

How to Lay and Oppose Evidentiary Foundations

A sharp opponent will object if you overlook any foundational elements

Remembering all the elements required to lay a proper foundation can be difficult. Take the simple admission of a letter.

First you have to authenticate the document, then demonstrate that it complies with the best evidence rule if its terms are in issue, then show that it is not hearsay if you intend to use its contents.

Quick-reference solution

Here is a handy courtroom guide that will keep you from overlooking any required foundational elements, and point out when your opponent has. John Tarantino's *Trial Evidence Foundations* contains the rule, elements, tactics, and key cases for most foundations.

Designed for use when time is short, the book is formatted for quick reference. Each foundation is tightly covered in three or four pages. Frequent headings and key words are emphasized with bold type, and case citations and descriptions are condensed with small type. 20 sturdy divider tabs, each printed with a foundation category and color-coded, quickly direct you to the correct page.

Covers most foundations

Witnesses

1. Competency
2. Establishing credibility
3. Attacking credibility
4. Rehabilitation

Opinion

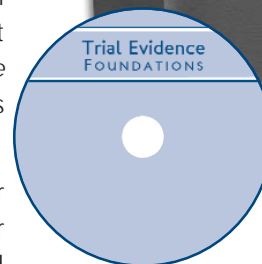
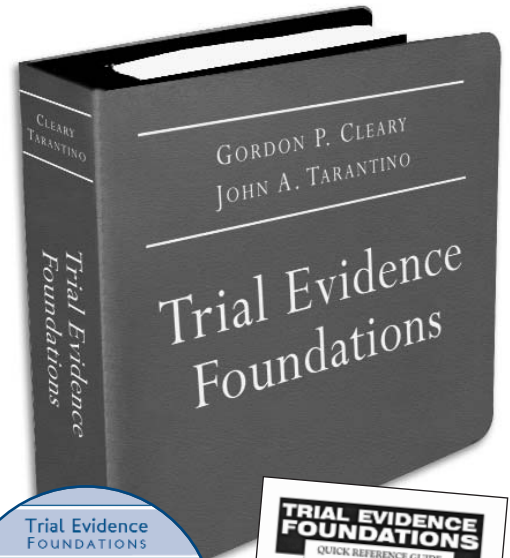
5. Lay witnesses
6. Experts

Authentication

7. Writings
8. Oral statements
9. Recordings
10. Real or physical evidence
11. Demonstrative evidence

Hearsay

12. Admissions



A compact courtroom guide containing the rule, elements, tactics, and key cases for most foundations. \$99

13. Declarations
14. Records
15. Excited utterances
16. Present sense impression

Privileges

17. Waiver
18. Specific privileges

Contents and sample pages inside...

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993). DNA identification evidence satisfies Daubert standard as the evidence was **relevant, helpful** to the jury in determining whether the defendants were guilty of the crimes charged, and where both the **theory and technique** of DNA identification have been **tested**. The assessment of the validity and reliability of the conclusions drawn by the expert in respect of DNA testing is a jury question. It is for the judge to determine only whether the principles and methodologies are scientifically valid and accepted. Any criticisms about the specific application and procedures used, or questions about the accuracy of the DNA test results, go to the weight of the evidence and not to its admissibility.

§423.1 Technical Experts

Experts may testify regarding technical issues, including mechanical, chemical and engineering sciences. These experts can play important roles in environmental, product liability, personal injury and criminal cases. Remember that the amendments to Rule 702 now make clear that even if testimony is technical rather than scientific, the *Daubert/Kumho Tire* standards still apply to that testimony. This section deals with the introduction of technical expert testimony and special problems that may arise during that introduction.

Elements

Following are the foundational elements for the introduction of technical expert testimony.

Qualifications

- The witness has specialized training in some technical field (mechanics, mold making, tool making, metallurgy, etc.).
- The witness has acquired advanced degrees from educational institutions.
- The witness is licensed or certified to practice his skills in a particular field.
- The witness's practice in the field is for a substantial period of time.
- The witness has published texts, treatises, articles or reviews in peer reviewed journals in the particular field.
- The witness has taught courses or seminars in the particular field.
- The witness belongs to appropriate professional societies or organizations in a particular field, particularly those that issue credentials.
- The witness has previously testified and has been qualified as a technical expert before a court or administrative body.

1. The Rule. A concise statement of the scope, application and rationale of the rule underlying each foundation.

2. Elements. The heart of the book, this section lists each fact which must be established to build a proper foundation.

3. Tactics for the proponent: anticipating and avoiding the possible objections to your foundation, meeting any objections made, alternative admission procedures, expected judicial reactions, and tactics of the opposition.

- Alternatively, because of practical training, skill and work history, the witness has specialized knowledge and training in the technical field.

Bases of Expert's Opinion

- The expert's testimony meets the *Daubert/Kumho Tire* codified standard in Rule 702:
 - The testimony is based upon sufficient facts or data;
 - The testimony is the product of reliable principles and methods; and
 - The expert witness has applied the principles and methods reliably to the facts of the case.
- The technical expert explains the data, studies or other information he has compiled, analyzed or reviewed.
- The technical expert explains that the data, studies or information he has reviewed, analyzed and compiled, is of the type reasonably relied upon by experts in his field.
- If the witness is testifying from assumed facts (i.e., a hypothetical question), then:
 - the facts that the examiner wants the technical expert to assume must be framed in the form of a question
 - the technical expert must rely upon his or her particular training, knowledge, skill and experience to draw an inference from those facts set forth in the hypothetical

The Statement of the Technical Expert's Opinion

- The technical expert states that he or she has an opinion.
- The technical expert states that the opinion is based upon "a reasonable degree of professional certainty" or "a reasonable probability."
- The technical expert states his or her opinion.

Explanation of the Technical Expert's Opinion

- The technical expert explains the opinion.
- The technical expert explains the significance of each bases for the opinion.
- The technical expert demonstrates how each basis contributes to or supports the opinion.

Tactics

- If you are seeking to elicit technical expert opinion:
- Establish a proper foundation for the technical expert's testimony.
 - The expert's testimony meets the *Daubert/Kumho Tire* codified standard in Rule 702:
 - The testimony is based upon sufficient facts or data;
 - The testimony is the product of reliable principles and methods; and
 - The expert witness has applied the principles and methods reliably to the facts of the case.
 - Demonstrate that the technical expert's testimony, as well as any data, reviews, studies or other information relied upon, are of the kind reasonably relied upon by other technical experts in the field.
 - Demonstrate that the technical expert's testimony will assist the trier of fact in resolving issues and disputes in the case.
 - Demonstrate that the technical expert's testimony will aid the trier of fact in understanding testimony.
 - Have the data which serves as the underlying support for the technical expert's opinion available, e.g., underlying studies, data, charts, graphs, informational reports and the like.
- If you are opposing the technical expert testimony:

- Challenge whether the expert's testimony meets the *Daubert/Kumho Tire* codified standard in Rule 702:
 - Argue that the testimony is not based upon sufficient facts or data;
 - Argue that the testimony is not the product of reliable principles and methods;
 - Argue that the expert witness has not applied the principles and methods reliably to the facts of the case.
- Review all underlying data, information and studies relied upon by the technical expert.
- Argue that the contents of the underlying data, if otherwise inadmissible hearsay, may not be read to the jury (e.g., the technical expert's opinion cannot be used as a means of placing otherwise inadmissible hearsay before the trier of fact).
- Remind the court that under the amendments to Rule 703 it is only the expert's opinion that may rest on inadmissible data; and
- The rule presumptively precludes disclosure of inadmissible data to the jury; and

...and for the opponent: supporting your objection, alternative arguments, effect on the jury, judicial preferences, and protecting the record.

4. Key cases. The names, citations, facts, and holdings of significant state and federal cases are listed. This section gives you fast, on-the-spot citations for the court, something any judge is sure to appreciate.

- The rule requires a balancing test, which is weighted against disclosure whenever the judge considers the issue.
- Where appropriate, seek an opportunity to voir dire the technical expert regarding qualifications or the basis of the opinion outside the presence of the jury.
- Attack the foundation of the technical expert's opinions and testimony.
- Where appropriate, argue that the technical expert's opinion is not based upon the kind of information, data or material reasonably relied upon by technical experts in the field.
- Where appropriate, argue that the technical expert's opinion is cumulative of other evidence. Accordingly, a needless presentation should be excluded under Rule 403, or the opinion otherwise is inadmissible under Rule 403 as being misleading, confusing or unduly prejudicial.

Cases

- Engelbreten v. Fairchild Aircraft Corp.*, 21 F.3d 721 (6th Cir. 1994). The rule of evidence allowing an expert to rely on outside material to form an opinion does not allow admission of the opinion contained in written documents through direct examination.
- Hammond v. International Harvester Co.*, 691 F.2d 646 (3rd Cir. 1982). In a products liability case, a witness with substantial experience, but no academic credentials, allowed to testify as an expert.
- Soo Line Rail Co. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. 1977). A witness who was skilled in the technical design of rail cars was permitted to interpret complex construction specifications and testify as an expert.
- Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185 (4th Cir. 1990). If an expert's testimony is within the general knowledge of jurors, it may properly be excluded under 702 and 403.
- Linkstrom v. Golden T. Farms*, 883 F.2d 269 (3rd Cir. 1989). Even though jurors had some knowledge of farming, the court abused its discretion in excluding a farm safety expert from testifying in a wrongful death action following the death of a migrant farm worker in a flatbed truck. The testimony could have been useful in assisting the jury in determining the appropriate standard of care.
- DuSilva v. American Brands*, 845 F.2d 356 (1st Cir. 1988). The trial court properly allowed testimony of an engineer even though engineer had only limited experience with machine at issue, but had 20 years' experience as an engineer and experience evaluating and recommending safety devices for machines.
- Polston v. Boomershine Pontiac-GMC Truck, Inc.*, 952 F.2d 1304 (11th Cir. 1991). A mechanical engineer may base an opinion on a reasonable degree of engineering certainty, but if the engineer lacks medical training, he may not offer an opinion within a degree of medical certainty.
- Sherbert v. Alcan Aluminum Corp.*, 66 F.3d 965 (8th Cir. 1995). An individual with 11 years' experience operating a forklift was allowed to testify as a technical expert witness on forklift operation and procedures.

Abbreviated Contents

Introduction — Tactics

Laying a Foundation • Witness Preparation • Direct Examination • Cross-Examination • Requests for Admissions • Trial Tactics: Deficiencies, Objections, Offers of Proof, Rule of Completeness, Harmless Error Doctrine • Practice Pointers: Trial and Evidence Preparation Checklist, Trial Notebook

Trial Proceedings and Motions

Voir Dire • Opening Statements • Closing Arguments • Motion in Limine • Motion to Strike • Motion to Voir Dire • Request for Limiting Instructions • Motions Heard Outside Presence of Jury • Practice Pointers

Witnesses

Competency: Specific Areas — Personal Knowledge, Child Witness, Witness Spouse • Attacks on Competency: Dead Man's Statutes (Survivorship Statutes), Felons, Language Barriers, Inability or Unwillingness to Take Oath, Testimonial Privileges, Insanity, Judges, Jurors, Hypnosis • Witnesses Called by the Court • Credibility: Establishment — Prior Identification, Fresh Complaint • Credibility: Attack — Impeachment: Prior Bad Acts, Character Trait of

Untruthfulness, Convictions, Bias, Prior Inconsistent Statements, Deficiencies in Mental or Physical Capacity, Exclusion of Witnesses, Impeachment of a Party's Own Witness, The Uncalled Witness Rule • Rehabilitation: Prior Consistent Statements, Character Trait of Truthfulness

Opinion Evidence

Lay Witness • Experts: Medical, Economic, Forensic, The Daubert Standard, Eyewitness Identification, Battered Woman Syndrome, Battered Child Syndrome, Rape Trauma Syndrome • Expert Compensation

Authentication

Writings: Private, Business, Official • Oral Statements • Audio Recordings • Video Recordings • Real or Physical Evidence • Demonstrative Evidence: Specific Forms, Miscellaneous Scientific Evidence

Hearsay

Assertive Versus Non-Assertive Conduct • Hearsay Versus Non-Hearsay Purpose: Prior Statement by Witness, Former Testimony • Admissions: Personal, Adoptive, Vicarious, Co-Conspirator Statements

• Declarations: Against Interest, State of Mind, Bodily Condition, Anticipation of Death • Records: Business, Official, Prior Testimony, Past Recollection Recorded, Present Recollection Refreshed, Other Hearsay Exceptions • Excited Utterances • Present Sense Impression

Privileges

Waiver: In Court, Out of Court • Absolute Work Product Privilege • Self-Incrimination • Attorney-Client • Physician-Patient • Clergyman • Trade Secrets • Government Information (Identity of Informants, Military Secrets, State Secrets) • Journalist's Privilege • Accountant-Client

Other Evidence Rules

Original Documents (Best Evidence Rule) • Compromise Statements: Civil and Criminal • Subsequent Remedial Measures • Consent Orders/ Stipulation: Confessions, Jury Views • Judicial Notice: Presumptions • Prior Convictions/ Sentence Enhancement • Liability Insurance • Character and Habit Evidence • Methods of Proving Character • Practice Pointers: Sanctions, Electronic Surveillance

About the Authors

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He is recognized in *The Best Lawyers in America* in the field of litigation, was recognized by *Rhode Island Monthly* as one of the best lawyers in Rhode Island, and was selected by *Lawyers Weekly USA* as a Lawyer of the Year. Mr. Tarantino is a former president of the Rhode Island and New England Bar Associations.

About the Book

Trial Evidence Foundations contains 450 letter-sized pages in a tabbed 3-ring binder. This portable collection of predicates is organized for quick reference before and during trial. Use it to lay foundations in federal and state courts for civil and criminal cases.

Included at no extra charge is an intuitive, full-text CD, which requires no installation before use. It may be searched by key word, case name, topic, or form. The CD's 20 chapters are also provided in Word in case you don't want to work with the CD's search program.

\$99 buys the book and CD. The book is updated annually for \$59.99 with replacement pages and a new CD. Both the book and its update are sold on a 30-day trial basis, and may be returned if not to your liking. The annual update service may be cancelled at any time.

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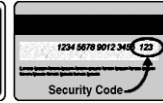
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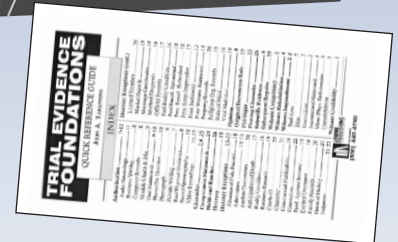
Solidify Your Foundations

Avoid objections of improper foundation with this quick-reference trial preparation tool



trial Evidence Foundations provides step-by-step instructions for laying objection-proof foundations. For each foundation, the book provides in three or four pages:

- A quick summary of the rule underlying the foundation
- A practical checklist of the required foundational elements
- Tactics to follow, whether you are laying and opposing the foundation
- A small-type listing of the key cases to cite to the judge



Includes a free 28-page, pocket-sized pamphlet listing the key elements of 60 common foundations

Sample pages and table of contents inside...