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Locke Lord QuickStudy: Show Me the Money: Florida Supreme ?Court Removes Ability to ?Include Non-Monetary ?Terms in ?Proposals for Settlement

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On May 26, 2022, the Florida Supreme Court amended Florida Rule of Civil Procedure 1.442 to exclude non-monetary terms from proposals for settlement. Effective July 1, 2022, non-monetary terms, such as the execution of settlement and release agreements, will no longer be permitted. Proposals for settlement may still include the voluntary dismissal of all claims with prejudice and any non-monetary terms that are permitted by statute.

The amendment is "intended to align rule 1.442 with the substantive elements of Florida's settlement proposal statutes. Fla. Stat. § 768.79 does not provide for the inclusion of nonmonetary terms in a proposal for settlement." *In re Amendments to Florida Rule of Civil Procedure 1.442*, SC21-277, 2022 WL 1679398, at *1 (Fla. May 26, 2022).

The amendment may also allow for a more streamlined process for accepting proposals for settlement and seeking attorney's fees where a proposal is not accepted; a process that has long been under scrutiny in Florida courts.

In Florida, a proposal for settlement can be filed by either party to a lawsuit. When properly served, a proposal for settlement allows for the recovery of attorney's fees incurred in prosecuting or defending claims where fees may not otherwise be available. While routinely used in personal injury cases, it is a useful negotiation tool in other types of cases as well.

If a proposal for settlement is not accepted and the matter proceeds to judgment, attorney's fees can be sought depending on the difference between the judgment amount and the amount included in the proposal for settlement. The rule states that if a defendant files a proposal for settlement, the plaintiff must obtain a judgment that is at least 75% of the amount proposed by the defendant. Fla. Stat. § 768.79(1). If there is a judgment entered for the defendant or the judgement is less than 75% of the proposal, then the plaintiff is responsible for the defendant's attorney's fees and costs. *Id.* Likewise, a plaintiff may make a proposal for settlement to a defendant and, if the plaintiff secures a final judgment that is 25% above the amount of the offer, then the plaintiff will be entitled to attorney's fees. *Id.*

However, fee claims are often challenged, and often denied, where proposal for settlements are too ambiguous.

See, Allen v. Nunez, 258 So. 3d 1207, 1211 (Fla. 2018) (proposal for settlement "must be sufficiently clear and free of ambiguity to allow the offeree the opportunity to fully consider the proposal.")*; Dryden v. Pedemonti,* 910 So. 2d 854, 855–56 (Fla. 5th DCA 2005) ("In order to qualify under the rule, the terms of the proposal must be devoid of ambiguity, patent or latent, and not require any clarification or later judicial interpretation."); *Lucas v. Calhoun,* 813 So.2d 971, 973 (Fla. 2d DCA 2002) (citation omitted). ("The rule intends for a proposal for judgment to be as specific as possible, leaving no ambiguities so that the recipient can fully evaluate its terms and conditions. Furthermore, if accepted, the proposal should be capable of execution without the need for judicial interpretation. Proposals for settlement are intended to end judicial labor, not create more.").

The disqualifying ambiguity often arose due to the inclusion of non-monetary terms – an issue that this amendment may rectify. *E.g., Ehlert v. Castro,* 46 Fla. L. Weekly D2361 (Fla. 4th DCA Nov. 3, 2021) ("Appellant moved for entitlement to fees pursuant to the [proposal for settlement) because the amount of the judgment exceeded the amount of the proposal by greater than twenty-five percent, entitling plaintiffs to fees pursuant to Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes. Appellees responded, arguing that the [proposal for settlement] contained language that was vague, ambiguous, and contradictory when read together, as it contained invalid conditions which encompassed claims beyond the scope of the claim at issue.").

Appellate Courts have routinely called for amendments to or clarifications of rule 1.442, and their wish appears to have been granted, at least in part. *See, Tower Hill Signature Ins. Co. v. Kushch*, 335 So. 3d 743, 753 (Fla. 4th DCA 2022) ("This case adds to the growing list of cases addressing the alleged ambiguity of a proposal for settlement.").

While the rule change may streamline the process for proposals for settlement, it may also limit a defendant's ability to obtain a written release of claims from a plaintiff – an important requirement where significant sums of money are being exchanged.

Parties to Florida lawsuits should continue to utilize proposals for settlement as a negotiating tool – attorney fee shifting can provide great incentive to settle even the most contested lawsuits. But, it should continue to be just one of the tools available to creatively resolve lawsuits. Parties should continue to mediate and arbitrate, enter into settlement and release agreements where appropriate, and offer valuable non-monetary considerations – just not in conjunction with statutory proposals for settlement.

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