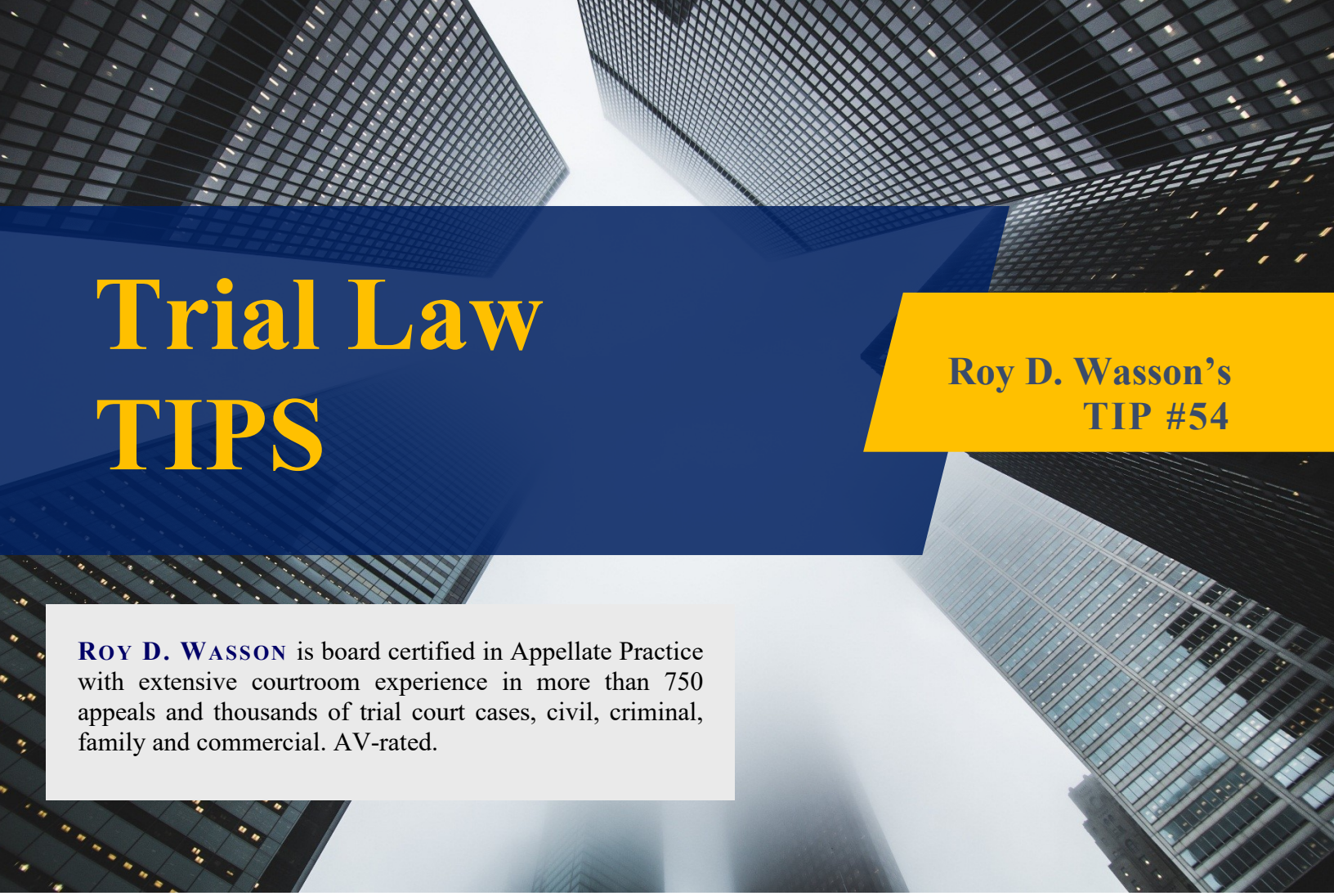

Trial Law TIPS

Roy D. Wasson's TIP #54

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.

Overcoming Work Product Objections to Discovery of Incident Reports

It goes without saying that some of the best evidence of how your client's accident occurred, and of the fact and extent of her injuries as a result thereof, can come from the defendant's own records in the form of incident reports. However, you are never going to get those reports without litigating the work product objection that invariably will be raised. The following should be useful in explaining to your judge that not all incident reports are work product, and the burden is on the defense to prove with evidence, not just argument, that the privilege exists in a given case.

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Defense Burden to Present Evidence Report Prepared In Anticipation of Litigation:

Defendant's claim of privilege as to incident reports should be rejected whenever the defendants fail to present admissible ***evidence*** that the report was prepared in anticipation of litigation, as opposed to be prepared because it was the regular course of Defendant's business to prepare such reports, or that it was prepared for another purpose, such as employee discipline and training. The courts have consistently held that the party claiming the work-product privilege has the burden of presenting competent, substantial evidence to establish that the incident reports were prepared in anticipation of litigation. In *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855 (Fla. 2d DCA 1997), for example, the court rejected an argument that all incident repors are privileged.

In *Weeks*, the defendant, Wal-Mart, sought certiorari review of a trial court order compelling it to produce "[c]opies of any and all incident reports, internal memoranda, and the like concerning similar incidents that have occurred in the Defendant's premises in the past two years." *Id*. at 856. The court denied the petition because Wal-Mart failed to present competent, substantial evidence to show the reports were prepared in anticipation of litigation, and explained:

> [I]t is undisputed that Wal-Mart argued to the trial court that under the dictates of *Winn-Dixie Stores, Inc. v. Nakutis*, 435 So. 2d 307 (Fla. 5th DCA 1983), *review denied*, 446 So. 2d 100 (Fla. 1984), and Florida Rule of Civil Procedure 1.280(b)(3), the items and information requested are nondiscoverable work product. There is no evidence of record that any documentation was presented to the trial court to support the assertion that the items requested and the statements to be produced constitute work product. In fact, Wal-Mart argues that its stated objection and assertion of work product privilege are sufficient in and of themselves to invoke the qualified privilege. It

> is undisputed that Wal-Mart did not present any additional argument in support of its position.
>
> * * *
>
> Wal-Mart cannot make a blanket statement that these items were prepared in anticipation of litigation and are protected from disclosure without presenting evidence to support its claim. *See Hartford Accident and Indemnity Co., v. McGann*, 402 So. 2d 1361 (Fla. 4th DCA 1981); *Kenleigh Assocs. v. Harris-Intertype Corp*., 279 So. 2d 373 (Fla. 3d DCA 1973). The trial court cannot be held to have abused its discretion when Wal-Mart failed to meet its burden of proof. The petition is denied as to the requests for production which are the subject of this petition.

Id. The cases so holding are legion. *E.g. S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385, 1386 (Fla. 1994) ("Southern Bell argues, alternatively, that the panel recommendations are protected as work product. . . . Although Southern Bell has proven that the employee interviews were conducted in anticipation of litigation, it has not proven that the panel recommendations were prepared for anything other than management's decision to consider whether [it] should discipline company employees."); *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444 (Fla. 3d DCA 2006) (holding that the party asserting the work-product privilege must present substantial, competent evidence in the form of testimony or evidence to establish that the requested incident reports were prepared in anticipation of litigation); *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 910 (Fla. 3d DCA 2004) (holding that a party objecting to discovery on the basis of the work-product doctrine "maintains the burden to show that the materials were compiled in response to some event which foreseeably could be made the basis of a claim against the insured"); *Carnival Corp. v. Romero*, 710 So. 2d 690, 695 (Fla. 5th DCA 1998) ("We conclude that Carnival in this case failed to carry its burden of establishing that the attorney-client and

work-product privileges apply to Harris or Jamerson, and that the trial court departed from the essential requirements of law in denying the blanket, general disqualification."); *Fla. Sheriffs' Self-Ins. Fund v. Escambia County*, 585 So. 2d 461, 463 (Fla. 1st DCA 1991) (holding that when objections to discovery requests are based on either the work-product doctrine or the attorney-client privilege, "the burden is upon the party asserting a privilege to establish the existence of each element of the privilege in question"); *Nationwide Mut. Fire Ins. Co. v. Harmon*, 580 So. 2d 192, 192 (Fla. 4th DCA 1991) (holding that the petitioner did not meet its burden of establishing that the requested materials were work product prepared in anticipation of litigation); *First City Devs. of Fla., Inc. v. Hallmark of Hollywood Condo. Ass'n, Inc.*, 545 So. 2d 502, 503 (Fla. 4th DCA 1989) ("[O]bjections such as attorney-client privilege or work product are viable objections, although the petitioners have the burden of proving such privileges apply, should it become an issue before the trial court."); *Hartford Acci. & Indem. Co. v. McGann*, 402 So. 2d 1361, 1362 (Fla. 4th DCA 1981) ("If objection is made necessitating a court hearing, then in the case of a party objecting on grounds of the work product privilege, that party has the burden, first of showing the privilege."); *Surette v. Galiardo*, 323 So. 2d 53, 58 (Fla. 4th DCA 1975) ("Since the rules of discovery permit a party to secure the production of documents for trial, the [b]urden of establishing that the particular document is privileged and precluded from discovery [r]ests on the party asserting that privilege (unless it appears from the face of the document sought to be produced that it is privileged)."); Charles W. Erhardt, *Florida Evidence*, § 501.1 at 340 (2007 ed.) ("The burden is upon the party asserting a privilege to establish the existence of each element of the privilege in question.").

Rule 1.280, Florida Rules of Civil Procedure, is derived from Federal Rule of Civil Procedure 26, and their provisions are very similar. Federal courts have interpreted Rule 26 to require the party asserting work-product privilege to produce evidence

that the requested documents were prepared in anticipation of litigation. *See McCoo v. Denny's Inc*., 192 F.R.D. 675, 683 (D. Kan. 2000); *Boyer v. Bd. of County Comm'rs*, 162 F.R.D. 687 (D. Kan. 1995). In *McCoo*, for example, the court held:

> The Court is also not persuaded by Denny's argument that the statements are protected by work product immunity. Although Denny's has satisfied the first two elements of the work product doctrine, *i.e*., that the statements are documents and that they were prepared by a party, it has not satisfied the third element that they were "prepared in anticipation of litigation." *See Bohannon v. Honda Motor Co. Ltd*., 127 F.R.D. 536, 538-39 (D. Kan. 1989) (setting forth the elements of work product immunity); Fed. R. Civ. P. 26(b)(3).
>
> "It is well settled that the party seeking to invoke work product immunity . . . has the burden to establish *all elements* of the immunity . . . and that this burden 'can be met only by an evidentiary showing based on competent evidence.'" *Johnson v. Gmeinder*, Nos. 98-2556-GTV, 98-2585-GTV, 2000 U.S. Dist. LEXIS 1211, 2000 WL 133434, at *4 (D. Kan. Jan. 20, 2000) (quoting *Audiotext Communications Network, Inc. v. U.S. Telecom, Inc*., No. 94-2395-GTV, 1995 U.S. Dist. LEXIS 15416, 1995 WL 625962, at *7 (D. Kan. Oct. 5, 1995)) (emphasis added by *Johnson*). *Accord National Union Fire Ins. Co. v. Midland Bancor, Inc*., 159 F.R.D. 562, 567 (D. Kan. 1994). That burden "cannot be 'discharged by mere conclusory or ipse dixit assertions.'" *Johnson*, 2000 U.S. Dist. LEXIS 1211, 2000 WL 133434, at *4 (quoting *Audiotext*, 1995 U.S. Dist. LEXIS 15416, 1995 WL 625962, at *7 (quoting *Bowne of New York City, Inc. v. AmBase Corp*., 150 F.R.D. 465, 470 (S.D.N.Y. 1993))).

192 F.R.D. at 683; *see also von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), cert. denied sub nom.

Reynolds v. von Bulow by Auersperg, 481 U.S. 1015, 107 S. Ct. 1891, 95 L. Ed. 2d 498 (1987); *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985) ("The burden of establishing that a document is work product is on the party who asserts the claim . . . .").

Conclusion

Hence, mere argument by trial counsel that the incident reports are work product does not constitute substantial, competent evidence. Unless the claimant of the privilege properly establishes that the privilege exists in the first place, the party requesting the documents has no burden to meet. You may not get the incident report immediately when you request it, but if the privilege is claimed without evidence to support it, you have to . . .

Keep Tryin!

Roy

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