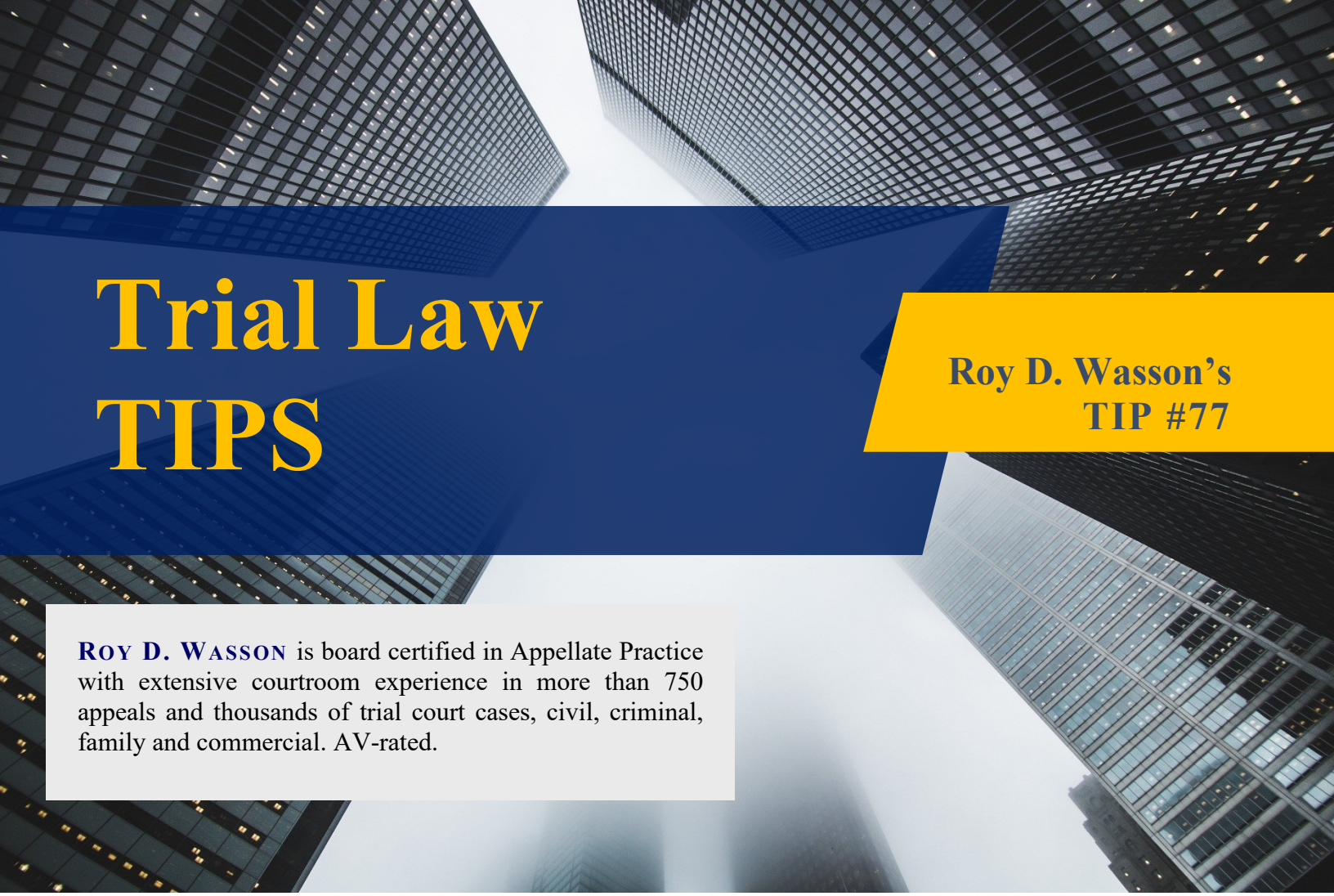

Trial Law TIPS

Roy D. Wasson's TIP #77

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.

Providing Notice of Constitutional Challenges to Statutes

Most of us have never filed a declaratory judgment action seeking to declare a bad law unconstitutional. However, with all of the tort "reform" (actually it should be "deform") enacted by the Florida Legislature over the last two decades, many attorneys probably have thought about pleading the unconstitutionality on limitations on damages, extensions of immunity, and other bad laws. Trial lawyer seem to know that there is some sort of provision requiring notification to the Attorney General when a constitutional challenge is posed. However, few of us actually have had to learn the process because we have raised constitutional challenges only in our replies to affirmative defenses, responses to motions for summary judgment, or challenges that did not involve declaratory judgment actions.

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Now, however, the law has changed to require notification to the Attorney General when the constitutionality of a statute or ordinance is raised by any "pleading, written motion, or other paper." A new rule expands the circumstances in which notice to the Attorney General must be given, but the law on how to perfect such notice has been made more clear and accessible to civil litigators.

The Supreme Court of Florida recently enacted new Rule 1.071. That rule and its notes provide as follows:

> CONSTITUTIONAL CHALLENGE TO STATE STATUTE OR COUNTY OR MUNICIPAL CHARTER, ORDINANCE, OR FRANCHISE; NOTICE BY PARTY
>
> A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a state statute or a county or municipal charter, ordinance, or franchise must promptly (a) file a notice of constitutional question stating the question and identifying the paper that raises it; and (b) serve the notice and the pleading, written motion, or other paper drawing into question the constitutionality of a state statute or a county or municipal charter, ordinance, or franchise on the Attorney General or the state attorney of the judicial circuit in which the action is pending, by either certified or registered mail. Service of the notice and pleading, written motion, or other paper does not require joinder of the Attorney General or the state attorney as a party to the action.
>
> Committee Notes 2010 Adoption. This rule clarifies that, with respect to challenges to a state statute or municipal charter, ordinance, or franchise, service of the notice does not require joinder of the Attorney General or the state attorney as a party to the action; however, consistent with section 86.091, Florida Statutes, the Florida Attorney General or applicable state attorney has the discretion to

> participate and be heard on matters affecting the constitutionality of a statute. See, *e.g.*, *Mayo v. National Truck Brokers, Inc.*, 220 So. 2d 11 (Fla. 1969); *State ex rel. Shevin v. Kerwin*, 279 So. 2d 836 (Fla. 1973) (Attorney General may choose to participate in appeal even though he was not required to be a party at the trial court). The rule imposes a new requirement that the party challenging the statute, charter, ordinance, or franchise file verification with the court of compliance with section 86.091, Florida Statutes. See form 1.975.

Fla. R. Civ. P. 1.071.

This new rule should make most of us more comfortable about raising constitutional challenges to bad statutes in our pleadings and motion papers. If you have a case that you believe would be appropriate for a constitutional challenge, I suggest that you contact the FJA Amicus Curiae Committee or attorneys who have handled constitutional challenges before. There is a wealth of research available to our members who have the foresight to seek assistance in such matters.

Although the notice requirements do not seem to be jurisdictional, it would be unfortunate to mount a challenge that would have succeeded but was rejected due to the plaintiff's failure to comply with the notice provision. Successful constitutional challenges to "tort reform" statutes may be few and far between; all we can do is . . .

Keep Tryin!

Roy

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