

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CIVIL
PROCEDURE**

CASE NO: 13-

**AMENDMENT TO RULE 1.442 REGARDING
ADDDITIONAL TIME AFTER SERVICE BY MAIL**

Hon. Richard A. Nielsen, Chair, Civil Procedure Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this out-of-cycle report of the Civil Procedure Rules Committee to amend *Fla. R. Civ. P.* 1.442(f)(1) under *Fla. R. Jud. Admin.* 2.140(e). The proposal was approved by the Committee on a final vote of 31-0 and by The Florida Bar Board of Governors by a vote of 34-0. Because this is an out-of-cycle report, it was not advertised in *The Florida Bar News* or posted on the Bar's website for comment before filing.

This issue was brought to the Committee's attention by John S. Mills (see Appendix C). Mr. Mills noted that with the Court's recent action deleting *Rule* 1.090(e) and adopting *Rule* 2.514(b) created a potential conflict within *Rule* 1.442, *Proposals for Settlement* .

In In re: Amendments to the Florida Rules of Judicial Administration, the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent

Predators, the Florida Probate Rules, the Florida Rules of Traffic Court, the Florida Rules of Juvenile Procedure, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure — Computation of Time, 95 So. 3d 96 (Fla. 2012), the Court adopted *Fla. R. Jud. Admin. 2.514* to govern computation of time throughout the rules of procedure. In addition, the court deleted rules governing computation of time from the various rules sets, including *Fla. R. Civ. P. 1.090(a)* and (e). The amendments were effective October 1, 2012.

Fla. R. Civ. P. 1.442(f)(1) currently reads:

A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of rule 1.090(e) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

Thus, the existing rule contains a reference to a rule that no longer exists.

Rule 2.514(b), which replaced *Rule 1.090(e)*, provides: “When a party may or must act within a specified time after service and service is made by mail or e-mail, 5 days are added after the period that would otherwise expire under subdivision (a).” *Rule 1.442* contemplates service of a proposal for settlement but

does not allow for additional days for acceptance. The proposed amendment to *Rule 1.442(f)(1)* would delete the reference to *Rule 1.090* and clearly indicate that a notice of acceptance of a proposal under the rule must be served within 30 days without any additional days added by providing that *Rule 2.514(b)* does not apply to proposals for settlement. (See Appendices A and B.)

The Committee is concerned that the potential for ambiguity with the current rule will create confusion for attorneys and the judiciary in service of proposals for settlement. Therefore, it asks that the Court amend *Rule 1.442* as outlined in this report outside of the Committee's regular reporting cycle.

Respectfully submitted February 5, 2013 .

/s/ Hon. Richard Nielsen
HON. RICHARD A. NIELSEN
Chair
Civil Procedure Rules Committee
800 E. Twiggs St., Ste. 527
Tampa, FL 33602-3556
813/272-5330
FLORIDA BAR NO.: 164118

/s/ John F. Harkness, Jr.
JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5600
FLORIDA BAR NO.: 123390

APPENDIX A

RULE 1.442. PROPOSALS FOR SETTLEMENT

(a) **Applicability.** This rule applies to all proposals for settlement authorized by Florida law, regardless of the terms used to refer to such offers, demands, or proposals, and supersedes all other provisions of the rules and statutes that may be inconsistent with this rule.

(b) **Service of Proposal.** A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. No proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.

(c) **Form and Content of Proposal for Settlement.**

(1) A proposal shall be in writing and shall identify the applicable Florida law under which it is being made.

(2) A proposal shall:

(A) name the party or parties making the proposal and the party or parties to whom the proposal is being made;

(B) identify the claim or claims the proposal is attempting to resolve;

(C) state with particularity any relevant conditions;

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

(E) state with particularity the amount proposed to settle a claim for punitive damages, if any;

(F) state whether the proposal includes attorneys' fees and whether attorneys' fee are part of the legal claim; and

(G) include a certificate of service in the form required by rule 1.080.

(3) A proposal may be made by or to any party or parties and by or to any combination of parties properly identified in the proposal. A joint proposal shall state the amount and terms attributable to each party.

(4) Notwithstanding subdivision (c)(3), when a party is alleged to be solely vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

(d) Service and Filing. A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule.

(e) Withdrawal. A proposal may be withdrawn in writing provided the written withdrawal is delivered before a written acceptance is delivered. Once withdrawn, a proposal is void.

(f) Acceptance and Rejection.

(1) A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of ~~rule 1.090(e)~~ Florida Rule of Judicial Administration 2.514(b) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

(2) In any case in which the existence of a class is alleged, the time for acceptance of a proposal for settlement is extended to 30 days after the date the order granting or denying certification is filed.

(g) Sanctions. Any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with rule 1.525.

(h) Costs and Fees.

(1) If a party is entitled to costs and fees pursuant to applicable Florida law, the court may, in its discretion, determine that a proposal was not made in good faith. In such case, the court may disallow an award of costs and attorneys' fees.

(2) When determining the reasonableness of the amount of an award of attorneys' fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following factors:

(A) The then-apparent merit or lack of merit in the claim.

(B) The number and nature of proposals made by the parties.

(C) The closeness of questions of fact and law at issue.

(D) Whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal.

(E) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

(F) The amount of the additional delay cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged.

(i) **Evidence of Proposal.** Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions.

(j) **Effect of Mediation.** Mediation shall have no effect on the dates during which parties are permitted to make or accept a proposal for settlement under the terms of the rule.

Committee Notes

1996 Amendment. This rule was amended to reconcile, where possible, sections 44.102(6) (formerly 44.102(5)(b)), 45.061, 73.032, and 768.79, Florida Statutes, and the decisions of the Florida Supreme Court in *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996), *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995), and *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992). This rule replaces former rule 1.442, which was repealed by the *Timmons* decision, and supersedes those sections of the Florida Statutes and the prior decisions of the court, where reconciliation is impossible, in order to provide a workable structure for proposing settlements in civil actions. The provision which requires that a joint proposal state the amount

and terms attributable to each party is in order to conform with *Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

2000 Amendment. Subdivision (f)(2) was added to establish the time for acceptance of proposals for settlement in class actions. “Filing” is defined in rule 1.080(e). Subdivision (g) is amended to conform with new rule 1.525.

2012 Amendment. Subdivision (c)(2)(G) is amended to reflect the relocation of the service rule from rule 1.080 to Fla. R. Jud. Admin. 2.516.

20—Amendment. Subdivision (f)(1) was amended to reflect the relocation of the rule regarding additional time after service by mail or email from rule 1.090(e) to Fla. R. Jud. Admin. 2.514(b).

APPENDIX B

APPX. B-1

Proposed rule

Reasons for change

RULE 1.442 PROPOSALS FOR SETTLEMENT

(a)–(e) [No change]

(f) Acceptance and Rejection.

(1) A proposal shall be deemed rejected unless accepted by delivery of a written notice of acceptance within 30 days after service of the proposal. The provisions of ~~rule 1.090(e)~~Florida Rule of Judicial Administration 2.514(b) do not apply to this subdivision. No oral communications shall constitute an acceptance, rejection, or counteroffer under the provisions of this rule.

Amended to reflect relocation of the rule regarding additional time after service by email or mail from rule 1.090(e) to Fla. R. Jud. Admin. 2.514(b).

(2) [No change]

(g)–(j) [No change]

Committee Notes

1996–2012: [No change]

20__ Amendment. Subdivision (f) was amended to reflect the relocation of the rule regarding additional time after

service by mail or email from rule 1.090(e) to Fla. R. Jud.
Admin. 2.514(b).

APPENDIX C

From: John Mills [mailto:jmills@mills-appeals.com]
Sent: Thursday, July 12, 2012 1:59 PM
To: Nielsen, Richard
Cc: Katherine E. Giddings (Katherine.Giddings@akerman.com); Michael Ufferman (ufferman@uffermanlaw.com)
Subject: FW: New rules on time calculations

Judge Nielsen,

I noticed a potential problem with today's amendments to the rules regarding time calculations. I just raised the issue with the chair of the appellate rules committee and past chair of the judicial administration rules committee, but the issue really involves the rules of civil procedure.

Please scroll down to see the problem, which your committee may wish to raise with the Court my motion for rehearing or an emergency rule proposal. If the rule changes are made as indicated on October 1 without a corresponding change to Rule 1.442, I fear substantial mischief in civil cases involving proposals for settlement.

Thank you for your consideration of this matter. I regret that I'm not that good at keeping abreast of the propose rule changes published in The Florida Bar News or I would have either brought this to your committee's attention earlier or filed a comment. As a former chair of a rules committee (appellate), I know how frustrating it can be to hear from members of the bar after the fact.

John S. Mills
The Mills Firm
203 North Gadsden Street, Suite 1A
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 fax
jmills@mills-appeals.com<mailto:jmills@mills-appeals.com>
www.mills-appeals.com<http://www.mills-appeals.com/>

Florida Bar board-certified appellate specialist

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, on February
 5 , 2013, to:

John S. Mills
jmills@mills-appeals.com

/s/ Heather Telfer

CERTIFICATION OF COMPLIANCE

I certify that this rule was read against *West's Florida Rules of Court – State*
(2012 Revised Edition).

I certify that this report was prepared in compliance with the font
requirements of *Fla. R. App. P. 9.210(a)(2)*.

/s/ Ellen Sloyer

Ellen Sloyer, Staff Liaison
Civil Procedure Rules Committee
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
esloyer@flabar.org