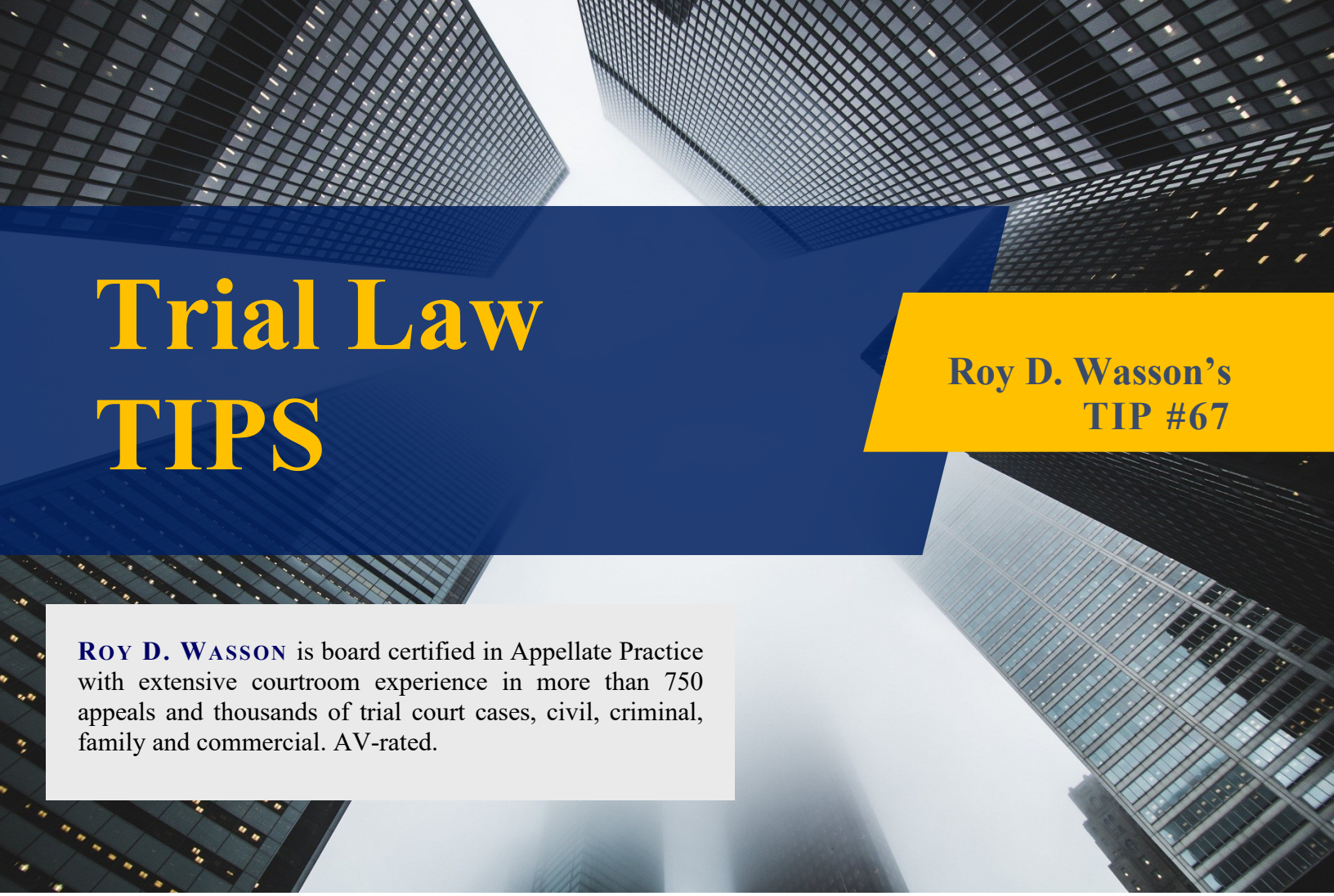

Trial Law TIPS

Roy D. Wasson's TIP #67

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 Judges Who Refuse to Set Actions for Trial

Introduction

How many of our readers have had defense counsel agree that a case should be set for trial immediately upon the pleadings being closed? Not very many of our readers are raising their hands. For some reason, defense counsel do not share our belief that justice should be speedy in the sense of a trial date set soon after the reply to affirmative defenses has been filed. Often times, trial judges agree with defense counsel that trial dates should not be set, notwithstanding the close of pleadings, until discovery has been completed and other pretrial proceedings have been conducted. However, trial courts have no discretion to deny setting trials once the pleadings are closed. Here's how to deal with the situation the next time your Notice for Trial is ignored.

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Compelling Trial Judges to Set Trials by Mandamus

Fla. R. Civ. P. 1.440(a) provides that a civil "action is at issue after any motions directed to the last pleading served have been disposed of or, no such motions are served, twenty days after service of the last pleading." Once a case is at issue, "any party may file and serve a notice that the action is at issue and is ready to be set for trial." *Id*. (b).

Once a case has been properly noticed as ready for trial, the trial court must set a trial date, and has no discretion in the matter. However, some defense attorneys convince some judges that subsection (c) of Rule 1.440 permits some discretion in setting a trial where—although the case is "at issue"—the defense is not "ready" for trial. The first sentence of that subsection provides: "if the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial." However, the term "ready" does not mean ready in the sense of completion of discovery and pretrial proceedings. Instead, it simply means that the action is indeed "at issue."

As Judge Philip Padovano explains in his treatise on trial practice, "in this context the term 'ready' is used in a legal sense to mean that the pleadings are closed. It does not necessarily mean that the lawyers are prepared to try the case." *Philip J. Padovano, Florida, Civil Practice ' 15.2* (2004-05 ed). Judge Padovano's treatise has been cited by appellate courts dealing with the problem of trial judges refusing to set trials, notwithstanding being at issue.

The proper remedy for a trial court's refusal to set an action for trial once it is at issue is to obtain a writ of mandamus from the district court of appeal with jurisdiction over that trial court. In *Garcia v. Lincare, Inc.,* 906 So. 2d 1268 (Fla. 5th DCA 2005), the Court issued such a writ of mandamus, holding as follows:

> In this medical malpractice case, Petitioner filed several notices for trial after the closure of the pleadings. In response, Respondents filed various objections claiming that the case is not ready for trial because of trial conflicts and outstanding discovery. On each occasion, the trial court sustained the objections, concluding that it would not set the case

> for trial until discovery had been completed. We think the trial court's conclusion misapprehends the applicable rule. Procedural readiness for trial differs from actual readiness for trial. It is the former, coupled with a properly filed "Notice for Trial," that imposes upon the court the mandatory duty to set a trial date. *Kubera v. Fisher*, 483 So. 2d 836 (Fla. 2d DCA 1986).

Id. at 1268-69.

This issue recently arose in a case before the Third District involving the refusal of a Miami-Dade County Circuit Court judge to set an action for trial in the "back-up division," which is where cases lasting longer than three weeks are tried in Miami. Local administrative procedures require the parties seeking a trial date in the back-up division to sign a certificate acknowledging that all discovery is completed and that all motions had been filed and ruled upon. Defense counsel in complex cases pending in the Miami-Dade Circuit Court frequently fail to cooperate in signing such a certification, coming up with ideas for additional discovery, dilatory motions, and other excuses for refusing to cooperate. Until recently, the failure of both parties to sign the certificate waiving further discovery and motions would prevent long cases from being set for trial at all.

That problem was resolved by the Third District in the recent case of *Rolle v. Birken*, No. 3D07-2579; 2008 Fla. App. LEXIS 214 (Fla. 3d DCA Jan. 9, 2008). That decision made it clear that the local administrative procedure for setting longer cases for trial could not trump the requirement of Rule 1.440 that trial be set as soon as a notice for trial has been properly filed. The Court held as follows:

> Petitioners seek a writ of mandamus to compel the trial court to set this case for trial. The parties do not dispute that the case is "at issue," as contemplated by Florida Rule of Civil Procedure 1.440, and that several notices for trial informed the court of such. Nevertheless, the trial court has refused to set a trial date because discovery is not yet completed and because internal court procedures presumably do not

> allow a case to be set for trial in the back-up division, where longer trials such as this one are tried, without the completion of a certificate of readiness for trial by all parties. We have jurisdiction, grant the petition and issue the writ.
>
> Once a case is procedurally at issue and upon the filing of a proper notice for trial, ***the court must act upon the notice within a reasonable time and give the parties a trial date***.

Id. at ** 1&2 (emphasis added).

The appellate court directed the trial judge to schedule a trial to start no more than four months from the date of the writ of mandamus, "and thereafter to proceed to a conclusion of the case in the ordinary course." Thus, trial counsel representing plaintiffs who are having difficulty getting their cases set for trial have controlling authority that trial judges must follow once a case is at issue.

Conclusion

My readers are encouraged to present the foregoing authorities to defense counsel who may be acting as impediments to a case being set for trial, prior to seeking a writ of mandamus compelling a trial judge to set the matter for trial. Perhaps your opposing counsel will be reasonable, and you will not have to face the prospect of trying a long case before a judge who has been ordered set a trial against his or her will. (If you don't want to sit through a long trial in front of a judge you have compelled to take action, ask your appellate attorney to obtain the writ of mandamus and take the heat instead.) Opposing counsel and the trial court may frustrate your efforts to get a trial date set at first. However, do not give up your quest to obtain your client's day in court and, if at first you don't succeed . . .

Keep Tryin!

Roy

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