

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO FLORIDA
SMALL CLAIMS RULE 7.090**

CASE NO. SC07-1724

**RESPONSE OF THE COMMITTEE ON ALTERNATIVE
DISPUTE RESOLUTION RULES AND POLICY TO
RESPONSE OF THE SMALL CLAIMS RULES COMMITTEE
TO REVISED OPINION ON THE THREE-YEAR
CYCLE REPORT, REGARDING RULE 7.090**

1. The Committee on Alternative Dispute Resolution Rules and Policy (hereafter ADR Committee) was created by the Chief Justice on July 8, 2004 by Administrative Order No. AOSC03-32. One of the ADR Committee's assigned tasks is to monitor court rules governing alternative dispute resolution procedures and recommend to the Court necessary amendments.
2. The ADR Committee, on March 24, 2005, filed a response to the 2005 rules submission of the Small Claims Rules Committee (hereafter Small Claims Committee) in which the ADR Committee recommended that rule 7.090 be amended to define what constitutes "full authority" to settle, to specifically reference the fact the mediation may occur at a pretrial conference, and to provide for sanctions for the failure to have "full authority." See Case No. SC05-146. In addition, the ADR Committee

proposed the adoption of a separate form, to be entitled “Notice to Appear for Pretrial Conference/ Mediation,” which would outline the procedures for mediation if it occurs at the pretrial conference. The Small Claims Committee, in its April 15, 2005 Response, had no objections to any of the ADR Committee’s recommendations. Oral argument occurred on September 30, 2005.

3. In its revised opinion dated December 15, 2005, this Court declined to adopt any amendments to rule 7.090 or to create Form 7.321. The Court rejected the imposition of sanctions language in the rule based on the “impact it would have upon a party who must send counsel to such conferences on short notice without an adequate opportunity to fully prepare for the settlement negotiations.” The issue was nevertheless recognized as important and was thus referred back to the Small Claims Committee for further consideration.

4. The Small Claims Committee filed a response, which was placed on the Supreme Court docket on August 6, 2007, and assigned the above-referenced case number. In its response, the Small Claims Committee resubmitted its amendment to rule 7.090(f), explaining essentially that since

it was reasonable to expect attorneys to come prepared to a mediation conference with full settlement authority, the imposition of sanctions was appropriate.

5. In response to the Small Claims Committee, the ADR Committee respectfully resubmits its proposed amendments to rule 7.090 and again petitions the court to adopt Form 7.321. In support of its proposals, which are contained in the Appendix, the ADR Committee offers the following arguments, which hopefully will alleviate the Court's concerns.

6. The requirement that attorneys have full settlement authority would appear to be merely an extension of the duty attorneys have to provide competent representation as required in rule 4-1.1, Rules Regulating the Florida Bar. The rule states that competent representation "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." The ADR Committee believes that an attorney, who accepts representation in any case, however small, should be prepared to comply with all requirements applicable to such representation. One such requirement is found in rule 7.090(f), which states "an attorney may appear on behalf of a party at mediation if the attorney has full authority to settle

without further consultation.” See also, rule 1.750(e), Florida Rules of Civil Procedure.

7. The ADR Committee would also point out that an attorney appearing at a pretrial conference is required to be prepared to represent his or her client in relation to all of the matters listed in the pretrial conference provision, rule 7.090(b). **The matters that shall be considered at this conference are** the simplification of the issues, amendments to the pleadings, obtaining any admissions of fact and of documents that avoid unnecessary proof, limitations of witnesses, **settlement**, and other matters as the court in its discretion deems necessary. Certainly, if an attorney has to be sufficiently informed to provide representation in such detailed legal matters, including settlement, then it is not unreasonable to require that the attorney have obtained full settlement authority from the client if the client is not to be present. The possibilities of settlement pursuant to Rule 7.090(b)(5) cannot be effectively explored without an attorney’s full settlement authority. Rule 7.090(b)(5) without a requirement of full settlement authority by an attorney has little meaning or effect.

8. A party always has the authority to appear on his or her own behalf; however, if a party exercises the privilege of substituting the appearance of an attorney for that of the party (as opposed to being subject to the general requirement in rule 1.720(b), Florida Rules of Civil Procedure, that a party or a representative must attend), it is reasonable to require that the attorney have the same authority as the party would have if appearing in person. Since a party by definition has full authority to settle, the allowing of an attorney to appear on behalf of a party without full authority would reduce the chances of a mediated settlement by limiting the parameters of the negotiation process. Thus, the rule requiring an attorney to have full authority performs a useful function and should be retained with the clarification described in paragraph 9.

9. Part of the proposal, which the ADR Committee resubmits, is a description of what constitutes full authority, that is, all amounts from zero to the amount of the claim. While this suggestion may appear obvious on its face, there may be ambiguity in the undefined term full authority, which could be subject to an interpretation that it is whatever the party tells the attorney even if it is above zero or below the amount of the demand. The essence of the full authority requirement is that the attorney should be in the

same position as the party and have the same authority to reach a mediated settlement as the party. Holding mediation with individuals who are incapable of resolving the issues due to lack of full authority to settle could be a waste of everyone's (a litigant's and, most often, a volunteer mediator's) time.

10. The ADR Committee again recommends that rule 7.090(b) be amended to specifically state that mediation may take place during the time scheduled for pretrial conference. While the absence of such language has not operated to prohibit the practice, the ADR Committee believes that it should be specifically authorized so as not to dissuade courts in any way from its utilization. This proposal appears to be consistent with the rule of construction in rule 7.010(a) that the purpose of small claims (the jurisdiction of which encompasses cases where the value of property involved does not exceed \$5000, exclusive of costs, interest, and attorneys' fees) court is to secure the "simple, speedy, and inexpensive trial of actions at law in county court." The recommendation would go a long way in ensuring that small claims cases would meet the 95 day (filing to final disposition) time standard pursuant to rule 2.250(a)(1)(B), Florida Rules of Judicial Administration. Finally, and most importantly, the proposal is

essentially a codification of the current general practice in counties where mediation is utilized in small claims cases, that is, to refer parties to mediation during the pretrial conference docket.

11. The ADR Committee is aware that attorneys may be given small claims actions on short notice. However, the mere existence of a practice does not make it either right or desirable. While such practices probably cannot be completely curtailed, they should not be allowed to create a de facto exception to the full authority rule or to this Court's time standard rule. Nor should existence of the practice result in undermining what is an essential element (full settlement authority) of the mediation process, an element necessary to effectuate party self-determination.

12. The ADR Committee once again submits Form 7.321. The form would be created for use in counties which utilize mediation at the time of the scheduled pre-trial conference. The proposed form would explain what mediation is and what parties can expect from the process. If such a form is adopted, Form 7.322 should remain unchanged for use in those few counties which do not currently utilize mediation prior to the pre-trial conference.

13. The ADR Committee, based on the above and foregoing, respectfully requests that this Court accept and implement its recommended modifications to rule 7.090(b) and adopt form 7.321.

Submitted on behalf of the Committee,

Judge Shawn L. Briese, Chair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a member of The Dispute Resolution Center staff on _____, furnished a copy of the foregoing by United States mail to:

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