

American Board of Trial Advocates™



Washington Chapter Newsletter

May 2022

This Issue:

- President's Message
- Free CLE
- Civil Trial Tip of the Month
- Upcoming Events & ABOTA's Spring Event on 5/19 highlighting keynote speaker Judge Melissa Hemstreet
- Bylaw Amendment Vote
- New Member Ballot

PRESIDENT'S MESSAGE



As you know, ABOTA is an organization that cherishes its exemplary civil trial attorneys for both the Plaintiff and Defense. Over the years it has become increasingly difficult to obtain the necessary trials and trial experience to be eligible for membership. I want to encourage all of us to continue to mentor and guide our attorneys with less experience to help foster this important skill and right that we have been given under the 7th amendment.

Be sure to check out this month's free CLE from the ABOTA Foundation. Our own J.D. Smith will be one of the presenters.

Sincerely,
Ketia

FREE CLE

The ABOTA Foundation is holding a free virtual CLE on May 23, 2022 from 12:00 P.M. - 1:15 P.M. Central

Jury Selection Tips for 2022 Jurors

Two highly experienced lawyers and a nationally known jury consultant will discuss advanced strategies for jury selection in today's environment.

Presenters:

J.D. Smith, Washington Chapter
Robert Vaughan, Fort Lauderdale Chapter
Diane Wiley, President, National Jury Project

Moderated by:

Christine Boyd, Eastern Pennsylvania Chapter

This CLE is free to everyone, including non-ABOTA members, so feel free to invite those from your firm who may benefit. CLE Credit will be applied for in Washington.

Register

at: https://www.abota.org/Online/Events/Event_Display.aspx?EventKey=FNDWEBMAY

CIVIL TRIAL TIP OF THE MONTH



With the prevalence of virtual trials around our state, we are partnering with King County Superior Court to provide a “Civil Trial Tip of the Month” by a designated superior court judge. This will help us improve our practices and also get to know the judges a little better.

This month's tip is from King County Superior Court **Judge Michael R. Scott**.

Judge Scott was appointed to the King County Superior Court by Governor Jay Inslee in 2018. He serves on the Washington State Board for Judicial Administration and has chaired its Policy and Planning Committee. Judge Scott is co-chair of the Washington Pattern Jury Instruction Committee. He also serves on the King County Superior Court's Executive Committee, Local Rules Committee, Courts & Community Committee, and is co-chair of the court's Personnel Committee. Prior to his appointment to the court, Judge Scott practiced civil litigation for 35 years. He is a graduate of Stanford University and Stanford Law School.

TIP: Trim back your ER 904 designations to obtain the promise and avoid the perils of the rule.

Evidence Rule 904 provides that in a civil case certain documents "shall be deemed admissible unless objection is made under section (c)." Among the documents listed in the rule are healthcare bills; reports made for purpose of treatment; health care provider charts and records; bills and estimates for property damage; weather reports; traffic signal reports; and photographs, drawings, maps, and blueprints. ER 904(a)(1-5). The rule also includes what is sometimes referred to as a "catch-all" provision – it applies to other documents relating to a material fact and having "equivalent circumstantial guaranties of trustworthiness." ER 906(a)(6). Documents offered by notice under ER 904 are "deemed authentic and admissible without testimony or further identification, unless objection is served within 14 days of the date of notice, pursuant to ER 904(c)."

The use of ER 904 has substantially expanded since the rule was first adopted in 1992. It has become common for trial lawyers to include hundreds and sometimes thousands of documents in their ER 904 notices. Most of the documents in many ER 904 notices are ostensibly offered under the "catch-all" provision. The objective behind such expansive use of the rule is dubious – it is a litigation form of a "shock and awe" tactic. Many documents offered in voluminous ER 904 notices lack "equivalent circumstantial guaranties of trustworthiness," and objections may be lodged as to admissibility of these "catch-all" documents.

The promise of ER 904 is to "expedite the admission of documentary evidence." *Hendrickson v. King County*, 101 Wash. App. 258, 268, 2 P.3d 1006 (2000) (citing *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wash.2d 250, 944 P.2d 1005 (1997)). However, overly expansive use of ER 904(a)(6) may not expedite anything if it serves only to draw a multitude of objections. Thus, the first peril of ER 904 is of a waste of effort and expense. ER 904 is not truly a "catch-all." ER 904 designations should be limited to "routine documentary evidence like hospital records and photographs and not documents that present conclusions or opinions on evidence." *Lutz Tile, Inc. v. Krech*, 136 Wash. App. 899, 904-05, 151 P.3d 219 (2007).

A second peril of the rule is that of a failure to properly object to a document

identified in an ER 904 notice. Such a failure may result in automatic admissibility of the document. *Id.*

Finally, there is third peril, more subtle and dangerous than the first two. The “benefits of [an ER 904] designation are available to all parties.” *Hendrickson*, 101 Wash. App. At 268. An opposing party may offer a document designated under another party’s ER 904 notice, and the designating party may be deemed to have waived any objection. *Id.* This peril comes under the heading: “Be careful what you wish for.” Documents designated in a vast “catch-all” list of ER 904(c)(6) documents “may, unbeknownst to [the designating party], contain damaging material that they would prefer to exclude.” *Id.*

UPCOMING EVENTS

May 19th - Spring Member Event

6:00pm at the Rainier Club

Register at <https://forms.gle/JkuEURQ7Xtdjpbfk7>

November 10th - MIT

Washington Athletic Club

More details to follow

November 10th - Annual Meeting Dinner and Awards

Washington Athletic Club

More details to follow

BYLAW AMENDMENT VOTE

There will be a vote to amend the Chapter Bylaws on May 19th at the Spring Member Event at the Rainier Club. The proposed changes will correct some inconsistencies in the current document as well as allow for electronic voting for future bylaw changes. You can view the proposed changes [here](#).

NEW MEMBER BALLOT

If you have not already done so, please click the link below to access the New Member Ballot and cast your votes **no later than May 13th**.

New member candidates must receive approval from at least 75% of voting chapter members to proceed to National for final consideration. Per National bylaws, abstentions will not count for or against a new member candidate, so please vote to Approve or Deny the candidate whenever possible.

Vote Here: <https://forms.gle/CXfd7s2JUXg14AKF8>