IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA SMALL CLAIMS RULES

CASE NO. SC10-144

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COMMENTS OF THE SIXTH JUDICIAL CIRCUIT ON PROPOSED AMENDMENT TO FLORIDA SMALL CLAIMS RULE 7.090(b)

Pursuant to the Court's invitation to comment on the proposed amendment to Florida Small Claims Rule 7.090(b), J. Thomas McGrady, Chief Judge of the Sixth Judicial Circuit, files these comments on the proposed amendment.

The Small Claims Rules Committee ("Committee") proposes that the Court adopt an amendment to Florida Small Claims Rule 7.090(b) requiring a judge to preside at small claims pretrial conferences, which would effectively eliminate this circuit's more than 22 year practice of using small claims pretrial hearing officers ("hearing officers"). In 1988, the Court rejected a proposal to eliminate the use of hearing officers and the Court should do so again. The Committee has not offered evidence of a problem with existing practices, adoption of the rule will result in a need for additional judges, and the proposed rule will result in an inefficient use of court resources. The Court has made it clear that use of alternative resources is cost-efficient and decreases case processing times but this proposed rule eliminates the use of those resources for small claims cases, a division of the court where alternative resources are most appropriate.

I. THE COURT REJECTED THIS PROPOSAL IN 1988 AND SHOULD DO SO AGAIN.

In 1988, the Court considered the same proposal that is before the Court in this case. At that time, the Bar proposed that the Court adopt an amendment to Small Claims Rule 7.090 that would require a judge to personally preside over every pretrial conference. *See In re: The Florida Bar Small Claims Rules*, 537 So.2d 81 (Fla. 1988). The Court rejected the Bar's proposal to abolish hearing officers then and should do so again.[1] The Sixth Circuit has operated its hearing officer program for the last 22 years in reliance on the Court's opinion rejecting the proposal to require a judge to preside over pretrial conferences.

The Sixth Circuit created the hearing officer program based on a pilot project begun in 1986. See Sixth Circuit Administrative Order 1986-4.[2] The Administrative Order provided for a hearing officer to assist judges in managing their case loads by performing "triage" on cases by "assisting the parties in settling the controversy by conciliation or compromise." *Id.* The Administrative Order

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[1] The Petitioner suggests that because the 1988 proposal was submitted by the Florida Bar Board of Governors that it carried less weight than the proposal in this case because the pending proposal is offered by the Small Claims Rules Committee. The Petitioner has overlooked the difference between the current Rules of Judicial Administration governing amendments to rules of court and those in effect in 1988. The 1988 rule amendments were proposed by the Small Claims Rules Committee but submitted to the Court by the Board of Governors because at that time, the Rules of Judicial Administration required that rule amendments be submitted by the Board of Governors. Fla. R. Jud. Admin. 2.130(c)(1)(1988).

[2] Subsequent administrative orders have continued this program. The current Administrative Order is 2005-030.

clearly states that hearing officers do not have "authority to decide disputed questions of law or fact." *Id.* However, hearing officers may "perform all of the ministerial acts appurtenant to the conduct of Pre-Trial Conferences." *Id.* The Administrative Order also provides that the parties to a pretrial conference "shall be entitled to have any issue decided by the assigned County Judge and to appear personally for such purpose before the Judge." *Id.* Further, the Administrative Order directs each County Judge who uses hearing officers to

> make himself or herself available to the litigants or their counsel during a specific period or periods of time in the course of the day. Where a motion is made by a litigant or by counsel which requires the attention of the Judge, the Hearing Officer shall refer the matter to the Judge on his own motion."

Id.

Today, the process is very similar to the process first established in 1986. First, the cases are set on a calendar for the pretrial conference by the Clerk. Because of the volume of cases, the hearing officer may handle more than 150 cases per day. The parties are often pro se and are unfamiliar with court procedures. When the hearing officer calls the case, if both parties are present at the pretrial conference, the hearing officer assigns a mediator to immediately meet with the parties in an attempt to resolve the case. When only the plaintiff is present, the hearing officer helps to process a default judgment which is brought to the judge. Conversely, when only the defendant attends the pretrial conference, the

hearing officer sends a proposed dismissal to the judge. If the parties have other issues, the hearing officer discusses these concerns with the parties and helps them to frame the issues for resolution by the judge. If the need for a judge arises, the parties are immediately brought before the judge. A county judge is available at all times for issues that require judicial resolution.

This process is designed for judicial economy and for the convenience of the parties. Most cases are able to be resolved on the day of the pretrial conference, thus making the process more convenient for the parties, and making efficient use of judicial resources.

Hearing officers are strictly prohibited from performing judicial functions and have no judicial authority to decide disputed questions of law or fact. They do not conduct trials or evidentiary hearings. Hearing officers do not deny access to judges or discourage parties from going before a judge. Instead, they function as managers, working to aid parties in resolving their conflicts and performing only non-judicial functions related to their cases.

Hearing officers allow county judges to focus their time on other cases rather than presiding over the pretrial conference. They help expedite the resolution of disputes and aid county judges in using their time as effectively as possible, allowing fewer judges to complete more work. The assigned judge is available to the parties in pretrial conferences. At the same time, the judge also has

other county court cases scheduled. The judge thus is available to both resolve issues in small claims and handle county civil cases.

Hearing officers perform an invaluable service to aid in the efficient and successful functioning of the court system. Their duties are tailored to complement the large caseloads, simplified procedures, and small amounts of money at issue in small claims court.

This process has been working effectively in Pinellas County since 1988. However, as in 1988, the Bar proposes an amendment to Small Claims Rule 7.090 to require a judge to preside over a pretrial conference. This Court previously rejected this proposal and should do so again.

II. THE COURT SHOULD REJECT THE PROPOSED AMENDMENT BECAUSE THE PETITIONER HAS NOT OFFERED EVIDENCE OF A PROBLEM WITH EXISTING PROCEDURES OR ANY RATIONALE THAT THE RULE IS NEEDED.

A. There is no evidence of a problem with existing procedures.

The Sixth Circuit's procedures have been in place for 22 years, providing an effective means for handling pretrial conferences in small claims. The current Chief Judge and the current County Administrative Judge are not aware of any complaints about the operation of the hearing officer program. The Court should not reverse its prior decision without evidence of a problem.

According to the minutes of the Small Claims Rules Committee, the Committee originally discussed this proposal during their meeting in September 2005. See minutes available on the Bar's website: www.floridabar.org/cmdocs/cm240.msf/WDOCS. In the ensuing months the Committee discussed and voted on the proposal, but decided in June 2006 to wait until the following cycle to submit the proposal rather than submitting it with other 2006 amendments. The Committee finally filed its petition to require a judge to preside at pretrial conference and thus to eliminate hearing officers on January 27, 2010, more than four years after the original proposal.

In its petition, the Committee reported that some circuits employ informal pretrial practices. However, the Committee did not substantiate those reports nor did it provide any documentation of complaints against hearing officers.

Judge Robert Lee, Chair of the Committee, confirmed in a conversation with counsel that the Committee received no documented complaints against hearing officers or other non-judicial personnel presiding over pretrial conferences. Judge Lee explained that the Committee gathered its anecdotal "evidence" of complaints by conducting informal discussions with Committee members regarding their personal pretrial conference experiences with persons other than judges. According to Judge Lee, if any complaints were filed they would be attached to the Committee's meeting minutes found on the Committee's website. After a

thorough review of the online minutes, no references to such complaints were found.

Further, when asked about the "procedures existing throughout the State" which the Committee reported it had reviewed, Judge Lee clarified that instead of conducting a systematic study on statewide pretrial procedures, the Committee relied on impromptu reports based on members' knowledge of pretrial practices and procedures in their own counties. Madelon Horwich, the Small Claims staff contact for the Florida Bar during the relevant time period, confirmed Judge Lee's report that there are no documented complaints against hearing officers and that she has no knowledge of any study of pretrial procedures conducted by the Committee or anyone else.

Statewide policy should not be changed on the basis of unsubstantiated evidence the Committee offered in its petition. The proposed amendment would produce a less efficient "solution" to a problem that does not exist.

B. <u>There is no rationale that the proposed rule amendment is needed.</u>

The Committee is misguided in its logic when one of its articulated purposes in proposing the amendment to Rule 7.090 is to "bring the rule clearly into alignment with existing form 7.322." However, forms provide guidance to implement the rules, not the other way around. Thus, in a conflict between a rule

and a form, the rule prevails over the form. Accordingly, the Committee errs by suggesting that the Court modify the rule to align with form 7.322.

The Petitioner alleges there is no legal authority which allows hearing officers to preside over pretrial conferences. Relying on *Lackner v. Central Florida Investments, Inc.*, 14 So.3d 1050, 1052-1054 (Fla. 5th DCA 2009), the Committee asserts that "nonjudicial parties performing judicial duties must have a specific mechanism to affirmatively authorize them" to perform judicial duties and that it is unlawful for hearing officers to preside over pretrial conferences because the Florida Small Claims Rules do not contain a provision authorizing them to do so. A closer examination of *Lackner* reveals the court's actual holding was that magistrates may not perform *judicial duties* without a specific mechanism authorizing them to do so. *Id.* at 1052-1055. However, as the Sixth Circuit uses them, hearing officers do not perform judicial duties at pretrial conferences. Instead, they perform only administrative and ministerial duties. Accordingly, the Committee's reliance on *Lackner* is misplaced.

The Sixth Circuit's hearing officer program operates smoothly and without documented complaints. The Committee has offered no evidence to challenge the effectiveness of the program or provided any basis for the Court to amend the rule to prevent such programs from operating. Accordingly, the Court should reject the proposed rule amendment.

III. THE COURT SHOULD REJECT THE PROPOSED AMENDMENT BECAUSE ADOPTION OF THE RULE WOULD REQUIRE ADDITIONAL JUDGES.

The Sixth Circuit's cost-effective practice of delegating pretrial tasks to hearing officers enables the courts to quickly dispose of numerous cases. In Pinellas County, 10,412 small claims pretrials were heard between January 1, 2009 and December 31, 2009. Of these, 2,104 were referred to mediation because both parties appeared at the pretrial conference. The remaining 8,308 cases that were processed by hearing officers resulted in another resolution such as a stipulation, dismissal, or default judgment. Only 306 cases were set for trial. If Florida Small Claims Rule 7.090(b) were amended to require county judges to hear all 10,412 of these cases on a pretrial calendar, it would create an enormous burden for the court system. Judges ultimately entered a ruling in all of these cases, but hearing officers allow for more efficient case processing by performing the ministerial function of administering the pretrial calendar. Adoption of this rule amendment would require additional judges to perform this ministerial function at a much greater expense to the State.

The Sixth Circuit's Judgeship Needs Application for FY 2010-2011 reflects that the Circuit requested two additional circuit judges and two additional county court judges for Pinellas County alone. Based on the data presented, the Court certified a need in the Sixth Circuit for two new circuit judges and in Pinellas

County, one of the more populated counties in Florida, two additional county judges. *In re: Certification of Need for Additional Judges*, 35 Fla. L. Weekly S139, S141 (Fla. Feb. 25, 2010). If hearing officers are eliminated, Pinellas County will likely need at least one county judge in addition to those two county judges recently certified by the Court.

In contrast to the two additional judges certified for Pinellas County, the Court certified eight additional county court judges for Duval County, six additional judges for Miami-Dade County, six additional judges for Broward County, and five additional judges for Palm Beach County. *Id.*

If this rule amendment is adopted and new county judges are not provided, it is likely that county judges currently used for circuit work would need to be reassigned to county court to handle ministerial pretrial conferences. This transfer of resources would create a ripple effect: not only would this amendment unduly overburden county courts, but circuit courts will also become even more overloaded if they lose the benefit of county judges' assistance.

The Court has been judicious in requesting new judges. It should not adopt a rule amendment that would lead to the need for additional judges to perform ministerial functions.

IV. THE COURT SHOULD REJECT THE PROPOSED AMENDMENT BECAUSE IT WOULD ELIMINATE THE USE OF A COST-EFFICIENT RESOURCE.

The Court recently emphasized the importance of court system efficiency. *In re: Certification of Need for Additional Judges*, 35 Fla. L. Weekly S139, S140 (Fla. Feb. 25, 2010). The Court discussed at length the negative impact of budget cuts on the court system and the distinct advantages of employing case managers and hearing officers to relieve some of the judges' workload. *Id.* at S139-S140. The Court found that:

> [w]e cannot overstate the causal relationship between the loss of supplemental resources and the increases in case processing times. When judges must absorb the workload of case managers, staff attorneys, or hearing officers, case processing times inevitably worsen. The net result is court delay. Moreover, having judges perform the work of subordinate staff is not a prudent use of higher level judicial resources. Judicial time is best spent adjudicating cases, and the loss of supplemental resources has consequences for litigants across all case types.

Id. at S139.

The Court continued by pointing out that magistrates facilitate the judicial process by performing routine, managerial, quasi-judicial functions that would otherwise fall to judges. *Id.* at S140. The Court found that magistrates enable judges to focus their time on complex issues requiring legal expertise, rather than dealing with tasks that could be completed by subordinates. *Id.*

This proposed rule amendment would have just the opposite result: it would require county judges to perform routine managerial functions that have historically been performed by non-judicial personnel. Many divisions of the circuit court routinely use magistrates, case managers, and hearing officers to perform administrative non-judicial tasks. This proposal would prohibit the use of similar resources in county court. In this time of budget constraints, the Court should not adopt a rule amendment that would unnecessarily require the expenditure of additional judicial resources.

If judges were required to perform pretrial conference duties in addition to their numerous other responsibilities, the added obligations could force judges to devote less time and attention to each case, resulting in missed opportunities to achieve dispositions at pretrial conferences. Thus, the proposed rule may cause a larger number of small claims cases to be set for trial, creating considerable financial and time strains on a court system that is already stretched too thin.

The requirement that a judge preside over pretrial conferences would affect other circuits. In addition to the Sixth Circuit, several other circuits report using non-judicial personnel to administer pretrial conferences. According to the results of a recent survey sent to Trial Courts Administrators, the Ninth Circuit and Twentieth Circuits utilize Clerks, the First Circuit uses a magistrate, and case managers preside over pretrial conferences in the Twelfth and Twentieth Circuits.

The elimination of these resources will limit the options other circuits have to process cases in the most efficient way in that jurisdiction.

The division of labor between judges and hearing officers is efficient, effective, and financially viable. The division of labor also benefits the public since cases can usually be resolved in one day, allowing the litigants to return to work or their daily activities. Hearing officers allow county judges to perform more work and clear more cases with fewer judges. In these times of limited resources, the Court itself should not impose a restriction on the use of cost-effective alternative resources that have served Pinellas County and many other counties so well, especially when similar resources are widely and successfully used in other divisions of the court.

With such a known shortage of judicial resources, each county should be given maximum flexibility to use available and less expensive resources to address their needs. In these challenging economic times, case loads are increasing and budgets are decreasing. Circuits should be allowed to creatively use non-judicial resources to perform administrative functions rather than being restricted to only using judges in small claims cases.

CONCLUSION

The Court should once again reject this proposal to eliminate hearing officers. The Committee has not offered evidence of a problem with existing practices, adoption of the rule will result in a need for additional judges, and the proposed rule will result in an inefficient and costly use of court resources. For all of these reasons, the Sixth Judicial Circuit respectfully requests that the Court reject the Committee's petition to adopt an amendment to Florida Small Claims Rule 7.090(b). In the alternative, the Court should reject the proposed amendment to Rule 7.090(b) and ask the appropriate Court committee to conduct a statewide study of existing practices to determine appropriate options for processing small claims pretrial calendars.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to The Honorable Robert Lee, Broward County Courthouse, 201 SE 6th Street, Suite 331, Fort Lauderdale, FL 33301-3372, and Jack Harkness, Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-6584, this ___ day of March 2010.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Appellate Procedure 9.100(*l*) I certify that this computer generated response is prepared in Times New Roman 14 point font and complies with the Rule's font requirements.

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B. Elaine New