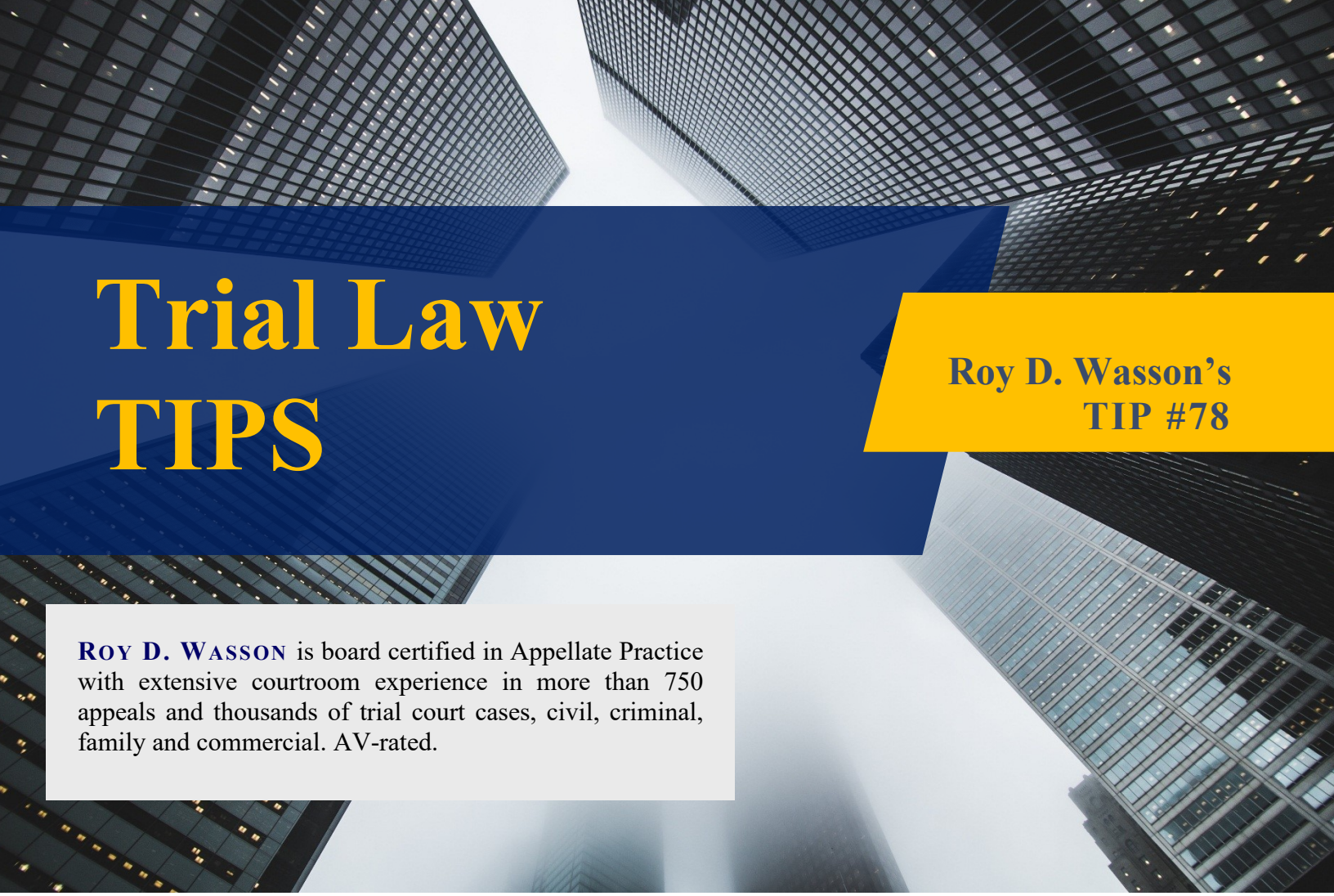

Trial Law TIPS

Roy D. Wasson's TIP #78

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.

Introducing Scholarly Publications—The "Learned Treatise" Doctrine

Once in a while an attorney preparing a case for trial discovers a wonderful resource in a medical journal, scientific textbook, or other scholarly publication supporting his or her position. Perhaps your expert in preparing to be deposed by the defense uncovers a recent article in the *New England Journal of Medicine* or another respected publication that negates the defendant's position concerning a key issue of causation.

As exciting as such discoveries may be in your trial preparation, attorneys planning on using authoritative publications should be aware that they will not ordinarily be allowed to introduce them—or testimony about their contents—into evidence during their case-in-chief. However, there are

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circumstances that may allow the use of such "learned treatises" if the proper groundwork is laid.

General Rule of Inadmissibility

The general rule prohibiting introduction of such evidence is stated as follows: "Under section 90.706, Florida Statutes (1991), authoritative publications can only be used during cross-examination of an expert and not to bolster the credibility of an expert or to supplement an opinion of the doctor which has already been formed . . . . Section 90.706 does not allow statements in a learned treatise to be used as substantive evidence ***since the treatise is hearsay if it offered as substantive evidence***." *Green v. Goldberg*, 630 So. 2d 606, 609 (Fla. 4th DCA 1993).

Not only may the proponent of such evidence not introduce a learned treatise as an exhibit, the proponent's expert may not tell the jury on direct examination that he or she relied upon the treatise in formulating the opinions offered at trial. Even if the content is not revealed, references to a treatise are not permitted. "[A]n expert cannot bolster his her testimony by testifying that a particular treatise supports an opinion." *Linn v. Fossum*, 946 So. 2d 1032, 1036 (Fla. 2006).

Further, do not attempt to utilize the learned treatise in the hopes that your opponent will be unaware of the exclusionary rule. Unfortunately, even if you get a great verdict after introducing such evidence without objection, the defense may well obtain a reversal on appeal under the fundamental error doctrine. *See Cordoba v. Rodriguez*, 939 So. 2d 319, 321 (Fla. 4th DCA 2006)(reversing judgment in favor of defendant in automobile collision case where defense expert testified without objection that his disbelief that plaintiff had sustained permanent injury was based in part on published study that "99 percent of motor vehicle accidents result in lawsuits where people are claiming personal injuries").

Laying the Foundation for Admissibility

If you cannot introduce the learned treatise through the direct examination of your own expert, then how is the jury to know that your opponent's expert's position has been soundly rejected by highly respected scientists in peer reviewed publications? There are three ways.

The first way to use a learned treatise is to obtain a concession by the defense expert on cross-examination that the treatise is authoritative. Section 90.706 states in pertinent part as follows: "Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness ***if the expert witness recognizes the author or the treatises***, periodical, book, dissertation, pamphlet, or other writing ***to be authoritative*** . . . ." (Emphasis added). However, as a practical matter, obtaining such a concession from a defense expert—who is very likely to have known about the article long before you did—is about as likely as settling a case with GEICO for the policy limits after your first demand letter. Therefore, you will probably need to find another way to introduce the learned treatise, even on cross-examination of the defense expert.

There are two other ways. Section 90.706 permits the introduction on cross-examination of a learned treatise "notwithstanding non-recognition by the expert witness [that the treatise is authoritative], if the trial court finds the author or the treatise . . . to be authoritative and relevant to the subject matter." One way to lay the foundation for the use of the learned treatise on cross-examination notwithstanding the defense expert's refusal to recognize it as authoritative is to ask the trial court to take judicial notice of its authoritativeness. You may have luck with that approach using well known publications by highly respected authorities in a field. However, as a practical matter, judges usually are going to refuse to take judicial notice of authoritativeness. That leaves one more approach: asking your

own experts to lay the foundation for the authoritativeness of the treatise.

"Wait a minute!" you may say, "didn't we already read that the learned treatise may not be used on direct examination of the plaintiff's expert? How can the expert lay the foundation for the introduction of the treatise if he or she cannot testify about it on direct examination?" Good question.

The fact that your expert may not disclose the content of the learned treatise on direct examination does not preclude you from asking the expert on direct if the article or book is authoritative. Laying the foundation for using the treatise on cross-examination of the defense expert does not require the plaintiff's expert to tell the jury what is in the hearsay treatise. You should be allowed to lay the foundation for later use of the treatise while your expert is on the witness stand, either within the hearing of the jury or on a proffer with the jury excused.

In *Chesterton v. Fisher*, 655 So. 2d 170 (Fla. 3d DCA 1995), the court reversed a final judgment based upon the trial court's ruling preventing defense experts from cross-examining the plaintiff's pathology expert with an article from the *New England Journal of Medicine*. "During the defendants' proffer, they requested the trial court take judicial notice that the *New England Journal of Medicine* is authoritative. After the trial court refused to do so, the defendants requested that they be permitted to establish the publication as authoritative through other expert witnesses. The trial court also denied this request and ruled that the articles and treatises were not authoritative." *Id*. at 171.

In reversing, the Third District in the *Chesterton* case found "that the trial court abused its discretion in at least not allowing the defense the opportunity to establish the authoritativeness of these articles and treatises through other expert witnesses, as requested during its proffer." *Id.* Thus, while your expert is on the stand on direct (nor even that your expert relied on it), you should attempt to ask him or her whether a given treatise is authoritative. Of course you are going to draw

an objection that the content of the treatise is hearsay. However, if you make it clear that you are not attempting to introduce the content of the treatise during your expert's direct, but merely attempting to lay the foundation for the later use of the treatise on cross-examination of the defense expert, you should be permitted the opportunity to establish that foundation without having to re-call your expert for a proffer during the defendant's case.

Another way to establish the foundation for authoritativeness is to file a pre-trial motion to determine authoritativeness by the affidavits of your experts. "There is little Florida case law interpreting section 90.706 or for providing guidance as to what standard must be met before a trial court may find a writing authoritative for cross-examination purposes where the cross-examined expert does not acknowledge that the text is authoritative." *Kirkpatrick v. Walford*, 704 So. 2d 708, 709 n.1 (Fla. 5th DCA 1998). However, utilizing affidavits in a pre-trial hearing was recognized as a permissible method for laying such a foundation in the *Kirkpatrick* case.

Conclusion

You may not succeed in obtaining an admission from defense counsel or defendant's experts that a given treatise is authoritative. You may fail in your effort to have the trial judge take judicial notice of the authoritativeness of the treatise. However, with the ability of laying the foundation through your own expert testimony, you should eventually be permitted to cross-examine the defendant with the article or other publication that you have discovered. All you can do is . . .

Keep Tryin!

Roy

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