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In re Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989)

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NOTES

Rules of Civil Procedure/Pretrial Settlement Offers—THE SUPREME COURT OF FLORIDA INCREASES THE RISKS OF REFUSING REASONABLE SETTLEMENT OFFERS—In re *Rules of Civil Procedure, Rule 1.442 (Offer of Judgment),* 550 So. 2d 442 (Fla. 1989)

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AMONG the many problems facing American courts are overcrowded court calendars, protracted litigation, astronomical legal expenses, and scarce judicial resources.[1] Florida's courts have their share of these problems.[2] Consequently, both the Supreme Court of Florida and the Florida Legislature have attempted to develop various alternatives to the adjudication of disputes.[3] One method both the court and the Legislature have employed to avoid protracted litigation has been to impose various sanctions upon parties who refuse to accept an offer of settlement by the opposing party and choose instead to litigate the dispute.[4]

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1. *See, e.g.*, Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A. J. 848 (July 1980) (protracted cases inflict unreasonable delays and costs on parties awaiting trial); *see also* Burger, *The State of Justice*, 70 A.B.A. J. 62 (Apr. 1984) (Chief Justice Burger lamenting the proliferation of lawsuits filed in state and federal courts and complaining that this inundation of cases places an unmanageable burden on the courts and imperils the judicial system).

2. Staff of Fla. S. Comm. on Judiciary-Civ., CS for SB 866 (1987) Staff Analysis 1 (May 5, 1987) (on file with committee) [hereinafter Staff Analysis].

3. *See, e.g.*, FLA. STAT. § 45.061 (1989); *id.* § 768.79; FLA. R. CIV. P. 1.442.

4. *See, e.g.*, FLA. STAT. § 45.061 (1989) (sanctions, including fees and costs, available from adverse party in civil action where court finds offer of settlement unreasonably rejected); *id.* § 768.79 (sanctions, including fees and costs incurred from date of filing offer, awarded adverse party in civil actions involving personal injury and property damage where final judgment deviates more than 25% from the offer of judgment or demand for settlement); *In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980) (under original Rule 1.442 adverse party had to pay costs incurred by offeror in any civil action after making offer where final judgment not more favorable than offer); FLA. R. CIV. P. 1.442 (1989 amendment) (sanctions, including fees and costs, awarded where offer of judgment unreasonably refused and subsequent judgment disproportionate to that offer by more than 25%).

In 1972, the Supreme Court of Florida adopted Rule 1.442 of the Florida Rules of Civil Procedure (Rule 1.442),[5] which provided for an assessment of post-offer costs against a plaintiff who refused a settlement offer and then failed to recover more than the offer at trial.[6] This was followed by the enactment of section 768.79, Florida Statutes,[7] which provided for an offer of judgment and demand for judgment, and the enactment of section 45.061, Florida Statutes,[8] which provided for an offer of settlement. These statutes, unlike Rule 1.442, authorized a sanction of costs as well as attorneys' fees for either a plaintiff or a defendant who refused to settle and then failed to fare better than the offer at trial.[9]

The latest of these efforts to encourage settlement of lawsuits prior to trial by the imposition of sanctions against those who refuse to settle is the adoption by the supreme court of a new Rule 1.442, Florida Rules of Civil Procedure (New Rule 1.442).[10] New Rule 1.442, which became effective on January 1, 1990, is an attempt to reconcile some of the procedural conflicts among sections 768.79 and 45.061 and former Rule 1.442, thereby eliminating some of the confusion caused by

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5. *In re* Rules of Civil Procedure, 265 So. 2d 21, 40-41 (Fla. 1972). Rule 1.442 was amended by the supreme court in 1980 in *In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980), in order to make some minor procedural changes. In 1989, in *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989), the court adopted a new Rule 1.442. *See infra* text accompanying notes 10-13.

6. The text of Rule 1.442 before the 1989 amendment provided:

> At any time more than ten days before the trial begins a party defending against a claim may serve an offer on the adverse party to allow judgment to be taken against him for the money or property or to the effect specified in his offer with costs then accrued. An offer of judgment shall not be filed unless accepted or until final judgment is rendered. If the adverse party serves written notice that the offer is accepted within ten days after service of it, either party may then file the offer and notice of acceptance with proof of service and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence of it is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the adverse party is not more favorable than the offer, he must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by further proceedings, the party adjudged liable may make an offer before trial if it is served within a reasonable time, not less than ten days, before beginning of the hearing or trial to determine the amount or extent of liability. This rule shall not apply to actions or matters related to dissolution of marriage, alimony, nonsupport or child custody.

In re Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980).

7. Ch. 86-160, § 58, 1986 Fla. Laws 754, (codified at FLA. STAT. § 768.79 (1986)).

8. Ch. 87-249, § 1, 1987 Fla. Laws 1721, (codified at FLA. STAT. § 45.061 (1989)).

9. *See supra* note 4.

10. *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989).

having two statutes and one rule seeking to solve the same problem.[11] New Rule 1.442 is also an attempt to strengthen former Rule 1.442 by incorporating the more stringent sanctions of the two Florida statutes.[12] Specifically, New Rule 1.442 provides for the assessment of costs and attorneys' fees against either party who spurns reasonable settlement offers and then proceeds to trial.[13]

Part I of this Note discusses the various attempts of the Supreme Court of Florida and the Florida Legislature to impose economic sanctions on parties as a means to encourage settlement and avoid the problems associated with protracted litigation in the Florida courts. Part II of this Note discusses the adoption of New Rule 1.442 and its anticipated impact on the settlement process in the Florida courts.

I. HISTORICAL DEVELOPMENT OF ECONOMIC SANCTIONS TO ENCOURAGE SETTLEMENT PRIOR TO TRIAL IN FLORIDA

The Supreme Court of Florida and the Florida Legislature have made various attempts to avoid costly and protracted litigation by encouraging settlement of lawsuits prior to trial.[14] In 1972, the court adopted Rule 1.442 of the Florida Rules of Civil Procedure, entitled "Offer of Judgment."[15] This measure was followed by the enactment of section 768.79, Florida Statutes, entitled "Offer of Judgment and Demand for Judgment," as part of the Tort Reform and Insurance Act of 1986.[16] Section 768.79 differed significantly from Rule 1.442.[17] Making matters even more confusing, the Florida Legislature in 1987 enacted yet another settlement statute, section 45.061, entitled "Offer of Settlement," which differed from both section 768.79 and Rule 1.442.[18] While each of these devices had the same purpose—to impose

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11. *See id.* at 442-43.
12. *Id.* at 443.
13. *Id.* at 444.
14. *See supra* note 3.
15. *In re* Rules of Civil Procedure, 265 So. 2d 21, 40-41 (Fla. 1972).
16. Ch. 86-160, § 58, 1986 Fla. Laws 160 (codified at FLA. STAT. 768.79 (1989)).
17. While former Rule 1.442 was available in all civil actions except those involving dissolutions of marriage, alimony, nonsupport or child custody, section 768.79 was available only in civil actions involving personal injury and property damage, whether sounding in tort or contract, and accruing after July 1, 1986. Additionally, former Rule 1.442 was available only to defendants and provided for a mandatory sanction of costs incurred after making a settlement offer more favorable than the judgment. Section 768.79, on the other hand, was available to both plaintiffs and defendants and provided for a sanction of both costs and attorneys' fees where the final judgment deviated by more than 25% from the offer.
18. Section 45.061 was available in all civil actions except class actions, shareholder derivative suits, dissolutions of marriage, alimony, nonsupport, eminent domain, or child custody. Sanctions under section 45.061 included costs and attorneys' fees where the court found that an offer was unreasonably rejected. An offer was presumed to be unreasonably rejected if it deviated from the final judgment by more than 25%.

sanctions upon a party who spurned settlement and forced the case to proceed to trial—the type of sanctions permitted and the procedures employed for imposing sanctions differed significantly.[19] For causes of actions accruing after July 2, 1987, all or some of these devices could be used in the same action to varying degrees.[20] The result was a great deal of confusion for the Florida practitioner.[21]

The Supreme Court of Florida, in an effort to quell some of this confusion, adopted New Rule 1.442 in 1989.[22] New Rule 1.442 incorporates elements from each of the two statutes to provide for the imposition of uniform sanctions.[23] At the same time, the court eradicated some of the procedural conflicts between the statutes and the rule by having the procedural mandates of New Rule 1.442 supersede the procedural aspects of the statutes.[24]

A. Rule 1.442—The Court's First Attempt to Impose Economic Sanctions to Force Settlement of Disputes Prior to Trial

The first attempt to force settlement of a claim without resort to litigation occurred in 1972, when the Supreme Court of Florida adopted Rule 1.442 of the Florida Rules of Civil Procedure.[25] The purpose of Rule 1.442 was to encourage settlements and to discourage trials wherever possible.[26] Rule 1.442 was designed to "encourage defendants to acquiesce in claims discovered during litigation to be meritorious and to shift to the claimant the financial burden of carrying on litigation beyond the point where an appropriate offer of judgment on the merits is made."[27] As amended in 1980, this rule applied to all

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19. *See supra* text accompanying note 4; *see also In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980) (offer could be served up to 10 days prior to trial and was deemed rejected if not accepted within 10 days); FLA. STAT. § 768.79 (1989) (offer could not be made until 60 days after filing the suit, could not be accepted later than 10 days before trial, and remained open for only 30 days), *id.* § 45.061 (offer could be made at any time more than 60 days after the service of summons and complaint, but not less than 60 days before trial; and offer remained open for only 45 days).

20. *See supra* notes 17-18.

21. *See* Vocelle, *Offers of Judgment, Demands for Judgment and Offers of Settlement: Who's on First?*, 62 FLA. B.J. 10, 14 (Mar. 1988) (although language and time periods under statutes and rule differed, the Florida attorney needed to learn them all because they could be "a trap for the unwary and a sure pitfall" for attorneys who routinely over- or under-value their clients' claims before trial).

22. *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989).

23. *Id.*

24. *Id.*

25. *In re* Rules of Civil Procedure, 265 So. 2d 21, 40-41 (Fla. 1972).

26. Giglio v. Weaner, 503 So. 2d 1380, 1382 (Fla. 2d DCA 1987).

27. Wisconsin Life Ins. Co. v. Sills, 368 So. 2d 920, 922 (Fla. 1st DCA 1979).

civil cases, with the exception of actions related to dissolutions of marriage, alimony, nonsupport, or child custody.[28]

To accomplish its purpose, Rule 1.442 provided that at any time more than ten days prior to trial a defendant could serve an offer to the adverse party that a judgment be taken against the defendant for money or property with costs then accrued.[29] An offer under Rule 1.442 was not filed with the court unless it was accepted or until final judgment was rendered.[30] The adverse party then had ten days after service of the offer to give written notice that it was accepted.[31] An offer not accepted was automatically withdrawn, and evidence of the offer was not admissible in any proceeding except one to determine costs.[32]

Any offer made less than ten days before trial was void and could not be accepted at any time thereafter.[33] Further, under no circumstances did the rule permit a party to accept an offer of judgment once trial had begun.[34] For purposes of Rule 1.442, the selection and swearing in of the jurors marked the "commencement" of trial.[35] Thus, if a timely offer was made but not accepted before the swearing of the jury at trial, it was deemed rejected, not withdrawn.[36]

In the event the judgment finally obtained by the plaintiff was not more favorable than the offer, Rule 1.442 provided that the plaintiff *must* pay the costs incurred after the making of the offer.[37] Application of Rule 1.442 was mandatory, and the court had no discretion to withhold costs once it had been determined that the final judgment was less favorable than the offer.[38] Offers did not survive once they

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28. *In re* Rules of Civil Procedure, 391 So. 2d 165, 174 (Fla. 1980).

29. *Id.* at 173.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* Kennard v. Forcht, 495 So. 2d 924 (Fla. 4th DCA 1986). Plaintiff received an offer on April 1, but did not accept by the time the case went to trial on April 10. On April 11, after the case had gone to the jury, the plaintiff attempted to accept the offer in open court. The court refused to allow the plaintiff to accept the offer, finding it invalid under Rule 1.442 because it was made less than 10 days before trial on April 10. Implicit in the court's finding is that an offer of judgment that does not comply with the time requirements of Rule 1.442 is void and unacceptable at any time thereafter.

34. *Id.*; *see also* Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977, 982 (Fla. 1984) (implicit requirement of Rule 1.442 is that offer be accepted, if at all, prior to trial).

35. Loy v. Leone, 546 So. 2d 1187, 1188 (Fla. 5th DCA 1989). This requirement is unchanged under New Rule 1.422.

36. *Id.* at 1188 n.1.

37. *In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980).

38. Santiesteban v. McGrath, 320 So. 2d 476 (Fla. 3d DCA 1975). The court stated:

> [T]he express language of the rule leaves no doubt that reasonable costs must be awarded to the defendant where[] a proper offer of judgment is made thereunder, the

had been rejected; therefore, Rule 1.442 did not provide for combining two separate and distinct offers.[39] However, where an offer was made and not accepted, subsequent offers were not precluded.[40] "Although successive offers were expressly countenanced by Rule 1.442, 'amended offers' that 'related back' to an original timely offer" were not permitted.[41] For purposes of Rule 1.442, "judgment finally obtained" meant the judgment that disposed of the case and became final after all rights to appellate review had been exhausted.[42]

One problem that occurred early in the application of Rule 1.442 was the effect that an offer had on attorneys' fees.[43] The rule itself made no mention of attorneys' fees, but simply stated that the defendant could allow judgment to be taken against her together with costs then accrued.[44] Attorneys' fees usually became an issue when the plaintiff, as the prevailing party in the litigation, was entitled to attorneys' fees, either by statute or by contract, but the defendant's offer failed to make express reference to such fees.[45]

Where no mention of attorneys' fees was contained in the offer of judgment, a sharp distinction was drawn in the case law between an entitlement to attorneys' fees pursuant to a contract, and the entitlement to attorneys' fees pursuant to a statute.[46] Where a plaintiff's entitlement to attorneys' fees was predicated upon a statute, and where the offer and acceptance did not affirmatively indicate that the amount specified in the offer was to include attorneys' fees, entitle-

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> plaintiff does not accept the offer, and the judgment finally obtained by the plaintiff is not more favorable than the offer. The rule itself is couched in mandatory terms and is designed to induce or influence a party to settle litigation and obviate the necessity of a trial.

Id. at 478.

39. Thornburg v. Pursell, 476 So. 2d 323 (Fla. 2d DCA 1985). This case law would also be applicable to New Rule 1.442.

40. *Id.* at 325.

41. Cheek v. McGowan Elec. Supply Co., 511 So. 2d 977, 981 (Fla. 1987).

42. Cheek v. McGowan Elec. Supply Co., 483 So. 2d 1373, 1380 (Fla. 1st DCA 1985), *aff'd*, 511 So. 2d 977 (Fla. 1987) ("judgment finally obtained" included a judgment rendered on remand after reversal for a new trial, even though the offeror did not renew the previous offer or serve a new offer of judgment after remand). The initial offer of judgment would also remain viable through the appeal and review of the second trial. *Id.*; *see also Thornburg*, 476 So. 2d at 323 (where judgment reversed on appeal it is not proper to allow a cost judgment pending outcome of the matter on remand).

43. *See, e.g.*, cases cited *infra* note 45.

44. *In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980).

45. *See, e.g.*, *Cheek*, 511 So. 2d at 977 (Fla. 1987); Seminole Colony, Inc. v. Stanko, 501 So. 2d 195 (Fla. 4th DCA 1987); George v. Northcraft, 476 So. 2d 758 (Fla. 5th DCA 1985); Encompass, Inc. v. Alford, 444 So. 2d 1085 (Fla. 1st DCA 1984); River Road Constr. Co. v. Ring Power Corp., 454 So. 2d 38 (Fla. 1st DCA 1984).

46. McDermott v. City of Clearwater, 526 So. 2d 121, 123-24 (Fla. 2d DCA 1988); *River Road Constr. Co.*, 454 So. 2d at 38.

ment to attorneys' fees was an issue to be decided by the court independently of the merits.[47] Thus, acceptance of an offer that was silent as to fees did not preclude the plaintiff from pursuing a statutory entitlement to fees.[48] The converse of this proposition was also true.[49] Where the offer was silent as to attorneys' fees, the offeror was permitted to contest attorneys' fees as vigorously after an acceptance of an offer of judgment as in any other case.[50] Where a party rejected an offer of judgment and did not recover an amount exceeding that which was offered, then the party was not entitled to pursue any statutory attorneys' fees because the party was not considered a "prevailing" party.[51]

A party who accepted an offer of judgment was a "prevailing party" for purposes of Rule 1.442 and was entitled to recover attorneys' fees accruing prior to the offer, because the fees were considered to be an unliquidated and integral part of the damages stemming from the suit on the contract.[52] These fees, unlike costs, were not "incidental" to the cause of action.[53] An offer that failed to mention fees specifically or to reserve a right to seek them later precluded any entitlement to post-offer fees.[54] However, where the entitlement to attorneys' fees depended on a contract provision, the courts have held that, if the offer and acceptance were silent as to attorneys' fees, an award of such fees is not allowable.[55] The courts have further held that attorneys' fees predicated on a contract become an element of damages that have to be determined by the jury, as is the case with any other element of damages.[56]

Pre-judgment interest also has been held to be an element of compensatory damages that must be determined by the trier of fact, as any other element of damages.[57] An offer of judgment under Rule 1.442 that contained only a single figure has been held to have included all elements of damages attributable to the plaintiff's cause of action, includ-

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47. *See, e.g., Encompass, Inc.*, 444 So. 2d at 1085; *River Road Constr. Co.*, 454 So. 2d at 38; Wisconsin Life Ins. Co. v. Sills, 368 So. 2d 920 (Fla. 1st DCA 1979).

48. *See, e.g.*, cases cited *supra* note 45.

49. *Id.*

50. *Id.*

51. C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So. 2d 1177 (Fla. 1985).

52. George v. Northcraft, 476 So. 2d 758, 759 (Fla. 5th DCA 1985).

53. *Id.*

54. *Id.*

55. *See, e.g.*, McDermott v. City of Clearwater, 526 So. 2d 121, 123-24 (Fla. 2d DCA 1988); *see also George*, 476 So. 2d at 759; River Road Constr. Co. v. Ring Power Corp., 454 So. 2d 38, 41 (Fla. 1st DCA 1984).

56. *See* cases cited *supra* note 47.

57. Encompass, Inc. v. Alford, 444 So. 2d 1085, 1087-88 (Fla. 1st DCA 1984).

ing the damage resulting from deprivation of the use of money.[58] Therefore, a plaintiff who accepted a single-figure offer of judgment was not entitled to a separate claim for pre-judgment interest.[59]

B. Section 768.79, Florida Statutes—The Legislature Moves Beyond Rule 1.442 and Creates Its Own Sanctions for Failure to Settle a Claim

In 1986, the Florida Legislature, concerned about the fiscal impact of litigation on the court system,[60] enacted section 768.79, Florida Statutes, entitled "Offer of Judgment and Demand for Judgment," as part of the Tort Reform and Insurance Act of 1986.[61] While Rule 1.442 was available in all civil actions, except those related to marriage, alimony, nonsupport, and child custody,[62] section 768.79 applied only to claims for personal injury and property, whether sounding in tort or contract,[63] accruing after July 1, 1986.[64] This statute differed significantly from Rule 1.442 in that it provided for the assessment of attorneys' fees as well as the payment of costs by any party (either the plaintiff or the defendant) who failed to respond to "good faith" efforts by an opponent to settle a case.[65]

Under this statute, when the defendant filed an offer of judgment that the plaintiff did not accept within thirty days, the defendant was automatically entitled to reasonable costs and attorneys' fees, which accrued from the date of the filing of the offer of judgment, if the judgment eventually obtained by the plaintiff was at least twenty-five percent less than the offer made by the defendant.[66] A judgment for the plaintiff, however, was required for costs and attorneys' fees to be awarded;[67] the statute did not provide for costs and attorneys' fees awards where the defendant prevailed in the action.[68] The statute required that the costs and attorneys' fees due the defendant be set off against the plaintiff's award.[69] In the event that the costs and the at-

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58. *Id.*

59. *Id.*

60. *See* Staff Analysis, *supra* note 2, at 2.

61. FLA. STAT. § 768.79 (1989).

62. *In re* Rules of Civil Procedure, 391 So. 2d 165, 174 (Fla. 1980).

63. Smith v. Department of Ins., 507 So. 2d 1080, 1087 (Fla. 1987).

64. Mudano v. St. Paul Fire and Marine Ins. Co., 543 So. 2d 876, 877 (Fla. 4th DCA 1989) (section 768.79 does not apply to offers of judgment or the underlying cause of action that accrued prior to its effective date).

65. FLA. STAT. § 768.79(1)(a)-(2)(a) (1989).

66. *Id.* § 768.79(1)(a).

67. Rabatie v. United States Security Ins. Co., 14 Fla. L.W. 1753 (Fla. 3d DCA 1989) (must be a judgment for the plaintiff as "defined in the statute" in order to award attorneys' fees to the defendant).

68. *Id.*

69. FLA. STAT. § 768.79(1)(a) (1989).

torneys' fees owed to the defendant exceeded the amount of the plaintiff's award, the court had to enter a judgment for the defendant for costs and attorneys' fees less the amount of the award.[70] Thus, plaintiffs could conceivably win favorable verdicts but still receive judgments against them.

Under the "demand-for-settlement" provision of the statute, when a plaintiff filed a demand for settlement that the defendant did not accept within thirty days, the plaintiff was entitled to reasonable costs and attorneys' fees if the judgment finally obtained was at least twenty-five percent greater than the offer.[71]

Under section 768.79, offers and demands could not be made until sixty days after filing of the suit, and could not be accepted later than ten days before trial.[72] Although the statute was couched in mandatory language ("shall" was used throughout), the court retained some discretion in awarding attorneys' fees or costs.[73] Where the court determined that an offer was not in "good faith," the court could disallow an award of costs and fees.[74]

When determining the reasonableness of an award of attorneys' fees, the court was permitted to consider certain enumerated factors and all other relevant criteria.[75] The factors included the merits of the claim, the number and nature of offers made by the parties, the questions of fact and law at issue, whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, whether the matter was a test case presenting questions of far-reaching importance, and the additional cost of delay that the offeror might be expected to incur if the litigation were prolonged.[76]

Procedurally, section 768.79 differed significantly from former Rule 1.442. While an offer of judgment under former Rule 1.442 was available in all civil actions, except for matters pertaining to dissolutions of marriage, alimony, nonsupport, and child custody,[77] offers of judgments and demands for settlement under section 768.79 were available only in claims for personal injury and property damages ac-

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70. *Id.*

71. *Id.*

72. *Id.* § 768.79(1)(b). *But see In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989) (to the extent the procedural aspects of New Rule 1.442 are inconsistent with section 768.79, the rule supersedes the statute).

73. *See* FLA. STAT. § 768.79(2)(a) (1989).

74. *Id.*

75. *Id.* § 768.79(2)(b).

76. *Id.*

77. *In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980).

cruing after July 1, 1986.[78] An offer of judgment was available only to a defendant under former Rule 1.442;[79] however, under section 768.79 either a plaintiff or a defendant could proffer an offer and thus shift the costs of unnecessary litigation to the opponent.[80] An offer of judgment under Rule 1.442 could be served at any time earlier than ten days before trial.[81] An offer of judgment or a demand for settlement under section 768.79, on the other hand, could not be made until sixty days after the filing of the suit,[82] and the offer or demand could not be accepted later than ten days before trial.[83] An offer under section 768.79 was open for thirty days,[84] while an offer under former Rule 1.442 remained open for only ten days.[85] As under former Rule 1.442, an offer of judgment or a demand for settlement under section 768.79 was inadmissible in subsequent litigation, except for a proceeding to enforce an accepted offer or to determine the imposition of sanctions.[86] An offer under former Rule 1.442 was served on the adverse party, but not filed with the court,[87] as opposed to an offer or demand under section 768.79, which was actually filed with the court with a copy to be served on the opposing counsel.[88]

In addition to the procedural differences between Rule 1.442 and section 768.79,[89] the consequences of an offer under Rule 1.442 and an offer or demand under section 768.79 were significantly different.[90] Under Rule 1.442, once the court determined that a final judgment was less than the offer of judgment, the court was required to award

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78. *See supra* text accompanying notes 63-64.

79. *In re* Rules of Civil Procedure, 391 So. 2d at 173-74.

80. FLA. STAT. § 768.79(1)(a) (1989).

81. *See In re* Rules of Civil Procedure, 391 So. 2d at 173-74. *But see* FLA. R. CIV. P. 1.442(b) (an offer of judgment must be served no sooner than 60 days after the offeree has filed its first paper in the action and no later than 60 days prior to trial, except that the offeree may serve a counteroffer within 15 days after service of an offer notwithstanding the time limits of this rule).

82. *See* FLA. STAT. § 768.79(1)(b) (1989). *But see In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989) (the time limitations under section 768.79 have been changed by New Rule 1.442).

83. FLA. STAT. § 768.79(1)(b) (1989).

84. *Id.* § 768.79(1)(a).

85. *In re* Rules of Civil Procedure, 391 So. 2d at 173-74. *But see* FLA. R. CIV. P . 1.442(f)(1) (under New Rule 1.442 an offer stays open for 30 days).

86. FLA. STAT. § 768.79(1)(a) (1989).

87. *In re* Rules of Civil Procedure, 391 So. 2d at 173-74; *see also* FLA. R. CIV. P. 1.442(e) (providing for the same requirements for service and filing as former Rule 1.442).

88. FLA. STAT. § 768.79(1)(a) (1989).

89. *See supra* text accompanying notes 77-88.

90. *See supra* note 4 and accompanying text.

costs incurred after the making of the offer to the defendant.[91] The application of Rule 1.442 was mandatory at that point: the court had no discretion to override it.[92] However, under section 768.79, while the statute itself contains the mandatory command "shall," section (2)(a) permitted the court to use its discretion to determine whether an offer was made in "good faith."[93] Where an offer was not made in "good faith," the court could disallow an award of costs and attorneys' fees.[94]

C. Section 45.061, Florida Statutes—The Legislature Enacts a Second Statute Providing Sanctions for Failure to Settle a Claim

In 1987, the Legislature further expanded the offer of judgment concept embodied in section 768.79 and Rule 1.442 by enacting section 45.061, Florida Statutes, entitled "Offer of Settlement."[95] This statute was designed to "encourage settlement between parties."[96] Noting that neither the Florida Statutes nor the Florida Rules of Civil Procedure provided for an offer of settlement, the Legislature enacted section 45.061 to encourage out-of-court settlements early in the litigation process.[97] The Legislature stated that, by encouraging out-of-court settlements, it hoped to lower litigation costs to the public and reduce the fiscal impact of litigation on the court system.[98] This statute provided sanctions for the unreasonable rejection of an offer of settlement given by either a plaintiff or a defendant.[99]

An offer under this section could not be made until sixty days after the service of the summons and complaint, but had to be made at least sixty days before trial. Counteroffers could be made up to forty-five days before trial.[100] This was significantly different from the time limit for an offer under Rule 1.442, which permitted service at any time up to ten days before trial,[101] and from the time limit for an offer under section 768.79, which could not be filed with the court until sixty days after filing suit.[102] The offer of settlement under section

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91. *See In re* Rules of Civil Procedure, 391 So. 2d at 173-74.
92. *Id.*
93. FLA. STAT. § 768.79(2)(a) (1989).
94. *Id.*
95. *Id.* § 45.061 (1989).
96. *See* Staff Analysis, *supra* note 2, at 1.
97. *Id.* at 2.
98. *Id.*
99. FLA. STAT. § 45.061(1) (1989).
100. *Id.*; *see also In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989) (procedural details of section 45.061 inconsistent with New Rule 1.442 are now superseded by the rule).
101. *In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980).
102. FLA. STAT. § 768.79(1)(b) (Supp. 1986).

45.061 was not filed with the court, but was served by any party on an adverse party.[103]

An offer of settlement under section 45.061 remained open for forty-five days, unless withdrawn earlier by a written withdrawal served on the offeree prior to acceptance. An offer not accepted within forty-five days was automatically deemed rejected.[104] Thus, section 45.061 provided a longer period for a party to accept an offer than did Rule 1.442, which allowed the plaintiff only ten days to accept,[105] or section 768.79, which allowed a party only thirty days to accept.[106]

Section 45.061, as well as section 768.79 with its assessment of "good faith," provides that the court may determine if an offer was unreasonably rejected.[107] Within thirty days after the entry of judgment, the party who made the offer may assert that it was unreasonably rejected.[108] If the court agrees, it may impose an appropriate sanction upon the offeree.[109] In making this determination, the court may consider all of the relevant circumstances at the time of the rejection,[110] including whether the offeror unreasonably refused to provide information that was necessary to evaluate the reasonableness of the offer[111] and whether the suit is a "test case" presenting questions that would affect non-parties.[112] An offer is presumed to have been unreasonably rejected by a defendant if the final judgment is at least twenty-five percent greater than the plaintiff's offer, or unreasonably rejected by a plaintiff if the final judgment is at least twenty-five percent less than the defendant's offer.[113] As the twenty-five percent deviations raise only presumptions, the court could, in an appropriate case, determine that an offer was unreasonably rejected even though it was within twenty-five percent of the final judgment, or that the offer was reasonably rejected although it deviated more than twenty-five

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103. *Id.* § 45.061(1) (1989).

104. *Id. But see In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d at 443 (procedural aspects of section 45.061, to the extent they are inconsistent with New Rule 1.442, are superseded by the rule).

105. *See In re* Rules of Civil Procedure, 391 So. 2d at 173-74.

106. FLA. STAT. § 768.79(1)(a) (1989).

107. *See id.* § 768.79(2)(a) (court could, in its discretion, determine that an offer was not made in "good faith" and disallow sanctions); *id.* § 45.061(2) (if court determined that an offer was unreasonably rejected, "resulting in unnecessary delay and needless increase in the cost of litigation," it could impose an appropriate sanction upon the offeree).

108. *Id.* § 45.061(2).

109. *Id.*

110. *Id.*

111. *Id.* § 45.061(2)(a).

112. *Id.* § 45.061(2)(b).

113. *Id.*

percent from the final judgment.[114] The amount of the final judgment is required to include the total amount of money damages plus court costs and expenses incurred prior to making the offer.[115]

Sanctions that may be imposed under section 45.061(3)(a) are the amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses incurred after the making of an offer.[116] The sanctions could also include interest that could have been earned at the prevailing statutory rate.[117] These sanctions may be imposed notwithstanding limitations on recovery by operation of a contract or Florida law.[118] If a sanction is imposed against a plaintiff, it is set off against any award to the plaintiff.[119] If the sanction is greater than the award, judgment is entered for the defendant in the amount of the excess.[120]

While former Rule 1.442 was available in all civil matters except those relating to dissolution of marriage, alimony, nonsupport, or child custody,[121] and section 768.79 was available in civil actions involving personal injury and property damage accruing after July 1, 1986,[122] section 45.061 was available in all civil actions accruing after July 2, 1987,[123] with the exception of class actions, family-law matters, and shareholders' derivative suits.[124]

II. Offers of Judgment Under New Rule 1.442

The enactment of sections 768.79 and 45.061 and the relationship these sections had to former Rule 1.442 created much confusion for Florida practitioners.[125] In response to this confusion, the Supreme Court of Florida requested the Civil Procedure Rules Committee (Committee) in 1988 to examine any possible conflict between sections 768.79 and 45.061, Florida Statutes, and former Rule 1.442.[126] The

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114. *See* Staff Analysis, *supra* note 2, at 1.

115. *Id.* at 2.

116. Fla. Stat. § 45.061(3)(a) (1989).

117. *Id.* § 45.061(3)(b).

118. *Id.* § 45.061(5).

119. *Id.* § 45.061(3).

120. *Id.*

121. *See In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980); *see also* Fla. R. Civ. P. 1.442 (New Rule 1.442 is available in all civil actions).

122. *See supra* text accompanying notes 64-65.

123. *See* Richardson v. Honda Motor Co., 686 F. Supp. 303 (M.D. Fla. 1988) (portion of section 45.061 requiring payment of attorneys' fees is substantive in nature and can only be applied prospectively).

124. *See* Fla. Stat. § 45.061(4) (1989).

125. *See generally* Vocelle, *supra* note 21.

126. *See In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989).

Committee, upon the completion of its investigation, petitioned for the adoption of a New Rule 1.442.[127]

A. *New Rule 1.442 Reconciles the Procedural Conflicts Among Sections 768.79 and 45.061 and Former Rule 1.442*

In In re *Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, the court adopted New Rule 1.442, to take effect on January 1, 1990.[128] In New Rule 1.442, the court incorporated selected provisions from sections 768.79 and 45.061 and created a rule that imposes sanctions based on both costs and attorneys' fees.[129] The court strengthened the rule to permit sanctions whenever an offer of judgment is unreasonably refused and the subsequent judgment is disproportionate to that offer by more than twenty-five percent.[130]

The court declined to address the constitutionality of the purely substantive aspects of sections 768.79 and 45.061 due to the nonadversarial nature of the petition for a new rule.[131] However, the court did agree with the Committee's assessment that the procedural details of sections 768.79 and 45.061 impinged upon the court's duty to adopt uniform rules of procedure to govern the courts of Florida.[132] Thus, the court held that to the extent the procedural aspects of New Rule 1.442 conflict with sections 768.79 and 45.061, the rule shall supersede

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127. *Id.* The rule change proposed by the Committee (by a vote of 20 to 4) called for:

> a sanction equal to: (a) 15% of an unaccepted *offer to pay* any time the jury verdict is less than 75% of the offer; and (b) 15% of an unaccepted *offer to accept* any time the jury verdict is more than 125% of the offer. The Committee argue[d] that the present sanction, consisting of costs, [was] inadequate to deter unnecessary litigation; and it urge[d] [the] [c]ourt to declare [sections 768.79 and 45.061] unconstitutional . . . . The four members of the minority believe[d] the sanction should consist entirely of costs.

Id. at 442 (emphasis in original).

128. *Id.* at 443.

129. *Id.* at 444.

130. *Id.*

131. *Id.* Both the Committee and The Board of Governors of The Florida Bar urged the supreme court to declare sections 768.79 and 45.601 unconstitutional. *Id.* What remains unclear is the effect that the adoption of New Rule 1.442 has on sections 768.79 and 45.061. While the supreme court clarified that the rule will supersede the statutes to the extent that they impinge upon the court's duty to adopt uniform rules of procedure, the court declined to address the constitutionality of the "purely substantive" aspects of sections 768.79 and 45.061. The court did not clarify which sections of the statutes are procedural and which are purely substantive. The court referred to time limitations as an example of a procedural requirement superseded by the rule, but did not specify what other provisions within the statutes are to be considered procedural and governed by the rule and what portions are purely substantive and not subject to conformity with the rule.

132. *Id.* The Florida Constitution provides that it is the duty of the Supreme Court of Florida to adopt rules of practice and procedure in state courts. FLA. CONST. art. V, § 2(a).

the statutes.[133] Under New Rule 1.442, an offer of judgment must be served no sooner than sixty days after the offeree has filed its first paper in the action and no later than sixty days prior to trial, except that the offeree may serve a counteroffer within fifteen days after service of an offer.[134] An offer of judgment may be made by either the defendant or the plaintiff and shall be served on the opposing party.[135] It is not necessary to file the offer with the court unless it is accepted, or unless it is necessary to enforce the provisions of New Rule 1.442.[136] A party receiving an offer has thirty days after service of the offer to file a written acceptance, upon which the court enters judgment.[137] An offer may be withdrawn in writing before a written acceptance is served on the offeree.[138]

Upon motion made within thirty days after the judgment, the court may impose sanctions equal to reasonable attorneys' fees and all reasonable costs of the litigation accruing from the date of the offer.[139] A party may be sanctioned if the court finds that an offer was unreasonably rejected, resulting in unreasonable delay and needless increase in the costs of litigation, and that the offer to pay was refused and the damages awarded in favor of the plaintiff were less than seventy-five percent of the offer.[140] If an offer to accept payment was unreasonably refused and the damages awarded in favor of the plaintiff and against the defendant are more than 125% of the offer, the court may impose sanctions against the defendant.[141]

In determining entitlement to and the amount of a sanction, the court may consider any relevant factor, including: (1) the merits of the claim; (2) the number, nature, and quality of the offers; (3) the closeness of questions of law and fact; (4) the likelihood that the delay would have resulted in unreasonable cost or lost time when the offer was rejected; (5) whether a party seeking sanctions has behaved unreasonably; (6) whether the proceeding was equitable in nature; (7) whether "good faith" in making the offer was lacking; and (8) whether the judgment was grossly disproportionate to the offer.[142] New Rule 1.442 is available in any civil action, except class actions,

133. *See In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989).
134. FLA. R. CIV. P. 1.442(b).
135. *Id.* 1.442(c)(1)-(2).
136. *Id.* 1.442(e).
137. *Id.* 1.442(f)(1).
138. *Id.* 1.442(g).
139. *Id.* 1.442(h)(1).
140. *Id.*
141. *Id.*
142. *Id.* 1.442(h)(2).

shareholder derivative suits, or actions involving dissolutions of marriage, alimony, nonsupport, child custody, and eminent domain.[143]

B. *The Anticipated Impact of New Rule 1.442*

New Rule 1.442 is a substantial improvement over former Rule 1.442 and sections 768.79 and 45.061. By providing uniform procedural details, New Rule 1.442 lessens the confusion that stems from having one rule and two statutes.[144] The practitioner no longer needs to worry about learning all of the language and different time periods, but instead has one rule that applies in almost every civil case.[145] Further, by incorporating some of the provisions from sections 768.79 and 45.061, New Rule 1.442 corrects some of the problems that subjected former Rule 1.442 to criticism.[146]

1. *New Rule 1.442 Adopts New Time Limits*

Under former Rule 1.442, a plaintiff could be served with an offer at any time up to ten days prior to trial.[147] Once served, the plaintiff had only ten days to decide whether to accept or reject the offer.[148] Section 768.79, on the other hand, provided that an offer could not be filed with the court until sixty days after filing suit.[149] The offeree then

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143. *Id.* 1.442(h)(4).

144. *See In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989) (to the extent the procedural aspects of New Rule 1.442 are inconsistent with sections 768.79 and 45.061, the rule shall supersede the statute).

145. *See id.*

146. Rule 1.442, as originally enacted, was modeled after Rule 68 of the Federal Rules of Civil Procedure. At that time, the Florida Bar Rules Committee, based on information about Rule 68, commented that it felt Rule 1.442 would not be used often. *See In re* Rules of Civil Procedure, 265 So. 2d 21, 41 (Fla. 1972) (committee note). For a discussion of the problems associated with the use of Rule 68, see generally Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts*, 102 F.R.D. 407, 432-37 (1984) [hereinafter *1984 Proposal*]. In 1984, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed amendments to Rule 68. *See id.* At that time, the Committee's evaluation of Rule 68 revealed that Rule 68 had been ineffective as a means of achieving its goal—settlement of disputes without resort to litigation. *Id.* at 433. The Committee stated that the principal reasons for the rule's past failure was that "costs" were too small to motivate parties to settle and that Rule 68 was a "one-way street" available only to those defending against claims and not to claimants. *Id.* at 433-34. The Committee also stated that the 10-day time limit for accepting offers was too short to enable offerees to act upon offers made to them. *Id.* at 434-35.

147. *In re* Rules of Civil Procedure, 391 So. 2d 165, 173 (Fla. 1980).

148. *Id.*

149. FLA. STAT. § 768.79(1)(b) (1989).

had thirty days in which to accept, provided that acceptance occurred no later than ten days before going to trial.[150] Section 45.061 provided that the offer could be served at any time more than sixty days after the service of the summons and complaint but not less than sixty days before trial (forty-five days if it was a counter-offer).[151] The offer remained open for forty-five days.[152]

New Rule 1.442, by adopting time limits more in line with the time limits provided for in sections 768.79 and 45.061, eliminates some of the problems associated with the time limits in former Rule 1.442.[153] Under New Rule 1.442, an offer can be served no sooner that sixty days after the offeree files its first paper in the action and no later than sixty days prior to trial.[154] An offeree then has thirty days to accept or reject the offer.[155] These new time periods solve some of the problems that existed under former Rule 1.442: they prohibit litigants from ambushing each other with premature settlement offers, they prohibit offers on the eve of trial, and they provide parties with adequate time to evaluate any offers that are proffered.[156]

Allowing the offer to be served no sooner than sixty days after the offeree files its first paper provides protection against premature offers that a party is unable to investigate and evaluate properly.[157] This

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150. *Id.* § 768.79(1)(a)-(b).

151. *Id.* § 45.061(1).

152. *Id.*

153. *See supra* text accompanying note 148. For a general discussion about the problems associated with Rule 68, see Simon, *The Riddle of Rule 68,* 54 GEO. WASH. L. REV. 1 (1985). Because Rule 1.442, as originally enacted, was exactly the same as Rule 68, an analysis of the problems associated with Rule 68 is also applicable to Rule 1.442 prior to its 1989 amendment.

154. FLA. R. CIV. P. 1.442(b).

155. *Id.* 1.442(f)(1).

156. In 1984, the Advisory Committee on Civil Rules circulated a proposal to amend Rule 68 of the Federal Rules of Civil Procedure. The 1984 proposal prohibited Rule 68 offers for 60 days after service of the complaint, required parties to make Rule 68 offers no later than 90 days before trial, and allowed 60 days for an offeree to decide whether to accept or reject an offer. The proposed changes in the time limitations reflected the Committee's view that parties should be encouraged to consider settlement early in the litigation after enough discovery had been taken for a party to appraise the strengths and weaknesses of a claim or defense. At the same time, the Committee, by requiring a party to wait at least 60 days after the service of the summons and complaint, sought to guard against premature offers that a defending party could not evaluate properly. By changing the time limit for accepting an offer from 10 days to 60 days, the Committee sought to provide the offeree with enough time to act upon the offer. *See 1984 Proposal, supra* note 146, at 434-35; *see also* Simon, *supra* note 153, at 28-31 (discussing the need to revise Rule 68 time limitations). Because Rule 1.442, prior to its 1989 amendment, had the same time limitations as Rule 68, any criticism of Rule 68 time limitations is applicable to former Rule 1.442 as well.

157. *See* Simon, *supra* note 153, at 28-29. A discussion of Rule 68 suggested that one of the major procedural objectives in redesigning Rule 68 should be to adjust the time limits. Simon maintained that an initial prohibition period of 60 days was suitable to meet Rule 68 objectives if

time limit allows enough time for discovery so that the offeree can assess the strengths and weaknesses of the case and the reasonableness of the offer.[158] The offeree will not be pressured to settle on the basis of inadequate information but instead will be given the opportunity to make an informed decision when responding to an offer.[159] By providing for a cut-off period for acceptance of the offer no later than sixty days prior to trial, New Rule 1.442 provides parties with an incentive to settle before the most intensive preparations for trial have begun and the heavier expenses of litigation are incurred.[160]

Under former Rule 1.442, the ten-day response time was too short to enable many offerees to act upon offers, particularly when authority from others was needed to act upon the offer, such as in the case of bureaucratic or corporate parties.[161] The ten-day response time was also too short to permit the offeree to obtain needed information through discovery to appraise the reasonableness of the offer.[162] Under New Rule 1.442, offers are prohibited until sixty days after the filing of a paper,[163] and the party then receives an additional thirty days to accept the offer.[164] Thus, New Rule 1.442 provides for at least ninety days to investigate and evaluate the offer. This time limit provides sufficient time to obtain permission to accept the offer, if necessary, but does not unduly stretch out negotiations.[165]

2. *New Rule 1.442 is Available to Plaintiffs as Well as Defendants*

One defect of former Rule 1.442 that caused its failure to encourage settlement was that it was a "one-way street" available only to those

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the courts were given discretion to adjust the 60-day restriction upon a showing of good cause. Simon also proposed that Rule 68 should be amended to change the 10-day response period to 30 days.

158. *See generally 1984 Proposal*, *supra* note 146, at 434-35.

159. *See generally* Marek v. Chesney, 473 U.S. 1, 13-51 (1985) (Brennan, J., dissenting). Justice Brennan in his dissenting opinion criticized Rule 68, which allowed defendants to make a settlement offer any time after the complaint was filed and which permitted the plaintiff only 10 days to accept or reject the offer. *Id.* at 31. Justice Brennan stated that defendants were encouraged "to make 'low-ball' offers immediately after suit [was] filed and before the plaintiffs [were] able to obtain the information they [were] entitled to by way of discovery to assess the strength of their claims and the reasonableness of the offers." *Id.* The result was that severe pressure was put "on plaintiffs to settle on the basis of inadequate information, in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability." *Id.*

160. *See generally* Simon, *supra* note 153, at 31.

161. *See generally 1984 Proposal*, *supra* note 146, at 434-35.

162. *Id.* at 435.

163. FLA. R. CIV. P. 1.442(b).

164. *Id.* 1.442(f)(1).

165. *See generally* Simon, *supra* note 153, at 25.

defending claims, not to claimants.[166] On the other hand, both sections 768.79 and 45.061 were available to both claimants and defendants.[167]

New Rule 1.442 seeks to remedy this problem by allowing Rule 1.442's sanctioning powers to be invoked against either claimants or defendants.[168] Thus, no longer can the timing and the terms of Rule 1.442 be controlled totally by the defendant.[169] If a defendant makes an offer that the plaintiff feels is unreasonable, the plaintiff is no longer compelled to accept the offer or run the risk of facing sanctions under Rule 1.442. Under New Rule 1.442, the plaintiff is free to make another offer or counter-offer and thus place the risks of failing to settle back on the defendant.[170]

3. *New Rule 1.442 Imposes a Sanction Based on Costs and Attorneys' Fees*

Another defect in former Rule 1.442 was that the imposition of post-offer costs was too slight a sanction to motivate parties to settle.[171] The Legislature, on the other hand, when enacting sections 768.79 and 45.061, imposed a sanction based on both costs and attorneys' fees.[172]

When amending Rule 1.442, the Committee recommended to the Supreme Court of Florida a sanction equal to fifteen percent of an unaccepted offer.[173] The court rejected the Committee's proposal, stating that "[w]e believe it is wiser policy to have a sanction based on costs and attorneys fees."[174] The court noted that costs and attorneys' fees is the sanction imposed by both sections 768.79 and 45.061 and

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166. *See generally 1984 Proposal*, *supra* note 146, at 433-34 (discussing the principal reasons Rule 68 has been considered largely ineffective as a means of achieving its goal). Because Rule 1.442 was modeled after Rule 68, this discussion is applicable to Rule 1.442 as well. *See also In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989) (the Board of Governors of The Florida Bar urged the supreme court to extend coverage of Rule 1.442 to all parties).

167. FLA. STAT. § 768.79(1)(a) (1989); *id.* § 45.061(1).

168. FLA. R. CIV. P. 1.442(h)(1).

169. *See generally* Simon, *supra* note 153, at 8-9.

170. FLA. R. CIV. P. 1.442(c)(1)-(d).

171. *See generally 1984 Proposal*, *supra* note 146, at 433-34. One of the principal reasons for Rule 68's failure is that costs, except in those rare instances in which they are defined to include attorneys' fees, are too small a factor to motivate parties to use the rule.

172. FLA. STAT. § 768.79(1)(a) (1989); *id.* § 45.061(3)(a).

173. *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442 (Fla. 1989).

174. *Id.*

that the legislative determination on this point was persuasive.[175] Thus, under New Rule 1.442 the sanction that can be invoked by either party goes beyond costs; it adds reasonable attorneys' fees accruing from the date the offer is made.[176] The threat of both costs and attorneys' fees should now be sufficient to promote settlements through making or accepting reasonable offers.[177]

4. *New Rule 1.442 Adds a "Reasonableness" Standard for Imposing Sanctions*

New Rule 1.442 reduces the rigidity of former Rule 1.442, which required the court to impose a mandatory sanction of costs if the judgment eventually obtained by the offeree was not more favorable than the rejected offer.[178] Although section 768.79 contains the mandatory command "shall" throughout, the Legislature provided the court with some discretion to disallow an award of costs and attorneys' fees if the offer was made in "bad faith."[179] Under section 45.061, sanctions could be awarded only if the court found that the adverse party rejected an offer unreasonably.[180] An offer under section 45.061 was presumed to have been unreasonably rejected only if the final judgment deviated from the offer by more than twenty-five percent.[181] A court was vested with some discretion to disallow a sanction under section 45.061 because a party was allowed to rebut the presumption that anything more than a twenty-five percent deviation was unreasonable.[182]

New Rule 1.442 incorporates provisions from sections 768.79 and 45.061[183] and replaces the existing mathematical formula of former Rule 1.442 with a more flexible standard, allowing the courts discretion to reduce or eliminate sanctions if sanctions are deemed inappropriate under the facts of the case.[184] New Rule 1.442 borrows the

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175. *Id.* The court also stated that, in modifying the rule, it had incorporated provisions from sections 768.79 and 45.061, as well as suggestions from the Civil Procedure Rules Committee, the Board of Governors of the Florida Bar, and a number of commentators who had filed letters or responses on the proposal. *Id.*

176. FLA. R. CIV. P. 1.442(h)(1).

177. *See supra* text accompanying note 173.

178. *In re* Rules of Civil Procedure, 391 So. 2d 165, 173-74 (Fla. 1980).

179. FLA. STAT. § 768.79(2)(a) (1989).

180. *Id.* § 45.061(2).

181. *Id.*

182. Staff Analysis, *supra* note 2, at 2.

183. *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d 442, 443 (Fla. 1989).

184. FLA. R. CIV. P. 1.442(h) (as amended by *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d at 442).

reasonableness standard from section 45.061.[185] New Rule 1.442 provides that a court *may* impose sanctions if the party to be sanctioned unreasonably rejects an offer—resulting in unreasonable delay and needless increase in the cost of litigation—and if the judgment deviates from the offer by at least twenty-five percent.[186]

In amending Rule 1.442, the supreme court added extensive new language defining what constitutes an unreasonable refusal and clarifying the extent of the trial court's discretion in deciding this issue.[187] When determining the entitlement to and the amount of a sanction, Rule 1.442 permits the courts to consider any relevant factor but enumerates ten factors the court may specifically consider appropriate.[188] One of these factors is whether a party refused during discovery to furnish sufficient information for the other side to assess the value of the offer.[189] The courts may also consider whether the case is a test case that would present questions of such far-reaching importance that non-parties to the suit would be affected.[190] Litigation that would be in the best interests of the public, for example, would not be chilled. Another factor listed under New Rule 1.442 permits the court to determine reasonableness according to when the offer was made, instead of at the time of judgment when the reasonableness of the offer could possibly be cast in a new light because of events at trial.[191] Finally, the rule vests the courts with the discretion to look at the "good faith" underlying the offer and allows the courts to forego sanctions where "bad faith" or sham offers are made, not to settle the case, but simply to shift the costs and possibly to receive attorneys' fees where none are warranted.[192]

III. New Rule 1.442 May Deny Certain Litigants Access to the Courts

New Rule 1.442, with its increased sanctions of costs plus attorneys' fees and its added availability to either party, has the potential to fulfill its goals of encouraging settlement and avoiding protracted litigation. However, by seeking to solve one set of problems—those

185. *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d at 443.
186. Fla. R. Civ. P. 1.442(h).
187. *In re* Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So. 2d at 443.
188. Fla. R. Civ. P. 1.442(h)(2).
189. *Id.*
190. *Id.*
191. *See id.*
192. *See id.* 1.442(h)(2)(i).

associated with overcrowded courts and protracted litigation—New Rule 1.442 creates an even greater problem. By encouraging greater use of court-imposed sanctions, New Rule 1.442 threatens to impair, for many litigants, a fundamental right guaranteed by the Florida Constitution—the right of equal access to the courts—because Rule 1.442 is now stacked in favor of the wealthier litigant.[193]

The Florida Constitution provides: "The courts shall be open to every person for redress of injury, and justice shall be administered without sale, denial or delay."[194] The added risk of potential liability for an adverse party's costs and attorneys' fees, however, creates an element of risk in litigation that poor and middle-class litigants may be unable to bear.[195] While it is true that, under New Rule 1.442, wealthy or corporate defendants will face the same risks as the poorer litigants if they choose to reject a settlement offer, the reality is that litigants of modest means stand to lose the most under the new rule.[196] Wealthy litigants have a greater ability to pay an opponent's attorneys' fees, and corporate litigants have the option of transferring a large loss to their customers if forced to pay an opponent's attorneys' fees.[197] A bad decision during the settlement process would not necessarily cause financial ruin for the wealthy or corporate litigant.

The poorer litigants, facing the possibility of a severe financial setback, are left in an inferior bargaining position when weighing an offer from a wealthier opponent.[198] The greatly enhanced risks associated with rejecting an offer may lead the litigant who is of poor or modest means to accept an offer that is pathetically low and woe-

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193. *See* Note, *The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions*, 70 IOWA L. REV. 237, 256-57 & n.182 (1984) (fee-shifting changes in Rule 68 would adversely impact on poorer litigants); *see also* Branham, *Offers of Judgment and Rule 68: A Response to the Chief Justice*, 18 J. MARSHALL L. REV. 341, 359 (1985) (poor and middle class litigants are disadvantaged by sanctions that shift attorneys' fees).

194. FLA. CONST. art I, § 21.

195. *See id.*

196. Poorer litigants do not have the personal resources to absorb the cost of an opponent's legal fees. In many cases, poorer litigants could not even afford to pay for their own attorneys and would not even be in the courtroom but for the contingency fee system. If a poorer defendant misjudges the likelihood of prevailing on the claim or miscalculates the amount of the recovery, Rule 1.442 sanctions could cause financial disaster. The wealthier litigant, however, could absorb the loss without facing personal financial ruin, and the corporate defendant could write off the loss as a part of doing business. *See* Note, *supra* note 193, at 257 & n.182.

197. *See id.* at 257.

198. A private settlement is an adequate measure of a dispute only where the parties are in a roughly equal bargaining position. For example, in many personal injury cases the plaintiff is a working-class person with limited personal resources, while the defendant is backed by the resources of a large insurance company. It is not reasonable to assume that the risk of incurring sizeable legal fees would affect these two individuals equally. *See generally* Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719, 741 (1984).

fully inadequate when compared to the merits of that person's claim.[199] Claims that should, and would be litigated but for the fear of court-imposed sanctions, may be settled for a fraction of their real worth.

Even though one of the factors the court may consider in deciding whether to impose sanctions is whether the case is a test case, New Rule 1.442 may also deter litigation where a claim, although based on good faith, lies on the cutting edge of the law.[200] Litigants may be reluctant to pursue these claims when faced with the possibility of the fee-shifting provisions of New Rule 1.442.[201]

Historically, contingent fee litigation has opened the courts to the poorer litigants and to the litigants who have claims on the cutting edge of the law.[202] The contingent fee system has addressed the problems of these persons by permitting them to pursue their claims with the security that they are not at financial risk.[203] If New Rule 1.442 actually does result in the increased use of fee-shifting sanctions, it could imperil the future of contingent fee litigation and slam the courthouse door shut for parties who depend on the contingent fee arrangement to vindicate their claims.[204] Lawyers could no longer advise claimants that attorneys' fees would be charged only if they won. Instead, lawyers would need to warn claimants that they might be liable for any post-offer attorneys' fees incurred by the adverse party if they failed to win at trial.[205] As a result, claimants who can afford

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199. *See supra* text accompanying note 196.

200. *See generally* Note, *supra* note 193, at 257. *See also infra* notes 207-10 & accompanying text.

201. Note, *supra* note 193, at 257.

202. *See generally id.* at 257-58. *See also* Trubek, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 111 (1983) (71% of plaintiffs in sample used contingent fee arrangements); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 652 (1974) (contingent fee arrangement "felt to give the poor man the keys to the courthouse").

203. *See supra* note 196.

204. *See generally* Note, *supra* note 193, at 257-58 (1984) (proposed amendment to Rule 68, which provided for sanctions of costs and attorneys' fees, criticized as a threat to contingent fee litigation).

205. The Florida Bar Rules of Professional Conduct provide that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." FLA. BAR RULE OF PROF. CONDUCT 4-1.4(b). Additionally, Rule 4-1.5—*Statement of Client's Rights*—provides:

> Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights . . . .
>
> . . .
>
> (7) You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money which you might have to pay to your lawyer for costs and liability you might have for attorney's fees to the other side.

Id. 4-1.5.

lawyers only on a contingent fee basis may be denied effective access to the courts.[206]

While it is true that the New Rule 1.442 provides the courts with sufficient discretion to refuse to impose sanctions or to modify sanctions if such action is needed to prevent unjust results,[207] judicial discretion may be of limited comfort to poor or middle-class litigants or to those with novel claims; these litigants may still be unwilling to take the chance of incurring substantial financial setbacks.[208] These litigants will have no assurance, nor even a reasonable gauge of the likelihood, that the judge will decide to exercise the discretion allowed by the rule. Thus, these litigants may fear that the mere presence of such an "escape clause" is not sufficient to justify the risks.[209] A good-faith, but inaccurate prediction could lead to a crushing financial burden for these persons, and this possibility could lead them to conclude that such a risk is simply too much to bear.[210]

The sanctions provided by New Rule 1.442 may deny access to the courts to still another group of litigants: those who simply want their day in court.[211] These litigants have a variety of motives for seeking to appear in court, many of which have nothing to do with money.[212]

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206. *See supra* text accompanying note 204.

207. *See* FLA. R. CIV. P. 1.442(h).

208. *See supra* note 196.

209. Rule 1.442(h)(i) provides:

> [T]he court may impose sanctions equal to reasonable attorneys fees and all reasonable costs of the litigation accruing from the date the relevant offer of judgment was made whenever the court finds both of the following:
> (a) that the party to be sanctioned has unreasonably rejected or refused the offer, resulting in unreasonable delay and needless increase in the cost of litigation; and
> (b) that either
> (i) an offer to pay was refused and the damages awarded in favor of the offeree and against the offeror are less than 75 percent of the offer; or
> (ii) an offer to accept payment was refused and the damages awarded in favor of the offeror and against the offeree are more than 125 percent of the offer.

FLA. R. CIV. P. 1.442(h)(i). The rule goes on to delineate 10 factors the court may consider when determining entitlement to and the amount of the sanction. The problem is that, even with these guidelines, it is still impossible for the litigant to determine exactly when the judge will exercise that discretion and refuse to award fees and costs. For some litigants, any chance of sanctions may be more than they can bear.

210. In a personal injury case, for example, a major component of the damages may be pain and suffering and punitive damages—intangibles that are unpredictable and vary over an enormous range. A claimant could "reasonably" expect to receive a large sum for these damages and then have the jury return a nominal amount or nothing at all for these types of damages.

211. For a discussion of the "process values" associated with litigation, see Simon, *supra* note 153, at 62-63. "Process values" are derived from the theory that the process of litigation serves some social values in every case. These values include such things as the desire for a day in court, the need for finality, a desire for public vindication, and the general psychological value that comes from knowing that a trial is available to everyone.

212. *Id.*

Some of these litigants seek vindication of personal feelings, while others may be motivated by the desire to protect their public reputations.[213] Others, whose only motivation may be to protect their wallets, can reach this goal only by litigating the case.[214] These people may be concerned about the possibility of future suits and may want to send a message to would-be litigants that they should not file suit unless they intend to go to trial, because settlement dollars will not be forthcoming.[215] These persons may desire to complete the process of litigation even where victory is unlikely, particularly if victory in court is the only way to achieve their goals.[216] The Florida Constitution effectively guarantees to every person equal access to the courts; no one should be penalized for exercising this right by refusing to settle and proceeding to trial.

IV. CONCLUSION

The adoption of New Rule 1.442 signals a commitment by the Supreme Court of Florida to use court-imposed sanctions as a tool to limit litigation costs and promote early dispute resolution without resort to the courts. New Rule 1.442 eliminates much of the confusion associated with having two statutes and one rule seeking to achieve the same goals. No longer will Florida attorneys be forced to struggle with the intricacies of two statutes and one rule when deciding whether to settle or litigate a dispute. With the adoption of New Rule 1.442, the Florida practitioner has a single rule that applies in almost every civil case.

By incorporating the more stringent sanction provisions of sections 768.79 and 45.061 into New Rule 1.442, the court has significantly increased the risks involved in refusing a reasonable settlement offer. A party who unreasonably refuses to settle a dispute and proceeds to litigation may now face paying both post-offer costs and attorneys' fees if the final judgment deviates from the offer by more than twenty-five percent. The threat of New Rule 1.442 sanctions is sufficiently severe to motivate parties to seriously evaluate the merits of their cases before spurning settlement offers and proceeding to trial.

Although New Rule 1.442 has the potential to encourage out-of-court settlements and thereby reduce the fiscal impact of litigation on the Florida court system, it will do so at the expense of certain litigants. For poorer litigants, litigants with cases on the cutting edge of

213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*

the law, or litigants who simply want their day in court, the added risk of potential liability for costs as well as attorneys' fees may be more risk than the litigant can afford to assume. For these litigants, New Rule 1.442 threatens to impair a fundamental right guaranteed by the Florida Constitution—the right of equal access to the courts. Litigants who choose to exercise that right should not be penalized by court-imposed sanctions regardless of their reasons for refusing to settle.