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It's Amazing What You Can Find in Those Books: Top Ten Underutilized Rules for the Criminal Law Practitioner

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IT'S AMAZING WHAT YOU CAN FIND IN THOSE BOOKS: TOP TEN UNDERUTILIZED RULES FOR THE CRIMINAL LAW PRACTITIONER

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The title of my presentation is "It's Amazing What You Can Find in Those Books," and what I mean by that is – you should never assume that you know how to do something no matter how long you have been practicing law. One of the best things you can do if you're trying cases, no matter how long you've been doing it, is to take out the rule book and re-read the Rules of Evidence and the Rules of Criminal Procedure. I learned that many years ago from a great lawyer that I started practicing with, Bob Ritchie. The first time I was ever going to try a case with him, we were frantically getting ready and we had gotten discovery dumped on us at the last minute that we were trying to go through, and I ran into his office to coordinate, and I said, "What are you working on?" He answered, "I'm reading the Rules of Criminal Procedure." He said that was the best thing that you could possibly do for getting ready for trial, and I think that's exactly right. If you'll do that, I guarantee you every single time that you go through these rules, you'll say, "Huh, I never saw that before!" It'll give you a new idea. When you read the rules in a different context when you're working on different cases, reconsidering the rules will give you different tactics that you can use that you wouldn't have come up with before.

Sometimes I don't quite make it through all of the rules. Sometimes I'll cheat and go through the table of contents and see something in particular that I need to look at. But simply opening the book will increase your confidence level and I guarantee there will be things you find that will apply to situations that you are dealing with that didn't mean the same thing when you looked at them before you were really in the context of the particular case. So, the phrase is something that I used in kind of a smart aleck way in response to

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another lawyer that I used to practice with. Several times, he would ask me a question about how to do something and I would turn to the rule and show him and say, "You'd be surprised what you can find in the book if you actually look at it." Of course, you don't actually have to use a *book* now, you can look it up on your computer.

I put together a top ten list of things you can find in these books that I think are really underutilized, and the ways that you can use these things practically. As I've gotten older, I probably think a lot less about theory and policy, and I have become much more interested in using these rules to get the best possible result for the clients that I'm representing at the time. I'm aware that in a top ten list situation you usually start with number ten and build up to number one, but I'm not going to do it that way because I'm not sure how much time I have so I don't want to have to end before I get to number one.

NUMBER 1 – PUBLIC RECORDS

I'm going to start with Rule of Evidence 803(8).[1] You can get all kinds of facts into evidence in your trials just by using Rule 803(8)[2] – public records. The theory behind hearsay exceptions is that in certain situations hearsay is likely to be reliable. We all know that people don't lie when they're dying, and similarly, the theory is that we all know that the government always tells the truth, so government records and documents are admissible under a hearsay exception. Some only think about this exception in terms of complex civil litigation, but you can make great use of 803(8)[3] in the criminal law context. You can see that under the state rule, public records and reports are admissible if they're compilations, if they set forth the activities of the office or agency.[4] Likewise, under the federal rule, if it sets out a matter observed while under a legal duty to report. In the federal rule, you will see that you can admit a public record against the government in a criminal case that has factual findings from a legally authorized investigation.[5] Think about how broad that is. There are government reports and factual findings on *everything*. You can go to agency websites and research any particular topic that you have in a case. Sometimes you can find all kinds of contradictory information, but you can mine those for findings that support your theory and then all you have to do is pull those reports out, and most of those documents are self-authenticating. You can then offer them as exhibits in trial.

1. Fed. R. Evid. 803(8).
2. *Id.*
3. *Id.*
4. Tenn. R. Evid. 1005, 1006.
5. Fed. R. Evid. 803(8).

I first used this rule a long, long time ago and I didn't know about it when I got the case. I learned about in a contract fraud case where there had been a Department of Defense inquiry, and as part of that inquiry there was a report produced that said that all the contractual elements had been complied with. So, once we were able to find the report, we were able to use that as an exhibit. The rule has recently been changed if you now look at the federal rule, if you look at bullet point "B" there at the bottom, it says, "It is up to the opponent of admission to show that the document or report is not trustworthy."[6] Presumptively, it would be admissible under the rule. Think about the following question when you're researching a factual topic that you're trying to prove. What governmental sources are out there that you can use especially on behalf of a criminal defendant?

NUMBER 2 – DEPOSITIONS

Next, I would like to talk about depositions. Rule 15 of the Rules of Criminal Procedure.[7] How often have we said you *cannot* take depositions in a criminal case? That is not true. There's a specific rule that allows depositions to be taken in criminal cases, and it is both in the federal and the state rule. I've taken depositions in a criminal case, although you can't take discovery depositions. The purpose of the deposition has to be to preserve testimony. I think prosecutors are much, much better at thinking about taking depositions than defense counsel usually are, because when this comes up most of the time is a situation where a prosecutor has a witness whose health is in question. Before trial, they'll apply for leave of court to take the person's deposition. Defense counsel can do the same thing. If there is a reason why there is an exceptional circumstance why you'd really much rather take someone's deposition than subpoena them to trial, think about asking the court for permission to take a deposition. You can also do it by agreement if there's a situation where both sides would be interested in taking a deposition for proof, so it doesn't hurt to ask the other side if they would be willing to take a deposition. Then, if you file a motion to take deposition, the worst that could happen is that the judge could say no. Think about whether there is a tactical reason and an exceptional circumstance why you would prefer to do a deposition in a certain case.

NUMBER 3 – PRE-TRIAL SUBPOENAS

Next is another one of my very favorite rules. In the state system it's Rule 17(d)[8] (1), in the federal system it's Rule 17(c).[9] As you know, in criminal

6. *Id.*
7. Fed. R. Crim. P. 15.
8. Tenn. R. Crim. P. 17.
9. Fed. R. Evid. 17(c).

cases, discovery is fairly limited; it's basically what you get in Rule 16.[10] The prosecution has to give the defendant certain documents in addition to the documents it intends to use in the case-in chief. As trials and areas of criminal law become more complicated, there are times where you need to get documents from a third party that you really can't get, and it's not sufficient to issue a trial subpoena and have someone come to trial with discs full of email that you would never have time to review. Luckily, there is a remedy for that: you can ask the court to allow you to issue a subpoena. The state rule says that the court may directly designate items be produced in court before trial, or before they are to be offered into evidence and that a court can then authorize the parties to review those documents.[11] Again, what you need to do is think ahead about the items that you really need. You can file a quick motion with the court asking for production, for permission to issue subpoenas, and then what you'll want to do is put in a good explanation of why (without setting out your whole theory of why you really need this stuff before trial) you don't want to go on a big fishing expedition but you need to set up what you need. There are factors that you need to show the court – you need to show the court that the documents are evidentiary and relevant, that you can't get them otherwise, that the defendant can't prepare for trial without such production, and that it's not just a general fishing expedition.

That's the general standard. What I would typically do next is attach the proposed subpoena duces tecum to the motion, and sometimes courts will give you a date to issue the subpoena and the subpoenaed party will bring those records and provide them at or before that date. One thing that is really interesting about this rule is (and this is where I think defense counsel forgets to use it) that this rule applies in general sessions court. The reason that it applies in general sessions court in addition to courts of record, is because Rule 1 of the Tennessee Rules of Criminal Procedure[12] specifically says that Rule 17 applies in general sessions court. I have had to argue with a number of sessions courts about their authority. They have it. The rule very clearly applies. If you need something for a preliminary hearing, you could ask the general sessions court to give you a date to get those documents beforehand.

One of the times that I did this was in a case where we had a suppression motion in sessions court that involved a drug dog. We needed the drug dog records, which were pretty voluminous, before the hearing and there was no way to go through everything on the morning of that hearing. Thus, another thing to think about is if the records that you might really need, say you have a case involving a violent crime, if you need to get medical records you may use this method. However, this way, you need to also make sure that the order that you get from the court and the subpoena itself have HIPAA compliance

10. Fed. R. Crim. P. 16.
11. Tenn. R. Crim. P. 17.
12. Tenn. R. Crim. P. 1.

language in them, because otherwise the medical provider will say, "We can't do it unless there's a specific court order that has the magic HIPAA language in there."

There's some dispute over whether you actually have to have court authorization to issue a subpoena under 17(c) or 17 (b)(1). Some people think that as long there is a court date, then you can just automatically issue a subpoena and if there is complaint about it they can file a motion to quash. I think that a better way to handle that situation if you're defense counsel is to ask before you actually do it because you usually have a good explanation. If you get denied a pretrial subpoena, number one, you need to make a record as best you can of the negative effect that the denial had on you in case you want to try to appeal. But also keep in mind that the denial of the motion for a pretrial production subpoena doesn't mean that you can't subpoena those same materials to trial. You have a constitutional right to compel the production of relevant documents to trial, so the standard is actually different. The standard is actually higher pretrial than it is for issuing a valid trial subpoena. Thus, in other words, if you lose don't give up because you can still get material, although you might have to scramble at the time of trial to get it.

This is an example of an order from a federal court authorizing the pretrial production of documents. I was actually proud of this particular one because it was a federal drug conspiracy case and I asked for a subpoena to every single law enforcement agency, the TBI, the FBI, the judicial task force, Cocke County Sheriff's Office, the Newport Police Department to bring in all of their documents related to the case, and the judge not only granted it, he also delayed trial by a day so that he personally could review it to see if there was exculpatory material. It turned out that there was and the material was subsequently provided to us to use at trial. One of the interesting things that the judge said was, "There are some issues in the justice system that are just awkward and present recurring problems and this is one of them." The situation where you have the defendant's right to take information versus bogging down the court system and making the judge review some of those documents to see if we were entitled to them is exactly that type of issue. The court here ended up finding that this was so important that the court was going to err on the side of allowing us to get those documents.

NUMBER 4 – STATEMENTS

The next point is that I think people sometimes forget in discovery, particularly in state court, that they are entitled to the statements of their client. In any kind of situation where there are co-defendants indicted or if the case has been joined for trial, you are also entitled to get those co-defendant statements. Many times those are just as important as your own

client's statements in terms of getting ready for trial and seeing if there is any reason to file a severance motion or a motion to suppress or try to exclude those statements on Confrontation Clause grounds.[13] This is something that is sometimes easy to forget; you are not entitled to only discovery that's relevant to your particular defendant. In fact, under the state rule, it's not just the co-defendant's statements, you're entitled to get all of the discovery that is relevant under Rule 16 to *any* of the defendants that are charged or tried together.[14] I don't think there is a corresponding federal rule. That was one of my tasks when I was trying live by my own advice and say, "you know, it's amazing what you can find in these books."

NUMBER 5 – INTERIM COMMENTARY

One thing that I almost never ever see people use in criminal courts in East Tennessee is a rule that was created a number of years ago. The idea was to improve the experience for jurors and help them in trials. Rule 29.2 allows counsel of either side to make interim commentary during the course of the trial.[15] I don't know about other parts of the state, but I see this done very infrequently. It's a great tool because, many times in the middle of trial, things are both a little bit boring and confusing to the jurors who are trying to figure out what is going on. What Rule 29.2 allows you to do is give them a short statement about why you think this next piece of evidence or the next witness is important.[16] If you can make a short non-argumentative statement, that commentary is permissible. The way to do it is you can say, "Your Honor pursuant to Rule 29.2, I'd like to make a short interim commentary before I call my next witness or before the State calls the next witness." Then, you can tell the jury why you think this person is going to be testifying or indicate what about that person's testimony you really want jurors to focus on and why you think it is important. You can do that before either your own witness or an adverse witness testifies.

I was able to use interim commentary in a first-degree murder trial that involved a former co-defendant who had already been convicted. I subpoenaed him and called him, and then I asked the court to allow me to make interim commentary. I simply said to the jurors, "I am calling the person that I believe committed the murder. And I don't know exactly what he's going to say, but I think you all are entitled to hear from the person who actually killed the victim." The reason that I did that was because I *wasn't* exactly sure what he was going to say, so for one, I wanted to cover myself in case it went really badly, but also I wanted jurors to know that I wasn't associated with this person. I wanted to distance myself from him and tell

13. U.S. Const. amend. VI.
14. Tenn. R. Crim. P. 16, 17.
15. Tenn. R. Crim. P. 29.2.
16. *Id.*

them that beforehand. Since the co-defendant had already been convicted, he really didn't have much to lose and he came in and said, "Well yeah, I stabbed the person and your client didn't really have anything to do with it." That was a way of introducing critical testimony that really could have gone either way, so I think this interim commentary rule is really underutilized.

Either side can use the strategy; frankly, I think it's very helpful to the jury because sometimes the longer the case is, the less of a chance the jury has any idea why you're calling a certain person or introducing an exhibit. I think it's helpful to them to give some explanation during the course of the trial about what's really happening and why you're doing it, and sometimes it doesn't really make sense to wait for closing argument to give them some explanation. Obviously, in court the judge is not going to let you make a speech every single time that you call a witness, so you don't want to abuse that, but maybe once in a trial you can ask to use Rule 29.2.[17] One problem to make note of is that the other side has a chance to respond to what you say, but if you don't do it very often they're usually not prepared to do that.

NUMBER 6 – SUMMARIES

Next is a great rule of evidence, Rule 1006.[18] This is another rule that I think is extremely helpful to jurors and it's also extremely helpful in putting forth your theory of the case. Rule 1006 allows you to introduce a summary, or a chart or excerpts of videos or recordings into evidence.[19] Often you see this with undercover recordings or jail calls, or something similar where there's a ton of material. What you can do with this rule is compile a summary, but also, of course, your summary is going to have the portions which are favorable to your side of the case. You can then put it in the form of a chart or something that you might want to use in closing argument. The format of the summary is what would normally be considered a demonstrative aid if you were doing a closing statement for the prosecution in a robbery that linked the defendant's whereabouts over a three or four-hour period. The thing about this rule is that if you use Rule 1006 and make it a *summary* of admissible evidence then you can actually admit it as an exhibit that then becomes substantive evidence that the jury can rely on and it goes into the jury room with them during deliberations.[20]

The rules under 1006 are pretty simple. The material has to be "voluminous." There used to be cases that said, "too voluminous even to bring it into court," but that's actually not the majority rule. Most courts say that you can use

17. *Id.*
18. Fed. R. Evid. 1006.
19. *Id.*
20. *Id.*

1006 summary even of documents that have been made exhibits.[21] So, you can actually summarize things that have been brought into evidence, and I think that the U.S. Attorney's Offices are excellent at this. What they'll often do is take a huge document case and then they'll prepare a summary of their exhibits and then they'll call an FBI agent to go over the summary with the jury–which allows them to almost give a closing argument through testimony. They go point by point, summarizing this voluminous evidence. Essentially, you could set out your theory of the case in a chart that actually comes in. This slide is an example of that process used in a fraud case and it sets out in a chart for each count that highlights the most important documents. Then, prosecutors could explain the reason they thought those documents were significant and then they had an agent testify about each one of those and each one of the transactions. The agent, who had no personal knowledge of this stuff, was able to testify and explain to the jury their entire theory. Thus, you could use Rule 1006 as an extremely, extremely important tool, especially in a complicated case.

You can also think about using the summary rule for things like summarizing location data if you were able to get that. You might need an expert to prepare and talk about that, but you could summarize location data or you could probably get readings off of someone's iPhone where locational data about where they go most often is stored. That might not even need an expert – just make a chart of it yourself and have someone testify about it. There are all kinds of really visual ways you can use 1006 to give jurors a visual picture of your theory of the case, and I think that's another tool that people probably do not use enough.[22]

NUMBER 7 – CUSTODIANS AND AUTHENTICATION

Next on my top ten list are rules regarding the use of a records custodian and authentication. You might not think that sounds very exciting, but sometimes you can get great testimony from a records custodian. I wanted to talk about the rules around that and some strategy about whether you want to call a records custodian or whether you want to try to use an affidavit and get in records that way. You know the rule about the admission of business records and then there's a rule, Rule 902(11), that basically allows for business records to be authenticated by an affidavit so you don't actually have to call a witness to get these business records into evidence.[23] You can, with phone records for example, issue a subpoena for the phone records. You can say, "You don't have to come to court if you give us this affidavit that says these are made in the regular course of business activity at the time, near the time, by the person whose job it was to do it." That is a very convenient way to get

21. *Id.*
22. *Id.*
23. Fed. R. Evid. 902(11).

evidence admitted, and all you really have to do is get that affidavit and then provide notice to the other side so that they can object to it if they want to. Sometimes you'll be presented with a request for a stipulation about the admissibility of certain records, and there may be some strategic reasons not to do that because sometimes you can get really good evidence in through the examination of a records custodian.

There is also a little bit of a sub-issue here in trying a criminal case, especially if you are defense counsel because if you're taking a huge beating at trial sometimes it's just nice to be able to cross-examine somebody who doesn't actually know anything about the case. You get a little break that way; you have a nice interaction with this person from the bank that brought the records and you get a little break from gruesome photos or whatever it is. But, there are also some other tactical issues. Sometimes people who are brought in as records custodians don't know anything about the records, and so you can do an effective cross-examination that can undercut the credibility of the other party who called them. Justice Bivins is speaking this afternoon and when he was a trial judge we had a situation like that where there were a bunch of bank records and the custodian of the other side had never seen them before. The other side just tried to get them in through this person who really didn't even know if they were bank records or not. Sometimes you can hold the other side's feet to the fire that way and it can undercut the reliability of the records if you can point out to the jury that these may be records that came in the box from the business, but this person doesn't really know who made the records, what the circumstances were, whether they were reliable, or whether there can be mistakes in the records.

The other thing that I think people fail to do with records custodians is get into the *content* of the records themselves. Sometimes you can use a records custodian to bring out really important facts in your case just by looking at and reading the records that they brought that they really don't know anything about. You can get all that stuff in front of the jury through a person who's "safe" because they don't know anything about the case and they can't be examined about bad things regarding one side or the other. Let me give you an example: one of the last cases that we did, opposing counsel subpoenaed some court files and they brought in the clerk simply to say, "Are these the records that we subpoenaed?" "Yes." "No further questions." There was some great stuff in these records that set out what our theory of the case was, so what you can then do with the most important parts of the records is put them up on a screen right then and there and highlight the parts that are important to your case. You can read the segments or you can have the witness read them, and you can say, for example, "This witness was arrested in circumstances where the police had to tase him, isn't that what it says?" "Well, yes." And thus you're able to get in some really important things from the documents themselves when the other side has no way of undercutting

that because the witness doesn't know anything else other than what the document says. That's my speech about fun with records custodians, and I think people just forget to do that because they think, "Well I'm going to get these records in then we'll just use them in closing argument."

NUMBER 8 – IMPEACHMENT OF HEARSAY DECLARANT

Rule 806 is another rule that many forget about involving impeachment of a hearsay declarant.[24] This is a great rule because any time the other side gets hearsay admitted though an exception, you get to impeach that declarant even though the declarant is not there using any of the methods that would be available to you if that person was on the stand. As trial lawyers we forget about this rule because we don't think about being able to impeach someone who isn't there. Any time the other side gets in hearsay by present sense impression or something like that, you can go after that declarant who is not there, and you could even use interim commentary to explain to the jury why you're doing that. You're then able to put in evidence of that declarant's bias or prejudice if you have evidence of their capacity, Rule 608 character and conduct, any prior convictions that you have a record of, or inconsistent statements.[25] Of course, since they're not there, you don't have to ask them about the inconsistent statements.

NUMBER 9 – BEST EVIDENCE

Rules 1002 and 1003 are not particularly exciting, but they have to do with the Best Evidence Rule.[26] Generally, the original document involved in a case is required, but there's also Rule 1003 that says that a duplicate is admissible.[27] Normally, you don't think about that; you think that typically you can hand them copies and that will come in. There was a case a couple years ago called *A-Action Bonding Company* and what happened in that case involved a dispute between bondsmen.[28] One of them went down to jail and pulled the jail recordings and videotaped the competing bondsman's meeting with someone because there was a jail video system. He recorded the jail system on his cell phone and then that recording was used in evidence. The Court of Criminal Appeals said that the recording should have been excluded because it wasn't a duplicate, and because no one could testify that it was exactly the same as the original jail recording that nobody had anymore. The reason I think this is an important rule is because it may apply not just to videos, but to copies of electronic evidence like emails or text messages that

24. Fed. R. Evid. 806.
25. Fed. R. Evid. 608.
26. Fed. R. Evid. 1002, 1003.
27. Fed. R. Evid. 1003.
28. *In re A-Action Bonding Co.*, No. M2013-01526-CCA-R3CD, 2014 WL 524607 (Tenn. Crim. App. Oct. 15, 2014).

people pull from a different format. If the other side can't show that they possess an exact duplicate of the original, then there might be grounds to exclude it.

NUMBER 10 – WITNESS STATEMENTS

Finally, I would like to discuss Rule 26.2, which is the rule that says that opposing counsel has to provide witness statements, although they only have to do it after the witness testifies on direct.[29] Remember, also, that it doesn't just apply at trial, it also applies at most motion hearings. This could be one reason to go forward with the motion hearing if you have a witness that you wish to get discovery about and you can find out what they have said in the past. Look at Rule 26.2, and understand that it has a much broader application than just at trial.[30]

29. Fed. R. Evid. 26.2.
30. *Id.*