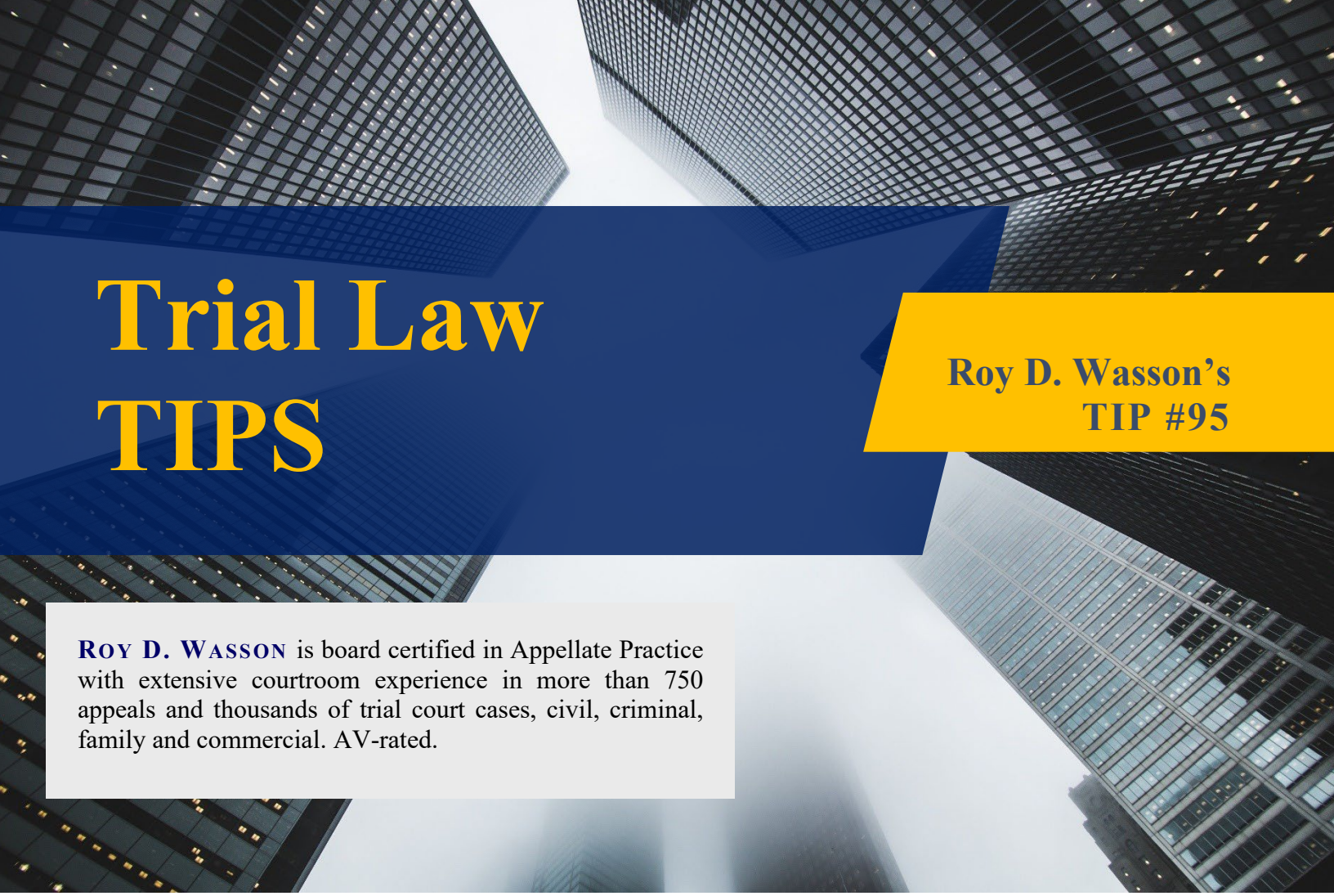

Trial Law TIPS

Roy D. Wasson's TIP #95

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.

Figuring Out Scheduling Deadlines in Federal Cases

I have written before how trial lawyers hate being in federal court because of the lack of live hearings, requirement of legal memoranda for every motion, inflexible deadlines, and other characteristics that distinguish it from state court practice. I even had a federal judge reading one of my articles about such matters into the record (without a jury present) during a federal civil rights trial. One of the more confusing things about federal practice is figuring out when your pretrial disclosure deadlines are due. This Tip is intended to provide a roadmap of figuring out such deadlines.

The main rules involved in figuring out pretrial deadlines are Fed. R. Civ. P. 16 and 26, along with the Local Rules. In the Southern District of Florida, Rule 16.1 is the operative rule that must be considered. Those rules confusingly refer to one

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another and make it very difficult to calculate deadlines. One of the tricks to calculating the operative deadlines is to start at the last deadline and then work your way to the present. In performing that "retrograde extrapolation" it will be important to note that there are confusing terms in the rules, most notably what is meant by a "scheduling conference."

The last deadline we must start from to work our way back is the deadline for the "scheduling order." Under Fed. R. Civ. P. 16(b)(2), "[t]he judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within ***the earlier of 90 days after any defendant has been served with the complaint or 60 days after the defendant has appeared."*** (Emphasis added). Thus, once you have obtained service on the first defendant, you must calculate the deadline of 90 days thereafter for the "scheduling order." However, if any defendant "has appeared" within the first thirty days of that period, then the deadline for the scheduling order is accelerated to sixty days from that first appearance.

Once you have the deadline for the scheduling order, it is possible to calculate the deadline for the parties to meet and exchange pre-trial disclosures. Under Fed. R. Civ. P. 26(f)(1) the deadline for providing the opposing party with pretrial disclosures requires that "the parties must meet confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)." This is an important rule to illustrate that there is a difference between this required *meeting of counsel* and the "scheduling conference" that is referenced elsewhere in the rules. In cases, the district court judge (or appointed magistrate judge) sets a "scheduling conference" to establish pretrial deadlines. In most other cases, the judge merely issues a "scheduling order" after receiving the parties' submissions on those deadlines. Thus, the "scheduling conference" is rarely used but is something different than the meeting of counsel required under Rules 16 and 26.

Thus, under both Southern District Rule 16.1(b)(2) and Fed. R. Civ. P. 26(f)(1), the parties must meet for the purposes of Rule 26(f) exchanges of materials "at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)."

The first deadline for filing something as a result of these meetings is the deadline "for submitting to the court within 14 days after the conference a written report outlining the plan" for discovery and other pretrial deadlines. *See* Fed. R. Civ. P. 26(f)(2). Again, the language of that rule requiring the "written report outlining the plan" before the deadline of the "scheduling conference" illustrates that the meeting of counsel is something different from the "scheduling conference" referred to in these rules.

To put some meat on the bones of this explanation, if you got service of process on a defendant on January 4, 2021 (the first business day following New Year's), you must calculate the deadline for the "scheduling order" 90 days later, which is a April 5. If a defendant appears in the case within the first 30 days after another defendant was served, then that deadline for the scheduling order is accelerated to 60 days after the first defendant has appeared.

Assuming that no defendant appeared within the first 30 days of the first defendant being served, the deadline for the meeting of counsel under rule 26(f)(1) and Southern District Rule 16.1(b) is "at least 21 days before a scheduling conference is to be held or a ***scheduling order is due under Rule 16(b)***." (Emphasis added). Remember that the "scheduling order" is due on April 5. Again, because the meeting of counsel must occur at least twenty-one days "before a scheduling conference," that meeting of counsel is something different from the "scheduling conference." That deadline is March 15, 2021. Then your conference report is due 14 days thereafter, on April 6.

Is this all as clear as mud? At least I hope it is somewhat more clear than trying to go back and forth between the various rules and somewhat clarifies the difference between the "scheduling conference" (which rarely occurs) and the meeting of counsel required prior to the issuing of a scheduling order.

Part of the reason appellate lawyers are in high demand is when cases are removed to federal court somebody has to figure out when stuff like this is due. Please thank your appellate lawyer for helping you through these issues. It is impossible to keep track of all the nuances of federal practice, but all we can do is . . .

Keep Tryin!

Roy

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