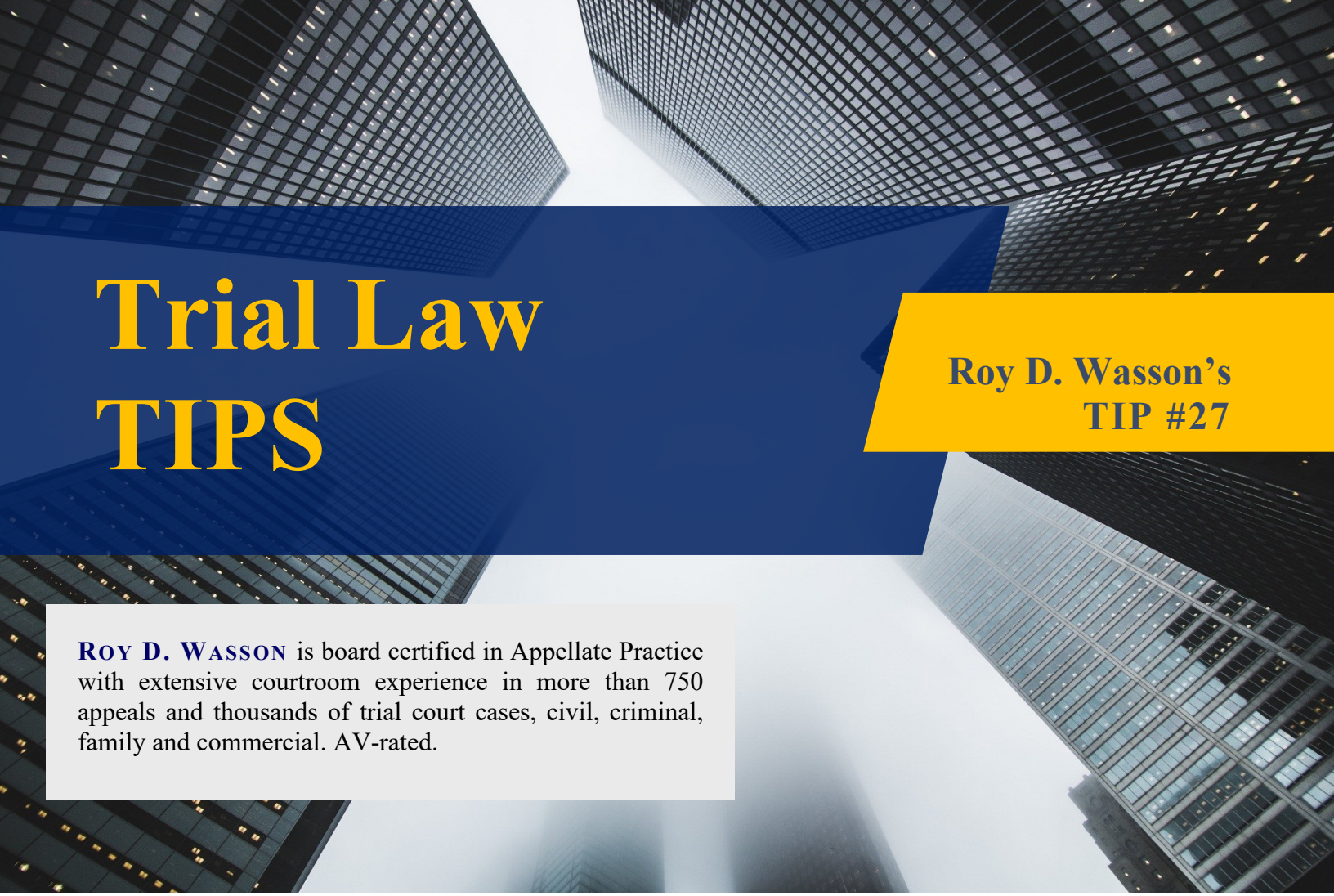

Trial Law TIPS

Roy D. Wasson's TIP #27

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.

Affidavits and Verifications—Notarization Not Always Necessary (or Sufficient)

Introduction

If it has not yet happened to you, you either are a brand new lawyer or you have a fairy godmother perched on your shoulder: You need an affidavit executed now, but your witness is snowed-in at a ski lodge in the Alps with no notary public within 100 miles. You have a summary judgment hearing coming up next week, but your expert witness is in a hotel somewhere with a fax machine, but no one to administer an oath for the opposing affidavit you have prepared. You finally found a doctor who is willing to give you a verified opinion so you can file that malpractice case, but the doctor has no notary in his or her office and basically ignores you when you make a suggestion about going someplace to get the corroborative affidavit signed.

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What most of us do in such a situation is to file a faxed and signed copy of the affidavit without any notary public's signature, hoping to follow-up with a notarized original in the next few days. But wouldn't it be great if you could just skip the notarization altogether? Here is how to do just that.

Notarization Not Essential for Most Affidavits or Verified Pleadings

When it comes to papers filed in litigation, there is no requirement under the rules of civil procedure or statutes that an affidavit or verified pleading be notarized. Further, there is nothing in the general definitions of "affidavit" or "verified" which requires a notary's signature. While it ***is*** required that an affidavit be under oath or under penalty of perjury, the witness who is signing the affidavit can attest to such an oath without necessarily being sworn in by a third party.

This issue came up in a case I handled several years ago called *Mieles v. South Miami Hospital*, 659 So. 2d 1265 (Fla. 3d DCA 1995). That was a medical malpractice case which was dismissed because my co-counsel did not obtain a notarized corroborative opinion in a timely fashion. However, he did file a document entitled "Verified Written Medical Expert Opinion" executed by a doctor. That was just the sort of situation in which the expert had no notary in his office and did not want to go looking for one.

The verified opinion in *Mieles* contained the following after the substance of the opinion and above the doctor's signature: "Under penalties of perjury I declare that I have read the foregoing verified written medical expert opinion pursuant to §766.203, Florida Statutes and that the facts stated are true to the best of [my] knowledge and belief." The trial judge held that the opinion was not 'verified" because it was not notarized, and dismissed the complaint. The Third District reversed and reinstated our case.

The basis for the Third District's decision was the statutory requirements for verification of documents set out in §92.525, Florida Statutes, which provided two different avenues for such verification; one of which requires an oath by a notary (or other

officer), and the other of which does not. The current version of that statute provides in pertinent part as follows:

> (1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:
>
> (a) Under oath or affirmation taken or administered before an officer authorized under S. 92.50 to administer oaths; ***or***
>
> (b) By signing of the written declaration prescribed in Subsection (2).
>
> (2) A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, except when verification on information or belief is permitted by law, in which the words "to the best of knowledge and belief" may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

Id. (emphasis added). Subsection (2) does not require any notarization.

While the doctor's verified opinion in the *Mieles* case did not contain the exact language of the statute, the court held: "We conclude that Dr. Vega's signed declaration, using the language set forth in §92.525, substantially complies with the verification requirement . . . , and was permissible when initially and timely filed, therefore making immaterial the subsequent late filing of the notarized copy of the doctor's opinion." 659 So. 2d at 1265. Thus, where a rule or statute requires something to be "verified" you may decide to have the document notarized, or you can instead simply use the

language of §92.525 and have your witness execute it under penalty of perjury without notarization.

Mieles dealt with a statute which required something to be "verified," but what about where a rule or statute expressly requires an "affidavit"? Can you rely upon the *Mieles* case and the statutory language in that situation? I think that you can in the usual situation. There is no statutory definition of "affidavit" which expressly requires notarization. There is authority for the proposition that an affidavit can be one containing the above verification and without any notary's execution.

In *State of Florida v. Padilla*, 629 So. 2d 180 (Fla. 3d DCA 1993), the court determined whether or not a document signed by a police officer met the statutory requirement of "an ***affidavit*** stating the officer's grounds for belief that the person arrested was in violation of [a criminal statute]." (Emphasis added). The proof of probable cause in that case consisted of the arresting officers written statement to which he swore: "The above statement is correct and true to the best of my knowledge and belief." The affidavit stated that it was sworn to "before an authorized attesting officer," but it was not signed by a notary or other officer.

The Third District held that the affidavit was a valid affidavit in *Padilla*, even though it was not notarized, again relying on the language of § 92.525, Fla. Stat. upon which the court in *Mieles* case focused. The court in *Padilla* noted that the non-notarized alternative applied to "affidavits" by virtue of subsection (4) of that statute, which provides: "As used in the section . . . (b) the terms 'document' means any writing, ***including, without limitation,*** any form, application, claim, notice, tax return, inventory, ***affidavit***, pleading or paper . . . ." (Emphasis added). In other words, if a rule or a statute requires a party to file an "affidavit," the court in *Padilla* has held that a document which is verified in accordance with the provisions

of §92.525—which does not require notarization—is sufficient.

Other support for a definition of "affidavit" which does not include any requirement of notarization can be found in the First DCA's decision *Swartz v. State of Florida*, 316 So. 2d 618 (Fla. 1st DCA 1975). The court in that case cited legal dictionary definitions of "affidavit" as including "any voluntary ex parte statement reduced to writing and sworn to or affirmed." *Id*. at 621. Another definition used by the court in the *Swartz* case for "affidavit" was "a written or printed declaration or statement of facts made voluntarily and ***confirmed under oath*** or affirmation." *Id.* (emphasis added).

Notably, the court employs a definition of "oath" which does not necessarily include any requirement of the witness being sworn in by a notary or other officer. That definition was as follows: "Oath: Any form of attestation by which a person signifies that he is bound in conscience to perform the act faithfully and truthfully." *Id.* Thus, applying that definition of "oath," there is nothing to prevent the witness from administering the oath upon himself, by simply including it in the verification in writing at the bottom of the affidavit.

Notarization Alone May Not Be Sufficient

I'm not by this "TIP" encouraging anyone to stop using notaries for routine affidavits and to quit paying for your secretary's renewal of the notary license. The purpose of this TIP is merely to give you some assurance that you can get by with a non-notarized affidavit when time deadlines so require. Don't throw up your hands and fail to meet a filing deadline because there is no one to notarize a needed affidavit.

One further word of caution, however, is that the mere fact that something you prepare as an "affidavit" has been notarized may not, in and of itself, be sufficient. Unless the affidavit contains the statutory language (or substantial equivalent) signifying that the witness has taken an oath or executed the document under penalty

of perjury, the mere fact that it has been notarized will not be enough to constitute an affidavit.

This issue was addressed by the court in *Pina v. Simon-Pina*, 544 So. 2d 1161 (Fla. 5th DCA 1989). That was a case in which the question before the court was the sufficiency of the process server's affidavit that the process had been served in The Netherlands Antilles. Section 48.194, Fla. Stat., requires that "[a]n affidavit of the officer shall be filed stating the time, manner, and place of service" effectuated outside of Florida. The court in the *Pina* case held that the requirement of an affidavit was not met, notwithstanding the fact that the return was executed before a notary public, because the thing that was signed before the notary was "acknowledgment" rather than an 'affidavit." The Court noted as follows:

> A translation of the return of service states that the process server, Rogelio Cipriano Ersilia, personally left the dissolution papers with Antonio at his residence . . . on June 13, 1988. . . . further, ***he signed an acknowledgment rather than an oath or affidavit before the notary*** public. It states:
>
> > *Acknowledgment* Before me the Undersigned Miguel Lionel Alexander, LLM, a civil law notary, residing in Curacao, Netherlands Antilles, on this the fifteenth day of June 1988, personally Mr. Rogelio Cipriano Ersilia, known to me to be the person whose name is subscribed to the foregoing document and who ***acknowledged to me that he executed same*** for the purposes therein expressed. Subscribed before me on the date aforementioned.

544 So. 2d at 1162.

The court found that the document did not meet the requirements of an "affidavit" even though it was signed before a notary, defining the difference between an affidavit and an acknowledgment as follows:

> Confusion often arises between and affidavit and an acknowledgment. Both memorialize acts done before a notary. But, in an affidavit, which is required by § 48.194, the person swearing before the notary must under oath assert that the facts set forth in the document are true. In an acknowledgment, the person merely declares that he executed and signed the document. . . .
>
> > ***Where an affidavit is called for, an acknowledgment will not suffice*** . . . . In this case, the notary only asserted that the process server acknowledged he signed the return. He did not require Rogelio to swear that the facts set forth in the return were true.

544 So. 2d at 1162 (footnote deleted).

Thus, even where your affidavit is notarized, make sure that it contains the language complying with the requirement for verification under § 92.525.

Disclaimer Concerning Probate and Transactional Matters

Your housekeeper does not "do windows." I do not "do wills."[1] Nor do I draft documents in legal transactions, such as those pertaining to sales of property, administrative licensing and so on. (I have lawyers for that stuff, and good ones, I guess.) However, I have seen some references to statutes controlling probate matters, business transactions, and other non-litigation documents as requiring a "notarized affidavit." You're on your own when it comes to stuff like that. This article addresses only what will fly if used in ordinary civil and criminal litigation matters.

[1] I say a little prayer that I predecease the nice lady whose will I once wrote as a favor, so I'm not around to see the fallout which may occur when people try understand what it was that I was trying to say on her behalf.

Conclusion

Don't fire the notary if you have one on staff, but don't despair if today's the deadline for serving or filing an affidavit and there is no notary anywhere near your affiant. Follow or paraphrase the statutory language for verification of documents, and you should be okay. Stay tuned for a later edition of Trial Law "Tips" to address the substantive sufficiency of affidavits, admissibility in various proceedings, and more on this intriguing (yawwnn!) subject.

Keep Tryin!

Roy

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