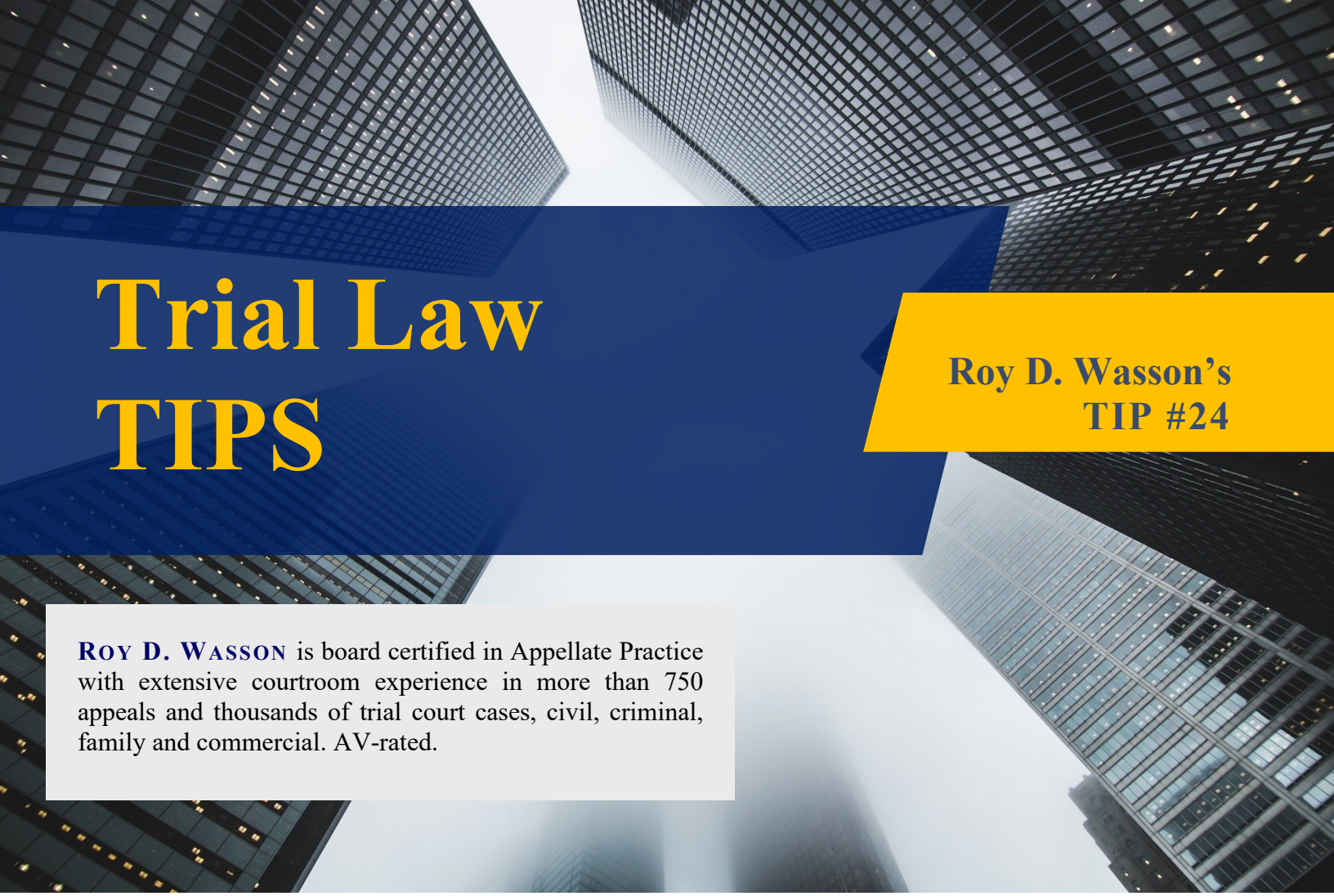

Trial Law TIPS

Roy D. Wasson's TIP #24

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.

Calling Witnesses to Summarize Records—Comply with Section 90.956 First

Introduction

You're in the middle of trial and are seated at counsel's table surrounded by foot-high stacks of medical records. The vast majority of the documents are routine nursing entries which shed no light on your claim. The truly "good stuff" is buried like golden needles in the haystack of hospital records that cost you hundreds or thousands of dollars to have duplicated. Are you going to bore the jury with all of that irrelevant stuff? There's gotta be a better way!

On the stand is one of your best witnesses, a subsequent treating physician who has helped you sift through all of the gobbledy-gook and helped you understand the key points of the trail of medical evidence. You rise to approach the witness with a beautifully printed chart containing an outline of the salient points

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you want the jury to know about which are contained in the stacks of hospital records.

"Objection," squeaks the defense attorney, who continues by arguing that "plaintiff's counsel did not comply with Section 90.956." That is the rule of evidence which permits you to use summaries or charts to present to the jury the essence of voluminous documents. But what does that rule have to do with oral testimony?

The Rule of Evidence Applicable to Written Summaries

The rule cited by the DA in the stated objection reads as follows:

> **90.956 Summaries**
>
> When it is not convenient to examine in court the contents of voluminous writings, recordings or photographs, a party may present them in form of a chart, summary, or calculation by calling a qualified witness. The party intending to use such a summary must give ***timely written notice of his or her intention*** to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is compiled available for examination or copying, or both, by other parties at a reasonable time and place. A judge may order that they be produced in court.

Section 90.956, Fla. Evid. Code (emphasis added).

Annoyed at the delay which your obstreperous opponent is causing, and the interruption in the flow of your case, you stroll up to sidebar, confident that the judge will put the mealy-mouthed defense attorney in his or her place. "I provided defense counsel with copies of the charts I'm going to use two weeks ago, and they must already have all the medical records, so I don't see what the objection is, Your Honor," you state upon reaching the bench.

"I can't remember whether he showed me that chart or not, Judge," the defense attorney equivocally states, "but that's not the

point." The DA states: "There's no 'written notice' of Plaintiff's 'intention to use the summary' in the court file, Judge, I checked it this morning."

Defense counsel's argument is one which has been made in numerous cases, some of which have resulted in reported decisions that provide authority for keeping your detailed chart from the jury, even if it was shown to defense counsel before trial. For example, one of the cases on the subject states: "Florida courts require ***strict compliance*** with the 'timely written notice' requirement contained in this rule of evidence, especially where the record contains no evidence that the underlying data from which the summary is compiled was made available to the complainant." *Batlemento v. Dove Fountain, Inc.*, 593 So. 2d 234, 240 (Fla. 5th DCA 1991).

Don't be overconfident in your ability to persuade the judge that you provided the DA with the chart and underlying records before trial. Your unsworn assurance to the judge that the medical records were provided to defense counsel is not sufficient to constitute "evidence" which would excuse the "written notice" requirement. *See* Trial Law "Tip" of the Week—Tip #2: *Don't Tell the Judge What Happened Outside the Courtroom (He or She Is Not Supposed to Believe You). See also, e.g., Leon Shaffer Golnick Advertising v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982)("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").

But what about the fact that you produced in discovery copies of those stacks of medical records to defense counsel? Isn't that "evidence" in the record? Not usually. It has been many years since attorneys filed copies of the documents which are produced in discovery (much to the relief of burdened court clerks everywhere). Although the response itself may be filed without the attachments, most responses to production requests simply say something indefinite like "see attached records," rather than specifically identifying what was produced. In short, if the judge wants to make things tough on you, you have little in the way of "evidence" in the record to act as a substitute for your "written notice" of your intention to use the summary.

Proceed to "Plan B" as a Fallback–But Proceed with Caution

At this point in the sidebar conference, you may be thinking that it would be better to use an alternative method of getting the subject information before the jury which may not carry the same risk of alienating the judge or building error into the record on appeal, so you say something to the effect of: "I'll withdraw the chart and just ask the witness questions." After everybody gets back into position, you resume your direct examination of your doctor: "Dr., can you give the jury an overview of the salient aspects of the treatment my client received while hospitalized?" Before the witness can respond, defense counsel is on his [or her] feet again, with the favorite word of the day: "Objection."

"Ground?" The judge asks.

"Again, judge, Section 90.956 requires prior 'written notice' before you can ask a witness to summarize the contents of documents."

"Nonsense," you think to yourself, Section 90.956 by its express terms only applies to presentations "in the form of a chart, summary, or calculation," not to the testimony of witnesses. "Does this defense attorney expect me to file a written notice every time I plan on asking a witness to give an overview of a state of affairs for the jury?" you wonder to yourself.

At sidebar, you make those thoughts known to the judge. Then defense counsel pulls out his dog-eared copy of the authority for winning this argument: *Bowmar Instrument Corp. v. Fidelity Electronics, Ltd.*, 466 So. 2d 344, 345 (Fla. 3d DCA 1985). In that decision the court held: "Contrary to the ruling of the trial court, we are of the view that Section 90.956, Florida Statutes (1982), applies not only to a written summary which a party intends to offer in evidence, ***but also to a summary which, as in the present case, is offered through the testimony of a witness***." (Footnote deleted and emphasis added).

While the court in the *Bowmar Instrument* case found that the violation of Section 90.956 was not reversible error under the facts of the case, the result would be different in a situation where

such an objection were made and there was no showing in the record that the objecting party had been provided with the underlying materials sufficiently in advance of trial to prepare for the testimony.

D. Conclusion:

The lesson here is a simple one. In preparing for trial there are two ways to ensure the admissibility of your witnesses' testimony which amount to summaries of voluminous documents. One is to comply with Section 90.956 by providing defense counsel with a "timely written notice" of your "intention to use the summary, proof of which ***shall be filed with the court***." The other way to protect yourself is to make sure that the record reflects the fact that you have provided opposing counsel with complete copies of all the underlying records which the witness will be summarizing in his or her testimony.

Hey, maybe this will never come up in your practice and I am just worrying about things needlessly. But that is my job; I am, after all, an appellate lawyer. Nag, nag, nag!

Keep Tryin!

Roy

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