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My Civil Case Was Ordered to Nonbinding Arbitration: Now What? Tips From an Arbitrator

Good news: The courts are now opening up again after the COVID-19 closures. Bad news: There remains a backlog of civil cases and the judges are scrambling to move them forward.

By **Rick Ellsley** | March 02, 2022

Rick Ellsley of The Ellsley Law Firm. Courtesy photo

Good news: The courts are now opening up again after the COVID-19 closures. Bad news: There remains a backlog of civil cases and the judges are scrambling to move them forward. Adding to the pressure, the chief justice of the Florida Supreme Court issued Administrative Order No. AOSC20-23 Amendment 12 (April 13, 2021), requiring that the chief judge in each circuit enter a new administrative order (AO) that establishes procedures to move civil cases faster.

In this AO, the court also reminded judges that they must strictly comply with Rules 2.545(a), (b), and (e) of the Florida Rules of General Practice and Judicial Administration. The chief justice wrote that these rules "require judges to conclude litigation as soon as it is reasonably and justly possible to do so … [and] … to take charge of all cases at an early stage … [and] to apply a firm continuance policy allowing continuances only for good cause shown …"

Jurisdictions throughout Florida acted quickly to comply. In Broward County, the 17th Judicial Circuit's Chief Judge Jack Tuter issued AO 2021-19-Civ Am. 2 (May 19, 2021) outlining a three-track case categorizing system and requiring firm trial dates with strict discovery deadlines and mandatory mediation. Tuter also issued AO No. 2022-7-Civ (Jan. 31, 2022) establishing the procedures for nonbinding arbitration in civil cases. In Hillsborough County, the 13th Judicial Circuit's AO S-2021-060 (October 25, 2021) created the amended differentiated case management order for every civil case. This sets up a similar structure to Broward's, but has the added requirement that every civil case go to nonbinding arbitration, with very few exceptions.

During a recent conference among the Broward County judiciary and the legal community, we were told that there had been no jury trials for a 17-month period when COVID-19 shut things down. Currently, each of the civil circuit divisions have about 2,000 cases. On average, approximately 100 cases each month are sitting on a trial docket in each division. Broward circuit civil judges are working extremely hard, having disposed of roughly 6,000 more cases in 2021 than in 2020, despite roughly 600 more cases having been filed in 2021 compared to 2020.

Judges around the state are following Broward's lead and stepping up efforts to comply with the high court's mandate. Many trial judges are denying continuances that used to be freely given. Discovery delays are being phased out. Trial judges have much less tolerance for dilatory lawyers and their clients. Alas, the Rocket Docket is upon us.

Trial judges have been turning to nonbinding arbitration as a reliable tool for caseload reduction. Nonbinding arbitration is becoming increasingly understood and favored. Arbitration is not scary, is economical, and it actually works!

What is nonbinding arbitration? It is a statutorily created animal codified in Florida Statute Section 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. … Congratulations! You have now read them. What are the takeaways? It is nonbinding; While the process is informal and strict compliance with the Florida Evidence Code is unnecessary, there is no ex parte communication permitted with the arbitrator; 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 fact-finder. 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 do I prepare for nonbinding arbitration? Until you provide 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 Section 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 in mediation, 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 nonbinding 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 nonbinding arbitration. Expert witness discovery and investigation materials that are used at mediation are sufficient for a nonbinding arbitration.

If the arbitration decision is not accepted by one of the parties, there might be 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 nonbinding 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 requesting a trial de novo from the trial court.

The bottom line with nonbinding arbitration? It is here to stay. Do not fear it. Embrace it. Prepare for it. Enjoy it. Win it.

Rick Ellsley, *of The Ellsley Law Firm, is a Florida Bar Board Certified civil trial lawyer and Florida arbitrator in Broward County, Florida. www.ArbitrateSouthFlorida.com (http://www.ArbitrateSouthFlorida.com) Contact him at 954-888-7720 or ellsley@ellsleylaw.com (mailto:ellsley@ellsleylaw.com).*

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