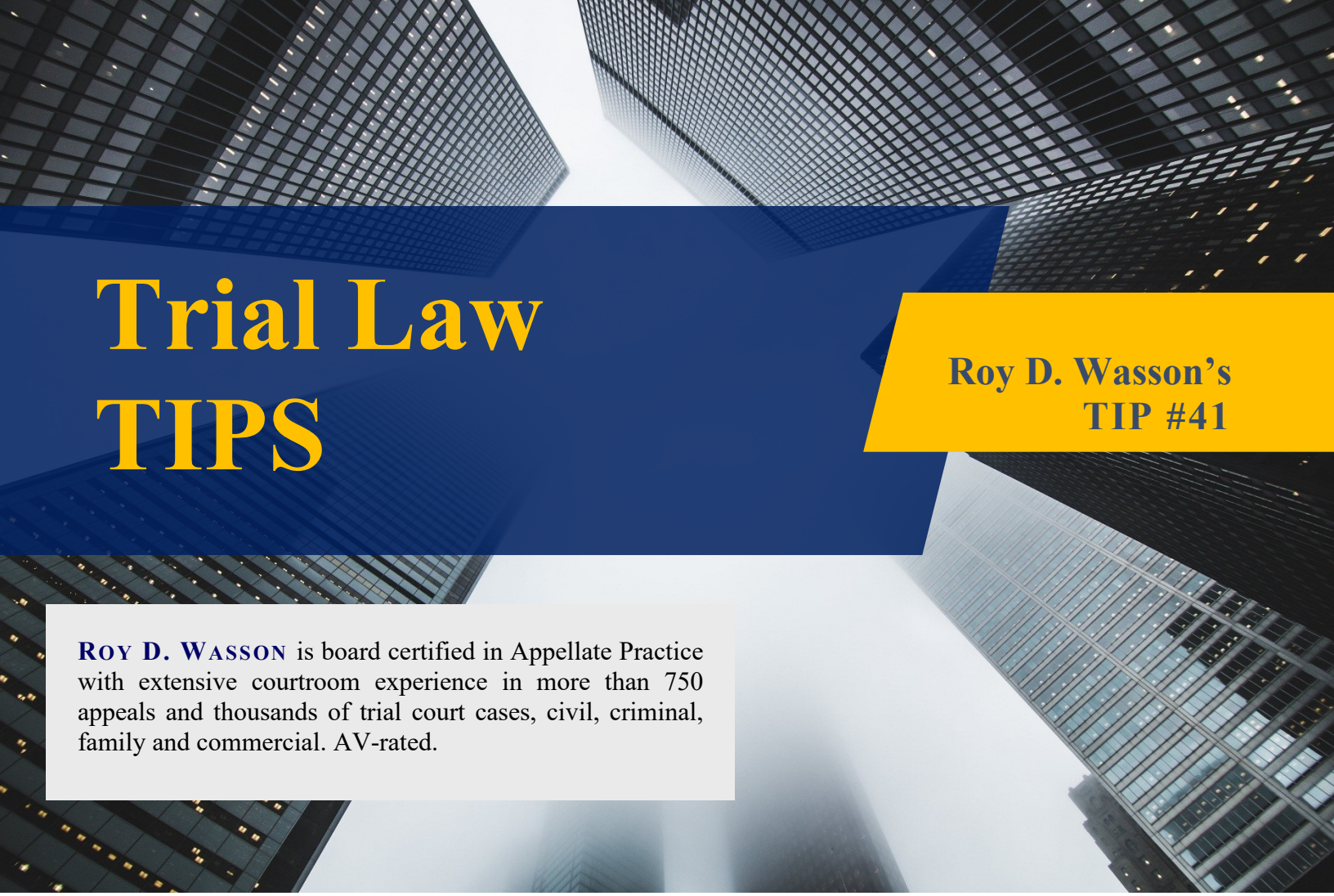

Trial Law TIPS

Roy D. Wasson's TIP #41

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.

Refreshing Witnesses' Recollection with Inadmissible Documents

Introduction

Nothing interrupts the smooth flow of a trial like an unexpected objection on a point you thought was uncontested and incontestable. Have you ever been caught flat-footed, slack-jawed, like the proverbial "deer in the headlights," when the defense attorney rises solemnly to object that the answer to your routine question would be "hearsay," or "privileged," or both? That feeling of unpreparedness doesn't happen when your question of a witness calls for something hotly contested and controversial; you are expecting objections to questions like that.

But the question you asked this time which evoked the unexpected objection was nothing like that. You did not ask the witness to tell the jury the defense attorney's ATM pin. Nor did

Wasson & Associates, Chartered
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com

you inquire of a third party whether the fifty-year-old defendant in a motor vehicle case had a report card which showed he failed "Driver's Ed" in the tenth grade.

Your question was much more innocuous. The witness was eminently capable of answering it. The issue was not even a matter in controversy. You had asked the investigating traffic patrol officer: "***What was the make and model of the car which the [defendant/plaintiff/phantom] was driving***?" What could be wrong with that question? you wonder to yourself. If looks were lasers, the defendant's attorney would be toast.

"Calls for privileged information" the defendant's attorney argues at sidebar. "The officer started to read from her accident report, which is inadmissible under the accident report privilege. She's not testifying based on her recollection of what happened," the defendant's attorney states. The judge looks your way for a response, giving you that sinister smirk; that "I'm gonna direct a verdict against you if you can't prove whose car hit your client" look.

You feel that sickly feeling in the pit of your stomach like you get when the jury has reached a verdict only ten or fifteen minutes after deliberations began. You ask for a potty break, dig out the cell phone, and call appellate counsel for that daily dose of free advice. You're in luck: I'm in. And my secretary forgot that I told her to screen your calls.

Refreshed Recollection Versus Offering Inadmissible Exhibit

Where a witness cannot recall some fact about the case which is called for in your question, it is perfectly proper for that witness to read to himself or herself from ***any document*** to refresh his or her recollection[1]. "The writing itself need not be admissible in evidence; all that is required is for the witness to state the facts from his own present recollection after inspecting it." Michael H.

[1] As with other documents shown to a witness, the opposing party has the right to inspect the document and to cross examine with it. *See* § 90.613, Fla. Evid. Code.

Graham & Robert S. Glazier, HANDBOOK OF FLORIDA EVIDENCE § 613.1 (2d ed. 1996).

You may not ask the witness to read aloud from a document that is used to refresh recollection. "Section 90.613 does not contemplate that evidence which might otherwise be inadmissible will be paraded in front of the jury in the course of refreshing the witness's memory. Rather, the witness should be shown the statement and asked if it refreshed the witness's recollection." *Morton v. State of Florida*, 689 So. 2d 259, 264 @ n. 5 (Fla. 1997).

Even a document which is itself absolutely privileged and inadmissible may be used to refresh the recollection of a witness. But that use will not render the document admissible as an exhibit in evidence.

> As a corollary to the rules allowing such wide latitude in the choice of writings as mnemonic aids, the writings used to prompt recollection are not necessarily admissible in evidence themselves. If a writing is admissible independently, its use to spur a witness' memory does not disqualify it, but ***it cannot come into evidence on the coattails of the testimonial recollection it sparks.***

Auletta v. Travelers Indemn. Co., 388 So. 2d 1067, 1068 (Fla. 4th DCA 1980)(reversing judgment based on ***erroneous*** introduction of vehicular damage estimate after it was ***properly*** used to refresh recollection of witness about what parts of vehicle were damaged)(emphasis added).

Establishing Foundational Elements for Refreshing Recollection

The first two elements of the foundation for using a document to refresh recollection go hand-in-glove. Those are 1) to establish that the witness once knew the answer to the question, but 2) has forgotten the answer by the time of trial. There is a difference between those two elements, but the first one usually is presumed. However, don't try to "refresh" the recollection of someone who never knew the answer in the first place. *See Claussen v. State Dept. of Transportation*, 750 So. 2d 79, 82 (Fla. 2d DCA 1999), in

which the court reversed based on the improper use of a letter to ostensibly refresh the recollection of the plaintiff. "Mr. Claussen, however, professed no lack of memory; rather, he denied ever receiving the suggested information. Essentially, ***he had no memory to refresh***." (Emphasis added).

Here are some suggested forms of questions to establish the foundation for using items to refresh recollection:

Sample Foundational Question Element #1: "Officer Jones, did you in the course of your investigation make a determination as to the makes and models of the vehicles involved in this accident?"

You expect that the answer will be a simple "yes." If you are thrown by some surprise response like: "No, my partner handled that end of the investigation," you should persist, with a fallback question like: "Did you become aware of your partner's findings about the makes and models of the vehicles?"

The second element is that the witness has no present memory of the subject of a question, or too little memory to fully answer. Establishing this element is sometimes complicated by the witness' misguided belief that he or she fully remembers the facts, when that memory is faulty.

For example, if you ask the first foundational question above about the officer determining the makes and models of the cars, the witness may try to be helpful and volunteer the wrong information that the defendant's car was the red Cadillac, when it was the black Beetle. One way to guide the witness to establish the second element is to ask a question like the following immediately after getting a "Yes" answer to the first foundational question, above:

Sample Foundational Question Element #2: "Officer, in light of the hundreds of accidents per year that you told us you investigate, do you have a clear memory of the vehicles involved, or would it assist you to refer to your notes?"[2] If you draw an

[2] The questioner should avoid referring to the document as the "accident report," so as to minimize the possibility that the

objection to "leading," just rephrase it something to the effect: "Can you recall all the details without the use of your notes?"

The third element of the foundation is that, after reviewing the document, the memory of the witness has been jogged. This element is crucial. One court has noted:

> We think this sufficiently shows that the memorandum was not used by the witness for the mere purpose of refreshing her independent recollection, but that she relied on the memorandum as the basis of her testimony. There is a clear and obvious distinction between the use of a memorandum for the purpose of stimulating the memory, and its use as a basis for testimony regarding transactions as to which there is no independent recollection. In the former case it is immaterial what constitutes the spur to memory, as the testimony when given, rests solely upon the independent recollection of the witness.

Volusia County Bank v. Bigelow, 33 So. 704, 706 (Fla. 1903).

The framework for establishing this element is to show the witness the document in question. Guide the witness by saying something like: "Please read this to yourself and let me know when you are finished." Once the witness has refreshed his or her recollection with the document, ***don't*** ask something like: "What does it say there about the make and model of the cars?" Instead, ask something like this:

Sample Foundational Question Element # 3: "After review of that document, Officer Jones, has your recollection of the makes and models of the accident vehicles been refreshed?"

You are now one question away from asking what kind of car the defendant was driving. Congratulations. But before you get too excited, I hope that, for your sake and that of the jury, you still

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privilege will be held to have been violated by putting before the jury the source of the information underlying the witness' testimony.

remember why you were asking that question to begin with. It seemed important at the time, didn't it?

Author and Date of Document/Other Item Immaterial

There is no limitation on the source or nature of a document used to refresh recollections. "The writing need not have been prepared by the witness or at his direction, nor need the writing have been made at or near the time of the event recorded." *See* HANDBOOK OF FLORIDA EVIDENCE, supra, at 549. For that matter, the item used to refresh recollection may be a tangible object or other non-documentary item. *Id.* *See United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946)(cited by the EVIDENCE GODS at 549 & n. 427)(it can be "a song, a scent, a photograph, an allusion, even a past statement known to be false").

Conclusion

After the initial shock wears off when the defendant's attorney objects to something you thought was a non-issue, you should be able to introduce evidence of an important fact, even where the documents containing those facts are inadmissible and the witnesses no longer recall the facts themselves. If at first you don't succeed, remember to:

Keep Tryin!

Roy

WASSON & ASSOCIATES, CHARTERED
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com