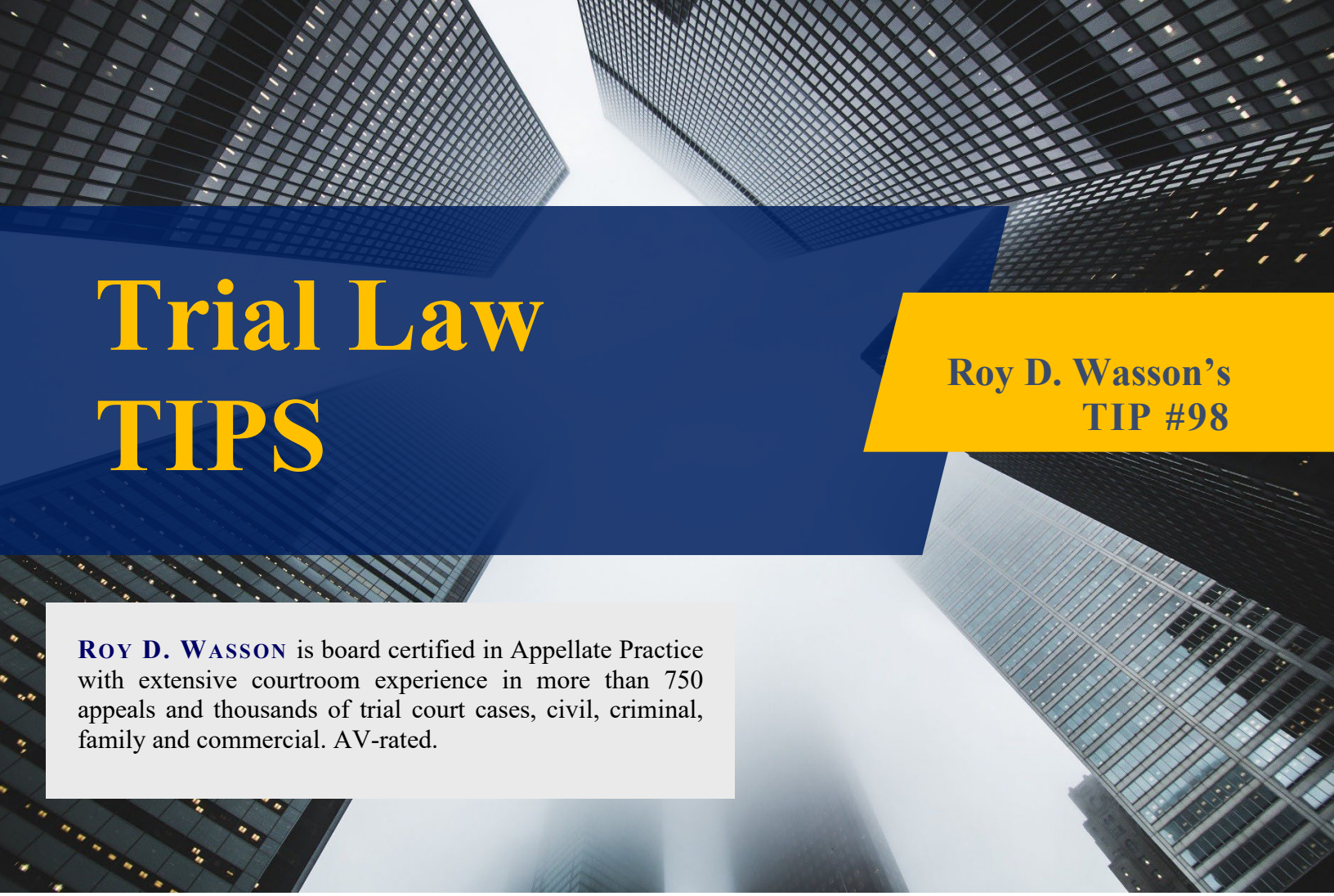

Trial Law TIPS

Roy D. Wasson's TIP #98

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.

Motions for Attorneys' Fees Under §57.105 Movant Must Follow the "Letter" of the Law

What does your co-counsel suggest that you should do when the opposing attorney files something that is meritless? Does he or she say that you should send the other lawyer a "57.105 letter"? If you ever hear such a suggestion, you should firmly tell your colleague that "there is no such thing as a 57.105 'letter.'"

"Huh?" your longtime co-counsel asks when you correct him or her on that point. "I thought you had to send a letter threatening to file a 57.105 motion at least 21 days before filing it."

Categorically no, should be your answer. Such a letter is not only unnecessary, it is legally meaningless. However, there is a strict set of rules regarding what must be done before filing a 57.105 motion. This is your introduction to that body of Florida law.

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Letter Threatening 57.105 Motion Unnecessary and Meaningless

Although all of us know that there is something called a "safe harbor" provision under section 57.105 requiring a party seeking sanctions to take some action before filing such a motion, there is a widespread misunderstanding that some sort of "letter" is part of that safe harbor process. That is wrong. As the Third DCA has explained:

> Section 57.105(4) provides: "A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." This Court has repeatedly stated that the statute is in derogation of common law and must be strictly construed. *See Anchor Towing, Inc. v. Fla. Dep't of Transp*., 10 So. 3d 670 (Fla. 3d DCA 2009); *Nathan v. Bates*, 998 So. 2d 1178 (Fla. 3d DCA 2008).
>
> In order to comply with section 57.105, a ***party must first serve a motion seeking fees***, "followed by its filing twenty-one days later." *Nathan*, 998 So. 2d at 1179. This is commonly known as the safe harbor provision, *see Bionetics Corp. v. Kenniasty*, 69 So. 3d 943 (Fla. 2011), and "give[s] a pleader a last clear chance to withdraw a frivolous claim." *Davidson v. Ramirez*, 970 So. 2d 855, 856 (Fla. 3d DCA 2007). ***A letter, as this Court has previously stated, does "not meet the mandatory notice requirements*** of section 57.105(4)." Anchor, 10 So. 3d at 672; see also Nathan, 998 So. 2d at 1179 ("The statute, however, clearly provides for a motion, ***not a letter***.").

Global Xtreme, Inc. v. Advanced Aircraft Center, Inc., 122 So. 3d 487, 490 (Fla. 3d DCA 2013)(emphasis added).

In *MC Liberty Express, Inc. v. All Points Servs.*, 252 So. 3d 397 (Fla. 3d DCA 2018) the Third District explained the law on the "safe harbor" issue as follows:

> In *Anchor*, we held that providing actual ***notice, by way of a letter, was insufficient to comport with the statutory***

> ***requirement that a proposed motion be served*** twenty-one days prior to it being filed with the court. *Anchor*, 10 So. 3d at 672 (emphasis added). The *Anchor* case, while not entirely factually parallel to this case, is certainly instructive. There, Anchor Towing, Inc. ("Anchor"), the unsuccessful bidder on a roadside assistance contract, sought review of an administrative law judge's award of attorney's fees to the successful bidder, Sunshine Towing, Inc. ("Sunshine"). Sunshine's counsel had sent a detailed letter to Anchor's counsel threatening section 57.105 sanctions if Anchor did not withdraw certain objections raised in Anchor's bid protest. No proposed motion for sanctions was attached. Following a hearing, the administrative law judge found that the letter complied with section 57.105(4)'s mandatory notice requirement. On appeal, this Court held that "***the letter sent to opposing counsel [was] not the same as the statutorily required motion, which is required to be served on opposing counsel and later filed with the court***." *Id*. (*citing Nathan v. Bates*, 998 So. 2d 1178, 1179 (Fla. 3d DCA 2008)) (emphasis added).

Id. at 400.

Thus, in order to comply with the safe harbor provision, the moving party must "serve" the 57.105 motion without "filing" it until the safe harbor period expires. A letter is meaningless and insufficient. Your threat will be contained in the motion itself, which must be "served," but not filed until after the safe harbor period expires without appropriate corrective action.

Standard for Granting 57.105 Motion

Years ago, the standard for granting a 57.105 motion was that the moving party had to establish that the opposing party's entire claim or defense was "frivolous." The standard was loosened a few years ago to make fees recoverable based upon the opposing party's refusal to withdraw "***any claim or defense*** at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts." (Emphasis added). Thus, no longer does the moving party have to establish that there was no merit to any part of the other side's case. You can get fees for litigating "any claim or defense" that should not have been raised.

Under the current version of the statute, the term used for the standard for sanctions under section 57.105 no longer expressly requires a showing that the other side's position is "frivolous." However, in applying the revised section 57.105, Florida appellate courts have recognized that, while the 1999 revision expands the circumstances in which fees may be awarded under section 57.105, the statute "still is intended to address the issue of frivolous pleadings." *Read v. Taylor,* 832 So. 2d 219, 222 (Fla. 4th DCA 2002); *see also Connelly v. Old Bridge Village Co-Op, Inc.,* 915 So. 2d 652, 656 (Fla. 2d DCA 2005); *Pappalardo v. Richfield Hospitality Serv., Inc.,* 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001).

In seeking to define when a claim or defense is "not supported by the material facts . . . or . . . the application of then-existing law" under the current version of 57.105, Florida courts have applied standards that maintain a high barrier to the imposition of sanctions. For example, in *Cowgill v. Bank of America,* 831 So. 2d 241, 242 (Fla. 2d DCA 2002), while the Second District affirmed a summary judgment in favor of Cowgill based on the application of the statute of limitations, it reversed an order imposing sanctions under section 57.105(1) "because the Appellant's claim was ***arguably supported*** by material facts and then-existing law" (emphasis added); *see also Stagl v. Bridgers,* 807 So. 2d 177, 177 (Fla. 2d DCA 2002) ("An award of attorney's fees pursuant to section 57.105 is appropriate only when the action is 'so clearly devoid of merit both on the facts and the law as to be completely

untenable.'") (quoting *Brinson v. Creative Aluminum Prods.,* 519 So. 2d 59, 60 (Fla. 2d DCA 1988)).

Similarly, in *Goldfisher v. Ivax Corp.,* 827 So. 2d 1110, 1111 (Fla. 3d DCA 2002), the Third District held that the appellee could not recover appellate attorney's fees under section 57.105 because, although the appellant "was not victorious . . . neither his action nor subsequent appeal, were ***totally without merit***." (Emphasis added; citing *Concrete & Lumber Enters. v. Guaranty Bus. Credit Corp.,* 829 So. 2d 247 (Fla. 3d DCA 2002)).

In *DeVaux v. Westwood Baptist Church,* 953 So. 2d 677, 683-685 (Fla. 1st DCA 2007), the court discussed the standards applicable to awarding fees under the current version of section 57.105(1), continuing to require a showing of frivolousness even though the language of the statute had changed. In *DeVaux*, the court looked to the Restatement for definitional guidance. The Restatement establishes an objective and strict standard, explaining that "[a] frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." Restatement Third of Law Governing Lawyers, § 110, cmt. d. (2000).

In addition, in *Wendy's,* 865 So. 2d at 524 (quoting *Visoly, 768 So. 2d at 491*), the court explained that

> there are established guidelines for determining when an action is frivolous. These include where a case is found: (a) to be completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (b) to be [contradicted] by overwhelming evidence; (c) as having been undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (c) [sic] as asserting material factual statements that are false.

These cases establish rigorous standards that must be applied before awarding sanctions under section 57.105 which restrain a court's authority to levy sanctions. If your opponent's behavior warrants such a motion, your client should be compensated by the value of your services in addressing the meritless defense or other action. Make sure you strictly comply with the procedures for perfecting such a motion. The first rule is this: forget about

sending any sort of letter. The "letter of the law" does not require or permit one. If your co-counsel requires some convincing to drop the idea of a letter, all you can do is:

Keep Tryin!

Roy