ADR Matters: Non-Binding Arbitration

By Christina Magee, Esq.

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If you have specific questions that you would like to see addressed in this column, please contact the author at cmagee@brevardmediationservices.com.

Did you notice the change in title from ***Mediation Matters*** to ***ADR Matters***? There is no dispute that mediation, especially as practiced in Florida with clear statutory guidelines and the Florida Supreme Court's involvement via the Dispute Resolution Center, continues to be a dispute resolution technique that has unlimited potential for parties. However, it bears pointing out that the same statutes are designed to accommodate **all forms of ADR** in Florida.

The Florida Supreme Court recently took up the ADR Rules and Policy Committee's Petition, recommending that the ethical rules applying to certified mediators be effective for mediation of *any* case in Florida's courts, regardless of the certification status of the Neutral. See, In Re Amendments to The Florida Rules of Civil Procedure, The Florida Small Claims Rules, The Florida Rules of Juvenile Procedure, The Florida Rules of Appellate Procedure, The Florida Family Law Rules of Procedure, and the Florida Rules for Certified and Court-Appointed Mediators, SC 20-565 (Fla. Jan. 22, 2021). The Court's decision declined to extend the Rules for Certified and Court-Appointed Mediators ("Ethical Rules") in the manner requested.

In his dissent, Justice Polston noted that Florida statutes recognize a myriad of alternative dispute resolution processes among which mediation is but one and that parties are free to resolve cases with a Neutral's help in any process that is not designated "mediation". The Florida Rules for Certified and Court-Appointed Mediators only apply to that process that is "Mediation" under Chapter 44. Thus, Justice Polston points out that parties could utilize a Neutral to assist in a settlement conference without invoking the Ethical Rules, so long as the facilitator, the lawyers and the parties are all clear that the proceedings are not a mediation as that term is employed in Florida.

All of this is a lot of background to support a larger point. COVID-19 has reduced the flow of civil trials in this County and across Florida to a trickle. Civil cases are even more backlogged as criminal cases

get underway, recognizing the constitutional and speedy trial burdens imposed by those cases. So what's a civil litigator in Florida to do? In this article and upcoming articles, I will explore the types of "other ADR" that parties might consider as they stare down a long calendar that might require many months to elapse before a trial date can be set.

Under consideration in this article is Non-Binding Arbitration, codified at FL Statute §44.103 and Florida Rule of Civil Procedure 1.820.

Non-Binding Arbitration in Florida is designed to be short and sweet – a summary proceeding that gets to the heart of the case. Typically, the hearing takes a single day. While a panel of arbitrators can be established in an appropriate case, usually a single arbitrator is involved. The arbitrator will provide an award within ten days from the conclusion of the arbitration proceeding. Awards can differ depending on counsel's strategic considerations. A simple award tells the parties who has a liability exposure and the amount of associated damages. A reasoned award asks the arbitrator to give further detail about both liability and damages. The most extensive discussion is found in a full award, where the arbitrator sets out the facts, discusses the legal principles that apply and the reasoning that leads the arbitrator to the conclusion regarding liability and damages. Parties can submit a proposed award if the arbitrator agrees.

Once the arbitrator provides the decision to the parties (and notice to the court that it is in the parties' hands), a clock begins to run. The parties have twenty days to decide whether they want to accept the arbitration decision or seek a trial *de novo*. If a trial *de novo*, is sought, the seeking party faces a risk: they must do better than the arbitration award or face responsibility for the other side's fees and costs associated with trying the case and with the arbitration. Under the statute if a plaintiff gets an award in arbitration but seeks trial *de novo*, plaintiff is subject to the costs assessment if the verdict and judgment following trial is at least 25% less than the arbitration award. Likewise, if a defendant seeks trial *de novo*, the defendant must pay costs if the amount awarded by the jury is not at least 25% more than the arbitration award. If the parties choose not to seek a trial *de novo*, then the Court will adopt the arbitrator's decision as the final judgment in the matter.

Recognizing that the process entails risk to the parties, you might wonder why counsel would volunteer for this approach. Getting a Neutral's assessment of the case can be very helpful as a client considers, with counsel's assistance, whether the costs associated with trial are worthwhile. Having an evaluation in hand can make future settlement of a case during the twenty day period easier to obtain. With fewer trial opportunities available during the pandemic, these "other than trial" tools may be helpful in getting a case to the finish line. And, the statute allows the Court *sua sponte* to send a case to Non-Binding Arbitration where the Court deems appropriate.

Another topic to consider regarding non-binding arbitration is the "hybrid" order. Some courts send the parties to mediation, to be followed if no agreement is the outcome, by an arbitration with the same Neutral. This approach can create an ethical dilemma for the Neutral. First, what is the scope of the dilemma? The order requires the mediator to change function with the parties and move from being a facilitator of a resolution governed by party self-determination to being a decision-maker who determines the outcome of the dispute in the arbitrator's assessment. During a mediation, the parties might reveal many types of information to the mediator, all under the shield of the Confidentiality and Privilege Act contained in Chapter 44. The information does not lose its confidential nature once the impasse occurs, and an arbitrator might not consider some of the information shared in confidence with

the mediator as necessary or relevant to the decision-making process that the arbitration entails. The hybrid order may permit the parties to designate certain information as "confidential" and beyond the scope of the arbitrator's consideration and if it does not, it may be important for counsel to make that request.

There are at least two MEAC decisions (one containing a dissent and concurrence) addressing this situation. See MEAC 2009-002 and 2015-003 (dissent and concurrence). While it may seem counter-intuitive, it is acceptable on an ethics basis for a Neutral to function first as mediator, then as arbitrator for the same matter involving the same parties. MEAC requires the Neutral to make it clear in writing to the parties after ensuring the parties fully understand the change in function that the Neutral is no longer acting as a mediator, but instead will be an arbitrator. One might say the Neutral goes from being everyone's friend (albeit slightly flawed as no party is ever fully satisfied with a compromise) to being one side's hero and the other side's villain. These MEAC decisions make it clear that the Neutral cannot first arbitrate and then mediate. A Neutral cannot be a "decider" and then become a facilitator. That approach is a bridge too far under the Rules for Certified and Court-Appointed Mediators.

A comprehensive review of the Statute, Rules and case law interpreting Non-Binding Arbitration is beyond the scope of this brief article. However, a better understanding of these less well-known types of ADR may help counsel assess whether these methods have utility for their clients.