



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Under current law, court-ordered, nonbinding arbitration must be conducted according to the rules of practice and procedure adopted by the Florida Supreme Court.<sup>1</sup> These rules provide that a judge may refer a case to a "neutral third person or panel, called an arbitrator or arbitration panel, to consider the facts and arguments presented by the parties and render a decision."<sup>2</sup> Unlike mediation, which is relatively informal, arbitration is similar to a mini-trial because arbitrators may administer oaths, take testimony, issue subpoenas, and apply to the court for orders compelling attendance and production.<sup>3</sup> The arbitrator or panel will issue a written decision that will become final if the parties do not submit a timely written request for a trial de novo.<sup>4</sup> Under current law, if a party requests a trial de novo and does not achieve a result that is more favorable than the arbitration award, that party may be assessed court costs, including attorney's fees.<sup>5</sup>

Under the Florida Rules of Civil Procedure, hearings for court-ordered nonbinding arbitration must "be conducted informally. Presentation of evidence must be kept to a minimum, and matters must be presented to the arbitrator primarily through the statements and arguments of counsel."<sup>6</sup>

Court-ordered nonbinding arbitration has been used with varying frequency by courts throughout the state.<sup>7</sup> It is often used in medical malpractice cases under ch. 766, F.S., and other tort cases.<sup>8</sup> However, a lengthy proceeding may be expensive, and the parties generally incur certain costs.<sup>9</sup> At present, Florida law limits the amount that an arbitrator can charge to "\$1,500 per day, unless the

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<sup>1</sup> Section 44.103(1), F.S.

<sup>2</sup> Section 44.1011(1), F.S. See also 3A FLA. JUR. 2D *Arbitration and Award* §§ 1, 2, 140 (2007).

<sup>3</sup> A "mini-trial" is "a private, voluntary, and informal form of dispute resolution in which each party's attorney presents an abbreviated version of its case to a neutral third party and to the opponent's representatives, who have settlement authority. The third party may render an advisory opinion on the anticipated outcome of litigation." Black's Law Dictionary (8th ed. 2004). The idea behind the mini-trial is that the parties can resolve a dispute on their own more efficiently if litigant representatives with settling authority are educated about the strengths and weaknesses of each side, giving summary presentations of their best cases under the eye of a jointly selected neutral advisor. After each case is presented, the parties meet privately to negotiate an agreement. The mini-trial is confidential and nonbinding. Usually, no transcript is made of the proceeding. Mini-trials have had some success in saving both time and money. *Id.* (quoting Alfred C. Aman Jr. & William T. Mayton, *Administrative Law* 291 (2d ed. 2001)).

<sup>4</sup> Section 44.103(5), F.S. A trial de novo is "a new trial on the entire case (on both questions of fact and issues of law) conducted as if there had been no trial in the first instance." *Black's Law Dictionary* (8th ed. 2004).

<sup>5</sup> Section 44.103(6), F.S.

<sup>6</sup> Fla. R. Civ. P. 1.820(c).

<sup>7</sup> Conversation with the Alternative Dispute Resolution (ADR) Director of the Lee County Courts, March 2007. According to the ADR Director, less than 2 percent of cases in Lee County go to trial. Although judges have referred some cases to voluntary arbitration, under the Florida Arbitration Code, ch. 682, F.S., and mediation, under ch. 44, F.S., judges have been less likely to order nonbinding arbitration when it is not provided for by statute or contract.

<sup>8</sup> Conversation with staff of the Florida Justice Association (formerly the Academy of Florida Trial Lawyers) (March 2007). To a lesser extent, nonbinding arbitration has also been used in cases involving soft tissue injuries such as muscle sprains and joint dislocations, as well as in family law cases. However, "under no circumstances may the following categories of actions be referred to arbitration: (1) Bond estreatures. (2) Habeas corpus or other extraordinary writs. (3) Bond validations. (4) Civil or criminal contempt. (5) Such other matters as may be specified by order of the chief judge in the circuit." Fla. R. Civ. P. 1.800.

parties agree otherwise.”<sup>10</sup> Local court rules and administrative orders may specify hourly rates to be paid to the Chief Arbitrator or arbitrators who are involved in the case.<sup>11</sup>

## Effect of Bill

This bill requires court-ordered nonbinding arbitration to be informal. In addition, the bill requires that presentation of testimony and evidence be kept to a minimum, and it requires matters that are submitted to arbitrators be presented primarily through the statements and argument of counsel. Moreover, the bill inserts a “good cause” standard. Under that standard, a party must show good cause when he or she petitions the court to authorize an arbitrator to issue subpoenas for the attendance of witnesses and the production of books, records, documents, and other records.<sup>12</sup>

This bill also addresses the issue of liability for an opposing party’s attorney’s fees and costs. This bill provides that a court may assess costs against a party if the trial judgment differs from the arbitration award by 25 percent. Thus, if a plaintiff requests a trial de novo and obtains a judgment at trial that is more than 25 percent less than the arbitration award, the defendant’s costs and attorney’s fees will be set off against the award. This bill also provides that when the costs and attorney’s fees total more than the amount of the judgment, the court must enter judgment for the defendant against the plaintiff for the amount of the costs and attorney’s fees, less the amount of the award to the plaintiff. Similarly, a defendant who files for a trial de novo may be liable for the plaintiff’s attorney’s fees and costs if the judgment is at least 25 percent more than the arbitration award.

### C. SECTION DIRECTORY:

Section 1 amends s. 44.103, F.S., relating to court-ordered, nonbinding arbitration.

Section 2 provides an effective date of October 1, 2007

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<sup>9</sup> Florida law provides that “arbitrators shall be compensated by the parties, or, upon a finding by the court that a party is indigent, an arbitrator may be partially or fully compensated from state funds according to the party’s present ability to pay.” Section 44.103(3), F.S. In a similar context, under mandatory nonbinding arbitration involving land sales, condominiums, and mobile homes, costs and attorney’s fees include the following:

Typical awards of costs and attorney’s fees range from \$2,200.00 for simple, uncontested proceedings to \$20,000.00 or more for more involved proceedings. The exact award depends on the complexity and number of the issues involved, on whether you dispute the facts and a final hearing is required, and other factors. Attorney’s fees in these proceedings are typically billed between \$150.00 and \$250.00 per hour, depending upon the experience of the attorney and the location of the condominium. Some attorneys bill more and some attorneys bill at a lesser sum. Costs that you may be required to pay if you lose include the filing fee, hourly paralegal costs, computerized legal research costs, and fees paid to expert witnesses to inspect the property in dispute, to prepare reports, and to testify. These costs may commonly run into the thousands of dollars.

Florida Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Information Sheet, at [http://www.myflorida.com/dbpr/lsc/arbitration/general\\_information/information\\_sheet\\_on\\_attorney\\_fees.htm](http://www.myflorida.com/dbpr/lsc/arbitration/general_information/information_sheet_on_attorney_fees.htm). See also Fla. R. Civ. P. 1.820(f), which states, “any party may have a record and transcript made of the arbitration hearing at that party’s expense.”

<sup>10</sup> Section 44.103(3), F.S.

<sup>11</sup> Fla. R. Civ. P. 1.810(b); *In Re: Seventeenth Judicial Circuit Florida Arbitration Research Project*, Admin. Order I-05-T-2 (Fla. 17th Judicial Circuit, Oct. 19, 2005).

<sup>12</sup> Generally, “good cause” refers to “a legally sufficient reason. It is often the burden placed on a litigant (usually by a court rule or order) to show why a request should be granted or an action excused.” Black’s Law Dictionary (8th ed. 2004).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

Under the bill, a litigant in court-ordered nonbinding arbitration may have less risk of being ordered to pay his or her opponent's attorney's fees and costs when seeking a trial de novo. Under existing law, a party seeking a trial de novo may be liable for these fees and costs if the trial judgment is not more favorable than the arbitration award. Under the bill, one seeking a trial de novo may be liable for an opponent's attorney's fees and costs if the judgment is at least 25 percent less favorable than the arbitration decision.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

On line 57 of the bill, there appears to be a clerical error. The "a least 25" needs to be amended to read "at least 25".

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

N/A