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A Proposal for Settling the Interpretation of Florida's Proposals for Settlement

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NOTE

A PROPOSAL FOR SETTLING THE INTERPRETATION OF
FLORIDA'S PROPOSALS FOR SETTLEMENT

*Lauren Rehm**

Abstract

Although created to encourage settlement, few rules have generated more collateral litigation than Florida's proposals for settlement provisions. While Florida Statutes section 768.79 creates a substantive right to attorney's fees, Florida Rule of Civil Procedure 1.442 provides a procedural enforcement mechanism. However, through its unprecedented application of strict construction to a rule of civil procedure, the Florida Supreme Court has arguably made it more difficult to accomplish settlement by adding new requirements for valid proposals. Thus, with collateral litigation looming over proposals for settlement, burdening court dockets, and costing parties additional time and expense, now is the time to realign the court's interpretation of Rule 1.442 with the legislature's intent to facilitate settlements.

This Note specifically addresses the recent demise of joint proposals for settlement. Part I examines the history of Florida's proposal for settlement provisions. An overview of recent court decisions regarding joint proposals highlights the implausibility that any joint proposal could satisfy the rigid requirements demanded by the Florida Supreme Court's interpretation of Rule 1.442. Part II explores how strict construction of Rule 1.442 is at odds with the court's own interpretive principles for rules of civil procedure. Because this unprecedented strict judicial interpretation of a rule of civil procedure tends to blur the distinction between substantive law and procedural mechanisms, Part III discusses potential constitutional separation of powers implications. Finally, Part IV offers a comparative analysis of Nevada's proposal for settlement statute and court rule to propose a framework for change in Florida.

In conclusion, this Note suggests that the court's reliance on strict construction of a rule of civil procedure undermines the plain language and intent of Florida Statutes section 768.79. The court would better serve the purpose of proposals for settlement by adhering to the principle that procedural rules are to be construed for the equitable and just application of the substantive law.

* J.D. expected, May 2013, University of Florida Levin College of Law. I am blessed to have an amazing family who encourages me every step of the way. I could not be more grateful for their constant love and support. Thank you to the members and staff of the *Florida Law Review* for their dedication during the editing and publication process. A special thank you to Professor Amy Mashburn for her invaluable insights.

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INTRODUCTION

Despite the confusion surrounding proposals for settlement, this much is certain: The road to hell is paved with good intentions. Although created to encourage settlement,¹ “proposals for settlement’ have become the plague of Florida’s civil justice system”² as they continue to spawn burdensome collateral litigation.³ Few rules have generated more unintended consequences than those created by the implementation of Florida Statutes section 768.79 and Florida Rule of Civil Procedure 1.442.

1. See *Attorneys’ Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 650 (Fla. 2010) (explaining that the expected result of proposals for settlement “was to reduce litigation costs and conserve judicial resources by encouraging the settlement of legal actions”); *United Servs. Auto Ass’n v. Behar*, 752 So. 2d 663, 664 (Fla. 2d Dist. Ct. App. 2000) (stating that the purpose of proposals for settlement “is to encourage the resolution of litigation”).

2. Mark Roman Law Grp., *Formal Settlement Offers in Florida: A Hopeless Debacle for the Civil Justice System*, ROMAN GAYNOR SCALES OF JUSTICE, <http://www.clearwatercaraccidentlawyerblog.com/?p=142> (last visited Sept. 16, 2012).

3. See *Gorka*, 36 So. 3d at 650 (stating that the effect of proposals for settlement “has been in sharp contrast to the intended outcome because the statute and rule have seemingly increased litigation as parties dispute the respective validity and enforceability of these offers”).

Section 768.79 of Florida Statutes⁴ is Florida's offer of judgment statute. This provision creates a statutory entitlement to attorney's fees and court costs in civil actions when a party fails to timely accept a settlement offer and specific criteria are met.⁵ While the statute creates the substantive right, Florida Rule of Civil Procedure 1.442 purports to track the statutory language to provide a procedural enforcement mechanism.⁶ However, Rule 1.442 (which refers to offers of judgment as "proposals for settlement") seems to go beyond creating pertinent procedures by adding new requirements for valid proposals for settlement. For instance, one of the most litigated areas of proposals for settlement is joint proposals⁷—an area which Florida Statutes section 768.79 does not explicitly address. Despite the fact that the legislature did not hinder such proposals, courts interpreting Rule 1.442 have struck down many joint proposals as defective.⁸ For reasons such as this, "Rule 1.442 continues to be the most litigated of the Rules of Civil Procedure notwithstanding its intended purpose of reducing litigation by encouraging settlements."⁹

As the unintended consequences of proposals for settlement continue to plague Florida courts, there is an increasing concern over "whether either [Rule 1.442] or [Florida Statutes section 768.79] is fulfilling its intended purpose of encouraging settlement or at times is having the opposite effect of increasing litigation."¹⁰ In its recent 2010 decision *Attorneys' Title Insurance Fund, Inc. v. Gorka*,¹¹ the Florida Supreme Court alluded to this concern regarding the effectiveness of the provisions by quoting the lament of Florida's Fourth District Court of Appeal: "We regret that this case is just one more example of the offer of judgment statute causing a proliferation of litigation, rather than

4. FLA. STAT. § 768.79 (2011).

5. *See id.* § 768.79(1).

6. *Saenz v. Campos*, 967 So. 2d 1114, 1116 (Fla. 4th Dist. Ct. App. 2007); *see also Adams v. Wright*, 403 So. 2d 391, 393–94 (Fla. 1981) (distinguishing substance, which is the domain of the legislature, and procedure, which is the domain of the courts, by stating that procedure "encompass[es] the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof.").

7. *See* FLA. R. CIV. P. 1.442(c)(3) (establishing that "[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"); Raymond L. Robin, *What Is Left of the Joint Proposal for Settlement?*, 85 FLA. B.J. 16, 17 (2011) (defining a joint proposal for settlement as "a single proposal made to or from multiple parties").

8. *See* Robin, *supra* note 7, at 22.

9. BRUCE J. BERMAN, *BERMAN'S FLORIDA CIVIL PROCEDURE* 728 (2010–2011 ed.).

10. *Campbell v. Goldman*, 959 So. 2d 223, 227 (Fla. 2007) (Pariente, J., specially concurring).

11. 36 So. 3d 646 (Fla. 2010).

fostering its primary goal to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process.”¹²

Although many issues surrounding proposals for settlement have been recognized as ripe for review,¹³ this Note specifically addresses the recent demise of the joint proposal for settlement. The demise of this useful tool for ending disputes undermines the legislative intent behind proposals for settlement. There are two different avenues toward correcting this problem, and both avenues should be considered. First, the Florida Supreme Court can adapt its current interpretation of Rule 1.442 to better facilitate the purpose of encouraging settlement. Second, the Florida Legislature can amend Florida Statutes section 768.79 to specifically address joint proposals for settlement. This Note will pursue the first avenue, proposing that the most pragmatic means of reviving the joint proposal as an effective tool for settlement lie in the hands of the court.

Perhaps due to the Florida Supreme Court’s current strict construction of Rule 1.442, the continuing trend is “that Florida courts, more likely than not, strike down Proposals for Settlement when the issue goes on appeal.”¹⁴ Thus, the good intentions of encouraging settlement are seemingly forgotten. With collateral litigation looming over proposals for settlement, burdening court dockets, and costing parties additional time and expense, appellate courts have articulated the

12. *Id.* at 650 (quoting *Sec. Professionals, Inc. v. Segall*, 685 So. 2d 1381, 1384 (Fla. 4th Dist. Ct. App. 1997)) (internal quotation marks omitted).

13. *See Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.*, 632 F.3d 1195 (11th Cir. 2011). The Eleventh Circuit Court recently certified three questions to the Florida Supreme Court for clarification:

First, we inquire whether an offer of judgment may be viable when filed under the following circumstances: the offer was filed by a defendant after a jury verdict for the defendant had been set aside by the district court’s grant of a new trial, and after the new trial date had been scheduled, but more than 45 days before the scheduled retrial; and the defendant ultimately prevailed because the appellate court reversed the grant of a new trial and reinstated the initial verdict. Second, we ask whether the term “joint proposal” in Rule 1.442(c)(3) applies to cases where acceptance of the offer is conditioned upon dismissal with prejudice of an offeree’s claims against an offeror and a third party. Finally, we seek a determination of whether the Florida offer of judgment statute applies to actions filed in Florida, in which there exists a contractually agreed upon choice-of-law clause providing for the application of the substantive law of another state. We certify these questions because we are unable to find definitive answers in clearly established Florida law, either case law or statutory.

Id. at 1197.

14. Christopher B. Hopkins, *Another Joint Proposal for Settlement Voided in Florida . . . Concurrence Asks for Legislative Intervention*, FLA. L. COMMENT. (Mar. 25, 2009), <http://www.floridalawcommentary.com/category/proposals-for-settlements>.

need for the Florida Supreme Court “to consider whether [R]ule 1.442 should be amended to align with the legislative intent that offers of judgments . . . are meant to encourage settlements.”¹⁵

Part I of this Note examines the history of Florida's proposals for settlement provisions. An overview of recent court decisions regarding joint proposals highlights the implausibility that any joint proposal could satisfy the rigid requirements demanded by the Florida Supreme Court's interpretation of Rule 1.442. Part II explores how strict construction of Rule 1.442 is at odds with the court's own interpretive principles for rules of civil procedure despite the reasons the court has offered to justify an exception. Because this unprecedented strict judicial interpretation of a rule of civil procedure tends to blur the distinction between substantive law and procedural mechanisms, Part III discusses potential constitutional separation of powers implications. Finally, Part IV offers a comparative analysis of Nevada's proposal for settlement statute and court rule to propose a framework for change in Florida.

In conclusion, this Note suggests that the Florida Supreme Court's strict construction of a rule of civil procedure undermines the plain language and intent of Florida Statutes section 768.79—the statute that Rule 1.442 is meant to implement. Rather than interpreting Rule 1.442 to require unyielding inflexibility, the court would better serve the purpose of proposals for settlement by adhering to the well-established interpretive principle that procedural rules are to be construed for the equitable and just application of the substantive law.

I. THE HISTORY OF PROPOSAL FOR SETTLEMENT PROVISIONS

A. *An Overview of Florida Statutes Section 768.79*

In order to craft an enforceable proposal for settlement, Florida Statutes section 768.79 and Florida Rule of Civil Procedure 1.442 must be read alongside one another.¹⁶ At the outset of this historical overview, it is important to note the distinction between a statute and a court rule. Substantive law is created by statutes; “statutes are manufactured by a constitutionally authorized legislative body, and are directed towards those who are constitutionally obligated to implement,

15. *Cano v. Hyundai Motor Am., Inc.*, 8 So. 3d 408, 411 (Fla. 4th Dist. Ct. App. 2009) (Hazouri, J., concurring specially).

16. *See, e.g., V. Julia Luyster & Jennifer Lodge, When Is a Joint Proposal for Settlement a Valid Proposal for Settlement: Apportionment, Avoiding Ambiguity in Release Language, and the Barnes Dilemma*, 24 TRIAL ADVOC. Q. 12, 12 (2005) (explaining that “[d]rafting a valid and enforceable joint proposal for settlement requires strict adherence to § 768.79, Florida Statutes and Florida Rule of Civil Procedure 1.442”). *See generally Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276 (Fla. 2003).

enforce, or follow the law.”¹⁷ In order to provide a mechanism for enforcing the substantive law created by statutes, “courts possess an inherent power to regulate proceedings and facilitate the administration of justice by the promulgation of rules of practice.”¹⁸

Florida Statutes section 768.79 establishes the substantive law for proposals for settlement.¹⁹ The statute provides in relevant part:

In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand.²⁰

In other words, the statute creates an “entitlement’ to fees”²¹ for a party who makes a proposal for settlement that is not accepted within thirty days, and the proposal is ultimately 25% greater than or less than the resulting court judgment depending on the party. After these basic criteria are satisfied, the statute “provides four requirements that an offer must fulfill in order to be used as the basis for an award of attorney’s fees and costs.”²² First, the offer must be in writing and

17. Cheryl Boudreau et al., *What Statutes Mean: Interpretative Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 958–59 (2007).

18. Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 624 (1957). In Florida, this power of the courts is rooted in the Florida Constitution, which states that “the supreme court shall adopt rules for the practice and procedure.” FLA. CONST. art. V, § 2.

19. The Florida Legislature enacted a companion statute, Florida Statutes section 45.061, in 1987. However, due to the confusion caused by three provisions (two statutes and one court rule) simultaneously governing proposals for settlement, a 1990 amendment to Florida Statutes section 768.7 incorporated various provisions of Florida Statutes section 45.061. After this consolidation, the legislature effectively repealed Florida Statutes section 45.061. FLA. STAT. § 45.061(6).

20. FLA. STAT. § 768.79(1) (2011).

21. Schmidt v. Fortner, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993).

22. Katherine H. Miller, Note, *A History of Apportioning Joint Offers of Judgment in*

reference Florida Statutes section 768.79.²³ Second, the offer must specify the names of the offeror and the offeree.²⁴ Third, the offer must “state with particularity the amount offered to settle a claim for punitive damages, if any.”²⁵ Fourth, the offer must “state its total amount.”²⁶ Attorney’s fees and court costs should be awarded if the offer satisfies these four requirements.²⁷ However, even if a party is entitled to fees under the statute, the court has discretion to reject an award if it “determine[s] that an offer was not made in good faith.”²⁸ Finally, the statute specifies six criteria the court must consider in determining the reasonableness of an attorney’s fees award.²⁹

Although shifting attorney’s fees and court costs may arguably penalize a party who rejects a proposal and fails to terminate litigation,³⁰ a proposal for settlement “is intended to be used as a tool to encourage settlement not a tool of intimidation.”³¹ In fact, the Florida Legislature enacted the statute in 1986 for the purpose of “encourag[ing] parties to settle . . . without going to trial.”³² Thus, the

Florida: Is Willis Shaw Really the Bottom Line, or Is There an Exception?, 28 NOVA L. REV. 841, 845 (2004).

23. FLA. STAT. § 768.79(2)(a) (2011).

24. *Id.* § 768.79(2)(b).

25. *Id.* § 768.79(2)(c).

26. *Id.* § 768.79(2)(d).

27. *See* *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993) (stating that “the legislature has created a mandatory right to attorney’s fees, if the statutory prerequisites have been met”).

28. FLA. STAT. § 768.79(7)(a) (2011); *see also* *Sharaby v. KLV Gems Co., Inc.*, 45 So. 3d 560, 563 (Fla. 4th Dist. Ct. App. 2010) (explaining that “the good faith requirement ‘insists that the offeror have some reasonable foundation on which to base an offer’”) (quoting *Schmidt*, 629 So. 2d at 1039).

29. *See* FLA. STAT. § 768.79(7)(b). The court must consider the following factors:

- (1) The then apparent merit or lack of merit in the claim.
- (2) The number and nature of offers made by the parties.
- (3) The closeness of questions of fact and law at issue.
- (4) Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
- (5) Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
- (6) The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

Id.

30. *See* *Abbott & Purdy Grp. Inc. v. Bell*, 738 So. 2d 1024, 1026 (Fla. 4th Dist. Ct. App. 1999).

31. *Kaufman v. Smith*, 693 So. 2d 133, 134 (Fla. 4th Dist. Ct. App. 1997).

32. *Aspen v. Bayless*, 564 So. 2d 1081, 1083 (Fla. 1990); *see also* *Pirelli Armstrong Tire Corp. v. Jensen*, 752 So. 2d 1275, 1278 (Fla. 2d Dist. Ct. App. 2000) (summarizing that the staff analysis prepared by the Florida House of Representatives Committee on Judiciary for House

statute aims to persuade parties not to pursue litigation but rather to avoid costs, attorney's fees, and extensive time by settling.³³

B. An Overview of Florida Rule of Civil Procedure 1.442

While Florida Statutes section 768.79 provides the substantive law for proposals for settlement, “rule 1.442 of the *Florida Rules of Civil Procedure* presents the means of properly applying the statute.”³⁴ Rule 1.442 was adopted in 1972³⁵ for the same purpose as the statute—“to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process.”³⁶ However, because of the rule's many discrepancies with the requirements of the statute, Rule 1.442 actually adds to the need for judicial intervention.³⁷ The long history of uncertainty resulting from the interplay between Rule 1.442 and Florida Statutes section 768.79 was characterized by one judge as “one of the most oblique areas of rule and law that I think I have ever seen.”³⁸ Thus, rather than attempting to fully chronicle each amendment and its impact, this Section provides an overview of the most significant developments in Rule 1.442.

Rule 1.442 was initially modeled after Federal Rule of Civil Procedure 68,³⁹ “the only federal rule devoted exclusively to encouraging settlement.”⁴⁰ In its original form, Rule 1.442 was exactly the same as Federal Rule 68,⁴¹ which is an asymmetric cost-shifting

Bill 321 indicates the purpose of the bill was to “encourage settlement of civil cases which could, in turn, result in lower litigation costs. Similarly, the Senate Staff Analysis and Economic Impact Statement prepared for Senate Bill 866 indicates the bill's purpose was to expand the offer of judgment concept to encourage settlements between parties” (internal quotation marks omitted); *Nat'l Healthcorp Ltd. P'ship v. Close*, 787 So. 2d 22, 26 (Fla. 2d Dist. Ct. App. 2001) (“The legislative purpose of section 768.79 is to encourage the early settlement and termination of litigation in civil cases generally.”).

33. See Miller, *supra* note 22, at 843.

34. *Id.*; see also Julie H. Littky-Rubin, *Proposals for Settlement: Minding Your P's and Q's Under Rule 1.442*, 75 FLA. B.J. 12, 12 (2001) (explaining that Rule 1.442 “provides the mechanism to assert those rights [created by Florida Statutes section 786.79] and delineates the proper procedure necessary for implementing the substantive statute”).

35. *In re the Fla. Bar: Rules of Civil Procedure*, 265 So. 2d 21, 40–41 (Fla. 1972).

36. *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989).

37. See Miller, *supra* note 22, at 847 (stating that “rule 1.442 does not fulfill its intended purpose to alleviate the judicial system of its burdensome caseload; instead, it adds to it”).

38. *Stouffer Hotel Co. v. Teachers Ins.*, 944 F. Supp. 874, 875 (M.D. Fla. 1995) (Merryday, J.).

39. *Abbott & Purdy Grp. Inc. v. Bell*, 738 So. 2d 1024, 1027 (Fla. 4th Dist. Ct. App. 1999) (stating that the “former Rule 1.442 was adopted using Federal Rule 68 as a model”).

40. Clinton A. Wright III, Note, *Confusion in Florida Offer of Judgment Practice: Resolving the Conflict Between Judicial and Legislative Enactments*, 43 FLA. L. REV. 35, 37 (1991).

41. *In re the Fla. Bar: Rules of Civil Procedure*, 265 So. 2d 21, 41 (Fla. 1972).

mechanism available only to defending parties.⁴² Because Federal Rule 68 only pertains to court costs and does not create an entitlement to attorney's fees, a defending party has little incentive to attempt a settlement.⁴³ Thus, Federal Rule 68 and its protégé have been largely ineffective in reducing litigation.⁴⁴

In 1989, the Florida Supreme Court adopted a new version of Rule 1.442.⁴⁵ This new rule came in the wake of the legislature's enactment of Florida Statutes section 768.79 and attempted to align Rule 1.442 with the two-way fee-shifting statute.⁴⁶ However, despite good intentions, the adoption of the new rule failed to settle confusion over the proper procedural requirements for a proposal for settlement.

The Florida Supreme Court attempted to alleviate this confusion in *Timmons v. Combs*.⁴⁷ In *Timmons*, the court explicitly recognized that "the circumstances under which a party is entitled to costs and attorney's fees is substantive and . . . rule [1.442] can only control

42. See FED. R. CIV. P. 68. The federal offer of judgment rule states:

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Id.

43. See Robert G. Bone, "To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1566 (2008) (observing that "the penalty for rejecting an offer is too small in most cases to be taken seriously").

44. See *id.* (explaining that Federal Rule 68 "is written in a way that makes it an extremely poor tool for settlement promotion"); AM. COLL. OF TRIAL LAWYERS, SURVEY OF STATE OFFER OF JUDGMENT PROVISIONS 1 (2004), available at http://www.actl.com/AM/Template.cfm?Section=Offers_of_Judgment&Template=/CM/ContentDisplay.cfm&ContentFileID=120 (referring to Federal Rule 68 as a "toothless provision").

45. See Fla. Bar Re: Amendment to Rules of Civil Procedure, 550 So. 2d 442 (Fla. 1989).

46. See Miller, *supra* note 22, at 847 (providing a brief historical overview of the amendments to Florida's proposals for settlement provisions).

47. 608 So. 2d 1 (Fla. 1992).

procedural matters.”⁴⁸ In an effort to reconcile troublesome distinctions between the provisions, the court repealed Rule 1.442 and adopted the procedural elements of Florida Statutes section 768.79.⁴⁹ Ultimately, however, the new version of Rule 1.442 did little to eliminate the uncertainty surrounding proposals for settlement.

C. An Overview of Joint Proposals for Settlement

Rule 1.442 was again amended in 1996.⁵⁰ This time, the court adopted various requirements not specifically contemplated by the substantive statute.⁵¹ In particular, the court adopted subsection (c)(3), requiring apportionment for joint proposals.⁵² Although the 1996 amendments “were designed to create a coherent framework for reconciling Florida’s offer of judgment law, and to end the proliferation of litigation sabotaging the statute’s goal of ending claims and disputes,” the amendments have not had that effect.⁵³ In fact, the Florida Supreme Court lamented:

Rule 1.442 was amended effective January 1, 1997, to set forth specific procedures for effectuating a valid offer of judgment, including the requirement that a joint offer of

48. *Id.* at 2–3.

49. *Id.* at 3.

50. See FLA. R. CIV. P. 1.442 cmt. n.1.

51. See FLA. R. CIV. P. 1.442(c). This section of the rule requires:

- (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 the attorneys’ fees are part of the legal claim; and
 - (G) include a certificate of service in the form required by rule 1.080(f).
- (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.

Id.; cf. FLA. STAT. § 768.79(2) (2011) (requiring only that the offer (1) be in writing, (2) identify the parties, (3) state with particularity any amount offered to settle any punitive damages claim, and (4) state its total amount).

52. FLA. R. CIV. P. 1.442(c)(3).

53. Littky-Rubin, *supra* note 34, at 12.

judgment state the amount and terms attributable to each party It was the Court's hope that the . . . amendments to rule 1.442 would enable parties to focus with greater specificity in their negotiations and thereby facilitate more settlements and less litigation [S]ubdivision (c)(3) of rule 1.442 has instead caused a proliferation of litigation rather than obviate the need for further intervention of the judicial process.⁵⁴

Although Rule 1.442 now explicitly addresses joint proposals, “the Florida Supreme Court limited the use of joint proposals for settlement even before Rule 1.442(c)(3) became effective.”⁵⁵ In *Allstate Indemnity Co. v. Hingson*,⁵⁶ the court struck down as defective a joint proposal served by a single defendant to multiple plaintiffs because the proposal failed to apportion the amount each plaintiff would receive.⁵⁷ Although Rule 1.442(c)(3) was not yet effective when the proposal was made, the court invalidated the proposal and held that Florida Statutes section 768.79 requires “each party who receive[s] an offer of settlement is entitled . . . to evaluate the offer as it pertains to him or her.”⁵⁸ The dissent disagreed with this reading of the statute, emphasizing that “[i]n fact, section 768.79(2)(d) merely provides that the offer of judgment must [s]tate its total amount.”⁵⁹ However, the majority's “strict approach to joint proposals for settlement has been followed ever since.”⁶⁰

After the adoption of Rule 1.442(c)(3), the Florida Supreme Court carried its strict approach even further in *Lamb v. Matetzschk*.⁶¹ In *Lamb*, the court mandated apportionment among parties in joint proposals for settlement “even when one party's alleged liability is purely vicarious.”⁶² However, such a requirement “is most problematic because the liability of the defendants in [the vicarious liability] context is coextensive and therefore incapable of being realistically apportioned.”⁶³ In a special concurrence, Justice Barbara Pariente cautioned the court that its rigid interpretation of Rule 1.442 may fail to

54. *Lamb v. Matetzschk*, 906 So. 2d 1037, 1043 (Fla. 2005) (Pariente, J., specially concurring) (internal quotations and citations omitted).

55. Robin, *supra* note 7, at 17.

56. 808 So. 2d 197 (Fla. 2002).

57. *See id.* at 199.

58. *Id.* (quoting *C & S Chems., Inc. v. McDougald*, 754 So. 2d 795, 797–98 (Fla. 2d Dist. Ct. App. 2000)).

59. *Id.* at 200 (Harding, J., dissenting) (quoting *Bodek v. Gulliver Acad. Inc.*, 702 So. 2d 1331, 1332 (Fla. 3d Dist. Ct. App. 1997)).

60. Robin, *supra* note 7, at 18.

61. 906 So. 2d 1037 (Fla. 2005).

62. *Id.* at 1042.

63. *Id.* at 1045 (Lewis, J., concurring in result only).

“foster the primary goal of the rule and section 768.79 . . . which is to encourage settlements in order to eliminate trials if possible.”⁶⁴

Perhaps in recognition of the implausibility of the strict requirement it imposed in *Lamb*, the Florida Supreme Court amended Rule 1.442 in 2010.⁶⁵ Although the apportionment requirement established by Rule 1.442(c)(3) is still problematic for many parties who attempt to settle disputes through joint proposals,⁶⁶ Rule 1.442(c)(4) now carves out an exception to the apportionment requirement in the context of vicarious liability.⁶⁷ In light of recent developments in the realm of joint proposals, specifically in regards to the issue of joint proposals conditioned on mutual acceptance, it may be time for the court to once again reconsider its strict approach.

II. THE DEMISE OF JOINT PROPOSALS FOR SETTLEMENT

Until relatively recently, collateral litigation surrounding joint proposals for settlement primarily focused on issues of apportionment. It was not until 2008 that Florida appellate courts first faced “the issue of whether a joint proposal for settlement could be partially accepted; in other words, whether an offeree of a joint proposal for settlement could settle the case where others included in the joint proposal rejected it.”⁶⁸ The certified conflict between the First District Court of Appeal in *Clements v. Rose*⁶⁹ and the Second District Court of Appeal in *Attorneys’ Title Fund, Inc. v. Gorka*⁷⁰ demonstrates how the Florida Supreme Court’s recent decision on this issue has weakened the utility of joint proposals.

64. *Id.* at 1042–43 (Pariente, J., specially concurring) (internal quotation marks omitted).

65. *See In re Amendments to the Fla. Rules of Civil Procedure*, 52 So. 3d 579, 588 (Fla. 2010).

66. *See* Luyster & Lodge, *supra* note 16, at 12 (“Although the purpose of compliance with the rule is to reduce or eliminate judicial intervention in the resolution of litigation, strict compliance may not always be possible or even plausible without judicial intervention.”).

67. *See Amendments to the Fla. Rules of Civil Procedure*, 52 So. 3d at 588. Florida Rule of Civil Procedure 1.442(c)(4) states:

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.

FLA. R. CIV. P. 1.442(c)(4).

68. Robin, *supra* note 7, at 20.

69. 982 So. 2d 731 (Fla. 1st Dist. Ct. App. 2008).

70. 989 So. 2d 1210 (Fla. 2d Dist. Ct. App. 2008).

In *Clements v. Rose*, the First District Court of Appeal confronted a joint proposal for settlement issued by a plaintiff dog bite victim to the two defendant dog owners.⁷¹ The proposal clearly apportioned the amount demanded from each defendant to settle the suit, and the proposal explicitly stated that it was conditioned on the acceptance of both defendants.⁷² Both defendants rejected the proposal, and the plaintiff later received a verdict 25% greater than the amount of the proposal.⁷³ The trial court denied an award of attorney's fees under the proposal for settlement provisions finding that the proposal failed to state with particularity any relevant conditions as required by Rule 1.442.⁷⁴ In particular, the court found the proposal was ambiguous as to whether each defendant could independently accept the proposal.⁷⁵ The appellate court reversed, finding the proposal was not ambiguous under the plain language of Rule 1.442 because the proposal clearly stated that it was conditioned on joint acceptance.⁷⁶ Further, the court stated that "[a]lthough it is conditional, the offer is as definite as it is within [offeror's] power to make, because the condition depends not on [the offeror's] election, but on each [offeree's] election."⁷⁷ In its reasoning, the appellate court emphasized that "Rule 1.442 is designed to facilitate settlements, not to render settlement of a case impossible where there are multiple defendants."⁷⁸

In *Attorneys' Title Fund, Inc. v. Gorka*, the Second District Court of Appeal confronted the same issue of whether a joint proposal conditioned on mutual acceptance is enforceable. In *Gorka*, a defendant insurance company offered to settle the claims brought against it by a married couple.⁷⁹ In its proposal, the insurance company specified that it would pay \$12,500 to the wife and \$12,500 to the husband to fully settle all damages, attorney's fees, and costs.⁸⁰ The proposal was conditioned upon the offer being accepted by both spouses.⁸¹ Neither spouse accepted the proposal and the insurance company later prevailed

71. See *Clements*, 982 So. 2d at 731.

72. See *id.* at 731–32. The proposal read: "*TOTAL AMOUNT OF PROPOSAL*: Seventy-Five Thousand and no/100 Dollars (\$75,000.00), payable to Plaintiff, JAMES CLEMENTS; (Thirty-Seven Thousand Five Hundred and no/100 Dollars (\$37,500.00) from Defendant, BOBBY B. ROSE, and Thirty-Seven Thousand Five Hundred and no/100 Dollars (\$37,500.00) from Defendant, MAUDEANNA ROSE)." *Id.*

73. *Id.* at 732.

74. *Id.* at 731–32.

75. *Id.* at 732.

76. *Id.*

77. *Id.*

78. *Id.*

79. See *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 989 So. 2d 1210, 1212 (Fla. 2d Dist. Ct. App. 2008).

80. *Id.*

81. *Id.*

at trial.⁸² The appellate court upheld the denial of an award of attorney's fees to the insurance company under the proposal for settlement provisions.⁸³ Rather than emphasizing the purpose of Rule 1.442, as the court did in *Clements*,⁸⁴ the Second District Court of Appeal repeatedly emphasized the importance of strictly interpreting the rule.⁸⁵ The court invalidated the proposal because it did not allow both offerees to independently accept the offer.⁸⁶

The Florida Supreme Court addressed the district court conflict by accepting review in *Attorneys' Title Insurance Fund, Inc. v. Gorka*.⁸⁷ In a per curiam opinion, the supreme court upheld the Second District Court of Appeal's decision that a proposal for settlement conditioned upon mutual acceptance renders that proposal invalid because "neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal."⁸⁸ The court relied on *Lamb v. Matetzschk*,⁸⁹ stating that *Lamb* instructed that "an offer must be differentiated such that each party can unilaterally settle the action."⁹⁰ Despite the plain language of Rule 1.442(c)(3), which allows joint proposals so long as the amounts and terms attributed to each party are defined, the court found that joint proposals conditioned on mutual acceptance are defective because such proposals are "the antithesis of a differentiated offer."⁹¹

Justice Ricky Polston's dissent, which is joined by two other justices, stressed the adverse consequences of the court's strict position against joint proposals conditioned on mutual acceptance.⁹² The dissent urged that *Gorka* "effectively eliminates the ability to make joint offers."⁹³ By imposing a prohibition against joint proposals for settlement which is not found in the plain language of either the statute or the court rule,⁹⁴ the court failed to further the legislature's goal of

82. *Id.*

83. *Id.* at 1214.

84. *Clements v. Rose*, 982 So. 2d 731, 732 (Fla. 1st Dist. Ct. App. 2008) (stating that "Rule 1.442 is designed to facilitate settlements, not to render settlement of a case impossible where there are multiple defendants").

85. *See Gorka*, 989 So. 2d at 1213 (stating that "the statute and rule are strictly construed in favor of the party against whom the penalty is sought"); *id.* at 1214 (reiterating the "penal nature of section 768.79 and the strict construction that we must apply").

86. *Id.*

87. 36 So. 3d 646 (Fla. 2010).

88. *Id.* at 649.

89. 906 So. 2d 1037 (Fla. 2005).

90. *Gorka*, 36 So. 3d at 651.

91. *Id.*; *see also* *Schantz v. Sekine*, 60 So. 3d 444, 445–46 (Fla. 1st Dist. Ct. App. 2011) (summarizing the *Gorka* court's analysis).

92. *See Gorka*, 36 So. 3d at 652–54 (Polston, J., dissenting).

93. *Id.* at 654; *see also* *Schantz*, 60 So. 3d at 446 (agreeing with the *Gorka* dissent).

94. *See Gorka*, 36 So. 3d at 652 (Polston, J., dissenting) ("There is no prohibition against

encouraging settlement.⁹⁵ Rather, the court minimized incentives to settle disputes by exposing parties to the risk of partial settlements.⁹⁶ The dissent explained that “a party is motivated to settle an entire case with all parties because the litigation is expensive, distracting, and unpleasant.”⁹⁷ However, if a party cannot condition a proposal for settlement on the acceptance of all offerees, “then there may be little incentive to partially settle.”⁹⁸ The defendant insurance company noted this concern in its appellate brief, stating:

Creating a blanket rule that joint acceptance conditions make an offer invalid would run counter to the motivation of many offerors to bring a complete end to litigation Requiring parties to subject themselves to piecemeal settlements that neither end the case nor reduce the cost of litigation (or worse, fund the litigation against the offeror), would discourage offers and run counter to the purpose of the statute to encourage settlements.⁹⁹

Thus, “[t]he only way then to settle these cases is to make joint offers conditioned on all accepting This encourages settlement, consistent with the intent of the statute, and should be enforced by the Court as a valid condition of settlement.”¹⁰⁰

In addition to its damaging impact on the utility of joint proposals as tools for settlement, *Gorka* can also be criticized for its unsound reliance on *Lamb*. “Although *Lamb* had held that each offeree must be able to independently *evaluate* a proposal for settlement, no court had previously held that each must be able to independently *accept* the proposal.”¹⁰¹ This substantive right of independent control is noticeably absent from the plain language of the Florida Statutes section 768.79, which Rule 1.442 is meant to implement. The *Gorka* majority feared that without this independent control, an offeree who is willing to accept a proposal for settlement will be subject to court costs and attorney’s fees because of the decision of an unwilling offeree.¹⁰²

offers to multiple parties conditioned on joint acceptance within rule 1.442 or section 768.79, Florida Statutes.”).

95. *See id.* (“Rule 1.442 implements section 768.79, which was enacted by the Legislature for the purpose of encouraging settlements.”).

96. *Id.* at 654.

97. *Id.* at 653.

98. *Id.*

99. Reply Brief for Petitioner at 2, *Attorneys Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646 (Fla. 2010) (No. 08-1899), 2009 WL 1387807 at *2 (internal citations omitted).

100. *Gorka*, 36 So. 3d at 654 (Polston, J., dissenting).

101. Robin, *supra* note 7, at 21.

102. *See Gorka*, 36 So. 3d at 651 (“[A]n offeree who desires to avoid exposure to the fee sanction is restrained from doing so without the agreement of the other party and is therefore

However, the dissent noted that “a proper interpretation of how the rule and statute function” dispels this misplaced fear.¹⁰³ Pursuant to Florida Statutes section 768.79(4)¹⁰⁴ and Rule 1.442(f)(1),¹⁰⁵ a joint offeree who wishes to settle would file a written notice of acceptance.¹⁰⁶ Because the proposal specifies that it is explicitly conditioned on the acceptance of all offerees, the court would not have jurisdiction to enforce the agreement. However, Florida Statutes section 768.79(6)(a)¹⁰⁷ ensures that the joint offeree who files notice of acceptance cannot be subject to attorney’s fees and court costs. On the other hand, the joint offeree who fails to file notice of acceptance is subject to attorney’s fees and court costs.¹⁰⁸

In the wake of *Gorka*, “litigants would be wise to avoid using the joint proposal for settlement because it is fraught with pitfalls and has been rendered obsolete by the case law.”¹⁰⁹ The troubling demise of this popular tool for settlement may be rooted in the equally troubling judicial abandonment of established principles of interpretation for rules of civil procedure.

A. *Strict Construction at Odds with the Court’s Interpretive Standard*

The Florida Supreme Court’s strict construction of a rule of civil procedure is puzzling in light of the court’s own interpretative standard for procedural rules. Florida Rule of Civil Procedure 1.010 clearly sets forth that procedural rules are to be construed to further the goal of resolving litigation in a “just, speedy, and inexpensive” fashion.¹¹⁰ Further, the commentary to Rule 1.010 provides:

The direction that the rules “shall be construed to secure the just, speedy, and inexpensive determination of

forced to participate in litigation that could have been settled. Consequently, the offeree lacks independent control over the decision to settle and conclude the litigation.”)

103. *Id.* at 653 (Polston, J., dissenting).

104. This section provides: “An offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.” FLA. STAT. § 768.79(4) (2012).

105. This rule states that a proposal may be “accepted by delivery of a written notice of acceptance within 30 days after service of the proposal.” FLA. R. CIV. P. 1.442(f)(1).

106. *Gorka*, 36 So. 3d at 653 (Polston, J., dissenting).

107. This section provides for an award of reasonable attorney’s fees and court costs only “[i]f a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer.” FLA. STAT. § 768.79(6)(a) (2012).

108. *See Gorka*, 36 So. 3d at 654 (Polston, J., dissenting) (“[I]f a plaintiff does not file the requisite notice of acceptance, then the plaintiff who has not accepted is subject to the terms of the costs recovery statute.”).

109. Robin, *supra* note 7, at 17.

110. FLA. R. CIV. P. 1.010.

every action” has two courses. It is, first, a direction that if a rule needs interpretation, the stated objective is the guide. The direction recognizes that procedural law is not an end in itself; it is only the means to an end. And that end is the proper administration of the substantive law. Procedural law fulfills its purpose if the substantive law is thereby administered in a “just, speedy, and inexpensive” manner

It is, next, a direction that each rule shall be applied with that objective in mind, especially where the court may exercise a judicial discretion.¹¹¹

In other words, “the settled, formal principle within the rules themselves for interpreting the rules is not one of strict construction—or woodenly enforcing every failure to follow procedural rules—but instead an equitable guide of just application.”¹¹² Like the substantive statute it is meant to enact, the stated objective of Rule 1.442 is “to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process.”¹¹³ With that objective as a guide, the interpretive standard established in Rule 1.010 instructs courts to construe Rule 1.442 as a means to effect the “proper administration of the substantive law.”¹¹⁴ On the contrary, courts may interpret Rule 1.442 as an “end in itself”¹¹⁵ by reading in additional requirements not found in the plain language of the proposal for settlement statute or court rule.¹¹⁶ Specifically, a judicially created requirement that proposals cannot be conditioned on mutual acceptance does not fulfill the purpose of the substantive law; rather, it discourages offerors from ending disputes by exposing them to the risk of piecemeal settlement.¹¹⁷

It is also significant to note that the Florida Rules of Civil Procedure are generally modeled after the Federal Rules of Civil Procedure; therefore, federal case law may be considered in interpreting the purpose and operative effect of various rules.¹¹⁸ According to Professors

111. FLA. R. CIV. P. 1.010 authors' cmt.

112. *Hauss v. Waxman*, 914 So. 2d 474, 477 (Fla. 4th Dist. Ct. App. 2005) (Farmer, J., concurring specially).

113. *Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989).

114. FLA. R. CIV. P. 1.010 authors' cmt.

115. *Id.*

116. *See Attorneys Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 652 (Fla. 2010) (Polston, J., dissenting) (emphasizing that “[t]here is no prohibition against offers to multiple parties conditioned on joint acceptance within rule 1.442 or section 768.79, Florida Statutes”).

117. *See id.* at 654 (Polston, J., dissenting) (stating that if an offeror cannot condition an offer on mutual acceptance “there may be little incentive to partially settle”).

118. *See, e.g., Sheradsky v. Basadre*, 452 So. 2d 599, 602 (Fla. 3d Dist. Ct. App. 1984); Brief and Appendix of Respondent at 14, *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007) (No. 06-611), 2006 WL 2701071 at *14.

Charles A. Wright and Arthur R. Miller in *Federal Practice & Procedure*:

There is no place in the federal civil procedural system for the common law rule that statutes, and rules having the force of statutes, that are in derogation of the common law are to be strictly construed. Rule 1 requires the judge to construe the rules liberally to further the cause of justice. However, the judge must exercise this discretion soundly and with restraint because a construction that ignores the plain wording of a rule or fails to view it as part of the total procedural system ultimately may prove to be as detrimental to the system as an arbitrary or rigid construction and, in the end, not further the goal of the “just, speedy, and inexpensive determination of every action.”¹¹⁹

In the face of this inconsistency, the Florida Supreme Court has pointed to the derogation of common law doctrine and the penal nature of proposals for settlement¹²⁰ to justify its departure from its own established interpretive standard. However, these grounds fail to provide a solid justification for the court carving out an exception to its “just, speedy, and inexpensive” directive for a single rule of civil procedure.

B. *Derogation of the Common Law Doctrine as Grounds for an Exception*

There is a longstanding tradition that statutes in derogation of the common law must be strictly construed.¹²¹ Florida Statutes section 768.79 is in derogation of the common law because it creates an exception to the “American Rule,” which requires that “all litigants, even the prevailing one, must bear their own attorney’s fees.”¹²² The

119. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1029 (3d ed. 2004).

120. *See Willis Shaw Exp., Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003) (stating that Rule 1.442 should be strictly construed because the procedure is in derogation of the common law and is penal in nature).

121. *See, e.g., Hauss v. Waxman*, 914 So. 2d 474 (Fla. 4th Dist. Ct. App. 2005) (Farmer, J., concurring specially) (providing a historical overview of the Florida Supreme Court’s decisions regarding the construction of statutes dating back to 1943); *see also* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 440–41 (1950) (tracing the historical origin of the derogation doctrine to English common law cases of the seventeenth century and perhaps earlier).

122. BLACK’S LAW DICTIONARY (9th ed. 2009); *see also* FLA. STAT. § 768.79(1) (2012); *TGI Friday’s, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995) (“The Legislature has modified the American rule, in which each party pays its own attorney’s fees, and has created a

Florida Supreme Court has stated that “[t]he fundamental rule in Florida has been that an award of attorneys’ fees is in derogation of the common law and that *statutes* allowing for the award of such fees should be strictly construed.”¹²³ It is important to bear in mind that “the court’s original basis for strict construction of attorney’s fees statutes was the ancient canon of statutory construction involving legislative changes in the common law.”¹²⁴ Further, the court’s holdings did not contemplate strict construction for rules of civil procedure, but rather expressly referred to strict construction for statutory canons.¹²⁵

Willis Shaw Express, Inc. v. Hilyer Sod, Inc.,¹²⁶ a case decided in 2003, was the first case to find that a rule of civil procedure should be strictly construed.¹²⁷ Without explanation for its unprecedented expansion of strict construction,¹²⁸ the Florida Supreme Court stated that strict construction applies “because the offer of judgment statute *and rule* are in derogation of the common law rule that each party pay its own fees.”¹²⁹

It makes little sense to carve out an exception to the well-established “just, speedy, and inexpensive” interpretive directive on the basis of the derogation of common law doctrine because a rule of civil procedure should not create substantive rights in derogation of any law.¹³⁰ Rather, the rule should simply provide a procedural mechanism to enforce the statute.¹³¹ If Rule 1.442 is creating substantive rights in derogation of

substantive right to attorney’s fees in section 768.79 on the occurrence of certain specified conditions.”).

123. *Roberts v. Carter*, 350 So. 2d 78, 78–79 (Fla. 1977) (emphasis added) (internal quotation marks omitted).

124. *Hauss*, 914 So. 2d at 475 (Farmer, J., concurring specially).

125. *See* *Great Am. Indem. Co. v. Williams*, 85 So. 2d 619, 623 (Fla. 1956) (“[T]he award of attorneys fees is in derogation of common law and that *acts* for that purpose should be construed strictly.”) (emphasis added); *Weathers ex rel. Ocean Accident & Guar. Corp. v. Cauthen*, 12 So. 2d 294, 295 (Fla. 1943) (holding that statutes in derogation of common law must be strictly construed).

126. 849 So. 2d 276 (Fla. 2003).

127. *Id.* at 278.

128. *See* *Goldman v. Campbell*, 920 So. 2d 1264, 1268 (Fla. 4th Dist. Ct. App. 2006) (Farmer, J., concurring specially) (noting that in *Willis Shaw*, “[w]ithout any explanation, the supreme court simply asserted” that strict construction applied to a rule of civil procedure).

129. *Willis Shaw*, 849 So. 2d at 278 (emphasis added); *see also* *Lamb v. Matetzschk*, 906 So. 2d 1037, 1040 (Fla. 2005) (reaffirming a strict construction of Rule 1.442).

130. Ellen K. Lyons, *Strict Construction of Civil Procedure Governing Settlement Proposals*, TRIAL LAWYERS SECTION OF THE HILLSBOROUGH COUNTY BAR ASSOCIATION LAWYER 52 (2007), available at <http://www.carltonfields.com/files/Publication/94db32e3-73bd-427f-aed0-3423d5262da2/Presentation/PublicationAttachment/e4f77368-98b6-4b9a-ad18-376e650a315a/Strict%20Construction%20of%20Civil%20Procedure%20Governing%20Settlement%20Proposals.pdf>.

131. *See* *Timmons v. Combs*, 608 So. 2d 1, 3 (Fla. 1992) (stating that Rule 1.442 “can only control procedural matters”).

the common law, it should be declared unconstitutional.¹³²

C. Penal Nature as Grounds for an Exception

Just as the Florida Supreme Court's original basis for strict construction of attorney's fees statutes did not contemplate application to rules of civil procedure, "[t]he court's reasoning had nothing to do with the idea that statutes for attorneys fees are penal in nature."¹³³ The shifting of attorney's fees upon the satisfaction of various criteria is no more penal in nature "than other consequences experienced routinely and frequently in ordinary litigation."¹³⁴ Therefore, it is seemingly inconsistent to require strict construction for Rule 1.442, but to leave just and speedy construction for all of the other rules of civil procedure.¹³⁵

However, there is a noteworthy counterargument that the proposals for settlement provisions are penal in nature. Specifically, one can argue that "section 768.79 imposes a penalty for unreasonably rejecting a settlement offer."¹³⁶ Thus, proposals for settlement create disincentives to litigate by "applying pressure and creating risks for an opposing party."¹³⁷ Counter to the American Rule, the shifting of attorney's fees becomes a punishment for a party who fails to correctly predict a jury's decision. Under this view that strict construction should apply to

132. See *infra* Part IV. See generally Lyons, *supra* note 130, at 52 (explaining rules of civil procedure should not create substantive rights in derogation of any law); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 855 (2012) (articulating that a "delicate balance between substance and procedure . . . is central to the smooth functioning of a constitutional democracy").

133. Hauss v. Waxman, 914 So. 2d 474, 475 (Fla. 4th Dist. Ct. App. 2005) (Farmer, J., concurring specially).

134. *Id.* at 478. Judge Gary Farmer went on to explain that:

Every time the court enters a money judgment, an injunction or a decree, every time it imposes costs, fees and interest, it vindicates the judgment with the coercive force of final process. As a matter of routine coercion of law's decisions, individuals can have their property taken in a levy of execution, they can be held in contempt, they can be made to pay a fine, and they can even be incarcerated. All of this is surely *penal* in the sense that *Willis Shaw* uses the term.

Id.

135. See Lyons, *supra* note 130, at 52 (noting the same inconsistency is pronounced in the Florida Supreme Court's decision in *Campbell v. Goldman*, 32 Fla. L. Weekly S320 (June 14, 2007)).

136. Hilyer Sod, Inc. v. Willis Shaw Exp., Inc., 817 So. 2d 1050, 1054 (Fla. 1st Dist. Ct. App. 2002).

137. Ellen Koehler Lyons, *Understanding Proposals for Settlement* 8 (Client Article published by Carlton Fields, 2006), available at <http://www.carltonfields.com/elyons/?op=publications>.

proposal for settlement provisions due to their penal nature, a legislative solution to the recent demise of joint proposals would be most effective. Arguably, the legislature would be in the best position to guide the court's application of strict construction by amending Florida Statutes section 768.79 to specifically address joint proposals.

However, even if strict construction should apply to this one specific procedural rule, Florida courts' current reading of Rule 1.442 seems inconsistent with the application of a rigid interpretative standard. Judge Gary Farmer of the Fourth District Court of Appeal made this clear as he expressed his hope that the Florida Supreme Court "will reconsider its policy of strict construction of procedural rules like rule 1.442 and make clear that strict construction of attorneys fees statutes means only that judges have no power of interpretation to extend such statutes beyond their stated terms and nothing else."¹³⁸ Imposing a requirement that proposals for settlement cannot be conditioned upon mutual acceptance is seemingly beyond the bounds of strict construction because such a requirement expands both the statute and the court rule beyond their stated terms.

III. CONSTITUTIONAL SEPARATION OF POWERS IMPLICATIONS

Not only does the Florida Supreme Court's strict interpretation of a rule of civil procedure stand in stark contrast to the court's own interpretive principles, it also blurs the distinction between substantive law and procedural rule. "[B]ecause courts frequently must address difficult questions of statutory construction in the context of a specific fact situation involving a live controversy between or among litigants, in the course of that effort, courts sometimes lose sight of the implications of their decision for interbranch relations."¹³⁹ Thus, recent decisions such as *Gorka* may raise constitutional separation of powers concerns inadvertently created by the court.

As discussed in Part I of this Note, statutes and court rules serve different functions and stem from the authority of different governmental branches.¹⁴⁰ "Article V, section 2(a), of the Florida Constitution provides [the Florida Supreme Court] with exclusive authority to adopt rules for practice and procedure in the courts of this State. The Legislature, on the other hand, is entrusted with the task of enacting substantive law."¹⁴¹ When provisions combine substantive and procedural aspects, the judiciary and the legislature must work together

138. *Goldman v. Campbell*, 920 So. 2d 1264, 1274 (Fla. 4th Dist. Ct. App. 2006) (Farmer, J., concurring specially).

139. Peter D. Webster et al., *Statutory Construction in Florida: In Search of a Principled Approach*, 9 FLA. COASTAL L. REV. 435, 521 (2008).

140. See *supra* notes 17–18 and accompanying text.

141. *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995).

to ensure that neither branch encroaches on the other's constitutional powers.¹⁴²

The Florida Supreme Court has previously noted that “the area of attorney fees and sanctions in the offer of judgment process may well be substantive.”¹⁴³ At the very least, it is clear that “the circumstances under which a party is entitled to costs and attorney’s fees is substantive and [the Florida Supreme Court’s] rule can only control procedural matters.”¹⁴⁴ Florida Statutes section 768.79 establishes a “mandatory right to attorney’s fees, if the statutory prerequisites have been met.”¹⁴⁵ This mandatory right is substantive in nature.¹⁴⁶ Essentially, Florida Statutes section 768.79 “begins by creating an ‘entitlement’ to fees.”¹⁴⁷ A party “shall be entitled” to attorney’s fees and court costs if two prerequisites are met: (1) the party serves a proposal for settlement that is rejected or not accepted within thirty days, and (2) the offering party has recovered a judgment that is at least 25% greater than or less than the proposal for settlement.¹⁴⁸ “No other factor is relevant in determining the question of entitlement.”¹⁴⁹

“That entitlement may then lead to an ‘award’ of fees. That award may then be lost by a finding that the entitlement was created ‘not in good faith,’ or the amount of the award may be adjusted upward or downward by a consideration of statutory factors.”¹⁵⁰ “When the Legislature enacted section 768.79, it [made] a policy determination that attorney’s fees should be recoverable under certain circumstances.”¹⁵¹ Therefore, the legislature designed the statute such that a court must find a party is entitled to attorney’s fees when the statutory prerequisites are met,¹⁵² unless the court determines the proposal was not made in

142. *See id.* at 611; *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992).

143. *Leapai*, 595 So. 2d at 15; *see also* Fla. Bar Re: Amendment to Rules of Civil Procedure, 550 So. 2d 442, 442 (Fla. 1989) (explaining that “it is not so clear that a sanction is ‘procedural’ when it imposes a ‘fine’ based on a percentage of an unaccepted offer, especially when a party may have done nothing more serious than guessing wrong about a jury verdict”).

144. *Timmons v. Comb*, 608 So. 2d 1, 2–3 (Fla. 1992).

145. *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. 4th Dist. Ct. App. 1993).

146. *TGI Friday’s, Inc.*, 663 So. 2d at 611 (noting that the legislature “has created a substantive right to attorney’s fees in section 768.79 on the occurrence of certain specified conditions”).

147. *Schmidt*, 629 So. 2d at 1040.

148. FLA. STAT. § 768.79(1) (2012).

149. *Schmidt*, 629 So. 2d at 1040.

150. *Id.*

151. *BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So. 2d 366, 368 (Fla. 4th Dist. Ct. App. 2001).

152. *See* FLA. STAT. § 768.79(1) (stating that a party “shall be entitled to recover reasonable costs and attorney’s fees” when the statutory prerequisites are satisfied); *id.* § 768.79(2) (listing the four prerequisites of a valid offer).

good faith.¹⁵³

In light of the *Gorka* decision, it is worth questioning whether a substantive right to attorney's fees serves any purpose if it cannot be enforced.¹⁵⁴ "Under the statute, the legislature intended to encourage settlements and reduce litigation costs on society by providing that prevailing parties who make a legitimate offer of judgment will have a reasonable expectation of recovering their attorney's fees";¹⁵⁵ however, the Florida courts have frustrated this purpose by making settlement more difficult to accomplish.¹⁵⁶ By adding a requirement that the legislature did not deem relevant in determining entitlement¹⁵⁷ and effectively rendering joint proposals for settlement useless,¹⁵⁸ the Florida Supreme Court has arguably infringed on the legislature's purview to create substantive law.¹⁵⁹

This same separation of powers concern was raised in *Heymann v. Free*.¹⁶⁰ In *Heymann*, the First District Court of Appeal was constrained by *Lamb v. Matetzschk*¹⁶¹ and the language of Rule 1.442(c)(3)¹⁶² to invalidate a joint proposal for settlement that failed to apportion the offer.¹⁶³ Although the court in *Heymann* was confronted with the judicially created requirement that joint proposals be apportioned, the same concerns presented by the court could apply to the judicially created prohibition against joint proposals conditioned on mutual

153. *See id.* § 768.79(7)(a)

154. *See Schantz v. Sekine*, 60 So. 3d 444, 447 (Fla. 1st Dist. Ct. App. 2011) (Thomas, J., specially concurring) ("This substantive right is meaningless, however, if it cannot be enforced").

155. *Id.*

156. *See Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 654 (Fla. 2010) (Polston, J., dissenting) ("[The *Gorka* decision] effectively eliminates the ability to make joint offers. In many instances, a party is motivated to settle an entire case with all parties because the litigation is expensive, distracting, and unpleasant. But if the case is going to continue, then there may be little incentive to partially settle.").

157. *Id.* at 652 (stating that "[t]here is no prohibition against offers to multiple parties conditioned on joint acceptance within . . . section 768.79, Florida Statutes").

158. *Id.* at 654 (urging that *Gorka* "effectively eliminates the ability to make joint offers"); *Schantz*, 60 So. 3d at 446 (agreeing with Justice Polston's dissent in *Gorka*).

159. *See Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975) ("Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature within the limits of the state and federal constitutions."). *See generally* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 644 (2010) (emphasizing that "[a]s a matter of . . . constitutional separation of powers . . . a court may not employ a rule of procedure to alter the essence of the underlying substantive right being enforced").

160. 913 So. 2d 11, 12 (Fla. 1st Dist. Ct. App. 2005).

161. 906 So. 2d 1037 (Fla. 2005).

162. Florida Rule of Civil Procedure 1.442(c)(3) requires in relevant part that "[a] joint proposal shall state the amount and terms attributable to each party." FLA. R. CIV. P. 1.442(c)(3).

163. *Heymann*, 913 So. 2d at 12.

acceptance. The *Heymann* court cautioned:

In our view, the result in this case implicates the separation of powers clause in Article II, Section 3 of the Florida Constitution. Such a result will deprive [the offerors of the proposal for settlement] of a significant attorney's fee award based on a requirement of rule 1.442 that is not contained in section 768.79, Florida Statutes.¹⁶⁴

The court also noted that a “rule of procedure cannot alter, amend or eliminate an entitlement to an award of attorney’s fees authorized in Section 768.79, Florida Statutes.”¹⁶⁵ The court’s concern for separation of powers implications seems even more pronounced if applied to a judicially created requirement that is neither in the plain language of the statute or the court rule. In *Gorka*, the court relied on *Lamb* to read into Rule 1.442 a new requirement—the right of independent control for offerees¹⁶⁶—that likely alters, amends, or eliminates an offeror’s entitlement to fees under Florida Statutes section 768.79. Thus, the same separation of powers concern articulated in *Heymann* also arises in *Gorka*.

It is important to note that an opposing separation of powers concern may be raised: Perhaps, the legislature has infringed on the judiciary by enacting procedural mechanisms through Florida Statutes section 768.79. The Florida Supreme Court has stated that “where a statute does not basically convey substantive rights, the procedural aspects of the statute cannot be deemed ‘incidental,’ and that statute is unconstitutional.”¹⁶⁷ However, Florida Statutes section 768.79 expressly establishes a substantive right to attorney’s fees¹⁶⁸ and therefore does not fall into this category. It is also clear that Florida Statutes section 768.79 does not fall into the purely substantive category¹⁶⁹ as it establishes procedural time frames for acceptance of proposals.¹⁷⁰ Thus, Florida Statutes section 768.79 does not fit exclusively into either a procedural or substantive category. The court has stated “where a statute

164. *Id.*

165. *Id.*; see also *In re Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105, 106 (Fla. 1996) (rejecting a proposed amendment to Rule 1.442 which would enable courts to determine “the entitlement to” fees because the legislature has made this determination as matter of substantive law).

166. See *supra* notes 101–102 and accompanying text.

167. *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).

168. See FLA. STAT. § 768.79(1) (2012).

169. See *Massey*, 979 So. 2d at 937 (stating that “[i]f a statute is clearly substantive and ‘operates in an area of legitimate legislative concern,’ [the Florida Supreme Court] will not hold that it constitutes an unconstitutional encroachment on the judicial branch).

170. See FLA. STAT. § 768.79(4) (stating that a party has thirty days to accept a proposal for settlement from the time the proposal is filed).

contains some procedural aspects, but those provisions are so intimately intertwined with the substantive rights created by the statute, that statute will not impermissibly intrude on the practice and procedure of the courts in a constitutional sense.”¹⁷¹ Therefore, a separation of powers argument that the legislature is unconstitutionally infringing on the judiciary through the procedural aspects of Florida Statutes section 768.79 will likely fail.

In *Timmons v. Combs*,¹⁷² the Florida Supreme Court acknowledged that the proposal for settlement statute has procedural elements,¹⁷³ but the court did not invalidate the statute nor address any constitutional separation of powers concerns. Rather, the court repealed its own rule of civil procedure and adopted the procedural aspects of the statute into the amended Rule 1.442.¹⁷⁴ Thus, even if the prohibition against joint proposals conditioned on mutual acceptance were entirely procedural in nature, the Florida Supreme Court may have ceded its procedural authority to the legislature in the proposals for settlement context.

An alternative reading is that *Timmons* implies that authorizing joint proposals for settlement is substantive in nature, and should therefore be explicitly authorized by the legislature. On this view, separation of powers concerns would be most effectively addressed by the legislature clearly defining the rights and responsibilities of parties in the realm of joint proposals for settlement. Ultimately, however, the most pragmatic solution to these separation of powers concerns is for the court to strive to effectuate the legislative intent behind Florida Statutes section 768.79. In doing so, the court will be more inclined to interpret Rule 1.442 in such a manner as to avoid altering, amending, or eliminating any entitlement to an award of attorney's fees which the legislature did not prohibit as a means of encouraging settlement. One way to begin this process is to look to the proposal for settlement provisions and interpretative principles of other states.

IV. COMPARATIVE ANALYSIS OF NEVADA'S PROPOSAL FOR SETTLEMENT PROVISIONS

Nevada is a forerunner in implementing statutory and procedural provisions that further the goal of proposals for settlement (or “offers of judgment,” as they are referred to in Nevada)—encouraging settlement. Nevada Revised Statutes section 17.115 and Nevada Rule of Civil

171. *Massey*, 979 So. 2d at 937.

172. 608 So. 2d 1 (Fla. 1992)

173. *See Timmons*, 608 So. 2d 1 at 3 (explaining that Florida Statutes section 768.79 “does contain procedural aspects which are subject to [the Florida Supreme Court's] rule-making authority”).

174. *See id.* (stating that the Florida Supreme Court “hereby adopt[s] the procedural portion of section 768.79 as a rule of this Court effective as of the date of this opinion”).

Procedure 68 set forth Nevada's offer of judgment protocols and must be read alongside one another.¹⁷⁵ Despite minor differences between the language of the statute and the court rule, "[a]s a general matter, [the Nevada Supreme Court] construes the rules in harmony with the statute."¹⁷⁶

Similar to Florida Statutes section 768.79, Nevada Revised Statutes section 17.115 is also a two-way fee-shifting provision.¹⁷⁷ The most notable difference between the two statutes is that Nevada Revised Statutes section 17.115 specifically addresses joint offers of judgment:

(6) Multiple parties may make a joint offer of judgment pursuant to this section.

(7) A party may make to two or more other parties pursuant to this section an apportioned offer of judgment that is conditioned upon acceptance by all the parties to whom the apportioned offer is made. Each party to whom such an offer is made may serve upon the party who made the offer a separate written notice of acceptance of the offer.¹⁷⁸

Under the Nevada offer of judgment statute, an offeror may condition an offer on the joint acceptance of the offerees.¹⁷⁹ If at least one offeree does not accept the offer, then "[t]he action must proceed as to all parties to whom the apportioned offer was made, whether or not the other parties accepted or rejected the offer."¹⁸⁰ However, only those offerees who rejected the offer will be subject to the fee-shifting provisions of the statute.¹⁸¹ Offerees who accepted the offer are not subject to these fee-shifting provisions, even if they fail to obtain a more favorable judgment at trial.¹⁸² Ultimately, the statute exists to encourage settlement: "[t]he purpose of section 17.115 is to place the risk of loss on the offeree who fails to accept the offer, thus encouraging both offers and acceptance of offers."¹⁸³

175. See *McCrary v. Bianco*, 131 P.3d 573, 576 (Nev. 2006).

176. *Id.*

177. However, unlike Florida Statutes section 768.79 which requires at least a 25% differential between the rejected offer and the judgment at trial, Nevada Revised Statutes section 17.115 simply provides for fee-shifting when a "party who rejects an offer of judgment fails to obtain a more favorable judgment." NEV. REV. STAT. ANN. § 17.115(4) (West 2011).

178. *Id.* § 17.115(6)-(7); see also NEV. R. CIV. P. 68(c) (addressing joint proposals).

179. See NEV. REV. STAT. ANN. § 17.115(7).

180. *Id.* § 17.115(7)(a).

181. See *id.* § 17.115(7)(b)(1).

182. See *id.* § 17.115(7)(b)(2).

183. *Trs. of Plumbers & Pipefitters Union Local 525 Health & Welfare Trust Plan v. Developers Sur. & Indem. Co.*, 84 P.3d 59, 62 (Nev. 2004).

The Nevada offer of judgment court rule also exists “to encourage settlement of lawsuits before trial.”¹⁸⁴ Nevada’s Rule 68 is notable in that it “introduced a tremendous degree of flexibility to parties that choose to serve offers of judgment. This high degree of flexibility is unique to Nevada”¹⁸⁵ Rather than requiring an unyielding and rigid construction of the procedural rule, the Nevada Supreme Court reads Rule 68 alongside the offer of judgment statute “such that no part of the statute is turned to mere surplusage.”¹⁸⁶ Thus, Rule 68 fulfills its purpose by properly administering the substantive law. Further, the court’s practical interpretation of Rule 68 furthers legislative intent and recognizes that “[t]he offer of judgment is a useful settlement device which should be made available at every possible juncture where the rules allow.”¹⁸⁷

Although Nevada’s offer of judgment provisions are something of an outlier, Nevada’s approach can be looked to as a model for judicial and legislative cooperation in effectuating the true intent of offer of judgment provisions. The Nevada Supreme Court’s pragmatic construction of its procedural rule can provide instruction. Further, the language of Nevada’s provisions embodies the interpretation advocated by the *Gorka* dissent, and “[t]o interpret these provisions any other way effectively eliminates the ability to make joint offers.”¹⁸⁸ Nevada’s flexible approach to offers of judgment maximizes the utility of joint offers by recognizing that “if it would be futile to remove only some of the parties from the litigation, it makes sense to require all parties to accept the offer of judgment.”¹⁸⁹ Thus, Nevada’s provisions promote the early resolution of litigation by eliminating the risks of piecemeal settlement that exist under Florida’s provisions.

CONCLUSION

Despite the good intentions of the Florida Legislature and the Florida Supreme Court, proposals for settlement continue to generate more litigation rather than settlement. In order to better effectuate the intended purpose of Florida Statutes section 768.79 and Florida Rule of Civil Procedure 1.442, courts should uniformly apply the “just and speedy” interpretive standard set forth in Rule 1.010. A pragmatic

184. *Allianz Ins. Co. v. Gagnon*, 860 P.2d 720, 724 (Nev. 1993).

185. Craig Roecks, *A Proposal to Clarify Rule 68 of the Nevada Rules of Civil Procedure Regarding Offers of Judgment*, 7 NEV. L.J. 382, 382 (2007).

186. *Albios v. Horizon Comtys., Inc.*, 132 P.3d 1022, 1031 (Nev. 2006).

187. *Allianz*, 860 P.2d at 724.

188. *See Attorneys’ Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 654 (Fla. 2010) (Polston, J., dissenting).

189. *See Micah S. Echols & Erik W. Fox, Offers of Judgment in Nevada: Best Friend or Worst Enemy?*, 2010 NEV. LAW. 25, 26 (2010).

construction of Rule 1.442 will further opportunities for settlement rather than hinder them, better enabling the procedural rule to enact the substantive law.

Although the Florida Supreme Court labels its current interpretation of Rule 1.442 “strict construction,”¹⁹⁰ the distinctions between strict and liberal construction have been blurred by decisions like *Gorka*. Instead of striving to adhere to the often confusing and ill-suited strict construction standard, the court should strive to promote justice and interpret Rule 1.442 correctly by giving it its intended meaning.¹⁹¹ By shifting the court’s focus to the purpose of the proposal for settlement provisions, constitutional separation of powers concerns will likely be eliminated as the court will be less inclined to expand the provisions beyond their stated terms.

The Florida Legislature can aid the court by “clarifying parties’ rights and responsibilities in making and receiving offers of judgments.”¹⁹² Like Nevada’s statute, Florida Statutes section 768.79 should specifically address joint proposals for settlement. The legislature should make clear whether enforceability is determined by apportionment, by the ability of each offeree to act independently, or whether neither of those considerations is important.¹⁹³ However, even if the legislature does not offer such clarification, the Florida Supreme Court, much like the Nevada Supreme Court, should make joint proposals for settlement available at every junction the statute does not prohibit. The court has the power to revive joint proposals as useful tools for settlement by adhering to its own interpretive principle that procedural rules are to be construed for the equitable and just application of the substantive law. Thus, the court can “repave” the road toward settlement by returning to, and effectuating, the purpose behind Florida’s proposal for settlement provisions.

190. See *supra* notes 126–29 and accompanying text.

191. See *Hauss v. Waxman*, 914 So. 2d 474, 475 (Fla. 4th Dist. Ct. App. 2005).

192. *Schantz v. Sekine*, 60 So. 3d 444, 447 (Fla. 1st Dist. Ct. App. 2011) (Thomas, J., specially concurring).

193. See Barbara Busharis, *One Offer, Indivisible? Florida Courts Continue to Clarify the Limits of Joint Settlement Proposals*, 30 TRIAL ADVOC. Q. 4, 5 (2011).