EVIDENCE 101 FOR THE FAMILY LAW PRACTITIONER

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1. Source and purpose of Washington evidence law

Washington adopted the Federal Rules of Evidence in the late 1970s. For the most part, Washington’s rules are the same as the federal rules. If you learned the Federal Rules of Evidence in law school, this knowledge will serve you well in Washington, with only a few exceptions (see heading 2, below).

ER 102 states: “These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”


When seeking to overcome an objection in a borderline situation, remind the court that under ER 102, the ultimate purpose is to see that “the truth may be ascertained.”

2. Objections and rulings – Generally

Objection. ER 103 governs the mechanics of objecting to the introduction of evidence and making an offer of proof as to excluding evidence.

The rules of evidence do not operate by themselves, nor does the trial court have any obligation to invoke the rules of evidence on its own initiative (and normally it will not do so). If you have an objection to your opponent’s evidence, you must say so.

In the absence of a proper objection, the evidence becomes part of the evidence in the case and may be considered by the trier of fact. Matthias v. Lehn & Fink Products Corp., 70 Wn.2d 541, 424 P.2d 284 (1967).

To state the same rule another way, the Court of Appeals is a court of review. In the absence of an objection to evidence at the trial court level, and a ruling thereon, there is nothing for an appellate court review. A objection to evidence made for the first time on appeal will normally be ignored.

Ideally, an objection should be made after the question is asked but before the witness answers, or prior to the introduction of an exhibit.

If the witness answers before an objection can be made or if the witness gives an unresponsive answer, the objection should nevertheless be made as soon as the basis for an objection becomes apparent. Lundberg v. Baumgartner, 5 Wn.2d 619, 106 P.2d 566 (1940). A later objection should be phrased in terms of a motion to strike the objectionable evidence, and in a jury trial, counsel should request that the court instruct the jury to disregard the evidence.

Offer of proof. The foregoing discussion concerns your objections to your opponent’s evidence. When you are in the reverse situation -- when your opponent objects and your evidence has been excluded – you should make an offer of proof, thus creating a record for subsequent motions and a possible appeal. An offer of proof assists the trial court in evaluating its ruling and assists the appellate court by assuring that it has an adequate record to review the merits of the evidentiary issue. An offer of proof may be made as a matter of right. Gray v. Lucas, 677 F.2d 1086 (5th Cir.1982).

No particular procedure is required by the rule. Counsel may state orally or in writing what the witness is expected to say. State v. Jackson, 46 Wn.App. 360, 730 P.2d 1361 (1986). The witness may furnish an affidavit for the record. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985). The most effective method, and the method that the appellate courts prefer, is to have the jury excused and to question the witness on the record as if the jury were present.
If the rejected evidence is a document or some other exhibit, counsel should ask that the exhibit be made part of the record for purposes of appeal, and should be sure that any colloquy with the judge or clerk is recorded by the court reporter. Unless these steps are taken, appellate review may be precluded. Sturgeon v. Celotex Corp., 52 Wn.App. 609, 762 P.2d 1156 (1988).

3. Objections and rulings – Special considerations in nonjury proceedings

Although the rules of evidence fully apply in nonjury trials, evidentiary battles are usually won or lost at the trial court level. The appellate courts are extremely tolerant of trial court rulings on evidence in nonjury cases, and reversals are rare because of the presumption that the trial court disregarded inadmissible evidence. State v. Melton, 63 Wn.App. 63, 817 P.2d 413 (Div. 1 1991) (“A trial judge is presumed to be able to disregard inadmissible evidence, thus avoiding any prejudice to the defendant”).

Erroneous rulings that admit evidence are disregarded on appeal if there is substantial competent evidence to support the court’s findings. In In re Dependency of S.S., 61 Wash. App. 488, 814 P.2d 204 (Div. 1 1991); Primm v. Wockner, 56 Wash. 2d 215, 351 P.2d 933 (1960).

In case of doubt, it is said, the judge in a nonjury case should admit the evidence. Nielsen v. Northern Equity Corp., 47 Wash. 2d 171, 286 P.2d 1031 (1955).

Because of the trial court’s broad discretion in nonjury cases, it is sometimes said that in a nonjury proceeding, it is more important to know the judge than to know the rules of evidence. This is probably an overstatement, but nevertheless, if you are not personally familiar with your judge’s general attitude towards the rules of evidence, it is good practice to learn the judge’s general attitude before entering the courtroom.

Is the judge casual about the rules of evidence and likely to admit any evidence that he or she wants to hear? Or is the judge strict, and likely to apply the rules of evidence to the same extent as they would be applied in a jury case? Or is the judge somewhere in between? If you don’t know, ask friends or colleagues who do.

Counsel should launch an appeal on an evidentiary issue in a nonjury case only after careful evaluation. If an appeal on an evidentiary issue is contemplated, the law does offer ways of steering the appellate court’s attention away from the trial court’s broad discretion, and towards issues of law, which are reviewed de novo rather than for an abuse of discretion.

For example, appellants have occasionally overcome the limitations inherent in the traditional standard of review by arguing that the issue on appeal is not the proper application of a rule of evidence, but instead the proper construction of the rule. When the text of the rule itself is at issue, the appellate courts are more likely to view the case as presenting an issue of law, thus increasing the appellant’s chances of reversal. State v. Lough, 70 Wn.App. 302, 853 P.2d 920 (Div. 1 1993) (an appellate court will reverse only for abuse of discretion, but an incorrect application of the law will be deemed an abuse of discretion); U.S. v. Sanchez-Robles, 927 F.2d 1070, 1077 (9th Cir. 1991) (trial court’s construction of the Federal Rules of Evidence is reviewed de novo).

Similarly, an appellate court may be persuaded to review on a de novo basis when the issue is framed in terms of the applicability of a rule, or in terms of whether a particular piece of evidence falls within a definition found in a rule. For example, an appellate court will determine on a de novo basis whether an out-of-court statement fits within the definition of hearsay. State v. Edwards, 131 Wn.App. 611, 128 P.3d 631 (Div. 3 2006). And an appellate court will determine on a de novo basis whether a document constitutes work product as defined in CR 26. Soter v. Cowles Pub. Co., 131 Wn.App. 882, 130 P.3d 840 (Div. 3 2006) (“The decision to exempt public documents as attorney work product presents a mixed question
of law and fact …. The definition of work product is a question of law that we review de novo …. But whether a particular document falls within the definition of work product under that interpretation is a finding of fact.”).

4. Judicial notice and its limits, investigation by judge

ER 201 authorizes the court to take judicial notice of facts that fall into either of two categories: (1) facts generally known within the territorial jurisdiction of the court, or (2) facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Facts subject to judicial notice under ER 201 are obvious things – that Seattle is north of Tacoma, that the Pacific Ocean is larger than Lake Washington, and the like. Also included are things that may not be obvious, but that can be readily determined by reference to an objective standard – what the prime rate of interest was on a specific date, the population of Moses Lake according to the 2000 census, and the like.

Of perhaps more importance is the rule that it is error for the trial court to take judicial notice of a fact when the fact is not so obvious that it fits within ER 201. For example, it is error for the court to take judicial notice of a fact that was determined by the same judge in another case, based upon the judge’s memory. Vandercook v. Reece, 120 Wn.App. 647, 86 P.3d 206 (2004) (but error harmless).

Similarly, the trial judge should not do independent factual investigation by visiting the scene, using the Internet, or the like. Such investigation has been held to violate ER 605, the rule barring a judge from being a witness in a case over which he or she is presiding. State v. Romano, 34 Wn.App. 567, 662 P.2d 406 (Div. 2 1983) (error for trial judge to contact friends of defendant prior to sentencing for information about defendant).

A violation of ER 605 is considered so serious that it can be raised for the first time on appeal, even in the absence of an objection at the trial court level. ER 605, last sentence.

5. Attorney as witness

An attorney for a party to litigation is competent to testify as a witness. The attorney does not become incompetent to testify simply by appearing as counsel of record for a party to the case. Ryan v. Ryan, 48 Wn.2d 593, 295 P.2d 1111 (1956) (family law case). The attorney’s testimony, however, is subject to the restrictions in CR 43 and in RPC 3.7 CR 43(g) states as follows: “If any attorney offers himself as a witness on behalf of his client and gives evidence on the merits, he shall not argue the case to the jury, unless by permission of the court.”

Notice that the point of the rule is not to bar the attorney from testifying as a witness. The point of the rule is that if an attorney testifies as a witness for a client, and if the testimony is on the merits, the court may rule that the attorney is disqualified from arguing the case to the jury.

Technically speaking, CR 43(g) does not even apply in a nonjury proceeding. Nevertheless, even in nonjury cases, attorneys will normally limit themselves to giving testimony about purely formal matters (for example, when a paper was filed and served), thereby avoiding quibbles about whether testimony is or is not on the merits of the case.

The prohibition against testimony by an attorney does not apply to testimony from an employee or agent of the attorney (typically a secretary, paralegal, or investigator). M.K.B. v. Eggleston, 414 F. Supp. 2d 469 (S.D. N.Y. 2006). Thus, if an attorney needs to verify the fact that a document was sent or re-
ceived by the attorney's office, quibbles can often be avoided by using a declaration from an employee or agent.

**RPC 3.7.** RPC 3.7 discourages testimony by a party’s attorney, but does not flatly prohibit such testimony. The rule states as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case;
(3) disqualification of the lawyer would work substantial hardship on the client; or
(4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

**Practicalities.** Even though CR 43(g) does not apply to nonjury proceedings, and even though RPC 3.7 is less than absolute, the general tenor of the rules is to discourage testimony by a party’s attorney of record. And by instinct, many attorneys and judges are inclined to think there is something vaguely unprofessional about an attorney testifying for a client.

As a result, attorneys will, in all cases, normally limit themselves to giving testimony about purely formal matters (for example, when a paper was filed and served). This form of self-restraint avoids the appearance of impropriety and avoids quibbles about whether testimony is or is not on a contested issue, or is or is not on the merits of the case.

The prohibition against testimony by an attorney does not apply to testimony from an employee or agent of the attorney (typically a secretary, paralegal, or investigator). M.K.B. v. Eggleston, 414 F. Supp. 2d 469 (S.D. N.Y. 2006). Thus, if an attorney needs to verify the fact that a document was sent or received by the attorney’s office, quibbles can often be avoided by using a declaration from an employee or agent.

**Further research.** Washington case law concerning testimony by attorneys is relatively sparse. For further research, see the following.

Mueller & Kilpatrick, 3 Federal Evidence 6:3 (3d ed.).


**6. Children as witnesses**

Special considerations often arise when a child is a potential witness. A child may or may not be mature enough to be competent to testify. Even if the child is competent to testify, one or both parties may be reluctant to force the child to bear the often uncomfortable burden of testifying, thus triggering the search for an exception to the hearsay rule so that someone else can recount the child’s out-of-court statements. And if a child does testify, the normal ground rules in the courtroom may be altered.
Entire books have been written on the subject of children as witnesses, and the subject cannot be addressed comprehensively in an outline such as this. The following is only a summary of the principal evidentiary considerations.

**Competency to testify.** A child of any age is presumed to be competent to testify as a witness. Competency is the default rule. The burden is on the party challenging a child’s competency to persuade the court that the child is not competent. State v. S.J.W., __Wn.2d__, 239 P.3d 568 (2010) (C. Johnson, J.).

Competency is judged case-by-case, based upon (a) the child's understanding of the obligation to speak the truth on the witness stand; (b) the child's mental capacity, at the time of the events in question, to receive an accurate impression of the events; (c) whether the child's memory is sufficient to retain an independent recollection of the events; (d) whether the child has the capacity to express in words his or her memory of the events; and (e) whether the child has the capacity to understand simple questions about the events. State v. Wyse, 71 Wn.2d 434, 429 P.2d 121 (1967).

As long as the child is able to demonstrate some independent recollection of the events in question and has the ability to describe them, the child's equivocation or inability to recall details normally goes to the weight of the testimony, rather than its admissibility. State v. Guerin, 63 Wn.App. 117, 816 P.2d 1249 (1991).

In practice, the borderline is about age 4. Children younger than 4 are usually held to be incompetent, while children over 4 are usually held to be competent.

**Courtroom ground rules.** If a child does testify, the normal courtroom ground rules are often relaxed a bit. Leading questions and narrative testimony are often allowed. In addition, the court may invoke ER 403 and 611 to control questioning that may be unduly embarrassing or uncomfortable for a child.

**Hearsay exceptions generally.** As mentioned above, one or both parties may be reluctant to force a child to bear the often uncomfortable burden of testifying, thus triggering the search for an exception to the hearsay rule so that someone else can recount the child’s out-of-court statements. All hearsay exceptions are potentially available, but the following tend to be the exceptions employed with respect to statements by children.

**Excited utterance.** An out-of-court statement that is spontaneous and triggered by something the child saw or heard may qualify as an excited utterance. ER 803(a)(2). The courts have been generous in allowing the use of this hearsay exception for statements by children.

Although many scenarios are possible, a common application of the rule is to allow testimony regarding a child’s report of physical or sexual abuse. In State v. Woodward, 32 Wn.App. 204, 646 P.2d 135 (1982), a child's statement that the defendant had sexual intercourse with her, given 20 hours later in response to her mother's question, was held admissible as an excited utterance.


A statement may qualify as an excited utterance even though the declarant was too young to be a competent witness in court. State v. Robinson, 44 Wn.App. 611, 722 P.2d 1379 (1986) (statement by 3-year-old held admissible).

A statement may qualify as an excited utterance even though the out-of-court declarant recants, or otherwise disavows the statement. State v. Young, 160 Wash. 2d 799, 161 P.3d 967 (2007) (child's statement to neighbor, describing sexual molestation by defendant, admissible as excited utterance even though child later recanted; extended discussion by divided court).
**Statements for medical diagnosis or treatment.** A child’s out-of-court statement to a physician, nurse, or medical technician may be admissible as a statement reasonably pertinent to medical diagnosis or treatment. Again, the courts have been generous in allowing the use of this hearsay exception for statements by children.

The hearsay exception is stated in terms of statements for diagnosis or treatment applies even to statements made to a physician consulted solely for the purpose of enabling the physician to testify as a witness. In re Dependency of Penelope B., 104 Wn.2d 643, 709 P.2d 1185 (1985).

The hearsay exception applies not only to statements reasonably pertinent to physical diagnosis and treatment, but also to statements pertinent to psychological diagnosis and treatment. In State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001), a prosecution for murder, the victim had described both the attack and the assailant to a physician before she died. The court held that the trial court properly admitted the victim's statement under the instant hearsay exception. The court said the physician needed to hear all of the facts and circumstances surrounding the victim's injuries in order to assess the potential for post-traumatic stress and to arrange for counseling.

The rule has occasionally been troublesome, and controversial, as it relates to statements to counselors, therapists, social workers, and the like. When statements are made to a person who is acting as an integral part of a medical team providing medical diagnosis and treatment, the courts tend to view the situation as the equivalent of an interview with a nurse or an emergency room worker and admit the testimony. In re Welfare of J.K., 49 Wn.App. 670, 745 P.2d 1304 (1987).

When statements are made to a person who not part of a medical team, but who is nevertheless acting as a therapist, the courts likewise tend to admit the testimony. In State v. Ackerman, 90 Wn.App. 477, 953 P.2d 816 (1998).

In other situations, in which the person is acting less as therapist and more as an investigator, the results on appeal have been mixed. State v. Lopez, 95 Wn.App. 842, 980 P.2d 224 (1999) (inadmissible); In re Custody of A.C., 137 Wash. App. 245, 153 P.3d 203 (Div. 3 2007) (admissible).

**Statements describing abuse.** Under RCW 9A.44.120, a statement by a child under the age of ten, describing sexual contact or physical abuse of the child by another, is not objectionable as hearsay if the statement is shown to be reliable.

The statute has only limited utility in family law cases because by its terms, the statute applies only in criminal proceedings, in juvenile offense proceedings, and in juvenile court dependency proceedings. No provision is made for other kinds of cases.

The statute applies in a criminal case regardless of whether the child is available to testify, and thus hearsay may be admitted pursuant to the statute even when the child testifies as a witness. State v. Bedker, 74 Wn.App. 87, 871 P.2d 673 (1994)(rejecting defendant's argument that hearsay should have been excluded because the child himself testified as a witness).

A statement is not necessarily rendered unreliable by the fact that the child later recants the statement or makes other statements that are inconsistent with it. State v. Clark, 139 Wn.2d 152, 985 P.2d 377 (1999)

The fact that the child is too young to be competent as a witness does not necessarily render the child's out-of-court statements unreliable and thus inadmissible. State v. Clark, 53 Wn.App. 120, 765 P.2d 916 (1988).

**Exceptions to privileges for reports of child abuse.** Most of the familiar privileges for confidential communications contain an exception for statements admitting or reporting child abuse. The privilege for communications between psychologist and client does not contain such an exception, but the courts have
said that the exception will be read into the privilege, on the theory that an exception is necessary so that the psychologist can report child abuse pursuant to RCW 26.44.040. In the same case, the court held that after a client admitted child abuse to his psychologist, the psychologist could be called to testify against his client. *State v. Hyder*, ___Wn.App.__, 244 P.3d 454 (2011).

7. Text Messages and e-mails – The law governing admissibility inches forward

Introduction

Text messages. Text messages, composed and sent by cell phone, present difficult evidentiary issues. Assuming a text message is relevant to the issues at trial, how can it be proved? How is it authenticated? Is it hearsay, thus requiring the proponent to find an exception to the hearsay rule for the content of the message?

If the content of a text message is recounted by a witness from memory (the usual situation), does this create a second level of hearsay, in addition to the content of the message being hearsay? Is the proponent thus required to find two exceptions to the hearsay rule?

And what about the best evidence rule? Is the content of the text message an electronic document, and if so, is the best evidence rule violated if a witness recounts the content of a text message from memory?

And in a criminal case, what about the Sixth Amendment right to confrontation? If the prosecution offers a text message against the defendant, and if the author of the message is not present in court, can the defendant object on the basis of the Sixth Amendment?

Washington’s appellate courts have not yet had an opportunity to rule on these issues, and the issues remain largely unresolved in other jurisdictions as well.

E-mails. E-mails raise the same evidentiary concerns as text messages, except that with an e-mail a printed copy is usually available, thus eliminating any objection under the best evidence rule.

North Dakota case – State v. Thompson

The admissibility of text messages was recently addressed in North Dakota in *State v. Thompson*, 2010 N.D. 10, 77 N.W.2d 616 (2010), hereinafter *Thompson*.

In *Thompson*, D was accused of punching her husband several times in the face. She was convicted of domestic violence assault. The jury rejected D’s claim of self-defense.

D appealed, claiming a variety of errors with respect to text messages and a picture of a text message that had been admitted as evidence against her at trial. The State alleged, and the jury found, that the text messages had been sent by D to H during the day that ended with the assault at approximately 11:00 p.m.

D and H were separated at the time, and the text messages concerned money. D repeatedly asked H for money, and H repeatedly refused to give her money. In at least one of the messages, D used what the court called “profane and threatening language.”

The court’s opinion in *Thompson* contains a wealth of citations to cases in other jurisdictions, especially on the issue of authenticating text messages and e-mails.
Relevance

On appeal, D first argued that the messages were simply irrelevant. The court quickly disposed of this argument, saying that the messages helped explain D’s “state of mind and the circumstances of the events” on the day in question. The court added that the messages “could reasonably and actually help to prove or disprove factual matters pertaining to the charge against [D] and her self-defense claim.”

Authentication

D also argued on appeal that since text messages are relatively anonymous, the proponent must present foundation testimony of authenticity. In the present case, D said, the messages should have been excluded because there was no way to establish who actually sent the text messages.

At trial, the foundation testimony had consisted of H’s testimony that he knew the messages were from D because the messages were preceded with “Fr: Jen” – which was the way he listed D’s name in his own cell phone’s memory. Also, H said, her messages concluded with her telephone number and her digital nickname, both of which he recognized.

The appellate court in Thomson held that the foundation testimony was sufficient. Citing traditional principles of authentication, the court said that under Rule 901, the proponent is required only to present evidence “sufficient to supporting a finding” of authenticity. In other words, the proponent is required only to make a prima facie showing of authenticity. Thereafter, the opponent’s challenges to authenticity go only to weight, not admissibility.

The court said that the foundation testimony offered in the present case was sufficient under traditional principles of authentication, and thus it saw no error in this regard. The appellate court rejected D’s invitation to establish special, more rigorous requirements for the authentication of text messages and e-mails.

With respect to the most damaging message from D – the message containing profane language and threatening H – the State presented a photograph of the message on H’s cell phone. The appellate court’s opinion mentioned the photograph only briefly, saying rather cryptically that “there was no testimony from the person who took the picture … to show the picture was what it purported to be.”

In any event, the appellate court concluded that the photograph was sufficiently authenticated by the same testimony from H that authenticated the other text messages.

Hearsay

D also argued on appeal that the text messages were objectionable as hearsay. The court quickly disposed of this argument, saying that D’s statements were admissions by party opponent, and thus were outside the definition of hearsay, per Rule 801.

Best evidence rule

During the trial, H was allowed to testify about most of the text messages from memory. From the appellate court’s opinion, it is not crystal clear whether D raised any objection under the best evidence rule. (In theory, if a printed version can be obtained, the best evidence rule requires that a printed version be introduced as an exhibit.)
The court did note a ruling by the trial court that H would be allowed to testify from memory because the messages were “akin to verbal statements” by D.

Author’s comments

With Thompson and cases cited therein, the rules of evidence with respect to text messages and e-mails may be summarized as follows.

1. The message must be relevant to be admissible.

2. The message must be authenticated to be admissible. Most courts, including Thompson, have applied traditional principles of authentication as defined in Rule 901, making the process of authentication relatively easy. The proponent is required only to present a prima facie showing of authenticity. Thereafter, challenges to authenticity go to weight, not admissibility.

   A few courts have established special, more rigorous requirements for the authentication of text messages and e-mails.

   The Washington courts have not yet addressed this issue.

3. The hearsay rule applies, but if the message was sent by a party (including the defendant in a criminal case), it is admissible against that party as an admission by party-opponent.

4. The courts have not yet spoken definitively on the effect, if any, of the best evidence rule. As mentioned above, the best evidence rule says that if a printed version can be obtained, a printed version must be obtained and introduced as an exhibit. However, if no printed version can be obtained, then Rule 1004 allows testimony in lieu of a printed version.

   The best evidence rule is satisfied by production of a printed copy of an e-mail. Text messages may be more problematic because printing is sometimes impracticable.


The claw-back rules – CR 26 and CR 45

In 2010, Washington Supreme Court added new provisions to CR 26 and CR 45. The new provisions, popularly known as claw-back provisions, address the trial lawyer’s worst nightmare.

Suppose that during discovery, Attorney A accidentally discloses to Attorney B materials that are protected by the work product rule or by a privilege. The claw-back rules allow Attorney A to notify Attorney B of the error, and specify a procedure by Attorney A can seek to retrieve the materials.

The language added to CR 26 provides as follows:

Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Ei-
ther party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Similar language was added to CR 45, governing subpoenas. The new provisions took effect January 12, 2010.

According to the drafters’ comments accompanying the new provisions, the new provisions are “procedural only” and “do not purport to alter the legal standards applicable to privileges or their waiver.”

Thus, for the attorney who inadvertently discloses a protected document, the rules offer a brief reprieve but not necessarily long-term protection. The rule states that the document may not be used as evidence or disclosed to others “until the claim of protection is resolved.”

The court then turns to ER 502 to determine whether the disclosure resulted in a waiver of the protection. See below.

Related ethical considerations

Notice that the claw-back provisions discussed above do not place any duty upon Attorney B (the receiving attorney) to notify Attorney A (the sending attorney) that certain materials provided by Attorney A during discovery appear to be protected materials. Attorney B’s duties instead stem from the Rules of Professional Responsibility.

If Attorney A inadvertently provides protected materials to Attorney B, RPC 4.4(b) gives Attorney B a duty to notify Attorney A.

RPC 4.4 does not require Attorney B to refrain from reading the protected material. According to the official comment accompanying RPC 4.4, the issue of whether Attorney B should return the protected material without reading it is “a matter of professional judgment.”

A 2007 California case was more stringent, suggesting that Attorney B has an ethical duty not to read the protected material. Rico v. Mitsubishi Motors Corp., 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092 (2007).

Further debate and litigation in this area of the law seems inevitable.

ER 502 and limitations on waiver

ER 502 was adopted as a new rule, effective September 1, 2010. The rule and official drafters’ comment state as follows:

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Washington Proceeding or to a Washington Office or Agency; Scope of a Waiver. When the disclosure is made in a Washington proceeding or to a Washington office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter;
and

(3) they ought in fairness to be considered together.

**b)** Inadvertent Disclosure. When made in a Washington proceeding or to a Washington office or agency, the disclosure does not operate as a waiver in any proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following CR 26(b)(6).

**c)** Disclosure Made in a Non-Washington Proceeding. When the disclosure is made in a non-Washington proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Washington proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Washington proceeding; or

(2) is not a waiver under the law of the jurisdiction where the disclosure occurred.

**d)** Controlling Effect of a Court Order. A Washington court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding.

**e)** Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a Washington proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

**f)** Definitions. In this rule:

(1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

**Author's comments on ER 502**

For the most part, ER 502 codified existing law and provides the court with guidelines for determining whether a waiver has, or has not, occurred with respect to materials that have been clawed back.

Subdivision (a) states that with respect to waiver resulting from deliberate disclosure, the waiver extends to other materials relating to the same subject matter which ought, in fairness, be considered together with the disclosed materials. This point has not been addressed directly in the Washington case law, but the rule is consistent with the majority view and the law in the federal courts. Broun, McCormick on Evidence § 93 (two-volume 6th ed.); FRE 502.

Subdivision (b) states that with respect to an inadvertent disclosure, a waiver may or may not result, depending upon whether the disclosing attorney or party took reasonable steps to rectify the error. This provision is consistent with earlier Washington case law. Sitterson v. Evergreen School District No., 147 Wn.App. 576, 196 P.3d 735 (2008). Factors pointing towards a waiver include failure to promptly ask for the return of the document, and failure to establish in-house procedures to guard against inadvertent disclosures.

Notice that an inadvertent disclosure results in a waiver of protection only with respect to the materials that were disclosed. The waiver does not extend to materials relating to the same subject matter.
Subdivisions (c) through (e) add new details that have not been addressed in the Washington case law, but that are consistent with the majority rule and the law in the federal courts. FRE 502.

Subdivision (f) makes it clear that ER 502 applies to waiver of the protections provided by both the attorney-client privilege and the work product rule. This approach is consistent with the Washington cases, which have applied the same ground rules for determining whether either form of protection has been waived.

9. The big picture – Evidence checklist

1. Introduction

The following are the hurdles that the proponent should be prepared to clear in order to introduce evidence. For the opponent, the same lists suggest the potential objections to the proponent’s evidence.

For example, to introduce testimony by a lay witness, the proponent must show that the witness is speaking from personal, firsthand knowledge. In the absence of this showing (often called a foundation showing), the lack of personal, firsthand knowledge is the opponent’s objection.

2. Rules that apply to all evidence

- Evidence must be relevant in general sense. It must be both probative (have some tendency to prove a fact in issue) and material (of consequence to the outcome). ER 402, 402.
- Evidence must be relevant under ER 404 to 412, which predetermine the issue of relevance for certain kinds of evidence. The rules cover a wide variety of matters, including evidence of character or habit, subsequent remedial measures, settlement negotiations, plea negotiations, insurance coverage, and a witness’s sexual history.
- To be admissible, evidence cannot be privileged. Privileged communications are inadmissible.
- Evidence not objectionable under ER 403 (confusion, unfair prejudice, waste of time).

3. Testimony by lay witness

- Must comply with rules that apply to all evidence (see above).
- Witness must be competent to testify. ER 601.
- Special rules for testimony by party’s attorney. CR 43, RPC 3.7
- Witness must testify from personal, firsthand knowledge. ER 602.
- When possible, witness should phrase testimony as fact rather than opinion. ER 701.
- If witness recounts out-of-court statement, hearsay rule must be overcome. ER 801, 802.
- If witness recounts content of document, hearsay rule (ER 801, 802) must be overcome and best evidence rule (ER 1001 to 1008) must also be satisfied.
- Criminal cases only. If witness for State recounts out-of-court statement by another and statement is testimonial in nature, Sixth Amendment right to confrontation requires that the State produce the out-of-court declarant at trial for cross-examination.
4. Testimony by expert witness

- Must comply with rules that apply to all evidence (see above).
- Witness must qualify as expert.
- Testimony must be helpful. Trier of fact must need help from expert. ER 702.
- Expert must have adequate theoretical basis for opinion. Opinion must be based upon theory generally accepted in expert’s professional community. Frye rule.
- Expert must have adequate factual basis for opinion. Expert’s opinion must be based upon reasonable sources of information. ER 703. Without adequate factual basis, expert’s opinion is objectionable as speculation. ER 702.
- Expert may explain factual basis for opinion without violating hearsay rule. ER 705. Trial court can curb abuses under ER 403.

5. Documents – The quick way (ER 904 – civil cases only)

- Proponent gives pretrial notice of intent to introduce document. Notice and copy of document served in accordance with ER 904.
- If opponent makes timely objection in accordance with ER 904, the objection is preserved and admissibility is determined at trial.
- If opponent fails to make timely objection in accordance with ER 904, document is admissible. ER 904(c).
- In absence of timely objection, opponent’s only escape from ER 904 is to successfully argue that (1) the objection goes to relevance, which can always be asserted at trial despite ER 904, or (2) the rule does not apply to the document in question. Lutz Tile, Inc. v. Krech, 136 Wn.App. 899, 151 P.3d 219 (2007) (ER 904 inapplicable to written report by expert, but error harmless).
- Sanctions can be imposed for unreasonable objections. ER 904(c).

6. Documents – The long way

- Must comply with rules that apply to all evidence (see above).
- Document must be authenticated. Normal way is through testimony by witness who says the document is what it purports to be, and not a fake or forgery. ER 901.
- Certified copies of most public records are self-authenticating and do not require authentication via live testimony. ER 902.
- If document recounts facts at issue, hearsay rule applies and must be overcome. ER 801, 802.
- Some hearsay exceptions, notably for public records and business records, require additional foundation testimony beyond the usual authentication. ER 803.
- A document that is the central focus of the case (i.e., the contract in a contract dispute, or the decedent’s will in a contested probate) is highly unlikely to be objectionable as hearsay. Such documents are called “verbal acts” because the very existence of the document has legal significance. Thus the document is not being offered to proved certain facts at issue.
* Best evidence rule applies and must be satisfied. ER 1001 to 1008. Best evidence rule normally requires the original or a photocopy. Testimony describing a document from memory is admissible only if the document has been lost or destroyed through no fault of the proponent.

* Criminal cases only. If document is offered by State and is testimonial in nature, Sixth Amendment right to confrontation requires that the State produce the author at trial for cross-examination.

* Mechanics of offering a document as an exhibit. See heading 10, below.

7. Photos, video recordings

* Must comply with rules that apply to all evidence (see above). May be deemed irrelevant if too remote in time from the times at issue at trial (see above).

* Must be authenticated. The usual method of authentication is to have a witness with firsthand knowledge testify that the photo or recording is a reasonably accurate portrayal of the subject.


* A small number of cases hold that the authenticating witness must also be prepared to testify as to when, where, and under what circumstances the photograph was taken or the recording was made. See, e.g., Saldivar v. Momah, 145 Wn.App. 365, 186 P.3d 1117 (2008). These holdings are at odds with less stringent holdings and are arguably incorrect. Nevertheless, the proponent should be aware of this potential objection.

* Mechanics of offering a photograph or video as an exhibit. See heading 10, below.

8. Audio recordings

* Must comply with rules that apply to all evidence (see above).

* Must be admissible despite privacy statutes. RCW 9.73.

* Must be authenticated. ER 901.

* Ideally, authenticating witness should have personal knowledge of the original conversation and the contents of the recording; should testify that the recording accurately portrays the original conversation; and should identify each relevant voice heard on the recording. State v. Jackson, 113 Wn.App. 762, 54 P.3d 739 (2002).


* If the recording recounts facts at issue, hearsay rule applies and must be overcome. ER 801, 802.

* Criminal cases only. If recording is offered by State and is testimonial in nature, Sixth Amendment right to confrontation requires that the State produce the out-of-court speaker at trial for cross-examination.

* Mechanics of offering a recording as an exhibit. See heading 10, below.
9. Video images – Text messages, Caller ID, Internet-based information displayed on computer monitor

- Must comply with rules that apply to all evidence (see above). May be deemed irrelevant if too remote in time from the times at issue at trial.

- Best evidence rule applies. ER 1001 says with regard to electronic data, proponent must produce a “printout or other output readable by sight.”

- The preferred method of complying with the best evidence rule is to produce a printout, which can be marked and received as an exhibit. This is also the only method that assures the creation of a record for appeal. In criminal cases, the police and prosecuting attorneys often use a digital photograph of the video display screen.

- In theory, the proponent could also satisfy the best evidence rule by recreating the same video display on a video monitor in the courtroom because it is “readable by sight” (above). As just mentioned, however, this method does not assure the creation of a record for appeal.

- Under the best evidence rule, a witness cannot testify as to the content of something previously seen on a video monitor unless it is impossible to reproduce the image in the courtroom, due to loss or destruction of the underlying electronic data. ER 1004.

Thus, if the image can be reconstructed from phone records or the like, testimony describing the image violates the best evidence rule. But if is literally impossible to reproduce the image in the courtroom due to loss or destruction of data, ER 1004 allows a witness with firsthand knowledge to describe the image from memory.

- The evidence must be authenticated. An authenticating witness with personal knowledge should testify as to when, where, and under what circumstances the exhibit was obtained. ER 901.

- An exhibit downloaded and printed from a governmental website is not self-authenticating because it is not a certified copy. It must be authenticated either by certification or by live testimony. State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000).

- If exhibit recounts facts at issue, hearsay rule applies and must be overcome. ER 801, 802.

- Some hearsay exceptions, notably for public records and business records, require additional foundation testimony beyond the usual authentication. ER 803.

- Assuming authentication can be accomplished, the hearsay rule may be less of an obstacle that it first appears to be. Information posted on the Internet by a governmental agency is probably within the hearsay exception for public records. Information posted on the Internet by the opposing party is admissible as an admission by party-opponent.

- Criminal cases only. If the exhibit is offered by State and is testimonial in nature, Sixth Amendment right to confrontation requires that the State produce the out-of-court declarant at trial for cross-examination.

- Mechanics of offering a computer print-out as an exhibit. See heading 10, below.

10. Mechanics of offering an exhibit

Many courts, and even many individual judges, have their own expectations on how exhibits should be offered into evidence. Counsel should make a point of learning local practices and customs before the trial begins. The following steps are typical.
• The exhibit is offered into evidence during the testimony of the same witness who will be authenticating it.

• At appropriate time during witness’s testimony, counsel hands the exhibit to the clerk and asks the clerk to mark the exhibit for identification. The clerk does so.

• The exhibit is then handed to opposing counsel for inspection. After the exhibit has been inspected, it is handed to the witness.

• The witness gives the necessary foundation testimony to identify and authenticate the exhibit (that it is what it purports to be).

• In a criminal case, when the State intends to offer “real” evidence (the actual weapon, the actual drugs, etc.), the State’s witness describes the chain of custody, to assure the court that the evidence has not been altered prior to trial.

• The witness gives the necessary foundation testimony to show that the exhibit is relevant (that the photo is a reasonable representation, that the video is not too remote in time, and the like).

• The witness gives the necessary foundation to satisfy any specialized requirements for the type of exhibit in question (identifying the voices in a recording, assuring the court that an image on a computer screen has been printed, and the like).

• If the hearsay rule is a potential objection, the witness gives the necessary foundation testimony to show that the exhibit is not within the definition of hearsay (e.g., that is an admission by party-opponent), or that a hearsay exception applies (e.g., that it is a business record).

• Counsel offers the exhibit into evidence.

• Opposing counsel raises objections, if any.

• Court either overrules objection or invites response from counsel offering the exhibit.

• If invited by the court, counsel then makes argument for admissibility.

• Court rules on issue of admissibility.

• If exhibit is excluded, counsel offering the exhibit makes sure the exhibit remains in the record for the limited purpose of creating a record for appeal (often called making an offer of proof).

• Special rules for depositions. If counsel anticipates using a deposition as evidence, the deposition is filed with the court if it has not already been filed. The deposition (or a copy thereof) is handled like any other exhibit in the courtroom, as described above. If the court rules that the deposition, or some portion thereof, is admissible, the deposition is marked and received as an exhibit. It is not, however, reviewed by the jury, and the deposition does not go to the jury room during deliberations. Instead, counsel reads from the admissible portions at the appropriate time(s) during the trial, and counsel’s reading becomes part of the record.

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