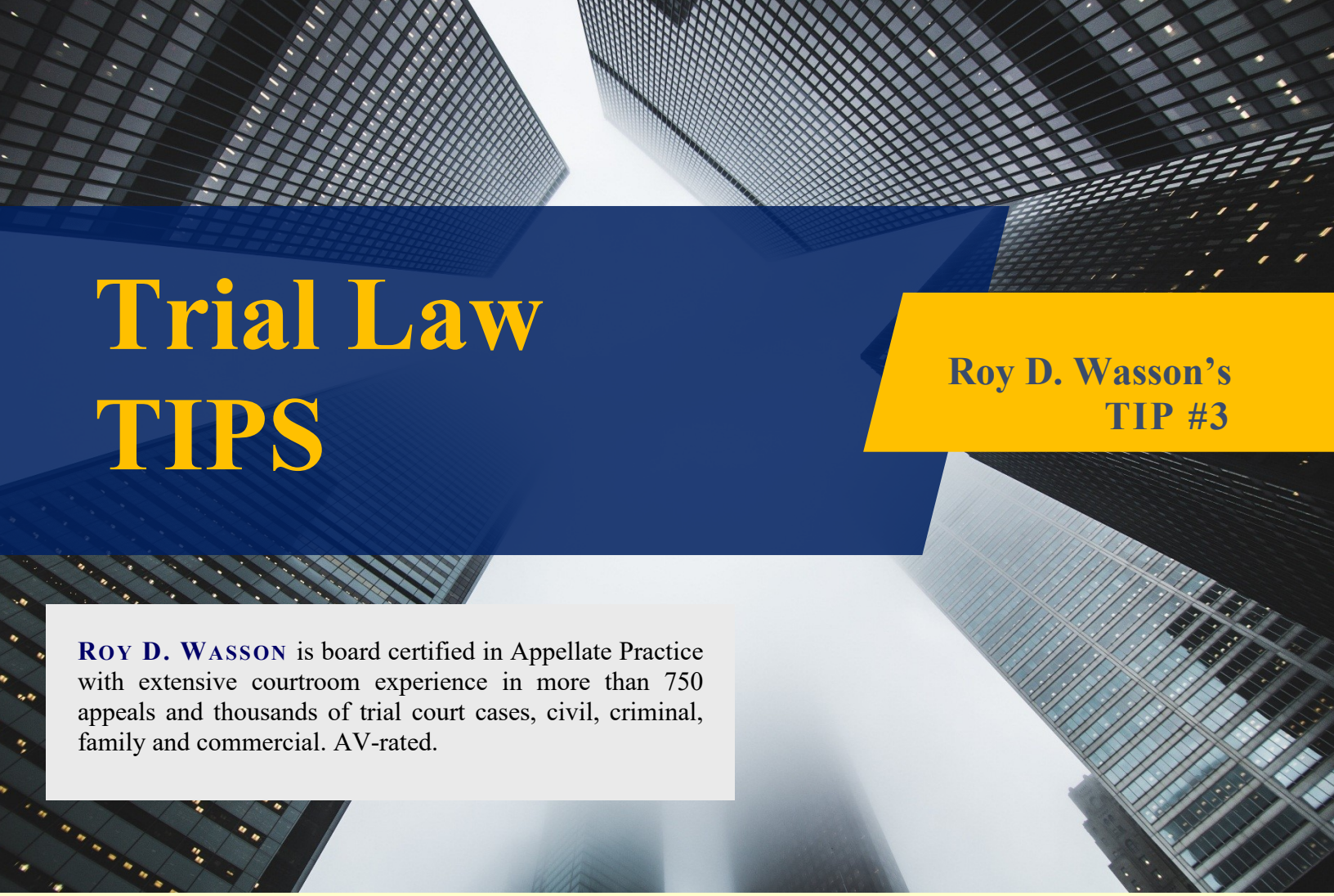

Trial Law TIPS

Roy D. Wasson's TIP #3

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.

Do Not, Under Any Circumstances, Give Your Original Jury Instructions to the Trial Judge!

I. Introduction:

Don't give the judge your requested jury instructions; at least not the original set. Sounds strange, doesn't it? Everyone gives the original set to the judge for use in the charge conference, right? Stop now and never let it happen again! Stay tuned below for why and what to do instead.

II. Record of Written Requested Instructions Required:

You want to win a big verdict right? Sure you do, that's the most important thing about trial work. Second most important: keeping the verdict on appeal or reversing a bad result on appeal. The first step in winning the appeal comes long before the jury returns its verdict at trial: that step is protecting and preserving the record, so you can show the DCA what happened below.

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One very important part of the record to preserve issues regarding your Requested Jury Instructions. All requests for instructions have to be made in writing "not later than the close of the evidence." Fla. R. Civ. P. 1.470(b). If the trial judge refuses to give an important instruction, you may not have any argument on appeal unless you can point to the record to show that the exact language of the subject charge which you requested in writing. *E.g.*, *Underwriters at LaConcorde v. Airtech Services, Inc*., 468 So. 2d 386 (Fla. 3d DCA 1985); Marlowe v. State, 190 So. 602 (Fla. 1939).

You may luck out and find a sympathetic appellate panel who will bend the rule and hear an argument based on failure to give an instruction requested orally. *See Morowitz v. Vistaview Apts.*, 613 So. 2d 493 (Fla. 1993). But why chance it? Make your requests in writing, with each charge identified by a number so you can refer to them at the charge conference and the DCA can tell which ones you were discussing, like exhibits. "Judge, are you rejecting my requested instruction no. 7?" is a lot cleaner for the appellate record than: "Your Honor, are you denying the two-paragraph instruction which comes after the comparative negligence definition?"

Back to the main message of the day: DO NOT give the original set of jury instructions to the judge. He or she will take them apart, mark all over them, insert some pages you did not request, then leave the whole mess on the bench for long after your trial is over, win or lose. You never will be able to show the DCA just what it was that you requested, because the original set will be in a shambles.

III. File The Original Requested Jury Instructions With The Clerk!!!

And I certainly do not mean the courtroom deputy clerk, who will give them to the judge, just as sure as can be. File the original set in the clerk's main file room and never let them get anywhere near the courtroom. Give the judge a photocopied set for him or her to draw pictures on, mutilate, and lose under the bench.

Somebody out there is thinking: "What's the big deal if I give the originals to the judge and he or she dismantles the set? We'll have the typed transcript of the charge conference to go by." Yeah, sure. Read a few pages from any old charge conference one day in your

"spare" time. They go something like this:

> **[The Judge]: "Billy Bob, I've been looking over your set of jury instructions during lunch, and they are okay, but we have to make some changes. Like this one here, see where I've circled it? Take that part out and put in that quote from the new Second DCA case on that issue instead that we talked about before"**
>
> **"And the one before damages. Lookie how I shortened it from what you had. You didn't need all that stuff in there about violation of statutes. I left part of that one in, but I moved it over to "negligence."**
>
> **"I also had Myrtle copy one that I liked from Grayson's set on the agency issue and inserted it in your set right here. See that one is his, and the other one is yours. I put them both after the special instruction on foreseeability they were handing-out at the judicial college last week."**
>
> **"Okay, here comes the jury. Let's get back to work."**

Okay Listmates. You're all quick studies, and you get my drift. Right? And this is not all academic theory. Appeals have been won and lost based on preserving the record concerning instructions. I even have a war story about losing an appeal when the judge refused to give a critical instruction which my co-counsel (not one of you folks) had foolishly handed--not to the clerk--but to the judge himself. Just to make sure, I said to the judge that I wanted to read the text of our requested charge into the record, and he said okay, but the court reporter's fingers slipped and the transcript was unintelligible. The "original" typed instruction, as you may have guessed, disappeared into a space-time warp on the bench or in the judge's desk somewhere when the appellate record was shipped to the [Bleep] DCA. That [censored] DCA also denied my motion to reconstruct that part of the record because the jerks on the other side refused to agree that we had asked for that charge. If our whole set had been placed in the court file, we may have had an excellent

chance on appeal.

Enough said on the filing of ***your*** requested charges. In closing, note that you must object on the record at the charge conference to any bad instructions requested by the defense attorney or which the judge decides to give *sua sponte*, or the objection will be waived for appellate purposes. See *Murray v. Moore*, 541 So. 2d 694 (Fla. 1st DCA 1989).

That's all for the third installment of "Trial Law TIPS." Now go get a verdict with lots of zeroes! And if at first you don't succeed,

Keep Tryin!

Roy

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