

# BROWARD COUNTY BAR ASSOCIATION BARRISTER

APRIL 2022



## 2022

# BENCH AND BAR CONVENTION



### KEY NOTE SPEAKER

Incoming Chief  
Justice Carlos G. Muñiz



### WHAT COMES NEXT?

FL Bar President-Elect  
Gary S. Lesser



### MARKETING TIPS

John Morgan, Esq.

### A VIEW FROM THE BENCH

Chief Judge Tuter, Fourth District Court of Appeal Chief Judge Burton C. Conner,  
Federal Judge Raag Singhal, Circuit Civil Admin Judge Carol-Lisa Phillips,  
and County Court Admin Judge Robert W. Lee

FRIDAY, MAY 13

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# NON-BINDING ARBITRATION IS HERE TO STAY – NOW WHAT? AN ARBITRATOR'S TIP SHEET FOR THE TRIAL LAWYER

by Rick Ellsley

As we all know, the Florida courts have once again opened up as COVID-19 closures are disappearing. The civil justice system is backlogged, and the Florida Supreme Court has mandated that trial courts move their cases more quickly. Many judges are denying continuances that used to be freely given. Discovery delays are being phased out. The judges have much less tolerance for dilatory lawyers and their clients.

Judges have been turning to Non-Binding Arbitration as a reliable tool for caseload reduction. Non-binding arbitration is becoming increasingly understood and favored. It is efficient and it works. Let's discuss what it is, how to prepare for it, and how to be successful for your client.

**What is Non-Binding Arbitration?** It is a statutorily created animal codified in Florida Statute §44.103 and Florida Rule of Civil Procedure 1.820. If you learn nothing else from reading this article, please take 15 minutes right now and read these two laws. What are the takeaways? 1) It is non-binding; 2) While the process is informal because strict compliance with the Florida Evidence Code is unnecessary, there is no ex parte communication permitted with the Arbitrator; 3) The parties submit documents, make arguments, and may call witnesses but do not need to; and 4) under certain circumstances there is shifting of attorney's fees against a party if that party rejects the arbitration award. Here is the best part: *Litigants will have the Arbitrator's decision within 10 days.*

If you are going to arbitration, it is important to educate your client that the Arbitrator is a factfinder. The Arbitrator is not trying to settle your case during the hearing. The Arbitrator is not trying to be your friend. The Arbitrator's role is akin to a judge in a bench trial. The Arbitrator will listen to the presentations, question the lawyers and witnesses on the details of the case, review the materials submitted, and dutifully try to make the correct ruling on the merits of the case.

**How to prepare for Non-Binding Arbitration?** Until you forward materials to the Arbitrator, he or she has as much knowledge about your case as your pet goldfish. Your job is to educate and persuade. The best way for the attorney to advocate for his or her client in an arbitration is to be professional, organized, concise, credible, and persuasive. Here are some suggestions:

First, read the Order sending your case to NBA. Also, read the Notice of NBA. Finally, read FL ST §44.103 and Fla. R. Civ Pro. 1.820, again. After you do so, you will know the law that will regulate the arbitration process.

Second, create a short summary and a timeline of case events with only the necessary supporting documentation. A concise PowerPoint is a helpful tool. Only include what is essential to prove the case. Less is more, but the "less" must include the critical evidence. Email these items to the Arbitrator and the opposing lawyers at least a few days prior to the hearing. Again, there is no ex parte permitted in Arbitration which obviously is a major difference from mediation.

Third, do a short practice run of your presentation. If it is a video conference with ZOOM or TEAMS, become fluent in the software so that you may seamlessly call up documents during the hearing.

Fourth, at the hearing make your points clearly and quickly, and be prepared for the Arbitrator to interject questions during your presentation. Witnesses may be called so be ready. If the law that applies to your case is disputed, be prepared for the give and take

that typically occurs at oral argument with an appellate court. The Arbitrator is trying to understand the facts and at the same time apply the correct law and will challenge the legal arguments if needed.

Finally, enjoy the hearing! A trial lawyer loves the courtroom, and an arbitration hearing is the closest cousin to a trial that we have. Unlike a mediation presentation, in arbitration a fact finder will issue a formal ruling on your case after you present it. Make sure your presentation is worthy of your talent and that it honors your client's crusade.

## **Why is Non-Binding Arbitration Useful?**

NBA requires all parties to truly focus on the strengths and weaknesses of the case. This promotes honest assessment on all sides. It may even give rise to a settlement just before or right after the arbitration hearing.

The NBA hearing allows the litigants to see the other side's case, feel like they had their day in court in front of a neutral decisionmaker, and hold a decision in their hands within 10 days. There is a psychological benefit for a litigant to have had an opportunity to present his or her case and have it decided by an unbiased legal professional.

The parties do not need to spend large amounts of money on their experts to testify at a non-binding arbitration. Expert witness discovery and investigation materials that are used at mediation are sufficient for a non-binding arbitration.

If the arbitration decision is not accepted by one of the parties, there is shifting of attorney's fees depending upon the ultimate result at trial. This gives sharp teeth to the Arbitrator's ruling. It provides true leverage to the attorneys for the respective parties and encourages them to push their clients to re-evaluate their view of the case if warranted. It forces the parties to reassess their risk tolerance for increasing litigation costs and pursuing a verdict and judgment.

**Does Non-Binding Arbitration Resolve Cases?** Anecdotally, a few Broward judges have indicated that they are seeing about one-third of the cases settle as soon as the parties receive the court's order to go through arbitration. They find that one-third of the cases resolve after the arbitration decision, and one-third of the cases have at least one party rejecting a trial de novo from the trial court.

The Bottom Line with Non-Binding Arbitration? It is here to stay. Do not fear it. Embrace it. Prepare for it. Enjoy it. Win it. **B**

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