

SCBA & WSBA Construction Law Section Construction Law CLE

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Select Evidentiary Considerations for Construction Cases

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INTRODUCTION

Perhaps it is because many construction disputes are resolved in arbitration where the rules of evidence are relaxed and formalities are much more liberalized construction lawyers do not find themselves entrenched in the rules of evidence. Also of consideration is the that getting to the courtroom for a trial is a long, expensive, and difficult task with many hoops other than one lawyer's desire to try a case. That said, the rules of evidence, the procedural and practical effects of the rules are still important and crucial to the outcome in construction litigation. This brief continuing legal education paper is designed to raise a variety of evidence issues related to construction, such as relevancy, foundations, spoliation, and witness testimony at deposition and at trial.

RELEVANCY

Relevance should be every lawyer's favorite evidence subject as it is evidence having any tendency to make the existence of any fact that is of consequence to determine the action more or less probable. ER 401. Two requirements are probative value and a fact of consequence. Facts of consequence come from substantive law of your state and probative value is liberal and up to the trial judge's discretion. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wn. App. 702, 729, 315 P.3d 1143, 1157 (2013). "Any fact" should be the words of emphasis at trial when meet with an ER 403 objection.

The trial judge may exclude relevant evidence if the legitimate probative value of the evidence is substantially outweighed by the potential damage that the evidence might do to the orderly, efficient, and fair process of trial. ER 403 calls for a weighing or balancing judgment in the trial judge's discretion of the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

waste of time, or needless presentation of cumulative evidence.” ER 403. Remind the judge that this rule favors admission. When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239, 1257 (1997).

While Washington case law does not point this out, a particular subset objection in ER 403 for construction cases tends to be undue delay, waste or time, or needless presentation of cumulative evidence. This is where each witness takes his or her shot at the facts on a repetitive basis, be on the lookout for such pile on and cite Mutual of Enumclaw Ins. Co., 178 Wn. App. at 732.

FOUNDATION

Evidentiary doctrines and the associated foundation are difficult concepts to learn in just a semester at law school. Thus, the truth of the practice of law is no more evident than in the lawyer attempting to lay foundation and seek admission of a document only to be on the receiving end of a sustained objection. Converting the doctrines into question is an imposing task. It takes, one, understanding and, two, practice.

Laying foundation is required before formally offering an item into evidence. Always lay a foundation for authenticity or other foundational predicate, i.e., expert qualification, before admission. The practical rule to accomplish this is to craft simple, brief, and prepared line of questions well before you take your place at the dais.

Always use the simplest most easily understood term. Have your substantive nomenclature converted into simple terms. Use the dictionary and use any subject matter expert to assist in finding words that all other mortals may understand. Try before instead of prior and after rather than subsequent.

Always make each question as short as possible. 25 words or less is the upper end mark. 15 words or less is the preferred length of experienced trial lawyers. Comprehension is a scare resource and so is attention span. Do not lose your audience because you wax on to arrive at your question.

Being prepared is of utmost importance. It takes time, time means hours, and hours mean bills, understand that plan for it and prepare your client accordingly. If you

stammer or pause during direct it loses its flow and rhythm. If that rubs off on your witness, you may affect the judge or jury's impression of the witness's credibility. Prepare with your witness with practice, make it mock and have another unrelated lawyer join in the prep session to submit objections and observe the objective flow and rhythm.

When on direct the lawyer must understand that leading questions, except for preliminary matters, are generally not allowed. So, you want to craft a direction exam that complies with technical evidentiary rules, so it limits any objection from the opponent and creates a flowing and uninterrupted exam. To that end, begin as many questions as possible with what I call the "W" words: who, what, which, when, where, how, and why. If you begin questions with a "W" word, it is very difficult to make the question leading and hard for the opponent to find room to object. You may start the questions with words other than a "W" word to avoid monotony. For example, lead with: please tell us "w"hat ...,or now I want to ask you "h"ow you While you may use gently leading questions try to avoid it in favor of allowing your witness the center stage to tell the story of why you and your client find themselves in a Courtroom.

Now on to the cross-examination, you still must lay foundation. Exhibits are fine so long as they relate to a matter raised on direct exam. ER 611. However, here the exam must elicit testimony that is favorable, and two discredits the witness. Do this again with simple, one fact per question, leading questions. ER 611(c). Each question should be building on your theme and especially in construction cases that are complex it may be necessary to repeat portions of direct testimony to make sure the jury understands the significance of the admission. This can be lost in many cross exams, so timing and flow are important. Construction cases are easily adept to this because of the linear nature of most disputes and the contemporaneous records often at play. Use the records, the timing of those records and likewise the discrepancies from other records to your advantage in a case. Many triers of fact will tend to believe the record (i.e. accident report, daily report, equipment log) created closest to the event in time rather than a crafted "ghost" letter sent days, weeks, or months later. So, as the lawyer come fully prepared, have the questions written out, contemplate likely objections, and control the

testimony with leading questions. Remember cross-examination is a battle for impression not logic.

SPOILIATION

In Washington, there is a recent high-profile construction litigation case involving issues of spoliation. See Seattle Tunnel Partners v. Great Lakes Reinsurance, King County District Court Case # 15-2-15009-0 Order dated December 7, 2018. We are all familiar now with the litigation hold letters, and the wait do no repair until we “get a chance to look at” letters that are sent at the drop of a feather suggesting forthcoming litigation.

While spoliation may be conflated to mean the intentional destruction of evidence, that is not the case. Spoliation is a situation when evidence which would properly be part of a case is within the control of a party whose interest it would naturally be to produce it and that party fails to do so, without satisfactory explanation, then the inference of that failure must be unfavorable to that party. See Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86 (1977). To summarize, spoliation is the destruction or significant alteration of evidence or the failure to preserve property for another’s use as evidence, in pending or future litigation, once the duty to do so has been triggered. A trigger may be commencement of litigation or service of a notice to preserve.

As a precursor there must be a connection between the spoiler and the missing evidence. That connection must come a control relationship or custody over the evidence, not just mere agency relationship. See Homeworks Construction v. Dan Wells, 133 Wn. App. 892, 894, 900 (2006). A court considers two factors regarding spoliation inferences: (1) the potential importance or relevance of the missing evidence, and (2) the culpability or fault of the adverse party. Henderson v. Tyrell, 80 Wn. App. 592, 607 (1996).

WITNESSES

I learned at a CLE as a young lawyer from a grizzled east coast trial lawyer that a lawyer no matter how bad they want to—testifies. So, to tell the story, to present the documents, to craft the remedy a lawyer must have a witness. In construction cases many of the witnesses are project persons like: a foreman, superintendent, or hired gun

project manager. It is likely that the construction dispute arises after completion of the project or at least the trial is many months if not years after substantial completion. As such, many of those persons often move, go to other projects, change jobs, are union hall employees and are not readily available for the construction company's lawyer to interview much less compel into court. This is especially true when the witness has moved beyond the jurisdictional subpoena arm of the Court.

The construction lawyer must always consider the field persons involved in a case and make sure to capture that testimony, especially when that testimony is foundational to a record or a fact of performance. You may find yourself relying upon CR 32 and use depositions in trial instead of live testimony. Not my personal belief is that is not compelling and often is lost upon the Court and a jury but may be necessary and likely an only choice if you can convince a witness to travel, or worse the witness passes before the trial date.

Of course, the best is to control the witness with a trial subpoena (don't forget witness fees and mileage) and have the witness appear when called to the stand. This is an important step even with "friendly" witnesses.

OBJECTIONS TO FORM OF QUESTION

1. Ambiguous question (ER 611(a))
2. Argumentative question (ER 611(a))
3. Asked and answered (ER 403 and 611(a))
4. Assumes facts not in evidence (ER 611(a))
5. Compound question (ER 611(a))
6. Confusing (ER 611(a))
7. Harassing the witness (ER 611(a))
8. Repetitious question (ER 403 and 611(a))
9. Unintelligible question (ER 611(a))
10. Leading (if it is a friendly witness) (ER 611 (c))

Select Deposition Misconduct Rules:

Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted. CR 30(h)(2).

Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court. CR 30(h)(5)