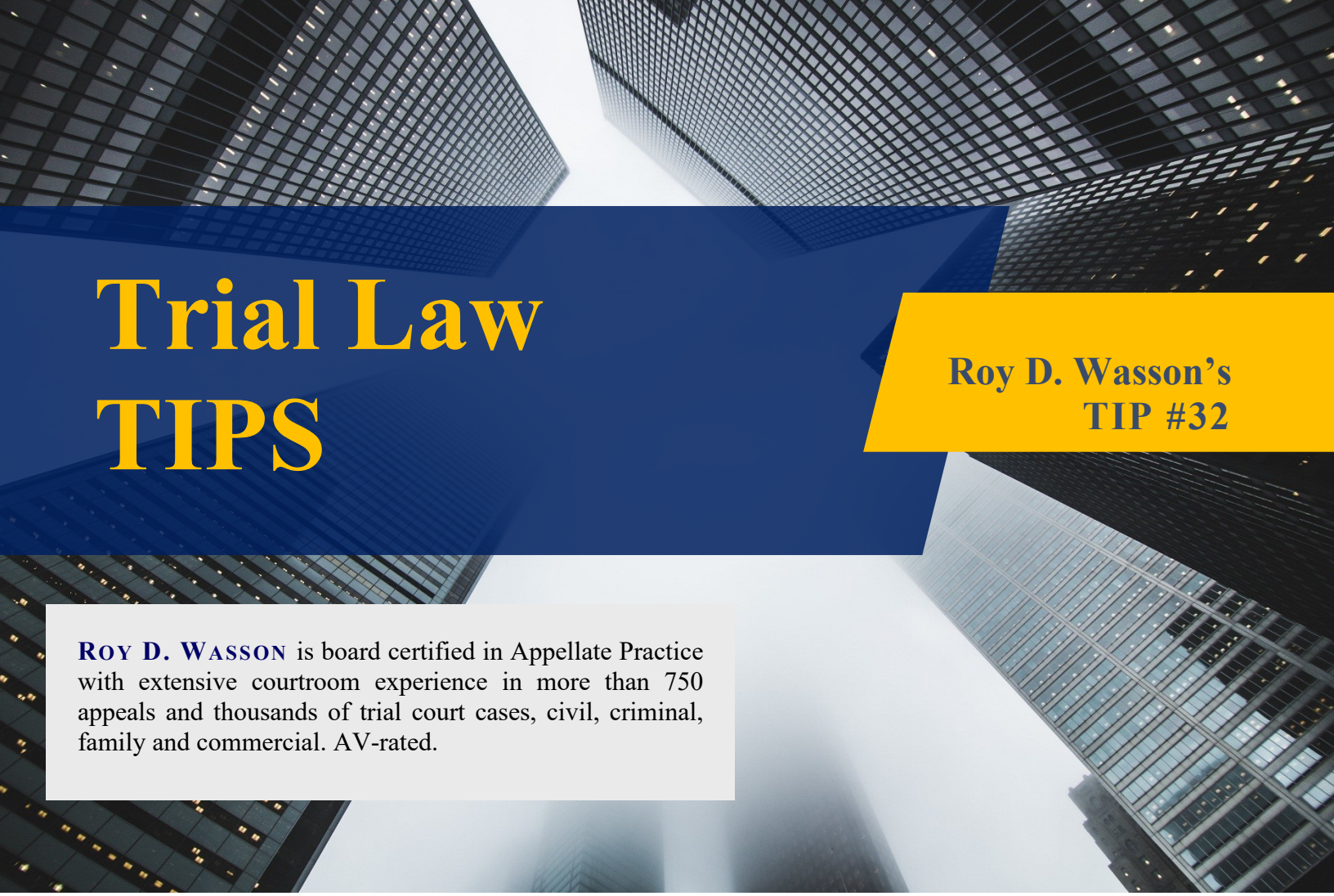

Trial Law TIPS

Roy D. Wasson's TIP #32

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.

Court Reporters Must Keep Typing Videotaped Testimony During the Trial —No Rest for the Weary

Introduction

We all agree that court reporters work as hard as anyone in the legal system for the amount of money they make. No one wants to give the court reporter unnecessary work to do, especially during a long and contentious jury trial. So the common practice is when you're videotape operator cues-up a tape of a long deposition—especially one which has been electronically edited to take out all of the objections and extraneous proceedings—you readily agree to let the court reporter take that well-deserved break and take a stretch for an hour or so. Blame it upon your "virtual" appellate attorney (me) if you need to; from this point on you need to lay down the

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law and ask the reporter to keep typing during that videotape testimony.

Appellate Judges Must Dislike Television Viewing

The appellate courts of Florida require the court reporter who types the live testimony during trial to also sit in front of the television monitor and type-up the portions of all videotaped depositions which are played to the jury. Even if every word of the depo is played for the jury, the reporter must transcribe it as well. While that requirement is not a new one by a long shot, in recent years it has grown somewhat forgotten, due to a combination of wanting to keep court reporters happy and the mistaken belief by trial lawyers that the videotape and original deposition transcript filed in the record will be enough to constitute the record on appeal.

Back in 1989, the First District spoke clearly on this subject in *Matson v. Wilco Office Supply and Equipment Co.*, 541 So. 2d 767 (Fla. 1st DCA 1989), which held as follows:

> When a videotape deposition is played in the trial court, it is evidence adduced at trial. What the jury saw and heard should be made a part of the record on appeal and no more. In order to avoid the problem created in this case, when a videotape is played in the trial court, the court reporter should not cease reporting but continue so that a stenographic record is made of the evidence being presented to the court. When the videotape is ended, counsel should submit it to the court as an exhibit. This procedure will help to prevent similar problems in future appeals.

Id. at 769.

Part of the problem with just filing the transcript of the original deposition, rather than having the court reporter at trial type up the testimony, involves omissions from the deposition which result from rulings on objections, counsel's decisions to omit certain questions and answers, and other circumstances which make what the jury heard somewhat different than the original transcript.

That problem cannot be cured by filing a marked-up copy of the transcript of deposition, as most of us know from being part of the process whereby highlighting, use of shorthand codes for the videotape operator and obliteration of certain portions makes it totally confusing for the appellate court to discern what was heard by the jury.

Even if you could be sure which version or combination of marked-up versions of a depo transcript looks most like the testimony the jury saw, those edited transcripts are almost impossible for the trial attorneys to decipher ***during*** the trial. By the time that transcript reaches the appellate court file months later—and without our guidance to tell them stuff like "This mark is where the video operator muted the sound"—the appellate judges would be clueless about what the jury heard at trial.

"Oh no!" you lament, "my favorite reporter will go nuts if I tell her she can't take a smoke break during taped doctors' depos." I have seen lawyers try to get around this requirement by letting the court reporter go during the videotape and asking the reporter to take the marked-up depo. back to their office and transfer the testimony which the jury heard onto the trial transcript at their leisure. Even if the defense agrees with that tactic, the marked-up depo. is going to be as hard for the court reporter to follow—especially since he or she was not there during the playing of the tape—as it would be for the appellate court. The risk of vital errors is too great to take shortcuts like that.

Another shortcut which won't get you very far is to ask the appellate judges to just pop the tape into the television monitor and sit back during bench conferences to watch the witness testify. Maybe someday we will reach that stage, but appellate judges are not yet used to that technology at the present time, and instead want to see an old-fashioned trial transcript containing the testimony of each witness.

In *Travieso v. Golden*, 643 So. 2d 1134 (Fla. 4th DCA 1994), the court adopted the holding of the First District in *Matson*, and cautioned trial lawyers everywhere not to simply rely upon the videotaped as a substitute for a transcript of what the jury heard of trial:

> The use of videotapes on appeal in lieu of a written transcript is not authorized by any rule and would be counterproductive to efficient review by the Court. We judges can digest a transcript covering a day's worth of trial with far more dispatch than we can watch the same events unfold on eight hours of videotape. While video may eventually provide useful ***supplements*** to a written record, efficient use of appellate court time requires the submission of a written transcript of trial proceedings.

Id. at 1136 (emphasis in original).

Conclusion

Everyone wants to keep the court reporter happy, but the appellate judges have spoken and directed us to keep their fingers flying during the playing at trial of videotape depositions. Just when you thought you had trial practice down to a formula, someone throws you a curve to keep you on your toes.

Keep Tryin!

Roy

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