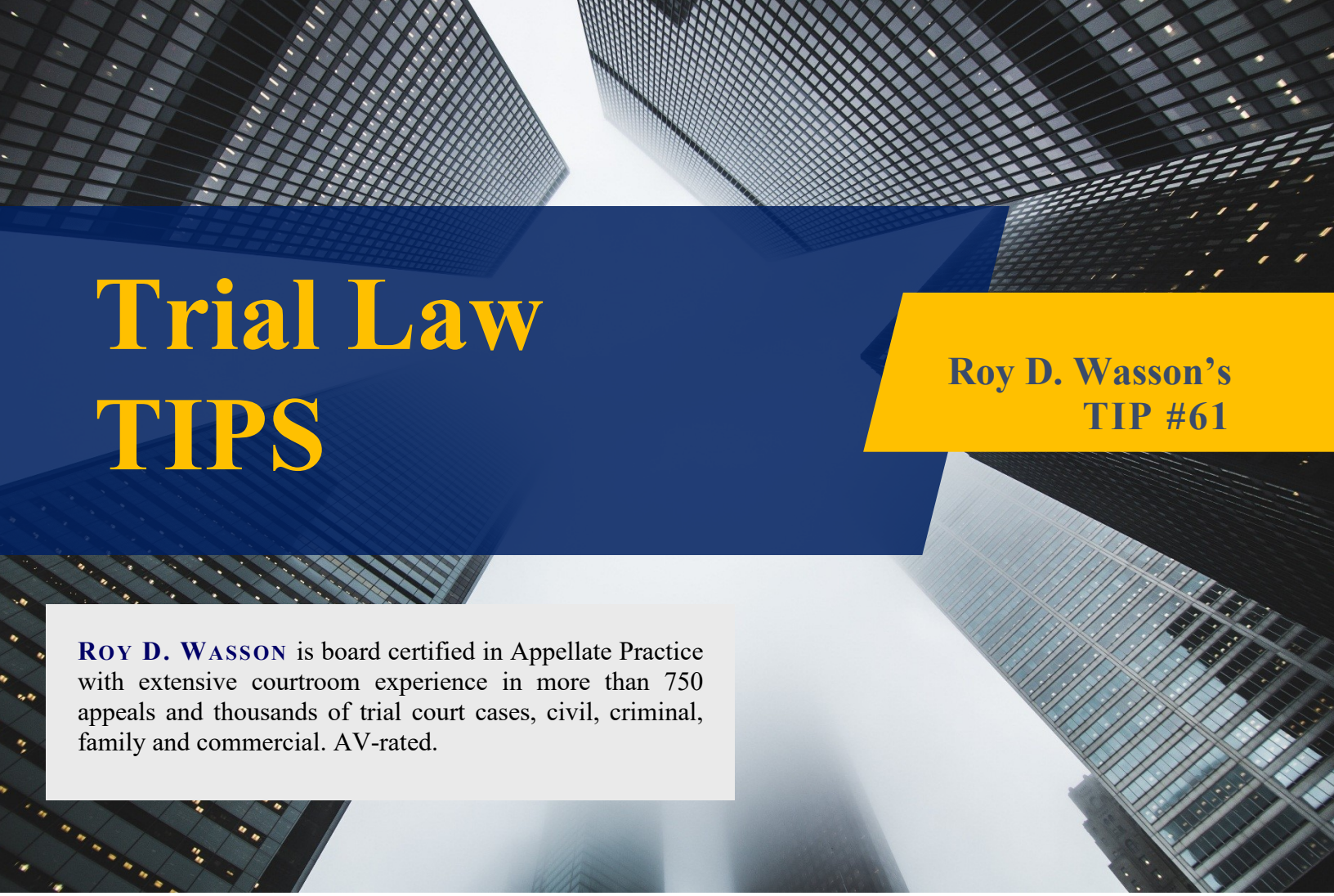

Trial Law TIPS

Roy D. Wasson's TIP #61

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.

Introducing Documents into Evidence

Introduction

You are set #1 on the trial calendar in June and need to get your exhibits and trial notebook ready. You make a list of your witnesses and makes notes beside their names about what points you are going to make with them and what exhibits you are going to get into evidence through their testimony. The DA is honest and pleasant, but makes you work for everything you get due to his so-called "difficult client."

Woops! In matching-up your key exhibits to your available witnesses you realize that Polly Policyholder, the author of a vitally-important document, died awhile back. How are you going to get Exhibit A before the jury? There is one more potential witness, Fleibei Knight, who saw Polly sign and mail Exhibit A. Ms. Knight could (in a perfect world) lay the

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foundation for authenticity of the document Problem is, Fleibei is unreliable and does not care much about the case now that Polly is dead and gone. She was two hours late for her deposition and cannot be counted on to find her way to the courthouse once the trial starts.

Evidentiary Foundation Required

GROAN! You wish that you could just get away with moving the document into evidence at the start of the trial and hear nothing in the way of an objection from the DA, but that would be dreaming. You need a plan to get Exhibit A into evidence. First let me convince you that filing a copy of the exhibit will not do much good—as a filed document like a pleading is not automatically "in evidence" for appellate purposes. You also cannot count on just handing a document to the judge at the hearing. Even though the judge is likely to consider the unsworn submission as having some weight, unless it is marked with an exhibit sticker by the clerk and admitted into evidence by the judge, the communication is not part of the record and will soon be out of the court file and nowhere to be found, as if it never happened.

An excerpt from a typical appellate decision on the subject of introducing documents demonstrates that Florida's courts are taking seriously the rules of evidence and procedures for introducing them:

> Appellee's argument to this court that the documents were admissible as public records or as business records is equally without merit. It is well settled that public records and reports or business records are admissible as an exception to the hearsay rule provided they are authenticated by a custodian. *Adams v. State,* 521 So. 2d 337, 338 (Fla. 4th DCA 1988) (***public records are inadmissible without a proper foundation for their introduction, even when referred to at trial by public officer***); *Jacksonville Elec. Auth. v. Department of Revenue,* 486 So. 2d 1350, 1354

> (Fla. 1st DCA 1986); *Turk v. State*, 403 So. 2d 1077, 1078-79 (Fla. 1st DCA 1981); *Thompson v. Citizens Nat'l Bank of Leesburg,* 433 So. 2d 32, 33 (Fla. 5th DCA 1983). In the case at bar, the records were not authenticated by anyone and it does not appear as though any attempt was made to lay a proper foundation for the admissibility of the documents either as public records or as business records.

Bifulco v. State Farm, 693 So. 2d 707, 710-11 (Fla. 4th DCA 1997).

The most common way to authenticate documentary exhibits is through the testimony of a witness who knows first-hand what the document is. This approach usually is satisfied by testimony from a witness that he recognizes the document; that he knows what kind of document it is; knows where it was filed; and so on. None of those elements are in the Rules of Evidence, however; the rule that pertains to this approach is not at all specific about what foundational questions have to be asked:

> **Requirement of authentication or identification**
>
> Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by ***evidence sufficient to support a finding*** that the matter in question is what its proponent claims.

Section 90.901, Fla. Evid. Code (Emphasis added). Here's what that means.

Marking the Exhibit "For Identification"

Before asking a witness questions about a document, it should be marked for identification with an Exhibit No. "for I.D." If and when that document is admitted into evidence by the judge, it will likely receive a different Exhibit No. "In Evidence."

The questions and answers required to lay the foundation for admission of most documents are pretty standard, with some minor variations when circumstances require. The party offering the exhibit into evidence should plan on calling one or more witnesses knowledgeable about the document in question and obtaining answers to all of the required questions. Although frequently parties believe that they have an agreement as to the admissibility of given evidence, in the heat of trial such offhand agreements are soon honestly forgotten, and you should always plan on satisfying each element of admissibility in the courtroom through witnesses.

The reason for first portion of this two-step process is that the assignment of an Exhibit No. for I.D. will provide the parties with a short and objective name to use when referring to the document during the questioning to determine its admissibility. That Exhibit No. should be used when vocally referring to the document, especially before the document is admitted into evidence and especially within the hearing of the jury. It is improper for counsel on direct examination to verbally characterize an unadmitted document with a label such as "the contract with the defendant," or the "waiver letter." Using such suggestive terms is a classic example of leading the witness. The reason you are in court is to let the witnesses tell you what a given document is, or means, not to place your own spin on the testimony.

Some courts and clerks give a single permanent number to an exhibit, assigned when the exhibit is first marked for identification. They will hand write, or stamp-in, "for I.D." until the court admits the exhibit into evidence, then cross that out or change it to "In Evidence." However, many courts believe that separate numbers aid the appellate record, by providing a written record of just what exhibits were offered and admitted, which ones were offered but rejected by the judge, and so on. In cases where the court reporter does not hear the verbal reception of a given exhibit into evidence, the clerk's notes will provide clarification. The marking of exhibits process should read something like this:

Question/Desired Answer

[After swearing witness and preliminary background questions]

[You] "Judge, before I begin my direct, I need to ask the clerk to mark an exhibit for identification."

[Judge] "It will be marked."

[Judge] "Madam Clerk, What is the exhibit Number for identification of this exhibit?

[Clerk] "It is Plaintiff's exhibit A for identification, Your Honor."

[You] "Ms. Witness, I am showing you what has been marked for identification as Plaintiff's Exhibit A [hands exhibit to witness]. Do you recognize it?"

[Witness] "Yes, I do."

[You] "Ms. W., please tell the court and the jury what that is, that the clerk has marked Exhibit A."

[Witness] It's a letter from Billy Bob to Polly; she wrote to him and he wrote her this back.

[You] "How do you recognize it?"

[Witness] Huh? What do you mean, "recognize"?

[You] "How do you know who it was that wrote that letter? What makes you think that it was Billy Bob?"

'Cuz I seen him sign his name lots of times, over at the VA Hospital, where they make us sign the same thing all the time. Billy Bob always makes that curly bottom on the "Y"

[You] "Did Billy send that to Polly in the mail? How do you know that she got it?"

"Polly showed it to me the day she got it, when she was still shaking from Bobby leaving."

[You] "Are you sure that Billy is who sent that letter—Exhibit A, to Polly?"

"Very sure."

[You] "What makes you so sure?"

[Witness] "Because I called Billy and asked how he could be so cruel to poor Polly?"[May draw improper hearsay objection; answer lacks compliance with rule on authentication of phone calls that witness personally recognize the sound of the other voice].

[You] "What did he say to you?"

"Nothing, not a word." [This could be an admission by silence]

Introducing and Publishing the Exhibit

[At this point, assuming that there is some relevance in your case to the fact that Billy Bob sent a letter to Polly, the foundation would appear to be sufficiently laid for admission into evidence of the exhibit, so take the following action]:

[You] "I move into evidence the document that's been marked for identification as Ex. A"

[Judge] "Any objection?"

[DA] "I object judge, it's hearsay."

[Judge] "Overruled. Exhibit A is received into evidence."

[Clerk] It will become Plaintiff's Ex. 1A in evidence."

[You] "May I publish Exhibit 1A to the Jury, Your Honor?"

[Judge] "You may. Hand the exhibit to the juror on the end and let them pass it down the box after they each have looked

at it. Not too long, folks, it's getting late and you will have the exhibit to look at as long as you want during deliberations."

After the jurors complete their first review of Ex. 1A, counsel who admitted the document should retrieve it from the edge of the jury box and return the exhibit to the safe custody of the Court Clerk.

Keep Tryin!

Roy

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