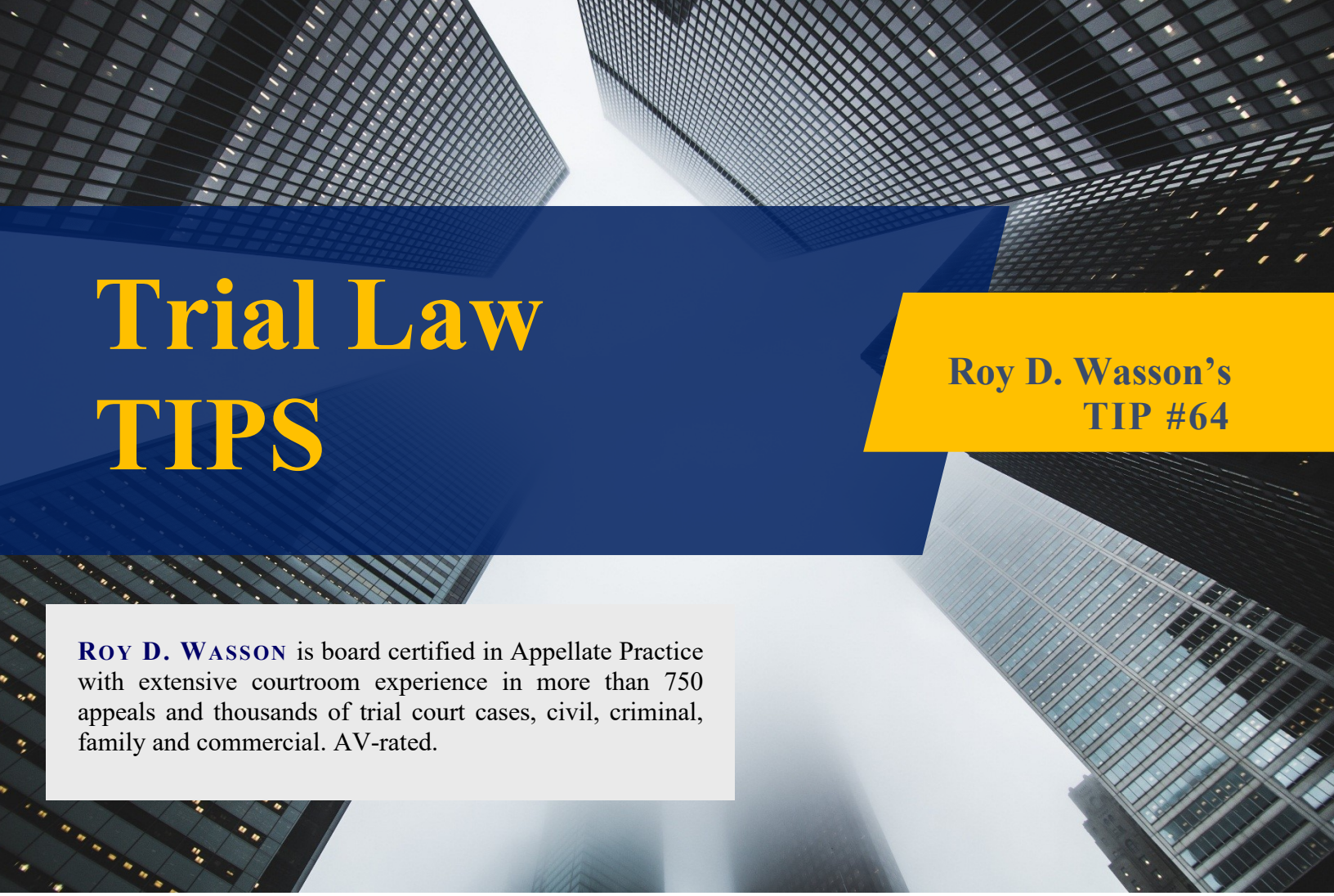

Trial Law TIPS

Roy D. Wasson's TIP #64

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.

Dealing with Experts Who Turn Negative After Being Listed as Testifying Witnesses

Introduction

Have you ever had the nauseating experience of learning from an expert you retained (and paid substantial sums) that he or she no longer holds opinions favorable to your client's case? If you have never heard an expert explain that "additional research" required him or her to reevaluate a prior favorable report, you either are so lucky that you should buy a Lotto ticket, or are still fairly young in the practice of law.

What should you do when the inevitable time comes that your expert turns 180 degrees and favors the defense theory? If you already provided the defense with a report or answers to expert interrogatories, should you just try to keep a low profile and take no action on the problem? Are you worried about stirring up the proverbial "hornet's nest" if you tell the defense attorney that you

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are getting a different expert for trial? Will the defense attorney sense weakness and try to flip your expert into becoming a favorable witness for the defendant? Would it be better for you to say nothing and just try your case without calling the expert or mentioning anything about it?

In a nutshell, you should not try to soft-pedal the problem and take no action but should immediately and expressly withdraw the expert from your witness list, and convert him or her into a "consulting" expert. Here's why.

Two Kinds of Experts: One Discoverable; One Not

Under the Florida (and similar federal) Rules of Civil Procedure, there are two different categories of expert witnesses, and two much different standards for your opponent to meet in order to obtain discovery about their opinions. First is the type of expert you retained "in anticipation of litigation or for trial" and who is "expected to be called as an expert witness at trial." *See* Fla. R. Civ. P. 1.280(b)(4)(A)(ii). Your opponent may depose such a "testifying" expert "without motion or order of court." *Id*.

On the other hand, much different discovery rules apply to "an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is ***not*** expected to be called as a witness at trial." *See* Fla. R. Civ. P. 1.280(b)(4)(B). Your opponent is not entitled to obtain discovery about such a "consulting" expert, except "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." *Id.*

Transforming Testifying Experts into Consulting Experts—Never too Late

If a previously-favorable "testifying" expert suddenly turns "south" on you and recedes from prior favorable opinions, you should immediately transform the expert into a "consulting" expert and issue a revised witness list expressly withdrawing the expert's name from those expected to testify at trial.

Contrary to "courthouse legend," it is possible to transform your expert from one category to another and change the discovery rules applicable to that expert.

In *Forman v. Fink*, 646 So. 2d 236 (Fla. 3d DCA 1994), the Plaintiff apparently had the problem addressed here of a listed expert witness changing her opinion. Although the Plaintiff had withdrawn that expert, Dr. Joan Pehta, from her list as a testifying expert, the trial court erroneously entered an order compelling "full and complete discovery from Plaintiffs' former medical expert." *Id*. at 237.

On *certiorari* review, the Third District Court of Appeal quickly quashed the trial court's order compelling discovery from the withdrawn expert "[b]ecause no exceptional circumstances were shown to compel discovery from an expert not expected to testify at trial." *Id*.

Similarly, the Fourth District quashed such an order compelling discovery from a former testifying expert who had been withdrawn in *Morgan v. Tracy*, 604 So. 2d 15 (Fla. 4th DCA 1992). The *Morgan* case is significant because the expert's report had previously been provided to opposing counsel, which was alleged to have constituted a waiver of the work product privilege. In rejecting that argument, the Fourth District in the *Morgan* case held as follows:

> We grant the petition for writ of certiorari on the authority of rule 1.280(b)(4)(B), Florida Rules of Civil Procedure. *See also Glimor Trading Corp. v. Lind Electric, Inc.*, 555 So. 2d 1258 (Fla. 3d DCA 1989); *Ruiz v. Brea*, 489 So. 2d 1136 (Fla. 3d DCA 1986). ***We reject respondent's contention that petitioner's prior disclosure of the expert's written report constituted a waiver of the work product privilege as to the facts known and opinions held by the expert that were not previously disclosed.*** *See Truly Nolen Exterminating, Inc. v. Thomasson*, 554 So. 2d 5 (Fla. 3d DCA 1989), *rev. dismissed*, 558 So. 2d 20 (Fla. 1990); *Eastern Air Lines, Inc. v. Gellert*, 431 So. 2d 329 (Fla. 3d DCA 1983).

> ***We also conclude the petitioners' initial listing of the expert on their trial witness list did not constitute a waiver of the work product privilege.*** Now that petitioners have withdrawn the expert's name from their trial witness list, respondent cannot depose the expert absent a showing of exceptional circumstances. Fla. R. Civ. P. 1.280(b)(4)(B).

Id. at 15. As you can see, it is important to file a revised witness list as soon as your expert turns against you, and you should be able to rest assured that the defense will not be able to conduct discovery from that consulting expert.

Conclusion

Do not let the shock and disappointment from learning that your expert has changed his or her mind paralyze you from acting to minimize the damage. As soon as you become convinced that your expert will do more harm than good, withdraw his or her name from your witness list and change the expert into the category of consultant, whose opinions may not ordinarily be discovered. It is bad enough that your highly-paid expert "jumped ship;" don't let things get worse by allowing the opposing party to discover the expert's newly-formed and harmful opinions. Above all . . .

Keep Tryin!

Roy

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