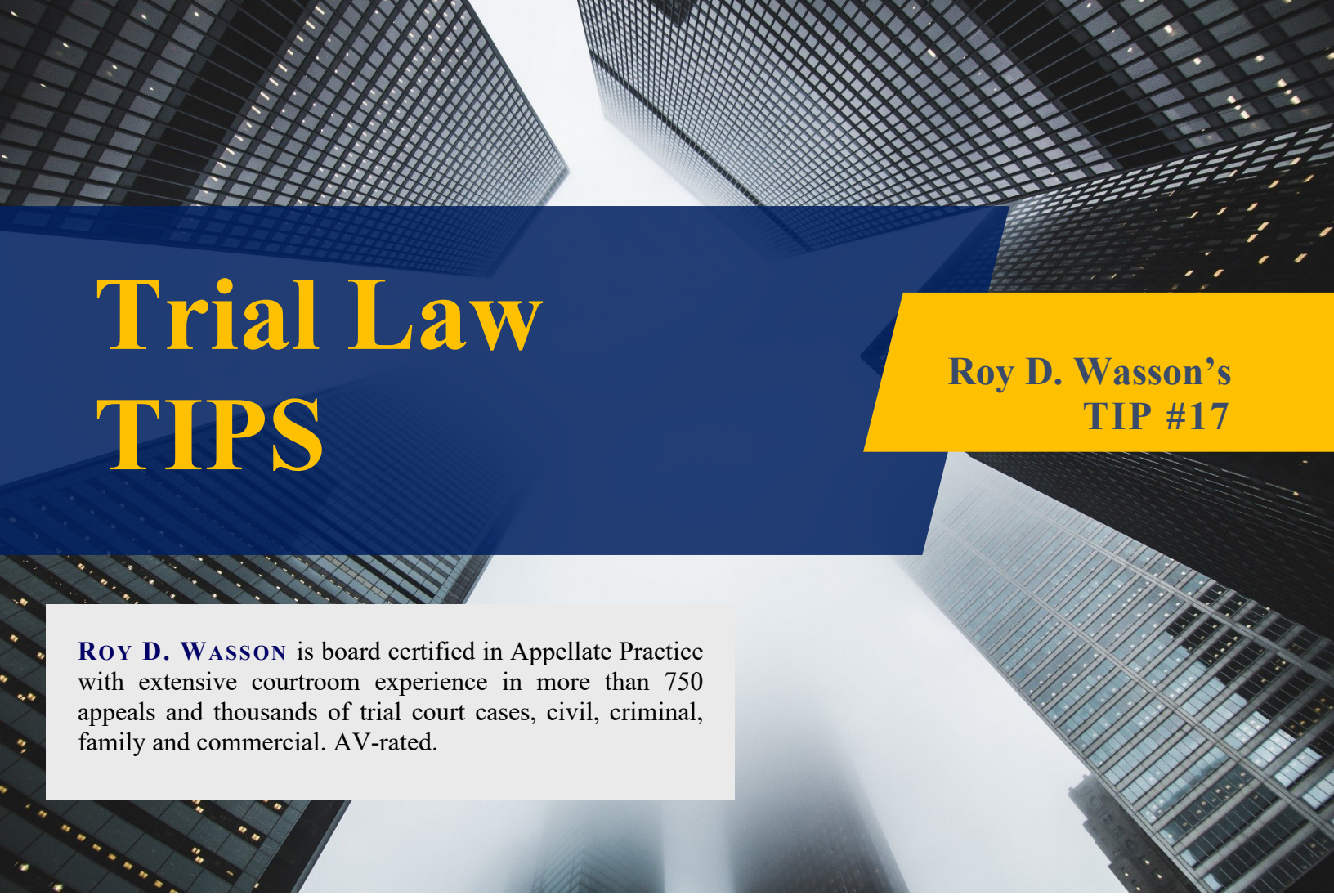

Trial Law TIPS

Roy D. Wasson's TIP #17

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Your Star Witness Develops Sudden Amnesia Substantive Use of a Deposition of an Otherwise-Available Non-Party

The Nightmare on Flagler Street

Your one and only favorable eyewitness has found his or her way to the courthouse and is on the stand. At last the jury can hear the truth from a non-biased source! You ask all the preliminary stuff about the witness' background and the circumstances for being at the scene of the collision/explosion/slip-and-fall, etc. Then you wind-up for the kill:

> "Q. And what color was the traffic signal when my client entered the intersection?"

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"A. I, uh, I really don't remember." [pause, then sound of trial lawyer "thudding" on courtroom floor]

After the bailiff resuscitates you with CPR and an oxygen mask, you fumble for your rule book and the witness' deposition, avoiding looking at the jury for fear they will see the fear in your eyes.

You ask yourself: "Am I really in trial?" You wonder if this is just another episode of the recurring nightmares that trial lawyers have? The one akin to the nightmare that lawyers and non-lawyers have: dreaming that you are standing in front of a crowd, and then suddenly noticing that you are naked.

You say that ***this nightmare has never happened to you*** during trial? That just means that you are still very young. Or very lucky. Or both. It ***will*** happen, when you least expect it. It will happen on the very next day after your mid-trial meeting with your Ace witness, the meeting you left with gladness and certainty that things are going to go smoothly for the rest of the trial.

What *Not* to Do Next

What do you do next? Let's see a show of hands. Who votes to impeach your own witness by digging out the depo. and laying the foundation: "Don't you remember coming to my office on June 9th and giving your testimony in the presence of a court reporter? Don't you remember that I asked you then, at page 21, 'What was the color of the light?' And your answer then was . . . .?" [If you raised your hand for this choice, go sit in the corner for 5 minutes.]

Who votes instead to "refresh the recollection" of the witness, by letting him or her read the page out of the depo., then asking: "Does that refresh your recollection?" [If your hand is up, join the other group in the corner. And no talking.]

DO *NEITHER* OF THOSE THINGS!! At least not until you try a better approach: reading the deposition testimony as ***substantive evidence***. "How can I do that?" you ask. "The witness is not a party and he/she is available at trial," you protest. Patience,

Grasshopper. First let me explain why you don't want to use the other two approaches.

Impeachment of your witness is a bad idea strategically. And there is an even stronger reason than that not to use that approach. If you impeach with the deposition as a prior inconsistent statement, you only have challenged the ***credibility*** of the witness' testimony that he or she cannot recall. You have not put on any ***substantive*** evidence about what color the dang light was! (Don't give me that spiel about "the jury doesn't know the difference about substantive-evidence-versus-impeachment; they'll think its substantive proof." The ***judge*** knows the difference, and it may well matter.)

Even if the witness clearly said in his or her depo. that your client had the green light, and even if the witness agrees with your impeachment question at trial by saying "Yes, that was my testimony," when it comes to a directed verdict motion, if all you do is impeach with the prior statement, you still have no proof in the record that the light was in fact green. If that was your only proof on the liability issue: directed verdict for the defense. Don't come cryin' to me.

The other option is not much better. Refreshing recollection of a witness is risky business, especially one who has just turned on you without warning. What if the witness reads his or her deposition testimony to himself or herself at your behest at trial, and then responds to your question whether his or her recollection is refreshed by saying: "I know that I said that when you took my depo., but I really did not remember then either, and I was just guessing that the light may have been green."?

The bailiff might not be able to resuscitate you a second time.

Tell the Judge: "My Appellate Lawyer Says This Will Work"

Instead of impeaching or refreshing your witness' recollection, excuse the witness and read the depo. as substantive proof instead. Sure the DA will shriek that Rule 1.330 does not

permit the use of a non-party witness' depo., when that witness actually made it to trial. The exceptions in that rule are as follows:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

The only arguable bases for reading the depo. in this "nightmare" case are C or E, but no case holds that a sudden memory lapse is "illness" or "infirmity," and the exception under E requires prior notice that you have no time to furnish. Tell the judge: "We are not relying on Rule 1.330, Your Honor."

Instead, rely on the "former testimony" provision of Florida Evidence Code §90.804. That provision states as follows:

> (2) *HEARSAY EXCEPTIONS.* --The following are not excluded under s. 90.802, *provided that the declarant is unavailable* as a witness:
>
> (a) *Former testimony.* --Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an

> opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(Emphasis added).

"Wait a minute!" you shout. "That section only applies to allow depositions of witnesses who are 'unavailable,' and my star witness appeared at trial under subpoena, so how can I say that s/he was 'unavailable'?"

"Easy," I say (That's easy for me to say, right?). Here is the definition of "unavailable" under 90.804:

> **(1)** ***DEFINITION OF UNAVAILABILITY.*** "Unavailability as a witness" means that the declarant:
>
> (a) Is exempted by a ruling of a court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
>
> (b) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
>
> (c) ***Has suffered a lack of memory of the subject matter of his or her statement*** so as to destroy the declarant's effectiveness as a witness during the trial;
>
> (d) Is unable to be present or to testify at the hearing because of death or because of then-existing physical or mental illness or infirmity; or
>
> (e) Is absent from the hearing, and the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means. However, a declarant is not unavailable as a witness if such exemption, refusal, claim of lack of memory, inability to be present, or absence is due to the procurement or wrongdoing of

> the party who is the proponent of his or her statement in preventing the witness from attending or testifying.

(Emphasis added).

"Show me a case," the judge commands, immediately suspicious of these statutes on evidence and the mysterious "appellate lawyer" who would suggest such nonsense as reading the depo. of a non-party witness who just left the courtroom in perfect health only minutes ago.

One good case on the point is *Walden v. Sears, Roebuck & Co.,* 654 F.2d 443 (5th Cir. Unit A. 1981), which involved a plaintiff's attorney's ability to use his own client's deposition under Federal Rule of Evidence 804, which has the same language as 90.804. In *Walden* the plaintiff had in his deposition testified in great detail how the accident had occurred. But then the effects of the accident took their toll and he could not recall very much by the time of trial. The court held as follows:

> Walden first contends District Court erred in excluding Christopher's deposition testimony because of (i) the losses in both Christopher's long and short-term memory, and (ii) the lengthy intervening period before the case went to trial. Walden emphasizes that only Christopher could testify he attempted to actuate both the hand and pedal brakes and that they "went out." Moreover, Walden argues, had Christopher's deposition testimony been admitted, it would have given greater weight to the testimony of his expert witness.
>
> Sears asserts the District Court properly excluded the deposition evidence because Walden failed to meet any of the requirements of F. R. Civ. P. 32(a) which provide for the admission of deposition testimony. . . .
>
> The provisions of F. R. Civ. P. 43(a) state the testimony of witnesses shall be in open court unless otherwise provided by the Federal Rules of Evidence. ***Deposition testimony is admissible under F. R. Evid.***

> ***804 when the declarant is unavailable. See 4A Moore's Federal Practice P 32.32(2). As defined by Rule 804, "unavailability" includes situations in which the declarant testifies to a lack of memory of the subject matter of his statement. The crucial factor is not the unavailability of the witness but rather the unavailability of his testimony.*** 4 Weinstein & Berger, Weinstein's Evidence, P 804(a)(01).
>
> [The] District Court erred in excluding the deposition testimony. At the time of his deposition, Christopher gave a detailed account of his efforts to stop the bicycle by use of both the handle and pedal brakes. Due to the losses to his memory medically related to the occurrence such was not the case when he testified at trial, approximately nine years after the accident.

Id. at 446-47(emphasis added).

There are a few other similar cases from Missouri and Kansas and other cattle-raising epicenters of jurisprudence, but if you think I am sitting in front of a monitor all night typing cites to those at the rates this List pays for these TIPS, you're dreamin'. The foregoing authorities, and the idea to use them, should be enough to keep away the nightmares about amnesiac witnesses. Now back to the naked dream . . . .

Keep Tryin!

Roy

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