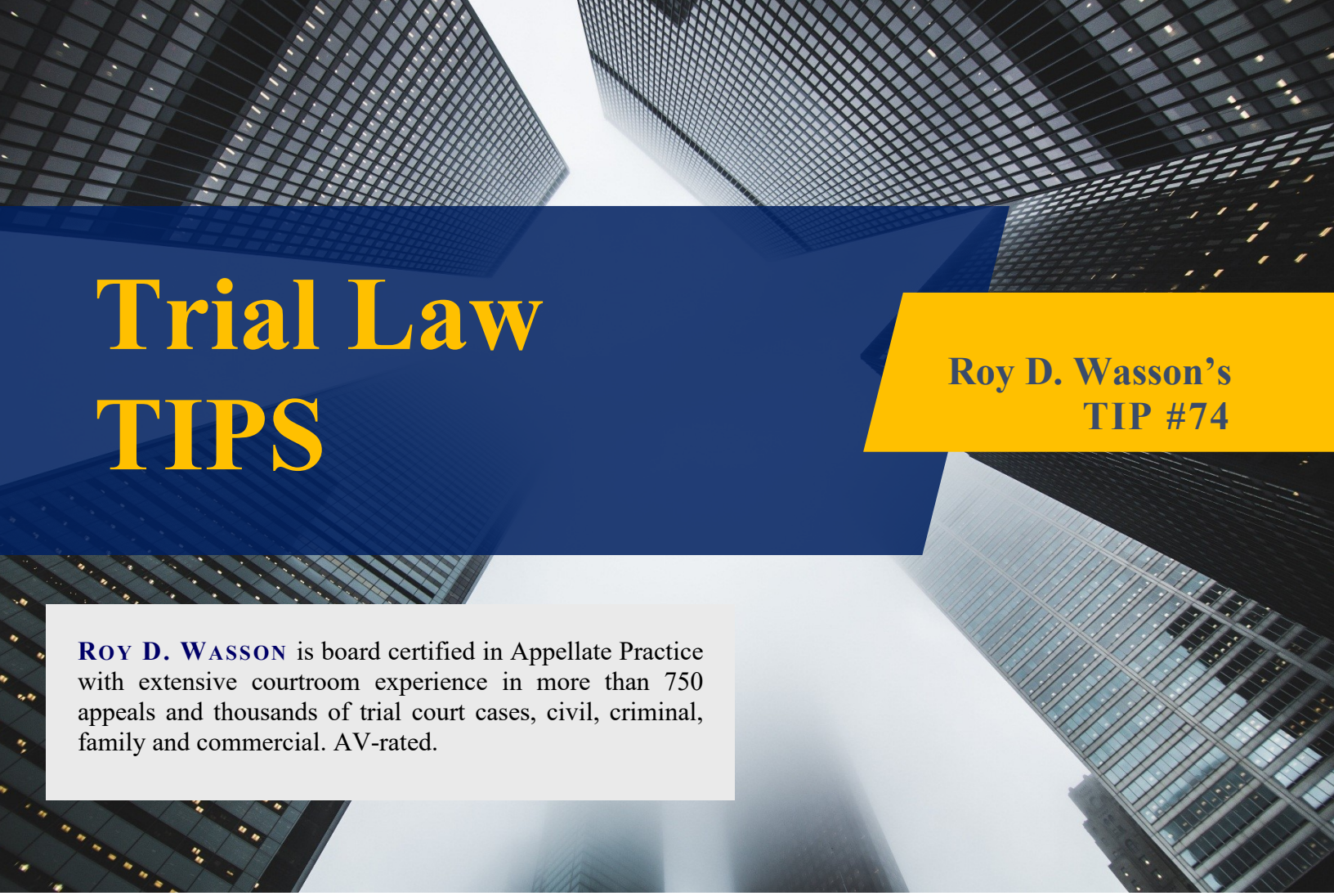

Trial Law TIPS

Roy D. Wasson's TIP #74

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.

Use of Non-Party Depositions at Trial

After fighting with defense counsel over continuances that you believe were unnecessary, you finally have been called to start trial in a serious injury case involving disputes concerning liability and damages. While you would have preferred to call as a live witness the motorist driving behind your client at the scene of the collision, that witness does not present well as a live witness. Therefore, you plan on reading his deposition pursuant to §90.803(22), Fla. Evid. Code. Be careful because defense counsel may convince the judge that you cannot use the discovery deposition, unless you demonstrate that the witness is unavailable to testify in person.

The Florida Evidence Code purports to render admissible deposition testimony even without a showing of unavailability of the witness, "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a

WASSON & ASSOCIATES, CHARTERED
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com

predecessor in interest, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Section 90.803(22), Fla. Evid. Code. However, that provision of the Evidence Code has never been adopted by the Supreme Court of Florida. In fact, the Florida Supreme Court has expressly declined to adopt §90.803(22), insofar as that provision is procedural. See In Re Amendments to the Florida Evidence Code, 782 So. 2d 339, 340-41 (Fla. 2000). Further, §90.803(22) has been held to be unconstitutional in a criminal trial as violative of the criminal defendant's right of confrontation. See State v. Abreu, 837 So. 2d 400 (Fla. 2003).

Insofar as §90.803(22) purports to allow use of depositions even where witnesses are not shown to be unavailable, the courts in civil cases have not embraced the code provision. *See Jones v. R.J. Reynolds Tobacco Co*., 830 So. 2d 854 (Fla. 2d DCA 2002)(affirming trial court's grant of a new trial based upon questionable admission of depositions taken by plaintiffs in other cases). Even though defense counsel was present at the eyewitnesses' deposition and explored his testimony through cross examination, it is unlikely that the trial court will follow §90.803(22) to allow you to read the deposition at trial.

Subsection (a)(1) of Rule 1.330, Florida Rules of Civil Procedure, appears to adopt §90.803(22) notwithstanding the fact that the Florida Supreme Court has declined to adopt that provision of the Code. That rule states: "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness or for any purpose permitted by the Florida Evidence Code." Fla. R. Civ. P. 1.330(a)(1) (emphasis added). While subsection (3) of Rule 1.330 apparently requires the party seeking to introduce a deposition to demonstrate the unavailability of the witness, the argument could be made that subsection (1) dispenses with that requirement in the situation where opposing counsel attended the deposition. That argument could be based upon

the language of §90.803(22) recognizing the admissibility of former testimony "if the party against whom the testimony is now offered . . . or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Thus, the Florida Evidence Code permits the use of a deposition in trial proceedings, so long as defense counsel was there in attendance. Rule 1.330(a)(1) allows use of depositions if permitted under the Evidence Code. It would seem clear that the rule allows you to use the deposition, even though the Evidence Code provision has not itself been adopted by the court. However, the only appellate decision analyzing the effect of subsection (a)(1) of Rule 1.330 has imposed a serious limitation upon that reading of the rule.

In *Friedman v. Friedman*, 764 So. 2d 754 (Fla. 2d DCA 2000), rejected the argument that Rule 1.330(a)(1) dispenses with the need to demonstrate unavailability of a non-party witness. The court in Friedman held as follows:

> We hold that the admissibility of a discovery deposition of a nonparty witness as substantive evidence continues to be governed by rule 1.330(a)(3). We reach this conclusion for two reasons. First, rule 1.330(a)(3) has not been amended and continues to require certain prerequisites before the deposition of a nonparty is admissible at trial. Second, section 90.803(22) requires that "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." (Emphasis added). An attorney taking a discovery deposition does not approach the examination of a witness with the same motive as one taking a deposition for the purpose of presenting testimony at trial. *See Green,* 667 So. 2d at 759.

764 So. 2d at 755.

There is not much that attorneys can do to get around the first basis for the Friedman court's holding that non-party depositions are not admissible absent a showing of unavailability. Attorneys may avoid the second grounds for the holding by clearly designating the purpose of a deposition in the notice as including use as evidence at trial. Even with such a designation, however, the only case on the subject holds that a showing of unavailability remains as a requirement for use of a non-party deposition in evidence. Therefore, you should be ready to make such a showing of unavailability and be prepared to argue against your opponent's use of depositions from this case and other cases absent such a showing.

Even the most experienced trial practitioner may never fully comprehend all of the nuances of the discovery and evidentiary rules. All we can do is . . .

Keep Tryin!

Roy

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