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Non-Binding Arbitration: Tools for Your ADR Toolbox

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I Introduction

207. When most attorneys think of Alternative Dispute Resolution ("ADR") methods, the immediate thought is mediation. While mediation is a tried and true method of resolving cases, non-binding arbitration can be another effective method of ADR when utilized thoughtfully. In Florida's 20th Judicial Circuit, where I spend most of my practice, we have utilized non-binding arbitration for many years as the court ordered method of ADR for any case anticipated to be longer than a 3-day trial. While many of us were uncertain about non-binding arbitration at first, it has proven to be effective in resolving cases, even if the case does not resolve on the day of arbitration. There has been a trend lately of courts utilizing non-binding arbitration more often, but there are still many attorneys in the State of Florida who have never participated in the process. The great thing about non-binding arbitration is that the process is fairly fluid and less formal than one may think. Ultimately, it is up to you and your opposing counsel to set up the non-binding arbitration process to work best for the case you have at hand. Treating non-binding arbitration as a throw away process is a waste of time and a disservice to your client, especially when the process can really help to narrow the issues, educate your client about the other side's case, and potentially help to resolve the case. The following will provide basic suggestions to help make your next non-binding arbitration work for you and your clients.

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II. The Blueprint: Effective Non-Binding Arbitration

208. You just received an Order/Referral to Non-Binding Arbitration pursuant to Section 44.103(2), Florida Statutes, and Rule 1.800, Florida Rules of Civil Procedure. What happens next? If you give Section 44.103, Florida Statutes, and Rule 1.820, Florida Rules of Civil Procedure a quick read, you will see that the process for non-binding arbitration is laid out for you and discusses the following: selection and compensation of arbitrators, the power of the arbitrator over the proceeding, hearing procedures, administration of oaths, rules of evidence, use of subpoenas for production of documents or attendance of witnesses, the presentation of the arbitration decision, requesting a trial de novo, and the potential fees and costs penalties associated with a request for a trial de novo.[2] The process is supposed to be informal, but still make sure you follow any rules set by the Court. If those rules are contrary to the suggestions below, please make sure you follow the order(s) from the Court.

209. Usually the Order/Referral will appoint a lead counsel to coordinate and schedule the arbitration. The Order/Referral will likely provide a timeframe for selection of a mutually agreeable arbitrator and, if this is not performed in time, the court may appoint an arbitrator. Here is where you and opposing counsel can start to make the process work for both of you.

210. Selection of the proper arbitrator helps to set the tone for the entire non-binding arbitration process. You know your case and your client best so now is the time to think about what arbitrator would be best suited for this particular case. The subject matter of the case is generally where I start to contemplate what arbitrator would be the best for my case. If I have a medical malpractice case with a really complex medical condition, lots of experts, and several parties, I may choose an arbitrator with a different background than a case involving a slip and fall or commercial litigation. Just like choosing a mediator, your arbitrator will have their own background and experiences that make them more effective for certain types of cases. This is not to say that any certified arbitrator could not hear your case, but if you want to make the most of your non-binding arbitration, being thoughtful in your selection of an arbitrator can make all the difference in the outcome of the process. When the selection of the arbitrator process begins, make sure you are aware of your client's preferences. I have had some clients refuse to work with certain arbitrators for a variety of reasons. Involve your client in this selection process because this is, after all, their case and as you will see later, the ramifications of this process can carry throughout the remainder of the case.

211. Speaking of the client, another thing I like to keep in mind when selecting an arbitrator is the arbitrator's overall process and what is most effective for my client in this particular case. Does the arbitrator like a written submission with the attorney

2 §44.103(4) Fla. Stat. (2023); Fla. R. Civ. P. 1.820(f).

presenting the information or do they want to read all of the documents in the case? Will the arbitrator provide me with a full written opinion of their decision or will they just give me an allocation of liability and a monetary amount for damages? Do I have a client that does not understand the merits of the other side's case and needs a written explanation of how the arbitrator arrived at their award? Do I have a savvy client who just needs a number to evaluate a case? Again, every case and every client is different. Thinking through this part of the process and identifying the needs of the client and the case will help you to identify the right arbitrator for this particular case.

212. I once had a case once where Opposing Counsel and I just fundamentally disagreed on the facts of the case. My client was adamant about their role in the underlying facts and Opposing Counsel just did not believe my client. We had even conducted extensive discovery on the issue and neither side was changing their position. When contemplating an arbitrator, we wanted an arbitrator that was not just going to "split the baby," but would possibly go out on a limb and give a full defense award. We also wanted an arbitrator who would provide a reasoned opinion to help the other side understand our position or help our client understand how the other side had a viable claim. The arbitrator we agreed upon was the correct one for the case. The arbitrator ended up making a clear decision on the factual situation (not just riding the fence) and the reasoned opinion that they provided helped to bring a swift resolution to the case. The selection of the arbitrator and the request for a reasoned opinion was absolutely the catalyst that case needed to help break the stalemate in our view of the facts.

213. Another question to consider that is somewhat unconventional, but is gaining traction with the courts and the parties, is whether this is an appropriate case to do a hybrid mediation/non-binding arbitration.[3] For instance, if opposing counsel and I think that we can get the case resolved in a mediation process, but the court ordered us to non-binding arbitration, we need to find an arbitrator that will allow us to provide a non-binding arbitration presentation and then serve as a mediator for the rest of the proceeding. Consent of both parties is required to participate in the hybrid process. In the hybrid process, each party gives a non-binding arbitration presentation, which is much like an opening at mediation. The arbitrator uses the information gathered from the presentations and evidence provided to them by the parties to determine an arbitration award. The arbitrator keeps this information private and does not share their opinion regarding the non-binding arbitration award. The arbitrator then switches "hats" and serves as a mediator and works to effectuate a compromise in a more traditional mediation process. If the case does not resolve at mediation, the arbitrator then puts their "arbitrator hat" back on and publishes the award to the parties in accordance with Florida Statutes.

3 The hybrid process is now contemplated in the revised Rule 1.800, Fla. R. Civ. P. ("A civil action shall be ordered to arbitration or arbitration in conjunction with mediation upon stipulation of the parties." (emphasis added).)

214. Not every arbitrator will participate in a hybrid process so if this is something you and opposing counsel are interested in, you have to discuss this with the arbitrator ahead of time and agree on the process that makes you and your clients most comfortable. You also have to keep in mind that you will likely be sharing confidential information with the arbitrator when they have on their "mediator hat." Some clients are not comfortable with this when they know that a failure to settle the case at mediation will result in a non-binding arbitration award with potential attorney's fees implications. It is important to discuss this with the client and obtain their consent prior to agreeing to the hybrid process. I have seen parties come to an agreement wherein they mutually agree to waive the right to obtain attorney's fees that could be obtained resulting from a non-binding arbitration award if they participate in a hybrid process (there are other ways to obtain attorney's fees that are discussed below).[4]

215. With the penalty of attorney's fees off the table, the parties felt more comfortable to speak freely in the mediation portion of the process. This hybrid process is not appropriate for every case, but again, you and opposing counsel can make this process the most effective for you, your clients, and your case.

216. In my practice, I frequently use a hybrid mediation/non-binding arbitration process. As I mentioned above, mediation is a tried and true ADR process that helps to resolve many cases. However, the parties are not always in a position to participate in two separate ADR proceedings. Sometimes there is not enough time to schedule both mediation and non-binding arbitration or maybe two different proceedings is cost prohibitive. That is the perfect time to consider a hybrid process. Generally, I do not keep track of the success rate for the hybrid process, but I would say that at least half of the cases where we use the hybrid process resolve on the day of the mediation/non-binding arbitration.

217. Remember that this is a joint effort between you, opposing counsel, and all other counsels in the case (if any), so use it as a time to find common ground, if possible. Even if the arbitrator selected by other counsel is not your first choice or the "most perfect" arbitrator, chances are the arbitrator recommended by other parties may be a better choice for this case than the one appointed by the court. This is not to say that a court appointed arbitrator will not handle your case appropriately, but there may be an arbitrator that is better for this particular case. The parties are in control of this process so try to keep as much control in the hands of the parties as possible!

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4 At this time, I am not aware of any court weighing in on the parties' rights to waiving attorney's fees that are provided by Statute. If this is an agreement of the parties, please make sure it is in writing and your client understands the ramification of this waiver. Please note that this waiver may not be accepted by the trial court so proceed with caution.

III. The Sandbag, the Paintbrush, and the Laser: How Should I Present My Case?

218. An arbitrator has been selected and a date is set...Now what? Now is the time for you to decide the best way to present your case to the arbitrator. In my experience, I have generally seen three categories of non-binding arbitration presentations: the sandbag, the paintbrush, and the laser.

219. The sandbag method is the least useful method of presentation and generally leaves everyone with a feeling that this process was a waste of time. For the sandbag method, counsel provides very limited information and does not "give away" the crux of their case. They withhold information from the arbitrator and opposing counsel, likely in an effort to save this information for the time of trial. In my experience, this method very rarely results in a meaningful arbitration award because the arbitrator did not have all of the information to make a decision. You get out of this process what you put into it and blowing off the non-binding arbitration presentation does not get you an accurate outcome. A sandbag presentation also does very little to create goodwill between the parties when negotiating later. Remember, your client and the opposing client are generally present for non-binding arbitration.[5] This process takes coordination of schedules, conversations with clients about expectations and presentation of evidence, at least half of a day for the non-binding arbitration proceeding, and conversations about the arbitration award. From a client's perspective, this is very time consuming process and a sandbag presentation comes across as rude and disrespectful to everyone present at the non-binding arbitration. I attended one court-ordered non-binding arbitration with a client that was incensed at the lack of presentation from the other side. We took a break and my client instructed me to withhold the presentation I had already prepared (dreaded Power Point and all) because they were insulted that the other side did not take the process seriously. We ended up keeping the proceeding open for a while so the other side could provide us with actual evidence before I provided my presentation and evidence to the arbitrator. Unfortunately, the extra effort and ill will with my client could have been avoided if the process were taken more seriously. If strategy absolutely requires this method, you would be wise to discuss this ahead of time with your client and probably opposing counsel so they can prepare their client.

220. The paintbrush method is a way to cover the broad strokes of the entire case. For instance, most of my cases involve medical malpractice and there are a lot of rabbit holes that we can go down in any given case. These cases can require proof of standard of care, causation, damages, and agency/vicarious liability. These issues can lead to multiple experts, affidavits, deposition testimony, thousands of pages of medical records,

5 Fla. R. Civ. P. 1.820(b)(3) "Individual parties or authorized representative of corporate parties must attend the arbitration hearing unless excused in advance by the chief arbitrator for good cause shown."

employment contracts to determine agency relationships, etc. Sometimes all of these issues are on the table and need to be considered by the arbitrator. At that point, a written summary of the issues prepared by counsel is helpful to keep track of all of the issues. Providing the arbitrator with documents like medical records can be helpful in their decision-making process. If the records are voluminous, it may be helpful to bookmark the pertinent records ahead of time to help the arbitrator be more efficient with their time. Just remember, any documents you provide to the arbitrator, including your summary, also need to be provided to opposing counsel. This is not a confidential process like mediation, so make sure you go through your submissions to the arbitrator to make sure there is nothing contained in them that you do not want to share with the other side. If you use the paintbrush method when presenting the case to the arbitrator and parties at non-binding arbitration, try to stay as organized and concise as possible. Decide ahead of time if you are going to call any live witnesses and treat the presentation of live witnesses as a highlight reel, not a recitation of every little detail of the case.[6] If you are going to have live testimony, remember that the arbitrator can administer oaths or affirmations and you are permitted to have a court reporter present.[7] Most of us hate the dreaded Power Point presentation, but if there are multiple issues that all need to be discussed, then a short Power Point may be helpful to stay on topic. Finally, if the paintbrush method is necessary for your case, you may want to work with opposing counsel prior to non-binding arbitration to come up with a verdict form for the arbitration award so you can ensure the arbitrator addresses all of the issues. Special interrogatories can also be included in the verdict form if you need insight for a particular issue.

221. The laser method is a way to focus on the limited question(s) in the case. If this was the presentation of a slip and fall case at non-binding arbitration and the only real issue is actual notice of a hazard, then only focus on that issue. There is no need to waste time and effort on constructive notice or damages if those are not real elements of your case. Let the arbitrator know that you see this case as a singular issue and really focus on that issue. Present pertinent photographs or video clips only related to the singular issue. A written submission to the arbitrator may not be necessary or could be greatly parsed down from the submission that one would provide with the paintbrush method. Likewise, if you have already briefed this issue for the court for a dispositive motion and have to attend non-binding arbitration before a hearing on the issue before the court, you can submit your motion/reply to the arbitrator for consideration. While their decision is not binding, it may give insight into how the court may rule on the issue.

222. Generally, I find the laser approach very effective. For instance, I had a radiology case where one image was the crux of the entire case. There was no need to go through

6 §44.103(4) Fla. Stat. (2024).

7 Fla. R. Civ. P. 1.820(f).

the entire study when the only issue was one slice of the films. I was able to take the one image that was at issue and include it in my submission to the arbitrator. This was a very narrowed approach to the issues in the case, but there really was no point in dealing with other issues when this was the only issue that would be a deciding factor for the case.

223. Again, this process is what you make of it and there is no need to treat every case the same way. Discuss the process with your client ahead of time, determine what is the best course of action for presenting your particular case, discuss the client's budget for non-binding arbitration, and help to manage the client's expectations of the process before the day of non-binding arbitration. Once you have given your presentation at non-binding arbitration, most of the heavy lifting is over. However, sometimes the other side presents something during their presentation that you did not think was a big issue or you had never heard of before non-binding arbitration. If you feel it needs to be addressed and you are not prepared to discuss that issue at that moment, ask your arbitrator if they can leave the proceeding open for a few days for you to provide evidence on that issue and/or to provide a supplemental brief.[8] Supplemental submissions should use a laser method of providing evidence and should only address the limited issue that was not addressed at arbitration. Rearguing your entire case is a waste of your and the arbitrator's time.

IV. The Saw: An Award on the Merits

224. Ten days after the proceedings are closed, the arbitrator should have the award to you unless the parties discussed an extension of time. The arbitrator files a notice with the court and the award is filed under seal.[9] The attorneys should receive the award from the arbitrator at that time. As discussed above, this is another area whether the parties can use the process to help themselves and their clients. If you utilized the Blueprint portion of the non-binding arbitration process effectively, you know ahead of time if your arbitrator will provide you with a written opinion or only a determination of liability and damages. You can discuss with opposing counsel ahead of time to see if you would like to prepare a verdict form, much like you would with a jury trial. You can also ask your arbitrator specific questions about the case, as you would with special interrogatories to a jury. This is an opportunity for you to be thoughtful about what information you need to help your client make a decision about whether they would like to proceed to trial or see if resolution of the case is a better idea. Being candid

8 Fla. R. Civ. P. 1.820(g)(1) requires the arbitration process to be completed within 30 days of the first arbitration hearing unless a court order is obtained by the chief arbitrator or a party. The extension of time cannot exceed 60 days from the first arbitration hearing.

9 Fla. R. Civ. P. 1.820(g)(3).

with opposing counsel and the arbitrator can make this process effective and give you valuable information regarding how others could see your case.

225. For instance, I defended a medical malpractice case in a non-binding arbitration that was weak on liability and causation. However, the damages potential was well into the seven figures if a jury sided with the Plaintiff. The policy limits were low so there was a big decision as to whether we should defend or settle the case. We brought the case to arbitration and presented all of our liability, causation, and damages information to the arbitrator to see if we could get a better read on how a jury in our area would make a determination. After the award, we were able to resolve the case. The adjuster and the client were happy because they now had a better idea of how an independent person would view the case. The arbitration award also helped the Plaintiff understand our view of the case, which helped them to be more reasonable in negotiations.

V. The Chisel: Carving Out Attorney's Fees and/or Costs

226. Generally, the arbitrator does not make a determination on the issue of fees and costs. If this is an element of your case, be sure to include the information in your presentation and ask the arbitrator to make a determination on this issue. The last thing you want to have happen is a decent arbitration award that does not speak to your fees and costs issue. If that happens, you will likely have to reject the award because the Court may not have the authority to make this determination once the arbitration award becomes a judgment.

227. For example, in commercial litigation, attorney's fees and costs can be part of the contractual claim and, as you can imagine, that part of the claim adds up quickly. Many times, the underlying claim can probably be resolved, but the attorney's fees and costs hold up a resolution. If you take a case like this to non-binding arbitration, you should have the arbitrator make a determination on the issues of (1) entitlement of attorney's fees and costs according to the contract and (2) the value of the attorney's fees and costs. This determination by the arbitrator requires them to perform contractual interpretation for entitlement of fees and costs. You may need to present an expert on the value of fees and costs if the parties cannot agree ahead of time on the reasonable value of the services. Again, this process is what you make it and you can always ask the arbitrator to make a determination on the underlying claim and reserve on the issue of attorney's fees and costs so you can come back after the parties have dealt with the award regarding the merits of the claim. This election needs to be made very clear in the verdict form and the parties need to have a clear understanding of this portion of the process before the arbitration begins.

228. Remember, the court could potentially make a post judgment decision on things like prevailing party costs, but if attorney's fees are an element of your actual claim, make sure the arbitrator knows that and the information is included in your verdict form. In *Connell v. City of Planation*, the plaintiff brought a negligence action against the city and received an award at non-binding arbitration. The trial court refused to enter a final judgment and award costs. The appellate court reasoned that section 44.103(6) is silent on the issue of costs and fees when there is no request for a trial de novo.[10] Substantive attorney's fees and costs are not contemplated in the Statute. In the instance where the non-binding arbitration award is accepted and a final judgment is entered for a party, section 57.041, Florida Statutes, is the guiding statute with respect to prevailing party costs. As such, prevailing party costs (and potentially fees related to other post judgment fee settlement mechanisms) are at issue once a judgment is entered.

VI. The Level: Communicating the Award to the Client

229. As always, communication with your client is paramount. If you have a client that is not very savvy in the litigation realm, the communication about the non-binding arbitration award is critical. Presumably, you already explained the process to them, but we all know how that goes once they are staring at numbers written on a verdict form... all of your explanations go out the window and panic can set in for the client. Generally, I try to send the client the written verdict form and any explanation that was provided by the arbitrator so they can see exactly what the arbitrator said about their case. I then try to have a verbal conversation regarding the verdict form, any comments from the arbitrator, the ramifications of accepting or rejecting the award, and the time frame we have to file a trial de novo. Written confirmation of the client's chosen path also cannot hurt.

230. Please remember, you have 20 days from the date the arbitrator transmitted the arbitration award to file a (1) notice of rejection of the arbitration decision and (2) request a trial de novo.[11] This is a new requirement of Rule 1.820(h), Fla. R. Civ. P. and the rejection of the award and request for trial de novo need to be contained within the same document. Another change in the rule specifically states "[n]o action or inaction by any party, other than the filing of the notice, will be deemed a rejection of the arbitration decision." This change in the rule is likely due to some conflicting decisions made in trial and appellate courts across the State of Florida. Notably, in *de Acosta v. Naples Community Hospital*, the plaintiff failed to timely file a motion for trial de novo in accordance with Rule 1.820(h), Fla. R. Civ. P. (hereinafter "the Rule"). However, the

10 *Connell v. City of Planation*, 901 So.2d 317, 318-320 (Fla. 4th DCA 2005).

11 Fla. R. Civ. P. 1.820(h).

plaintiff and the defendant followed a court ordered Case Management Plan and filed statement of facts and disputed issues before the 20 days expired following the non-binding arbitration award. The court later unsealed the award and entered a judgment in accordance with the arbitration award after noting that neither party timely moved for trial de novo. The Second DCA held that the Rule should not be strictly applied and determined that the plaintiff's filing of the statement of facts and disputed issues "substantially complied" with Rule 1.820(h), Fla. R. Civ. P. They also indicated that it was crucial to their holding that the defendant also filed a statement of facts and disputed issues so this action "led [the plaintiff] to believe that [the defendant] was also prepared to proceed to the already set trial date." The dissenting opinion by Judge Atkinson made it clear that the Rule is supposed to be strictly followed and the following of other court ordered deadlines should not constitute waiver of the 20-day requirement of the Rule.[12]

231. However, very recently, the Fourth DCA receded from their decision in *Nicholson-Kenny Capital Management, Inc. v. Steinberg* and certified a conflict with *de Acosta v. Naples Community Hospital, Inc*. and *Beyond Billing, Inc. v. Spine & Orthopedic Center, P.C.* in a July 3, 2024 opinion in *Lawnwood Medical Center, Inc. v. Rouse*.[13] In *Lawnwood*, some defendants filed a motion for a trial de novo 22 days after the arbitration decision, which was two days beyond the deadline set in the Rule. The defendants' counsel argued that they showed intent to not accept the arbitration decision by communicating with the other side about settlement and medical records authorizations and discussing mediation with all parties. The Fourth DCA also pointed out that the defendants' counsel abandoned the argument of excusable neglect as a reason for missing the deadline and only proceeded on the concept of "substantial compliance" with the Rule. The court determined that their prior 2006 decision in *Nicholson-Kenny Capital Management, Inc. v. Steinberg* clearly conflicted with Fla. Stat. Section 44.103(5) (the "Statute") and Rule 1.820(h), Fla. R. Civ. P. and there was no allowance in the Statute and the Rule for "some notice." The court held that enforcement of the bright-line requirement means the arbitration decision must be rejected and a request for trial de novo needs to be filed within 20 days of the arbitrator's decision.28 It should be noted that this decision was dated July 3, 2024 and the change in the Fla. R. Civ. P. 1.820(h) was published on July 11, 2024 so the decision placed a heavy emphasis on the prior version of Fla. R. Civ. P. 1.820(h), which did not contain the language "[n]o action or inaction by any party, other than the filing of the notice, will be deemed a rejection of the arbitration decision."[14]

12 *de Acosta v. Naples Community Hospital*, 300 So.3d 264, 265 (Fla. 2d DCA 2019).

13 *Nicholson-Kenny Capital Management, Inc. v. Steinberg*, 932 So.2d 321 (Fla. 4th DCA 2006), *de Acosta v. Naples Community Hospital, Inc*. 300 So.3d 264 (Fla. 2d DCA 2019), *Beyond Billing, Inc. v. Spine & Orthopedic Center, P.C.*, 362 So.3d 256 (Fla. 2d DCA 2023), *Lawnwood Medical Center, Inc. v. Rouse*, No. 4D2022-2637 (Fla. 4th DCA 2024).

14 *Lawnwood Medical Center, Inc. v. Rouse*, No. 4D2022-2637 (Fla. 4th DCA 2024).

232. If no parties file for a trial de novo, the sealed arbitration award is referred to the presiding judge and they enter any orders/judgments in accordance with the arbitration award. At that time, there will be a prevailing party and there could be attorney's fees and/or costs at issue in post-judgment proceedings.

233. There are some things to remember when deciding with your client about the rejection of arbitration decision and motion for trial de novo. First, if you represent multiple parties, are you going to reject and move for trial de novo with respect to the award for all of the parties or only some of them? A rejection and request for a trial de novo against one party does not apply to all parties and all claims in the case.[15] A rejection of the arbitration decision and motion for a trial de novo needs to specifically identify which parties are the subject of the trial de novo. Similarly, a request for trial de novo does not allow a party to request a trial de novo for only liability or only damages related to one claim.[16] Next, you will need to communicate with your client the implications the fee-shifting rules under Section 44.103(6), Florida Statutes. Please see below for further discussion on this issue. Finally, Rule 1.820(h) is crystal clear about the 20 day deadline to file a rejection of the arbitration decision and request for a trial de novo, but the case law is still in limbo. Proceed with caution and adhere to the deadline indentified in the Statute and the Rule.

VII. The Hammer: Fee Shifting Implications

234. Now comes a huge issue in the non-binding arbitration process: fee-shifting implications. We all utilized the mediation process effectively for a long time, but when communication would break down, there was nowhere to go but trial. Court-ordered non-binding arbitration allows for a flexible dispute resolution process, but it carries with it a penalty that encourages the parties to use the process effectively and think about the ramifications of rejecting the arbitration award.

235. An important thing that must be communicated to the client is the risk of rejection of the award. In Section 44.103(6), Florida Statutes, a process is laid out to discuss the potential penalties for rejection of an arbitration award and then a subsequent trial. According to Section 44.103(6)(a), if a plaintiff rejected the arbitration award with a trial de novo and then received at least 25% less at trial than the arbitration award, "the costs and attorney's fees pursuant to this section shall be set off against the award." (emphasis added.) If the attorney's fees and costs are greater than the judgment amount, the court "shall enter judgment for the defendant against the plaintiff for the amount of

15 *Johnson v. Levine*, 736 So.2d 1235, 1240 (Fla. 4th DCA 1999).

16 *Morgan v. Southeast Service Corp.*, 861 So.2d 1224, 1227 (Fla. 2d DCA 2003).

the costs and attorney's fees, less the amount of the award to the plaintiff."[17] The same happens in reverse for the defense if they filed for trial de novo. If the defense filed for trial de novo and then a judgment is entered against them for at least 25% more than the arbitration award, they would be responsible for fees and costs to the plaintiff. While most cases do resolve before the time of trial, these penalties are not something to brush off or treat as insignificant.

236. As with the rest of this process, there are some things that are within your control regarding the fee-shifting implications. If the case cannot be resolved in the hybrid process and the arbitrator renders an award that you actually like, you can always file a Proposal for Settlement under Rule 1.442, Fla. R. Civ. P. and Section 768.79, Florida Statutes. The ramifications of a Proposal for Settlement somewhat track that of Section 44.103(6), Florida Statutes, so even if the parties have waived the penalty under the non-binding arbitration statute, it is still possible to pursue a fee-shifting mechanism in your case for the non-binding arbitration award amount.

VIII. Conclusion

237. With more courts turning to court-ordered non-binding arbitration as a dispute resolution process, resistance to the process may be futile. The great part about non-binding arbitration, if used effectively, is that it can really help you to either potentially resolve the case or narrow the issues for trial. As you can see, there are several ways that you and opposing counsel can use the process to benefit all of the parties in the case. While this is an adversarial process, there is a reason it is part of dispute resolution. By using the tools above, you can help yourself and your client get as much out of the process as possible. Ultimately, you can help craft a court-ordered non-binding arbitration that provides you and your client with clarity of your position, understanding the other side's perspective, narrowing of the issues for trial, and/or eventual resolution of the case. Try to be open-minded about the process and make it work for you and your client!

17 §44.103(6)(a) Fla. Stat. (2024).