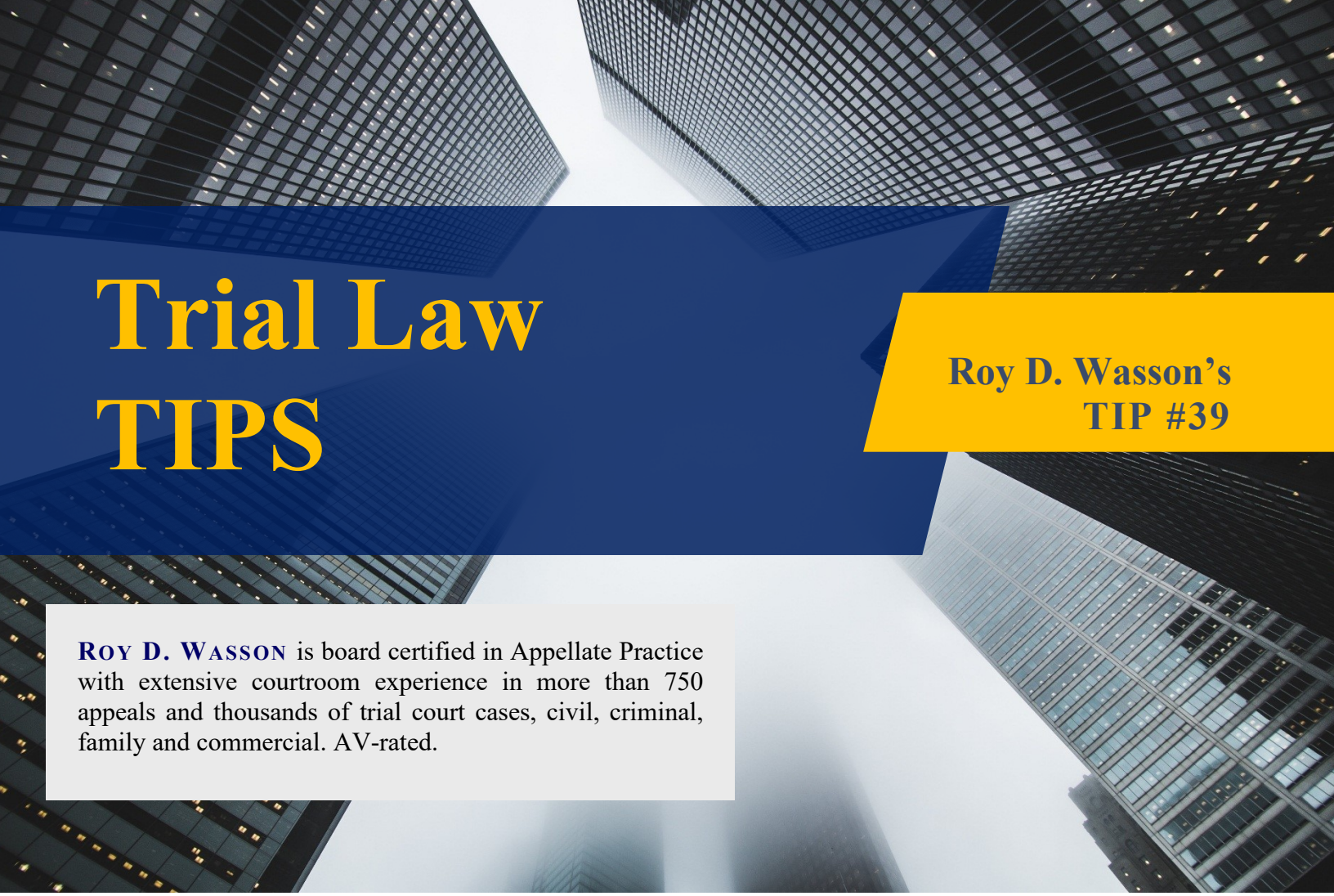

Trial Law TIPS

Roy D. Wasson's TIP #39

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.

Keeping Defense Doctors' So-Called IME Reports Out of Evidence

Introduction

Defense doctors who perform hundreds or thousands of Compulsory Physical Examinations ("CPE") under Fla. R. Civ. P. 1.360 must be able to make a lot more money by staying in their office and dictating reports (which all say that there is nothing wrong with your client) than they can make by attending trial, because Defendants seem to be having trouble getting their experts to show up at the courthouse. Maybe these notorious insurance company hired guns are just getting sick of the extensive cross examination about how many hundreds of thousands of dollars they make from this racket, so sometimes the defense attorney will seek to move—instead of calling their doctors as witnesses—the so-

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called "IME"[1] report into evidence at trial. Defendants also sometimes attach such CPE reports to motions for summary judgment on issues such as permanency and causation. Judges are sometimes allowing such reports to come into evidence over objections that they are hearsay.

Trial lawyers certainly may decide as a matter of strategy to waive any objection to the admissibility of such reports. How you handle the trial of your case is a matter of personal preference. However, trial lawyers should not automatically assume that such reports are going to be admissible in evidence, especially in the situation where they are offered by the defense because their examining physician is not available to testify in person at trial. Keep this "TIP"in your trial notebook for those times when you decide to object to a report of a defense doctor written under Rule 1.360 (b).

Background: Treatment Records as Business Records

Several cases over the last few years have made it easier to get into evidence hospital charts, doctors' notes, and other medical records documenting the course of treatment of a patient. While hearsay used to be a common objection to medical records offered (usually by the Plaintiff) at trial, the appellate courts have been less and less likely to hold that such records are inadmissible. "Under the business records exception, the trustworthiness of medical records is presumed." *Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994). The courts also have adopted the common sense approach that—where the parties agree to dispense with the necessity of calling records custodians to establish the ***authenticity*** of medical records—such an agreement as to authenticity also suffices to

[1] There is nothing ***independent*** about the compulsory physical exam performed by defense doctors. *See* Wasson, *Overview, Assessment and Analysis of Case Law Related to the Defense Exam and Examiner* (AFTL Workhorse Seminar 1988). *See* Fla. R. Civ. P. 1.360 (c) ("the examiner may be called as a witness by any party to the action, but ***shall not be identified as appointed by the court***.")(Emphasis added). While it is a small point, let's try not to fall into the habit of using the defense's label of "IME" in referring to these examinations. Try CPE instead.

establish the predicate elements of the business records ***exception to the hearsay rule*** under Section 90.803(6)(a).[2] *See Heckford v. Florida Department of Corrections*, 699 So. 2d 247, 251 (Fla. 1st DCA 1997)("Where the parties agree that the testimony of the records custodian is not necessary, medical records may be introduced into evidence under the business records exception to the hearsay rule, without the testimony of a qualified witness as to the Section 90.803(6)(a) predicate"). *Accord.*, *e.g., Phillips v. Ficarra*, 618 So. 2d 312 (Fla. 4th DCA 1993).

CPE Reports As Medical Records Under Rule 803(6)

You may be asking yourself what the law pertaining to records of treating healthcare providers has to do with the reports written by defense experts under Rule 1.360. CPE reports aren't "medical records," are they? As surprising as it seems, some courts are blurring the distinction between records prepared in the ordinary course of treating a patient and adversarial reports dictated after a cursory examination by your opponent's retained expert.

In the *Heckford* case, *supra*, the plaintiff was injured while serving time as an inmate at the Martin Correctional Institution and sued the Department of Corrections for negligence. The DOC sent the plaintiff to be examined by Dr. Joseph Ferrer in a procedure which the First District characterized as "an independent medical examination." 699 So. 2d at 249. In a rare example of truth being told in such a report, Dr. Ferrer concluded that the plaintiff "has an impairment of the body as a whole of 20% secondary to loss of function of the anterior cruciate ligaments on both knees," which

[2] Some of you who have been out of law school for more than a couple of years are probably scratching your head and asking "Why not? Isn't authenticity the same as the business record exception?" There is such a difference in the foundational elements, but the courts have grown weary of the "gotcha" tactics of the few lawyers who remember the difference and try to blindside their opponents by agreeing to "authenticity" but then objecting to the documents as "hearsay." (It happened to me.) The *Heckford* case makes it clear that such word games will not work in the First DCA.

was the injury sustained in the subject accident. Naturally the plaintiff wanted the CPE report admitted into evidence in that case.

The defense objected to the admission of Dr. Ferrer's report on hearsay grounds and on the ground "that a proper foundation was not laid for admission of Dr. Ferrer's report, and Dr. Ferrer could not have testified at trial because his opinions were not expressed in terms of reasonable medical probability." *Id*. at 251. The First District on appeal held that the CPE report was properly admitted as medical record/business record under the hearsay exception of Section 90.803(6)(a), and that there was no need for the Plaintiff to call a records custodian to lay the foundation for the report.

While the result in the *Heckford* case was beneficial to the plaintiff, the appellate court's acceptance of the argument that the examining physician's report was a "medical record" for purposes of the hearsay exception poses potential problems for plaintiffs in the usual case where that report says that the plaintiff is healthy enough to become a professional figure skater. How can you keep out a CPE report offered by the defendant to prove that there is nothing wrong with your client, and which you cannot cross examine?

Establish that Litigation Was Purpose for which Report Was Prepared

In *McElroy v. Perry*, 753 So. 2d 121 (Fla. 2d DCA 2000), the plaintiff was sent to an examination by a defense expert, Dr. Phillips who did not testify at trial. "Dr. Phillips concluded in his report that: Perry had not sustained any disability; she was probably capable of full-time sedentary work; and, if his recommendations were followed, he anticipated an increase in her physical capacity to her pre-accident status." *Id*. at 123. (Sound familiar?) Over plaintiff's objection, the defense moved into evidence Dr. Phillips' report, convincing the trial judge that it was admissible as a business record.

On appeal the Second DCA reversed the ruling allowing the report into evidence, holding that the reason it was not admissible as a business record was that the report was prepared "for the purpose of litigation." Noting that the defense doctors did not

examine the plaintiff "in the typical doctor/patient circumstance" and had issued reports which "are more properly characterized as forensic or advocacy reports" than medical records, the Second DCA held that the trial court should have excluded the report as untrustworthy. Citing some out-of-state cases which held that reports of defense examiners are inadmissible if prepared for the purpose of litigation, the court in the *McElroy* case held: "We agree with this view and conclude that ***an IME report prepared for the purpose of litigation*** lacks the trustworthiness that business records are presumed to have, and therefore, is ***not admissible*** under the business records exception." *Id.* at 126.

The Second District in *McElroy* held that the fact that Dr. Phillips' report was prepared for dual purposes—to assist the insurance carrier in evaluating the case as well as for litigation purposes—did not render the report admissible because "the carrier's motivation for requesting the examination was a financial one that placed the physician in much the same adversarial posture in relation to the insured as that of a physician hired by an opposing party to perform an IME for the purpose of litigation." *Id.*

Thus, the *McElroy* decision is extremely important in establishing the elements of inadmissibility of defense examiners' reports. It should not be hard to make a record to establish that a major purpose of the reports in the usual negligence or insurance claim is to assist the defense in litigation. You may be able to develop some admissions from the defense on the record to have ready to oppose the introduction of such reports when the time comes.

In an apparent example of "the left hand not knowing what the right hand is doing," a different panel of the Second DCA decided a case the week after the *McElroy* decision which does not cite *McElroy* and seems to hold to the contrary: that CPE reports are generally admissible. Citing the *Love v. Garcia* case and the First DCA's decision in *Heckford, supra*, the Second District in that decision held as follows:

> Ross also argues that the trial court improperly refused to admit the medical report of the independent medical examiner (IME) into evidence. Because we are compelled to reverse this case, we

> note that the trial court was incorrect in its belief that an IME's medical records are inadmissible as untrustworthy per se.

Ross Dress For Less, Inc. v. Radcliff, 751 So. 2d 126, 127 (Fla. 2d DCA 2000).

The *Ross* case did not, however, automatically establish the admissibility of a defense examiner's report. Although ignoring the prior panel's *McElroy* decision, the *Ross* panel did not reverse the trial judge for excluding the report under the facts of that case, finding "that the trial court did not abuse its discretion in refusing to admit the report based on its belief that the report was untrustworthy ***because it was made in preparation for litigation***." 751 So. 2d at 127 (emphasis added). Thus, the two cases reached the same result when discussing defense examiner's reports prepared for litigation. Therefore, to keep such reports out of evidence you need to demonstrate to the trial court the purpose for which the report was prepared, which should render it untrustworthy and not admissible as a medical record under the "business records" exception to the hearsay rule.

Conclusion

If you like making the defense examiner squirm under the pressure of your grueling cross examination about his or her huge income from insurance examinations, you may be disappointed when the defense doctor does not show up for trial, robbing you of your opportunity to demonstrate your skill before the jury. Don't drop your guard and allow the report to come in instead without thinking about it. Because the purpose of such cross examination is to keep the jury from buying-into the nonsense that there is nothing wrong with your client, you can reach the same result just as well (if not better) by keeping the doctor's report out of evidence. The jury will not be dazzled by your performance, but the nice verdict you recover for your client should make that minor disappointment worthwhile.

Keep Tryin!

Roy

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