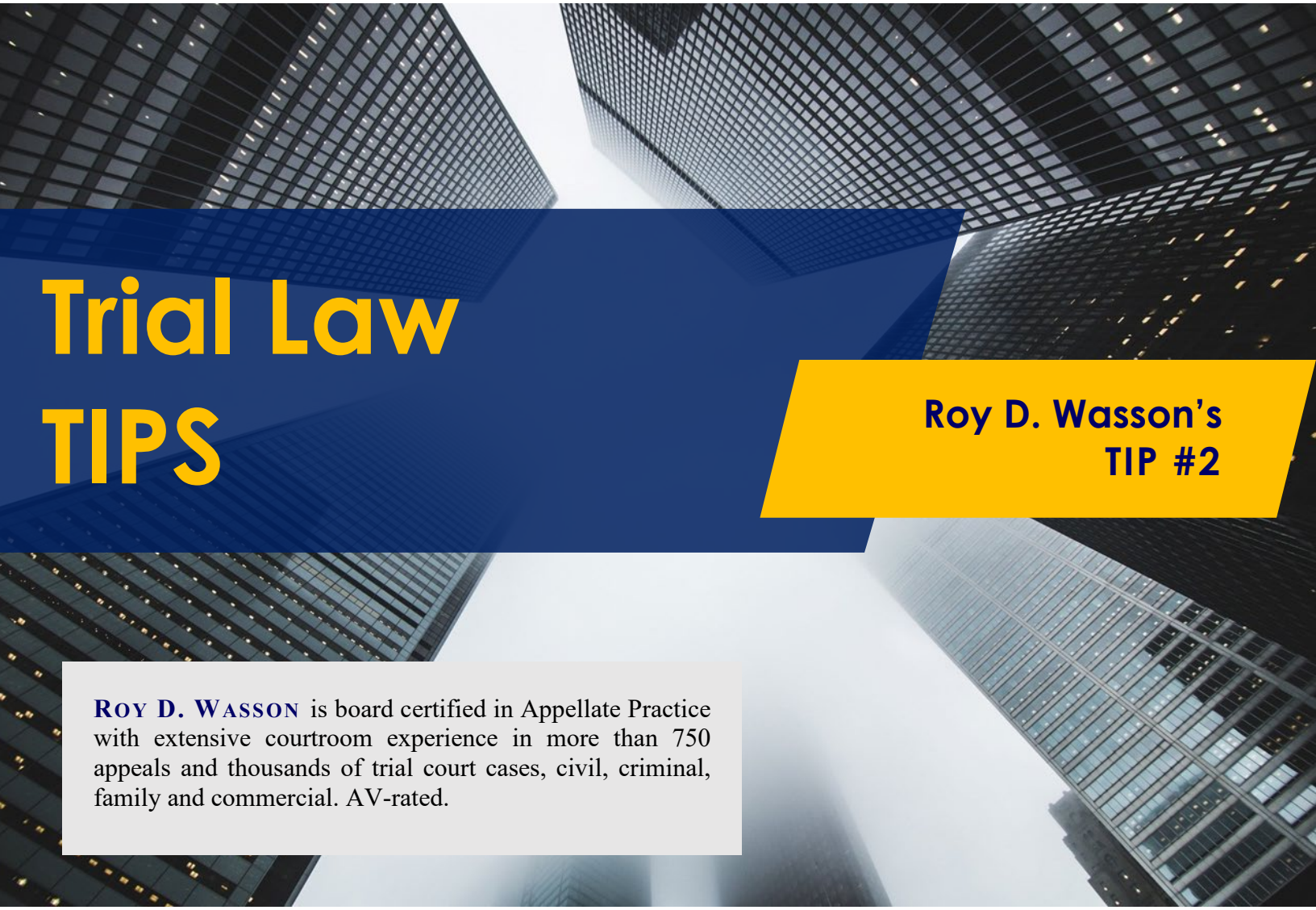

Trial Law TIPS

Roy D. Wasson's TIP #2

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.

Don't Tell the Judge What Happened Outside the Courtroom
(Judges Are Not Supposed to Believe You)

It happens every day in every courthouse in Florida. You have done it a dozen times at least: You show up at a motion calendar or special appointment hearing and launch into the other side for his or her transgressions. "Judge, they did not tell me the expert's depo was cancelled until after my plane landed in Zanzibar, so I need my airfare and fees paid."

Sometimes the entire case can be won or lost on things which happened outside the courtroom, but which have little or nothing to do with the core facts of the case. For example, to avoid having a

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defense motion for summary judgment granted based on your failure to deny Requests for Admission, you tell the judge: "I served the responses within thirty days but they must have been lost in the mail."

Don't do that! You are improperly attempting to establish matters of contested fact with unsworn "lawyer talk," and if the judge rules against you, the appellate court will tell you that you needed to call a witness and swear him or her in to testify, or at least file an affidavit under oath.

In *Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd.*, 636 So. 2d 838 (Fla. 2d DCA 1994), the Court noted: "We have held that, in the absence of a stipulation, a trial court ***cannot make a factual determination based on an attorney's unsworn statements***." *Id*. at 540 (emphasis added). Although trial judges frequently accept the unsworn representation of an attorney concerning factual matters, if your opponent objects, the acceptance of those representations may well result in reversal. The court in the *Blimpie Capital* case made it clear that "[a] trial court, as well as this court, is also precluded from considering as fact unproven statements documented only by an attorney." *Id. Accord, Schneider v. Currey*, 584 So. 2d 86 (Fla 2d DCA 1981).

Other districts have similarly held that unsworn "lawyer-talk" is not properly considered by a trial judge. "If the advocate wishes to establish a fact, ***he must provide sworn testimony through witnesses other than himself*** or a stipulation to which his opponent agrees." *Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982)(emphasis added).

An affidavit will usually be acceptable to establish factual matters of this sort, but try to get one from a secretary or your client, or someone other than counsel of record to avoid the "lawyer-as-witness" problem. Or you can use Requests for Admission (if you have time) or a stipulation from your opposing counsel that certain facts occurred. But don't just do things the way you have always done them before and make unsworn statements of fact at the hearing. (Easy for me to say that you should change overnight, huh?)

On the other hand (as appellate lawyers are wont to say to hedge our bets in giving advice), don't sit blithely silent if your adversary tries to avoid a default by making unsworn representations of excusable neglect (etc.) to the judge. ***Object, object, object***, or the defect may be waived. *See Centennial Ins. Co. v. Fulton*, 532 So. 2d 1329, 1331 (Fla. 3d DCA 1988)("Obviously a lawyer's unsworn statement cannot overcome actual testimony to the contrary. In this case, however, there was neither such evidence nor even any argument which challenged the accuracy of the attorney's representation").

It is difficult to change old habits, such as the habit of merely making unsworn representations about factual matters to trial judges during non-jury proceedings. It is better, however, to break bad habits than to risk jeopardizing your client's position.

Keep tryin!

Roy