Embracing Chapter 44 of the Florida Statutes, Or, How I Learned to Love NBA

By Christina Magee, Esq.

David W. Henry, Esq., raises complaints about the non-binding arbitration ("NBA") process and advocates for early mediation as a superior means of dispute resolution. [1] Dave appears to be saying that the use in tandem of both these ADR processes is redundant and excessively costly for the parties, and that NBA cannot result in parties experiencing "process justice" to the degree that this quality is present in mediation.

Dave Henry and I are both members of the Executive Council for the ADR Section of the FL Bar and I have enormous respect for his talents and abilities as both a trial advocate and a well-respected Neutral. With all due respect, I find myself disagreeing with the main points of his article. Mediation and non-binding arbitration are not mutually inconsistent dispute resolution alternatives. Among his primary objections is the tendency of NBA to result in a mediation[2] that ultimately settles the case instead of allowing early mediation to play out towards ultimate resolution. But that is exactly the role and function of NBA – to provide the parties with a Neutral's opinion of the strengths and weaknesses of a claim or defense. Does that information often trigger a re-assessment of the utility of proceeding with litigation and a desire to settle? Of course it does, as it is designed to do. How often in mediation circles has the issue of Florida's non-coercion philosophy of mediation as facilitative, as opposed to evaluative, been the source of heated discussion? NBA's reason for existence is to provide exactly that input– where does a party's case fall apart so that counsel can determine whether continuing serves the client's needs and provide appropriate legal counsel.

Non-binding arbitration ("NBA") is governed by Section 44.103 of the Florida Statutes and Rule 1.820 of the Florida Rules of Civil Procedure. Together, these two sources determine much of what happens in the context of NBA and what makes it a distinct form of dispute resolution that is not identical to either mediation, binding arbitration, voluntary trial resolution, or elder-focused dispute resolution, the other forms of dispute resolution provided in Chapter 44. NBA is described as a "summary proceeding" in Section 44.103. NBA typically does not entail days of evidentiary presentations to the arbitrator (although in complex cases, extended presentations can become necessary). While the statute provides the arbitrator with subpoena power if the parties deem it necessary and petition the court to provide it, the legislative intent behind non-binding arbitration is a hearing to be held informally with presentation of testimony and evidence kept to a minimum and matters presented to the arbitrators primarily through the statements and arguments of counsel. See Fl. Stat. §44.103. As a summary proceeding, NBA is designed to be limited and thus, more cost effective than binding arbitration. Cf., Fl. Stat. § 44.104 Voluntary binding arbitration and voluntary trial resolution; see also Fl. Rule of Civ. Pro. 1.830 Voluntary Binding Arbitration.

[1] David W. Henry, Esq., An Open Letter to Judges in Florida: Why Non-Binding Arbitration Stinks and the Role of Early Mediation in Dispute Resolution, The Briefs (Orange County Bar Organization), May 2022 Vol. 90 No.4.

[2] MEAC Opinion 2015-003 points out that whereas the same Neutral can mediate a case and then arbitrate that case, arbitration of a case, followed by mediation with the same Neutral, is so fraught with ethical pitfalls that it should be avoided.

Without doubt, the provisions of Section 44.103 and Rule 1.820 enhancing the costs of challenging an NBA award via trial de novo add an element of risk to participants beyond the cost of the arbitration and the legal fees and costs associated with the de novo trial. Focusing on this risk as a basis to undermine NBA's utility is a mistake. One of the strongest arguments for NBA is that it gives parties and counsel a Neutral's assessment of the strengths and weaknesses of a case. Typical awards mimic verdict forms and demonstrate exactly which elements of a defense or liability case failed on the merits, based on information presented to the arbitrator. With that information in hand, parties and counsel can assess realistically how their case may be received by a fact-finder. The value of this information plainly exceeds the potential cost of the NBA process, which is often divided pro rata among the parties in the absence of a court-order to the contrary. More significantly, this blunt assessment is missing from an early mediation of a case, either because the facts needed are undiscovered at the time of the early mediation or because ethical constraints in mediation against coercive conduct by the mediator make it more difficult to convey efficiently that some or all of what a party is relying on as justification for its liability or damages evaluation is irredeemably flawed.

Having mediated extensively over the course of a multi-decade career as a lawyer and now as a Neutral, I would be the first to say that mediation is a powerful dispute resolution technique. When handled skillfully, mediation indeed results in "process justice" even where parties recognize that the resolution achieved in that proceeding may not be as greatly in their favor as a verdict. Mediation does provide empowerment and permits the parties to craft a resolution that can exceed the boundaries of an up or down verdict. Of course, the compensating factor that enables the parties to come to resolution is the diminution of risk against an adverse verdict.

Where NBA differs from mediation is the injection of a realistic assessment by a Neutral whose role is to determine if the parties have met their burden on the essential elements of a claim or defense. Why process justice is deemed to be absent under these circumstances presents a mystery. This information gives the parties exactly what they expected as "justice" from the court – a cold-eyed evaluation of their case's strengths and failings.

In addition to the complaints discussed above, other arguments against the use of NBA include the risk of attorneys' fees in the event a de novo trial results in a worse outcome for the side advocating to discard the NBA award. These costs are labelled as unbargained for at the litigation's outset. This stance appears to overlook the frequent use of Proposals for Settlement (Fl. R. of Civ. Pro. 1.442 and Fl. Stat. §45.061 Offers of Settlement) that accompany litigation today. Further, when NBA is ordered by a court, it does not create an insurmountable obstacle to the parties' decision to reject NBA in favor of a voluntary binding arbitration. For many reasons, such as the designation of the same Neutral by the Court for arbitration followed by mediation, the parties may seek the Court's permission to proceed with a voluntary arbitration under Rule 1.830 and Fl. Stat. § 44.104.

Anecdotal evidence of costs incurred for various ADR processes will vary on a case-by-case basis. That unsubstantiated premise alone should not be the basis of a determination about the acceptability of one form of dispute resolution over another. For example, a skilled mediator is usually more efficient and effective in getting the parties to a resolution than an inexperienced or unskilled mediator, and may ultimately cost less to employ, despite a higher hourly rate. Comparing the unique strengths of each process is more effective than examining costs alone.

Nothing in this response to the referenced article is intended to undermine the efficacy of mediation. Nor should the other dispute resolution techniques contained in Chapter 44 be relegated to a second-class status in comparison to mediation. These myriad tools and approaches to dispute resolution exist because experience has shown that one-size-fits-all fails in the dispute resolution context. The juxtaposition of mediation as against or superior to these other techniques creates a false dichotomy. All of these methods succeed – not in all of the cases and not all of the time – and it is reassuring to know that more than one approach is available.