhibits? Several reasons come to mind: (1) jurors are easily distracted during testimony, and demonstrative exhibits can break through "highway hypnosis"; (2) demonstrative exhibits assist in organizing your facts and themes as developed through the witness's testimony; (3) demonstrative exhibits can simplify complicated subjects. Sometimes, you will only need to show the jury a demonstrative exhibit during the testimony; many times, you will want to admit the exhibit into evidence. You may also choose to create a summary of otherwise admissible evidence (such as voluminous writings, photographs, etc.).[2] Other types of exhibits **need** to be introduced into the record; e.g., medical records to establish the plaintiff's pre- and post-accident condition; medical bills to establish these damages; etc.

Whether seeking to introduce demonstrative exhibits such as photographs or charts, or documents such as medical records, business records, written statements, etc., you will need to demonstrate, at a minimum, the evidence is *authentic* and *relevant* to the case. As it relates to expert testimony, opinion, and evidence, you will further need to demonstrate the evidence is *reliable*.

If you feel comfortable your evidence is both relevant and admissible and will survive any other evidentiary challenges (discussed in more detail in Section E), how, then, can you introduce your evidence? There are two ways to do so. The simpler way is

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[1] This course packet and presentation is generally agnostic to the distinction between state and federal rules, as the Louisiana Code of Evidence largely tracks the language in the federal rules. As such, references to both are contained within this. However, please be sure to check the statutes, rules and case law in your jurisdiction prior to making strategy decisions.

[2] See LA. CODE EVID. art. 1006.

with uncontested evidence, where the parties can stipulate by agreement as to the authenticity and introduction of certain pieces of evidence. No doubt you will confer with your opponent and any co-counsel and reach agreement on at least some pieces of evidence not in dispute, such as the medical records of a party relating to the subject matter of the lawsuit. The second method is through witness testimony, and to do this, you need to lay the proper foundation.

Here is an example of how such a direct examination and introduction of evidence may proceed:

> Q: Dr. Adams, we have gone over your credentials and the court has recognized you as an expert in infectious disease. And you are familiar with the type of infection at issue in this case and where it was located in the plaintiff's body, correct?
> A: Yes, I am.
> Q: And for the benefit of the jury, you intend on using this illustration which demonstrates a cross-section of the plaintiff's body where the infection was located, which we have marked as Exhibit 4 for identification?
> A: Yes.
> Q: Does Exhibit 4 fairly and accurately depict the cross-section of the plaintiff's body where the infection was located, including the physical structures contained within that area?
> A: Yes.
> Q: Your Honor, at this time plaintiff moves to offer, file and introduce into evidence Exhibit 4.

Reading that exchange, alarms may have gone off in your head, along these lines "But the attorney is leading on direct examination! That isn't allowed!" Au contraire, as the rules of evidence are suspended when presenting issues related to the admission of a particular piece of evidence: "[p]reliminary questions concerning … the admissibility of evidence shall be determined by the court … In making its determination it is not bound by the rules of evidence except those with respect to privileges."[3]

This is a general overview. The following sections will go into the nuts and bolts of the use and admission of evidence.

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[3] See, LA. CODE EVID. art. 104(A).

B. Authenticity, Reliability and Relevance

First things first, do you need the evidence? One rule which lawyers often overlook is a simple one which may streamline your need for additional testimony and/or evidence, and that is that state or federal court pleadings and discovery are judicial admissions. As the Louisiana Supreme Court has explained, "[i]t is well settled that an admission by a party in a pleading constitutes a judicial confession and is full proof against the party making it."[4] Likewise, under well-established law in the U.S. Fifth Circuit and at least within the Second, Eighth, and Eleventh Circuits, federal courts can take judicial notice of facts contained within documents filed within the court; as to documents filed within courts outside of the litigation, these courts can only take judicial notice of the fact of such litigation and related filings, but not necessarily facts contained within those outside pleadings.[5] This also applies to statements by counsel during trial if it was made intentionally as a waiver.[6] This is provided for explicitly under FED. R. EVID. art. 801(d)(2), which will generally extend as to any pleadings and discovery signed by a party's attorney. The Eastern District of Louisiana has even addressed interrogatories directly, explaining "[i]f the court were to allow the defendant to equivocate on its answers to interrogatories, the doctrine of judicial admissions would lose its meaning and effectiveness."[7] However, the court also noted that "[o]nly deliberate, clear, and unequivocal statements can be judicial admissions."[8]

What if your evidence is not something of which the court can take judicial notice (i.e., most evidence). How, then, does one establish authenticity of evidence? What about the reliability (or lack thereof) of an expert's testimony and opinions? Finally, is the evidence relevant? Each of these will be addressed in turn.

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4 *C.T. Traina, Inc. v. Sunshine Plaza, Inc.*, 2003-1003, p. (La. 12/03/03); 861 So. 2d 156, 159.

5 See, *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829-830 (5th Cir. 1998); see also, *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992); *Holloway v. A.L. Lockhart*, 813 F.2d 874, 878-79 (8th Cir. 1987); *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

6 *Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476-77 (5th Cir. 2001).

7 *United States ex rel. Garibaldi v. Orleans Par. Sch. Bd.*, 46 F. Supp. 2d 546, 554 (E.D. La. 1999), *vac'd on other grounds*, 244 F.3d 486 (5th Cir. 2001).

8 *Id.* (*citing Matter of Corland Corp.*, 967 F.2d 1069, 1074 (5th Cir. 1992), (*citing Backar v. Western States Producing Co.*, 547 F.2d 876, 880 n.4 (5th Cir. 1977)).

Authenticating Evidence

LA. CODE EVID. art. 901(A) explains "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The article goes on to give examples, such as "[t]estimony that a matter is what it is claimed to be." LA. CODE EVID. art. 901(B)(1), which is the most common method used to authenticate evidence.

Establishing Reliability

When dealing with experts, particular care must be taken by both the parties and the court to ensure that the expert does not provide prejudicial or confusing information to the jury. In the federal courts, the admissibility of expert evidence and testimony is controlled by *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[9] The *Daubert* standard as enunciated by the Supreme Court requires the trial court to evaluate: the expert's theory (and whether it has been tested); the standard controlling the expert's technique; whether the theory has been subjected to peer review and publication; the known or potential error rate; the general acceptance of the theory; whether the expert adequately accounted for alternative explanations; and, whether the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion. While courts generally allow experts some leeway (allowing them, for example, to rely at least in part on otherwise inadmissible hearsay in forming their expert opinions), these criteria are an important check on the expert's ability to dictate the outcome of the case. These criteria are set forth in FED. R. EVID. 702, *et seq*.

When the Louisiana Supreme Court was faced with the question of admitting borderline scientific evidence, it adopted the *Daubert* analysis.[10] LA. R. EVID. art. 702 similarly governs the admission of expert witness testimony in Louisiana and provides as follows:

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9 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

10 *State v. Foret*, 628 So. 2d 1116 (La. 1993).

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In interpreting article 702, *Foret*, and *Daubert*, the Louisiana Supreme Court has adopted a three part analysis to assist the trial Court in determining whether an expert witness's testimony is admissible.[11] The following three criteria must be met for an expert witness's testimony to be admissible:

> (1) The expert must be **qualified** by knowledge, skill, experience, training, or education, regarding the matters he intends to address;
> (2) The **methodology** by which the expert reaches his conclusions must be sufficiently reliable as evaluated by *Daubert*; and
> (3) The testimony must assist the trier of fact, through the application of scientific, technical, or specialized expertise, to **understand the evidence or to determine a fact in issue**.[12]

Pursuant to *Foret* and *Daubert*, the trial Court is required to exercise its gatekeeping function to ensure any expert's testimony is based on sound and accepted methodologies before that testimony is admitted at trial.[13] As held by the Louisiana Supreme Court, the reliability of expert witness testimony is to be assessed by the trial court before it is admitted to ensure there is a "valid scientific connection to the pertinent inquiry as a precondition to admissibility."[14] The Louisiana Supreme Court also recognized not all expert witness testimony will assist the trier of fact to understand the evidence or to determine a fact in issue and expert witness testimony which does not relate to any issue in the case is not relevant or helpful.[15]

To help with unpacking this: the first step in utilizing an expert is in communicating and working with your expert ahead of trial, being sure to timely identify your expert, exchange reports, and proactively identify any demonstrative or other visual aids you may wish to use at trial. Remember that the trial court will act as a gatekeeper for the expert's testimony, including any exhibits or evidence you rely upon during the

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11 *Cheairs v. State*, 2003-680, pp. 8-9 (La. 12/3/2003), 861 So. 2d 536, 542; *citing*, *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 562 (11th Cir. 1998).

12 *Id.* at p. 9, 861 So. 2d 542; *citing*, *City of Tuscaloosa*, 158 F.3d at 562.

13 *State v. Brannon*, 2007-431 (La.App. 3 Cir. 12/05/07); 971 So. 2d 511, 519.

14 *Foret*, 628 So. 2d at 1122; *citing*, *Daubert*, 509 U.S. at 591-92.

15 *Cheairs*, p. 9; 861 So. 2d at 542; *see also*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590-592.

expert's testimony. The expert's testimony must be based on the application of sound scientific and mathematical principles as may be appropriate. Be certain you are comfortable with your expert's testimony meeting these criteria. While the expert need not have personal knowledge, and is afforded more latitude in relying on hearsay than lay witnesses, the expert cannot render opinions out of whole cloth. Although your expert (if qualified) can testify as to his findings, reports prepared by an expert witness are generally not admissible because they constitute hearsay - whether or not the expert testifies at trial.[16]

Relevance

Three rules will always govern a relevance analysis and must be satisfied for the introduction of any piece of evidence: LA. CODE EVID. arts. 401, 402 and 403. For the use or admission of any exhibits at trial, the exhibit must be relevant to the case. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17] This is required whether you seek to use the evidence as a demonstrative aid or to actually admit the evidence into the record.

So you know how to show an exhibit, but how do you determine if the evidence can additionally be admitted? The Code goes on to explain "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Louisiana, this Code of Evidence, or other legislation. Evidence which is not relevant is not admissible."[18] Lastly, the Code cautions that "[a]lthough relevant,

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16 *See Guzzardo v. Town of Greensburg*, 563 So. 2d 424, 426 (La. App. 4th Cir. 1990); *Matter of Fox*, 504 So.2d 101 (La. App. 2d Cir. 2/25/1987; *but see, Bolton v. Willis-Knighton Med. Ctr.*, 47,923 (La. App. 2 Cir. 4/24/13), 116 So. 3d 76, 89–90 ("We find no error in the trial court's admission of these documents into evidence. The record before us clearly shows that during the testimony of each witness, the subject reports and documents were identified and reviewed. The witnesses' memories were effectively refreshed. *See* La. Code. Evid. art. 612. Thus, regardless of the timing of their admission into evidence, these documents were properly authenticated through the testimony of their preparers. Moreover, most of the documents were viewed by the jury without objection from the defense. Ultimately, any technical error in the unorthodox introduction of evidence was harmless considering the cumulative nature of the evidence received.").

17 LA. CODE EVID. art. 401.

18 LA. CODE EVID. art. 402.

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."[19] Article 403 represents a significant authority for courts to limit otherwise relevant and admissible evidence as provided for under articles 401 and 402; indeed, the official revision comments explains "Taken together, these three articles reflect a positive, receptive attitude towards the admissibility of relevant evidence, tempered, however, by the broad authority conferred upon the court to exclude evidence that fails the balancing test prescribed in Article 403."[20]

C. Foundation Requirements for Real, Illustrative, Demonstrative and Documentary Evidence

In order to introduce any evidence into the record, it requires the laying of a proper foundation. The evidence must be introduced through testimony (unless the parties stipulate as to the authenticity and admissibility of the testimony), and the witness needs to establish:

- They are familiar with and can authenticate the evidence; and,
- They can confirm the accuracy of the evidence (e.g., it has not been altered and it is a fair and accurate depiction of the subject in question)

Additionally, the attorney after offering the evidence for introduction into the record may face objections, ranging from a need to establish the relevance of the evidence to defending against a hearsay objection. These are discussed in more detail in Section D, below.

Do you need to introduce the evidence into the record, or do you merely intend to use it to assist the trier of fact as they follow along with the testimony, particularly that by an expert? Think about this question carefully; oftentimes, most objections can be avoided if you simply intend to use the evidence in an illustrative or demonstrative manner. The effect is largely the same, but if it is not introduced and accepted, it will not be part of the court's record and will therefore not be considered in any potential appeal.

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19 LA. CODE EVID. art. 403.

20 LA. CODE EVID. art. 401, Off'l Rev. Cmt. (c) (1988).

If this does not pose a problem for you, you may be better served simply using the evidence in a demonstrative or illustrative fashion. If you choose to do so, your opponent's objections will likely be limited to whether the evidence will assist the trier of fact or mislead, prejudice, or confuse the trier of fact. LA. CODE EVID. art. 403.

D. How to Handle Evidentiary Objections

The best way to handle evidentiary objections is to plan ahead for them. Meeting and conferring with opposing counsel prior to counsel can help you avoid (most) surprises. Still, familiarity with, if not a strong command of the rules will assist you immensely at trial. The most common objections which may arise concern arguments of hearsay (which can include photographs and other documentary evidence) or Rule 403 arguments (i.e., the probative value is outweighed by the prejudicial value of the evidence). Be sure to identify in advance what hearsay exception(s) may apply; oftentimes, simply having testimony from the person who took the photograph, identifying it as a true and accurate (and unaltered) representation of what occurred can overcome most objections. In the event of a 403 objection, highlight the importance to your case and be sure to minimize, while addressing, any claimed prejudice. In a bench trial, the judge may be more willing to allow evidence in under the theory she can weigh the evidence appropriately. Still, do not count on your evidence "getting in" just because you face a bench trial as opposed to a jury trial.

E. Preparing Evidence and Planning for Admissibility Issues Before Trial

Planning is once again everything. Agreeing with opposing counsel on stipulations as to the authenticity and admissibility of certain exhibits can significantly streamline your trial process, and both the judge and jury will appreciate the work that goes into it. You will as well with the reduced level of stress. Was this piece of evidence exchanged in discovery? Be sure to have that information, and pleadings, available in case this common objection comes up; more often than it should happen, an opposing attorney may claim the evidence was never provided in discovery, and the responding

lawyer cannot respond with the certainty required by the court. As one example, the attorney may respond "I don't have the discovery here, but I am sure I produced it!" Consider how much more persuasive this response is: "I produced it to opposing counsel in our response to plaintiff's second request for production on this date, and here is a copy of that pleading for the court." Organizing all of your evidence with a summary of when it was produced, who can authenticate it, and pre-prepared responses to objections can significantly improve your trial flow.

For critical evidence, you may wish to file advance motions in limine to permit the introduction of evidence, laying out your arguments to the court in briefs and, if applicable, in oral arguments. While commonly thought of as an exclusionary pleading, motions in limine can be filed to exclude, limit, or permit evidence. One note on these motions - be sure to check your court's local rules along with the scheduling order issued by the court; there are often deadlines for these motions, typically to be filed if not heard 60+ days before trial, so be sure not to put this off. Particularly if you plan on filing a motion to permit evidence, be sure to give yourself time to develop cogent and concise arguments in support.

If your motion or offer of the evidence at trial is unsuccessful, be sure to make a proffer of the evidence to preserve the record in the event of an appeal. With that being said, whether your evidence is denied via motion in limine or at trial, always have a Plan B - is there other evidence, even if less persuasive, which can get the point across without suffering from the same admissibility issue? Oftentimes lawyers fixate on a certain piece of evidence, or a certain line of testimony, missing the bigger picture. Determine how the evidence fits into your story, and what other evidence can accomplish the same task? Oftentimes, there is another piece of evidence which can do the same if not a better job as the questionable evidence you wish to introduce.

F. Issuing Trial Subpoenas to Witnesses

This is a rule which should be simple but lawyers often make mistakes on. The rules for issuing subpoenas vary among state and federal courts, among their local rules,

and among individual judges. Read everything you can on these requirements! When does the subpoena need to be filed by? How can it be served? Does it need to be served with a witness fee? Do you need that witness? Trial subpoenas can be a significant expense, not just for the attorney time but also in terms of the court costs; culling these costs is to your client's advantage and it is your ethical responsibility to do so as you can as their fiduciary agent. Can a prior deposition taken in this or another case be used at trial in lieu of their live testimony? If the deposition contains all of the testimony you need, consult the relevant rules; you may need opposing counsel's consent, or it may be admissible as of right. It never hurts to consult and confer with your opposing counsel, but do not wait until the day before your trial subpoenas need to be ordered - this will inevitably raise the costs and the stakes for everyone involved.

Be sure you are familiar with the trial court's local rules and practices; e.g., at Civil District Court in New Orleans, judges will typically not enforce a trial subpoena unless issued and served at least 30 days before trial. Practices such as these can vary from court to court (and even among judges in a court).

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This constitutes a broad overview of common problems and pitfalls lawyers face in offering and introducing evidence, as well as in utilizing demonstrative aids. Be sure to consult the local rules, and when in doubt, in addition to research, it never hurts to ask the judge's law clerk - they are often an invaluable resource!