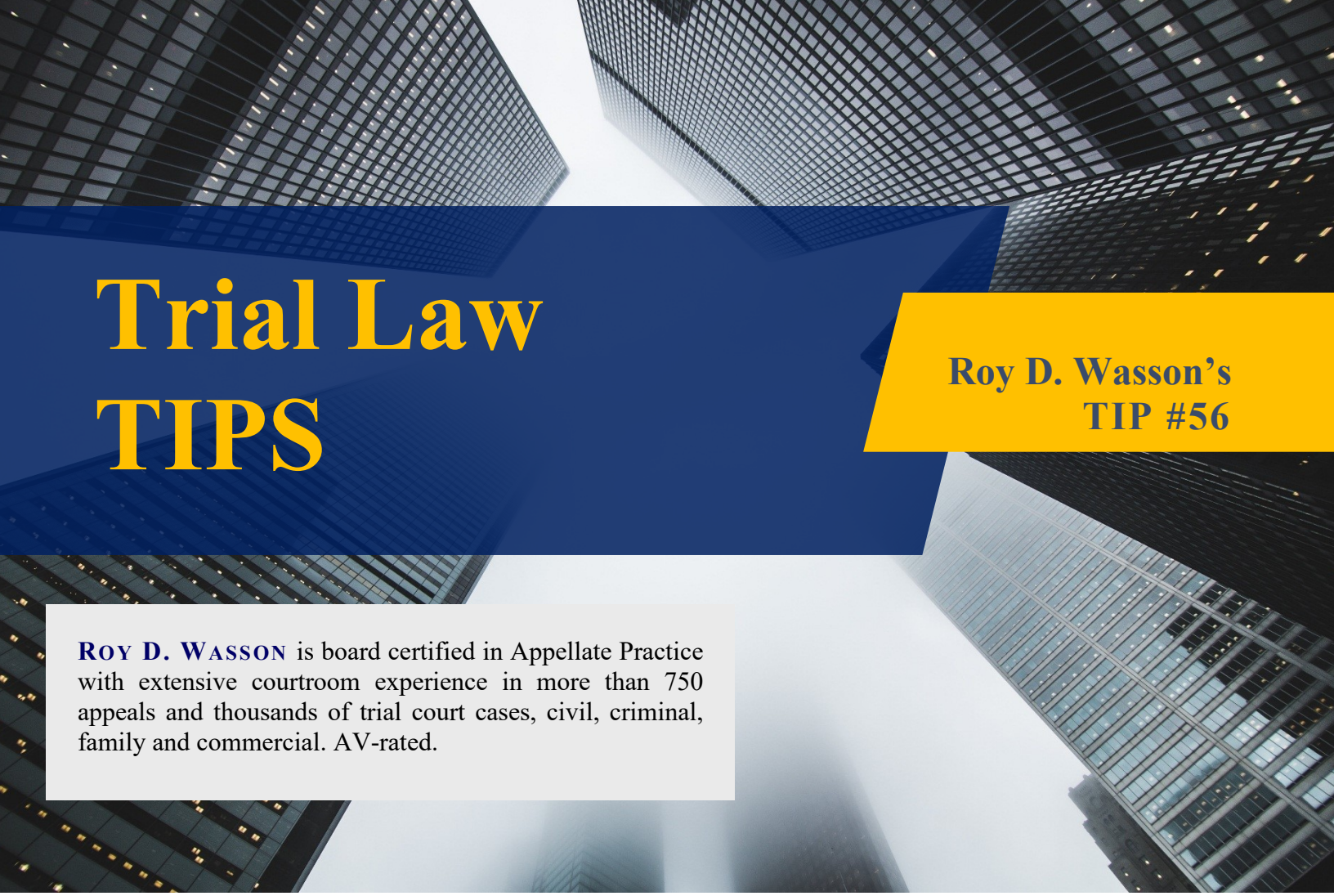

Trial Law TIPS

Roy D. Wasson's TIP #56

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.

Overcoming Vague Objections that Discovery is "Overly Burdensome"

Introduction

This is an audience-participation "TIP," so let's see a show of hands on this question. Who among you has ever served a Request for Production of Documents to the Defendant [hands begin to raise] in a product liability or medical malpractice case and received a response that did not include the objection that your request was "overly burdensome"? [hands drop limply]. No one is holding up their hand, which proves my point. The defense ***always*** objects that discovery is unduly burdensome, especially in a product or professional negligence case. Here is an approach to consider in addressing such vague objections.

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Florida Law Requires Specific Showing of Burden Imposed

Where the defense asserts without any explanation that some or all of your discovery requests are "burdensome," you should move to strike the objections and to compel full discovery, because such an unexplained objection is legally insufficient. In *First City Developments of Florida, Inc. v. The Hallmark of Hollywood Condo. Ass'n,* 545 So. 2d 502 (Fla. 4th DCA 1989), the court held as follows:

> Lastly, we turn our attention to ***petitioners' objections that some of the discovery sought was "overly broad" or "burdensome."*** Such objections, standing alone, would not constitute a basis for granting certiorari relief. . . . more importantly, ***such words of art have little meaning without substantive support. Is this objection raised because petitioners would be required to produce a railroad boxcar full of documents, or are they merely objecting to the production of a half-inch thick file folder?*** Since the trial court has to consider petitioners' other objections, it is incumbent upon petitioners to ***quantify for the trial court the manner in which such discovery might be overly broad or burdensome. They must be able to show the volume of documents, or the number of man-hours required in their production, or some other quantitative factor*** that would make it so.

Id. at 503 (emphasis added).

Another Florida court has held that, where a party makes no showing quantifying an alleged burden in its objection to discovery, such objections are merely "stonewalling tactics, designed to delay making a timely response to valid discovery requests," and, as such, "constitute discovery abuse and should not be condoned." *First Health Care Corp. v. Hamilton*, 740 So. 2d 1189, 193 (Fla. 4th DCA 1999), *disapproved on other grounds by Florida Convalescent Centers v. Somberg*, 840 So. 2d 998 (Fla. 2003). Unless the Defendant explains in his or her objection exactly what will be required to produce the requested material, a bare objection of

"undue burden" is insufficient and should be stricken by the trial court.

Evidentiary Showing by Defendant Should be Required

It should not be enough for the Defendant to make the unsupported argument in its objection that "X" number of hours will be required to gather the requested discovery or that "Y" dollars will be expended in the effort. Instead, the objecting Defendant should be compelled to submit an affidavit establishing such claims as a matter of fact. Although there are not many state court cases on the issue, the federal cases on point are favorable.

In *Whites v. Wirtz,* 402 F.2d 145 (10th Cir. 1968), the court of appeals reviewed the trial court's order compelling the defendants to answer certain interrogatories which they claimed would constitute "an undue burden and expense." The trial court had ordered that discovery after finding "that Defendants fail to show why responding to the interrogatories would be burdensome, or why a protective order was required." *Id*. at 148. In affirming that discovery order, the court of appeals noted that "[t]he ***Defendants did not submit an affidavit*** to support their position." *Id.* (emphasis added). Absent some evidence to support the claim of burdensomeness, the trial court has no factual basis on which to accept the Defendant's argument that discovery will be burdensome.

In *DirecTV, Inc. v. Puccinelli*, 224 F.R.D. 667 (D. Kan. 2004), the court granted a motion to compel and overruled the objections to discovery which stated that an "interrogatory is unduly burdensome and overly broad." The court held that "[t]he objecting party must ***show specifically*** how, despite the broad and liberal construction afforded the federal discovery rule, the discovery request is overly broad or burdensome ***by submitting affidavits or offering evidence*** revealing the nature of the burden." *Id*. at 688-89 (emphasis added). Other courts similarly have held that "generally, a party seeking to avoid discovery on a ***burdensome argument must substantiate that position with detailed affidavits or other evidence*** establishing an undue burden" *Coker v. Duke & Co.*, 177 F.R.D. 682, 686 (M.D. Alla. 1998)(emphasis added).

The foregoing cases dovetail with the principle of Florida procedural law that a party may not establish factual matters at a hearing before the court by way of mere unsworn representations by counsel. *See* Trial Law Tip No. 2*, Don't Tell the Judge What Happened Outside the Courtroom (He or She is Not Supposed to Believe You)*. Even if there are no Florida cases directly holding that an affidavit is required to establish that discovery is unduly burdensome, it is the law in Florida that "in the absence of a stipulation, a trial court cannot make a factual determination based on an attorney's unsworn statements." *Blimpie Capital Venture, Inc. v. Palms Plaza Partners Ltd.*, 636 So. 2d 838, 839 (Fla. 2d DCA 1994). *See also, E.g. Leon Shaffer Golnick Advertising, Inc. v. Ceder,* 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982), in which the Court held: "if the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees."

Thus, the defense should be required to provide a detailed affidavit of the records keeper concerning the specific number of hours and type of labor required in responding to discovery before a "burdensome" objection will be sustained. You should have the chance to depose that witness if you wish and impeach the affidavit if the facts permit. The defense attorney's say-so about the burden required is not admissible and certainly not sufficient.

Conclusion

An objection to "burdensome" discovery requires two things which Defendants are not typically supplying: first, the Defendant should be required to provide details concerning the volume of the documents which must be reviewed to respond, the man hours required for production, or other specific details about the alleged burden.

Second, that information must be provided in evidentiary form by way of an affidavit or deposition of someone with personal knowledge. Do not allow the defense to avoid its discovery obligation merely through unsworn and vague assertions of undue burden. It may take us a while to condition trial judges to requiring such things of defense attorneys raising such objections, but we all

should make the effort to strike such objections and, if we do not always succeed, just . . .

Keep Tryin!

Roy

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