THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 73,263

In re: PROPOSED FLORIDA RULE OF
          CIVIL PROCEDURE 1.442
          (Offer of Judgment)

_____

COMMENTS

The undersigned, an attorney licensed to practice law in this State since 1976, opposes the language of the proposed Rule but favors an amendment to Fla. R. Civ. P. 1.442, and offers the following comments:

1.   "The public policy of this state favors amicable settlement of disputes and the avoidance of litigation." City of Coral Gables v. Jordan, 186 So.2d 60, 63, affirmed, 191 So.2d 38 (Fla. 1966).   The proposed rule, by the Florida Bar Civil Procedure Rules Committee, does not go far enough in effectuating this public policy.

2.   The proposed rule is seemingly limited to the amount of "damages" either offered or accepted.   It is respectfully submitted that Section 45.061(2), Florida Statutes, providing the "judgment" yardstick including not only the total amount of money damages awarded but also the amount of costs, interest and expenses reasonably incurred, goes further to enforce the public policy of this state.   It also realistically imposes upon the parties, the obligation to very carefully assess their respective positions in light of the anticipated costs, interest and expenses to be incurred by each.   Costs, expenses, interest and attorney's fees should be included in the language of the amended rule for this reason; and, as well, in an attempt to force parties to seriously, and in good faith, approach amicable resolvement before the proverbial "eleventh hour" courthouse steps.   One would hope that judicial economy would, as well, be served by such a rule.

3. The undersigned agrees with the concept enunciated in proposed Rule 1.442(g) that an award should be mandatory. But, the mandatory nature of the award should be conditioned upon a rebuttable presumption that the offer was made in good faith and under reasonable circumstances. The party opposing the award would have the burden to prove that the offer was neither made in good faith or was unreasonable. The court would be required to make specific findings that the offer was either not made in good faith or was unreasonable in order to avoid a mandatory award.

4. In determining the issues of "good faith" and "reasonableness" the rule should be amended to provide relevant criteria such as set out in Section 45.061(2)(a), (b), (3) and Section 768.79(2)(b), Florida Statutes.

5. It is recommended that the proposed rule include a provision that the time spent in establishing the entitlement to such sanctions be included in the assessment of attorney's fees but not the amount of time expended in establishing the amount, to be awarded. In this context, the proposed rule might also provide that the court could consider affidavits of the parties, their attorneys, and expert witnesses unless one of the parties affirmatively requests a formal hearing on the issue.
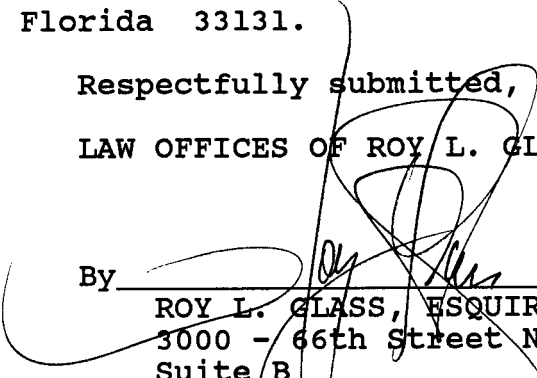
6. Finally, the amended rule should be liberally construed to effectuate its underlying purpose. This attorney's experience is that all clients, no matter how sophisticated in the legal process, do not understand why they are required to pay attorneys fees even should they prevail (in the absence of contract, equity, or statutory provision). Actual enforcement of the proposed amended rule might contribute to a better public perception of the judicial system and our profession. Indeed, the Florida Bar should seriously consider sponsoring and endorsing general legislation providing that the prevailing party in any case be entitled to recover costs, expenses, interest and reasonable attorney's fees.

I HEREBY CERTIFY that a copy of the foregoing Comments has been furnished by U.S. Mail this ___16___ day of November, 1988, to Henry Latimer, Chairman, Civil Procedure Rules Committee, 100 S.E. Second Street, Miami, Florida 33131.

Respectfully submitted,

LAW OFFICES OF ROY L. GLASS, P.A.

By_____

ROY L. GLASS, ESQUIRE
3000 - 66th Street North
Suite B
St. Petersburg, FL 33710
Attorney for Plaintiff
813/381-1946
Fla. Bar No. 210781

ple10\rule.cp

3