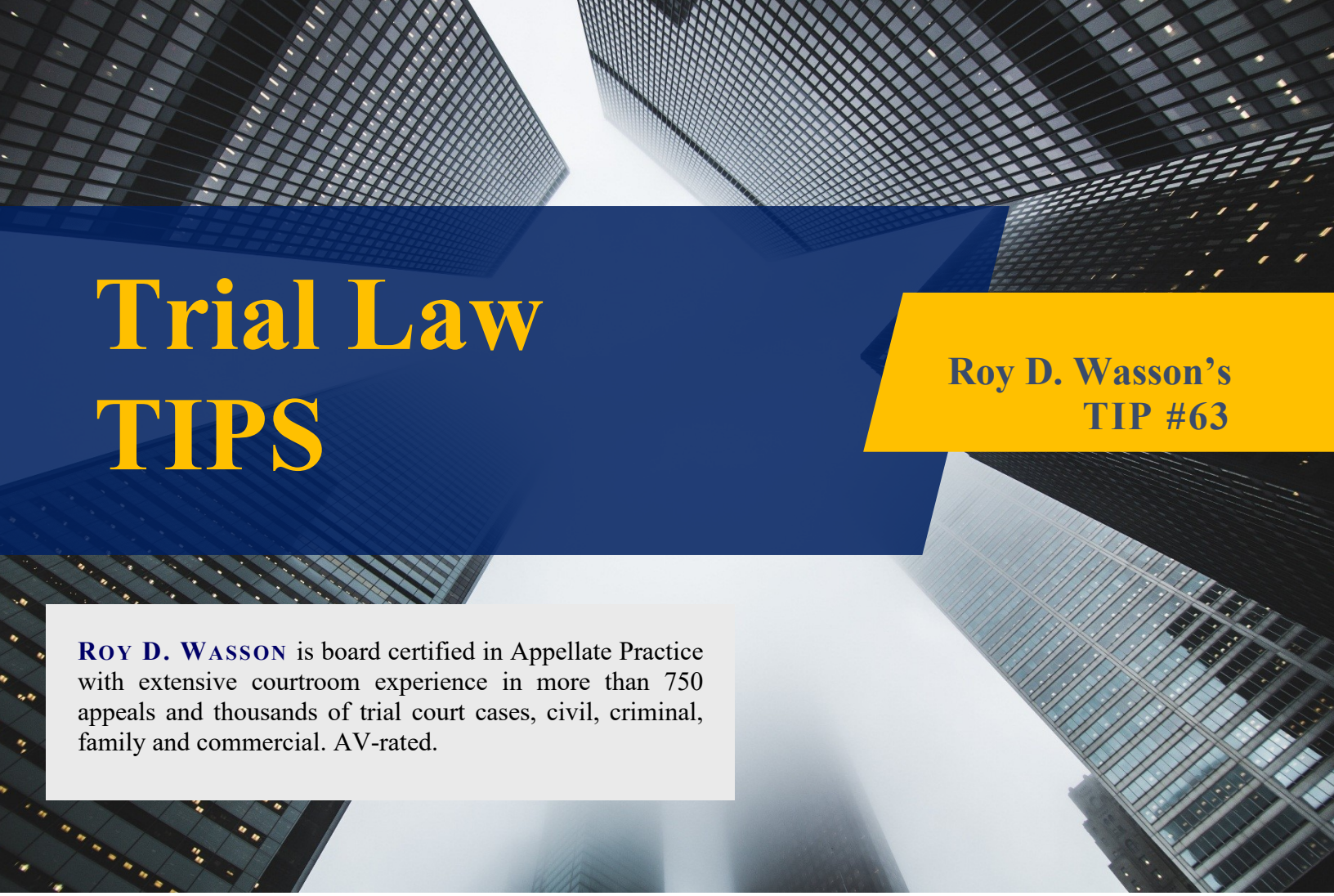

Trial Law TIPS

Roy D. Wasson's TIP #63

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.

Remedies for Improper Ex Parte Communication with Treating Physicians

Introduction

Part of the price trial lawyers pay for the elated feeling we get when the jury returns a nice verdict is the unpleasant feeling that results when something unexpected—and potentially negative—occurs during the course of litigation. Many of us have felt the stomach-wrenching emotions when the jury in a complicated case knocks on the courtroom door after only a few moments of deliberations. Perhaps you have felt the anxiety of learning that a new judge has been selected to preside over your trial who still holds a grudge against you for beating his team in trial advocacy competition in law school.

One of the most disheartening feelings a trial lawyer can experience is that which results when you arrive at your client's treating physician's office for a pre-depo conference, only to see

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the defendant's counsel emerging from the doctor's inner office as you arrive. "What you are you doing here?" you may ask your opponent, but you know that he or she was up to no good, attempting to improperly influence the plaintiff's doctor outside of your presence. Ex parte conferences between defense attorneys and treating physicians are unprofessional, improper, and prohibited by Florida law. However, the remedies for such violations are not that apparent, and you will need to call on your powers of persuasion to obtain appropriate relief for such misconduct by your opponent.

Defense Counsel's Ex Parte Communications Are Illegal

Defense attorneys who conduct ex parte conferences with treating physicians violate provisions of section 456.057, Fla. Stat. Subsections (5)(a) and (6) provide the patient with a privilege that has limited exceptions, not including conferences with defense counsel in non-malpractice cases. Those sections of the statute provide as follows:

> (5)(a) Except as otherwise provide din this section as in s. 440.13(4)(c), such records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient. However, such records may be furnished without written authorization under the following circumstances:
>
> 1. To any person, firm, or corporation that has procured or furnished such examination or treatment with the patient's consent.
>
> 2. When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the medical records shall be furnished to both the defendant and the plaintiff.
>
> 3. In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a

subpoena from a court of competent jurisdiction and proper notice to the patient or the patient's legal representative by the party seeking such records.

4. For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.

5. To a regional poison control center for purposes of treating a poison episode under evaluation, case management of poison cases, or compliance with data collection and reporting requirements of s.395.1027 and the professional organization that certifies poison control centers in accordance with federal law.

* * *

(6) Except in medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

(Emphasis added).

It has been more than ten years since the Florida Supreme Court resolved a conflict between the intermediate appellate courts of Florida concerning the question whether a defense attorney could conduct an ex parte conference with a treating physician without violating that statute's predecessor, section 455.241, Fla. Stat. In *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996), the court rejected several arguments advanced by the defendant and held that ex parte

communications were inappropriate. In *Acosta*, the defendant had gone so far as to argue that it should be allowed to have ex parte conferences with treating physicians, so long as those physicians were not required to say anything. The court held: "we believe it is pure sophistry to suggest that the purpose and spirit of the statute would not be violated by such conferences." 671 So. 2d at 156.

The courts have strengthened the *Acosta* holding to prevent defense attorneys from contacting plaintiffs' doctors for purposes of intimidating them. In *Knittell v. Beverly Health and Rehabilitation Services, Inc.*, 863 So. 2d 1279 (Fla. 2d DCA 2004), the court held that section 456.057 precluded communications between an attorney representing a defendant doctor in a malpractice case with other healthcare providers involved in the care or treatment of the patient. In *Knittell*, the court "note[d] that the supreme court already has rejected the trial court's determination that the statute is not violated by counsel contacting physicians until those physicians actually disclose confidential information." 863 So. 2d at 1281.

In *Lemieux v. Tandem Health Care of Florida, Inc.*, 862 So. 2d 745 (Fla. 2d DCA 2003), the court quashed an order of the trial court permitting disclosure of confidential patient information. The court held that "the purpose of the statute is to preserve a patient's right to confidentiality with respect to information disclosed to a healthcare provider in the course of the care and treatment of a patient and to limit the conditions under which such information may be disclosed to others. ***This includes closing the door to the previous practice of many defense attorneys of meeting privately or otherwise communicating ex parte with the plaintiff's treating physicians***." *Id*. at 750 (emphasis added). Thus, it is clear that such ex parte contacts are statutorily prohibited and improper.

Available Relief to Remedy or Prevent Violations

The case law has been slow to adopt significant remedies for violations of patient confidentiality by improper ex parte communication. In *Phillips v. Ficarra*, 618 So. 2d 312 (Fla. 4th DCA 1993), the court noted that "there is no sanctions specified in that section for a violation." *Id*. at 314. The trial judge had precluded defense counsel from calling the treating physician as a

witness, and that ruling was affirmed as being within the trial court's discretion. However, it would not seem to be a complete remedy to disqualify a doctor who the plaintiff's attorney probably would have called as a witness, but for the improper ex parte contact by defense counsel.

Another decision recognizing the trial court's discretion to strike a doctor's testimony when there was an improper ex parte conference is *Keel v. Psychiatric Institute of Delray, Inc.*, 668 So. 2d 691 (Fla. 4th DCA 1996). Other relief granted by the *Keel* court was to reverse the denial of a protective order prohibiting further communications with the doctor by defense counsel.

In *Acosta*, the Florida Supreme Court approved the Second District's decision prohibiting defense counsel from further communication with treating physicians, even if those communications ostensibly involved matters other than the plaintiff's medical condition in controversy. However, the court did not indicate what remedy would be available if such an order was ignored by defense counsel.

A case discussing a possibility of sanctions against defense counsel for an improper ex parte communication is *Bradley v. Brotman*, 836 So. 2d 1129 (Fla 4th DCA 2003). In that case, the trial court had refused to exclude certain evidence that had been tainted by improper contact between defense counsel and a treating doctor.

The plaintiff also had moved to strike the defendant's pleadings based on the improper communications. Although holding that it could not "say that the trial court abused its discretion in failing to strike [defendant's] pleadings," the Fourth District left the door open for those sanctions and other relief upon remand. The court held: "Whether that prejudice exists and whether it would require the striking of pleadings, the removal of [defense counsel] Mr. Cocalis from the case, or other monetary sanctions, are issues we leave for further consideration after remand." *Id*. at 1136. Thus, the full range of sanctions exists in a proper case.

Conclusion

It is undeniable that ex parte conferences with treating physicians by defense counsel are unprofessional, illegal, and should be remedied by appropriate sanctions. So far the law concerning the scope of those sanctions is not yet developed. Trial lawyers representing injured plaintiffs should be vigilant to signs of such improper contact, creative in suggesting appropriate remedies, and, even when initially unsuccessful in imposing serious sanctions upon defendants, should . . .

Keep Tryin!

Roy

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