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to: Don

from: JSL

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subject: Rule 1.070(j)

Fla.R.Civ.P. Rule 1.070(j) designates the time-limits for service of process and provides:

> [i]f service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period. When a motion for leave to amend with the attached proposed amended complaint is filed, the 120-day period for service of amended complaints on the new party or parties shall begin upon the entry of an order granting leave to amend. A dismissal under this subdivision shall not be considered a voluntary dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).

As might be expected based upon the rule's generalized language, the dictates of 1.070(j) are not rigidly enforced or administered by Florida courts. Nor does it seem that they were meant to be, as

the current iteration of the rule was designed "to provide courts with broad discretion to extend the time for service even when good cause for untimely service [has] not been shown." *Miranda v. Young*, 19 So.3d 1100, 1101 (Fla. Dist. Ct. App. 2009) This discretionary latitude that the rule affords was intended to allow courts "to avoid the 'harsh results of' often exacted under the prior version of the rule, 'such as where noncompliance triggered dismissal without prejudice, but expiration of the statute of limitations would preclude refiling of the action.'" *Id.*, quoting *Tortura & Co., Inc. v. Williams*, 754 So.2d 671, 677 (Fla. 2000).

Now, "[a] trial court may not exercise its discretion to refuse to dismiss a case under Rule 1.070(j) unless there is record evidence of efforts made at service during the 120 service period which would support a finding of 'good cause' under the rule," though "any dismissal for noncompliance with [the rule's] terms is to be without prejudice" to plaintiff's ability to refile. *Hodges v. Noel*, 675 So.2d 248 (Fla. Dist. Ct. App. 1996); *Bankers Ins. Co. v. Thomas*, 684 So.2d 246-7 (Fla. Dist. Ct. App. 1996). In the wake of the rule's fairly recent amendments, even the minimal constraints on Courts seemingly evinced by *Hodges* appear to have been eroded. In *Roberts v. Stidham*, 19. So.3d 1155, 1157-8 (Fla. Dist. Ct. App. 2009), the District Court of Appeals explained:

> When a plaintiff shows good cause for failure to serve process within 120 days, the trial court must extend the time for service and has no discretion to do otherwise. *Pixton v. Williams Scotsman, Inc.*, 924 So.2d 37, 39 (Fla. 5th DCA 2006). The trial court has broad discretion to extend the time for service even when good cause for failing to meet the 120–day deadline has not been shown. *Bacchi v. Manna of Hernando, Inc.*, 743 So.2d 34, 34 (Fla. 5th DCA 1999). However, even when there has been no showing of good cause or excusable neglect and the statute of limitations has run, discretion should be exercised in favor of allowing the plaintiff an extension to accomplish service. *Kohler v. Vega–Maltes*, 838 So.2d 1249, 1250

> (Fla. 2d DCA 2003). Even without a motion to extend, dismissal is required only if reasonable cause for the delay in service is not documented. *Root v. Little*, 721 So.2d 836, 837 (Fla. 5th DCA 1998). Rule 1.070(j) is designed to be a case management tool, not an additional statute of limitations cutting off the liability of a tortfeasor, and it is not to be imposed inflexibly when the plaintiff demonstrates diligence and good cause. *Id.*

A flexible attitude towards the 120-day rule seems to have been adopted by the Florida judiciary as a matter of general policy. If some effort or diligence can be shown on the part of the beleaguered plaintiff, the Courts appear to be poised to give such parties the benefit of the doubt, so as to not to deprive meritorious plaintiffs of their day in court in cases where "technical defenses become the centerpiece of the litigation and the merits are obscured, if not totally overshadowed." *Tortura*, 754 So.2d 671, 678 (Fla. 2000).

This characteristic generosity provides a contextual backdrop against which to view the issue of noncompliance by virtue of non-service within the 120-day window, whether for reasons of innocent inadvertence or outright neglect. If the terms of the rule have not been met, the only two ways dismissal may be effectuated, by the explicit language of the rule itself, are through the court's own initiative or motion by an aggrieved party. If the latter has not occurred, and the court has taken a passive approach, it stands to reason that litigation can proceed without delay or encumbrance. The District Court of Appeal's opinion in *Meadows of Citrus County, Inc. v. Jones*, 704 So.2d 202 (Fla. Dis. Ct. App. 1998), while not directly on point, provides some useful guidance through it elucidation on the issues of standing and waver with regard to Rule 1.070, stating that "[t]he defense of insufficient service of process under Rule 1.070(j) is waived where it is not raised in the answer or in a pre-answer motion...[moreover, the] defense is personal to the affected defendant and cannot

be raised by a co-defendant who has been timely served."

In sum, service of process outside of the 120-day period allowed under Rule 1.070 isn't necessarily fatal. If service is late, no objection is made by the affected party before answering, and the jurisdictional Court makes no *sua sponte* initiative, the defense is waived and dismissal on noncompliance grounds has been averted. If service is late for some reason in the way of good cause, the Court will likely forgive the error and permit the suit to proceed, whether by allowing amendment or some other means of rectification. If no good cause can be shown, the case can be dismissed, but *Roberts* showed that a Court might be inclined to flex its discretionary might in favor of the plaintiff where the practical effect of the technical dismissal would permanently deprive the plaintiff of possible future recourse because a re-filing would run afoul of the statute of limitations. If the statute of limitations is not an issue, then dismissal is effectively more of an inconvenience than anything else, as dismissal for noncompliance with the 120-day Rule must be without prejudice. See *Bankers*, 684 So.2d at 246-7.