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FACTS & FINDINGS

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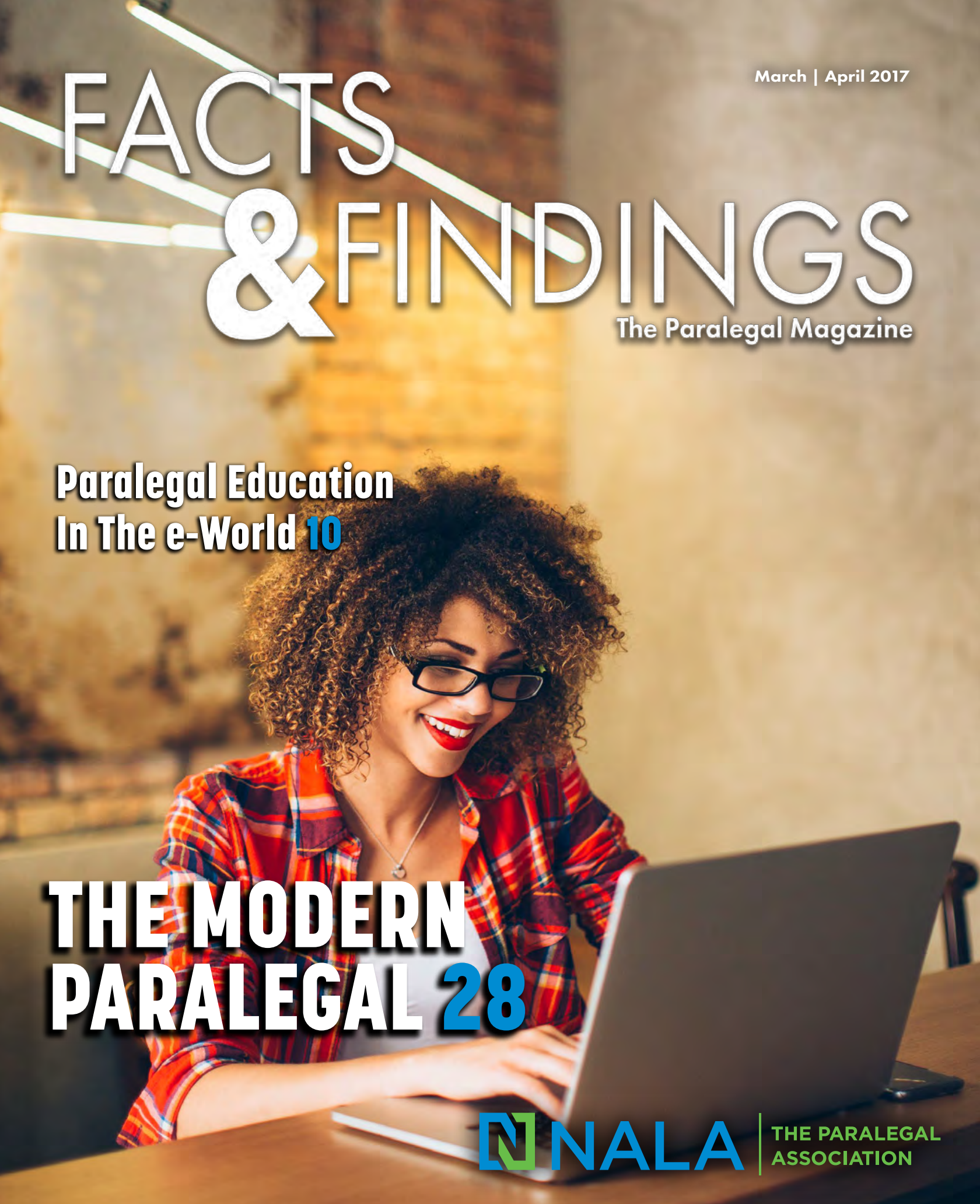

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When Constitutionality is Challenged, Know What Weapons You Have

Written by Michael Begey

In any critical situation, it is always preferable to have as much help and support as possible. This maxim applies to litigation as well. Wouldn't it be helpful if, when confronted with a challenge to the constitutionality of a state statute, a private lawyer could enlist the aid of the top public sector lawyer in the state to assist in arguing for the constitutionality of the challenged provision? Without question, such assistance would surely be welcomed.

State Attorneys General have various rights and responsibilities, which differ from state to state but which generally include such tasks as appearing on behalf of the state in court, ensuring consumers within the state are protected from fraudulent and illegal schemes, and overseeing statewide criminal prosecutions, just to name a few. Many in the public recall the involvement of a consortium of 46 State Attorneys General prosecuting consumer claims against the large tobacco companies in the 1990's. This litigation ended with the tobacco companies agreeing to pay more than 200 billion dollars. State Attorneys General are also commonly associated with administering state lemon law programs, which aid consumers in seeking redress for serious issues they many experience with their recently purchased car or truck.

The roles of a State Attorney General in prosecuting the case against big tobacco and in administering the state's consumer protection programs are fairly well known and should come as no surprise to you. What may not be well known is that State Attorneys General are often tasked with upholding the constitutionality of state statutes and regulations. As we'll see in this brief overview of Florida law, a State Attorney General's right to defend the constitutionality of her state's law can provide measurable support to a private litigant.

Challenges to the constitutionality of state statutes are often pursued in high stakes litigation. The court's determination as to whether a challenged statute passes constitutional muster is quite likely to demonstrably alter the course of the case. Because the outcome of the constitutional challenge may be a defining moment in the case, the litigant defending the constitutionality of the questioned statute must devote substantial effort to defending against the challenge. If the statute is found unconstitutional, at minimum the case dynamics are negatively altered; at worst the case is lost. For these reasons, the party defending the statute's constitutionality must be aware of all added support and tactics available in mounting a defense.

In Florida, this added support is available to all civil litigants through a procedure grounded in the attorney general's right to be notified of constitutional challenges and, should she so choose, appear on behalf of the state to defend the constitutionality of the state statute. This procedure is certainly not new, but, perhaps surprisingly, many lawyers do not seem aware of its existence. When in the trenches, facing a constitutional challenge that may well decide the fate of your high-stakes litigation, it is imperative that the procedure be noted and utilized to its fullest extent.

In a nutshell, the procedure requires that the Florida Attorney General be notified in any proceeding in which the constitutionality of a state statute is challenged. This requirement is rooted in Florida statute §86.091, a provision that has been on the books, in some form, since at least 1943. This statute states:

"When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration. No declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding concerning the validity of a county or municipal charter, ordinance, or franchise, such county or municipality shall be made a party and shall be entitled to be heard. **If the statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard."** [Emphasis added]

This longstanding statute was bolstered in 2011 by Florida Rule of Civil Procedure 1.071. This rule mandates that the party challenging the constitutionality of a state statute comply with certain requirements, including the pivotal requirement of providing notice of the constitutional challenge to either »

the state attorney general or the state attorney for the judicial circuit in which the action is pending. The rule provides as follows:

"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.** [Emphasis added]

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." Rule 1.071 provides no wiggle room—the party challenging the constitutionality of the state statute "must promptly" provide the appropriate notice, without exception.

The Florida Attorney General is not required to appear in support of the statute's constitutionality in any particular case. However, as the Committee Notes to Rule 1.071 explain, the Attorney General "has the discretion to participate and be heard on matters affecting the constitutionality of a statute." [Citing *Mayo v. National Truck Brokers, Inc.*, 220 So. 2d 11(Fla. 1969); *State ex rel. Shevin v. Kerwin,* 279 So. 2d 836 (Fla. 1973)]. While the Attorney General's appearance is certainly optional, it cannot be disputed that the Attorney General has the exclusive right to exercise this option by receiving the notice required by the Florida rules.

The principal benefit for a party opposing a constitutional challenge in knowing about and demanding compliance with the notice requirements is obvious: upon receiving the mandated notice, the State Attorney General may well elect to appear in the underlying action to assist in the argument for the statute's constitutionality. This support could take a variety of forms, including filing briefs in support of the statute, filing joinders in the briefing submitted by the private litigant, or even appearing at the hearing on the statute to actively argue in support of its constitutionality. Any of these outcomes will be a huge aid to the party facing the constitutional challenge and can sway the court's decision toward a finding of constitutionality, which may be the seminal moment in the case.

While an actual appearance of the State Attorney General to support your case is the optimal outcome, knowing about and demanding compliance with the notice requirement may yield other benefits. For example, because the notice requirement is mandatory, a court may not declare a statute unconstitutional if the appropriate officials have not first been provided with »

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proper notice of the constitutional challenge. In that event, the challenge is per se "deficient." [See Buckley v. *City of Miami Beach*, 559 So. 2d 310, 312 (Fla. 3d DCA 1990); *Orion Insurance Company v. Magnetic Imaging Systems*, 696 So. 2d 475, 477 (Fla. 3d DCA 1997); finding "no merit" in the constitutional challenge because, in part, the appropriate statutory notice was not provided]. Accordingly, the party facing the constitutional challenge may use the opposing party's failure to comply with the notice requirement as a barrier to the court finding unconstitutionality. Until, at minimum, the notice requirement has been satisfied, the constitutionality of the statute must be upheld.

Though failing to comply with the notice requirement shields against a finding of unconstitutionality, the court may rule the statute to be constitutional immediately, and need not wait for proper notice to be given to determine the constitutional challenge lacks merit. [See, eg, *Orion Insurance Company*, 696 So. 2d at 477.] In a case in which the court is leaning toward a finding upholding constitutionality, the challenging party's failure to comply with the notice requirement may be enough to dispositively tip the court's ruling in favor of constitutionality. So, demanding compliance with the notice requirement can be both a wonderful shield and a potent sword in the hands of the knowledgeable litigant.

Any litigant facing a constitutional challenge in a Florida court must be mindful of the obligation of the party challenging the statute to provide the appropriate notice to the State Attorney General. If the opposing party fails to comply with the mandatory notice requirement, then an immediate objection must be raised. The value of this procedure to the party facing the constitutional challenge is simply too great to ignore. Ensuring the Attorney General receives the proper notice provides the opportunity for your defense of the statute to be bolstered by the aid of the chief legal officer in the state. Who could deny the benefit to having this powerful entity in the foxhole with you during the battle? Meanwhile, if the notice requirement is not complied with, then the ability to block the court from finding the statute unconstitutional, and, perhaps to persuade the court to make an immediate finding of constitutionality, cannot be overlooked. In the pivotal litigation we often deal in, using every available weapon is essential. Florida's notice requirement is a potent, multifaceted weapon.

The problem is, sadly, that at least in this author's anecdotal experience, many lawyers in Florida are not aware of the procedure provided by Fla.§86.091 and Florida Rule of Procedure 1.071. I am not sure why this seems to be the case. Nevertheless, any practitioner in Florida must be mindful of these provisions. Similarly, for those in jurisdictions outside Florida, it is imperative that you look for and familiarize yourself with any procedures that may be in place within your jurisdiction applicable to challenges to state statutes. Your state might have a notice provision similar to Florida's, which requires notice to, but does not mandate, the Attorney General's appearance. Or, your state could require the Attorney General to be actually joined as a party in any action that raises the constitutionality of a state statute. Whichever the case may be, it is essential that these procedures be recognized, understood, and used to their maximum potential. **They could well make the difference between success and failure in your case.**

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