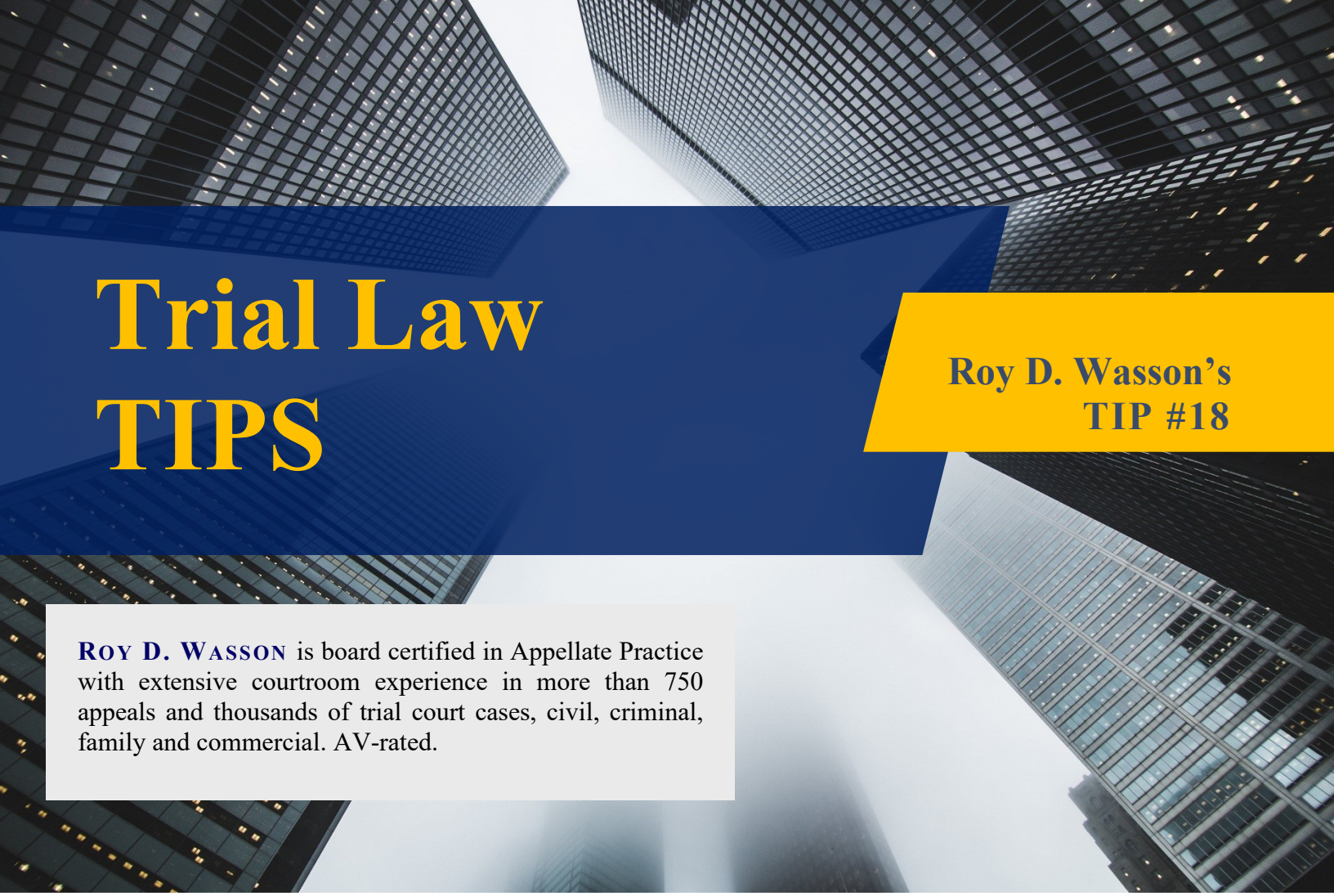

Trial Law TIPS

Roy D. Wasson's TIP #18

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.

Recovery of Court-Awarded Fees—Some Basics

There is only thing maybe more satisfying than getting a good verdict from the jury (that means with your clothes ***on***, Roy Glass). That is recovering an attorney's fee award paid by the defendant which is better than your maximum percentage fee under Rule 4-1.5. Cases involving fee awards for litigating insurance coverage issues under Section 627.728, Fla. Stat., beating your Proposal for Settlement, and contractual attorney's fee provisions make it clear that your fee award may exceed the amount of the principal judgment by many times and still be affirmed on appeal.

The first of two cases which come to mind to demonstrate the potential in the court-awarded fee context is the landmark PIP case of *State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836 (Fla. 1990), in which an attorney's fee of $253,000 was awarded on a

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PIP claim involving a $600 medical bill. The second case is one in which I had the pleasure of serving as the appellate attorney's fee expert: *Lugassy v. Independent Fire Ins. Co.*, 636 So. 2d 1332 (Fla. 1994),in which more then $1,000,000 in combined trial-level and appellate attorney's fees was awarded and collected on a fire insurance claim where the jury awarded the plaintiffs a verdict of less than $100,000, including prejudgment interest.

You could write a book on law on recovering court awarded fees. (No, come to think of it, the book already has been written: a multi-volume treatise by Judge James Hauser, which I keep within easy reach.) Rather than writing a book, I offer a few bullet points to remember when litigating contested court-awarded fees:

Valid Fee Agreement with Client

The first thing you will learn in litigating a court-awarded attorney's fees issue is that the discovery and harassment from the defendant is as intense (if not more so) than it was during the trial of the main case. The first thing you can expect to receive is a request for production of your time records, attorney's fee agreement, and other documentation. None of us keep contemporaneous time records, and we should know by now such a failure is not fatal to a good court-award based on reconstructed time records. Nothing else will be said on the subject of time records at this time.

Instead, this bullet pertains to your duty to have (and to produce) a valid attorney's fee agreement signed by you and your client. The bottom line is that such an agreement must comply in every respect with the Rules Regulating The Florida Bar, Rule 4-1.5, to be enforceable and to support an award of fees from the defendant. *See Chandris v. Yanakakis*, 668 So.2d 180, 185-96 (Fla. 1995) in which the Supreme Court clearly stated: "Likewise, we hold that a contingent fee contract entered into by a member of the Florida Bar must comply with the rule governing contingent fees in order to be enforceable."

Make sure your fee agreement meets all the requirements of Rule 4-1.5, including being signed by you, not exceeding the maximum percentages, referencing the Statement of Client's Rights, and so on. After overcoming other problems in the

Chandris case, the last barrier to enforcement was that the plaintiff's attorney *forgot to sign the contract*!

Contractual Caps On Fees—The Self-Inflicted Wound

The next problem to overcome in obtaining a decent court-awarded fee is to make sure that the fee agreement you drafted does not limit you to a percentage of recovery. Unless your fee agreement has a provision that you will recover ***"the greater of*** "the percentages permitted under Rule 4-1.5, "or a court-awarded fee," you will be capped at the percentage recovery, even on a claim against the opposing party where fees would be recoverable by law. *See Orlando Regional Medical Center v. Chmielewski*, 573 So. 2d 876 (Fla. 5th DCA 1990).

The pitfall in that case cost the trial lawyer (who is a friend of many of us) significantly, when a "lodestar" fee would have amounted to around $141,000, but the court held that the fee should be limited to the $34,000, which was the contractual percentage of the plaintiff's recovery. $100,000 lost due to eight or ten words left out of the contract! Don't let that happen to you.

Permissible Modifications to a Fee Agreement

If the jury is still out, or you haven't started trial yet, it is not too late to modify your fee agreement to reflect your original intent. In *Lugassy v. Independent Fire Ins. Co.*, 636 So. 2d 1332 (Fla. 1994), it occurred to the plaintiffs' attorneys that they had a *Chmielewski* problem while the jury was deliberating. They agreed with the plaintiffs that they had all along intended that the insurance company would be liable for an uncapped court-awarded fee, and went back to their office and modified the fee agreement accordingly, before the verdict was returned.

It took three appeals, but the Supreme Court eventually held that modifications to a contingent fee agreement were acceptable up to the time the jury returned its verdict. If your jury is still out, take a look at your fee agreement and act accordingly.

Discovery From Defendants—The "Goose/Gander Rule"

Don't let the defense attorney conduct all the discovery on the fee issue. There is authority supporting the proposition that the defendant's attorney's hours are relevant to the number of hours you expended in the case. *See State Farm Fire & Cas. Co. v. Palma*, 555 So. 2d 836-837 (Fla. 1990), in which the Supreme Court affirmed the award of 650 hours to the plaintiff's attorney's stating: "We note that State Farm's counsel expended 731 hours on this case."

Similarly, in *Chrysler Corp. v. Weinstein*, 522 So. 2d 894, 895-96 (Fla. 3d DCA 1988), the Third District approved the trial court's finding as follows: "a review of the record shows that the trial judge found the number of hours [expended by the plaintiff's attorneys] to be reasonable in comparison to those spent by *Chrysler's* attorneys."

See also LaFerney v. Scott Smith Oldsmobile, Inc., 410 So. 2d 534 (Fla. 5th DCA 1982), in which court of appeal reversed the trial court's reduction of attorney's fees which significantly cut back the number of hours awarded to the plaintiff, noting that the 90.5 hours expended were not excessive in light of the 60.25 hours expended by the defendant's attorney. Language that trial lawyers everywhere will find comforting is the portion of the 5th DCA's decision in that case which recognizes "the ***greater effort usually required by representing a plaintiff*** as opposed to a defendant." *Id.* at 535 (emphasis added).

If you are in federal court (or before a judge who wishes that he was), there is good authority supporting your efforts to obtain discovery of the defense attorney's hours. Start with the case of *Ruiz v. Estelle*, 553 F. Supp. 567 (S.D. Tex. 1982), in which the court discusses at length the relevance of the amount of hours expended by the defendant's attorneys, holding: "Federal courts have repeatedly noted the value of information concerning the defendants' counsel's time expenditure, in assessing the reasonableness of time claimed by plaintiff."

One of the best court of appeals cases on the point is the Seventh Circuit's decision in *Charapliwy v. Uniroyal, Inc.*, 670 F. 2d 760 (7th Cir. 1982). In footnote 18 on page 768 on that decision,

the court discusses the importance of knowing how much time the defense attorney expended in the case, and holds: "in the case before us, . . . we suggest that the hours and hourly rates charged by the defendant's provide a helpful guide in determining whether similarly high rates and hours requested by the plaintiff were reasonable."

Granted, the trial court's decision to grant or deny you discovery of the defense attorney's time is subject to an abuse of discretion standard. *See Mangel v. Bob Dance Dodge, Inc.*, 739 So. 2d 720, 724 (Fla. 5th DCA 1999) ("Florida has not yet adopted a hard and fast rule regarding discovery and admission of opposing counsel's fees. This reflects the salutary view that the discovery may be justified in some cases and not in others and that it is a matter that should rest within the sound discretion of the trial court.") But with the foregoing authority recognizing the importance of such evidence, persuasive trial attorneys such as you should be able to convince the trial judge to correctly exercise his or her discretion in the matter.

Need for Live Expert Testimony

Some courts have expressed frustration with the legal requirement of expert testimony on a matter of such familiarity as the measure of attorney's fees. *See Island Hoppers, Ltd. v. Keith*, 820 So. 2d 967 (Fla. 4th DCA 2002). The court in that case expressed the belief that the trial court ought to be able to determine the reasonable amount of a lodestar fee even without expert testimony, which it cynically viewed as being simply a rubber-stamp of the prevailing attorney's claimed number of hours and hourly rate. Still, the cases require expert testimony on the subject. *E.g., Lafferty v. Lafferty*, 413 So. 2d 170, 171 (Fla. 2d DCA 1982); *Tanner v. Tanner*, 391 So. 2d 305 (Fla. 4th DCA 1980).

While a common practice is to obtain an expert affidavit concerning your reasonable number of hours and reasonable hourly rates, be careful with that. Unless you have an agreement from the DA that the affidavit will be admissible, it will be excluded as hearsay. *See, e.g., Dhondy v. Schimpeler,* 528 So. 2d 484 (Fla. 3d DCA 1988); *Soundcrafter's v. Laird*, 467 So. 2d 480 (Fla. 5th DCA 1985).

If you do have the agreement of defense counsel and do not want to inconvenience your expert, an affidavit will be admissible. *See, Insurance Co. of North American v. Julien P. Benjamin Equip. Co.*, 481 So. 2d 511 (Fla. 1st DCA 1985). I suggest that you find a well-qualified expert and present him or her live to impress upon the trial court the significance of the matter and the weight of the expert testimony on the measure of the fees.

Fees for Your Expert— "He Ain't My Brother; He's Heavy"

Court-awarded fees for your fee expert are not automatic. The lead case on the subject surmises that most of the time we are willing to testify pro bono, as a favor to our friends. *See Travieso v. Travieso*, 474 So. 2d 1184 (Fla. 1985):

> We hold that pursuant to section 92.231, expert witness fees, at the discretion of the trial court, *may* be taxed as costs for a lawyer who testifies as an expert as to reasonable attorney's fees. We do not hold that such expert witness fees must be awarded in all cases. Generally, lawyers are willing to testify gratuitously for other lawyers on the issue of reasonable attorney's fees. This traditionally has been a matter of professional courtesy. An attorney is an officer of the court and should be willing to give the expert testimony necessary to ensure that the trial court has the requisite competent evidence to determine reasonable fees. ***Only in the exceptional case where the time required for preparation and testifying is burdensome, should the attorney expect compensation***.

(Emphasis added).

If your cases involve more than a single accordion file and a walk across the street to a 15-minute fee hearing, enter into an agreement with the expert that the time and labor involved are going to be burdensome and that he or she has the expectation of being paid. (Let me tell you about the time I was awarded 82 hours—as the fee expert, not as the attorney—in *Lugassy*.)

Conclusion

Much more can be said on the subject of court-awarded attorney's fees. This "TIP" does not even mention the subject of multipliers, which are near and dear to our hearts, but becoming much more difficult to recover. More to come in a later installment.

Keep Tryin!

Roy

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