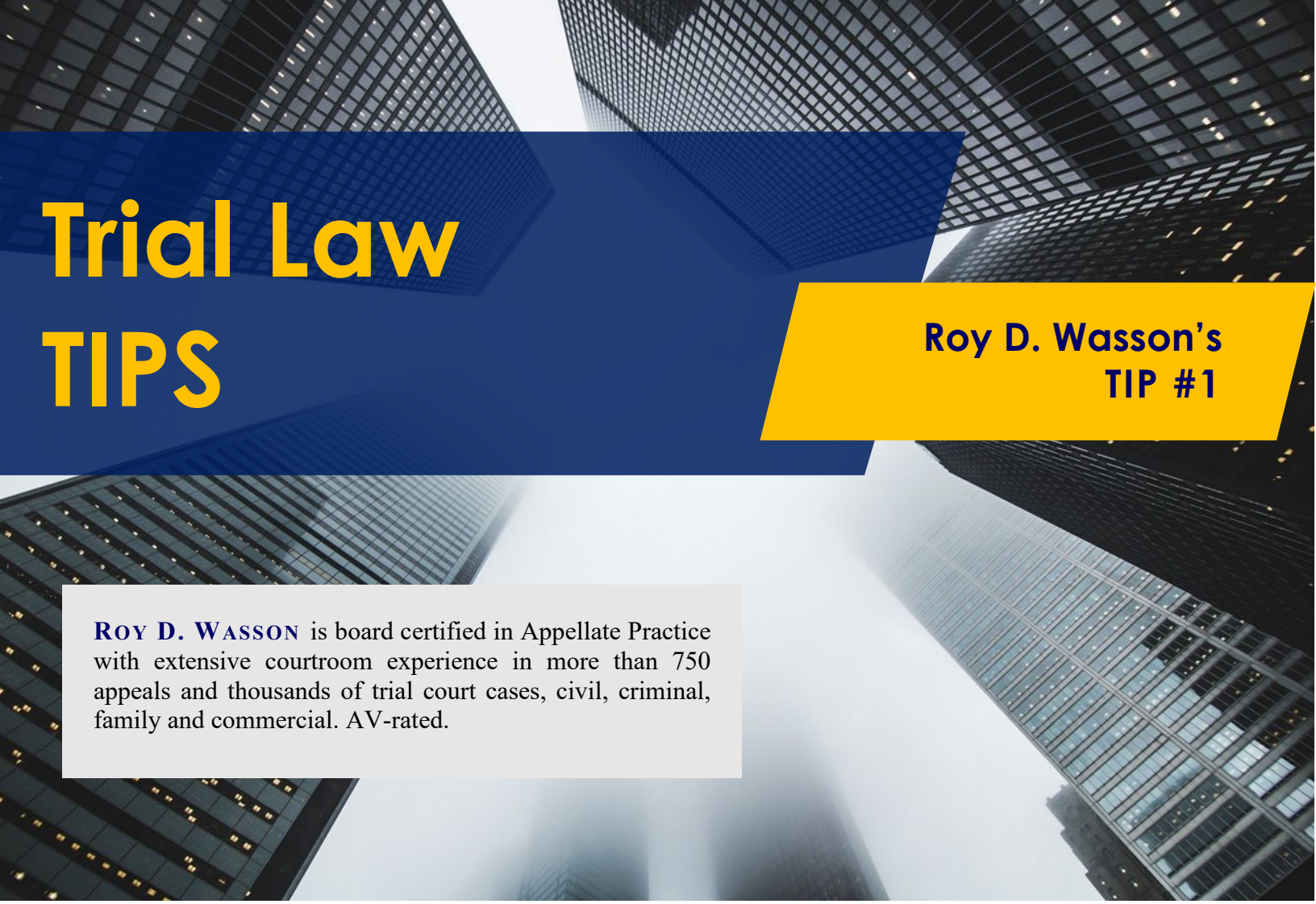

Trial Law TIPS

Roy D. Wasson's TIP #1

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.

Never File a Reply to Affirmative Defenses Which Just "Denies Each and Every Affirmative Defense and Demands Strict Proof Thereof"

Among many cases so holding, the *Buss Aluminum* case states: "It is well established that a reply should never be used to simply deny an affirmative defense. *Moore Meats, Inc. v. Strawn*, 313 So. 2d 660 (Fla. 1975); Henry P. Trawick, Jr., Trawick's Florida Practice and Procedure §§ 11-6 (1993)." Such a Reply is a needless pleading and can hurt you worse than not filing anything. In the "what could it hurt?" department, I will explain how it can harm your case to file such a reply later, but first let me touch on what you should plead in reply to affirmative defenses. *Buss Aluminum* has a couple of examples:

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Florida Rule of Civil Procedure 1.100(a) states that "if an answer ... contains an affirmative defense and the opposing party seeks to avoid it, the opposing party shall file a reply containing the avoidance. No other pleadings shall be allowed." (Emphasis supplied.) Rule 1.140(a)(1) provides twenty days to serve a reply "if a reply is required." An avoidance is an allegation of additional facts intended to overcome an affirmative defense. *Kitchen v. Kitchen*, 404 So. 2d 203 (Fla. 2d DCA 1981). For example, a plaintiff may allege facts establishing waiver or estoppel to overcome a statute of limitations defense. *Tuggle v. Maddox*, 60 So. 2d 158 (Fla. 1952).

Other avoidances include tolling of the statute (plead what conduct or event tolled the statute if you know it), fraud which induced contractual provisions pled as defenses, and so on. Use your best efforts to dream up such avoidances, as opposed to denials. Why? If a defense requires proof of facts to overcome it and you did not plead those facts in the reply, then a DA's objection to your evidence on such an avoidance as "immaterial" could be granted.

If you cannot think of any avoidances, why not just deny? Your case could be dismissed for failure to prosecute. A Reply which does not affirmatively avoid a defense with facts is a "stray pleading" which will not count for record activity, as Buss Aluminum holds: "For all practical purposes, a document entitled 'reply' which does not contain any additional facts in the nature of avoidance is not a pleading. It does nothing to hasten the suit to judgment and is a mere passive effort to keep the suit on the docket. *See Eastern Elevator, Inc. v. Page*, 263 So. 2d 218 (Fla. 1972). Even if the standard in *Del Duca v. Anthony*, 587 So. 2d 1306 (Fla. 1991), which measures the prosecutorial effect of discovery, were applicable to this document, this stray filing would not pass that test. . . . [A] plaintiff cannot avoid a dismissal for failure to prosecute by filing this type of unauthorized document . . . . "

I will close with this piece of advice. When a defendant pleads a statutory defense like the caps on rental car damages, go ahead and plead in the Reply the statute's unconstitutionality (in separate paragraphs for "single-subject," equal protection, denial of access to

courts, trial by jury, due process, and so on). While those defenses are not fact-based, they are avoidances which I think should be pled. Then when you move for summary judgment on the defense, your motion will be based on a pleaded avoidance.

Keep tryin!

Roy

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