LAW360, "FLORIDA PRIVATE TRIALS AN ATTRACTIVE OPTION DURING COVID-19"

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By: James D. Gassenheimer and Nicole Levy Kushner

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Florida's already overcrowded court system grinds to a halt as a result of the COVID-19 pandemic, and Florida's court system will surely be stretched beyond its limits when it reopens. Business litigants may wish to consider private trials also known as voluntary trial resolution as an alternative to state court litigation in these unprecedented times.

Businesses desiring to avoid protracted litigation often contract for a private resolution of their disputes, usually through binding arbitration. Binding arbitration, while helpful in consumer cases, can in many business cases prove more arbitrary and less predictable results with no appellate remedy. The waiver of a jury trial and appellate rights provides no checks and balances in the arbitration process.

Although primarily relied on by litigants for its voluntary binding arbitration provisions, Section 44.104 of the Florida Statutes also explicitly provides for voluntary trial resolution with a private judge. Private trials, including private jury trials, are often employed in other states like California, where the judicial system has been overloaded with cases.[1]

While voluntary trial resolution presents an additional up-front cost of paying for a private judge, the economics of long protracted disputes could very well outweigh this cost. In our experience, private trials are much faster from start to finish and more efficient as court time and trials are scheduled by agreement and not dictated by the court, and private judges often have more time to focus on the unique issues involved in the case. The savings to the client over the life of a case are significant in terms of additional legal fees and disruption to the client's business.

Enacted in 1999 and largely patterned after California's system for private civil trials, Section 44.104 provides an established procedure in Florida for civil cases to be decided by private judges, providing many of the benefits of binding arbitration or other alternative dispute resolution methods while maintaining the predictability of a system where the rules of procedure and evidence must apply and the checks and balances of an appeal exist. The private trial option is open to almost all civil disputes with some exceptions, including constitutional issues and cases with indispensable third parties not agreeing to this procedure.

The voluntary trial resolution occurs when all parties to the dispute agree and request it from the court. The agreement to the voluntary trial process may be contained in a preexisting contract or a separate agreement made by the parties after the dispute arises. Under the statute, a trial resolution judge is either chosen by the parties or, in the absence of an agreement, appointed by the court. The parties may agree on any member of the Florida bar in good standing for more than five years, or, if there is no agreement or cannot be followed, the court appoints the trial resolution judge. The court shall provide for the appointment of a trial resolution judge within 10 days of filing. The statute further states that the trial resolution judge is to be compensated by the

parties pursuant to their agreement. The filing of the application tolls the applicable statute of limitations.

The statute provides the appointed judge with broad powers, including the right to administer oaths or affirmations and conduct the proceedings as the rules of court shall provide. At the request of any party, the private judge shall issue subpoenas for the attendance of witnesses and the production of books, records, documents, and other evidence and may apply to the court for orders compelling attendance and production. Subpoenas shall be served and shall be enforceable in the manner provided by law. The private judge conducts a voluntary trial resolution hearing and may determine any question and render a final decision.

Upon the conclusion of the hearing and the rendering of a final decision, a party may enforce the final decision by filing a petitioning for final judgment in the circuit court in the circuit in which the private trial took place. Upon entry of final judgment by the circuit court, any party may appeal to the appropriate appellate court, but cannot appeal factual findings. The harmless error doctrine applies, and no further review is permitted absent the presence of a constitutional issue.

Finally, the statute provides that if no appeal is filed within the time permitted by the rules promulgated by the Florida Supreme Court (as are the Florida Rules of Appellate Procedure), the presiding judge or, if there is none, a judge appointed by the chief judge, is empowered to enter all orders necessary to carry out the terms of the decision, which orders shall be enforceable by the court's contempt powers; execution on judgments shall issue on a party's request.

Although the statute is silent on the issue of whether a jury trial is permitted through voluntary trial resolution, courts in at least two judicial circuits in Florida — the Sixth (Pasco and Pinellas counties) and 13th (Hillsborough County) — have issued local administrative orders establishing specific procedures for private trials. These circuits provide for use of public court facilities and personnel and for court officials to enable jury trials to be conducted.[2] California's private trial system has similarly allowed private jury trials.

The statutory language in Section 44.104(7) specifically states that "[t]he …trial resolution judge may administer oaths or affirmations and conduct the proceedings as the rules of court shall provide" which would necessarily include Florida Rule of Civil Procedure 1.430(a).

The additional backlog that will result from the COVID-19 pandemic mitigates in favor of private trials, including private jury trials, as an attractive option for business litigants to resolve their disputes.

[1] See CA Constitution art VI § 21 (2018) (providing that a case may be tried by a "temporary judge").

[2] See Sixth Judicial Circuit Local 2005-053 PA/PI-CIR; 13th Judicial Circuit Administrative Order No. S-2001-027; see also Merritt v. OLMHP, LLC, 112 So. 3d 559 (Fla. 2d DCA 2013) (involving a jury trial under §44.1004, Florida's voluntary trial resolution statute and affirming a trial resolution judge's granting of a motion for judgment notwithstanding the jury's verdict).

The COVID-19 pandemic is creating rapidly-changing issues for businesses, and government aid processes and measures designed to assist businesses may also change materially from when this post is issued. We therefore encourage you to monitor our website, review our future posts and generally remain alert for additional updates or modifications to laws and regulations.

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James D. Gassenheimer

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