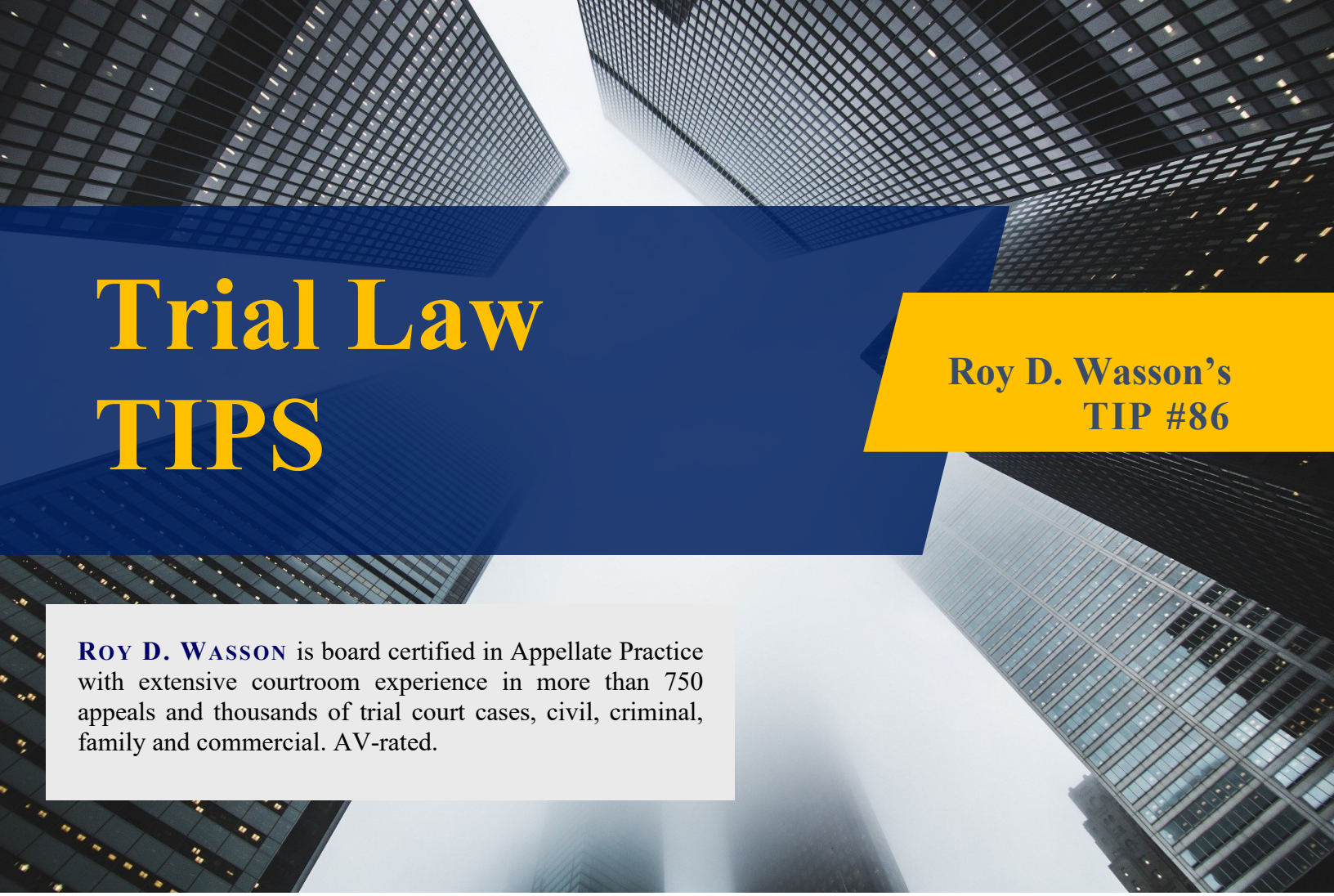

Trial Law TIPS

Roy D. Wasson's TIP #86

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.

Shortening the Time for Defense to Respond to Discovery or Other Filings Requiring Responses

By now, even the computer idiots like myself are aware that everything we file must be filed electronically on the Internet (however that happens) and be served by e-mail upon opposing counsel. However, not everyone realizes that e-mail service is considered service by snail mail, for periods of computing response times. Therefore, when you serve interrogatories or requests for production upon defense attorneys by e-mail, they get thirty-five days to respond or object, not thirty days. This "Tip" explains the simple way you can shorten the time for discovery responses back to thirty days, and shorten the time by five days for filing any other

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required responses whose due date time starts running upon service of your document.

Service in the Stone Age:

Before e-mail was invented (I know, back in the Stone Age when Roy had to write his briefs on the back of a shovel with a lump of coal), lawyers had the option of serving discovery documents and other court papers either by hand delivery or by U.S. Mail. It was easy to count the deadline for opposing counsel to respond to interrogatories and other discovery requests: if service of the discovery was by hand delivery, the thirty-day period began to run on the recipient's receipt of the paper. If service was by mail, five days were added to the period, even if the mail was delivered the next day. If you did not care how long the other side took to respond to your discovery, you mailed it out and saved the cost of a courier making a personal delivery. If time was tight, you had a runner hand carry the document to defense counsel (or you got in the car yourself).

I always loved the fact that "service by mail is complete upon mailing," as the rule made clear. I could drop something in the mailbox in the basement of my building, and it would not be picked up by the letter carrier for two or three days sometimes, but service was good. But that pick-up lag led to delivery delays that supported the "extra five days for mailing" rule we have come to love and hate.

Technology Advances—Service By "Telecopied Facsimile"

Next, along came service by facsimile. That method provided instant and inexpensive delivery with proof of receipt. But fax service alone was not permitted. Service also had to be effectuated by another means. And either service by fax and mail, or service by fax and hand delivery, would be treated as service by hand delivery. Five days would still be added to the time for a response to a discovery request served

only by mail, but not if you faxed the pleading and also effectuated service by another method.

Huh? Service by fax and mail triggered a thirty-day period for a response to discovery requests, and service by fax and ***hand delivery*** also shortened the time to respond to thirty days. That did not make sense.

To begin with, who in their right mind would serve something by facsimile (because it was cheap and easy), but also go to the trouble and expense of serving it by hand delivery? If you didn't want the other side to get the extra five days, all you had to do would be serve fax and mail.

I still cannot figure out why the Civil Rules Committee decided that dropping an envelope in the mail, in addition to sending requests for production or interrogatories by facsimile (or "telecopier" as it was known in the Stone Age of the Eighties), was required instead of service by fax alone, but that was the rule. Many times, I had to explain to young staffers that I really meant to serve it both by mail and fax. The rule was clear that the extra five days was not to be added for a response served those two ways, while five days would continue to be added when service was accomplished by mail alone.

Service By E-Mail Now Mandatory

The rule permitting service by e-mail seemed to be enacted to catch-up to the way lawyers started exchanging documents informally. Before the rule change officially recognizing e-mail service, I had a case in which my co-counsel served a motion for new trial (which at that time had a jurisdictional time deadline of being served within ten days from the return of the verdict) only by e-mail. When that motion was denied months later, I was worried that the appeal already was untimely because service by email alone was not officially recognized, but everything worked out that time.

Finally, service by email alone was recognized by the rules. Many people believed (and some still mistakenly think) that service by email—being so instantaneous and reliable—would be the same as hand delivery for timing purposes. Those people were mistaken. The rules on service (currently embodied in Florida Rule of Judicial Administration 2.516) seems to turn back the hands of time. Rule 2.516(b)(1)(D)(iii) makes it clear that "E-mail service, including e-service, is ***treated as service by mail*** for the computation of time." (Emphasis added).

In case that was not clear enough, Rule 2.514 provides: (b) **Additional Time after Service by Mail or E-mail**. — When a party may or must act within a specified time after service and service is made by mail ***or e-mail, 5 days are added*** after the period that would otherwise expire under subdivision (a). (Emphasis added).

Some attorneys also mistakenly believe that they can continue to serve documents just by the older methods, instead of serving by email. After all, if hand delivery was good enough for hundreds of years, why should we be denied the right to use that method? But under the new rules, you cannot substitute another method for service by e-mail. "All documents required or permitted to be served on another party ***must be served by e-mail***, unless the parties otherwise stipulate or this rule otherwise provides." *Id.* at (b)(1)(emphasis added).

So now it is clear: you always have to allow the other side to add the five days for mailing, right? Not so fast, cyber-breath. There still is a way to shorten the time back to thirty days for the defendant's responses to your discovery.

How to Shorten Time When Serving By E-Mail

Unlike the days when service by fax was permitted, but service by another method also was required, service by e-mail alone is now sufficient under the rules. But adding another

method of service, including U.S. Mail or facsimile, is permitted. Further, adding another method to your certificate of service will shorten the time for the other side's response. The rule now provides:

> **(2) Service by Other Means.** —In addition to, and not in lieu of, service by e-mail, service may also be made upon attorneys by any of the means specified in this subdivision. If a document is served by more than one method of service, the computation of time for any response to the served document shall be based on the method of service that provides the shortest response time.

Fla. R. Jud. Admin. 2.516(b)(2).

One of those other methods of service is by facsimile. Facsimile service continues to require service by another means, so service by e-mail and fax is permitted. Because service by fax does not result in adding the extra five days for service by mail or e-mail alone, service by fax and e-mail shortens the time for a response compared to serving a document by e-mail alone. Is that clear as mud?

Note that to be valid service by facsimile—and, hence, to operate to shorten the time for a response—the sender must follow the rule requiring "transmitting it by facsimile to the attorney's or party's office with a cover sheet containing the sender's name, firm, address, telephone number, and facsimile number, and the number of pages transmitted." *Id.* at (b)(2)(E). If that is done, it is as good as service by hand delivery. The other side does not get the extra five days.

This stuff is complicated (for us lawyers). If you don't fully understand the service rules, read them again and again, or hire someone smart like my office manager Don. And most of all:

Keep Tryin!

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