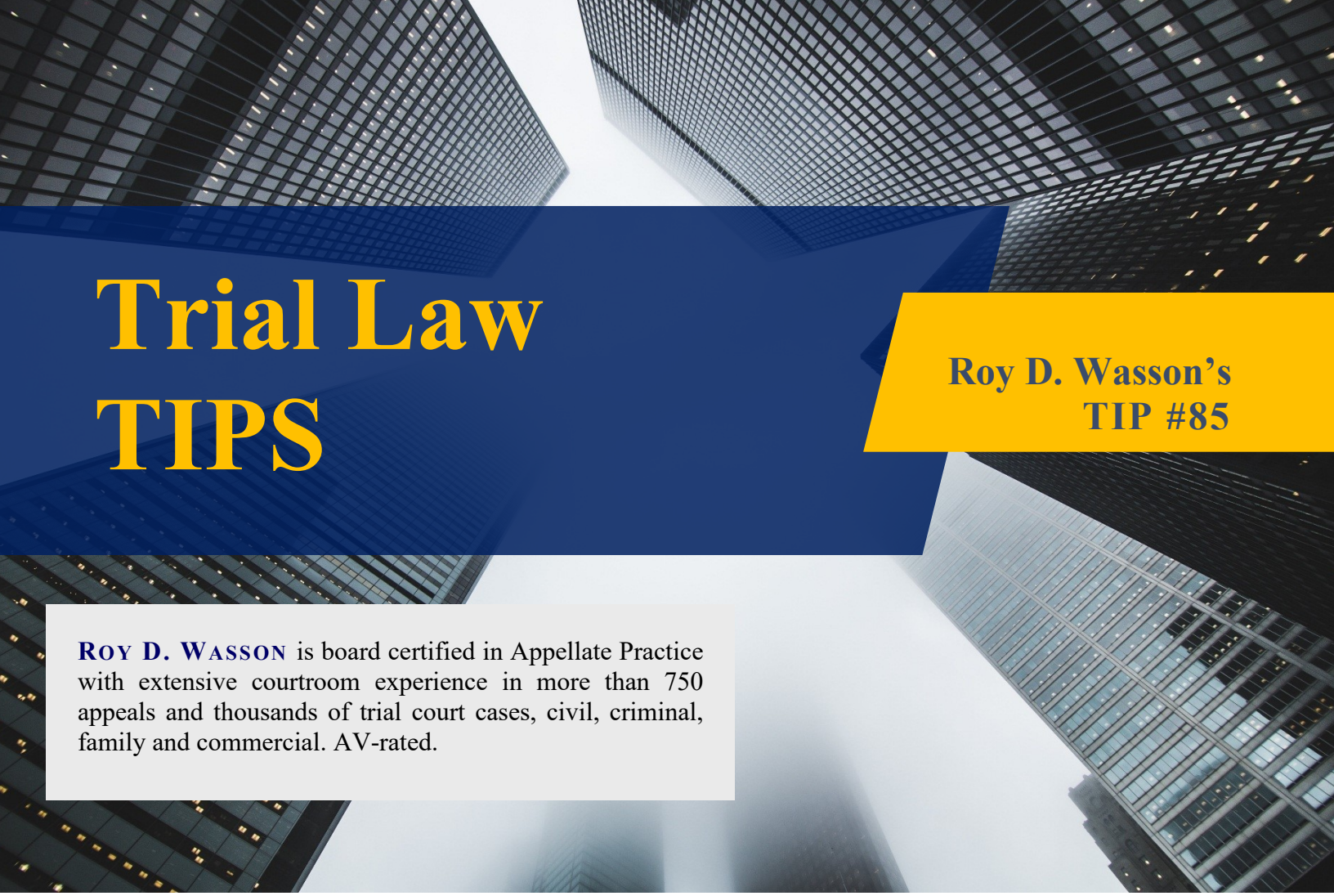

Trial Law TIPS

Roy D. Wasson's TIP #85

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.

Avoiding Having Experts Stricken in Federal Court

Most trial lawyers hate having their cases removed to federal court, for a variety of reasons, some which are these: We prefer to have face-to-face hearings in state court over having motions decided on the written documents. Many of us are more familiar with the Rules of Civil Procedure in state court than in federal court. The summary judgment standard is easier for defendants to meet in federal court. Several years ago it was hard to get to trial in federal court, and now the pendulum has swung too far the other way in some districts: trials are being set on a "rocket docket" with inadequate time for discovery and other preparation.

One critical disadvantage to being in federal court is the strict standard for disclosure of expert opinions early in the litigation. Unlike state court, where the Plaintiff wait for the

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defense to propound expert witness interrogatories, and then can initially disclose only a bare-bones summary of the expert's opinions and bases therefor, federal court requires full disclosure at the early stage of litigation, and plaintiffs failing to fully comply can have their experts stricken before the close of discovery. Don't let this happen to you.

Initial Expert Disclosure Requirements of Rule 26:

Federal Rule of Civil Procedure 26(a) provides in pertinent part as follows:

> Required Disclosures.
>
> (1) *Initial Disclosure.*
>
> (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, *without awaiting a discovery request*, provide to the other parties:
>
> * * *
>
> (2) *Disclosure of Expert Testimony.*
>
> (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
>
> (B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, *this disclosure must be accompanied by a written report--prepared and signed by the witness*--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) *a complete statement of all opinions the witness will express* and the basis and reasons for them;

(ii) *the facts or data considered by the witness* in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

Compliance with these requirements "is not merely aspirational." *Cooper v. Southern Co.*, 390 F. 3d 695, 728 (11th Cir. 2004) (*overruled on other grounds, Ash v. Tyson Foods, Inc.,* 546 US. 454 (2006)). The Federal Rules mandate the complete disclosure of this information "to provide opposing parties reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." *Reese v. Herbert,* 527 F. 3d 1253, 1265 (11th Cir. 2008).

Trial lawyers should be cautioned that they cannot provide a mere sketch of the basic components of their experts' opinions and allow the defense to find out the entire picture when they depose them. Stated differently, the information in an expert disclosure "must be complete such that opposing counsel is *not forced to depose an expert* in order to avoid ambush at trial." *Dyett v. N. Broward Hosp. Dist.,* No. 03-60804-CIV, 2004 WL 5320630, at *1 (S.D. Fla. Jan. 21, 2004) (emphasis added and citation omitted); *see also Managed Care Solutions, Inc*., 2010 WL 1837724 at *3 (same).

An expert report must therefore contain "a *complete statement* of all [the expert's] opinions *and the basis and reasons therefor*." *Reese,* 527 F.3d at 1265 (emphasis supplied, citation omitted). In may not "merely recite the general subject matter of [the expert's] expected testimony." *Romero v. Drummond Co.,* 552 F. 3d 1303, 1323 (11th Cir. 2008) (citation omitted). Similarly, "[e]xpert reports must not be sketchy, vague or preliminary in nature." *Dyett,* 2004 WL 5320630, at *1. Indeed, expert disclosures which purport to contain only a "preliminary analysis" from the expert do not satisfy Rule 26(a). *See Mobile Shelter Sys. USA, Inc. V. Grate Pallet Solutions, LLC.* No. 3:10-cv-978-J-37JBT, 2012 WL 115601, at *6 (M.D. Fla. Jan. 14, 2012) (excluding report that purported to reflect only expert's "preliminary analysis," which does not comply with Rule 26(a)(2)(B)).

Federal judges are not shy about striking a plaintiff's expert witness whose report does not comply with the foregoing requirements. Further, federal courts are tough on extending the deadlines for the automatic disclosures under the rules, requiring a showing of "good cause" to allow more time for compliance. Therefore, you need to have your expert's final opinions and the supporting bases for them much earlier in federal trials than in state court.

Conclusion

As can be seen, special caution must be used in disclosing expert witness opinions in federal court. We cannot always keep our cases in the state court system, and when our lawsuit is removed and we have to comply with these disclosure requirements, all we can do is to . . .

Keep Tryin!

Roy

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