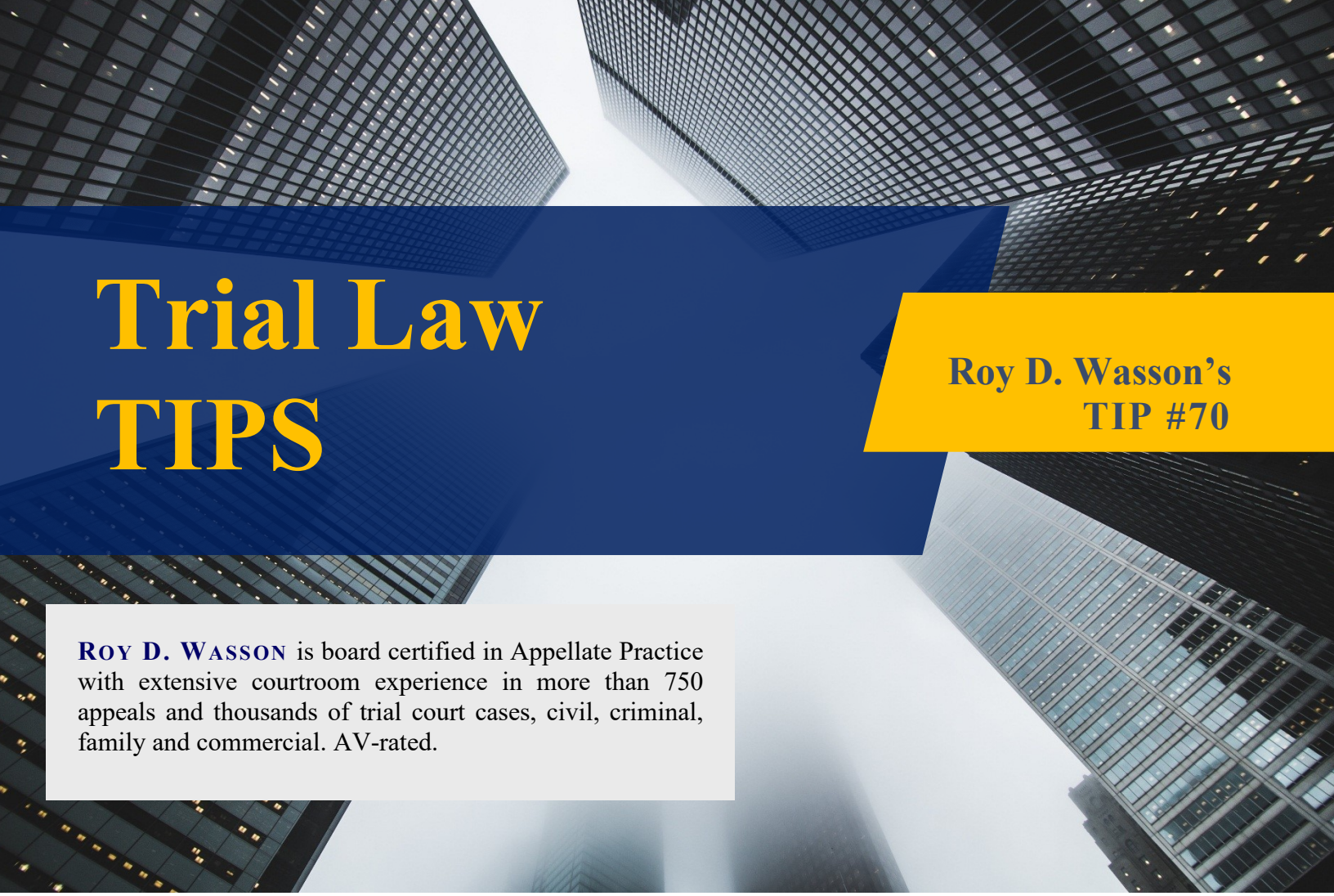

Trial Law TIPS

Roy D. Wasson's TIP #70

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.

Inadmissibility of Evidence of Settlement with Former Defendants

A settlement with some but not all of the defendants in a case can be a wonderful thing at times. Such a settlement can streamline the trial by ridding the case of a party against whom the plaintiff had proof problems, reduce the size of the army of defense counsel opposing you at trial, and generally streamline the issues for the jury. However, the remaining defendants may try to use the fact of your settlement with a former defendant to prejudice the jury into finding that the plaintiff already has been adequately compensated, thereby reducing the likelihood of a verdict in your favor. Some trial judges are not yet educated to the fact that a settlement with a former defendant is totally inadmissible. This "Tip" should provide you with the ammunition you need to educate such

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judges and defense counsel and prevent the jury from being prejudiced by the fact of your settlement with other parties.

Two Statutes Render Prior Settlements Inadmissible

It goes without saying that, when you settle with one of the defendants in your lawsuit, your client will be required to execute a release or covenant not to sue.[1] Section 768.041(3), Fla. Stat. makes it crystal clear that the jury should never learn of the fact of such a settlement, wherein states: "The fact of such a release of covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury." That clear statute is not susceptible to misunderstanding, once it is made known to trial judges.

Another statutory provision prohibiting introduction of evidence of a settlement with a former defendant is section 90.408, Fla. Evid. Code. That statute provides: "Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value." Although that statute typically is thought of as a tool to prevent evidence of settlement negotiations with a defendant remaining in the case, the Supreme Court of Florida has employed it in a recent decision as an additional authority for the inadmissibility of evidence of a plaintiff's settlement with a former defendant.

In *Saleeby v. Rocky Elson Constr., Inc.*, 3 So. 3d 1078, 1080 (Fla. 2009), the court held: "Both sections 768.041 and 90.408, Florida Statutes (2006), prohibit the admission at trial of any evidence of settlement or dismissal of a defendant."

[1] To allay any concerns you may have about the effect of your release discharging non-settling defendants from liability, you should review Trial Law "Tip" #25, entitled: *Release and Dismissal of Active Tortfeasors--Simple Steps to Preserve Claims Against Defendants Who Are Vicariously Liable--Another False Courthouse Legend Bites the Dust.*

The court in the *Saleeby* case concluded that the impermissible introduction into evidence of a settlement with a former defendant is not just prejudicial because it will inform the jury that the plaintiff already has been compensated. In addition, such evidence is inadmissible because it tends to mislead the jury into thinking that the at-fault defendant was the one that paid a settlement and was dismissed from the case. In other words, the jury may conclude that the remaining defendant is not at fault, because it did not participate in the settlement.

The court in *Saleeby* cited *City of Coral Gables v. Jordan*, 186 So. 2d 60 (Fla. 3d DCA 1966), which noted that "it is a practical impossibility to eradicate from the jury's minds the considerations that where there has been a payment there must have been liability." *Id*. at 63. Therefore, the plaintiff is prejudiced in two ways by the improper introduction of evidence that a former defendant has settled.

Conclusion

Once you have settled with one of the defendants in your case, you should file a motion in limine obtaining a pre-trial ruling that the fact of the settlement is not going to be made known to the jury. Perhaps the remaining defendant will, when it learns that proof of the settlement with other parties is not going to be admitted, relent to your reasonable settlement demands and compromise the remaining claims. If not, all you can do is pick a jury and . . .

Keep Tryin!

Roy

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