

## Private Adjudication — A Solution to Justice Delayed by Coronavirus Disruptions

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by **Gill Freeman and Patricia H. Thompson**

It is said that justice delayed is justice denied. Unfortunately, the current need for social distancing and prohibitions against public gatherings or travel has closed court houses, continued trials and canceled hearings, depositions and otherwise delayed the timely resolution of lawsuits. This “brave new world” circumstance, added to the issue of already crowded dockets and the recent retirement of experienced judges, does not bode well for the efficient administration of justice in the near term.

Fortunately, litigants in Florida state courts have a statutory solution for such disruptions or the desire for more efficient and speedy resolution of matters that could languish for years in the court

system. Specifically, Florida Statute Section 44.104 allows the parties to an eligible civil dispute two alternatives to the courthouse. The parties can agree to have their case referred for “voluntary trial resolution” by a private judge or they can elect to refer the matter to binding arbitration before one or more arbitrators. In either case, the parties reserve their rights to have their dispute governed by the Florida Rules of Civil Procedure and the Rules of Evidence. These neutrals in both types of proceedings may issue oaths, subpoenas, and orders compelling witness appearances.

While, it is generally known that parties can agree to arbitrate a matter, it is less well



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known that parties can agree to a voluntary trial resolution, with all the legal bells and whistles, while most importantly reserving the right to an appeal. The alternative of voluntary trial resolution, in essence, is a private judge, who is formally appointed by court order. Once appointed, the trial resolution judge takes over the case, holds a trial and renders a final decision. Thereafter any party may file a petition for a final judgment in the

circuit court. Once a judgment has been issued, any party may appeal to the appropriate appellate court although factual findings are not subject to appeal. (Fla. Stat. Section 44.104(11) If no appeal is taken the final judgment is enforceable by the contempt powers of the court as well as executions of judgment which shall be issued on the request of a party. (Fla. Stat. Section 44.104(13).

An appeal of a voluntary binding arbitration decision is directed to the circuit court and is limited to a review on the record of any failure of the arbitrators to comply with the rules of procedure or evidence, any alleged impartiality or misconduct of the arbitrator or whether the decision reaches a result “contrary to the Constitution of the United States or the state of Florida. (Fla. Stat. Section 44.104(10).

Moreover, these private adjudicators can be chosen by agreement of the parties, based on criteria important to their dispute, such as legal and subject matter expertise, prior judicial experience, or immediate availability and the time necessary to delve into managing, hearing and rendering a decision on a complicated case. Management of a complex civil lawsuit or arbitration also requires appointment of an adjudicating neutral with the

knowledge and sophistication to rule fairly and insure procedural due process. There are numerous well regarded, retired judges and other experienced arbitrators who are well equipped by their training and expertise to serve as private adjudicators and arbitrators in these proceedings.

Not all state court civil disputes are eligible for resolution under Section 44.104. Family matters and cases presenting constitutional questions of law are exempted. However, there do not appear to be limitations on the type of relief that can be granted on those disputes to which the statute applies. It appears from case law and other authorities that claims of injunctive relief and other relief may be resolved under this statute, although jury trials are not available.

This statutory process for private adjudication is not widely known or used. However, its relevancy has become increasingly evident as litigants seek to resolve matters in the current situation where courts are unable to address civil matters timely. The ability of trained private neutrals to convene hearings and conduct entire trials electronically also addresses growing concerns of many about the need to protect the environment by limiting travel and not using mountains of paper.

Private adjudication by trial or arbitration under Section 44.104 of the Florida Statutes may be the doubly beneficial secret solution to justice delayed.

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