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ER 904 is Scary - Five Practice Tips for Using and Opposing ER 904 Submissions
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ER 904 was supposed to expedite the admission of documentary evidence and save costs. A plaintiff could submit a medical report and not have to call the treating doctor to testify live. Perhaps in modest cases ER 904 does provide a benefit. However, I find that in many cases ER 904 creates more problems than it solves. Here is how I approach ER 904 issues.

THE RULE

ER 904 establishes that certain documents are deemed admissible unless timely objection is made.

"In a civil case, any of the following documents proposed as exhibits in accordance with section (b) of this rule shall be deemed admissible unless objection is made..."

The rule provides a listing of documents that fall within the rule. Many of the documents could be relevant to a personal injury claim, especially the documents that include medical records, chart notes and bills for treatment.

"(1) A bill, report made for the purpose of treatment, chart, record of a hospital, doctor, dentist, registered nurse, licensed practical nurse, physical therapist, psychologist or other health care provider, on a letterhead or billhead."

(2) A bill for drugs, medical appliances or other related expenses on a letterhead or billhead.

Any objection to an ER 904 submission must be made within 14 days or the document is deemed admissible.

"Within 14 days of notice, any other party may serve on all parties a written objection to any document offered under section (b), identifying each document to which objection is made by number and brief description."

THE PURPOSE OF ER 904

The purpose of ER 904 "is to expedite the admission of documentary evidence." *Fox v. Mahoney*, 106 Wn. App. 226 (2001).

PRACTICE TIPS FOR USING ER 904

I rarely use ER 904 to admit documents in my cases. However, in a modest case where you want to save the cost of putting on a live witness, you might consider using ER 904. In that situation I suggest the following.

TIP ONE:

MAKE YOUR ER 904 REQUEST WAY BEFORE THE DEADLINE.

The rule allows you to make an ER 904 submission up until 30 days before trial. In practice, many practitioners wait until the last minute to submit their ER 904 documents. However, if you represent the plaintiff and are counting on admission of certain documents, waiting until 30 days before trial may be a mistake. The defense can file its objection to your ER 904 submission up until 14 days later. Once the defense objects, you are then only 16 days before trial and you don't know if you will need a live witness (i.e. a doctor) to put on your evidence. Doctors do not like being called to testify on short notice. Instead, try filing your ER 904 objection a year before trial. You will get defense counsel's attention.

TIP TWO:

HAVE AN EARLY HEARING ON THE ER 904 OBJECTION

If you file an early ER 904 submission then you can have a hearing shortly after the defense files its objection. Then, you will have a ruling from the court as to whether your documents will be admitted or not. Then you will know well in advance of trial whether you need to call a live witness (i.e. a doctor) or not. Having an early ruling on such issues will get the defense attorney's attention and show you are serious about pursuing the case and obtaining a fair award for your client.

TIP THREE:

USE REQUESTS FOR ADMISSION IF THE DEFENSE FILES AN ER 904 OBJECTION

If the defense files an ER 904 objection plaintiff's counsel should then consider sending requests for admission and/or interrogatories to follow up on the subject(s) of the defenses' ER 904 objections, i.e., what basis the defense denies that your client sustained certain injuries, or incurred reasonable and necessary medical bills. Then, if you later have to put on the evidence with a live witness, you may be able to recover the costs of doing so on several bases. First, ER 904 (c) (2) provides that "If the court finds that the objection was made without reasonable basis and the document is admitted as an exhibit at trial, the court may award the offering party any expenses incurred and reasonable attorney fees.

You may also recover the cost of putting on your evidence based on your requests for admission under CR 36 and CR 37(c), which provides in part: "If a party fails to admit the genuineness of any document or the truth of any matter requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses

incurred in making that proof, including reasonable attorney fees".

PRACTICE TIPS FOR OPPOSING THE DEFENSE ER 904 SUBMISSION

My practice involves major injury cases. We typically call one or more physicians to testify at trial. In those cases where a physician will be called to testify, we have found that ER 904 favors the defense. The defense typically does an ER 904 submission 30 days before trial. The submission typically contains all the medical records of our client, and sometimes the medical bills. Such an ER 904 submission can be a disaster for the plaintiff because it may put your client's entire medical records before the jury.

Some attorneys want their clients' medical records going to the jury. So far, I have never had a case where I wanted that to occur. I want the relevant medical issues to be clearly identified, testified to by medical experts who are asked the relevant questions, and then cross-examined.

It may be relevant to project a portion of the medical records up on a screen before the jury, or even to have a relevant page of the medical records made into an exhibit. However, I do not want the client's entire medical record to go to the jury; they may go off on some tangent, misunderstand a medical term or abbreviation, or worse, see some collateral source information and conclude that the client is trying to double recover. There is much in medical records that is irrelevant, confusing, and prejudicial.

TIP FOUR: GROUNDS FOR OBJECTION

The guts of my ER 904 Objection contains the following language:

The intention of ER 904 is to "reduce the time and expense associated with presenting witnesses that are typically necessary to provide a foundation for the authentication of documents". 1998 Drafter's Comment, *Washington Practice*, TEGLAND, § 468, n.3. Plaintiffs do not object to these documents on authenticity grounds. The documents were produced by the providers that created them and presumably are authentic.

ER 904 was not designed to make documents admissible that otherwise would not be. It was not designed to authorize the admission of hundreds of pages of medical records containing medical opinions, matters outside a normal person's ordinary experience, hearsay, matters previously ruled inadmissible by the court, and other objectionable material. Experts in the fields of _____ and _____ will address the medical issues in this case. These experts can be asked their opinions about the medical care rendered to _____.

Specifically, the plaintiff objects to the admission of the _____ pages of medical records and _____ scans for the following reasons.

1. The documents are not timely. The rule requires that a notice of intent to offer documents under ER 904, accompanied by a copy of the documents, be served on the other party not less than 30

days before trial. ER 904(b). The documents were received in this office on _____.

2. The documents contain inadmissible collateral source information.
3. The documents contain matters of a medical nature outside a lay person's normal experience which, without expert testimony, would likely confuse, mislead, or prejudice a jury and is inadmissible under ER 403. To have the jury read medical records containing numerous abbreviations and sophisticated medical issues is likely to mislead a lay jury.
4. The documents contain expert opinions without stating the basis for those opinions nor the underlying data for the opinions, and are thus inadmissible under ER 703 and ER 705.
5. The documents contain hearsay and hearsay within hearsay, which is inadmissible under ER 802 and ER 805.
6. The _____ pages of medical records are cumulative evidence. The medical issues will be well addressed by the _____ expert witnesses who are likely to be called to testify by the parties.

There may be other grounds for objecting to a defense ER 904 submission that relates specifically to your case.

TIP FIVE:

BE PREPARED TO ARGUE VIGOROUSLY AGAINST THE ADMISSION OF IRRELEVANT, IMPROPER AND PREJUDICIAL EVIDENCE

The plaintiff wins by presenting an understandable and compelling case for a monetary award. The defense wins by disproving the case, or by complicating the case so that the plaintiff does not meet his burden of proof. ER 904 submissions which allow hundreds of pages of medical records to go to the jury without explanation invites the jury to be confused, go off on a tangent, or to be prejudiced by irrelevant information.

You should be prepared to argue against the wholesale admission of your client's medical records. You should make the legal arguments set forth above. However, one of the simple techniques that I have found to be effective is to dictate an attachment to my ER 904 Objection that contains medical terms and abbreviations found in the records. I find that about six pages of average medical records will result in a page long list of medical terms and abbreviations. A substantial set of medical records will easily produce a list of medical terms and abbreviations over 10 pages long. The list of undefined medical terms and abbreviations will be confusing. Although your Judge may recognize some of the terms, most likely he or she will not recognize or understand others. If the judge is confused, just think of the potential for the jury to be confused. Argue hard to keep wholesale medical records out of evidence.

I have had judges on several occasions say "well what do you want taken out of the records?" My response is usually that the medical records simply cannot go to the jury for the reasons stated in our ER 904 objection. The potential for confusion is too great. The records can't be made admissible by redaction. I also remind the judge that it should not be my burden to fix the

defendant's "evidence". It is the defendant's burden to show that their proposed evidence is admissible.

Lastly, be prepared if the judge rules against you. Decide whether you want to offer a redacted set of records. Decide how you will handle direct and cross exam if the defendant's ER 904 documents come in. Try to anticipate what arguments the defense will offer based on the records, and be prepared to counter them. If the documents come in then try to make the best of it and make what arguments that you can from the records.

Take care, and keep trying cases.

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