

# PROPOSALS FOR SETTLEMENT

HOW THIS FEE SHIFTING DEVICE  
COMPLICATES YOUR MEDIATION

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**ADR:**  
Improving the  
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PITFALL

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**THE RULES JUST CHANGED**  
**JULY 1, 2022**

(and your litigants may not be aware)

*IN RE: AMENDMENTS TO FLA. R. CIV. P. 1.442*  
*MAY 26, 2022*



**RULE 1.442. PROPOSALS FOR SETTLEMENT**

**(a)-(b) [No Change]**

(C) ~~state with particularity any relevant~~  
~~conditions~~ exclude nonmonetary terms, with the  
exceptions of a voluntary dismissal of all claims with  
prejudice and any other nonmonetary terms permitted by  
statute;

(D) ~~state the total amount of the proposal and state with~~  
~~particularity all nonmonetary terms of the proposal ;~~

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# IN RE: AMENDMENTS TO FLA. R. CIV. P. 1.442

## MAY 26, 2022



### Why the Change?

Rule 1.442 is supposed to provide the procedure for complying with F.S. 768.79. Before this change, the Rule had provisions which were not in the Statute.

(C) state ~~with~~ particularity ~~any~~ relevant conditions exclude nonmonetary terms, with the exceptions of a voluntary dismissal of all claims with prejudice and any other nonmonetary terms permitted by statute;

(D) state the total amount of the proposal ~~and state with particularity all nonmonetary terms of the proposal ;~~

### So What?

- No attached releases
- No required cooperation
- No confidentiality, non-disparagement
- No “deliver the check in 10 days”
- **What happens to old, non-complying PFS's?**
- **Not a long history of red-lining PFS's**



# PROPOSALS FOR SETTLEMENT

## What's Wrong With Them??

- Complicated (lots of steps, multi-parties)
- Rule and Statute Are An Imperfect Match
- “Strictly construed” (with some loosening after 2016)
- Frequently amended – some older precedent may not apply
- High stakes (for both sides & their lawyers)



# PROPOSALS FOR SETTLEMENT

## What's Wrong With Them??

“I write separately to once again highlight the proliferation of litigation surrounding proposals to settle, which runs counter to the entire purpose of these proposals – to reduce litigation.”

*Campbell v. Goldman* (Fla. 2007)(concurrence)





# PROPOSALS FOR SETTLEMENT

## What's Wrong With Them??

Consider:

*Campbell v. Goldman* (Fla. 2007) – PFS invalid because it cited to statute but not the rule

(Justice Pariente: “a minor omission, not an actual ambiguity”)



LET'S BACK UP...

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**§ 768.79, FLA. STAT. &  
FLA. R. CIV. P. 1.442**



## § 768.79, FLA. STAT. (1) BIG PICTURE

1. Offer of Judgment (“files”)
  - Civil action for damages (can’t be mixed)
  - 30 days
  - Defendant: no liability or judgment for P = 25% less than offer
  - Plaintiff: judgment for P = 25% greater than offer
  - Shall be awarded fees... but reasonable

# § 768.79, FLA. STAT.

## (2) TERMS



2. Subsequent offers are OK
  - An offer must:
    - Be in writing
    - State it is made pursuant to this statute
    - Name party (a) making it & (b) to whom it is made
    - State amount to settle punitives, if any
    - State total amount
    - Include all damages which may be awarded

**§ 768.79, FLA. STAT.**  
**(3) SERVED**



3. “shall be served upon the party to whom it is made, but it shall not be filed [unless accepted or litigated]”

*(but section (1) says the PFS is “filed”)*

§ 768.79, FLA. STAT.  
(4) ACCEPTANCE



4. Accepted by filing written acceptance within 30 days after service.

**§ 768.79, FLA. STAT.  
(5) WITHDRAWN**



5. Offer may be withdrawn in writing which is served before acceptance is filed.

# § 768.79, FLA. STAT. (6) SANCTION



6. Motion by offeror made within 30 days of judgment or dismissal:
- If Defendant & judgment at least 25% < offer, fees since date the offer was served
  - If Plaintiff & judgment at least 25% greater, same
  - Defines “judgment obtained”



§ 768.79, FLA. STAT.  
(7) GOOD FAITH



7. If offeror entitled to fees/costs, court may disallow if determines not made in good faith.
- Reasonableness factors

**§ 768.79, FLA. STAT.  
(8) ADMISSIBLE**



8. PFS only admissible to enforce offer or to impose sanctions



LET'S BACK UP...

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**§ 768.79, FLA. STAT. &  
FLA. R. CIV. P. 1.442**



# FLA. R. CIV. P. 1.442 (A) APPLICATION

A. Rule applies to all proposals for settlement authorized by Florida law, regardless of what they are called (offers, demands, proposals)



# FLA. R. CIV. P. 1.442 (B) SERVICE

B. To defendant – 90 days after service of process  
To plaintiff – 90 days after action commenced

Either way, no later than 45 days before earlier of  
1<sup>st</sup> day of docket or trial date



# FLA. R. CIV. P. 1.442 (C) FORM & CONTENT

C. Shall...

- a) In writing & identify law under which it is made
- b) Name offeror(s) and recipient(s)
- c) State it resolves all damages otherwise awarded in final judgment, subject to (f) [attorney's fees]
- d) State total amount
- e) State w/particularity amount to settle punitives, if any
- f) State (i) whether it includes fees & (ii) whether fees are part of the legal claim
- g) Include a certificate of serve in form req'd by Fla. R. J. Admin. 2.516



# FLA. R. CIV. P. 1.442 (C) FORM & CONTENT

## IMPORTANT

- PFS may be made by or two any party or parties properly identified in the PFS.
- Joint proposal shall state the amount and terms attributable to each party. *Why are “terms” still in there?*
- When party is solely vicariously, constructively, derivatively, or technically liable, a joint proposal made by or served on such party need not state apportionment or contribution.



# FLA. R. CIV. P. 1.442 (D) SERVICE & FILING

D. Shall be served on recipient but shall not be filed unless necessary to enforce the provisions of this rule.





## FLA. R. CIV. P. 1.442 (E) WITHDRAWAL

E. A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered.

*But see 768.79(5)...*

*An offer may be withdrawn in writing which is served before the date a written acceptance is filed.*



# FLA. R. CIV. P. 1.442 (F) ACCEPT / REJECT

- F. PFS is rejected unless
- Accepted by delivery of written notice within 30 days after service of PFS
  - Fla. R. J. Admin. 2.514(b) does not apply (counting/mail days)
  - No verbal acceptance, reject, counter
  - Class actions: time for acceptance extended to 30 days after order granting or denying class cert is filed



# FLA. R. CIV. P. 1.442 (G) SANCTIONS

G. Seek sanctions (fees) by filing motion under Rule 1.525  
(fees/costs motions)



# FLA. R. CIV. P. 1.442 (H) COSTS AND FEES

- H. If entitled to fees, court may determine not in good faith
- Reasonableness



# FLA. R. CIV. P. 1.442

## (I) & (J) EVIDENCE & MEDIATION

- I. Evidence of proposal or acceptance admissible ONLY in proceeding to enforce accepted PFS or determine fees
  
- J. Mediation – no effect on the dates when parties can serve or accept a PFS.

WHERE THINGS GET  
COMPLICATED

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**PROPOSAL FOR SETTLEMENT**  
**CASE LAW**



# CCM CONDO. ASSOC. V. PETRI POSITIVE PEST CONTROL (FLA. 2021)




How do you calculate pre-judgment interest in determining if a recipient beats the 25% rule? End of case or time of offer?

**[Holding:]** The Supreme Court, [Polston, J.](#), held that post-offer prejudgment interest is to be excluded from the “judgment obtained” that is compared to a rejected settlement offer when determining whether to award attorney fees under the offer-of-judgment statute, disapproving [Perez v. Circuit City Stores, Inc.](#), 721 So. 2d 409, and [Phillips v. Parrish](#), 585 So. 2d 1038.



# CCM CONDO. ASSOC. V. PETRI POSITIVE PEST CONTROL (FLA. 2021)

How do you calculate pre-judgment interest in determining if a recipient beats the 25% rule? End of case or time of offer?

In  *White* this Court concluded that, in determining whether attorney's fees are to be awarded under  [section 768.79](#), settlement offers should be compared to what would be included in judgments if the judgments were entered on the date of the settlement offers because these amounts are the ones that are evaluated when determining the amount of offers and whether to accept offers. See  [816 So. 2d at 550-51](#).

(only pre-offer, pre-judgment interest is included in calculation)





## WHEATON V. WHEATON (FLA. 2019)

What happens if you serve by email, don't include a certificate of service, and the subject line is not SERVICE OF COURT DOCUMENTS?

Recall... 768.79(2) says it must be served and Rule 1.442 says it must have cert of service in form required by R. Jud. Admin 2.516



# WHEATON V. WHEATON (FLA. 2019)

## TRICK QUESTION

- Rule 1.442(c)(2)(G) has changed since this case
- Current rule points to R. Jud. Admin. 2.516 which does not have an applicable certificate of service requirement
- You can serve via email (not required by Statute or Rule)
- "...a PFS that did not strictly comply with Rule 1.442(c)(2)(F) was not invalid where the proposal complied with the relevant requirement of the rule that implemented the substantive requirements of section 768.79."



## WHEATON V. WHEATON (FLA. 2019)

So...

- Strict construction was [only] required in contexts in which the provisions of the rule implemented the substantive requirements of the statute.

# KUHAJDA V. BORDEN DAIRY (FLA. 2016)



ISSUE: In a case where there is not a claim for attorney's fees, the PFS does not state whether attorney's fees are included or if attorney fees are part of the claim per Rule 1.442(c)(2)(F). Valid or invalid?

VALID. A PFS does not need to strictly comply with the requirements of the Rule which do not implement the substantive requirements of the statute. Here, a PFS need not strictly comply with "attorney fee listing rule" when fees were not part of the claim.



# IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE (FLA. 2018)

Rule 2.516 is amended to no longer allow parties an additional 5 days to respond following service of a document by e-mail.



## ALLEN V NUNEZ (FLA. 2018)

There were two plaintiffs. Plaintiff serves PFS on Defendant #1 of 2. PFS says it resolves “all damages claimed by Plaintiff.”  
Enforceable?

Yes. Only reasonable ambiguities need be eliminated. Courts should not “nitpick.” Here, PFS referred to individual parties and “all claims of PLAINTIFF against [respondent].”

The intention of the parties must be determined from an examination of the entire contract. *Will the loosening of “strictly construed” solve PFS litigation?*

# KOPPEL V. OCHOA (FLA. 2018)



Defendant receives PFS, files a motion for extension. Is that allowed? If so, does filing the motion toll the PFS time period?



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Defendant receives PFS, files a motion for extension. Is that allowed? If so, does filing the motion toll the PFS time period?

Rule 1.090 allows for the time period set forth in rule 1.442 to be enlarged, but this enlargement is at the trial court's discretion if the motion was filed before expiration of the time period and cause has been shown. After the time period has expired, the trial court still has discretion to enlarge the time period if the moving party can demonstrate excusable neglect in addition to cause. Nowhere does the rule allow additional time to accept by simply filing the motion to enlarge. This seems consistent with the rule, which provides for additional time only after cause has been shown.



# GEICO V. MACEDO (FLA. 2017)



Defendant rejects PFS because her insurer controls litigation. Under policy, is insurance company liable for resulting attorney's fees sanction?

Yes, interpreting the "Additional Payments" provision in the insurance agreement, the awarded attorney's fees are a 'cost'."

[but have insurance companies changed their policies since 2017?]

# ALLIANCE SPINE V. INFINITY AUTO (BROWARD CIRCUIT COURT APRIL 27, 2022)



Plaintiff opposes Defendant's PFS on these grounds. Any of these winners?

1. Defendant failed to file Notice of Serving PFS with Court.
2. PFS was emailed and there was a typo in the case number.
3. Body of the PFS did not state the Plaintiff's name, Defendant's name, and case number.
4. Plaintiff did not have actual notice since counsel did not personally open the email until after 30 days had run.

# ALLIANCE SPINE V. INFINITY AUTO (BROWARD CIRCUIT COURT APRIL 27, 2022)



Plaintiff opposes Defendant's PFS on these grounds. Any of these winners?

1. Defendant failed to file Notice of Serving PFS with Court.  
**No requirement to file a Notice. It turns on "actual notice."**
2. PFS was emailed and there was a typo in the case number.  
**PFS had correct case number; email & PFS had case name.  
"The error was trivial."**

# ALLIANCE SPINE V. INFINITY AUTO (BROWARD CIRCUIT COURT APRIL 27, 2022)



Plaintiff opposes Defendant's PFS on these grounds. Any of these winners?

3. Body of the PFS did not state the Plaintiff's name, Defendant's name, and case number.

**All of this was specified at the top of the PFS. [still, a good practice to define your terms in the PFS]**

4. Plaintiff did not have actual notice since counsel did not personally open the email until after 30 days had run.

**The Plaintiff received the email. Thus, the Plaintiff had actual notice.**

# OJ COMMERCE LLC V. KIDKRAFT LP (S.D. FLA. MARCH 16, 2022)



In federal court with state and federal claims. PFS limited to state court claims. PFS does not comply with Rule 1.442(c)(2)(B) that it is supposed to state it resolves all damages otherwise awardable in a final judgment. Enforced?

**No. 768.79 applies only to the Florida state law claims – not Plaintiff's federal claims. The Rule applies to all PFS's. Defendant still could have said that the PFS resolves all damages otherwise awardable.**

**[Rule 1.442(c)(2)(B) corresponds to / echoes 769.79(2)]**

# TEJEIRO V. TOWER MSA (PALM BEACH CIRCUIT COURT APRIL 28, 2021)



Recipient of PFS does not dispute that PFS meets the rule/statute but argues at non-evidentiary hearing that it was in bad faith? It was a \$50 PFS. What happens?

**There is a three step process:**

- 1. Decide entitlement to fees and costs (here, it was conceded)**
- 2. Consider argument that it was in bad faith**
- 3. Consider amount of fees and costs**

**Step #2 requires evidentiary hearing; “court finds it would be in error to rule on this issue without allowing parties to present evidence” (no authority cited)**



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