



The Honorable Lisa T. Munyon,
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Circuit

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TAKING A LOOK AT NONBINDING ARBITRATION

For this month's column, I'd like to take a moment to discuss nonbinding arbitration (NBA). A good number of you are familiar with it. A handful of you even serve as arbitrators for the Ninth – thank you. For the rest of you, I'm willing to bet the last time you gave arbitration any consideration was law school, if even then. So please, bear with me as I outline the basics, refresh your memories, and hopefully impress upon you why NBA is a valuable option for the settlement of cases.

Arbitration is governed by the Florida Supreme Court, which, in turn, tasked the Office of the State Courts Administrator (OSCA) to manage arbitration as part of the Florida Dispute Resolution Center (DRC). While part of the DRC and a form of alternate dispute resolution, NBA differs vastly from mediation: mediation is a collaborative process where the disputing parties decide the outcome, while cases eligible for NBA are decided by the arbitrator.

Our circuit has long had an administrative order regarding nonbinding arbitration, but recent changes to the statute have changed the usefulness of nonbinding arbitration in appropriate cases. As a result, I signed Administrative Order No. 2020-26-02, Amended Administrative Order Governing Court-Ordered Nonbinding Arbitration, on July 1 to conform to the changes in the Florida Statutes. FS §44.103 gives trial courts discretion to refer cases or select issues to NBA. To assist with the pretrial resolution of cases, civil, family, and probate judges use NBA in appropriate cases while still excluding certain matters (Fla. R. Civ. Pro. 1.800). Jury trials are not likely to be sent to NBA except to determine significant motions.

NBA is typically most effective at or near the time that discovery is complete in a

case, and either the judge or the parties can make the referral to the NBA process. NBA may also be used effectively during the discovery period for discrete issues such as *Daubert* motions.

The parties may agree upon an arbitrator or a three-person panel of arbitrators, allowing flexibility for someone knowledgeable about the subject matter to be selected. But if the parties fail to agree regarding the arbitrator within 30 days of the court's order of referral to NBA, the court's order contains a default appointment to an arbitrator of the court's choosing from the Ninth Judicial Circuit List of Qualified Arbitrators so as not to delay the start of the NBA. That list can be found on the Court's website.

Additionally, the selected arbitrator must make reasonable inquiries to assure impartiality. Past or existing relationships with any party and/or a financial or personal interest in the outcome will disqualify the arbitrator. Much like mediation, the cost of the arbitrator is negotiated with the parties pursuant to Fla.R. Civ.P.1.810(b) and §44.103(3). The administrative order provides the terms of the payment to the arbitrator as required by the statute and the Florida Rules of Civil Procedure.

Once chosen, the neutral third-party arbitrator will consider the evidence, typically in an abbreviated form, and must render a written decision within 10 days of the "final adjournment of the arbitration hearing." Fla.R.Civ.P.1.820((g)(3). (The arbitrator's decision is not revealed to the trial judge, however.) The hearing is conducted "informally." The statute specifically directs that NBA is done with "a minimum" of testimony and evidence, but that the presentation to the arbitrator should be "primarily through the statements and argument of counsel."



F.S. §44.103(4) As a result, NBA as envisioned in the revised §44.103 directs a summary trial intended to reduce trial costs while getting an effective ruling on the issue.

While NBA is a very straightforward procedure, the statute is very detailed, and the requirements must be strictly adhered to. Timeliness is paramount, and the consequences for missed deadlines can be catastrophic for your clients. Of note, if your clients reject the arbitrator's determination, a rejection of the award must be filed within 20 days of service, and a request for a trial de novo must be submitted at the same time. Fla.R.Civ.P. 1.820(h). Failure to file both pleadings will result in the arbitrator's award being referred to the presiding judge for entry of judgment.¹

The statute includes a provision that shifts the attorney's fees if the arbitrator's determination is rejected and the award at trial does not exceed 25% over the arbitrator's award for the Plaintiff or the judgment entered against the Defendant is at least 25% more than the arbitrator's award. F.S. 44.103(6). For this reason, NBA should not be entered into lightly, nor should consideration of the determination.

The use of NBA as an additional means of alternative dispute resolution presents unique opportunities to clients and their counsel. The process allows for the opportunity to preview your client's case with a knowledgeable fact finder, to test theories of liability or damages, and to expose weaknesses in the opposing counsel's case or your own. All of these opportunities can lead to reasonable settlements or to improving outcomes at trial.

NBA is a valuable alternate dispute resolution option, regardless of the outcome. There are very few downsides with the upside giving you an edge to develop the best case for your clients. Keep it in mind as a useful option for appropriate cases.

1. See AO No. 2020-26-02 (9)

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