Alternative Dispute Resolution in Florida for Commercial & Employment Disputes

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by

Gary S. Salzman, Esq.
GrayRobinson, P.A.
Attorneys and Counselors at Law
301 E. Pine Street, Suite 1400
Post Office Box 3068
Orlando FL 32802-3068
Office: (407) 843-8880
Fax: (407) 244-5690

email: gsalzman@gray-robinson.com
website: www.gray-robinson.com

I. Mediation

A. The Mediation Process

1. Mediation is a process whereby a neutral third person encourages and facilitates the resolution of a dispute between two or more parties in an informal proceeding to help the parties reach a voluntary binding agreement. *Fla. Stat.* § 44.1011(2); *Fla. R. Med.* 10.210.

2. The mediator does not make any rulings or decisions for the parties. *Fla. R. Med.* 10.310. The mediator may not give the parties any legal advice, but the mediator may discuss the possible outcomes of the lawsuit or arbitration if not settled, as well as the potential strengths and weaknesses of the parties' positions in the case. *Fla. R. Med.* 10.370. The process is conducted in an informal non-adversarial manner. The objective of the mediation is to reach a mutually acceptable agreement. *Fla. R. Med.* 10.410.

B. Mediation Order

1. A circuit or county court is *required* to order the parties to a civil lawsuit to mediation if one party requests mediation and the lawsuit is for monetary damages, *provided* the requesting party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties, unless:

a. The action is a landlord and tenant dispute that does not include a claim for personal injury.

b. The action is filed for the purpose of collecting a debt.

c. The action is a claim of medical malpractice.

d. The action is governed by the Florida Small Claims Rules.

e. The court determines that the action is proper for referral to non-binding arbitration.

f. The parties have agreed to binding arbitration.

g. The parties have agreed to an expedited trial.

h. The parties have agreed to voluntary trial resolution.

Fla. Stat. § 44.102(2)(a).

2. A circuit or county court may order the parties to mediation for any civil lawsuit for which mediation is not otherwise required. *Fla. Stat.* § 44.102(2)(b). Under no circumstances, however, may the following actions be referred to mediation:

   a. Bond estreatures.

   b. Habeas corpus and extraordinary writs.

   c. Bond validations.

   d. Civil or criminal contempt.

   e. Other matters specified by administrative order of the chief judge in the circuit.

Fla. R. Civ. P. 1.710(b).

3. When a civil action is referred to mediation by court order, the time period for responding to any settlement offer under *Florida Statute* § 45.061 or an offer or demand pursuant to § 768.79 is tolled until an impasse has been declared by the mediator or the mediator has reported to the court that no agreement was reached. *Fla. Stat.* § 44.102(5)(a).

4. Unless ordered by the court or stipulated by the parties, the mediation process does not suspend discovery. *Fla. R. Civ. P.* 1.710 (c).

5. For a sample mediation order, see Appendix "A."

C. Agreements to Mediate through AAA

1. If the parties wish to require mediation with the American Arbitration Association ("AAA"), for all future disputes relating to a contract **before** any arbitration or litigation can be commenced, the following mediation clause may be added to the contract:

> If a dispute between the parties arises out of or relates to this contract, the breach thereof, or any performance or obligation due hereunder, and if the dispute cannot be settled through direct negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure.

2. If the parties wish to mediate an existing dispute, they may enter into the following agreement, independent of any contract:

> The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Rules: (describe dispute).

D. Selection of the Mediator

1. The parties may agree on the appointment of any person to act as the mediator for any mediation conference. As long as the parties agree, the mediator does not need to be certified. *Fla. R. Civ. P.* 1.720(f)(1)(B). Depending on the level of "reality checking" the parties would like the mediator to undertake, the parties should consider the substantive experience of the mediator.

2. In the absence of the parties' agreement, the court may only appoint a certified mediator to conduct a mediation conference. *Fla. R. Civ. P.* 1.720(f). The chief judge of each judicial circuit is required to maintain a list of certified mediators who have registered for appointment in that circuit. *Fla. Stat.* § 44.102(4).

E. Pre- Mediation Summaries

1. Florida Statutes do not specifically provide for the mandatory submission of pre-mediation summaries; however, it is a common practice. Unless ordered by the court or requested by the mediator, mediation summaries are not required to be provided or mutually exchanged by the parties. If done, these summaries are confidential, privileged communications. *Fla. Stat.* §§ 44.102(3) and 90.408.

2. Rule M-9 of the AAA's Commercial Mediation Rules requires that, at least ten days prior to the first scheduled mediation session, each party is to provide the mediator with a brief memorandum setting forth their position with regard to the issues that need to be resolved.

3. Most mediation orders and mediator engagement letters require the parties to provide the mediator with a brief summary. Mediation summaries are very helpful for the mediator to determine how best to approach the mediation. Mediation summaries should include the following:

   a. A brief introduction of the parties and their respective lawyers;

   b. A brief summary of the relevant facts;

c. A summary of the status of the case, i.e., whether depositions have been taken, whether the case is set for trial, whether the action is a bench trial or is a jury trial, etc.;

d. A breakdown of any monetary and non-monetary relief sought in the action, including whether attorney's fees are recoverable;

e. The history of prior settlement negotiations, including all offers and counter offers.

F. Appearance at the Mediation Conference

1. Unless permitted by court order or the parties' written agreement, a party is deemed to appear at a mediation if the following persons are physically present:

a. The party or the party's representative having full authority to settle *without* further consultation; and

b. The party's counsel of record, if any; and

c. A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, which ever is less, *without further consultation*.

Fla. R. Civ. P. 1.720(b)(2012). Thus, the mediator does not have the authority to excuse any attorney, party or insurance carrier representative from attending the mediation in person, unless the parties are have agreed in writing.

2. Full authority to settle means that the person attending the mediation is the final decision maker with respect to all issues presented by the case and who has the legal ability to execute a binding settlement agreement. *Fla. R. Civ. P.* 1.720(c)(2012). As a result, it may be extremely difficult for most insurance carriers and large corporations to strictly comply with this rule. However, this rule does not require any party to actually enter in a settlement agreement. *Id.*

3. Appearance by a public entity under Chapter 286, *Florida Statutes*, only requires the party's representative to physically appear at mediation with full authority to *negotiate* on behalf of the entity and *recommend* settlement to the decision-making body of the entity. *Fla. R. Civ. P.* 1.720(d)(2012).

4. Unless otherwise agreed upon by the parties, each party must, 10 days prior to the mediation, file and serve a written notice identifying the persons who will be attending the mediation as a party representative or as an insurance carrier representative and confirm that those persons have full authority as required under the rule. *Fla. R. Civ. P.* 1.720(e)(2012).

5. If a party fails to appear at a "duly noticed mediation without good cause," the court upon motion *shall* impose sanctions against the party failing to appear, including the mediator's fees, attorney's fees and costs. The failure to file a certification confirming the representative's authority or the failure of the person identified in the certification to actually appear at the mediation creates a rebuttable presumption of the party's failure to appear. *Fla. R. Civ. P.* 1.720(f) (2012).

6. In *Carbino v. Ward*, 801 So. 2d 1028 (Fla. 5th DCA 2001), the defendants failed to appear at a court-ordered mediation, but their insurance carrier's representative appeared with full authority to settle up to the policy limits. The plaintiff, however, had not agreed to limit his demand to such limits. Under these facts, the appellate court agreed with the trial court's finding that the defendants had failed to "appear" at the mediation and the trial court was required to impose sanctions against them. *Id*.

G. Conduct of and Communications during the Mediation Conference

1. At all times, the mediator shall be in control of the mediation and the procedures to be followed in the mediation. *Fla. R. Civ. P.* 1.720(2)(d). For the most part, the mediation conference is conducted in at least two stages.

   a. **Joint Session**: Initially, the mediator will conduct a joint session in which the mediator and then each attorney will give brief opening statements. Each party should be advised by their attorneys prior to the mediation that they will hear statements from the opposing attorney with which the party may disagree. Nevertheless, each attorney and his or her client, if they desire, are typically given the full opportunity to be heard without interruption. Each person attending the mediation is expected to act in a civil, respectful manner to all other persons present.

   b. **Private Caucus**: After the joint session, the mediator will separate the parties and their respective attorneys into private sessions or caucuses in which they may feel more free to

candidly discuss other aspects of the dispute and how it may be resolved.

2. There are times when the mediator may not conduct a joint session, such as when emotions are at extreme levels and the parties are in a state of high conflict. These situations should be weighed against the need for the parties to have their opportunity to address each other directly or through counsel so that they will be able to move past their conflict towards resolution. A joint session is also a valuable time saving tool for the exchange of information directly between the parties, rather than the mediator shuttling the information between private caucuses.

3. Each party at mediation has the privilege to prevent any person present at the mediation from disclosing communications made during the mediation. *Fla. Stat.* § 44.102(3). However, Section 44.102(3), Florida Statutes, should not preclude evidence supporting a claim that a mediated settlement agreement contained a clerical error so as to lead the court to an unreasonable conclusion. *DR Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach*, 819 So. 2d 971 (Fla. 4th DCA 2002), *quoting Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984); *but see Feldman v. Kritch*, 824 So. 2d 274, 276 (Fla. 4th DCA 2002) (no exception for "unilateral mistake").

4. If one party unlawfully discloses communications at mediation to any person not present at the mediation, the disclosing party may be subject to sanctions by the court, including striking the party's pleadings for violating the mediation privilege. *Paranzino v. Barnett Bank of So. Fla.*, 690 So. 2d 725 (Fla. 4th DCA 1997).

5. Evidence of settlement negotiations, however, may be admissible in a federal criminal investigation or trial. There appears to be split of authority among the federal courts on the issue. *See U.S. v. Gonzalez*, 748 F.2d 74, (2nd Cir. 1984); *Manko v. U.S.*, 87 F.3d 50 (2nd Cir. 1996); *U.S. v. Meadows*, 598 F.2d 984 (5th Cir. 1979); *U.S. v. Hays*, 872 F.2d 582 (5th Cir. 1989); *U.S. v. Logan*, 250 F.3d 350 (6th Cir. 2001); *U.S. v. Prewitt*, 34 F.3d 436 (7th Cir. 1994); *U.S. v Arias*, 431 F.3d 1327 (11th Cir. 2005).

6. Mediation must be completed within 45 days of the first mediation conference unless extended by order of the court, the arbitrators or by stipulation of the parties. *Fla. R. Civ. P.* 1.710(a).

7. Although attendance at any court ordered mediation is mandatory, participation in settlement negotiations is completely voluntary. It is a party's right to refuse to compromise or settle any claim and to have their day in court. *Fla. R. Civ. P.* 1.730(a).

8. "Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of *self-determination*." *Fla. R. Med.* 10.310(a) (emphasis added).

9. Indeed, the mediation conference is an opportunity for the parties to control the outcome of the case and to fashion a resolution to the dispute which is certain and may encompass terms which an arbitrator or a court may not otherwise be able to award.

H. Mediator's Report

1. If no agreement is reached, the mediator must report the lack of an agreement to the court *without comment or recommendation*. With the consent of the parties, the mediator's report may also identify any pending motion or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement. *Fla. R. Civ. P.* 1.730(a).

2. The mediator is required to report to the court the names of all persons who attended the mediation. *Fla. R. Civ. P.* 1.720.

I. Mediated Settlement Agreements.

1. Mediated settlement agreements reached at a court ordered mediation are unenforceable unless signed by the parties and their counsel. *Fla. R. Civ. P.* 1.730(b). However, at least one court has held that a mediated settlement agreement which was not signed by counsel, but was signed by the parties was not rendered unenforceable where the parties conducted themselves as if they had reached a binding agreement. *Jordan v. Adventist Health System/Sunbelt, Inc.*, 656 So. 2d 200 (Fla. 5th DCA 1995).

2. Further, mediated settlement agreements may not be enforced where a party can demonstrate that the agreement was reached through coercion or any other improper tactics utilized by the mediator. *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 (Fla. 4th DCA 2001). If the mediator fails to substantially comply with the requisite practices and procedures, no party to the mediation may "rightfully claim the benefits of an agreement reached in such a way." *Id*. at 1099.

3. Based upon the Court's inherent power to maintain the integrity of the judicial system, a "court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures" may be invalidated. *Id*.

4. Cases settled in mediation are not suited for the liberal application of Florida Rule of Civil Procedure 1.540(b) allowing rescission of a settlement agreement based on unilateral mistake because mediation, like arbitration, is an *alternative dispute* resolution device and a more stringent standard of review applies. *Tilden Groves Holding Corp. v. Orlando/Orange County Expressway, Etc.*, 816 So. 2d 658 (Fla. 5th DCA 2002).

5. For a sample mediated settlement agreement, see Appendix "B."

J. Mediation Impasse

1. There may be various reasons for impasse. A party may truly evaluate claims and defenses based upon significantly different criteria, making the potential settlement ranges too far apart to broach. In that instance, the parties may feel they would be better served having a third party, such as a judge, jury or arbitrator decide the dispute. It is important for the parties in such a case to fully understand the range of possible outcomes, along with the costs of going forward, including all legal fees, expert fees, deposition costs and other court costs.

2. Sometimes the parties are not able to reach a compromise because one or more parties are emotionally vested in their case or the events that lead up to the dispute. In that instance, the emotional party often needs to feel they had the opportunity to tell their story, whether at the mediation or at a hearing. This need cannot be underestimated as a prerequisite for settlement, especially where an apology can be given.

II. <u>Arbitration</u>

A. The Arbitration Process

1. As opposed to mediation, arbitration results in a binding or non-binding decision of the dispute.

2. The arbitrator or panel of arbitrators consider the evidentiary presentations of the parties and then render(s) an award, which may then be confirmed by a court of competent jurisdiction.

B. Arbitration Agreements

1. The following is a sample clause for the arbitration of all future disputes between the parties before the AAA:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be resolved and determined by binding arbitration administered by the American Arbitration Association under its Commercial

Arbitration Rules, and judgment on the award rendered by the arbitrators shall be entered in any court having jurisdiction thereof.

2. Arbitration through the AAA for existing disputes may be accomplished by use of the following agreement, independent of any contract in question:

We, the undersigned parties, hereby agree to submit to binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: *(describe the dispute).*

We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrators, and that a judgment of any court having jurisdiction thereof shall be entered on the award.

3. To expedite matters, any arbitration clause can expressly adopt the summary procedures of Chapter 51, *Florida Statutes*, or customized expedited summary procedures set forth in AAA's rules or the clause itself. The arbitrators and the administrator of the proceeding are mandated to comply with those procedures, provided they are fundamentally fair to all parties.

4. The arbitration clause may provide for emergency interim relief by incorporating the AAA's optional rules for emergency measures of protection or other applicable emergency rules, such as applicable Florida Rules of Civil Procedure.

5. Subject to due process considerations, arbitration clauses may expressly provide for:

   a. The number of arbitrators;

   b. The specific minimum qualifications for the arbitrators;

   c. The method of and responsibility for payment for the fees and costs associated with the arbitration;

   d. The locale for all hearings and the use of any discovery tools, including depositions under the Florida Rules of Civil Procedure;

   e. Any other item of concern to the parties.

6. Clauses requiring splitting of arbitration costs, filing fees and arbitrator compensation.

   a. While courts are mindful of the "liberal policy favoring arbitration agreements," the Supreme Court has also made clear that arbitration is only appropriate "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" allowing the statute to serve its purposes. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991), *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637 (1985).

   b. The Supreme Court acknowledged that "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum." *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 90 (2000). However, the Court noted that the "possibility" that the plaintiff would "be saddled with prohibitive costs is too speculative," and "[t]o invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements." *Id.* at 91. The party seeking to avoid arbitration due to excessive costs "bears the burden of showing the likelihood of incurring such costs." *Id.* at 92.

   c. Since the Supreme Court addressed the issue of arbitration fees, all but one circuit has applied a case-by-case analysis when evaluating the validity of a fee splitting provision. *See, e.g, Musnick v. King Motor Co.of Fort Lauderdale,* 325 F.3d 1255, 1259 (11th Cir. 2003) (adopting a case by case approach to determine whether arbitration costs are prohibitive); *Thompson v. Irwin Home Equity Corp.,* 300 F.3d 88 (1st Cir. 2002) (adhering to case-by-case approach predating *Green Tree*); *Blair v. Scott Specialty Gases,* 283 F.3d 595, 610 (3d Cir. 2002) ("[T]he mere existence of a fee-splitting provision in an agreement does not satisfy the claimant's burden to prove the likelihood of incurring prohibitive costs"); *Primerica Life Ins. Co. v. Brown,* 304 F.3d 469, 471 (5th Cir. 2002) (adhering to case-by-case approach); *Bradford v. Rockwell Semiconductor Systems, Inc.,* 238 F.3d 549, 556 (4th Cir. 2001); *Burden v. Check into Cash of Kentucky, LLC,* 267 F.3d 483, 492 (6th Cir. 2001) (*Green Tree* requires party resisting arbitration to show likelihood of prohibitive expenses); *Gannon v. Circuit City Stores, Inc.,* 262 F.3d 677, 683 (8th Cir. 2001) (on remand, district court should consider the plaintiff's arguments in light of *Green Tree* which requires her to show the likelihood of incurring prohibitive expenses in arbitration).

These provisions do not render the agreements *per se* invalid. *See id*; *But see Circuit City Stores, Inc. v. Adams,* 279 F.3d 889, 894 (9th Cir. 2002).

d. When considering the cost sharing language in an employment agreement, however, the case-by-case analysis offers little guidance in calculating a numerical figure that would be categorically shielded from attack. In *Morrison,* the former employee's cost splitting rule in her arbitration agreement detailed her exposure to the greater of $500 or 3% of her annual salary. *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 669 (6th Cir. 2003). The court, applying a case-by-case analysis, concluded that this provision was unenforceable with respect to her claims. *Id.* The court supported its decision by emphasizing that an employee's resources can be scarce, and a substantial number of similarly situated persons would be deterred from seeking to vindicate their statutory rights under these circumstances. *Id.* at 670.

e. A cost-splitting provision limited at one week's compensation could also be rendered unconscionable. *See Garrett v. Hooters-Toledo,* 295 F. Supp. 2d 774 (N.D. Ohio 2003). Based on the lack of evidence regarding the plaintiff's income in the record, the court was precluded from rendering the agreement substantively unconscionable in this case. *Id.* at 781. The court noted in dicta that "one week's compensation, therefore, imposes a high burden on a single mother experiencing intermittent periods of unemployment." *Id.*

f. In *Roberson v. Clear Channel Broadcasting, Inc.*, a Florida district court evaluated the viability of plaintiff's argument alleging prohibitive costs associated with arbitration. 144 F. Supp. 2d 1371, 1373 (S.D. Fla. 2001). The court ruled that plaintiff's argument was defeated as the defendant stipulated both in its reply brief and in its motion to compel arbitration that it would cover the plaintiff's cost. *Id*.

g. Based upon the current state of the law, it appears virtually impossible to draft any arbitration clause providing for fee splitting for a consumer or employment dispute that is completely insulated from any challenge. Thus, providing for the non-consumer or employer to bear all filing fees, mediation fees, arbitration costs and arbitrator compensation is advisable until a safe harbor is established by binding case law.

7. The Florida Supreme Court has ruled that Florida's statute of limitations applies to arbitrations because an arbitration proceeding is

within the statutory term "civil action or proceeding" found in section 95.011. *Raymond James Financial Services, Inc. v. Barbara J. Phillips, etc., et al*., No. SC11-2513 (Fla. May 16, 2013).

8. A customized arbitration clause can be drafted with the foregoing in mind. In that regard, the following is a sample arbitration clause tailored for an employment agreement with a high level, managerial employee:

> Except for any claim relating to violations of the restrictive covenants contained in paragraphs ___ above, any and all other claims, controversies and disputes between Employee and Employer arising out of or relating to this Agreement, Employee's employment with Employer or the parties' performances due hereunder, including, without limitation, all known and unknown rights, demands, claims and causes of action arising under or in connection with the Americans with Disabilities Act of 1990, as amended, Title VII of the Civil Rights Act of 1964, as amended, the Florida Civil Rights Act of 1992, as amended, the Equal Pay Act of 1963, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974 (ERISA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the Genetic Information Nondiscrimination Act of 2009, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act (WARN Act) and any other federal, state or local law, including any and all tort claims relating to or arising out of Employee's employment with Employer, and whether any claim is arbitrable, shall be resolved by binding arbitration administered by and in accordance with the national employment rules of the American Arbitration Association, and any court of competent jurisdiction shall enter final judgment on any such final arbitration award.
>
> The final arbitration hearing shall be conducted in the county in which Employer's principal place of business is located no sooner than sixty (60) days and no later than one hundred twenty (120) days after any demand for arbitration is served upon the respondent for the proceeding. The arbitration proceeding shall be conducted by a panel of three neutral and impartial arbitrators. Said arbitrator panel shall be comprised of arbitrators who shall be members in good standing with the state bar association for the state in which the final arbitration hearing shall be conducted who [***have at least fifteen (15) years of substantial and continuous experience in employment law and/or are Board Certified in Labor and Employment Law by said bar association***].
>
> The parties to the arbitration proceeding shall be permitted to take no more than three (3) depositions, not to exceed five (5) hours each, without good cause shown and leave of the arbitrators. The parties shall also be entitled

to discover documents through the use of requests for production. No other forms of formal discovery shall be permitted by the arbitrators. All permissible discovery shall be governed by the applicable Federal Rules of Civil Procedure. The arbitrators shall be bound by and shall follow the choice of law provision set forth in this Agreement for the rendering of any final award. All defenses and claims which would otherwise be available to the parties in any court proceeding, **except for class actions**, shall be available in arbitration, including, without limitation, all applicable statutes of limitations.

Any final award shall reflect the reasoning for the award, but shall not be required to state findings of fact and conclusions of law. The arbitrators shall have the authority to award any and all relief which a court of competent jurisdiction could otherwise award. Employer shall be responsible to pay for all arbitration filing fees and arbitrator compensation. However, such fees and compensation may be awarded to Employer in the event it is determined to be the prevailing party in the arbitration proceeding.

The arbitrators and the parties shall maintain in the strictest confidence the arbitration proceeding, the final arbitration hearing, all papers filed therein and the substance of the underlying dispute for the arbitration proceeding, unless otherwise required to disclose same pursuant to applicable law.

9. The Arbitration Administrator.

   a. It is not necessary to require an arbitration (or mediation) to be administered by the AAA or that the proceeding be governed by its rules.

   b. The Florida Rules of Civil Procedure and Florida Statutes include arbitration rules and most experienced arbitrators (and mediators) are prepared to administer any arbitration (or mediation) themselves. Any qualified neutral dispute resolution organization or individual may be named as the administrator.[1]

C. Commencement and Submission to Arbitration to AAA

1. A party to an existing dispute may commence an arbitration under the AAA's rules by filing two copies of a demand for arbitration, signed by the party or its attorney with AAA's regional office. (See www.adr.org for various forms and rules). The demand must contain a statement of the nature of the dispute, the names and addresses of all parties,

[1] In the interest of complete candor, the author discloses that he is a member of the American Arbitration Association's arbitration and mediation panels.

the amount of the claim, if known, the remedy sought, the hearing locale requested and the name and address of the respondent. The demand must also attach a copy of the arbitration clause in question.

2. Under AAA's Commercial Arbitration Rules, the respondent to the arbitration demand is not required (but is encouraged) to file an answer to the claims. If the respondent desires to assert a counterclaim, then it must comply with substantially all requirements as those for a demand for arbitration.

D. Compelling Arbitration

1. After a dispute arises, the threshold issue is whether there is a right to arbitration of the dispute. If such a right is present, a motion to compel arbitration is appropriate where a party files a legal action and refuses to participate in the arbitration. When a party to an agreement refuses to arbitrate, application may be made to the court for an order compelling the party to proceed with arbitration. *Fla. Stat.* § 682.03(1). Upon application, the court must decide the following:

   a. Whether a valid written agreement exists containing an arbitration clause;

   b. Whether an arbitrable issue exists that is encompassed within the scope of the arbitration clause; and

   c. Whether the right to arbitration has been waived.

   Orkin Exterminating Co. v. Petsch, 872 So. 2d 259 (Fla. 2d DCA 2004); *Flyer Printing Company, Inc. v. Robbin Hill*, 805 So. 2d 829 (Fla. 5th DCA 2001); *Stinson-Head, Inc. v. City of Sanibel*, 661 So. 2d 119 (Fla. 2d DCA 1995), *rev. dism.*, 671 So. 2d 788 (Fla. 1996); *North American Van Lines v. Collyer*, 616 So. 2d 177 (Fla. 5th DCA 1993); *Piercy v. School Bd. of Washington County*, 576 So. 2d 806 (Fla. 1st DCA 1991).

2. The party opposing arbitration "has the affirmative duty of coming forward by way of affidavit or allegation of fact to show cause why the court should not compel arbitration," which is a burden "not unlike that of a party seeking summary judgment." *Aronson v. Dean Witter Reynolds, Inc.* 675 F. Supp. 1324, 1325 (S.D. Fla.1987).

3. If the court decides that there is an arbitrable issue, it must compel arbitration. If the court determines that there is an issue concerning the making of the agreement or waiver, it must summarily hear and resolve the issue. *Fla. Stat.* § 682.03 (1). *See also Bill Heard Chevrolet v. Wilson*, 877 So. 2d 15 (Fla. 5th DCA 2004).

4. When an arbitration has begun or is about to begin, a party challenging the right to arbitrate may obtain a stay by applying to the court. The court must summarily hear and determine the issue and grant or deny the application for the stay of the arbitration proceedings. *Fla. Stat.* § 682.03(4).

5. When a dispute within the scope of an arbitration provision is pending before a state court, a stay of the court action may be obtained pending the outcome of the arbitration. If the issue subject to the arbitration is severable from the remainder of that action, the stay should apply only to the dispute that is subject to arbitration. *Fla. Stat.* § 682.03(3).

6. Trial court's order denying appellant's motion to compel arbitration pursuant to the parties' underlying agreement was reversed. The agreement was entered into by out-of-state parties seeking to acquire the assets of a Florida corporation and as such, involved interstate commerce and was thereby governed by the Federal Arbitration Act. The agreement's choice of law provision was likewise enforceable because claims asserted for legal malpractice and breach of fiduciary duty were within the provision's scope of disputes "relating to or arising under" the retainer agreement. *Mintz & Fraade, P.C., et al. v. Beta Drywall Acquisition, LLC, et al.,* Case No. 4D10-546 (Fla. 4th DCA, Mar. 23, 2011) (pgs. D605-06).

E. Enforceability of the Arbitration Agreement

1. After the plaintiff sued the defendant for breach of contract, the parties agreed to arbitrate “with respect to the allegations in the complaint.” When the plaintiff amended his claim during arbitration, the defendant moved to terminate the arbitration proceedings. The arbitration panel denied the motion, and as a result, the defendant moved to terminate in circuit court. The trial judge granted the motion, but the appellate court reversed because the amended claim did not exceed the scope of the agreement to arbitrate as it was based upon the facts alleged in the original complaint. *Bates v. The Betty & Ross Company*, 46 So. 3d 615 (Fla. 3d DCA 2010).

2. Under Florida law, to prevail on a defense that an arbitration agreement is unconscionable and therefore unenforceable, a party must establish that the Agreement is both procedurally and substantively unconscionable. *See Golden v. Mobil Oil Corp.,* 882 F.2d 490, 493 (11th Cir. 1989); *Murphy v. Courtesy Ford LLC,* 944 So. 2d 1131, 1134 (Fla. 3d DCA 2006); *Voicestream Wireless Corp. v. U.S. Commc'ns., Inc.,* 912 So. 2d 34, 39 (Fla. 4th DCA 2005).

3. Procedural unconscionability "relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." *Powertel Inc. v. Bexley,* 743 So. 2d 570, 574 (Fla. 1st DCA 1999). A contract is substantively unconscionable if its terms are so "outrageously unfair" as to "shock the judicial conscience." *Gainesville Health Care Ctr., Inc. v. Weston,* 857 So. 2d 278, 285 (Fla. 1st DCA 2003).

4. Substantive unconscionability and procedural unconscionability need not exist in equal amounts for the contract to be unenforceable, but there must at least be a modicum of both. *Palm Beach Motor Cars Ltd., Inc. v. Jeffries,* 885 So.2d 990, 992 (Fla. 4th DCA 2004). Whether an arbitration clause is unconscionable is a question of state law. *Orkin Exterminating Co., Inc. v. Petsch,* 872 So.2d 259, 264 (Fla. 2d DCA 2004). *See Paladino v. Avnet Computer Technologies, Inc.,* 134 F.3d 1054 (11th Cir.1998) (arbitration clauses are interpreted according to ordinary state-law rules of contract construction). The party seeking to avoid enforcement of the arbitration clause based on a claim of unconscionability has the burden of presenting "sufficient evidence" to find that the provision is unenforceable. *Gainesville Health Care Center,* 857 So. 2d at 288.

5. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010):

   a. The employee had signed an arbitration agreement that provided for arbitration of disputes arising out of his employment, including discrimination claims. The agreement also provided that the arbitrator, and not a court, had exclusive authority to resolve any dispute relating to the enforceability of the arbitration agreement. The employee challenged the arbitration agreement, arguing that it was unconscionable under state law.

   b. The Supreme Court held that the agreement's delegation of authority to the arbitrator to decide whether the agreement was valid was severable from the rest of the agreement, such that challenge to the validity of the delegation provision itself was required before a court could intervene. Since the employee's unconscionability arguments challenged the validity of the arbitration agreement as a whole and not just the delegation provision, the Court determined that the delegation provision had to be treated as valid under 9 U.S.C. § 2, and any challenge to the validity of the agreement as a whole had to be determined by the arbitrator.

6. Where an arbitration clause is valid and not interdependent with the remaining clauses of an agreement, any offending or unlawful provision contained therein could be severed without affecting the intent of the parties or the agreement to arbitrate. *Healthcomp Evaluation Serv. Corp. v. O'Donnell*, 817 So. 2d 1095 (Fla. 2d DCA 2002).

7. If a contract containing an arbitration clause is challenged as void *ab initio*, it is submitted to arbitration, unless the challenged is to the specific arbitration clause. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S.Ct. 1204 (U.S. Feb. 21, 2006).

8. Whether a demand for arbitration was timely served is a question of fact to be decided by the arbitrator, not the trial court. *CED Construction, Inc. v. Kaiser-Taulbee Assoc., Inc.*, 816 So. 2d 813 (Fla. 5th DCA 2002).

9. An action to rescind a contract in its entirety may be subject to arbitration where the contract contained an arbitration clause and the validity of that clause was not specifically attacked, as opposed to the whole contract. *Sanchez v. Criden*, 899 So.2d 326 (Fla. 3d DCA 2005).

F. Arbitration with non-signatories to agreement.

1. A party may be bound to arbitrate a dispute even though the party did not physically sign a written contract to arbitrate. *See, e.g.*, *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002) (agency required non-signatory to arbitrate); *Qubty v. Nagda*, 817 So. 2d 952 (Fla. 5th DCA 2002) (investors suing stockbrokers compelled to arbitrate under thirty-party beneficiary theory); *Employers Ins. of Wausau v. Bright Metal Spec., Inc.*, 251 F.3d 1316 (11th Cir. 2001); *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Gottfried, Inc. v. Paulette Koch Real Estate, Inc.*, 778 So. 2d 1089 (Fla. 4th DCA 2001). *See also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993).

2. On the other hand, courts have refused to require non-signatories to arbitrate in various circumstances. *See, e.g., Benasra v. Marciano*, 112 Cal. Rptr. 2d 358 (2001) (president of corporation who signed contract in corporate capacity could not be compelled to arbitrate individually); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Circ. 1995) (corporate parent not required to arbitrate on claim relating to subsidiary's arbitration agreement).

3. Any employee who signed a document acknowledging that she received and reviewed her employer's arbitration policy was held to

be bound by its terms, even though she did not understand that the arbitration policy applied to all employment related disputes with the employer's parent and its subsidiaries. The appellate court held that her claimed misunderstanding did not undermine the enforceability of the arbitration policy and her continued employment evidenced her acquiescence to the terms of the new agreement. *United Healthcare of Florida, Inc. v. Brown*, 984 So. 2d 583 (2008).

4. Similarly, an employee was held to be bound by his employer's Dispute Resolution Policy (DRP) implemented for all employees during the particular employee's employment. The DRP stated that arbitration was the sole and exclusive forum and remedy for all covered claims, and that the parties agreed to waive any right to jury trial for a covered claim. The DRP also provided that the continuation of employment by an individual was deemed to be acceptance of the DRP. The employee contested the enforceability of the DRP because he never signed any arbitration agreement and there was no consideration for the change in the terms of his employment. The appellate court disagreed, ruling that the arbitration agreement was valid and enforceable under 9 U.S.C. § 2. The fact that the employee did not sign the DRP did not automatically render the agreement invalid as his continued employment after receipt of the DRP sufficiently demonstrated his assent to its terms. Finally, there was sufficient consideration to support the DRP because the agreement created a mutual obligation to arbitrate. *Santos v. Gen. Dynamics Aviation Servs. Corp*., 984 So. 2d 658 (2008).

5. The Pritzker Case -

    a. The trustees of a profit sharing plan brought suit against a brokerage company and one of its brokers alleging, among other claims, breach of fiduciary duty arising from alleged mismanagement of pension funds. *Pritzker*, 7 F.3d 1110, 1113 (3d Cir. 1993).

    b. In response to the defendants' motion to compel arbitration under an arbitration provision located in the contract governing the relationship between the trustees and the brokerage firm, the trustees argued that their claims against the individual broker were not subject to the arbitration agreement because the broker was not a signatory to the underlying contract. *Id*. at 1121.

    c. The Third Circuit Court of Appeals rejected this argument finding that the broker, as an agent and representative of the brokerage firm, was bound by the brokerage firm's arbitration

agreement under traditional agency principles.[2] *Id*. *See also Drulcrest Pty. Ltd v. Jamar Prods., Inc.*, No. 85 Civ. 2174 (PNL), 1986 WL 4547, at *2-3 (S.D. N.Y. April 11, 1986).

6. The Drulcrest Case -

   a. A promoter brought suit against a theatrical producer alleging that the producer failed to perform its obligations under the parties' touring agreement. *Drulcrest Pty. Ltd.*, 1986 WL 4547, at *1. The promoter also brought suit against the escrow agent named in the Touring Agreement alleging that the escrow agent breached its fiduciary duties with respect to the funds placed in escrow under the Touring Agreement. *Id*.

   b. The Touring Agreement contained an agreement to arbitrate and was not signed by the escrow agent. *Id*. In response to a motion to compel arbitration, the promoter argued that the claim against the escrow agent was not subject to arbitration because the escrow agent was not a signatory to the underlying agreement containing the arbitration clause. *Id*. at *2. In rejecting this argument as "irrelevant," the district court found that the escrow agent was bound by the agreement to arbitrate under ordinary contract and agency principals. *Id*.

   c. The district court found that by agreeing to act as the escrow agent under the Touring Agreement and by accepting the escrow funds, the escrow agent signified its intent to be bound by the arbitration provisions under the Touring Agreement. *Id*. at *3.

7. A party who personally guaranteed the obligations of another under a written agreement containing an arbitration clause was bound as a matter of law to arbitrate the dispute regarding the guarantee. *Berti v. Cedars Healthcare Group, Ltd.*, 812 So. 2d 580 (Fla. 3d DCA 2002).

8. Where a party was appointed as the agent for a principal who was bound to a contract containing an arbitration clause, the agent must arbitrate all disputes relating to the contract. *Koechli v. BIP Int'l*, 870 So. 2d 940 (Fla. 1st DCA 2004).

9. Arbitration provisions are binding on third-party beneficiaries of a contract that contains an arbitration provision, provided that the contract clearly expresses an intent to primarily and directly benefit

[2] *See also Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990) (extending scope of arbitration provision to non-signatory officers of corporation bound by arbitration provision); *Letizia v. Prudential Bache Securities*, 802 F.2d 1185, 1187-88 (9th Cir. 1986).

the third party. *Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259 (Fla. 5th DCA 2002).

10. In the absence of a signature, a party may be bound by an arbitration clause contained in a contract, if the party's conduct indicates that the party agreed to be bound by the contract in question.[3] *Thomson-CSF, S.A.*, 64 F.3d at 776. One's intention to be bound by a contract containing an arbitration clause may be evidenced by one's performance under other provisions of the contract. *Chanchani v. Salomon/Smith Barney, Inc.*, No. 99 CIV 9219 RCC, 2001 WL 204214, at *3 (S.D. N.Y. March 1, 2001); *Frynetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, No. 99 C 4704, 2001 WL 40900, at *4 (N.D. Ill. Jan. 11, 2001) (party's attempts to comply with other terms of the contract bound the party by the arbitration provision in the same contract); *In the Matter of the Arbitration Between John Thallon & Co., Inc. and M&N Meat Co.*, 396 F.Supp. 1239 (E.D. N.Y. 1975) (party's participation in performance under other provisions of a contract evinced such party's intention to be bound by the contract's arbitration provision).

11. Even if not joined in the arbitration, a surety on a construction bond can be bound by the results of an arbitration. *Fewox v. McMerit Constr. Co.*, 556 So. 2d 419, 425 (Fla. 2d DCA 1990).

12. The *Roman* case.

    a. The issue in this case was whether a non-signatory to a contract containing an arbitration agreement can compel a signatory to submit to arbitration. *Roman v. Atlantic Coast Construction and Development, Inc*., 44 So. 3d 222 (Fla. 4th DCA 2010). The appellate court affirmed an order requiring arbitration of the buyers' claims against a builder and its president.

    b. The builder contracted to construct three homes for the buyers, but the builder failed to construct the homes or return the deposit. "[A] non-signatory to a contract containing an arbitration agreement ordinarily cannot compel a signatory to submit to arbitration. There are, however, two exceptions relevant to the instant appeal: (1) a non-signatory agent can compel arbitration when the claims relate directly to the contract and the signatory is relying on the contract to assert claims against the non-signatory; and (2) when there are

[3] This rule of law appears to be an outgrowth of the general principle that one may be deemed to have accepted a written contract, which otherwise requires acceptance by a signature, by performing pursuant to its terms. *See, e.g., Bryan, Keefe & Co. v. Howell*, 109 So. 593 (Fla. 1926).

allegations of concerted action by both a non-signatory and one or more of the signatories to the contract." The court found that those exceptions applied to the buyers' claims for civil theft and the violation of a statute "governing escrow requirements for deposits received by 'building contractors.'" *Id.*

c. The buyers claimed that the arbitration provisions in the contracts were void and unenforceable. "`An arbitration clause is . . . unenforceable if its provisions deprive the plaintiff of the ability to obtain meaningful relief for alleged statutory violations.' . . . There is a distinction to be drawn, however, between a determination that an arbitration clause is invalid as it impermissibly limits a plaintiff's remedies and a challenge to the validity of the contract as a whole. The majority of courts, including this one, have held that the former is a question to be resolved by the trial court, but that the latter is a question to be resolved by the arbitrator." *Id.*

d. The provision of the arbitration clause that it would serve as a "complete defense to any suit, action, or proceeding" did not limit the buyers' remedies to the return of their deposit or prevent them from asserting the causes of action raised in their complaint. Another provision of the contract, which did purport to limit the buyers' remedies to termination of the contract and refund of their deposit in the event of a breach by the builder, could not be read as "waiving all statutory causes of action or remedies, such as those for illegal acts [as] the civil theft and improper maintenance of escrow funds alleged in the complaint. And, to the extent the [buyers] are suggesting the contract, as a whole, is void and/or unenforceable, such determination is one that must be resolved by the arbitrator." *Id.*

G. Waiver of Right to Arbitrate

1. The right to arbitration under an agreement may be waived by taking actions inconsistent with the arbitration provision. The court (not the arbitrator) determines whether a party to an arbitration agreement has waived its contractual right to arbitration by its subsequent conduct. *Florida Educ. Assoc. v. Sachs*, 650 So. 2d 29 (Fla. 1995).

2. Where one party actively participates in litigation which is the subject of an arbitration agreement before moving to compel arbitration, that party is deemed to have waived any right to compel arbitration. *Hansen v. Dean Witter Reynolds, Inc.*, 408 So. 2d 658 (Fla. 3d DCA

1982), *rev. den.*, 417 So. 2d 328 (Fla. 1982); *Ojus Indus., Inc. v. Mann*, 221 So. 2d 780 (Fla. 3d DCA 1969).

3. Such a waiver will be found where the party files an answer or affirmative defenses, takes discovery or files any claim for affirmative relief in a lawsuit, including a counterclaim before moving to compel arbitration. *Coral 97 Assocs., Ltd. v. Chino Elec., Inc.*, 501 So. 2d 69 (Fla. 3d DCA 1987); *Winter v. Arvida Corp.*, 404 So. 2d 829 (Fla. 3d DCA 1981); *but see Avid Engineering, Inc. v. Orlando Marketplace Ltd.,* 809 So. 2d 1 (Fla. 5th DCA 2001) (motion for arbitration and counterclaim at same time does not waive right).

4. "All questions concerning the scope or waiver of the right to arbitrate under contracts should be resolved in favor of arbitration rather than against it." *GBR3 v. Largo Dev. Corp.*, 807 So. 2d 723 (Fla. 3d DCA 2002), *quoting Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So. 2d 969, 971 (Fla. 5th DCA 1995).

5. The appellate court held that "a party's participation in discovery related to the merits of pending litigation is activity that is generally inconsistent with arbitration. Such activity – considered under the totality of the circumstances – will generally be sufficient to support a finding of a waiver of a party's right to arbitration." The defendant waived its right to arbitrate by propounding a request to produce and three sets of interrogatories dealing with the merits of the plaintiff's claims and filing a motion to compel and setting it for hearing. Seven months after propounding its discovery, the defendant withdrew its discovery requests, withdrew its motion to compel and cancelled the hearing on its motion to compel. These acts were determined to be too little and too late, to mitigate against a finding waiver of the party's right to arbitrate. *Green Tree Servicing, LLC v. McLeod,* 15 So. 3d 682 (Fla. 2d DCA 2009).

H. Selection of Arbitrators for Non-AAA Arbitrations

1. If an agreement for arbitration provides a method for the appointment of arbitrators, that method must be followed as long as it is fundamentally fair. *Fla. Stat.* § 682.04.

2. If there is no agreement regarding the appointment of the arbitrators or if the agreement fails, the Court, on application of a party, shall appoint one or a panel of three arbitrators. *Fla. Stat.* § 682.04; *Fla. R. Civ. P.* 1.810(a). Each of the arbitrators must either: (a) be a member of The Florida Bar, with the chief arbitrator being a member of The Florida Bar for at least five years; or (b) serve on the arbitration panel with the written consent of all parties.

I. AAA Arbitrator Selection Process

1. Following the demand for arbitration, the AAA typically sends each party a specially prepared list of proposed arbitrators to resolve the controversy. In compiling the list, the AAA draws from the applicable panel of arbitrators, considers geographical factors and is otherwise guided by the nature of the dispute. Biographical and fee information for each arbitrator is also enclosed with the list.

2. The parties are allowed a specified time period to study the list, strike names for good cause and then rank the remaining names in the order of preference.[4] The AAA administrator uses the parties' returned lists to select the top arbitrators based upon the parties' rankings. Additional information about the proposed arbitrators is available through the administrator.

3. If there are not a sufficient number of names from which to select the arbitration panel or individual arbitrator, the AAA may send out a second list or may make appointments without submitting additional lists. However, no arbitrator whose name was properly stricken by either party may be appointed in that event.

J. Arbitrators' Jurisdiction, Scope of Authority and Enforcement Issues

1. The following categories of actions may not be referred to arbitration by the Court:

   a. Bond estreatures.

   b. Habeas corpus or other extraordinary writs.

   c. Bond validations.

   d. Civil or criminal contempt.

   e. Any other matter specified by the chief judge in the circuit.

Fla. R. Civ. P. 1.800.

2. Statutory and intentional tort employment claims are arbitrable, such as hostile work environment, defamation, tortious interference with business relationships and intentional infliction of emotional distress, where the parties are subject to a written arbitration contract that provides for binding arbitration of "any and all claims and disputes that are related in any way to my employment or the termination of my

[4] While no authority can be found, the author suggests that good cause should be limited to similar grounds for disqualifying an arbitrator under the AAA's rules, as well as grounds for striking a prospective juror for cause.

employment." *Henderson v. Idowu*, 828 So. 2d 451 (Fla. 4th DCA 2002).

3. An arbitrator exceeds his or her power when he or she goes beyond the authority granted by the parties through the operative document and decides an issue not within the scope of the arbitration clause or not pertinent to the resolution of the issues submitted to arbitration. *Chandra v. Bradstreet*, 727 So. 2d 372 (Fla. 5th DCA 1999), *rev. den.*, 741 So. 2d 1134 (Fla. 1999); *Applewhite v. Sheen Fin. Res., Inc.*, 608 So. 2d 80 (Fla. 4th DCA 1992).

4. The Federal Arbitration Act ("FAA") controls where an arbitration agreement expressly provides that the agreement was made pursuant to a transaction involving interstate commerce and is governed by the Federal Arbitration Act. *Checksmart v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002).[5] Where the contract at issue involves interstate commerce, the FAA will control and pre-empt the Florida Arbitration Action ("FLAA"), but only to the extent that the FLAA may conflict with the FAA. *Hialeah Auto., LLC v. Basulto*, 22 So. 3d 586, 589 (Fla. 3d DCA 2009).

5. The FAA established federal public policy favoring arbitration, requiring Courts to rigorously enforce agreements to arbitrate. *Davis v. Prudential Sec., Inc.,* 59 F.3d 1186, 1192 (11th Cir.1995). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Creative Tile Mktg., Inc. v. SICIS Int'l. S.r.L.,* 922 F.Supp. 1534, 1538-39 (S.D. Fla.1996) *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

6. The FAA prohibits states from conditioning the enforceability of arbitration agreements on the availability of class arbitration procedures. The FAA also prohibits arbitration agreements from being invalidated by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Indeed, the FAA was held to preempt a California ruling which invalided an arbitration agreement in a consumer adhesion contract as unconscionable because it disallowed class procedures as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *AT&T Mobility, LLC v. Vincent Concepcion*, Case No. 09-892 (U.S. Sup. Ct. April 27, 2011).

7. Although the FAA governs the applicability of interstate arbitration agreements, state law governs issues "concerning the validity, revocability, and enforceability of contracts generally." *Perry v.*

[5] Except as stated herein, a detailed discussion of the FAA is outside the scope of these materials.

Thomas, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). Therefore, defenses such as fraud, unconscionability, and duress are governed by state law. *Dale v. Comcast,* 498 F.3d 1216, 1219 (11th Cir. 2007).

K. Class Arbitration

1. Where the agreement is silent on the subject of class arbitration, the arbitrator exceeds his or her authority by permitting class arbitration where the parties never agreed to class arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758, 1775 (2010). There must be a contractual basis for the arbitrator to conclude that the parties agreed to class arbitration. *Id.* In *Stolt-Nielson*, the parties stipulated that their agreement was silent on any agreement for class arbitration. *Id*. at 1768. Since the parties so stipulated, there was no agreement to class arbitration and a party may not be compelled to "submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to do so." *Id*. at 1775.

2. An arbitrator may, however, determine that the scope of the arbitration clause reflects the parties' intent to permit class arbitration. *Sutter v. Oxford Health Plans, LLC,* 675 F. 3d 215, 223-24 (3d Cir. 2012). In *Sutter*, the parties contractually agreed that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration … ." *Id*. at 217. The arbitrator ruled that the first phrase of the clause encompassed all possible court actions, including class actions, and thus the second phrase permitted class actions to be arbitrated. *Id*. at 218. Oxford attempted to have the arbitrator's ruling vacated based upon *Stolt-Nielsen*'s holding that an arbitrator panel exceeds its authority to allow class arbitration where the parties never agreed to do so. *Id.*

3. In affirming the arbitrator's ruling, the *Sutter* court noted that the FAA sets forth the exclusive grounds upon which an arbitration award may be vacated, including where the arbitrators exceed their powers. *Id*. at 219 (*citing* 9 U.S.C. § 10(a)). An arbitrator exceeds such authority when he or she decides an issue not submitted to arbitration by the parties, "grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether." *Id.* at 219-20 (*citing authorities*).

4. *Sutter* discussed at length *Stolt-Nielsen*, but determined that it was distinguishable because the parties in that case had stipulated that the agreement was silent on any agreement for class arbitration. *Id*. at 220-24. In contrast, the parties' intent as to class arbitration in

Sutter was in question and, as such, the scope of the arbitration agreement was relevant to resolve the issue. *Id*. at 224. "[T]he arbitrator construed the text of the arbitration agreement to authorize and require class arbitration." *Id.* By doing so, the arbitrator did not exceed his powers to authorize class arbitration. *Id.* at 225.[6]

L. Discovery in Arbitration

1. The parties may provide in the arbitration agreement for certain forms of discovery, either greater or less than those found in the Court's rules of discovery. The parties may also stipulate to discovery after the arbitration action is filed.

2. An arbitrator may permit a deposition to be taken for use at a hearing when a witness cannot be subpoenaed or is unable to attend the hearing. In absence of the parties' agreement, their incorporation of specific rules, such as the AAA's rules, or the demonstrated unavailability of the witness, there is no authority for the arbitrator to permit parties to take depositions. *Fla. Stat.* § 682.08.

M. Motions for Summary Judgment in Arbitration

1. The majority of case law provides that a motion for summary judgment may be granted by the arbitrators, provided they afford the parties fundamental fairness. Arbitration must provide for a fair opportunity to present evidence and argument. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997). "Fundamental fairness" has been described as the touchstone for arbitration. *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F.Supp. 2d 506 (S.D. N.Y. 2000).

2. The FLAA and the FAA do not expressly mandate oral hearings, unless the parties have agreed to such. *See Federal Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833 (9th Cir. 1987). Arbitrators are required to grant the parties a fundamentally fair and an adequate opportunity to present their evidence and argument. *Tempo Shain*, 120 F.3d 16; *British Ins. Co. of Cayman*, 93 F. Supp. 2d 506.

3. In *Federal Deposit Ins. Corp.*, the court directed the parties to arbitration. After arbitration, the FDIC moved to vacate the award because of the arbitrator's summary disposition instead of a ruling after an oral hearing. The arbitrator required the parties to submit, in written form, the material that they wished to have considered. The appellate court held that, as long as the process provided was full and fair, a procedural attack would fail. The court found that a "full and

[6] Sutter is presently on appeal with the United States Supreme Court.

fair" arbitration had occurred. *Federal Deposit Ins. Corp.*, 822 F.2d 833.

4. "[T]he failure to hold an oral hearing cannot be deemed misbehavior that prejudiced the FDIC's rights because the FDIC has not shown that its evidence was not amenable to presentation in written form. Admittedly, a "paper hearing" often will be an inadequate means to determine the facts upon which an arbitration decision must rely. In this case, however, the nature of the decision to be made leads us to conclude that the "paper hearing" was adequate." *Federal Deposit Ins. Corp*, 822 F.2d at 842.

N. Final Arbitration Hearing

1. The hallmark of the arbitration hearing is its informality. One purpose of an agreement to arbitrate is to avoid the formal requisites of a court proceeding. Each party must be given an equal and fair opportunity to be heard and present evidence.

2. While the order of the proceedings is at the arbitrator's discretion, the hearing generally begins by each party giving an opening statement to clarify the issues. The complaining party presents evidence first, followed by the defending party's presentation of evidence. Each party also has the opportunity to cross-examine opposing witnesses. *Fla. Stat.* § 682.06(2).

3. The technical rules of evidence do not apply to arbitration hearings. Hearsay evidence is admissible, leading questions may be asked, the best evidence rule is irrelevant and witnesses need not be qualified as "experts." *Fla. R. Civ. P.* 1.820(c).

O. The Arbitration Award

1. At a minimum, an arbitration award must be:

   a. In writing;

   b. Signed by the arbitrators joining in the award; and

   c. Delivered by the arbitrator to each party, personally or by registered or certified mail (unless otherwise agreed, such as set forth in the AAA's Commercial Arbitration Rules).

Fla. Stat. § 682.09.

2. The arbitrators are not required to make specific findings of fact and conclusions of law, unless the arbitration agreement expressly requires them to do so or a Court remands the matter to the

arbitrators for express findings to be made before any confirmation of the award will be entered. *Fla. R. Civ. P.* 1.820(g)(3).

3. Where an arbitration agreement does not expressly grant the arbitrators the jurisdiction to determine entitlement to and assessment of attorney's fees to the prevailing party, they have no jurisdiction to do so and this is a matter to be determined by the court in any confirmation proceeding. *Fla. Stat.* § 682.11.

4. In a multi-claim proceeding where less than all of the claims include a right to recover attorney's fees, the arbitration award must expressly state on which claims the award is based so that the Court may determine whether the prevailing party is entitled to recover his or her reasonable attorney's fees and costs. *Kesler v. Chatfield Dean & Co.*, 794 So. 2d 577 (Fla. 2001); *Moser v. Barron Chase Sec., Inc.*, 783 So. 2d 231 (Fla. 2001).

P. Post-Arbitration Proceedings

1. Modification. Pursuant to *Florida Statute* § 682.14, a binding arbitration award may be modified upon application made within 90 days after delivery of a copy of the award to the applicant, where:

   a. There is an evident miscalculation of figures in the award;

   b. There is an evident mistake in the description of any property referred to in the award; or

   c. The award was based upon a matter not submitted to the arbitrators and the award may be corrected without affecting the merits of the decision upon the issues submitted.

2. Vacation.

   a. A binding arbitration award may be vacated where an application to the court is made within 90 days after the delivery of a copy of the award to the applicant upon one of the following grounds:

      i. The award was procured by corruption, fraud or other undue means.

      ii. There was evident partiality by an arbitrator who was appointed as a neutral arbitrator or there was corruption in any of the arbitrators or misconduct prejudicing the rights of any party.

iii. The arbitrator exceeded his/her powers (i.e., jurisdiction).

iv. The arbitrators refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the controversy or otherwise substantially prejudiced the rights of a party.

b. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award. *Fla. Stat.* § 682.13(1).

3. Appeal. An appeal may be taken from:

a. An order denying an application to compel arbitration. *Fla. Stat.* § 682.20(1)(a).

b. An order granting an application to stay arbitration. *Fla. Stat.* § 682.20(1)(b).

c. An order confirming or denying confirmation of an award. *Fla. Stat.* § 682.20(1)(c).

d. An order modifying or correcting an award. *Fla. Stat.* § 682.20(1)(d).

e. An order vacating an award without directing a rehearing. *Fla. Stat.* § 682.20(1)(e).

f. A judgment or decree entered pursuant to *Florida Statute* § 682.20. *Fla. Stat.* § 682.20(1)(f).

4. Upon application of a party to the arbitration, the Court shall confirm an award, unless within the statutory time limits, sufficient grounds are asserted for vacating or modifying or correcting the award. Except where the Court finds that one of the enumerated grounds apply to vacate an award, the Court has no authority to overturn an award. *American Reliance Insurance Co. v. Devecht*, 820 So. 2d 378 (Fla. 3d DCA 2002).

III. Voluntary Binding Trial Resolution

A. The VTR Process

1. Florida Statute § 44.104, entitled "Voluntary binding arbitration and voluntary trial resolution" provides for private attorneys to be appointed with the parties' agreement to decide their legal disputes.

a. Parties may enter into a voluntary trial resolution ("VTR") agreement to have most disputes determined by a private attorney. *Fla. Stat.* § 44.104(1). The private attorney acts as the trial court judge for the case, subject to most of the same rules of Court and with appellate review of legal issues.

b. Pursuant to the VTR agreement, the Court appoints a private lawyer as the Trial Resolution Judge ("TRJ") to conduct the proceedings of an action and determine the case on its merits generally as if litigated before the Court. *Fla. Stat.* § 44.104(2); *Fla. Stat.* § 44.104(8).

B. The VTR Agreement

1. To be enforceable, the VTR agreement must be in writing and signed by the parties. The legal dispute may not involve any constitutional issue, child custody, child support or visitation issues. *Fla. Stat.* §§ 44.104(1), 44.104(14).

2. The VTR agreement may be signed before or after litigation is commenced and should provide for the compensation of the TRJ. *Fla. Stat.* § 44.104(2).

3. The following is a sample contract clause for submitting all permissible controversies that may arise between the parties to an agreement to voluntary trial resolution:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be resolved and determined by binding voluntary trial resolution pursuant to Chapter 44, Florida Statutes, including, without limitation, the procedures set forth in Florida Statute § 44.104, and final judgment on the decision rendered by the trial resolution judge shall be entered by any court having jurisdiction thereof.

4. Subject to the exceptions stated in *Florida Statute* § 44.104, the parties to an existing dispute or pending lawsuit may also submit their controversy to voluntary trial resolution by use of the following agreed application to the Court:

> We, the undersigned parties, hereby jointly agree and apply to the Court for binding voluntary trial resolution pursuant to Chapter 44, Florida Statutes,

including, without limitation, the procedures set forth in Florida Statute § 44.104, for the following controversy: *(Describe the dispute or identify an existing lawsuit),* and final judgment on the decision rendered by the trial resolution judge shall be entered by any court having jurisdiction thereof.

We further agree that *(Insert name and address of trial resolution judge)* shall be appointed by the Court as the trial resolution judge for the above-described controversy, who shall be compensated in accordance with that certain agreement between the parties, a copy of which is attached hereto as Exhibit "A."

C. The Trial Resolution Judge

1. The TRJ must be a licensed member of The Florida Bar in good standing for more than five (5) years. *Fla. Stat.* § 44.104(2).

2. If the VTR agreement does not specifically identify the TRJ and the parties cannot otherwise agree, the Court will appoint the TRJ as the case requires. *Fla. Stat.* § 44.104(2).

D. Benefits of VTR

1. The parties may jointly appoint a TRJ who is a qualified, experienced specialist (Florida Bar Board Certified) in the area of the legal dispute.

   a. *Only attorneys certified by The Florida Bar are allowed to identify themselves as "Florida Bar Board Certified" or as a "specialist."*

   b. Certification is the highest level of recognition by The Florida Bar of the competency and experience of attorneys in the areas of law approved for certification by the Supreme Court of Florida.

   c. Not all qualified lawyers are certified, but those who are board certified have taken the extra step to have their competence and experience recognized.

2. The parties' rights to procedural due process, rules of Court and appellate rights (except for findings of fact) are preserved as with most litigation. The filing of an application for VTR tolls the applicable statute of limitations. *Fla. Stat.* § 44.104(6).

3. The TRJ must follow the applicable law; failing which he or she may be reversed on appeal. *Fla. Stat.* § 44.104(10)(a). However, the harmless error doctrine is applicable for any appeal from a final

determination rendered by a TRJ for a dispute submitted to VTR. *Fla. Stat.* § 44.104 (12).

4. The parties have full availability to discovery and motion practice. *Fla. R. Civ. P.* 1.710(c).

5. The parties should have greater flexibility for hearings and trials before the TRJ.

E. Burdens/Costs of VTR

1. The fees of the TRJ can become sizable for any large, complex case.

2. There is no limitation on discovery as in arbitration.

IV. Immunity

With some exceptions, arbitrators, mediators and TRJs generally enjoy judicial immunity under certain circumstances. *Fla. Stat.* § 44.107.

DISCLAIMER

This commentary is for informational purposes only, is not legal advice and does not establish an attorney-client relationship. You should seek appropriate legal advice from a licensed attorney before making any decision based on these comments. The hiring of a lawyer is an important decision that should not be based solely upon advertisements.

APPENDIX "A"

(insert style)

_____/

AGREED ORDER SETTING MEDIATION CONFERENCE

THIS CAUSE came on to be heard before the Court upon the parties' application for a mediation conference and the appointment of a mediator, and the Court having reviewed the pleadings filed herein, being advised of the agreement of counsel and the parties, and being otherwise fully advised in the premises, it is

ORDERED that:

1. The Court hereby appoints _____, as the Court's Mediator to attempt to achieve a settlement of the issues of this cause.

2. The Mediation Conference shall be held on _____**, at** __**.M.**, at _____.

3. Plaintiff's attorney is hereby appointed as lead attorney to work with the Mediator and to coordinate the Mediation Conference. In the event it becomes impossible for an attorney or a party to attend the scheduled conference, coordination for rescheduling shall be done through the lead attorney to the Mediator. The lead attorney shall send a letter to the Court advising it of the new Conference date, with a copy of same being furnished to all parties and the Mediator confirming the change. The conditions stated in this Order will remain in effect for the new conference date.

4. The Mediator shall be compensated at the rate of **$_____.00** per hour, plus all out-of-pocket expenses, which shall be borne equally by the opposing parties. The Mediator shall be corresponded with at the address listed below, and shall be served with any paper(s) regarding this Order. Attorneys for each party shall be responsible to pay the Mediator's fees and expenses and each attorney shall ensure that the Mediator is paid within fifteen (15) days from the date of the Mediator's statement, even if the attorney is required to advance such payment.

5. If any party objects to the Mediator or Mediation Conference, such party shall file their objection no later than ten (10) days following service of this Order. The absence of any timely filed objection shall constitute consent to the within appointment and any failure to comply with this Order shall be grounds for sanctions.

6. The parties shall present a brief written summary of the facts, issues and a damages statement the Mediator no later than ten (10) days before the conference.

DONE AND ORDERED at _____, _____ County, Florida this _____ day of _____, 20___.

By:_____
County/Circuit Judge

APPENDIX "B"

(Insert style)
_____/

MEDIATED SETTLEMENT AGREEMENT

Plaintiff, _____, and Defendant, _____, hereby agree and stipulate as follows:

1. The parties acknowledge that this Agreement is given in compromise of disputed claims and any payment made hereunder shall not be construed as an admission of liability by any party. Without admitting any wrongdoing or liability, the parties to this stipulation desire to amicably resolve all disputes between them, including, without limitation, all claims and counterclaims for damages, interest, attorneys' fees and costs filed in the above-styled matter.

2. _____ hereby agrees to pay _____ the total sum of $_____, to be paid as follows: (a) $_____ paid within _____ (_____) days from the date hereof; and (b) $_____. paid within _____ (_____) days from the date hereof.

3. All payments required herein shall be made by cashiers check or money order payable to "_____," and shall be delivered to _____'s undersigned attorney.

4. Within _____ (___) days from the date the final payment is made as set forth above, the undersigned attorneys shall file a joint motion for dismissal with prejudice of all claims and counterclaims filed in the above-referenced matter.

5. Except for the parties' obligations and performances due under this Agreement, the parties hereby mutually remise, release, acquit, satisfy, and forever discharge each other, of and from all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, damages, judgments, executions, claims and demands whatsoever, in law or in equity which each and every party ever had, now has, or which the parties have, shall or may have against each opposing party and each such party's agents, officers, directors, shareholders personal representatives, successors, heirs and assigns, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of these presents, whether such claims are known, unknown, anticipated or unanticipated at this time, including, without limitation, all claims and counterclaims filed in the above-styled lawsuit.

6. The Court is authorized to enter an order staying and abating the above-styled action while all payments are being timely made as provided above and neither party is in default under this Agreement. Such order shall also approve of this Agreement.

7. Should _____ default under the terms of this Agreement by failing to make any payment when due hereunder, time being of the essence, Final Judgment shall be entered by the Court against said party for the total sum of $_____, less any payments made hereunder, upon the filing of an affidavit by counsel attesting to the default under this Agreement.

8. The parties acknowledge that they have had the opportunity to obtain counsel to represent them prior to their execution of this Agreement and they have not relied upon any representations or advice of any other party or opposing counsel before executing this Agreement. The parties further acknowledge that they have voluntarily agreed to the terms of this Agreement and have not been coerced under any circumstances by any opposing party, counsel or the mediator.

9. The parties and their counsel further acknowledge that: (a) the mediator is and has remained a neutral, impartial facilitator for the parties throughout the mediation; (b) although the mediator is a licensed attorney in Florida and may have used his experience to make observations or play "devil's advocate" during the course of the mediation, nothing the mediator did or stated during the mediation was relied upon by the parties or their counsel as legal services, legal advice or a legal opinion of the mediator; (c) the mediator did not make any decisions for the parties regarding whether to settle their dispute and/or on what terms to settle; (d) the mediator did not render any legal services or legal advice in connection with the drafting of this Agreement, except as a scrivener; and (e) the parties have solely relied upon the advice of their counsel for the drafting and execution of this Agreement.

10. This Agreement is the entire agreement between the parties and any modification or change hereof shall be in writing and signed by all parties and their attorneys. Except as otherwise provided herein, each party to this Agreement shall bear their own attorney's fees and costs.

DATED this _____ day of _____, 20___.

Parties:

By: _____

_____
Print Name and Corporate Capacity

By: _____

_____
Print Name and Corporate Capacity

Counsel for Parties:

By: _____
Type Attorney's Name
Florida Bar No.: _____
Attorney for Plaintiff

By: _____
Type Attorney's Name
Florida Bar No.: _____
Attorney for Plaintiff