LAW OFFICES

KATZ, KUTTER, HAIGLER, ALDERMAN, EATON & DAVIS

PROFESSIONAL ASSOCIATION

SILVIA MORELL ALDERMAN
FREDERICK L. BATEMAN, JR.
MARGUERITE H. "DITTI" DAVIS
MARTIN R. DIX
JAMES E. EATON
PAUL R. EZATOFF, JR.
WILLIAM M. FURLOW
MITCHELL B. HAIGLER
EDWARD S. JAFFRY
ALLAN J. KATZ
EDWARD L. KUTTER

SUITE 800
BARNETT BANK BUILDING
315 SOUTH CALHOUN STREET
POST OFFICE BOX 1877
TALLAHASSEE, FLORIDA 32301

TELEPHONE (904) 224-9634
TELEX 33-3627
TELEFAX (904) 222-0103
TELECOPY (904) 224-0781

RICHARD P. LEE
JOHN R. MARKS, III
GARY R. RUTLEDGE
BARBARA C. SUGAR
DAVID A. YON
PAUL A. ZEIGLER

SPECIAL CONSULTANTS
MONICA A. LASSETER *
WILLIAM D. RUBIN *

* NOT MEMBERS OF THE FLORIDA BAR

73,263

February 2, 1989

Chief Justice Raymond Ehrlich
Honorable Ben Overton
Honorable Parker Lee McDonald
Honorable Leander J. Shaw, Jr.
Honorable Rosemary Barkett
Honorable Stephen Grimes
Honorable Gerald Kogan
Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

FILED
SID J. WHITE
FEB 2 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

RE: Petition of the Civil Procedure Rules Committee of The Florida Bar, Submitting Proposed Amendment to Rule 1.442

Dear Justices:

This letter is in response to the proposed Rule for Offer of Judgment set forth in the December 1, 1988 issue of The Florida Bar News.

The American Insurance Association, an association of 204 member insurance companies, is a National Trade Association which represents the 204 property and casualty insurers. Its members write approximately 34.4% of the commercial insurance coverage which is written in Florida. The majority of these companies have offices in Florida and market insurance through independent agencies throughout Florida.

The American Insurance Association has doubts that the constitutionality of sections 46.061 and 768.79, Florida Statutes, should be addressed in the non-adversarial setting of a rule adoption proceeding, in the absence of a case or controversy ripe for judicial resolution. Most often, such issues have been presented in the context of a case or controversy where the issues are sharply defined. See, e.g., Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977); Smith v.

Department of Insurance, 507 So.2d 1080 (Fla. 1987). But, see, In re Clarification of Florida Rules of Practice and Procedure, etc., 281 So.2d 204 (Fla. 1973). Resolving such issues in the context of a case or controversy is preferable, since such a procedure allows for the Attorney General to appear and represent the interests of the legislature in a concrete case. See, §86.901, F.S. (1987). Those doubts aside, the American Insurance Association points out that the passage of §§45.061 and 768.79, F.S., are the result of extensive deliberation by the legislature, and its committees on the Judiciary. Legislative enactments on subjects found to be solely procedural have often been accorded great deference by the court and adopted as rules of practice and procedure. See, e.g., Avila South Condominium Association v. Kappa Corp., supra. As discussed below, the legislative response to the subject of offers of settlement more fully and comprehensively addresses the objectives to be reached than does the committee's proposed rule. The American Insurance Association, therefore, urges the Court, if it is to consider the petition to invalidate §§45.061 and 768.79, F.S., at all, to adopt the concepts embodied in those statutes as a procedural rule in lieu of the committee's proposal.

The committee's proposed rule offers a mechanistic procedure which, as do all such "simple" rules, appears on its face to be fair and uniform, but is unfair and uneven in actual practice. Such a mechanistic approach fails to rationally advance the legitimate objective of the rule: To discourage the wasteful continuance of litigation after an offer of settlement is made. Moreover, the rule discriminates against parties and their attorneys in exactly the sort of case where the logical underpinning for the rule is most lacking: In the complex case where issues are not clearly defined by existing law, and thus where the range of outcomes is not reasonably predictable even by experienced counsel.

The sanction of 15% of damages may work reasonably well in routine cases where the rules of liability are clear and where there are no unique, or cutting edge, damage issues. The rule breaks down though in what may be characterized as the big, novel case: the case where the elements of damage claimed and their manner of calculation are fairly certain, but where the theory of liability is novel and untested; or, conversely, where the liability is relatively certain, but the nature of the damages or their calculation is novel and uncertain. Those cases tend, in the practical nature of things, to involve large claims for damages; and those cases are the ones in which it is least reason-

able to impose a sanction for guessing wrong as to the outcome of the litigation. Yet, it is in those cases that the committee's proposed rule has its most discriminatory application.

To illustrate the nature of the discrimination imposed by the proposed rule against participants in the large novel case, one need only compare three situations: (1) Plaintiff sues the drunken driver-owner of a vehicle for injuries from which he has now totally recovered and seeks $50,000 in damages; (2) Plaintiff sues a city for failing to have adequate security in a municipal parking garage where the drunken driver hits plaintiff and injures him permanently, leaving him with devastating physical damages and demands $5 million; and (3) Plaintiff sues the drunken driver for plaintiff's psychological distress in the amount of $5 million for serious physical injuries to his child, not to the plaintiff. In the first case, the liability is clear and the damages are readily calculated. In the second and third cases there is rigorous and ongoing policy debate as to the parameters of liability and the extent of compensable injuries. In the first case, where the rules are relatively clear, the penalty for guessing wrong is relatively modest. But, in the second and third cases, the penalty becomes astronomical. Yet, it is in the second and third cases -- and cases of like ilk -- that the parties are most legitimately entitled to take their case to a jury for resolution and in which they most rightfully are concerned about the reasonableness of an offer of settlement. The rules of procedure ought not to be written with the supervening purpose of forcing settlement, particularly in the novel case where the range of potential outcomes is wide. Yet, the proposed mechanistic rule will have precisely that effect, in many cases, regardless of the novelty of the issues and the uncertainty and inability to predict the outcome. It is submitted that such an effect is poor policy and at odds with creating a mechanism for seeking more efficient justice, as opposed to a system for seeking efficient disposal of cases, without regard to justice.

The proposed rule does not reasonably relate the sanction imposed to the conduct which should be deterred. If the purpose of the rule is to encourage settlement, then the sanction ought to be one that charges the losing party with the additional expense of the prevailing party to gain victory after an offer of settlement is made and rejected. Those costs are most accurately reflected by a sanction which charges the losing party -- the plaintiff who recovers less than the offer of settlement, or the defendant who is liable for more than the offer of settlement -- the additional attorney's fees and trial preparation costs

required to prevail after an offer is rejected. The 15% measure of damages is not related to that objective. If a jury finds a plaintiff entitled to $100,000 in damages, after defendant rejects a plaintiff's offer of settlement of $74,000, and the verdict is obtained after a two-hour trial with little or no additional preparation after defendant rejects the offer of settlement, it is difficult to justify the addition of $11,250 as the penalty for rejecting the offer. Conversely, if the jury finds that a plaintiff is entitled to $100,000 in damages, after defendant rejects a $74,000 offer from the plaintiff, and the plaintiff must spend an additional $25,000 for preparation for trial to obtain the $100,000 verdict, the rule does not adequately preserve the plaintiff's recovery. The converse discrimination is true from the defense perspective.

Rather than such a mechanistic approach, the rule should be geared to reimbursing the true costs of further litigation. The statutory approach of awarding attorney's fees and costs accomplishes that objective. The award of attorney's fees and costs to the party rejecting settlement, coupled with consideration of a party's good faith in rejecting the settlement offer, is an accurate measure of the interests to be advanced by the rule and the interests of justice. Particularly given the court's ability to impose lode star considerations in awarding attorney's fees, the additional costs in attorney's fees subsequent to rejection of an offer of settlement most accurately reflects the complexity of the case and the expense of further litigation when coupled with recovery for additional costs of trial preparation. In addition, a good faith standard by which to judge the reasonableness of rejecting an offer, or a cap on the amount of sanction is needed in dealing with the parties' real life interests in the novel case.

Therefore, the American Insurance Association urges the Court to direct the committee to consider such an approach to amending rule 1.442, and urges the Court to reject the mechanistic formula contained in the committee's current proposal. While the current committee proposal offers to save judicial labor, its contours are at odds with the fundamental function of the courts, the delivery of efficient justice.

The American Insurance Association submits herewith a proposed rule for the Court's consideration which addresses the concerns set forth in this response.

Very truly yours,

Marguerite H. Davis

MHD/jam

Enclosure

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