

Shifting Your Legal Fees to Your Opponent:
Florida's Tricky and Prickly Proposals for Settlement
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Tired of winning your case in court but spending tens (or hundreds) of thousands of dollars in attorneys fees? Florida law has a mechanism whereby you, a litigant, can shift your legal fees and costs to your opponent, leaving him not only the humiliated, bloody, battle torn and defeated loser in the litigation (OK, maybe I'm a little competitive), but also with a boatload of your expenses that he has to pay. This cost-shifting mechanism is called a Proposal for Settlement ("PFS"), and when properly used it can assert pressures on the other side to settle, or at least be reasonable in negotiations. It can be used by either or both sides and is a strategy not to be overlooked. The rules regarding the PFS can be found in §768.79, *Florida Statutes* and Rule 1.442 of the Florida Rules of Civil Procedure.

The Proposal works like this: You serve your opponent with an offer to settle the case for a specific amount. Then you wait 30 days. If your opponent doesn't accept the offer within 30 days, it is deemed rejected. No harm, no fuss. But here's the rub – if you are the plaintiff, and you later go to trial and recover an amount that is more than 25% more than your offer (i.e., 125% of your offer), or if you are a defendant and the plaintiff recovers less than 25% less than your offer (i.e., 75% of your offer), then your opponent is on the hook for your fees and costs from the date of service of the Proposal.

Here are a couple of examples: suppose you're a plaintiff and you are willing to settle your fabulously meritorious and promising case for \$1,000. You serve a PFS on the defendant for \$1,000. If the defendant doesn't accept the offer in 30 days, it is deemed rejected. If you then go to trial and, after setoffs and court awarded taxable fees and costs, you recover an amount greater than 125% of your offer, or \$1,250 ($\$1000 \times 125\% = \$1,250$), then you are entitled to attorneys fees and costs from the date of service of the PFS.

Now, on the other hand, suppose you're a defendant. You want to settle this bogus, frivolous, piece of #*^ * case for no more than \$500. So, you serve a PFS for \$500 and wait the 30 days for the plaintiff to reject your offer. You then go to trial and, after setoffs and court awarded taxable fees and costs, the plaintiff recovers less than \$375 ($\$500 \times 75\% = \375), then you are entitled to attorneys fees and costs from the date of service of the PFS.

Here are some additional thoughts about the strategic uses of PFS's:

1. If you're a defendant, and you're dead in the water and you need to admit breach of the contract or negligence, but you think the damages are minimal, serve a PFS that leaves room for the court to award taxable fees and cost (i.e., the ones you'll have to pay just for losing the trial).
2. Also if you're a defendant and the plaintiff has no money, don't expect the plaintiff to be terribly concerned about having to pay your attorneys fees and costs. You know he doesn't have the money to pay, he knows he doesn't have the money to pay, and your PFS isn't going to scare him.

3. From the plaintiff's perspective, the PFS must be low enough to create a credible threat to the defense that it may ultimately cost them more money to refuse the PFS, but high enough that if the defendant accepts the PFS, you can live with the amount. A PFS is an offer to settle and, obviously, it can be accepted.
4. PFS's that are so low as to bear no relationship to the true merits of the case may be considered by a court to have not been made in good faith and may not be enforced by the court (the trial court has some discretion in enforcement of the PFS). Make sure it has *some* bearing on reality. Of course, the fact that you are in a position to enforce it is pretty good evidence that it was reasonable.
5. PFS's may be recoverable by the defense if they win summary judgment or dismissal. If you have a legally precarious case, you must tread with due care when you receive a PFS.

The rules surrounding the contents of a PFS are spelled out in Rule 1.442 of the Florida Rules of Civil Procedure, but there are additional requirements set out in the case law. Review the law carefully. Because PFS's are in derogation of the common law rule that everyone pays his own fees and costs, they are very strictly scrutinized by the courts before they are enforced. There can be no ambiguity, and generally a single person must have the right to accept or reject the Proposal. So, make sure your form and procedure are right. This includes the inclusion of the actual Release you want signed or a statement that you will dismiss the case with prejudice upon its acceptance.

There are also strict time limits for the service of a PFS. A proposal to a defendant cannot be served earlier than 90 days after service of process on that defendant; a proposal to a plaintiff cannot be served earlier than 90 days after the action has been commenced. No proposal can 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.

Used properly, a PFS can be a valuable tool for either side. But if you review the rules, do it right and win your case at trial, you may be able to hand your client the bonus of having some of his legal fees covered.