

## **PRACTICE TIPS PROPOSALS FOR SETTLEMENT**

By: Manuel L. Dobrinsky

Florida Statute § 768.79 (offer of judgment and demand for judgment) and Florida Rule of Civil Procedure 1.442 (proposals for settlement) provide the mechanism for obtaining legal fees and costs when a party rejects a formal offer to settle a case. These can be used as a tool to pressure the other side to settle a case or risk incurring attorneys' fees at a later date.

However, the timing of when to serve such a proposal is a strategic decision that requires certain considerations. For example, when you serve a proposal for settlement on your opponent, chances are that you will have one served on your client. Thus, you must weigh the risks of having your client served with such a proposal.

Second, since you must be able to beat your proposal for settlement by 25%, your proposal for settlement cannot be very high (in contrast to your valuation of your case) and therefore, if not accepted, you will not have much room to negotiate. Therefore, we often find that the best time to serve a proposal is right after mediation, when you have an idea as to what the defendant is willing to pay.

Finally, you must understand the law and the mechanisms for a proposal for settlement. Below is a survey of the law for your review:

Florida Statute § 768.79 provides in pertinent part:

If a **defendant** files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award (emphasis added).

If a **plaintiff** files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section (emphasis added).

Although the statute references the **filing** of a proposal/demand, Rule 1.442(d) states that the proposal shall be **served** and not filed unless necessary to enforce the provisions of this rule. The timing for filing the proposals is discussed below.

The following is an outline of the steps that must be followed to properly serve a proposal/demand. The case law, however, is varied as to how strictly compliance with the letter of the Rule will be enforced. *See, e.g., Saenz v. Campos*, 967 So. 2d 1114 (Fla. 4<sup>th</sup> DCA 2007)(a patent or latent ambiguity will render the proposal void).

1. **When should they be served**

- a. On a **defendant** no earlier than 90 days from service of process. *See* Fla. R. Civ. P. 1.442(b).
- b. On a **plaintiff** no earlier than 90 days after the action has been commenced. *See* Fla. R. Civ. P. 1.442(b).
- c. No later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier. *See* Fla. R. Civ. P. 1.442(b).
- d. However, if a continuance is granted, an offer of judgment can be served after the granting of the continuance but prior to the 45<sup>th</sup> day before the new trial date or new docket date. *See Liguori v. David*, 756 So.2d 268 (Fla. 4<sup>th</sup> DCA 2000); *Hathaway v. Hathaway*, 2000 WL 1345917 (Fla. 4<sup>th</sup> DCA 2000).

**There is a conflict in the districts as to whether the timing provisions are strictly construed**

There is a disagreement among the district courts of appeal as to whether the timing provisions in Rule 1.442 must be strictly construed. In *Grip Development Inc. v. Coldwell Banker Residential Real*, 788 So. 2d 262 (Fla. 4<sup>th</sup> DCA 2000), the Fourth District held that a plaintiff who had served a proposal for settlement three days prior to the expiration of the 90-day period was not entitled to attorneys' fees because the proposal had been served prematurely. The court reasoned that section 768.79 and Rule 1.442 are punitive in nature and thus must be strictly construed. The Second District, in *Bottcher v. Walsh*, 843 So. 2d 183 (Fla. 2<sup>nd</sup> DCA 2002) agreed that the provisions of the rule had to be strictly construed. In that case, the defendant had prematurely **filed** her proposal for settlement.

Two other courts, however, have disagreed with this interpretation. In *Kuvin v. Keller Ladders, Inc.*, 797 So. 2d 611 (Fla. 3<sup>rd</sup> DCA 2001) the Third District disagreed with *Grip* and held that any failure to follow the rule was "merely a harmless technical violation which did not affect the rights of the parties." (Citations omitted). In *Mills v. Martinez*, 2005 WL 1583740 (Fla. 5<sup>th</sup> DCA 2005) the Fifth District disagreed with *Bottcher* and held that prematurely filing a proposal for settlement was "immaterial and certainly not prejudicial." *Id.* at \*3. *See, also, Shoppes of Liberty City v. Sotolongo*, 2006 WL 1540881 (Fla. 3<sup>rd</sup> DCA 2006)

## 2. **When is response to a proposal due**

- a. A proposal shall be deemed rejected unless accepted by delivery of written notice within 30 days after service of proposal. When computing the time, please note that the provisions of Rule 1.090(e) **do not apply**. Rule 1.442(f)(1).
- b. Can request an enlargement of time from the court. *See* Florida Rule of Civil Procedure 1.090(b). However, the motion for enlargement of time should be set for hearing before the thirty days expires. *See Donohoe v. Starmed Staffing, Inc.*, 743 So. 2d 623 (Fla. 2<sup>nd</sup> DCA 1999).

## 3. **How do you address multiple parties**

- a. Florida Rule of Civil Procedure 1.442(c)(3) provides “a joint proposal shall state the amount and terms attributable to each party.”
  - i. Multiple defendants- *See McFarland & Sons, Inc. v. Basel*, 727 So. 2d 266 (Fla. 5<sup>th</sup> DCA 1999)(rule requires that specific amount be set forth as to each defendant); *Ford Motor Company v. Meyers*, 771 So. 2d 1202 (Fla. 4<sup>th</sup> DCA 2000);
  - ii. Multiple plaintiffs- *Allstate Indemnity Company v. Hingson*, 808 So. 2d 197 (Fla. 2002)(even under old rule offers to plaintiffs had to be separate); *Goldstein v. Harris*, 768 So. 2d 1146 (Fla. 4<sup>th</sup> DCA 2000)(separate offers must be made to each plaintiff)
- b. Rule 1.442 was recently (2011) amended and now provides that:  
“Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.”  
*See* 1.442(c)(4).
- c. Offer from multiple plaintiffs must apportion the offer among the plaintiffs. *Wills Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003). *But see Hall v. Lexington Insurance Company*, 895 So. 2d 1161 (Fla 4<sup>th</sup> DCA 2005) which distinguished *Hilyer Sod* in a case where a joint proposal was made to two plaintiffs and the plaintiffs made a unified single insurance claim and submitted a unified verdict form for damages.

## 4. **When must be filed**

- a. Rule 1.442(g) Any party seeking sanctions pursuant to applicable Florida law,

based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with rule 1.525

- i. Rule 1.525- party seeking a judgment taxing costs, attorneys' fees or both shall serve a motion within 30 days after filing of the judgment, including a judgment of dismissal or the service of a notice of voluntary dismissal.

*See Norris v. Treadwell*, 2005 WL 1467348 (Fla. 1<sup>st</sup> DCA 2005)- motion filed after verdict but before judgment considered timely. The court held that the main purpose of the rule was to set an outside limit as to when the motion could be filed, i.e. 30 days after the entry of a judgment.

- ii. Extensions beyond 30 days

- (1) may be enlarged pursuant to Fla. R. Civ. P. 1.090(b). *See Gulliver Academy, Inc. v. Bodek*, 694 So. 2d 675 (Fla. 1997).
- (2) Reservation of jurisdiction to consider motion for fees and costs in final judgment is an enlargement of time under Rule 1.090(b). Remember that in a jury case, the extension must be granted within 30 days of the verdict.
- (3) Pursuant to *Bodek*, motions for attorneys' fees should be ruled upon at the time that the court rules on its other post trial motions.

## 5. **When Proposal Requires a Release—**

- a. A “general release” is a “relevant condition” that must be described with particularity. A summary of the proposed release can be sufficient if it eliminates any reasonable ambiguity. *State Farm Mutual Automobile Insurance Company v. Nichols*, 2006 WL 1491542.
- b. *Rivera v. Publix Super Markets, Inc.*, 929 So. 2d 1184 (Fla. 4<sup>th</sup> DCA 2006)- making the release and other documents available at attorney's office not enough— must be stated in the proposal.

## 6. **Bad Faith Proposals**

- a. Nominal offers-A reasonable basis for a nominal offer exists only where the undisputed record strongly indicates that the defendant had no exposure. *Event Services America, Inc. v. Ragusa*, 917 So. 2d 882 (Fla. 3<sup>rd</sup> DCA 2005); *Eagleman v. Eagleman*, 673 So. 2d 946 (Fla. 4<sup>th</sup> DCA 1996)
- b. Obligation of good faith merely requires that offeror have a reasonable foundation on which to base the offer. *Downs v. Coastal Systems International, Inc.*, 2008

WL 34795; *Donohoe v. Starmed Staffing Inc.*, 743 So. 2d 623 (Fla. 2<sup>nd</sup> DCA 1999)

- c. No bad faith simply because plaintiff figured that demanded amount would be accepted. *Schmidt v. Fortner*, 629 So. 2d 1036 (Fla. 4<sup>th</sup> DCA 1993)

## 7. **Proposals to an Estate**

A judgment for fees and costs pursuant to Florida Statute § 768.79 can be enforced against an estate, but not against the beneficiaries of the estate. In *Thompson v. Hodson*, 825 So. 2d 941 (Fla. 1<sup>st</sup> DCA 2002) the court held that a judgment for fees and costs could not be satisfied from monies recovered for the survivors in an earlier settlement, even though those funds were still held by the personal representative. *Id.* at 950. *See, also, Johnson v. Schneegold*, 419 So. 2d 684, 685 (Fla. 2<sup>nd</sup> DCA 1982)(in a wrongful death case there is no provision authorizing recovery of costs against survivors by a successful defendant); *Walker v. Bozeman*, 243 F.Supp.2d 1298 (N.D. Fla. 2003)(explaining and applying *Thompson*).

## 8. **Voluntary Dismissals**

- a. A voluntary dismissal without prejudice will avoid an offer of judgment. *Mx Invs., Inc. v. Crawford*, 700 So. 2d 640 (Fla. 1997)(attorneys fees after voluntary dismissal only when voluntary dismissal is with prejudice); *Aero Toy Store, Inc. v. Sherwin Williams Co.*, 725 So. 2d 1267 (Fla. 4<sup>th</sup> DCA 1999).
- b. Voluntary dismissal without prejudice even after statute of limitations has run is without prejudice. *Tucker v. Ohren*, 739 So. 2d 684 (Fla. 4<sup>th</sup> DCA 1999).
- c. However, even if you dismiss without prejudice, costs can still be assessed pursuant to Rule 1.420(d).

## 9. **Judgment Obtained-**

- a. The Florida Supreme Court has held that “judgment obtained” pursuant to section 768.79 “includes the net judgment for damages and any attorneys’ fees and taxable costs that could have been included in a final judgment if such final judgment was entered on the date of the offer.” *White v. Steak And Ale of Florida, Inc.*, 816 So. 2d 546 (Fla. 2002).
- b. Attorneys’ fees at time of offer only accrue if they can be awarded pursuant to contract or statute. *Segui v. Margrill*, 864 So. 2d 518 (Fla. 5<sup>th</sup> DCA 2004).