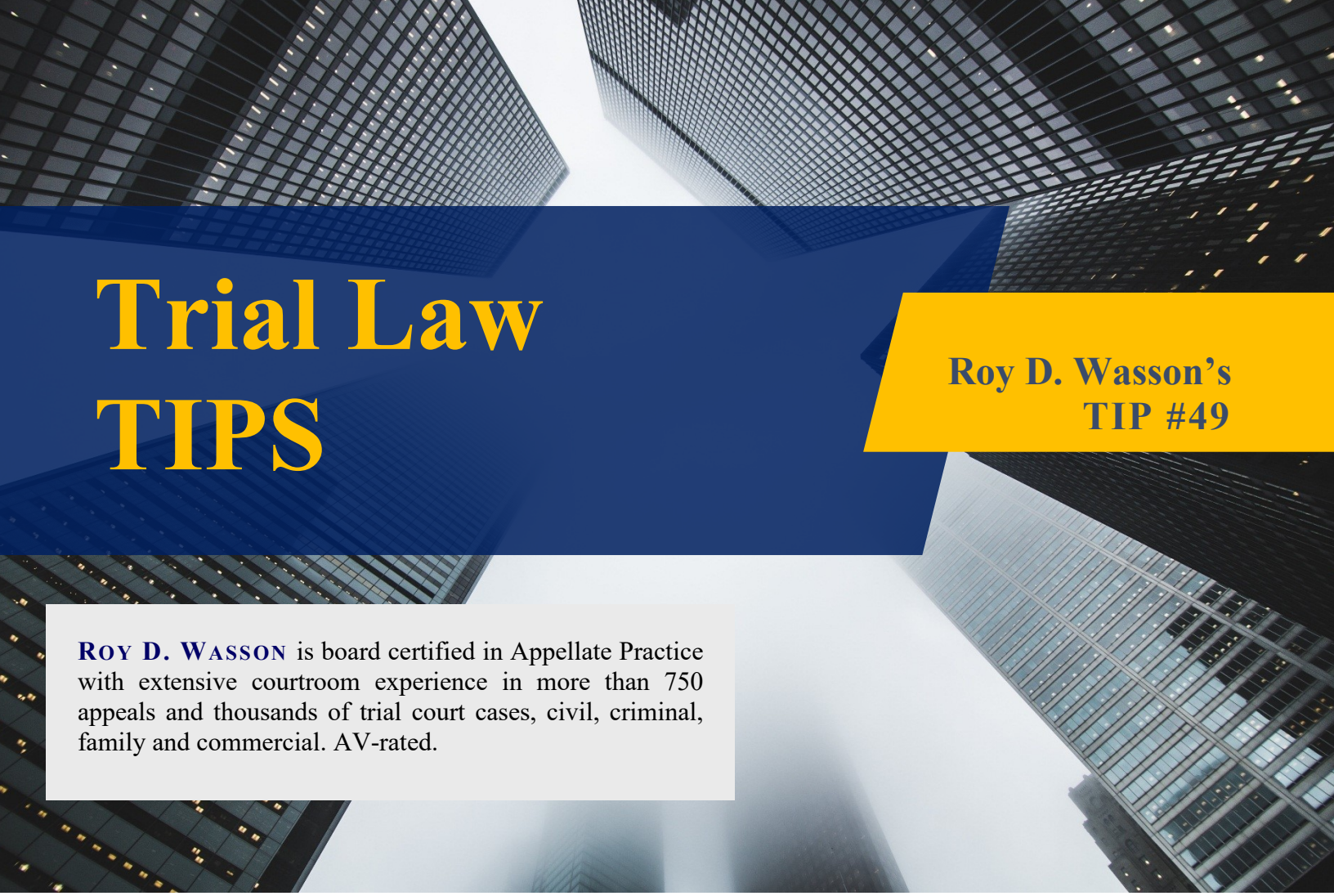

Trial Law TIPS

Roy D. Wasson's TIP #49

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.

Discovery of Work Product Communications from Counsel to Experts

Introduction

There is a widespread "Courthouse Legend" that correspondence from attorneys to retained experts is not discoverable where the expert says that he or she did not "rely upon" the content of the correspondence in formulating opinions for the case. While there is little law in Florida on the subject, there is a very-well developed body of law in the federal court system and other states which recognizes the discoverability of such correspondence. Even communications from lawyers to experts containing opinion work product have been held to be discoverable.

There are two basic reasons why many cases allow discovery of letters, telephone messages, and other evidence of communications between attorneys and the experts they retain on

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behalf of their clients. One is to permit the opposing party to show the jury how the expert was "steered" into formulating a given opinion by the lawyer. The other reason is to allow impeachment of the expert by demonstrating that there were facts made known which were ***not considered*** but which ***should have been considered*** when formulating opinions for the case.

Be careful that you do not assume the truth of this Courthouse Legend that your work product communications with experts cannot be discovered. Further, use the law which permits such discovery to your advantage to obtain information from the defense experts about what they were told by defense counsel.

Modern Federal Rule

The 1993 amendments to Fed. R. Civ. P. 26(a)(2)(B) and the Committee Notes thereto expressly provide that parties may discover materials considered by opposing experts, including work product materials from the attorneys retaining those experts., including materials the expert denies were relied upon. The rule itself provides for discovery of a report containing "the data or other information ***considered by*** the witness in forming the opinions." *Id* (emphasis added). The Committee Notes to that rule state as follows:

> The report is to disclose the data and other information ***considered by*** the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants ***should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged*** or otherwise protected from disclosure when such persons are testifying or being deposed.

Fed. R. Civ. P. 26(a)(2), Advisory Committee Notes (1993)(emphasis added).

Most of the cases which have addressed the issue since that 1993 amendment have clearly held that correspondence from attorneys to retained experts (even letters containing strategy and other work product materials) may be discovered and used to impeach the expert. *See B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.* 171 F.R.D. 57, 63 (S.D.N.Y. 1997)("any facts provided to an expert, even if provided by an attorney, are required to be disclosed"); *TV-3, Inc. v. Royal Ins. Co.*, 194 F.R.D. 585, 589 (S.D. Miss. 2000)(correspondence between expert witnesses and counsel was discoverable notwithstanding defendants' work product objection); *Simon Property Group L.P. v. Mysimon, Inc.*, 194 F.R.D. 644, 647 (S.D. Ind. 2000)("disclosure of opinion work-product to a testifying expert effectively waives the work-product privilege"); *Lamonds v. General Motors Corp.,* 180 F.R.D. 302, 305-06 (W.D. Va. 1998)(when an attorney provides work product material to a retained expert, the information becomes discoverable); *Musselman v. Philips* 176 F.R.D. 194, 198 (D. Md. 1997)(work product doctrine did not protect materials furnished by counsel to testifying experts considered in forming expert opinions); *Karn v. Ingersoll-Rand*, 168 F.R.D 633, 635-36 (N.D. Ind. 1996)(same); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.,* 168 F.R.D 61, 62 (D.N.N. 1996)(same). For other cases on the subject, *see* C. Klopfenstein, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 Ind. L. Rev. 481 (1999).

Some lawyers mistakenly believe that, because the Florida Rules of Civil Procedure do not contain any similar recognition of the discoverability of materials "considered by" a retained expert that there is no danger that work product documents (such as correspondence from counsel) which the expert says were not relied upon will be discovered. However, even before the 1993 amendments to the Federal Rules, numerous cases had held that parties could obtain discovery of work product communications between counsel and experts. The reasoning behind those cases can be (and has been) used in Florida courts as well.

The Pre-1993 Cases Destroy This Courthouse Legend

Although there was a decided split among the authorities on the issue of the discoverability of communications from attorneys

to experts before the 1993 amendment to the Federal Rules, a number of well-reasoned (and highly regarded) decisions clearly held that work product would not protect such correspondence. One of the lead cases on the issue was *In Re Air Crash Disaster at Stapleton International Airport*, 720 F. Supp. 1442 (D. Colo. 1988). In that case the court rejected the plaintiff's contention that the defendant could obtain discovery only of materials in the expert's file upon which the expert "relied" in formulating his opinions. In rejecting that argument, the court held: "Materials an expert reviews and then disregards in forming the opinion to which he will testify are relevant to the impeachment of the witness during trial. Discovery of all material possessed by an expert relating to the matter at hand develops a record which prevents a 'sanitized presentation at trial, purged of less favorable opinions expressed at a later date.'" *Id*. at 1444 (quoting *Quadrini v. Sikorsky Aircraft Division*, 74 F.R.D. 594, 595 (D. Conn. 1977)).

The court in the *Air Crash Disaster* case also expressly held that "the privilege normally afforded attorney work product gives way to the realities of expert preparation in regard to materials presented to an expert for consideration in forming an opinion to which he will testify at trial," even as to those matters which the expert "finds unpersuasive as well as material supporting his ultimate position." *Id*.

Another pre-1993 case on the point is the decision in *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991), in which Magistrate Judge Brazil held that "absent extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications would be deemed opinion work product." *Id*. at 387.

Another case permitting discovery of attorney/expert communications overruled objections to deposition questions of the expert whether he "had any discussion with [plaintiff's counsel] about the conduct of [the third party defendant] and the opinions you have expressed on that subject." *See William Penn Life Assur. Co. v. Goodwin*, 141 F.R.D. 142, 143 (W.D. Mo. 1990). The court

stated that such questions should be answered, and followed the dissenting opinion in *Bogosian v. Gulf Oil Co.*, 138 F.2d 587 (3d Cir. 1984) holding: "insofar as the questions at issue at the instant case sought to elicit matters that plaintiff's counsel had communicated to the expert witness, the third-party defendants are entitled to explore the effect those communications had on the expert's formation of his opinion." 141 F.R.D at 143.

In *Baxter Diagnostics, Inc. v. AVL Owl Scientific Corp.*, No. CV91-4178 1993 U.S. Dist. LEXIS 11798 (C.D. Cal 1993), the court ordered discovery of materials in the expert's file including "all documents and oral communications reviewed by the experts in connection with the formulation of their opinions, ***but ultimately rejected or not relied upon***" *Id.* *2 (emphasis added). Other cases on the point include *Boring v. Keller*, 97 F.R.D. 44 (D. Colo. 1983), in which the court held that even opinion work product communicated between an attorney and an expert was not protected by the work product doctrine and was discoverable to impeach the expert. *See also, e.g., Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D 611 (D.N.J. 1989), in which the court permitted discovery which ultimately revealed that the plaintiff's attorney typed the expert's report himself and convinced him to sign it without changes.

There are numerous other cases also addressing this issue and permitting discovery of work product communications between counsel and experts, even before the 1993 amendments to the Federal Rules. There is no reason that the reasoning of those case should not be applied to Florida discovery practice, and Florida circuit court judges have permitted discovery of such correspondence based upon authorities like the foregoing. The expert's testimony that he did not "rely upon" an item is not guaranteed to prevent its discovery. While there also are cases going the other way, why take the chance that those decisions will be followed as opposed to the ones cited above?

Conclusion

Do not fall victim to the Courthouse Legend that you can automatically avoid disclosure of your communications with experts simply by the expert's explanation that he or she did not

"rely upon" those communications in formulating opinions in the case. Opposing counsel will argue that the expert should have relied upon such other information, but did not. If you can't "beat 'em," then "join 'em" and use the cases cited above as tools to get discovery from defense expert files which help your case. And above all,

Keep Tryin!

Roy

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