Alternative Dispute Resolution in Florida for Commercial & Employment Disputes

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I. Mediation

A. The Mediation Process

1. Mediation is a process whereby a neutral third person encourages and facilitates the resolution of a dispute between two or more parties in an informal proceeding to help the parties reach a voluntary binding agreement. *Fla. Stat.* § 44.1011(2); *Fla. R. Med.* 10.210.

2. The mediator does not make any rulings or decisions for the parties. *Fla. R. Med.* 10.310. The mediator may not give the parties any legal advice, but the mediator may discuss the possible outcomes of the lawsuit or arbitration if not settled, as well as the potential strengths and weaknesses of the parties' positions in the case. *Fla. R. Med.* 10.370. The process is conducted in an informal non-adversarial manner. The objective of the mediation is to reach a mutually acceptable agreement. *Fla. R. Med.* 10.210.

B. Mediation Order

1. A circuit or county court is *required* to order the parties to a civil lawsuit to mediation if one party requests mediation and the lawsuit is for monetary damages, *provided* the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties, unless:

   a. The action is a landlord and tenant dispute that does not include a claim for personal injury.

   b. The action is filed for the purpose of collecting a debt.

   c. The action is a claim of medical malpractice.

   d. The action is governed by the Florida Small Claims Rules.

   e. The court determines that the action is proper for referral to non-binding arbitration.

   f. The parties have agreed to binding arbitration.

   g. The parties have agreed to an expedited trial.

   h. The parties have agreed to voluntary trial resolution.

   Fla. Stat. § 44.102(2)(a).

2. A circuit or county court may order the parties to mediation for any civil lawsuit for which mediation is not otherwise required. *Fla. Stat.* § 44.102(2)(b). Under no circumstances, however, may the following actions be referred to mediation:

   a. Bond estreatures.

b. Habeas corpus and extraordinary writs.

c. Bond validations.

d. Civil or criminal contempt.

e. Other matters specified by administrative order of the chief judge in the circuit.

Fla. R. Civ. P. 1.710(b).

3. When a civil action is referred to mediation by court order, the time period for responding to any settlement offer under *Florida Statute* § 45.061 or an offer or demand pursuant to § 768.79 is tolled until an impasse has been declared by the mediator or the mediator has reported to the court that no agreement was reached. *Fla. Stat.* § 44.102(5)(a).

4. Unless ordered by the court or stipulated by the parties, the mediation process does not suspend discovery. *Fla. R. Civ. P.* 1.710 (c).

5. For a sample mediation order, please email the author at the email address above.

C. Agreements to Mediate through AAA

1. If the parties wish to require mediation with the American Arbitration Association ("AAA"), for all future disputes relating to a contract **before** any arbitration or litigation can be commenced, the following mediation clause may be added to the contract:

> If a dispute between the parties arises out of or relates to this contract, the breach thereof, or any performance or obligation due hereunder, and if the dispute cannot be settled through direct negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

2. If the parties wish to mediate an existing dispute, they may enter into the following agreement, independent of any contract:

> The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Rules: (describe dispute).

D. Selection of the Mediator

1. The parties may agree on the appointment of any person (other than a senior judge presiding as a judge in that circuit) to act as the mediator for any mediation conference. As long as the parties agree, the mediator does not need to be certified. *Fla. R. Civ. P.* 1.720(j)(1)(B). Depending on the level of "reality checking" the parties would like

the mediator to undertake, the parties should consider the substantive experience of the mediator.

2. In the absence of the parties' agreement, the court may only appoint a certified mediator to conduct a mediation conference. *Fla. R. Civ. P.* 1.720(j)(2). The chief judge of each judicial circuit is required to maintain a list of certified mediators who have registered for appointment in that circuit. *Fla. Stat.* § 44.102(4).

E. Pre- Mediation Summaries

1. Florida Statutes do not specifically provide for the mandatory submission of pre-mediation summaries; however, it is a common practice. Unless ordered by the court or requested by the mediator, mediation summaries are not required to be provided or mutually exchanged by the parties. If done, these summaries are confidential, privileged communications. *Fla. Stat.* §§ 44.102(3) and 90.408.

2. AAA's mediation rules request (and at least one requires) that, at least ten days prior to the first scheduled mediation session, each party provide the mediator with a brief memorandum setting forth their position with regard to the issues that need to be resolved.

3. Most mediation orders and mediator engagement letters require the parties to provide the mediator with a brief summary. Mediation summaries are very helpful for the mediator to determine how best to approach the mediation. Mediation summaries should include the following:

   a. A brief introduction of the parties and their respective lawyers;

   b. A brief summary of the relevant facts;

   c. A summary of the status of the case, i.e., whether depositions have been taken, whether the case is set for trial, whether the action is a bench trial or is a jury trial, etc.;

   d. A breakdown of any monetary and non-monetary relief sought in the action, including whether attorney's fees are recoverable;

   e. The history of prior settlement negotiations, including all offers and counter offers.

F. Appearance at the Mediation Conference

1. Unless permitted by court order or the parties' written agreement, a party is deemed to appear at a mediation if the following persons are physically present:

   a. The party or the party's representative having full authority to settle *without* further consultation; and

   b. The party's counsel of record, if any; and

c. A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, *without further consultation*.

Fla. R. Civ. P. 1.720(b). Thus, the mediator does not have the authority to excuse any attorney, party or insurance carrier representative from attending the mediation in person, unless the parties have agreed in writing.

2. Full authority to settle means that the person attending the mediation is the final decision maker with respect to all issues presented by the case and who has the legal ability to execute a binding settlement agreement. *Fla. R. Civ. P.* 1.720(c). As a result, it may be extremely difficult for most insurance carriers and large corporations to strictly comply with this rule. However, this rule does not require any party to actually enter into a settlement agreement. *Id.*

3. Appearance by a public entity under Chapter 286, *Florida Statutes*, only requires the party's representative to physically appear at mediation with full authority to *negotiate* on behalf of the entity and *recommend* settlement to the decision-making body of the entity. *Fla. R. Civ. P.* 1.720(d).

4. Unless otherwise agreed upon by the parties, each party must, 10 days prior to the mediation, file and serve a written notice identifying the persons who will be attending the mediation as a party representative or as an insurance carrier representative and confirm that those persons have full authority as required under the rule. *Fla. R. Civ. P.* 1.720(e).

5. If a party fails to appear at a "duly noticed mediation without good cause," the court upon motion *shall* impose sanctions against the party failing to appear, including the mediation fees, attorneys' fees and costs. The failure to file a certification confirming the representative's authority or the failure of the person identified in the certification to actually appear at the mediation creates a rebuttable presumption of the party's failure to appear. *Fla. R. Civ. P.* 1.720(f).

6. In *Carbino v. Ward*, 801 So. 2d 1028 (Fla. 5th DCA 2001), the defendants failed to appear at a court-ordered mediation, but their insurance carrier's representative appeared with full authority to settle up to the policy limits. The plaintiff, however, had not agreed to limit his demand to such limits. Under these facts, the appellate court agreed with the trial court's finding that the defendants had failed to "appear" at the mediation and the trial court was required to impose sanctions against them. *Id*. at 1031.

G. Conduct of and Communications during the Mediation Conference

1. At all times, the mediator shall be in control of the mediation and the procedures to be followed in the mediation. *Fla. R. Civ. P.* 1.720(h). For the most part, the mediation conference is conducted in at least two stages.

   a. **Joint Session**: Initially, the mediator will conduct a joint session in which the mediator and then each attorney will give brief opening statements. Each party should be advised by their attorneys prior to the mediation that they will hear statements from the opposing attorney with which the party may disagree. Nevertheless, each attorney and his or her client, if they desire, are typically given the full opportunity to be heard without interruption. Each person attending the mediation is expected to act in a civil, respectful manner to all other persons present.

   b. **Private Caucus**: After the joint session, the mediator will separate the parties and their respective attorneys into private sessions or caucuses in which they may feel more free to candidly discuss other aspects of the dispute and how it may be resolved.

2. There are times when the mediator may not conduct a joint session, such as when emotions are at extreme levels and the parties are in a state of high conflict. These situations should be weighed against the need for the parties to have their opportunity to address each other directly or through counsel so that they will be able to move past their conflict towards resolution. A joint session is also a valuable time-saving tool for the exchange of information directly between the parties, rather than the mediator shuttling the information between private caucuses.

3. "All written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the [public records disclosure] requirements of chapter 119." *Fla. Stat.* § 44.102(3).

4. Evidence of settlement negotiations is generally inadmissible in a federal criminal investigation or trial. *Fed. R. Evid*. 408(a); *see, e.g.*, *Bouret-Echevarria v. Caribbean Aviation Maintenance Corp.*, 784 F.3d 37, 46 (1st Cir. 2015). This evidence is admissible "when offered in a criminal case and when the negotiations relate[] to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority," *Fed. R. Evid*. 408(a)(2), or to "prov[e] a witness's bias or prejudice, negat[e] a contention of undue delay, or prov[e] an effort to obstruct a criminal investigation or prosecution." *Fed. R. Evid*. 408(b).

5. Mediation must be completed within 45 days of the first mediation conference, unless extended by order of the court, the arbitrator or by stipulation of the parties. *Fla. R. Civ. P.* 1.710(a).

6. Although attendance at any court ordered mediation is mandatory, participation in settlement negotiations is completely voluntary. It is a party's right to refuse to compromise or settle any claim and to have their day in court. *Fla. R. Civ. P.* 1.730(a).

7. "Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of *self-determination*." *Fla. R. Med.* 10.310(a) (emphasis added).

8. Indeed, the mediation conference is an opportunity for the parties to control the outcome of the case and to fashion a resolution to the dispute which is certain and may encompass terms which an arbitrator or a court may not otherwise be able to award.

H. Mediator's Report

1. If no agreement is reached, the mediator must report the lack of an agreement to the court *without comment or recommendation*. *Fla. R. Civ. P.* 1.730(a) (emphasis added).

2. With the consent of the parties, the mediator's report may also identify any pending motion or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement. *Id.*

I. Mediated Settlement Agreements.

1. Mediated settlement agreements reached at a court ordered mediation are unenforceable unless signed by the parties and their counsel. *See Fla. R. Civ. P.* 1.730(b). *See also Scott v. Tischler*, 882 So. 2d 461, 462 (Fla. 4th DCA 2004). However, at least one court has held that a mediated settlement agreement which was not signed by counsel, but was signed by the parties was not rendered unenforceable where the parties conducted themselves as if they had reached a binding agreement. *Jordan v. Adventist Health Sys./Sunbelt, Inc.*, 656 So. 2d 200 (Fla. 5th DCA 1995).

2. Further, mediated settlement agreements may not be enforced where a party can demonstrate that the agreement was reached through coercion or any other improper tactics utilized by the mediator. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. 4th DCA 2001). If the mediator fails to substantially comply with the requisite practices and procedures, no party to the mediation may "rightfully claim the benefits of an agreement reached in such a way." *Id*. at 1099.

3. Based upon the Court's inherent power to maintain the integrity of the judicial system, a "court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures" may be invalidated. *Id*.

4. Cases settled in mediation are not suited for the "liberal application" of *Florida Rule of Civil Procedure* 1.540(b) allowing rescission of a settlement agreement based on unilateral mistake because "[m]ediation, like arbitration, is an *alternative dispute* resolution device" and a more stringent standard of review applies. *Tilden Groves*

Holding Corp. v. Orlando/Orange Cty. Expressway, 816 So. 2d 658, 660 (Fla. 5th DCA 2002) (quoting *Sponga v. Warro*, 698 So. 2d 621, 625 (Fla. 5th DCA 1997)).

5. For a sample mediated settlement agreement form, please email the author at the email address above.

J. Mediation Impasse

1. There may be various reasons for impasse. A party may honestly evaluate claims and defenses based upon significantly different criteria, making the potential settlement ranges too far apart to broach. In that instance, the parties may feel they would be better served having a third party, such as a judge, jury or arbitrator decide the dispute. It is important for the parties in such a case to fully understand the range of possible outcomes, along with the costs of going forward, including all legal fees, expert fees, deposition costs and other court costs.

2. Sometimes the parties are not able to reach a compromise because one or more parties are emotionally vested in their case or the events that led up to the dispute. In that instance, the emotional party often needs to feel they had the opportunity to tell their story, whether at the mediation or at a hearing. This need cannot be underestimated as a prerequisite for settlement, especially where an apology can be given.

II. Arbitration

A. Overview of the Arbitration Process

1. As opposed to mediation, arbitration results in a binding or non-binding decision of the dispute by one or three neutral third-parties.

2. The arbitrator or panel of arbitrators consider the evidentiary presentations of the parties and then render an award, which may then be confirmed by a court of competent jurisdiction.

B. Revised Florida Arbitration Act ("RFLAA")

1. RFLAA codifies Florida case law and adopt portions of the Uniform Revised Arbitration Code. *See* Ch. 682, *Fla. Stat.*

2. The RFLAA expressly provides that an "agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." *Fla. Stat.* § 682.02(1).

D. The RFLAA includes the following definitions:

1. "Arbitration organization" means an "association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator."

2. "Arbitrator" means "an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate."

3. "Court" means a "court of competent jurisdiction in this state."

4. "Knowledge" means actual knowledge.

5. "Person" means an "individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity."

6. "Record" means information that is "inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

Fla. Stat. § 682.011.

E. Whether an arbitration is subject to the RFLAA is dependent upon when the arbitration agreement was entered into and when its enforcement is sought.

1. An agreement made on or after July 1, 2013 is governed by the RFLAA.

2. An agreement made before July 1, 2013 and whose enforcement is sought between July 1, 2013 and July 1, 2016 is subject to the RFLAA if all parties to the agreement or to the arbitration proceeding so agree in a record. Otherwise, the date the arbitration agreement was created governs.

3. Beginning July 1, 2016, all agreements to arbitrate are subject to the RFLAA, regardless of when created.

   Fla. Stat. § 682.013.

F. The RFLAA prohibits certain provisions from being waived by the parties.

1. *Before a controversy arises*, the parties may not:

   a. Waive or agree to vary the effect of:

      i. Commencing a petition for judicial relief under *Fla. Stat.* § 682.015(1);

ii. Making arbitration agreements valid, enforceable, and irrevocable under *Fla. Stat.* § 682.02(1);
iii. Permitting provisional remedies under *Fla. Stat.* § 682.031;
iv. Conferring authority on arbitrators to issue subpoenas and permit depositions under *Fla. Stat.* § 682.08(1) or (2);
v. Conferring jurisdiction under *Fla. Stat.* § 682.181; or
vi. Stating the bases for appeal under *Fla. Stat.* § 682.20;

b. Agree to unreasonably restrict the right under *Fla. Stat.* § 682.032 to notice of an arbitration proceeding;

c. Agree to unreasonably restrict the right under *Fla. Stat.* § 682.041 to disclosures by a neutral arbitrator; or

d. Waive the right under *Fla. Stat.* § 682.07 of a party to be represented by an attorney at any proceeding or hearing, but an employer and a labor organization may waive the right to representation by an attorney in a labor arbitration. *Fla. Stat.* § 682.014(2).

2. *At any time*, the parties may not vary the RFLAA as to:

a. The dates of application of the RFLAA;

b. The availability to compel or stay arbitration under *Fla. Stat.* § 682.03;

c. The immunity conferred on arbitrators and arbitration organizations under *Fla. Stat.* § 682.051;

d. A party's right to seek judicial enforcement of an arbitration pre-award ruling under *Fla. Stat.* § 682.081;

e. The authority conferred on an arbitrator to change an award under *Fla. Stat.* § 682.10(4) or (5);

f. The right to confirmation of an award as provided under *Fla. Stat.* § 682.12;

g. The grounds for vacating an arbitration award under *Fla. Stat.* § 682.13;

h. The grounds for modifying an arbitration award under *Fla. Stat.* § 682.14;

i. The validity and enforceability of a judgment or decree based on an award under *Fla. Stat.* § 682.15(1) or (2); or

j. The validity of the electronic signatures under *Fla. Stat.* § 682.23; or

k. The effect of excluding from arbitration under chapter 682 disputes involving child custody, visitation, or child support under *Fla. Stat.* § 682.25.

Fla. Stat. § 682.014(3).

G. Arbitration Agreements

1. The following is a basic sample clause from the AAA for arbitration of all *future disputes* between the parties before the AAA:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be resolved and determined by binding arbitration administered by the American Arbitration Association under its ***[Commercial or National Employment]*** Arbitration Rules, and judgment on the award rendered by the arbitrators shall be entered by any court having jurisdiction thereof.

2. Arbitration through the AAA of *existing disputes* may be accomplished by use of a submission agreement, independent of any contract in question. The following is a basic sample submission agreement:

> We, the undersigned parties, hereby agree to submit to binding arbitration administered by the American Arbitration Association under its ***[Commercial or National Employment]*** Arbitration Rules the following controversy:
>
> ***(Describe the dispute)***
>
> We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrators, and that a judgment of any court having jurisdiction thereof shall be entered on the award.

3. For a complete submission agreement form, please email the author at the email address above.

4. To expedite matters, an arbitration clause can expressly adopt the summary procedures of Chapter 51, *Fla. Stats.,* or customized expedited summary procedures set forth in either the AAA's rules or the clause itself. The arbitrators and the administrator of the proceeding are mandated to comply with those procedures, provided they are reasonable and fundamentally fair to all parties.

5. The arbitration clause may provide for emergency interim relief by incorporating the AAA's optional rules for emergency measures of protection or other applicable emergency rules, such as applicable *Florida Rules of Civil Procedure*.

6. Subject to due process considerations, arbitration clauses may expressly provide for:

    a. The number of arbitrators;

    b. The specific minimum qualifications for the arbitrators;

c. The method of and responsibility for payment for the fees and costs associated with the arbitration;

d. The locale for all hearings; and

e. The use of any discovery tools, including depositions under the Florida Rules of Civil Procedure.

7. While courts are mindful of the "liberal policy favoring arbitration agreements," the U.S. Supreme Court has also made clear that arbitration is only appropriate "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," allowing the statute to serve its purposes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

8. Clauses requiring splitting of arbitration costs, filing fees and arbitrator compensation.

   a. The U.S. Supreme Court acknowledged that "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). However, the "possibility" that the plaintiff would "be saddled with prohibitive costs is too speculative," and "[t]o invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements.'" *Id.* at 91. The party seeking to avoid arbitration due to excessive costs "bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

   b. Since the U.S. Supreme Court addressed the issue of arbitration fees, all but one federal circuit has applied a case-by-case analysis when evaluating the validity of a fee splitting provision. *See, e.g.*, *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259 (11th Cir. 2003) (adopting a case-by-case approach to determine whether arbitration costs are prohibitive); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88 (1st Cir. 2002) (adhering to case-by-case approach predating *Green Tree*); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) ("[T]he mere existence of a fee-splitting provision in an agreement does not satisfy the claimant's burden to prove the likelihood of incurring prohibitive costs"); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002) (adhering to case-by-case approach); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483, 492 (6th Cir. 2001) (*Green Tree* requires party resisting arbitration to show likelihood of prohibitive expenses); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (on remand, district court should consider the plaintiff's arguments in light of *Green Tree* which requires her to show the likelihood of incurring prohibitive expenses in arbitration). These provisions do not render the agreements *per se* invalid. *See Gannon*, 262 F.3d at 681. *But see Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002).

c. When considering cost sharing language in an employment agreement, the case-by-case analysis offers little guidance in calculating a numerical figure that would be categorically shielded from attack. In *Morrison v. Circuit City Stores, Inc.*, the former employee's cost splitting rule in her arbitration agreement detailed her exposure to the greater of $500 or 3% of her annual salary. 317 F.3d 646, 669 (6th Cir. 2003). The court, applying a case-by-case analysis, concluded that this provision was unenforceable with respect to her claims. *Id.* The court supported its decision by emphasizing that an employee's resources can be scarce, and a substantial number of similarly situated persons would be deterred from seeking to vindicate their statutory rights under these circumstances. *Id.* at 670.

d. A cost-splitting provision limited at one week's compensation could also be rendered unconscionable. *See Garrett v. Hooters-Toledo*, 295 F. Supp. 2d 774 (N.D. Ohio 2003). Based on the lack of evidence regarding the plaintiff's income in the record, the court was precluded from rendering the agreement substantively unconscionable in this case. *Id.* at 781. The court noted in dicta that "one week's compensation, therefore, imposes a high burden on a single mother experiencing intermittent periods of unemployment." *Id.*

e. In *Roberson v. Clear Channel Broadcasting, Inc.*, a Florida district court evaluated the viability of plaintiff's argument alleging prohibitive costs associated with arbitration. 144 F. Supp. 2d 1371, 1373 (S.D. Fla. 2001). The court ruled that plaintiff's argument was defeated as the defendant stipulated both in its reply brief and in its motion to compel arbitration that it would cover the plaintiff's cost. *Id*.

f. It appears virtually impossible to draft an arbitration clause providing for fee splitting for a consumer or employment dispute that is completely insulated from any challenge. Thus, providing for the non-consumer or employer to bear all filing fees, mediation fees, arbitration costs and arbitrator compensation is advisable until a safe harbor is established by binding case law.

9. The Florida Supreme Court has ruled that Florida's statute of limitations applies to arbitrations because an arbitration proceeding is within the statutory term "civil action or proceeding" found in *Fla. Stat.* § 95.011. *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 193 (Fla. 2013).

10. A customized arbitration clause can be drafted with the foregoing in mind. In that regard, the following is a sample arbitration clause tailored for an employment agreement with a high level, managerial employee:

Except for any claim relating to violations of the restrictive covenants contained in paragraphs ___ above, any and all other claims, controversies and disputes between Employee and Employer arising out of or relating to this Agreement, Employee's employment with Employer or the parties' performances due hereunder, including, without limitation, all known and unknown rights, demands, claims and causes of action arising under or in connection with the Americans with Disabilities Act of 1990, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Florida Civil Rights Act of 1992, as amended, the Equal Pay Act of 1963, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974 (ERISA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Genetic Information Nondiscrimination Act of 2009, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act (WARN Act) and any other federal, state or local law, including, without limitation, any and all tort claims relating to or arising out of Employee's employment with Employer, and the determination of whether any claim is arbitrable, shall be resolved by binding arbitration administered by and in accordance with the National Employment rules of the American Arbitration Association, and any court of competent jurisdiction shall enter final judgment on any such final arbitration award.

Without limiting or waiving the foregoing requirement to arbitrate, any party may apply to any court of competent jurisdiction for the issuance of a temporary injunction pending and subject to a final award rendered in the arbitration proceeding. In the event any party seeks such an injunction, it shall not be deemed to be a waiver of the parties' obligation to arbitrate as contemplated hereunder.

The final arbitration hearing shall be conducted in the county in which Employer's principal place of business is located no sooner than ninety (90) days and no later than one hundred eighty (180) days after any demand for arbitration is served upon the respondent for the proceeding. The arbitration proceeding shall be conducted by a panel of three neutral and impartial arbitrators. The arbitrator panel shall be comprised of arbitrators who shall be members in good standing with the state bar association for the state in which the final arbitration hearing shall be conducted and who [***have at least fifteen (15) years of substantial and continuous experience in employment law and/or are Board Certified in Labor and Employment Law by said bar association***].

The parties to the arbitration proceeding shall be permitted to take no more than three (3) depositions, not to exceed five (5) hours each, without good cause shown and leave of the arbitrators. The parties shall also be entitled to discover documents through the use of requests for production. No other forms of formal discovery shall be permitted by the arbitrators. All permissible discovery shall be governed by the applicable Federal Rules of Civil Procedure.

The arbitrators shall be bound by and shall follow the choice of law provision set forth in this Agreement for the rendering of any final award. All defenses and claims which would otherwise be available to the parties in any court proceeding, **except for class actions**, shall be available in arbitration. Arbitration of class claims under this Agreement shall not be permitted by the Arbitrators, and each arbitration claim encompassed by this Agreement shall be administered and determined in separate proceedings.

Any final award shall reflect the reasoning for the award, but shall not be required to state findings of fact and conclusions of law. The arbitrators shall have the authority to award any and all relief which a court of competent jurisdiction could otherwise award. Employer shall be responsible to pay for all arbitration filing fees and arbitrator compensation. However, such fees and compensation may be awarded to Employer in the event it is determined to be the prevailing party in the arbitration proceeding.

The arbitrators and the parties shall maintain in the strictest confidence the arbitration proceeding, the final arbitration hearing, all papers filed therein and the substance of the underlying dispute for the arbitration proceeding, unless otherwise required to disclose same pursuant to applicable law.

11. The Arbitration Administrator

    a. It is not necessary to require an arbitration (or mediation) to be administered by the AAA or that the proceeding be governed by its rules.

    b. The *Florida Rules of Civil Procedure* and *Florida Statutes* include arbitration rules, and most experienced arbitrators (and mediators) are prepared to administer any arbitration (or mediation) themselves. Nevertheless, any qualified neutral dispute resolution organization may be named as the administrator.[1]

H. Commencement and Submission to AAA Arbitration

1. A party to an existing dispute may commence an arbitration under the AAA's rules by filing a demand for arbitration, signed by the party or its attorney with AAA. (See www.adr.org for various forms and rules). The demand must contain a statement of the nature of the dispute, the names and addresses of all parties, the amount of the claim (if known), the remedy sought, the hearing locale requested and the name and address of the respondent. The demand must also attach a copy of the arbitration clause in question.

2. Under most of the AAA's arbitration rules, the respondent to the arbitration demand is not required (but is encouraged) to file an answer to the claims. If the respondent desires to assert a counterclaim, then it must comply with substantially all requirements as those for a demand for arbitration.

3. Online commencement and filing of arbitration papers is available at www.adr.org.

[1] In the interest of complete candor, the author discloses that he is a member of the American Arbitration Association's arbitration and mediation panels.

I. Commencement and Submission of Non-AAA Arbitrations under the RFLAA

1. An arbitration proceeding is commenced under the RFLAA by giving notice in a "record" to the other parties to the arbitration agreement in the agreed upon manner or, "in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action." *Fla. Stat*. § 682.032(1). "The notice must describe the nature of the controversy and the remedy sought." *Id.*

2. Unless a party objects for "lack or insufficiency of notice" by the beginning of the arbitration hearing, any person appearing at the hearing "waives any objection to lack of or insufficiency of notice." *Fla. Stat*. § 682.032(2).

J. Compelling or Staying Arbitration

1. After a dispute arises and a lawsuit is filed, the threshold issue is whether there is a binding right to arbitration of the dispute. If such a right is present, a motion to compel arbitration is appropriate where a party refuses to participate in the arbitration. *Fla. Stat.* § 682.03; *Hosp. Ventures of Coral Springs, L.C. v. Am. Arbitration Ass'n Inc.*, 755 So. 2d 159, 160 (Fla. 4th DCA 2000) (per curiam); *see also Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (enumerating three factors for courts to consider when ruling on a motion to compel arbitration).

2. The RFLAA states that the Court (not the arbitrator) shall decide "whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." *Fla. Stat.* § 682.02(2). This provision of the RFLAA reflects a significant change in Florida law, which previously required the arbitrator to determine these issues unless the arbitration clause itself was being attacked. *See, e.g.*, *Sanchez v. Criden*, 899 So. 2d 326 (Fla. 3d DCA 2005).

3. The arbitrator, however, is still to decide "whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." *Fla. Stat.* § 682.02(3).

4. The RFLAA also confers jurisdiction to Florida courts to "enforce an agreement to arbitrate." *Fla. Stat.* § 682.181(1). Florida courts also have "exclusive jurisdiction … to enter judgment on an award under this chapter." *Fla. Stat.* § 682.181(2). As discussed below, however, these provisions will not apply to a transaction involving interstate commerce where the Federal Arbitration Act ("FAA") preempts the RFLAA.

5. The FAA was enacted pursuant to the Commerce Clause of the United States Constitution; therefore, the FAA preempts conflicting or inconsistent state law. *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 343-44, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). The FAA requires courts and arbitrators to "enforce arbitration agreements

according to their terms." *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013). As a result, courts must enforce arbitration agreements that are valid and enforceable under the Federal Arbitration Act -- even where the arbitration agreement may not be enforceable under state law. *Southland Corp.,* 465 U.S. 1, 11–12, 104 S.Ct. 852; *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

6. "If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders." *Fla. Stat.* § 682.02(4).

7. When a party to an agreement refuses to arbitrate, a party may file a motion with the Court for an order compelling arbitration. *Fla. Stat.* § 682.03(1). If the refusing party opposes the motion, the Court must "proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." *Id.; See also Bill Heard Chevrolet v. Wilson*, 877 So. 2d 15, 18 (Fla. 5th DCA 2004) ("[A]ll questions concerning the scope . . . of the right to arbitrate should be resolved in favor of arbitration rather than against it.").

8. Similarly, where an arbitration proceeding has been initiated or threatened, but that there is allegedly no agreement to arbitrate, the Court must "proceed summarily to decide the issue." *Fla. Stat.* § 682.03(1)(b). "The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established." *Fla. Stat.* § 682.03(4). In the event the Court compels arbitration on a claim, it must stay any judicial proceeding that involves the arbitrable claim, but may limit the stay to that claim. *Fla. Stat.* § 682.03(7).

9. Where either party has the option to submit a controversy to arbitration for a binding decision, the court must compel arbitration unless the right was otherwise waived. *Ziegler v. Knuck*, 419 So. 2d 818, 820 (Fla. 3d DCA 1982)

K. Enforceability of the Arbitration Agreement

1. Under Florida law, to prevail on a defense that an arbitration agreement is unconscionable and therefore unenforceable, a party must establish that the agreement is both procedurally and substantively unconscionable. *See Jones v. Waffle House, Inc.,* 866 F.3d 1257, 1265 (11th Cir. 2017); *Golden v. Mobil Oil Corp.*, 882 F.2d 490, 493 (11th Cir. 1989); *Murphy v. Courtesy Ford LLC*, 944 So. 2d 1131, 1134 (Fla. 3d DCA 2006); *Voicestream Wireless Corp. v. U.S. Commc'ns., Inc.*, 912 So. 2d 34, 39 (Fla. 4th DCA 2005).

    a. Procedural unconscionability "relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." *Powertel Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999). A contract is substantively unconscionable if its terms are so

"outrageously unfair" as to "shock the judicial conscience." *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 285 (Fla. 1st DCA 2003).

b. Substantive unconscionability and procedural unconscionability need not exist in equal amounts for the contract to be unenforceable, but there must at least be a modicum of both. *Palm Beach Motor Cars Ltd., Inc. v. Jeffries*, 885 So.2d 990, 992 (Fla. 4th DCA 2004).

c. The party seeking to avoid enforcement of the arbitration clause based on a claim of unconscionability has the burden of presenting "sufficient evidence" to find that the provision is unenforceable. *Gainesville Health Care Ctr.*, 857 So. 2d at 288.

2. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010):

a. An employee signed an arbitration agreement that provided for arbitration of disputes arising out of his employment, including discrimination claims. *Id.* at 65–66. The agreement also provided that the arbitrator, and not a court, had exclusive authority to resolve any dispute relating to the enforceability of the arbitration agreement. *Id.* at 66. The employee challenged the arbitration agreement, arguing that it was unconscionable under state law. *Id.*

b. The Supreme Court held that the agreement's delegation of authority to the arbitrator to decide whether the agreement was valid was severable from the rest of the agreement, such that a challenge to the validity of the delegation provision itself was required before a court could intervene. *Id.* at 71–72.

c. Since the employee's unconscionability arguments challenged the validity of the arbitration agreement as a whole and not just the delegation provision, the Court determined that the delegation provision had to be treated as valid under 9 U.S.C. § 2, and any challenge to the validity of the agreement as a whole had to be determined by the arbitrator. *Id.; See also Waffle House,* 866 F.3d at 1264.

3. Where an arbitration clause is valid and not interdependent with the remaining clauses of an agreement, any offending or unlawful provision contained therein can be severed without affecting the intent of the parties or the agreement to arbitrate. *Healthcomp Evaluation Serv. Corp. v. O'Donnell*, 817 So. 2d 1095, 1097–98 (Fla. 2d DCA 2002).

4. Under the FAA, if a contract containing an arbitration clause is challenged as void *ab initio*, then it is submitted to arbitration, unless the challenger specifically contests the arbitration clause. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447–49 (2006).

5. Whether a demand for arbitration was timely served is a question of fact to be decided by the arbitrator, not the trial court. *CED Construction, Inc. v. Kaiser-Taulbee Assocs., Inc.*, 816 So. 2d 813, 814 (Fla. 5th DCA 2002).

L. Arbitration with non-signatories to agreement

1. While the general rule is that "no party can be compelled to arbitrate unless that party has entered into an agreement to do so," there are some circumstances in which a party may be bound to arbitrate a dispute even though the party did not physically sign a written contract to arbitrate. *Emp'rs Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 (11th Cir. 2001). In compelling non-signatories to arbitrate, courts typically employ principles of contract and agency law, such as incorporation by reference, assumption, agency, veil-piercing, estoppel, and third-party beneficiaries. *See, e.g.*, *id.; Qubty v. Nagda*, 817 So. 2d 952, 957–58 (Fla. 5th DCA 2002) (compelling investors suing stockbrokers to arbitrate under principles of agency); *Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So. 2d 1089, 1090 (Fla. 4th DCA 2001) (per curiam) (compelling a third-party beneficiary to arbitrate); *see also MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (allowing a non-signatory to invoke agreement to arbitrate when, "under agency or related principles, the relationship between the signatory and [non-signatory] is sufficiently close that only by permitting the [non-signatory] to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided"), *abrogated on other grounds*, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (holding that state law governs whether an arbitrary clause is enforceable against a non-signatory under the FAA); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993) ("Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."). *But see Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073–77 (5th Cir. 2002) (refusing to require non-signatories to a contract with an arbitration clause to arbitrate where the non-signatories neither sued on the contract nor were third-party beneficiaries); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 780 (2d Cir. 1995) (implying a strong presumption against forcing non-signatories to arbitrate).

2. In *United Healthcare*, the court held that any employee who signed a document acknowledging that she received and reviewed her employer's arbitration policy was bound by its terms, even though she did not understand that the arbitration policy applied to all employment related disputes with the employer's parent and its subsidiaries. *United Healthcare of Fla., Inc. v. Brown*, 984 So. 2d 583 (2008). Further, the employee's claimed misunderstanding did not undermine the enforceability of the arbitration policy and her continued employment evidenced her acquiescence to the terms of the new agreement. *Id.* at 586.

3. Similarly, in *Santos*, an employee was held to be bound by his employer's Dispute Resolution Policy (DRP) implemented for all employees during the particular employee's employment. *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So. 2d 658 (Fla. 4th DCA 2008). The DRP stated that arbitration was the "sole and exclusive forum and remedy for all Covered Claims," and that the parties agreed to waive any right to jury trial for a covered claim. *Id.* at 659. The DRP also provided that the "continuation of employment by an individual [was deemed] to be acceptance of the DRP." *Id.* The employee contested the enforceability of the DRP because he never signed any arbitration agreement and there was no consideration for the change in the

terms of his employment. *Id.* at 660. The appellate court disagreed, ruling that the arbitration agreement was valid and enforceable under the FAA. *Id.* at 661. The fact that the employee did not sign the DRP did not automatically render the agreement invalid as his continued employment after receipt of the DRP sufficiently demonstrated his assent to its terms. *Id.* Moreover, "there was sufficient consideration to support the DRP because the agreement created a mutual obligation to arbitrate." *Id.* Thus the court held the arbitration agreement to be valid and binding. *But see Schoendorf v. Toyota of Orlando*, No. 6:08-cv-767-Orl-19DAB, 2009 WL 1075591, at *8 (M.D. Fla. Apr. 21, 2009) (considering an unsigned arbitration agreement invalid where the agreement left space for signatures, thus "defin[ing] the appropriate method of acceptance as the *signatures* of the parties").

4. The *Pritzker* Case –

   a. The trustees of a profit sharing plan brought suit against a brokerage company and one of its brokers alleging, among other claims, breach of fiduciary duty arising from alleged mismanagement of pension funds. *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1113 (3d Cir. 1993).

   b. In response to the defendants' motion to compel arbitration under an arbitration provision in the contract governing the relationship between the trustees and the brokerage firm, the trustees argued that their claims against the individual broker were not subject to the arbitration agreement because the broker was not a signatory to the underlying contract. *Id*. at 1121.

   c. The U.S. Court of Appeals for the Third Circuit rejected this argument finding that the broker, as an agent and representative of the brokerage firm, was bound by the brokerage firm's arbitration agreement under traditional agency principles. *Id*. at 1121–22. *See also Arnold v. Arnold Corp.–Printed Commc'ns for Bus.*, 920 F.2d 1269, 1281–82 (6th Cir. 1990) (extending scope of arbitration provision to non-signatory officers of corporation bound by arbitration provision); *Letizia v. Prudential Bache Sec.*, 802 F.2d 1185, 1187–88 (9th Cir. 1986) (same). *But see Westmoreland v. Sadoux*, 299 F.3d 462, 466–67 (5th Cir. 2002) (rejecting mere agency as a grounds for compelling arbitration where the complaint did not allege wrongdoing arising out of the contract containing the arbitration clause); *Britton v. Co-Op Banking Grp.*, 4 F.3d 742, 748 (9th Cir. 1993) (same); *McCarthy v. Azure*, 22 F.3d 351, 356 (1st Cir. 1994) (same).

5. A party who personally guaranteed the obligations of another under a written agreement containing an arbitration clause was bound to arbitrate a dispute regarding the guarantee. *Berti v. Cedars Healthcare Grp., Ltd.*, 812 So. 2d 580 (Fla. 3d DCA 2002) (per curiam).

6. An appointed agent for a principal bound to a contract containing an arbitration clause must arbitrate all disputes relating to the contract. *Koechli v. BIP Int'l*, 870 So. 2d 940, 946 (Fla. 1st DCA 2004).

7. Arbitration provisions are binding on the third-party beneficiaries of a contract that contains an arbitration provision, provided that the contract clearly expresses an intent to directly benefit the third party. *Tech. Aid Corp. v. Tomaso*, 814 So. 2d 1259 (Fla. 5th DCA 2002) (refusing to compel an unintended third-party beneficiary to a contract to arbitrate a dispute arising under it).

8. One's intention to be bound by a contract containing an arbitration clause may be evidenced by one's performance under other provisions of the contract. *Chanchani v. Salomon/Smith Barney, Inc.*, No. 99 CIV 9219 RCC, 2001 WL 204214, at *3 (S.D.N.Y. March 1, 2001) (party's attempts to comply with other terms of the contract bound the party by the arbitration provision in the same contract); *Frynetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, No. 99 C 4704, 2001 WL 40900, at *4 (N.D. Ill. Jan. 11, 2001) (same); *In re Arbitration Between John Thallon & Co., Inc. and M&N Meat Co.*, 396 F. Supp. 1239, 1242–43 (E.D.N.Y. 1975) (party's participation in performance under other provisions of a contract reflected the party's intent to be bound by the contract's arbitration provision).

9. Even if not joined in the arbitration, a surety on a construction bond can be bound by the results of an arbitration if the surety was aware of the arbitration, had every opportunity to appear and defend itself, but chose not to do so. *Fewox v. McMerit Constr. Co.*, 556 So. 2d 419, 425 (Fla. 2d DCA 1990).

10. The *Roman* case –

    a. Pursuant to Florida law, a non-signatory to an arbitration agreement can compel a signatory to submit to arbitration, where the non-signatory is the agent of a signatory party. *Roman v. Atlantic Coast Construction and Development, Inc*., 44 So. 3d 222 (Fla. 4th DCA 2010).

    b. In *Roman*, the builder contracted to construct three homes for the buyers, but the builder failed to construct the homes or return the deposit. *Id.* at 223. The appellate court affirmed an order requiring arbitration of the buyers' claims against the builder and its president. *Id.*

    c. "[A] non-signatory to a contract containing an arbitration agreement ordinarily cannot compel a signatory to submit to arbitration. There are, however, two exceptions relevant to the instant appeal: (1) a non-signatory agent can compel arbitration when the claims relate directly to the contract and the signatory is relying on the contract to assert claims against the non-signatory; and (2) when there are allegations of concerted action by both a non-signatory and one or more of the signatories to the contract." *Id.* at 224 (citations omitted).

    d. The court found that those exceptions applied to the buyers' claims for civil theft and the violation of a statute "governing escrow requirements for deposits received by 'building contractors.'" *Id.*

e. "An arbitration clause is . . . unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations. . . . There is a distinction to be drawn, however, between a determination that an arbitration clause is invalid as it impermissibly limits a plaintiff's remedies and a challenge to the validity of the contract as a whole. The majority of courts, including this one, have held that the former is a question to be resolved by the trial court, but that the latter is a question to be resolved by the arbitrator." *Id.*

f. The provision of the arbitration clause that it would serve as a "complete defense to any suit, action, or proceeding" did not limit the buyers' remedies to the return of their deposit or prevent them from asserting the causes of action raised in their complaint. *Id.* at 225.

g. Another provision of the contract, which did purport to limit the buyers' remedies to termination of the contract and refund of their deposit in the event of a breach by the builder, could not be read as "waiving all statutory causes of action or remedies, such as those for illegal acts like the civil theft and improper maintenance of escrow funds alleged in the complaint. And, to the extent the [buyers] are suggesting the contract, as a whole, is void and/or unenforceable, such determination is one that must be resolved by the arbitrator." *Id.*

11. In the absence of a signature, a party may still be bound by an arbitration clause contained in a contract, if the party's conduct indicates that the party agreed to be bound by the contract in question. *See, e.g.*, *Thompson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995); *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991) (holding that flight attendants manifested a clear intent to arbitrate the dispute, and thereby bound themselves to the arbitral outcome); *Invista N. Am. S.à.r.l. v. Rhodia Polyamide Intermediates S.A.S.*, 503 F. Supp. 195, 202 (D.D.C. 2007) (quoting *Thompson-CSF*, 64 F.3d at 777).

12. "A contract may be binding on a party despite the absence of a party's signature." *Integrated Health Services of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338, 339 (Fla. 3d DCA 2002) (quoting *Gateway Cable T. V., Inc. v. Vikoa Const. Corp.*, 253 So. 2d 461, 463 (Fla. 1st DCA 1971)). "The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, for example, by the acts or conduct of the parties." *Id*. (quoting *Gateway Cable TV*, 253 So. 2d at 463); *accord Consolidated Resources Healthcare Fund I, Ltd. v. Fenelus,* 853 So. 2d 500, 503 (Fla. 4th DCA 2003) (quoting *Integrated Health Services of Green Briar, Inc.*, 827 So. 2d at 339) ("A contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract."); *Garcia v. Centex Real Estate Corp.*, No. 2:05-cv-185, 2005 WL 8159511, at *5 (M.D. Fla. Oct. 4, 2005) ("Under Florida law, an unsigned contract may be binding on a party 'if the evidence supports that they acted as if the provisions of the contract were in force.'") (quoting *Sosa v. Shearform Mfg.*, 784 So. 2d 609, 610 (Fla. 5th DCA 2001)).

13. In *H.W. Gay Enterprises, Inc. v. John Hall Elec. Contracting, Inc.*, 792 So. 2d 580 (Fla. 4th DCA 2001), John Hall received and signed a written agreement on behalf of his

company, John Hall Electrical, and returned it to Herb Gay, the president of H.W. Gay Enterprises. Gay filled in blanks on the contract, but never signed it. Hall testified that Gay Enterprises did their best to comply with the terms of the contract and that they paid Hall in accordance with the unsigned contract. The Fourth District Court of Appeal concluded that "[t]he evidence of such a course of dealing supports the trial court's finding that the parties "agreed to be bound to the written but unsigned agreement containing an arbitration clause." *Id*. at 580-81. The court further concluded that the trial court's enforcement of the arbitration agreement in the written contract did not violate section 682.02, Florida Statutes because that provision requires only that an arbitration clause be in writing, not that both parties sign it. *Id*. at 581. The court opined that "the parties' assent to the terms of the written contract was established by their words and conduct." *Id*. at 581.

14. "Florida courts have enforced arbitration agreements despite the absence of one party's signature on the controlling document." *Blalock v. Dillard's Department Stores, Inc.*, No. 6:04-cv-1464, 2005 WL 8159917, at *3 (M.D. Fla. Jan. 25, 2005) (citations omitted). Thus, the "failure to sign an arbitration agreement does not automatically render the agreement invalid." *Fi-Evergreen Woods, LLC v. Robinson*, 135 So. 3d 331, 335 (Fla. 5th DCA 2013) (citations omitted). "In the absence of a signature, the courts look to a party's words and conduct to determine whether the party assented to the agreement." *Id.* at 336 (citation omitted). *See also Santos v. Gen. Dynamics Aviation Services Corp.*, 984 So. 2d 658, 661 (Fla. 4th DCA 2008) (recognizing that the fact that a party to a contract containing an arbitration provision did not sign the contract does not render the contract or arbitration provision invalid; instead, the court must "look to a party's words and conduct to determine whether the party assented to the agreement"); *Global Metal Trading Co., Inc. v. Planet Metals, LLC*, No. 8:13-cv-1767, 2013 WL 6283711, at *3 (M.D. Fla. Dec. 4, 2013) (concluding that plaintiff's conduct expressed assent to an arbitration agreement where "plaintiff received ten invoices, each signed by the defendants, for ten orders placed over six weeks, and each invoice contained an arbitration agreement conspicuously placed within the four page document" and plaintiff never objected to the arbitration agreement); *Comcast Spotlight, Inc. v. Eventys Marketing and Products, Inc.*, 984 So. 2d 631 (Fla. 3d DCA 2008) (concluding that "[b]ecause the parties' mutual course of conduct pursuant to an agreement which contained an arbitration clause evinced their assent to the entire agreement, it does not matter . . . that the appellee, which was suing for its breach, did not formally execute it."). *See also Dorward v. Macy's Inc.*, No. 2:10-cv-669, 2011 WL 2893118, at *8 (M.D. Fla. Jul. 20, 2011) (recognizing that "[u]nder both the Federal Arbitration Act and the Florida Arbitration Code, an arbitration agreement need not be signed to be enforceable.") (internal citations omitted).

15. On the other hand, courts have refused to require non-signatories to arbitrate in various circumstances. *See, e.g.*, *Thomson-CSF, S.A.*, 64 F.3d 773 (corporate parent not required to arbitrate on claim relating to subsidiary's arbitration agreement); *Benasra v. Marciano*, 112 Cal. Rptr. 2d 358 (Cal Ct. App. 2001) (president of corporation who signed contract in corporate capacity could not be compelled to arbitrate individually).

M. Waiver of Right to Arbitrate and Provisional Remedies

1. The RFLAA provides that a party to an arbitration proceeding may request the Court to grant "provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action" before it appoints an arbitrator and the arbitrator is able to act. *Fla. Stat*. § 682.031(1). A party to an arbitration may only do so if "the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." *Fla. Stat*. § 682.031(2)(b).

2. Once the arbitrator is appointed and is authorized to act, the arbitrator may "issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action." *Fla. Stat*. § 682.031(2)(a).

3. The arbitrator must state factual findings and the legal basis to award any provisional remedy for injunctive or equitable relief. *Fla. Stat*. § 682.031(4). A party may then seek to "confirm or vacate a provisional remedy award for injunctive or equitable relief" under *Fla. Stat*. § 682.081. *Fla. Stat*. § 682.031(5).

4. Contrary to the common law prior to the RFLAA, "a party does not waive a right of arbitration by making a motion" under *Fla. Stat*. § 682.031. *Fla. Stat*. § 682.031(3).

5. Except as expressly authorized under Chapter 682, *Florida Statutes*, a party waives the right to arbitration where they actively participate in litigation which is the subject of an arbitration agreement before moving to compel arbitration. *Compare Hansen v. Dean Witter Reynolds, Inc.*, 408 So. 2d 658 (Fla. 3d DCA 1982) (holding that a party that answered a complaint without demanding arbitration waived its right to arbitration), *with Ojus Indus., Inc. v. Mann*, 221 So. 2d 780 (Fla. 3d DCA 1969) (compelling arbitration where the party moving to compel did so without undue delay and in accordance with *Fla. Stat* § 682.02).

6. Such a waiver will be found where the party files an answer or affirmative defenses, takes discovery or files any claim or counterclaim for affirmative relief in a lawsuit before moving to compel arbitration. *Coral 97 Assocs., Ltd. v. Chino Elec., Inc.*, 501 So. 2d 69, 71 (Fla. 3d DCA 1987); *Winter v. Arvida Corp.*, 404 So. 2d 829 (Fla. 3d DCA 1981). *But see Avid Eng'g, Inc. v. Orlando Marketplace Ltd.,* 809 So. 2d 1, 5–6 (Fla. 5th DCA 2001) (motion for arbitration and counterclaim at same time does not waive right).

7. "All questions concerning the scope or waiver of the right to arbitrate under contracts should be resolved in favor of arbitration rather than against it." *GBR3 v. Largo Dev. Corp.*, 807 So. 2d 723, 723–24 (Fla. 3d DCA 2002) (quoting *Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So. 2d 969, 971 (Fla. 5th DCA 1995)).

8. The Second DCA held that "a party's participation in discovery related to the merits of pending litigation is activity that is generally inconsistent with arbitration. Such

activity—considered under the totality of the circumstances—will generally be sufficient to support a finding of a waiver of a party's right to arbitration." *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 694 (Fla. 2d DCA 2009). The defendant waived its right to arbitrate by propounding a request to produce and interrogatories dealing with the merits of the plaintiff's claims and filing a motion to compel and setting it for hearing. *Id.* Several months after propounding its discovery, the defendant withdrew its discovery requests, withdrew its motion to compel and cancelled the hearing on its motion to compel. *Id.* The court determined that these acts were too little and too late to mitigate against a finding waiver of the party's right to arbitrate. *Id.*

9. Prior to the RFLAA, the Court (not the arbitrator) determined whether a party to an arbitration agreement waived its contractual right to arbitration by its subsequent conduct. *Florida Educ. Assoc. v. Sachs*, 650 So. 2d 29, 30 (Fla. 1995). This point may be in question with the RFLAA.

N. Arbitrator Disclosures under the RFLAA

1. Before accepting any appointment, the potential arbitrator must make a "reasonable inquiry" and "disclose to all parties ... and to any other arbitrators any known facts that a reasonable person would consider likely to affect the person's impartiality as an arbitrator in the arbitration proceeding." *Fla. Stat*. § 682.041(1). Such facts include:

    a. Any "financial or personal interest in the outcome" of the proceeding.

    b. An "existing or past relationship with any of the parties …, their counsel or representative, a witness, or another arbitrator."

    Fla. Stat. § 682.041(1) (a)&(b).

2. An arbitrator has a continuing obligation to disclose to all parties and the other arbitrators "any facts that the arbitrator learns after accepting appointment that a reasonable person would consider likely to affect the impartiality of the arbitrator." *Fla. Stat*. § 682.041(2).

3. If an arbitrator discloses a fact required by *Fla. Stat*. § 682.041(1) or (2) and a party "timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under § 682.13(1)(b) for vacating an award made by the arbitrator." *Fla. Stat*. § 682.041(3).

4. If the arbitrator did not disclose a fact required by *Fla. Stat*. § 682.041(1) or (2), the Court may vacate an award under *Fla. Stat*. § 682.13(1)(b) upon "timely objection by a party." *Fla. Stat*. § 682.041(4).

5. "An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality" under *Fla. Stat*. § 682.13(1)(b). *Fla. Stat.* § 682.041(5).

6. "If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground" under *Fla. Stat*. § 682.13(1)(b). *Fla. Stat*. § 682.041(6).

O. Selection of Arbitrators for Non-AAA Arbitrations

1. If an agreement for arbitration provides a method for the appointment of arbitrators, that method must be followed, unless the method fails. *Fla. Stat.* § 682.04(1). A method could fail if it is fundamentally unfair, such as providing only one party with the right to select the sole neutral arbitrator. A method could also fail if it is impossible to perform, such as where the agreement requires a particular organization to appoint the arbitrators, but the organization no longer exists at the time of the dispute.

2. The court, on motion of a party to an arbitration agreement, shall appoint one or more arbitrators, if: (a) the parties have not agreed upon a method; (b) the agreed method fails; (c) one or more of the parties failed to respond to the demand for arbitration; or (d) an arbitrator fails to act and a successor has not been appointed. *Fla. Stat.* § 682.04(2).

3. Each of the arbitrators must either: (a) be a member of The Florida Bar, with the chief arbitrator being a member of The Florida Bar for at least five years; or (b) serve on the arbitration panel with the written consent of all parties. *Fla. R. Arb.* 11.010.

4. "An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party" may not serve as a neutral arbitrator under the parties' agreement. *Fla. Stat.* § 682.04(4).

P. AAA Arbitrator Selection Process[2]

1. Following the demand for arbitration, the AAA typically sends each party a list of proposed arbitrators to resolve the controversy. In compiling the list, the AAA draws from the applicable panel of arbitrators, considers geographical factors and is otherwise guided by the nature of the dispute. Biographical and fee information for each arbitrator is also enclosed with the list.

2. The parties are allowed a specified time period to study the list, strike names for good cause and then rank the remaining names in the order of preference.[3] The AAA administrator uses the parties' returned lists to select the top arbitrators based upon the parties' rankings. Additional information about the proposed arbitrators is available through the administrator.

[2] *See, e.g.*, AM. ARBITRATION ASS'N, LABOR ARBITRATION RULES 10 (2013) (Rule 10).
[3] While no authority can be found, the author suggests that good cause should be limited to the grounds for disqualifying an arbitrator under the AAA's rules, as well as grounds for striking a prospective juror for cause.

3. If there are not a sufficient number of names from which to select the arbitration panel or individual arbitrator, the AAA may send out a second list or may make appointments without submitting additional lists. However, no arbitrator whose name was properly stricken by either party may be appointed in that event.

Q. Arbitrators' Jurisdiction, Scope of Authority and Enforcement Issues

1. Statutory and intentional tort employment claims are arbitrable, such as hostile work environment, defamation, tortious interference with business relationships and intentional infliction of emotional distress, where the parties are subject to a written arbitration contract that provides for binding arbitration of "any and all claims and disputes that are related in any way to my employment or the termination of my employment." *E.g.*, *Henderson v. Idowu*, 828 So. 2d 451, 452 (Fla. 4th DCA 2002) (requiring arbitration of claims of tortious interference and intentional infliction of emotional distress); *Royal Caribbean Cruises, Ltd. v. Universal Emp't Agency*, 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995) (requiring arbitration of claims of defamation, fraud, and business interference).

2. The following categories of actions may not be referred to arbitration by the Court:

    a. Bond estreatures.

    b. Habeas corpus or other extraordinary writs.

    c. Bond validations.

    d. Civil or criminal contempt.

    e. Any other matter specified by the chief judge in the circuit.

    Fla. R. Civ. P. 1.800.

3. An arbitrator exceeds his or her power when he or she goes beyond the authority granted by the parties' agreement and decides an issue not within the scope of the arbitration clause or not pertinent to the resolution of the issues submitted to arbitration. *Chandra v. Bradstreet*, 727 So. 2d 372, 375 (Fla. 5th DCA 1999); *Applewhite v. Sheen Fin. Res., Inc.*, 608 So. 2d 80, 83 (Fla. 4th DCA 1992).

4. The FAA controls where an arbitration agreement expressly provides that the agreement was made pursuant to a transaction involving interstate commerce and is governed by the FAA. *Checksmart v. Cardegna*, 824 So. 2d 228, 230 (Fla. 4th DCA 2002).[4]

5. An arbitration agreement with out-of-state parties seeking to acquire the assets of a Florida corporation involved interstate commerce and was thereby governed by the

[4] A detailed discussion of the FAA is outside the scope of these materials.

FAA. *Mintz & Fraade, P.C., et al. v. Beta Drywall Acquisition, LLC, et al.*, 59 So. 3d 1173, 1175–76 (Fla. 4th DCA 2011).

6. "The FAA establishes a 'federal public policy favoring arbitration . . . requiring [that] courts rigorously enforce agreements to arbitrate'" that involve interstate commerce. *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1192 (11th Cir.1995) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Waffle House,* 866 F.3d at 1264; *Creative Tile Mktg., Inc. v. SICIS Int'l. S.r.L.*, 922 F.Supp. 1534, 1538–39 (S.D. Fla.1996) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626 (1985)).

7. The FAA prohibits states from conditioning the enforceability of arbitration agreements involving interstate commerce on the availability of class arbitration procedures. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011). The FAA also prohibits such arbitration agreements from being invalidated by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Id.* at 1746. Indeed, the FAA was held to preempt a California ruling which invalided an arbitration agreement in a consumer contract as unconscionable because it disallowed class procedures as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1753 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

8. Although the FAA governs the applicability of interstate arbitration agreements, state law governs issues "concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987). Therefore, defenses such as fraud, unconscionability, and duress are governed by state law. *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996)).

R. Consolidation of Arbitration Proceedings

1. Except as otherwise prohibited in the arbitration agreement, a party may move the Court to order consolidation of separate arbitration proceedings as to all or some of the claims, where:

    a. There are separate arbitration agreements or separate arbitration proceedings between the same parties, or one is a party to a separate arbitration agreement or a separate arbitration proceeding with a third person; and

    b. The arbitrable claims arise in "substantial part from the same transaction or series of related transactions"; and

    c. An existing "common issue of law or fact creates the possibility of conflicting decisions" in the arbitration proceedings; and

d. "Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation."

Fla. Stat. § 682.033 (1)(a)–(d).

2. Where an arbitration proceeding is subject to consolidation, the Court may order "consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings." *Fla. Stat*. § 682.033(2).

3. However, the Court may not order consolidation of any claims where the arbitration agreement prohibits consolidation and *Fla. Stat*. § 682.033 may not be construed to affect commencing, maintaining, or certifying a class action claim or defense. *Fla. Stat*. § 682.033(3).

4. In Florida, arbitration agreements which preclude class action relief are valid and enforceable. *Waffle House,* 866 F.3d at 1267.

S. Class Arbitration

1. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

   a. The parties stipulated that their agreement was silent on any agreement for class arbitration. *Id*. at 668.

   b. Since the parties so stipulated, there was no agreement to class arbitration and a party may not be compelled to "submit to class arbitration unless there is a contractual basis for concluding that the part[ies] *agreed* to do so." *Id*. at 684.

   c. Where the agreement is silent on the subject of class arbitration, the arbitrator exceeds his or her authority by permitting class arbitration where the parties never agreed to class arbitration. *Id.*

2. *Sutter v. Oxford Health Plans*, *LLC*, 675 F.3d 215 (3d Cir. 2012), *aff'd sub nom. Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013).

   a. The parties contractually agreed that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration . . . ." *Id*. at 217.

   b. As a result, the arbitrator ruled that the first phrase of the clause encompassed all possible court actions, including class actions, and thus the second phrase permitted class actions to be arbitrated. *Id*. at 218.

   c. Oxford attempted to have the arbitrator's ruling vacated based upon *Stolt-Nielsen*'s holding that an arbitrator panel exceeds its authority to allow class arbitration where the parties never agreed to do so. *Id.*

d. The *Sutter* court affirmed the arbitrator's decision and expressly noted that the FAA sets forth the exclusive grounds upon which an arbitration award may be vacated, including where the arbitrators exceed their powers. *Id*. at 219 (citing 9 U.S.C. § 10(a)).

e. An arbitrator exceeds such authority when he or she decides an issue not submitted to arbitration by the parties, "grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether." *Id.* at 219–20 (citations omitted).

f. Thus, the court held that an arbitrator may determine that the scope of the arbitration clause reflects the parties' intent to permit class arbitration. *Id.* at 223–24.

g. *Sutter* also discussed at length *Stolt-Nielsen*, but determined that it was distinguishable because the parties in that case had stipulated that the agreement was silent on any agreement for class arbitration. *Id*. at 220–24.

h. In contrast, the parties' intent as to class arbitration in *Sutter* was in question, so the scope of the arbitration agreement was relevant for the arbitrator to resolve the issue. *Id*. at 224. "[T]he arbitrator construed the text of the arbitration agreement to authorize and require class arbitration." *Id.* By doing so, the arbitrator did not exceed his powers to authorize class arbitration. *Id.* at 225.

T. Discovery in Arbitration

1. Subject to the RFLAA, the parties may provide in the arbitration agreement for certain forms of discovery. The parties may also stipulate to discovery after the arbitration action is filed.

2. "The arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths." *Fla. Stat.* § 682.08(1). Any such subpoena must be served in the same manner for a civil action and is enforced by the Court the same manner as well. *Id.*

3. The arbitrator may permit a deposition of any witness for use at the final hearing, including a witness who cannot be subpoenaed or is unable to attend the hearing, to make the proceeding "fair, expeditious, and cost effective." *Fla. Stat.* § 682.08(2). The arbitrator may also determine the conditions for the deposition. *Id.*

4. The arbitrator has the discretion to permit discovery as the arbitrator deems appropriate, considering the needs of the parties and other affected persons, as well as the arbitrator's obligation to make the proceeding "fair, expeditious, and cost effective." *Fla. Stat.* § 682.08(3).

5. The arbitrator may control the discovery process with a protective order to prevent the disclosure of privileged or confidential information, trade secrets, and other information protected from disclosure to the same extent as the Court. *Fla. Stat*. § 682.08(5).

U. Motions for Summary Award/Judgment in Arbitration

1. The majority of case law provides that a motion for summary judgment may be granted by the arbitrators, provided they afford the parties fundamental fairness. "Fundamental fairness" has been described as the touchstone for arbitration. *British Ins. Co. of Cayman v. Water St. Ins. Co.*, 93 F. Supp. 2d 506, 517 (S.D.N.Y. 2000).

2. Thus, the arbitration must provide for a fair opportunity to present evidence and argument. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).

3. The RFLAA and the FAA do not expressly mandate oral hearings, unless the parties have agreed to such. *See Federal Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842 (9th Cir. 1987). Arbitrators are only required to grant the parties a fundamentally fair process and an adequate opportunity to present their evidence and argument. *Tempo Shain*, 120 F.3d at 20; *British Ins. Co. of Cayman*, 93 F. Supp. 2d 506.

4. In *Air Florida Systems*, the Court directed the parties to arbitration. After arbitration, the FDIC moved to vacate the award because of the arbitrator's summary disposition, instead of a ruling after an oral hearing. The arbitrator required the parties to submit, in written form, the material that they wished to have considered. The appellate court held that, as long as the process was full and fair, a procedural attack would fail. The Court found that a "full and fair" arbitration had occurred. *Fed. Deposit Ins. Co. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 842–43.

5. "[T]he failure to hold an oral hearing cannot be deemed misbehavior that prejudiced the FDIC's rights because the FDIC has not shown that its evidence was not amenable to presentation in written form. Admittedly, a 'paper hearing' often will be an inadequate means to determine the facts upon which an arbitration decision must rely. In this case, however, the nature of the decision to be made leads us to conclude that the 'paper hearing' was adequate." *Id.* at 842.

6. Under the RFLAA, the arbitrator is expressly authorized to decide a "request for summary disposition of a claim or particular issue" where:

    a. All "interested parties agree;" or

    b. "Upon request of one party to the arbitration proceeding, if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond."

    Fla. Stat. § 682.06(2).

V. Final Arbitration Hearing

1. One of the hallmarks of the arbitration hearing is its informality. In fact, a purpose of an agreement to arbitrate is to avoid the formal requisites of a court proceeding. Nevertheless, each party must be given an equal and fair opportunity to be heard and present evidence.

2. While the order of the proceeding is at the arbitrator's discretion, the hearing generally begins by each party giving an opening statement to clarify the issues. The complaining party presents evidence first, followed by the responding party's presentation of evidence. Each party also has the opportunity to cross-examine opposing witnesses. The parties are then given the option to give closing arguments.

3. The arbitrator has the discretion to conduct the arbitration in a manner that is "fair and expeditious disposition of the proceeding." *Fla. Stat*. § 682.06(1). This discretion includes the power to determine the "admissibility, relevance, materiality, and weight of any evidence." *Id.*

4. The arbitrator sets the time and place for the final hearing, and must provide notice of the hearing not less than 5 days in advance. *Fla. Stat*. § 682.06(3). Any objection to the lack or insufficiency of notice must be made prior to the beginning of the hearing, otherwise it is deemed waived by the party's appearance at the hearing. *Id.*

5. For good cause shown by a party, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing as necessary. *Id.* However, the arbitrator may not postpone the hearing contrary to any deadline set forth in the arbitration agreement, unless the parties otherwise consent. *Id.*

6. At the final hearing, a party has the right to be "heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing." *Fla. Stat.* § 682.06(4).

7. Nonetheless, the technical rules of evidence generally do not apply to arbitration hearings. Hearsay evidence is admissible, leading questions may be asked, the best evidence rule is irrelevant and witnesses need not be qualified as "experts." *Fla. R. Civ. P.* 1.820(c).

W. The Arbitration Award

1. An arbitrator must make a "record" of his or her award. *Fla. Stat.* § 682.09(1). The record must be signed or otherwise authenticated by any arbitrator who concurs with the award. *Id.*

2. The arbitrator or the arbitration organization must also give notice of the award, including a copy of the award, to each party to the arbitration proceeding. *Id.*

3. The arbitrator is not required to make specific findings of fact and conclusions of law, unless the arbitration agreement expressly requires the arbitrator to do so or a Court

remands the matter to the arbitrator for express findings to be made before any confirmation of the award will be entered. *Fla. R. Civ. P.* 1.820(g)(3).

4. An arbitrator may award punitive damages or exemplary relief where "authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." *Fla. Stat.* § 682.11(1). Should the arbitrator award punitive damages or other exemplary relief, the arbitrator must also specify the "basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief." *Fla. Stat.* § 682.11(5).

5. An arbitrator may award "reasonable attorney fees and other reasonable expenses of arbitration" where "authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." *Fla. Stat.* § 682.11(2).

6. The arbitrator may award all other remedies which he or she considers "just and appropriate under the circumstances of the arbitration proceeding." *Fla. Stat.* § 682.11(3). Further, it is not a ground to vacate the award where the remedy could not be granted by the Court. *Id.*

7. Prior to the RFLAA, in a multi-claim proceeding where less than all of the claims included a right to recover attorney's fees, the arbitration award needed to expressly state on which claims the award is based so that the Court may determine whether the prevailing party is entitled to recover his or her reasonable attorney's fees and costs. *Kesler v. Chatfield Dean & Co.*, 794 So. 2d 577 (Fla. 2001); *Moser v. Barron Chase Sec., Inc.*, 783 So. 2d 231 (Fla. 2001). Since arbitrators are now authorized to award attorneys' fees under the RFLAA, the foregoing requirements may be unnecessary where the RFLAA applies to the arbitration.

X. Post-Arbitration Proceedings

1. Change or Correction of Award.

    a. Upon motion by a party within twenty (20) days after receiving the award, the arbitrator may change or correct an award:

        i. On the grounds set forth in *Fla. Stat*. § 682.14(1)(a) or (c);

        ii. Where the arbitrator has not made a "final and definite award" on a submitted claim; or

        iii. "To clarify the award."

    Fla. Stat. § 682.10(1) & (2).

    b. Any objection to such a motion must be made within ten (10) days. *Fla. Stat*. § 682.10(3).

2. Modification. A final award may be modified upon motion made within 90 days after delivery of the award to the applicant, where:

    a. There is an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

    b. The arbitrators have awarded a matter not submitted in the arbitration and the award may be corrected without affecting the merits of the decision upon the issues submitted;

    c. The award is imperfect as a matter of form, not affecting the merits of the controversy.

    Fla. Stat. § 682.14.

3. Vacation.

    a. Upon motion of a party, the Court must vacate an arbitration award if:

        i. The award was procured by corruption, fraud, or other undue means; or

        ii. There was:

            a) Evident partiality by an arbitrator appointed as a neutral arbitrator;

            b) Corruption by an arbitrator; or

            c) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

        iii. An arbitrator refused to postpone the hearing upon showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to *Fla. Stat*. § 682.06, so as to substantially prejudice the rights of a party;

        iv. An arbitrator exceeded the arbitrator's powers;

        v. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under *Fla. Stat*. § 682.06(3) not later than the beginning of the arbitration hearing; or

        vi. The arbitration was conducted without proper notice of the initiation of an arbitration as required in *Fla. Stat*. § 682.032 so as to substantially prejudice the rights of a party.

Fla. Stat. § 682.13(1).

b. A motion to vacate must be filed within 90 days after the movant receives notice of the award or within 90 days after the movant receives notice of a modified or corrected award, unless the movant alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion must be made within 90 days after the ground is known or by the exercise of reasonable care would have been known by the movant. *Fla. Stat.* § 682.13(2).

c. If the Court vacates an award on a ground other than that set forth in *Fla. Stat.* § 682.13(1)(e), it may order a rehearing. *Fla. Stat.* § 682.13(3).

d. If the award is vacated on a ground stated in *Fla. Stat.* § 682.13(1)(a) or (b), the rehearing must be before a new arbitrator. *Id.*

e. If the award is vacated on a ground stated in *Fla. Stat.* § 682.13(1)(c), (d) or (f), the rehearing may be before the same arbitrator or the arbitrator's successor. *Id.*

4. Appeal. An appeal may be taken from:

a. An order denying a motion to compel arbitration. *Fla. Stat.* § 682.20(1)(a).

b. An order granting a motion to stay arbitration. *Fla. Stat.* § 682.20(1)(b).

c. An order confirming an award. *Fla. Stat.* § 682.20(1)(c).

d. An order denying confirmation of an award unless the court has entered an order under *Florida Statute* § 682.10(4) or *Florida Statute* § 682.13. All other orders denying confirmation of an award are final orders. *Fla. Stat.* § 682.20(1)(d)

e. An order modifying or correcting an award. *Fla. Stat.* § 682.20(1)(e).

f. An order vacating an award without directing a rehearing. *Fla. Stat.* § 682.20(1)(f).

g. A judgment or decree entered pursuant to *Florida Statute* § 682.20. *Fla. Stat.* § 682.20(1)(g).

5. Confirmation. Upon motion of a party, the Court must enter an order confirming a final award, "unless the award is modified or corrected" or vacated pursuant to *Florida Statutes* Sections 682.10, 682.13 or 682.14. *Fla. Stat.* § 682.12.

6. Post-Confirmation Rights.

a. Once the Court enters an order that confirms, modifies, corrects or vacates an award without directing a rehearing, the Court must enter a "judgment in

conformity therewith." *Fla. Stat.* § 682.15(1). Thereafter, the judgment may be "recorded, docketed, and enforced as any other judgment in a civil action." *Id.*

b. The Court may also award "reasonable costs of the motion and subsequent judicial proceedings." *Fla. Stat.* § 682.15(2).

c. Upon motion, the Court may also award a prevailing party to a "contested judicial proceeding" under *Florida Statutes* Sections 682.12, 682.13, or 682.14, "reasonable attorney fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award." *Fla. Stat.* § 682.15(3).

III. Voluntary Binding Trial Resolution

A. The VTR Process

1. Florida Statute § 44.104, entitled "Voluntary binding arbitration and voluntary trial resolution" provides for private attorneys to be appointed with the parties' agreement to decide their legal disputes.

   a. Parties may enter into a voluntary trial resolution ("VTR") agreement to have most disputes determined by a private attorney. *Fla. Stat.* § 44.104(1). The private attorney acts as the trial court judge for the case, subject to most of the same rules of Court and with appellate review of legal issues.

   b. Pursuant to the VTR agreement, the Court appoints a private lawyer as the Trial Resolution Judge ("TRJ") to conduct the proceedings of an action and determine the case on its merits generally as if litigated before the Court. *Fla. Stat.* §§ 44.104(2) & (8).

B. The VTR Agreement

1. To be enforceable, the VTR agreement must be in writing and signed by the parties. The legal dispute may not involve any constitutional issue, child custody, child support or visitation issues. *Fla. Stat.* §§ 44.104(1), 44.104(14).

2. The VTR agreement may be signed before or after litigation is commenced and should provide for the compensation of the TRJ. *Fla. Stat.* §§ 44.104(2), (3).

3. The following is a sample contract clause for submitting all permissible controversies that may arise between the parties to an agreement to voluntary trial resolution:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be resolved and determined by binding voluntary trial resolution pursuant to Chapter 44,

Florida Statutes, including, without limitation, the procedures set forth in *Florida Statute* § 44.104, and final judgment on the decision rendered by the trial resolution judge shall be entered by any court having jurisdiction thereof.

4. Subject to the exceptions stated in *Florida Statute* § 44.104, the parties to an existing dispute or pending lawsuit may also submit their controversy to voluntary trial resolution by use of the following agreed application to the Court:

We, the undersigned parties, hereby jointly agree and apply to the Court for binding voluntary trial resolution pursuant to Chapter 44, *Florida Statutes*, including, without limitation, the procedures set forth in *Florida Statute* § 44.104, for the following controversy: ***(Describe the dispute or identify an existing lawsuit),*** and final judgment on the decision rendered by the trial resolution judge shall be entered by any court having jurisdiction thereof.

We further agree that ***(Insert name and address of trial resolution judge)*** shall be appointed by the Court as the trial resolution judge for the above-described controversy, who shall be compensated in accordance with that certain agreement between the parties, a copy of which is attached hereto as Exhibit "A."

C. The Trial Resolution Judge

1. The TRJ must be a licensed member of The Florida Bar in good standing for more than five (5) years. *Fla. Stat.* § 44.104(2).
2. If the VTR agreement does not specifically identify the TRJ and the parties cannot otherwise agree, the Court will appoint the TRJ as the case requires. *Fla. Stat.* § 44.104(2).

D. Benefits of VTR

1. The parties may jointly appoint a TRJ who is a qualified, experienced specialist (Florida Bar Board Certified) in the area of the legal dispute.

   a. Only attorneys certified by The Florida Bar are allowed to identify themselves as "Florida Bar Board Certified" or as a "specialist."

   b. Certification is the highest level of recognition by The Florida Bar of the competency and experience of attorneys in the areas of law approved for certification by the Supreme Court of Florida.

   c. Not all qualified lawyers are certified, but those who are board certified have taken the extra step to have their competence and experience recognized.

2. The parties' rights to procedural due process, rules of Court and appellate rights (except for findings of fact) are preserved as with most litigation. The filing of an application for VTR also tolls the applicable statute of limitations. *Fla. Stat.* § 44.104(6).

3. The TRJ must follow the applicable law; failing which he or she may be reversed on appeal. *Fla. Stat.* § 44.104(10)(a). However, the harmless error doctrine is applicable for any appeal from a final determination rendered by a TRJ.

4. The parties have full availability to discovery and motion practice. *Fla. R. Civ. P.* 1.710(c).

5. The parties should have greater flexibility for hearings and trials before the TRJ.

E. Burdens/Costs of VTR

1. The fees of the TRJ can become sizable for any large, complex case.

2. There is no limitation on discovery.

IV. Liability Immunity and Witness Protection

1. With some exceptions, arbitrators, mediators and TRJs generally enjoy judicial immunity. *Fla. Stat.* § 44.107.

2. "An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity." *Fla. Stat*. § 682.051(1)

   a. Immunity under the RFLAA supplements any immunity under other law. Fla. Stat. § 682.051(2)

   b. An arbitrator does not lose immunity under the RFLAA should he or she fail to make a disclosure as otherwise required by the RFLAA. Fla. Stat. § 682.051(3)

3. An arbitrator or representative of an arbitration organization "is not competent to testify" in any proceeding and "may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge … acting in a judicial capacity." *Fla. Stat*. § 682.051(4). However, this provision of the RFLAA does not apply:

   a. To determine any claim of an arbitrator or arbitration organization against a party to the arbitration proceeding; or

   b. To a hearing on a motion to vacate an award.

   Fla. Stat. § 682.051(4)(a)&(b).

4. Should a person commence any civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from their services or if a person seeks to compel them to testify or produce records in violation of *Fla. Stat*. § 682.051(4), and the Court decides that the arbitrator, arbitration organization,

or representative is immune from civil liability or they are not competent to testify, the Court must award them "reasonable attorney fees and other reasonable expenses of litigation." *Fla. Stat*. § 682.051(5).

V. Disclaimer

This commentary is for informational purposes only, is not legal advice and does not establish an attorney–client relationship. You should seek appropriate legal advice from a licensed attorney before making any decision based on these comments. The hiring of a lawyer is an important decision that should not be based solely upon advertisements.