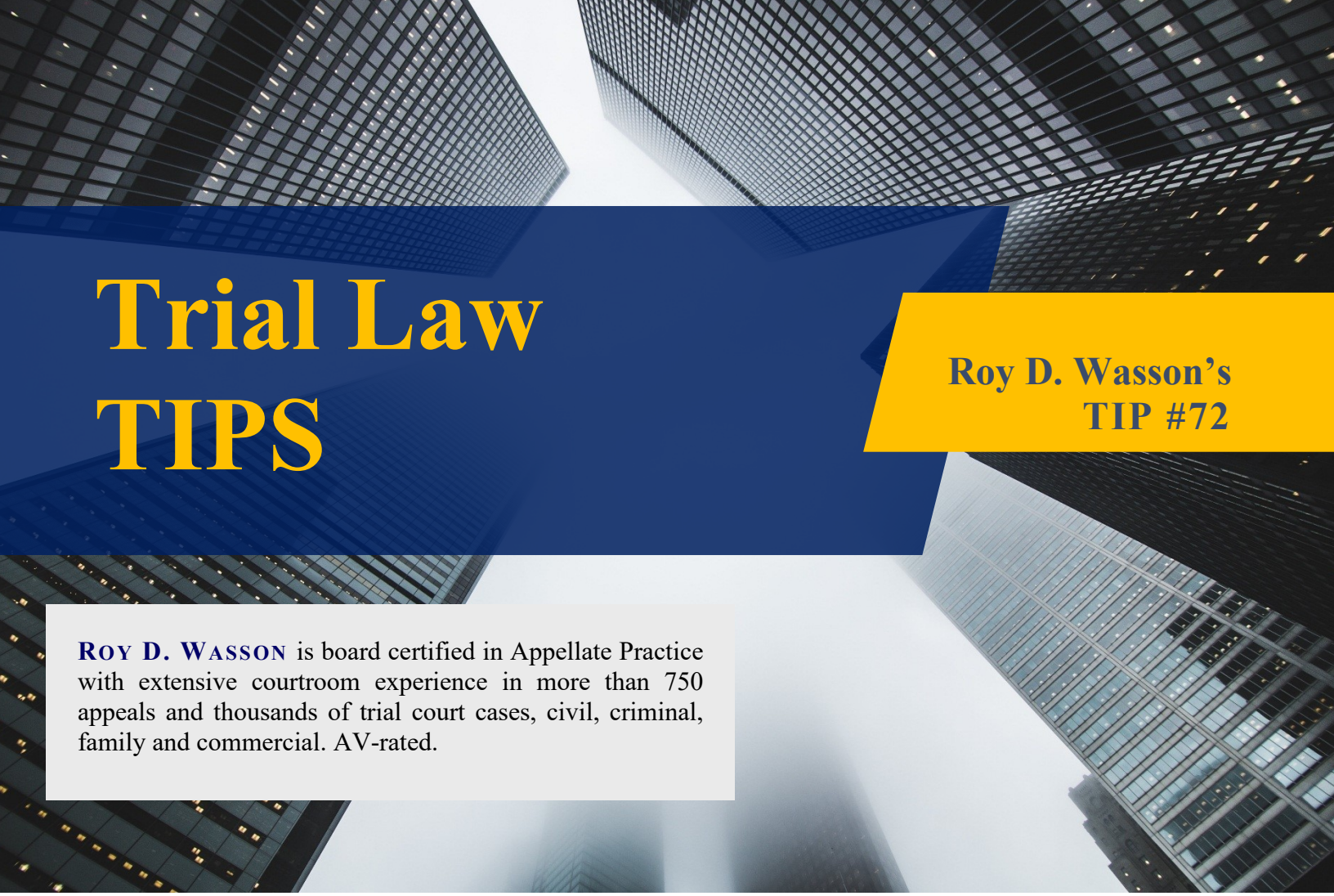

Trial Law TIPS

Roy D. Wasson's TIP #72

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.

Requirement of Expert Testimony to Recover Expert Fees as Taxable Costs

Who do you need to bring with you to a hearing on a motion to tax costs? You may respond by saying your paralegal, your partner, your court reporter, or another familiar companion who accompanied you on the long road to winning the trial that led to your recovery of taxable costs. However, there is another very important person you need to bring with you to the hearing, or you are going to lose thousands of dollars in taxable costs. Although lawyers are very familiar with the proposition that expert testimony is required to recover attorney's fees, many of us are unaware of a body of law preventing recovery of expert witness fees as taxable costs, in the absence of expert testimony.

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Expert Testimony Required From Expert in Same Field

A prevailing party may not recover any amount for expert witness fees unless he or she presents testimony from experts in the same field at the costs hearing establishing the reasonableness and necessity of the fees. "The prevailing party's burden at an evidentiary cost hearing to recover an expert witness fee is 'to present testimony concerning the necessity and reasonableness of the fee.'" Kendall Racquetball Investments, Ltd. v. The Green Companies, Inc., 657 So. 2d 1187, 1188 (Fla. 3d DCA 1995).

This is not a new body of law, but it is one that can be a very expensive lesson to learn the hard way. It has been more than fifteen years since the prevailing plaintiffs were denied recovery of more than $114,000 in expert witness fees in a case they won. In Powell v. Barnes, 629 So. 2d 185 (Fla. 5th DCA 1993) the court made it clear that expert fees simply are not taxable costs in the absence of expert testimony as to reasonableness and necessity. Further the testimony must come from an expert in the same field. You cannot rely on the "expertise" of another trial lawyer to convince the judge that your expert fees were reasonable, as held by the court in the following case:

> The issue on this appeal is a simple one: What is a prevailing party's burden at an evidentiary cost hearing for recovery of expert witness fees?
>
> In *Lafferty v. Lafferty*, 413 So. 2d 170 (Fla. 2d DCA 1982), it was held that, upon specific objection to the setting of an expert witness fee without an evidentiary hearing (as in the instant case), the prevailing party will have to present testimony concerning the necessity and reasonableness of the fee. *See also American Indem. Co. v. Comeau*, 419 So. 2d 670, 672 (Fla. 5th DCA 1982). Here, the prevailing plaintiffs, Barnes, sought to meet their burden at the evidentiary hearing by relying solely upon one "omnibus" witness, an experienced trial

> attorney, who was not shown to have expertise (i.e., training or experience) in the various fields of endeavor at issue such as metallurgy, accident reconstruction, forensic economics, rehabilitation, or video graphing. The defendants (Powell) objected to this unique tactic, and the trial judge initially indicated that whereas the trial attorney probably could testify as to the necessity for hiring the various witnesses for this particular litigation, he doubted that he could testify as to the necessity of their various work efforts and the reasonableness of their charges. Unfortunately, the trial judge receded from his initial view and accepted the trial attorney as an "omnibus" expert on everything. This clearly was error.
>
> ***Given the necessity for an evidentiary hearing in regard to the contested costs of $ 114,026.85, the plaintiffs were obligated to support their motion for the taxation of those costs by substantial, competent evidence of the services performed and the reasonable value of those services.*** *In re Lopez' Estate*, 410 So. 2d 618 (Fla. 4th DCA 1982). That was not done in this case. ***That evidence must come from witnesses qualified in the areas concerned.***

Id. at 185-86 (emphasis added).

No "Second Bite" for Those Who Show Up Without Expert

For those of you who have a costs hearing coming up, do not be tempted to attend the hearing without presenting expert testimony on this issue, in the hopes that opposing counsel will be unaware of the requirement and fail to object. It will not be a simple matter of coming back to court with your expert at a later time.

The court in Powell made it clear that such an approach will fail: "Having been afforded one evidentiary hearing on costs, the plaintiffs are not entitled to a second bite at the

apple." Id. at 186. It will be worth the investment to bring the expert with you the first time the costs motion is set.

Note that the courts refer to the need for the expert to "testify" at the costs hearing, as opposed to presenting an affidavit that his or her fees were reasonable and necessary. As with attorney's fee hearings, I caution you to make sure that you have a signed stipulation from opposing counsel before counting on your ability to present an affidavit in lieu of live testimony. Affidavits are hearsay not normally admissible in an evidentiary hearing.

Testimony from Expert Whose Fees You Seek Should Suffice

Finally, the good news is that you are probably going to be able to satisfy the foregoing evidentiary requirement with the testimony of the very expert whose fees you are seeking to recover. In the Kendall Racquetball case, the Third District held that, in the absence of testimony at the cost hearing from the "expert who testifies at trial" or "another expert similarly qualified in the same field," no amount may be awarded for a prevailing party's expert witness fees. See id. at 1189. Therefore, you will not need to retain two experts in the same field: one for trial and one for the costs hearing.

Conclusion

Congratulations on winning the trial that entitles you to recover taxable costs, including those expensive expert witness fees. This TIP should help your client keep more of the recovery. If you have not yet received the jury's verdict in that case in which you have laid out huge sums for expert witnesses, all I can say is:

Keep Tryin!

Roy

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