

Voluntary Trial Resolution: Tailor-Made for Employment Claims

Intro. Created by the Florida Legislature in 1999 in response to concerns about dwindling judicial resources and increasing delays in getting trial dates, Voluntary Trial Resolution (also sometimes referred to as “private trials”) provides a process likely to address most employment litigators’ concerns nicely. Voluntary Trial Resolution, at its base, is an alternative dispute resolution process where the parties agree to have someone other than a sitting judge hear and decide the dispute.

Here’s how it works, at least in the Thirteenth Judicial Circuit/Hillsborough County.¹ Once the parties/counsel have agreed to have the matter heard by a Trial Resolution Judge (which would usually occur presuit, but which could, presumably, occur after suit is filed), the case is assigned to a Circuit or County Judge, whose Judicial Assistant serves as the Trial Resolution Judge’s JA for the matter, coordinating with other court resources for the trial: arranging for bailiffs, clerks, reporters, courtrooms, and, if demanded, a jury venire. However, the selected Trial Resolution Judge presides over the pretrial litigation and the trial itself in the same manner as a Circuit or County Judge who would otherwise have heard the case. Fla. Stat. § 44.104. The Trial Resolution Judge has the authority to enter orders on motions to dismiss and for summary judgment, resolve discovery disputes, and the like. *Id.* § 44.104(7)-(8). While the Trial Resolution Judge does not have contempt powers as such, he or she does have the power to sanction parties pursuant to Rule 1.380 for discovery violations and the like. *Id.* Once the Trial Resolution Judge has ruled on the dispute, judgment is entered thereon, upon application of the prevailing party to the assigned Circuit or County Judge. *Id.* § 44.104(11), (13).

Voluntary Trial Resolution contrasted with Binding Arbitration. So far, Voluntary Trial Resolution sounds like another form of arbitration, but, at its base, it is not. True, both arbitration and Voluntary Trial Resolution are forms of ADR, where a neutral third party is chosen by the parties, and compensated by the parties, to decide the dispute. And, Voluntary Trial Resolution shares with arbitration the advantage of getting to choose your decision-maker: the parties have the ability to choose a provider with employment-law subject matter expertise, often lacking among appointed or elected circuit or county judges whose pre-bench practice may not have focused on that area of the law. However, Voluntary Trial Resolution and arbitration are fundamentally different in at least three ways.

First, Voluntary Trial Resolution culminates in an actual trial, with the full rules of procedure and evidence in effect, whereas arbitration culminates in a hearing, where the rules may apply only to a limited extent, notwithstanding the statutory requirement that the rules of evidence shall apply. *See* Fla. Stat. § 44.104(9). Even in those arbitral fora with extensive rules of procedure, such as the American Arbitration Association or National Association of Securities Dealers Dispute Resolution, which provide for greater adherence to rules of evidence in statutory

¹ Per Administrative Order S-2001-027 (13th Jud. Cir. Ct. May 3, 2001), www.fljud13.org/AO/DOCS/2001-027.pdf. The author believes this is indicative of how other circuits/counties that have addressed Voluntary Trial Resolution have handled it. *See, e.g.*, Administrative Order PA/PI-CIR-00-04 (6th Jud. Cir. Ct. January 26, 2000), available at <http://www.jud6.org/legalpractice/aosandrules/aos/aos2000/ao04papi.html>.

employment claims, there is still a criticism that some arbitration panels do not strictly apply evidence codes.

Second, Voluntary Trial Resolution can entail a jury trial. While the statute itself is silent on the issue, at least the Thirteenth Judicial Circuit has read into the statute the availability of jury trial. Of course, as those of us who arbitrate or who litigate before arbitrators know, there is no jury as such in arbitration.

Third, once complete, parties participating in Voluntary Trial Resolution have the full range of appellate remedies available to them, including a plenary appeal to the appropriate court, just as if the case had been tried before a sitting Circuit or County Judge; the only limitation is that factual determinations made by the Trial Resolution Judge are not appealable. *Id.* § 44.104(11). In contrast, the bases to “appeal” an arbitration decision are very few, and rarely have anything to do with the merits of the decision.²

These three distinctions make Voluntary Trial Resolution a viable alternative to arbitration, addressing the principal bases for denying enforcement of pre-dispute agreements to arbitrate statutory employment claims. *See* L. Langbein, “Arbitrability of Employment Disputes: When Process Matters”, *The Checkoff*, XLI, No. 1, at 8 (March 2003). These features also make Voluntary Trial Resolution an ADR mechanism that comports with the Due Process Protocol for statutory employment disputes.³

State court – why use? Once commenced, the Trial Resolution Judge handles this as the judge of the case. The matter proceeds as it would in state court, except that the parties may, at their agreement or upon order of the Trial Resolution Judge, agree to a discovery schedule. These are very helpful to keep the matter on track.

Further, if there are discovery disputes or the like (and when aren’t there?), counsel need not attend a cattle-call type, Uniform Motion Calendar hearing; instead, since the Trial Resolution Judge is “your” judge, you are generally able to get these matters heard quickly and expeditiously. If appearance is required, rather than a telephonic hearing, the hearing need not occur at the Courthouse; it can occur at either side’s office or at the office of the Trial Resolution Judge, or some other location. The Trial Resolution Judge, compensated by his or her “customers” is likely able to be more accommodating in this regard than most sitting judges, who simply do not have the time or resources to schedule such hearings in a manner more conducive to the parties’ schedules.

Finally, one can get a trial date certain with a Trial Resolution Judge. Unlike state court dockets, where counsel are at the mercy of the several other cases set for trial on the same docket (those of us who litigate know the hurry-up-and-wait, nail-biting anguish of the typical trial calendar),

² See Fla. Stat. § 682.13 (fraud, corruption, evident partiality of the arbitrator, exceeding scope of jurisdiction, or similarly egregious conduct usually required to vacate an award).

³ Task Force on Alternative Dispute Resolution in Employment, “A Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship”, Cornell Institute for Labor Relations, May 1995. http://www.ilr.cornell.edu/alliance/resources/Guide/Due_process_protocol_empdispute.html.

the Trial Resolution Judge schedules the trial to begin at a date and time for which you, your clients, and your experts can plan. This advantage of Voluntary Trial Resolution over traditional trial is underscored even further when we recall that, with Revision 7 to Article V of the Florida Constitution due to take effect this summer, many circuits are bracing for a relative lack of trial judges available to hear general civil cases. With the courts required to hear criminal and delinquency matters first (to avoid speedy trial rule dismissal), and many circuits giving next preference to dependency and family matters, at least one Circuit has warned that it may have only one Circuit Judge available to hear the rest of all civil trials. If this dire prediction should come true, then parties will have no choice but to embrace Voluntary Trial Resolution or something like it, or face years-long delay in getting cases tried.

Conclusion Voluntary Trial Resolution offers parties and counsel advantages over both binding arbitration and civil trial in Circuit or County Court.⁴ The expense of the Trial Resolution Judge's services should be more than offset by the savings the parties would realize through reduced delay and attendant costs. With its combination of formality and flexibility, the involvement of a subject-matter expert as presiding neutral, and preservation of appellate remedies, Voluntary Trial Resolution may very well become the wave of the future.⁵

⁴ Regrettably, nothing like Voluntary Trial Resolution is currently in place in the federal courts, at least those here in Florida. This is of great significance to employment lawyers since, as we know, most employment litigation, especially litigation of statutory claims, lands in federal court. While the "rocket docket" of several years ago helped clear the significant backlog of federal cases, at least in the Middle District, the reality is that it is still taking upwards of two years or more to get a trial. Even with the availability of trial by Magistrate Judge, with the advantage of a date certain for trial, these delays still abound. Further, discovery and pretrial disputes are still subject to the busy calendars of the federal bench, and delayed rulings are, regrettably, often the norm. Again, with a Trial Resolution Judge, dedicated to your case, such delays are likely to disappear, or at least to be greatly shortened.

⁵ Those interested in learning more about Voluntary Trial Resolution are welcome to attend the seminar on that subject that the Hillsborough County Bar Association Alternative Dispute Resolution Committee is holding in Tampa on May 28, 2004. For further information, please contact the author, who is organizing the seminar on behalf of the Committee.