

Trial Law TIPS

Roy D. Wasson's
TIP #79

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.

Experts Not Limited to Deposition Testimony

Defense attorneys like nothing better than interrupting the flow of trial with objections to the plaintiff's evidence. When expert witnesses are on the stand, the defense likes to make challenges to the qualifications or foundation for expert opinions (under either *Frye* or *Daubert*, depending upon whether the case is being tried in state court or federal court), and objections that the testimony is outside the scope of pretrial disclosures. The purpose of this Tip is to assist trial lawyers in countering objections that expert testimony being offered at trial is outside the scope of disclosure in the expert deposition taken by the defense.

Florida law does not limit a party to presenting evidence at trial that is identical to the testimony presented at deposition. The experts questioned by defendants are entitled to express

opinions as to which no questions were asked of them at trial. Further, plaintiff's experts are permitted to continue to develop the grounds for their testimony and the opinions, provided that they do not completely reverse their opinions from those expressed in discovery.

It is a longstanding principle of Florida law that an expert may continue to conduct research and investigation to strengthen the basis for his or her opinions. In *Davis v. Pfund*, 479 So. 2d 230 (Fla. 3d DCA 1985), the Third District reversed the trial court's ruling excluding the plaintiffs' expert witness from testifying. "The trial court's stated reason for not permitting the testimony was that, following the pre-trial conference and the closure of discovery, Mr. Ellwood had returned to the scene of the accident and taken certain measurements in order to clarify his original drawings." *Id.* at 231. On appeal it was held that the trial court committed reversible error in excluding the expert's testimony, rejecting "the proposition that an expert cannot continue to prepare materials . . . or examine objects . . . about which he is to testify" following the close of discovery. *Id.*

In another case, the First District Court of Appeal reversed the trial court's order granting a new trial which had been based upon the testimony of an expert that went beyond the scope of his report. The court held that a motion to exclude expert testimony based upon a change in expert opinion must be considered using the factors set forth in *Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981). The court held that an expert should not be limited to the specific opinions disclosed in discovery and may be permitted to testify concerning additional opinions so long as the objecting party is not prejudiced by a "substantial change in his opinion." *Allstate Property & Cas. Ins. Co. v. Lewis*, 14 So. 3d 1230, 1234 (Fla. 1st DCA 2009). The First District held that the trial court erroneously ruled that the expert testimony was inadmissible stating: "Florida Rule of Civil Procedure 1.360(b) requires only the disclosure of a '**substantial** reversal of opinion' after

a doctor has submitted a report.” *Id.* at 1235 (emphasis added). Thus, new information that does not constitute a “substantial reversal of opinion” is admissible and the plaintiff is not limited to having the expert parrot the exact words stated at his deposition.

The foregoing Tip may not prevent defense counsel from interrupting the flow of your trial with objections to your expert’s testimony. However, it will help you deal with those objections. It is hard to get the flow of the trial back on track after such an interruption in the flow of your case. All you can do is be ready with the legal authority to shorten the interruption and . . .

Keep Tryin!

Roy