# Civil Justice Subcommittee

**Thursday, November 16, 2023**
**12:00 PM - 1:30 PM**
**404 HOB**

**Meeting Packet**

**Paul Renner**
**Speaker**

**William Robinson**
**Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Civil Justice Subcommittee

**Start Date and Time:** Thursday, November 16, 2023 12:00 pm

**End Date and Time:** Thursday, November 16, 2023 01:30 pm

**Location:** Sumner Hall (404 HOB)

**Duration:** 1.50 hrs

Panel discussion on offer of judgment statute.

To submit an electronic appearance form, and for information about attending or testifying at a committee meeting, please see the “Visiting the House” tab at www.myfloridahouse.gov.

**NOTICE FINALIZED on 11/09/2023 4:00PM by Ramirez.Julia**

# A primer on section 768.79—otherwise known as **The PFS Statute**

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# Welcome to Proposals for Settlement

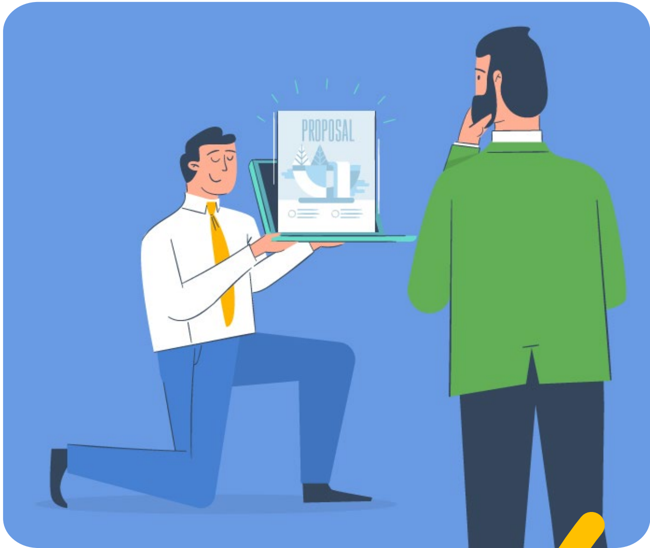
1. I went to law school because numbers are not my strong suit.

2. I could teach this class for a semester and not cover everything.

The Florida Legislature created section 768.79 in 1986 as a means to help resolve litigation.

The statute is titled “Offer of Judgment and demand for judgment” but practitioners usually call it the “proposal for settlement statute” because the Florida Rule of Civil Procedure that goes with the statute is called “Proposals for Settlement.”

People call it a PFS or OJ for short.



DEMAND

It is an “offer of judgment” when a defendant is sending it to a plaintiff.

It is a “demand for judgment” (which sounds so combative?) when it is a plaintiff sending it to a defendant.

It is a “proposal for settlement” regardless of who sends it to whom.

Whatever you call it, the statute says it must include FOUR THINGS:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The Legislature saw the rules as easy:

A party serves the offer.

The other side gets 30 days to evaluate it.

If a party serves an offer and they change their mind about it, they can withdraw the offer (in writing) at any point before it is accepted.

If the other side doesn't accept the offer within 30 days, they have now exposed themselves to a potential penalty.

The penalty created by this PFS statute is:

- when the defendant makes an offer to the plaintiff, if the plaintiff's "judgment obtained" is 25% **less** than the offer the plaintiff rejected, then the plaintiff owes all fees and costs incurred by the defendant after the date the defendant served the offer

- when the plaintiff makes the offer to the defendant, if the plaintiff's "judgment obtained" is 25% **greater** than the offer the defendant rejected, then the defendant owes all fees and costs incurred by the plaintiff after the date the plaintiff served the offer

Depending on the case and how early it was offered in the case, that can be

a few thousand dollars

to a few million dollars.

The idea is to incentivize people to accept reasonable settlement offers and to punish them when they take up court time on cases that should have settled.

When someone makes an offer that complies with the statute, the other side has to seriously evaluate whether they should reject it—because rejection means having to pay the other side's fees and costs from the date the offer was served to the end of the case (including appeal!).

EASY PEASY RIGHT?
NETFLIX

EH, NOT SO MUCH

There is a corresponding rule of Civil Procedure (rule 1.442) that lays out a few more parameters.

In addition to what the statute requires, the rule says you must:

- wait 90 days after the case was filed before you can serve an offer

- serve your offer at least 45 days before the case is set to start trial

- state that "the proposal resolves all damages that would otherwise be awarded in a final judgment in the action, subject to subdivision (F)."

- state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim"

It USED to be that you could include “non-monetary terms.”

The only limit was the creativity of the parties.

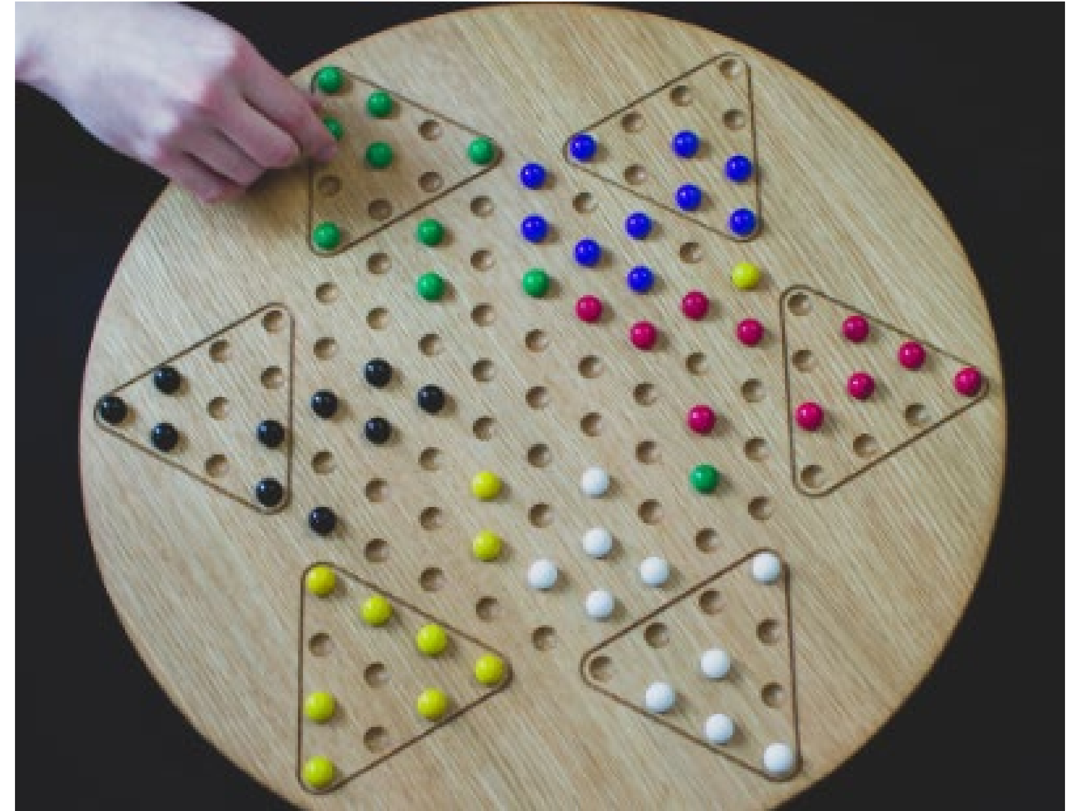
In a breach of contract case, the plaintiff could require the defendant to deliver the settlement check along with an apology letter.

Defendants usually wanted things like confidentiality, a guarantee that all liens will be paid, and they will be indemnified by the plaintiff if a lienholder goes after the defendant, and a release, etc. as part of their offer.

For either side, the sky was the limit. Want the money delivered in cash? Want to be able to make payments over time?

What the Legislature designed as Checkers…

Just turned into



Chinese Checkers

The “non-monetary terms” part caused A LOT of problems.

For example, when the defendant wanted a release, the Supreme Court said that some terms are simple enough to include in a release and it could just be described generally in the offer:

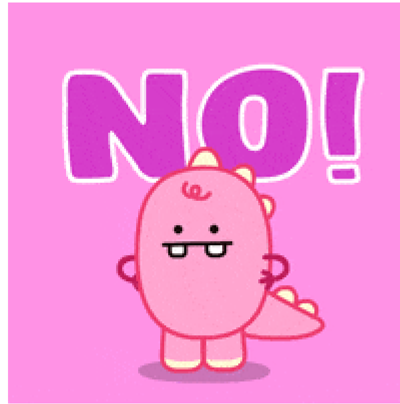
> “Plaintiff will agree to a general release that releases all claims arising from this incident and indemnifies the defendant against claims by any third party related to the incident.”

But then the defendant would attach a release that asked for MORE than what was described in the PFS.

Or, sometimes the release contained terms that it exceeded the scope of the PFS.

For example, if the offer was from Defendant to Plaintiff A but the release wanted Plaintiff A **and** Plaintiff B to release all claims, then the release would be inconsistent with the offer.

The Plaintiff would say "the offer is not consistent with the attached release, so I'm not going to accept."




And then the parties would duke it out in the appellate courts over whether the offer was valid and fees had to be paid or whether it was unenforceable because the offer and the release were inconsistent.

**And what happens if the defendant makes an offer for $100,000 that requires a release and confidentiality and the plaintiff only wins a $50,000 judgment after trial?**

**Did the defendant trigger the PFS? The money was right, but the defendant also demanded confidentiality…and didn't win that. The plaintiff can go tell anyone it wants that the defendant had to pay $50,000.**

**The First District Court of Appeal addressed something similar last year and said that there was no award for fees because the PFS statute is meant to resolve black and white disputes about money. Nothing else.**

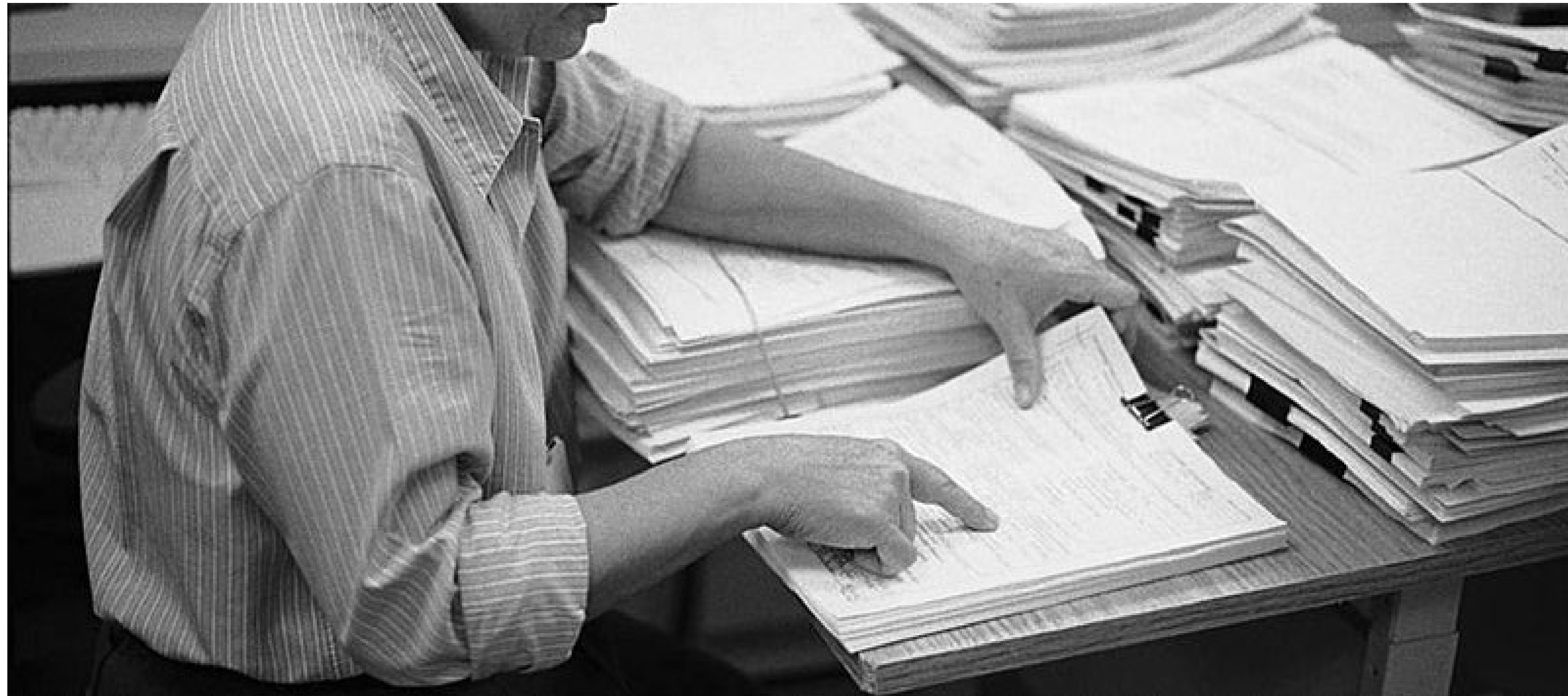
Effective July 1, 2022, the Florida Supreme Court eliminated the ability to make non-monetary conditions part of the offer.

Now, the only non-monetary condition one can make is to require/offer dismissal of the case with prejudice if the offer is accepted.

The Supreme Court made the proposal to eliminate non-monetary terms on its own.

The proposal went through a comment period where lawyers and judges were invited to provide the Court with their thoughts.

After receiving comments both for and against the elimination of non-monetary terms, the Court decided to move forward with amending rule 1.442 so that the only non-monetary term allowed is to agree to a dismissal with prejudice if an offer is accepted.



As someone who spends a lot of time reviewing proposals for settlement, I can say that the change in the rule has made a lot of the offers more simplistic.

Simplistic is good. Simplistic increases the odds the offers are accepted.

The point of the exercise is to be able to serve an offer that is easy to understand.

The party who made the offer is only entitled to recover costs and fees under the PFS statute if they do EVERYTHING right.

That way, it is clear that the other side made a knowing (bad) judgment to reject a clearly understandable offer.

Mess up on a detail, and the right to fees disappears.

It used to be that any MINOR incongruence would also make a PFS unenforceable.

If you wrote “the amount of this offer is $25,000 (Twenty thousand dollars)” that was not a minor incongruence. The offeree wouldn’t be able to tell if you were offering $25k or $20k.

But, in the old days, in a case where the plaintiff had no basis for claiming fees other than by enforcing the PFS (no contract claim for example) a trial court would say a PFS was not enforceable because it failed to comply with the provision in rule 1.442 that requires you to "state whether the proposal includes attorneys' fees."

Starting in 2016, the Supreme Court said:

**NO MORE!**

In a case called *Kuhajda v. Borden Dairy Company of Alabama, LLC*, 202 So. 3d 391, 396 (Fla. 2016), the Court wrote:

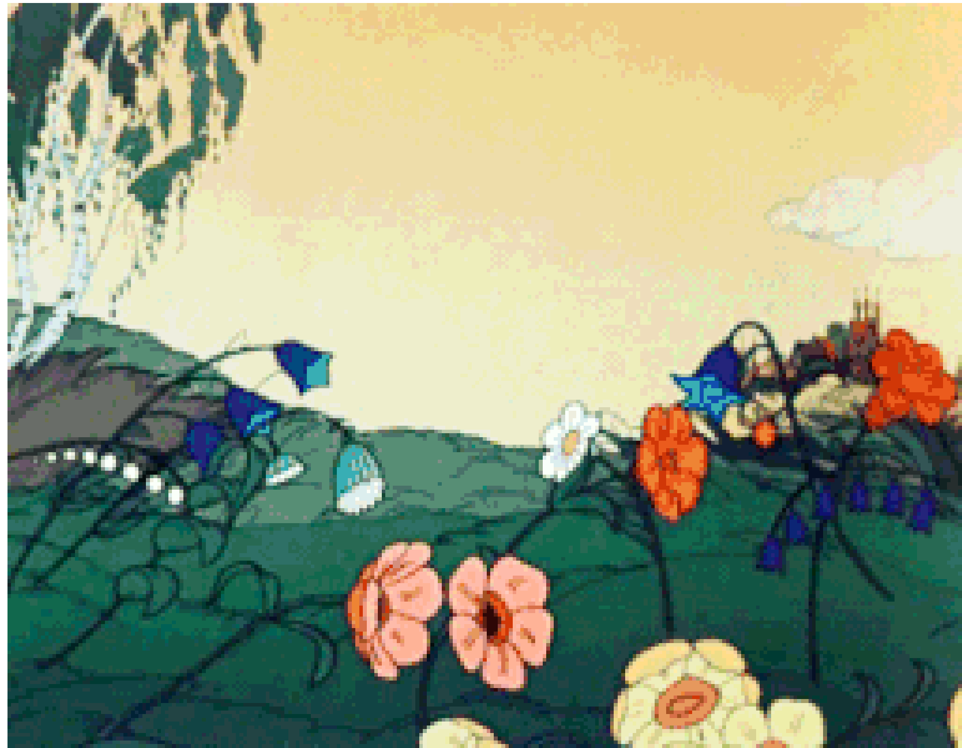
> We decline to invalidate Kuhajda's offers of judgment solely for violating a requirement in rule 1.442 that section 768.79 does not require. The procedural rule should no more be allowed to trump the statute here than the tail should be allowed to wag the dog. ***A procedural rule should not be strictly construed to defeat a statute it is designed to implement.***

# The Court has sent that message in several cases since *Kuhajda:*

**Don’t nitpick a PFS for reasons to find it invalid**. If you could understand the offer and you chose to reject it, then you will be held responsible for fees and costs.

That is helping PFSs be more useful tools.

If the opponent has trepidation about rejecting the offer because the offer looks “good” (no glaring facial errors in the format), then that means offers are taken seriously and have a better chance of blooming into the resolution of cases.



Let’s say you draft a proposal that complies with the statute and the rules…

Now you have to navigate the caselaw around the words "judgment obtained."

The statute says:

> For purposes of the determination required by paragraph (a) [when a defendant makes an offer to a plaintiff], the term "judgment obtained" means the amount of **the net judgment entered**, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced.
>
> For purposes of the determination required by paragraph (b) [when a plaintiff makes an offer to a defendant], the term "judgment obtained" means the amount of **the net judgment entered**, plus any postoffer settlement amounts by which the verdict was reduced.

## A primer on judgments

Let’s say a pedestrian is hit in a crosswalk.

Pedestrian sues the driver who ran the red light and the company that timed the “walk now” sign to illuminate immediately upon a light turning red instead of giving several seconds of for red light runners.

On the same day, Plaintiff serves a PFS on the red light runner for $100,000 and a PFS on the traffic light designer for $100,000.

Red light runner accepts.  Light designer does not.

Light designer serves a PFS on the plaintiff.  Plaintiff does not accept.

Case goes to trial and jury awards plaintiff $200,000 for her medical bills and for her pain.

The judge will take the amount of the jury's verdict and reduce it by the $100,000 settlement with the red light runner.

The judge will also reduce it by any amounts that insurance has paid for her medical bills (these are called collateral sources).

Section 57.041 says that the party who wins a lawsuit is entitled to recover their reasonable costs. The judge will determine the amount of the plaintiff's costs.

The judge will then enter a judgment for the plaintiff in whatever amount remains after the reduction for settlements and collateral sources and increases for prevailing party costs. Sometimes, the damages judgment and the costs judgment are entered as separate judgments.

| | |
|---|---|
| Verdict | $200,000 |
| Settlement | -100,000 |
| Health Ins. | - 50,000 |
| Judgment for verdict | $50,000 |
| Judgment for taxable Costs | $ 8,000 |

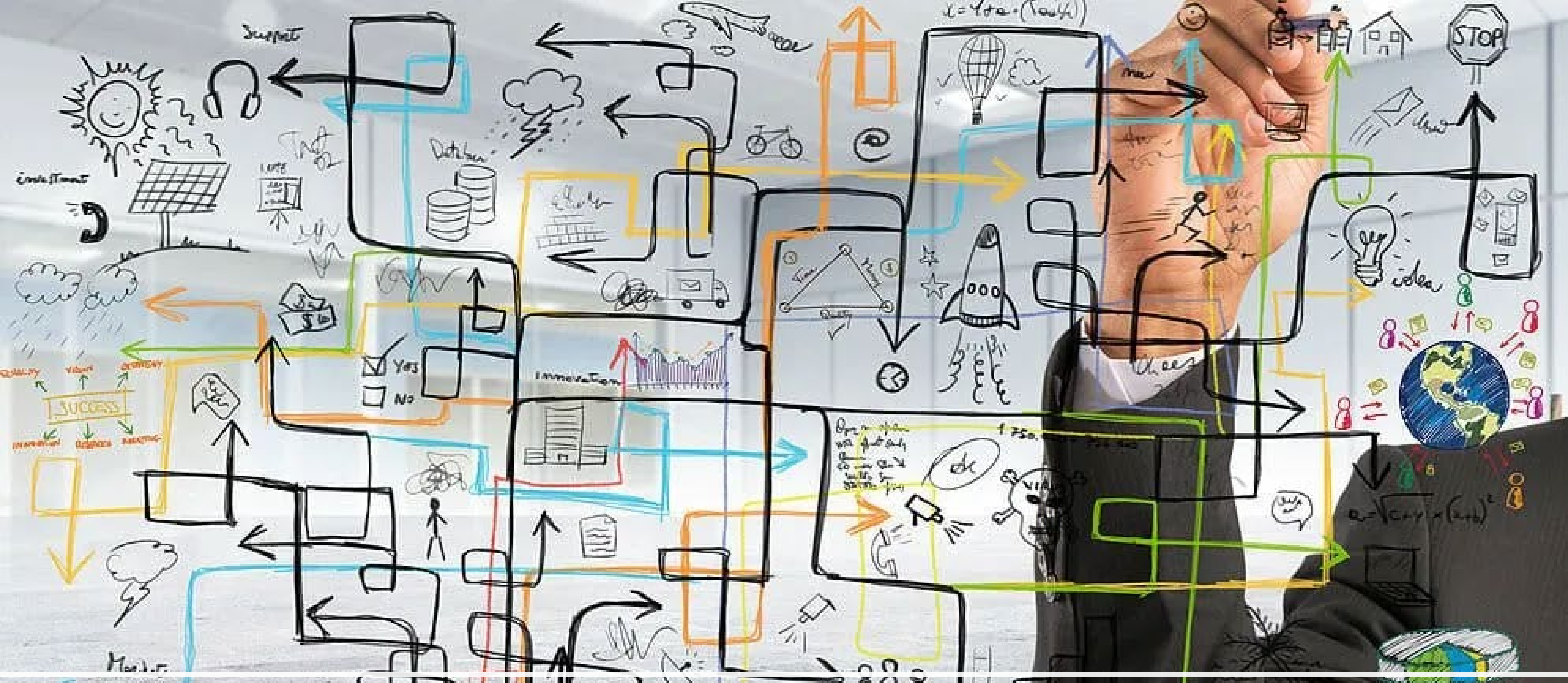
Under the PFS statute, when trying to determine whether the penalties of the PFS statute are triggered, if the settlement was reached after the PFS was served, those reductions come back into the judgment.

- Verdict $200,000
- ~~Settlement -100,000~~
- Health Ins. - 50,000
- ___________________________
- PFS “net jdmt $150,000
- Entered”

The Supreme Court has said that any costs paid after the date the PFS was served or any prejudgment interest earned after the date the PFS was served have to be SUBTRACTED from the judgment the court enters.

Basically, the trial court also has to figure out the costs the plaintiff is entitled to recover and the prejudgment interest on those costs. Then, draw a line on the day the PFS was served, anything before that date, goes into the “judgment obtained” pot. Anything after that date gets taken out.

| | A | B | C | D | E | F | G | H | I | J | K | L | M |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | PAYEE | AMOUNT | DATE PAID | INTEREST THROUGH 5/12/16 HRG | POST HRG# OF DAYS IN 2016 | POST HRG 2016 DAILY INTEREST RATE | 2016 INTEREST RATE AS PERCENTAGE | POST HRG 2016 PREJUDGMENT INTEREST | # OF DAYS IN 2017 | 2017 DAILY INTEREST RATE | 2017 INTEREST RATE AS PERCENTAGE | 2017 PREJUDGMENT INTEREST | TOTAL PREJUDGMENT INTEREST |
| 41 | Probative Production | $ 1,003.75 | 9/24/2009 | $ 532.89 | 233 | 0.0002192 | 8% | $ 51.27 | 41 | 0.0002192 | 8% | $ 9.02 | $ 593.18 |
| 42 | TDx Media, LLC | $ 1,000.00 | 6/10/2011 | $ 295.59 | 233 | 0.0001644 | 6% | $ 38.31 | 41 | 0.0001644 | 6% | $ 6.74 | $ 340.64 |
| 43 | TDx Media, LLC | $ 1,785.07 | 6/10/2011 | $ 527.65 | 233 | 0.0001644 | 6% | $ 68.38 | 41 | 0.0001644 | 6% | $ 12.03 | $ 608.06 |
| 44 | The Marker Group | $ 565.27 | 12/24/2014 | $ 37.12 | 233 | 0.000129781 | 4.75% | $ 17.09 | 41 | 0.0001361644 | 4.97% | $ 3.16 | $ 57.37 |
| 45 | Express Printing | $ 412.82 | 10/22/2015 | $ 10.89 | 233 | 0.000129781 | 4.75% | $ 12.48 | 41 | 0.0001361644 | 4.97% | $ 2.30 | $ 25.68 |
| 46 | Express Printing | $ 1,077.52 | 10/4/2015 | $ 30.94 | 233 | 0.000129781 | 4.75% | $ 32.58 | 41 | 0.0001361644 | 4.97% | $ 6.02 | $ 69.54 |
| 47 | Express Printing | $ 1,437.58 | 10/22/2015 | $ 37.91 | 233 | 0.000129781 | 4.75% | $ 43.47 | 41 | 0.0001361644 | 4.97% | $ 8.03 | $ 89.41 |
| 48 | TimeCoder Pro | $ 495.00 | 8/10/2015 | $ 17.76 | 233 | 0.000129781 | 4.75% | $ 14.97 | 41 | 0.0001361644 | 4.97% | $ 2.76 | $ 35.49 |
| 49 | Fed Ex-Kinko's | $ 152.12 | 8/30/2015 | $ 5.06 | 233 | 0.000129781 | 4.75% | $ 4.60 | 41 | 0.0001361644 | 4.97% | $ 0.85 | $ 10.51 |
| 50 | Express Printing | $ 609.18 | 5/4/2016 | $ 0.64 | 233 | 0.0001306011 | 4.78% | $ 18.54 | 41 | 0.0001361644 | 4.97% | $ 3.40 | $ 22.58 |
| 51 | Nurse - Gail Martin's son | $ 200.00 | 8/26/2015 | $ 6.76 | 233 | 0.000129781 | 4.75% | $ 6.05 | 41 | 0.0001361644 | 4.97% | $ 1.12 | $ 13.92 |
| 52 | Clerk, Circuit Court Volusia County | $ 300.00 | 1/6/2009 | $ 176.43 | 233 | 0.0002192 | 8% | $ 15.32 | 41 | 0.0002192 | 8% | $ 2.70 | $ 194.45 |
| 53 | Probate Court | $ 50.00 | 1/23/2009 | $ 29.22 | 233 | 0.0002192 | 8% | $ 2.55 | 41 | 0.0002192 | 8% | $ 0.45 | $ 32.22 |
| 54 | Probate Court | $ 4.00 | 1/29/2009 | $ 2.33 | 233 | 0.0002192 | 8% | $ 0.20 | 41 | 0.0002192 | 8% | $ 0.04 | $ 2.57 |
| 55 | Clerk, Circuit Court Volusia County | $ 100.00 | 3/6/2014 | $ 10.38 | 233 | 0.000129781 | 4.75% | $ 3.02 | 41 | 0.0001361644 | 4.97% | $ 0.56 | $ 13.96 |
| 56 | | | | **$ 13,406.15** | | | | **$ 3,475.62** | | | | **$ 633.23** | **$ 17,515.01** |




That is more complicated than what the Legislature—or reality—requires.

The reality is that when a plaintiff wants to settle a case, they think:

If this case goes to trial, I think my damages are probably X. Based on where we are in the litigation (early offers are usually lower), I'm willing to end it now for Y.

When a defendant wants to settle a case, they usually think:

If this case goes to trial, I think my exposure is probably X. Based on where we are in the litigation (early offers are usually lower), I'm willing to end it now for Y.

## EXAMPLE - Plaintiff rejects the Defendant's offer.

If the Defendant wins at trial, the issue is easy.  They are entitled to all fees and costs they incurred after the day they served the PFS.

If the Plaintiff wins, but it's a low amount, then it appears that the Legislature ***wanted*** the court to take the judgment it entered (a judgment that would include all costs and all prejudgment interest) and add back in any settlement amounts or collateral sources that were received after the date of the PFS and by which the damages judgment was reduced.

The idea being that the defendant didn't know those amounts were going to lower the plaintiff's recovery when the defendant made the offer, so the defendant doesn't get the benefit of those reductions.

**EXAMPLE - Plaintiff rejects the Defendant's offer.**

Conversely, if the Plaintiff makes the offer and the Defendant rejects it, then the Plaintiff gets to add back in the amount of any post offer settlements by which the judgment was reduced. The idea being that the Plaintiff couldn't know those amounts were coming when it was trying to decide the amount to offer the Defendant to resolve the case.

(The legislative history is silent. I can only guess that the reason that the Legislature felt like the Plaintiff might have more knowledge about collateral sources, so a Plaintiff doesn't get the benefit of adding those back in when the Plaintiff is the one moving for fees based on an offer the Defendant rejected.)

Because the statute is silent about what to do with costs, prejudgment interest and attorneys' fees, the Supreme Court filled in the blanks.

But the statute doesn't say anything about "subtracting" amounts from the judgment.

The statute could provide clarity on the policy and level of simplicity.

Another issue is the amount of the “difference” between what was offered and what was obtained.

Currently, the difference is 25%

I have heard a suggestion that the amount be lowered to 10%.

# DECLARATORY JUDGMENTS
## A PFS NO FLY ZONE

The PFS statute is not available in lawsuits where the plaintiff is seeking a declaratory judgment action.

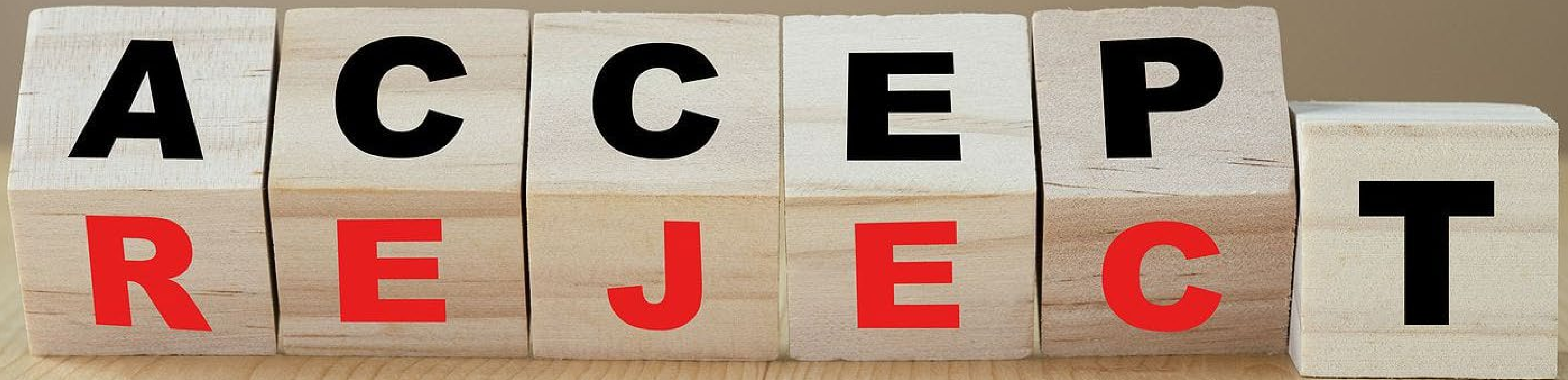
Relevant to our context, in a declaratory judgment action, the plaintiff policyholder sues the insurance company and the relief the plaintiff seeks is to have the court declare that some sort of coverage exists.

The PFS statute can only be made in cases involving lawsuits for money damages.

A declaratory judgment action is not a claim for damages.

For the insured who needs their insurance company to provide coverage, if the insured lacks the funds to pay an attorney privately, not even the PFS statute is available to offer an incentive for a lawyer to take the case.

For cases where there is <u>not</u> an insurance company defendant, the argument IN FAVOR of lowering the percentage threshold from 25% to 10% is that plaintiffs and defendants will make better offers.




It does the defendant no good to give the plaintiff a "low ball" offer because the plaintiff only has to beat the offer by 10% in order to escape the penalty of having to pay the defendant's fees under the PFS statute.

If the defendant wants to trigger entitlement to fees, then it needs to get closer to the real value of the case when it serves a PFS.

Meanwhile, the plaintiff is more incentivized to serve a PFS.

When a plaintiff serves a PFS, it often “starts a conversation” about settlement. The PFS might not be accepted, but the parties are talking resolution. That is a good thing!

But the problem for many plaintiffs is they never make an offer for fear of creating their own cap. Whatever number they choose as the offer is going to be the “ceiling” for negotiations.

At mediation, the defendant always says, “You were willing to settle if I accepted a PFS for $100.  So, we are negotiating down from there.”

Remember, the Plaintiff is already offering a number that they have calculated to be 25% LESS than what they think they can get in their judgment—because they want to trigger entitlement to fees if the defendant rejects the offer.

If the Plaintiff can offer a number that is only 10% less of what they think the judgment will be, then they are more incentivized to make offers.

The argument AGAINST lowering the PFS percentage is simple:

The statute is a “penalty” for guessing wrong. The party that rejects the offer misevaluated the monetary value of the case, or the strength/weak points upon which a fact finder focused.

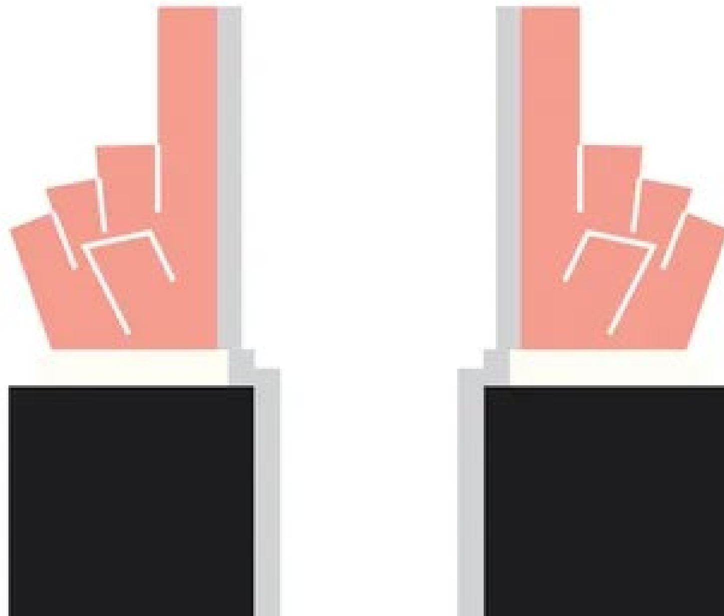
For a tort case, deciding what amount to put in a PFS is as much art as it is science.

A 25% difference is very forgiving if you guess wrong.

A 10% difference is not so forgiving.

IT'S A LOT,
IT'S A LOT TO TAKE IN.

# Thanks for having me



# Panel Bios

**MAEGEN PEEK LUKA**

Maegen Peek Luka is an attorney at the law firm of Newsome Melton. Maegen does trial support and appellate law for outside firms throughout the state.

Maegen attended the University of Florida College of Law where she graduated second in her class. She was a member of the Law Review and the Order of the Coif. After graduation, Maegen clerked for the Honorable Emmett R. Cox on the Eleventh Circuit Court of Appeals. From there, Maegen worked at both Holland & Knight and Zuckerman Spaeder in Tampa before a former partner from Holland & Knight asked her join him in creating the appellate and trial support boutique, Brannock & Humphries. After 10 years, Maegen left Brannock & Humphries to open the appellate and trial support division of Newsome Melton.

In 2022, Maegen was the recipient of the Barbara Pariente Award for tenacity in the pursuit of equal access to courts and justice for all. Maegen is a member of the American Law Institute, best known for writing the Restatements, the Uniform Commercial Code, and the Model Penal Code. Maegen has been selected as a Super Lawyer in appellate practice for the last 15 years and has been selected for Florida Trend Legal Elite multiple times. She is also part of an alphabet soup of honor societies: Golden Key National Honor Society, Phi Kappa Phi International Honor Society, Phi Eta Sigma National Honor Society.

Maegen loves public speaking, and she enjoys being a prolific presenter of continuing legal education courses for Florida lawyer groups. Recently, Maegen has devoted hundreds of hours to helping to refine Florida’s procedural rules through her work on the Florida Rules of Civil Procedure Committee and by teaching lawyers and judges about the changes.

In the rare event that Maegen has free time, she enjoys reading fiction, going to the beach, and trying to persuade her teen and tween daughters to spend time with her—she says arguing before a judge is a cakewalk by comparison!

## Bios for Trial Lawyer Section Members: Offer of Judgment

**Braxton Gillam, IV** earned his Bachelor of Arts degree from the University of North Carolina, Chapel Hill in 1994. He earned his Juris Doctorate, with honors, from Florida State University College of Law in 1997. Gillam specializes as a trial lawyer, and practice areas primarily involve business and construction disputes, and probate and trust litigation. Gillam has also tried will contests, wrongful death actions, premises liability cases and trucking accidents. He is Board certified by The Florida Bar in Business Litigation and Civil Trial. Gillam is currently a practicing attorney, and shareholder at Milam, Howard, Nicandri & Gillam P.A.

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**Kurt Alexander** earned his Juris Doctor from the University of Florida College of Law in 1988. Alexander is Board Certified in Trial Law by the Florida Bar, and a member of the Executive Council of the Trial Lawyer Section of the Florida Bar. His practice experience is primarily in the defense of matters involving civil litigation but has experience in a multitude of practice areas including commercial litigation, insurance, and personal injury. Alexander is a practicing attorney and shareholder at Rigdon, Alexander & Rigdon LLP.

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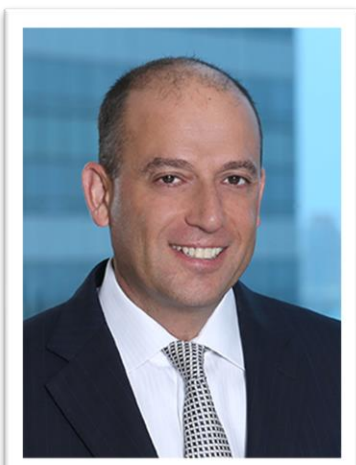

**James Gassenheimer** earned his Juris Doctor from the University of Miami Law School in 1992. Gassenheimer is Board Certified as a Civil Trial Lawyer by The Florida Bar, and currently serves on the Executive Council. He holds extensive jury and non-jury trial experience in State, Federal and Bankruptcy courts. Gassenheimer has experience in a multitude of practice areas, including real estate, business torts, insurance, and liability. Gassenheimer is currently a partner at Berger Singerman LLP.

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