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**SETTING CASES FOR TRIAL  
by Ted Babbitt**

It is no secret that cases are rarely resolved until they are set for trial. It is fair to say that setting a case for trial is the single most important act that a Judge can perform to relieve congestion on his or her docket.

The Supreme Court Work Group on Standards for Jury Panel Sizes, on which this writer serves, has heard testimony from around the state which establishes that circuits in which early trial dates are mandated enjoy far lower case loads than circuits where trial dates are not provided until later in the case. The Seventh Circuit, which includes Daytona Beach, has a procedure for the early setting of trial dates. That Circuit is one of the most efficient in the state and should serve as a template for other circuits around the state in disposing of civil litigation.

It is important to recognize, however, that serious consequences occur when a case is set for trial before the pleadings are at issue. Fla.R.Civ.P. 1.440(a) provides that an action is not at issue until all motions directed to the last pleading have been disposed of, or if no such motions are served, twenty days after service of the last pleading, unless the party entitled to serve motions waives the right to do so by filing a notice for trial.

Fla.R.Civ.P. 1.440(c) provides that a Court may not set the trial less than thirty days from the time of service of the notice for trial. It seems obvious that the purpose behind Fla.R.Civ.P. 1.440 is to give a party adequate time to prepare

for trial. The prohibition against setting a cause for trial until the pleadings are settled and twenty days has passed is apparently to permit the parties to focus their attention on pleading issues during the time the pleadings are not at issue and then allow them to refocus their attention on the trial with a built in thirty day hiatus. This rule, adopted in 1966, has little application to modern day dockets. The idea of getting a case set for trial in less than thirty days from the time it is noticed is simply ludicrous given the current case load of Circuit Judges.

Nevertheless, the appellate courts have strictly construed the requirements of Fla.R.Civ.P. 1.440 to preclude the setting of a trial when a case is not at issue. In the recent squib opinion of Sundale, Ltd. v. Williams Paving Co., Inc., 30 Fla. L. Weekly D2528 (Fla. 3<sup>rd</sup> DCA, Nov. 2, 2005), the District Court denied a petition for certiorari that alleged that the trial court's order setting a cause for trial violated Fla.R.Civ.P. 1.440. In doing so, the District Court held that a final appeal could remedy what was an apparent judicial error. The Court warned that if the case, in fact, went to trial under the current order setting it for trial, any judgment would be reversed because of the failure to comply with Fla.R.Civ.P. 1.440. In denying the petition, the Court stated:

“The petitioner must demonstrate that it has no adequate remedy on final appeal. (citing cases). Sundale has not even attempted to allege how an appeal cannot remedy this legal error. We therefore deny the issuance of a writ of certiorari or prohibition **but caution that, while the respondent may prevail today, any recovery may be subject to reversal on appeal, a** situation easily remedied if the matter is simply set in accordance with rule 1.440.” (emphasis supplied).

The District Court states in its opinion that the case was not at issue until September 16, 2005, and was set for trial on November 7, 2005. Thus, the trial court complied with the thirty day requirement of Fla.R.Civ.P. 1.440(c) but since the trial court's order was dated August 2, 2005, it did not comply with Fla.R.Civ.P. 1.440(a). This is puzzling to say the least. If the whole purpose behind the rule is to make sure that there is at least thirty days notice of a trial, it is hard to understand how a technical violation of the rule by setting it for trial before it is at issue should result in a reversal of the final judgment. Nevertheless, the lesson to be taken away from this case is that the trial court **must** comply with the rule or it taints any judgment.

This opinion is consistent with prior case law. In Precision Constructors, Inc. v. Valtec Construction Corp., 825 So. 2d 1062 (Fla. 3<sup>rd</sup> DCA 2002), the appellate court reversed a final judgment in a case which was tried before the case was at issue even though the original notice for trial was set when the case was at issue. The problem was that the plaintiff subsequently filed an amended complaint thereby reopening the pleadings and no subsequent notice for trial was filed once the pleadings were settled. The Court held that failure to adhere strictly to the mandates of Rule 1.440 was reverseable error. Courts have even held that a notice for trial before the case is at issue is a nullity, not to be considered on the issue of whether or not there has been record activity under Fla.R.Civ.P. 1.420(e). See Jones v. Volunteers of American North and Central

Florida, Inc., 834 So.2d 280 (Fla. 2<sup>nd</sup> DCA 2003) and Alech v. General Ins. Co., 491 So. 2d 337 (Fla. 3<sup>rd</sup> DCA 1986).

It seems to make little sense to have a bright line rule that any case which is set for trial before the pleadings are at issue results in a reversal even if the case is tried months after the case is at issue and the notice has been served. Nevertheless, it is clear that that is the rule in Florida. This problem can be easily remedied if the parties are aware of this technicality. If a case is set for trial after the pleadings are settled and the pleadings are thereafter amended or a motion is allowed directed to the pleadings, then the trial court need only reserve the time for the trial as originally set and have the parties go through the exercise of filing a new notice for trial once the pleadings are again settled. The Court can then reset the trial for the original time providing that it is no less than thirty days after the service of the notice for trial. To prevent disruption of its trial calendar, the Court can, under appropriate circumstances, deny a party's right to amend a pleading or attack a pleading by motion.

Trial courts must be aware of the importance of setting cases for trial as early as possible. On the other hand, Fla.R.Civ.P. 1.440 must be strictly construed so as not to set a case for trial prematurely. If amendments are necessary once a case is set, a new notice of trial must be filed once the pleadings are again settled.