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Best Practices for Private Dispute Resolution Under Section 44.104

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Section 44.104 of the Florida Statutes empowers the parties in most civil proceedings to resolve their disputes by “voluntary trial resolution” or statutory arbitration rather than conventional litigation. However, because the statute is relatively unknown in Florida, and is almost silent as to how to administer these cases, the following best practices are recommended based on the experiences of JAMS neutrals in Florida and California (where similar proceedings are widely used).

The benefits of a well-run voluntary proceeding

When these types of cases are effectively managed, the benefits of resolving litigation by “hired” judges or arbitrators include the following:

- The ability to choose a neutral with skills and experience particularly suited for a given case
- Immediate access to hearings for motion practice and prompt resolution of discovery disputes
- Increased party control of procedures and rules
- The ability to schedule pretrial and evidentiary hearings when and where convenient for the parties, at dates certain, with hybrid or virtual options
- Cost and time savings
- In the case of the arbitration option, the statutory limit on appellate rights provides the brevity and finality many parties prefer to litigation

How to select and contract with a private neutral

The first and most important challenges for the parties are agreeing on the qualifications and negotiating the retention of the arbitrator(s) or trial resolution judge.

Because these neutrals have more inherent authority and discretion and less appellate review than in formal litigation, parties should consider neutrals with significant subject matter knowledge and proven skill in managing



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voluntary dispute resolution proceedings. Counsel should investigate a proposed neutral’s prior legal and alternative dispute resolution (ADR) experience, reported decisions and legal writing. They should consider jointly interviewing candidates to inquire about their background, uncover any potential biases and review any procedural challenges their specific case may present.

Choosing a neutral who is associated with an administrative organization, such as JAMS, prevents *ex parte* communications between the parties and the neutral. This allows the parties to avoid the embarrassment of negotiating billing rates with the neutral, engaging in fee collection discussions or involving the neutral in administrative details.

If the parties’ chosen neutral is not affiliated with an ADR provider, then the proceeding will be *ad hoc*; that is, directly managed by the neutral. In this case, the parties must begin by negotiating the neutral’s contract. This should be carefully drafted to describe the scope of the neutral’s duties; how fees and expenses are to be charged, allocated and paid; and the consequences of nonpayment.

Judicial initiation of the process

Once the parties have agreed to a voluntary trial resolution judge or arbitrator(s), Section 44.104, augmented by Rule 1.830 of the Florida Rules of Civil Procedure, requires the parties to file an agreed motion, either in a pending judicial action or as an initial court filing, to appoint the neutral(s) and submit the dispute to binding arbitration or voluntary trial resolution. The motion should include a copy of the parties' agreement requesting judicial appointment of the voluntary judge or arbitrator(s) and outlining any initial procedures or rules the parties want the court to require or authorize. If the parties agree, the court will have no discretion and must submit the dispute to voluntary resolution. The appointed neutral(s) will take control of the case when the order is entered. Although voluntary trials are not truly private, in that the parties will continue to file motions, orders and other court records with the clerk of the court, the neutral(s) will make every ruling through entry of final decision.

Expediting the process

A newly appointed judge or arbitrator usually sets a case management conference to discuss with the parties how the matter will proceed, including the rules and procedures they will follow.

One of the benefits of these voluntary proceedings is the ability of the parties and the neutral to expedite the process and reduce costs by tailoring the rules to meet the needs of their dispute. As Miami JAMS neutral Judge John Thornton (Ret.) explains, parties may agree to modify certain rules and waive their rights under others. They may shorten the proceeding or modify evidentiary hearings in various ways. They may agree to use a witness's affidavit for direct testimony, provided the witness is available for cross-examination and rebuttal. They may stipulate to the admissibility of most exhibits and agree to forego, limit or expedite otherwise unduly expensive and often unproductive motion practice and discovery. They may agree to bifurcate or reorder the resolution of issues in order to address those that need to be decided before others.

Hearing locale and details

These cases could be tried in many locations, including the local courthouse. Section 44.104(5) provides that the clerk of the court should "handle ... these matters in all respects as if they were civil actions." Some judicial

circuits have administrative orders specifically governing the assignment of courtrooms for these cases.

However, it is common to hold these hearings and trials in more convenient locations, where the parties can leave their files and work whenever and for as long as they wish, rather than carting files, supplies and exhibits to and from the courthouse. For example, JAMS has comfortable suites designed for such purposes, as do many law firms. Additionally, counsel, clients and witnesses often prefer to conduct these hearings virtually so they can work from their own offices when not "in court."

Greater party control and flexibility in dispute resolution

Parties may avoid crowded dockets and get to trial quickly, at a location of their choosing, before a specially selected neutral who will give their case the attention it needs. They also may preserve certain appellate rights, determine the applicability of the rules of evidence and obtain the discovery they need. Regardless of whether parties prefer arbitration or litigation, they may tailor the management of these cases to best resolve their disputes.

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