

Voluntary Trial Resolution – The Most Overlooked Power Tool In The Shed

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OVERVIEW

There is a powerful litigation tool available to your clients that is rarely if ever considered. It can provide clients with a final resolution of their legal disputes in a small fraction of the time it would take to reach conclusion in the court system. That tool is voluntary trial resolution (VTR) under Florida Statute section 44.104. In addition, the use of VTR in conjunction with utilizing the same person as a special magistrate can further accelerate the process, and provide you greater hearing and trial time in a fraction of the time that it would take to reach final conclusion in the courts. That faster conclusion provides earlier closure for the client, and permits counsel to work on other pending cases generating additional income.

This article will be light on appellate authority because the universe of appellate cases addressing VTR in Florida is a small one. It is not intended as a scholarly law review article. This article is intended to acquaint the Bar with VTR, provide a thorough overview, and to suggest practice tips to consider in assessing its use in a particular case. Practice tips and suggestions will be included throughout the article.

VTR under Florida Statute Section 44.104 is commonly referred to as private judging. The statute permits the parties by written agreement to have their “civil dispute” tried by a voluntary trial resolution judge. Fla. Stat. 44.104(1). Certain family law cases can also be tried using VTR. The written agreement to use VTR may be entered into after the dispute arises, or the parties may have included the agreement in a contract that is the subject of the litigation. The parties can either agree on the choice of their VTR judge, or have the court appoint one. Fla. Stat. 44.104(2). In either case, once the VTR judge is chosen, the parties then work with the VTR judge to create the structure of the trial, and agree to a trial schedule, date and location. The trial is conducted as though it were tried before a circuit judge. With heavy caseloads, crowded court dockets, and court time as valuable as platinum, VTR may be the preferred mechanism for the trial of your client’s case.

ELIGIBILITY TO SERVE AS A VTR JUDGE

Any member of the Florida Bar in good standing for more than five years may serve as a VTR judge. Fla. Stat. 44.104(2).

CASES THAT CAN BE RESOLVED USING VTR

Although the statute authorizes the use of VTR for “civil disputes” it is clear from the statute that it is also available for some family law cases. The question of whether probate would fall into the definition of “civil” is unresolved.

There are some statutory limitations on the use of VTR. VTR cannot be used in:

- a case in which a constitutional issue is involved, Fla. Stat. 44.104(1);
- any dispute involving child custody, visitation, or child support, Fla. Stat. 44.104(14);
- any dispute which involves the rights of a third party not a party to the VTR when the third party would be an indispensable party if the dispute were resolved in court, or when the third party notifies the VTR judge that the third party would be a proper party if the dispute were resolved in court, that the third party intends to intervene in the action in court, and that the third party does not agree to resolving the case through VTR. Fla. Stat. 44.104(14).

In family cases this would permit the use of VTR in dissolution trials with no minor children, and in post-judgment disputes that do not involve child custody, visitation, or child support. See Fla. Stat. 44.104(14). The prohibition in section 44.104(14) relating to disputes that involve child custody, visitation, or child support, also applies to arbitration of those issues. However there is appellate authority that suggests that post-judgment child-related issues that do not involve the three prohibited subjects can be resolved by VTR.

In *Schulberg v. Schulberg*, 883 So.2d 352 (Fla. 3rd DCA 2004) the appellate court upheld a provision in the parties' marital settlement agreement that provided for binding arbitration in the event that they could not agree on whether their minor children should attend private school, and upheld the trial court order entered on that post-judgment arbitration. The appellate court reasoned that what the parties agreed to arbitrate was educational need and that the parties had previously agreed on the allocation of financial responsibility for tuition if the children were to attend private school. While this was an arbitration case, the decision addressed the child-related prohibitions in section 44.104(14), the same section that contains the child-related prohibitions for VTR. It is reasonable to conclude that the outcome on this point would be identical if the method used to resolve the dispute was VTR. (*Schulberg* was decided under Chapter 44, not the Revised Florida Arbitration Code, Chapter 682.)

In *Toiberman v. Tisera*, 998 So.2d 4 (Fla. 3rd DCA 2008) the court held that parties cannot submit a family case to binding arbitration that involves child custody, visitation or child support even by agreement. In *Toiberman* the parties had minor children. They agreed to fully resolve their divorce using binding arbitration. The circuit court referred it to binding arbitration and signed a final judgment based on the result of the binding arbitration. The appellate court reversed even though the issue had not been raised on appeal. The court found that the procedure that was used was "a wholly illegal procedure prohibited by statute." *Id.* at 8. (In *dicta* the court also discussed the inability to bifurcate the issues between circuit court and arbitration.) Since *Toiberman* was decided under section 44.104(14) it is reasonable to conclude that the same outcome would occur if the parties agreed to use VTR in an attempt to circumvent the statutory prohibitions.

There is no statutory authorization for jury trials using VTR, thus VTR trials would be non-jury. In *Merritt v. OLMHP, LLC*, 112 So.3d 559 (Fla. 2nd DCA 2013) the private trial was held before a VTR judge utilizing a jury and held in the courthouse using court personnel. The concurring opinion noted that the issue was not raised on appeal but questioned the ability to utilize jurors, a government courtroom and government personnel to try a VTR case.

PROCEDURE

Parties can file an application for voluntary trial resolution before or after the subject litigation is filed in court. (It is unclear from the statute whether the proper terminology for the pleading is an “application” or a “request.” The nomenclature is not significant.) Once the parties enter into a written agreement to engage in VTR, the parties file an application with the circuit court for the appointment of the VTR judge. The statute provides that within 10 days after the submission of the request, the court shall make the appointment. Fla. Stat. 44.104(4). That statute provides that the trial resolution judge shall notify the parties of the time and place for the hearing. Presumably since the parties are contracting directly with the VTR judge, they are going to be involved in selecting the trial dates and the location of the trial. However to eliminate a potential issue, it is advisable to have the VTR judge comply with the notice requirement.

The application for VTR is filed with the clerk, whether filed pre-suit or while the subject litigation is pending. The statute is silent on content. The clerk may charge a filing fee for the application including in those cases where a complaint is already filed. Fla. Stat. 44.104(5). Filing of the application will toll the running of the statute of limitations. Fla. Stat. 44.104(6). This is an important provision to toll the running of the statute since an application for VTR can be filed before a complaint is filed.

The VTR judge “may administer oaths or affirmations and conduct the proceedings as the rules of court shall provide. At the request of any party, the . . . trial resolution judge shall issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence and may apply to the court for orders compelling attendance and production. Subpoenas shall be served and shall be enforceable in the manner provided by law.” Fla. Stat. 44.104(7).

The trial is conducted using the relevant rules of procedure (civil, family, etc.) and the evidence code. Fla. Stat. 44.104(7) and (9).

The VTR judge is authorized to determine all issues in the case and then enters what is called a final decision. Fla. Stat. 44.104(8). Once the final decision is entered by the VTR judge, enforcement is obtained by filing a petition for final judgment in the circuit court in the circuit where the VTR trial took place. Fla. Stat. 44.104(11). The assigned circuit judge enters a final judgment incorporating the final decision which then functions as an enforceable final judgment.

Upon entry of the final judgment any party may appeal. An appeal of a circuit court VTR trial is to the appropriate district court of appeal. Fla. Stat. 44.104(11). Factual findings are not appealable. Fla. Stat. 44.104(11). No further appellate review is permitted unless a constitutional issue is raised. Fla. Stat. 44.104(12). (Considerations regarding appellate rights are addressed below.)

Section 44.104(13) provides:

If no appeal is taken within the time provided by rules promulgated by the Supreme Court, then the decision shall be referred to the presiding judge in the case, or if one has not been assigned, then to the chief judge of the circuit for assignment to a circuit judge, who shall enter such orders and judgments as are required to carry out the terms of the decision, which orders shall be enforceable by the contempt powers of the court and for which judgments execution shall issue on request of a party.

When the application for VTR is filed before the litigation is filed in circuit court, a circuit judge would need to be assigned the VTR case to act under the statute to sign the order referring the case to VTR and appointing the VTR judge. If the agreement to enter into VTR occurs after the litigation is filed there will already be a circuit judge assigned to the case. That judge would then handle the application for VTR, any court intervention per section 44.104(7), assignment of a special magistrate if the parties agree to use one, entry of the final judgment, and entry of any further judgments and orders under section 44.104(13).

COMBINING VTR WITH A SPECIAL MAGISTRATE

There are two practical reasons to consider utilizing one person to act in the capacity of VTR judge and special magistrate from case inception. First, a significant benefit of using the combination is that you should be able to obtain as much pre-trial hearing time as you need, obtain it quickly, and be able to obtain the benefit of greater flexibility in scheduling of hearings, including evenings and weekends. The second benefit relates to the loss of “institutional knowledge” of the pretrial proceedings. Judges rotate division assignments. When a case takes considerable time to reach trial the judge who tries the case may not be the judge who has heard the pretrial proceedings. In those situations the parties try the case having lost the judge who had significant knowledge of the case. If you decide to use VTR you can prevent that loss of institutional knowledge, or at least minimize it, by having your VTR judge appointed as a special magistrate to preside over your hearings. (See Fla. R. Civ. P. 1.490 and Fla. Fam. L. R. P. 12.492. Florida Probate Rule 5.095 permits appointment of a special magistrate, however whether a probate trial is a “civil dispute” included within section 44.104(1) is an open question.) If you agree to use VTR after the case has been pending for some time, the benefit will still be present, however some institutional knowledge will not be possessed by the special magistrate/VTR judge.

THE PROS AND CONS OF VTR

The benefits in using VTR are many. Judges have a significant number of cases pending in a given division. All cases compete for available hearing time, duration of hearing time, trial dates, and trial length. Of course the number one benefit is that you get to select your judge. If you select your VTR judge carefully, he or she will be able to:

- schedule your trial to be heard quickly on specific dates;
- reach a final decision within a time frame you agree upon;
- work with your schedule and the schedule of your clients and witnesses, including holding trial during evenings and weekends, and if necessary scheduling partial days over multiple weeks to accommodate the schedules;
- provide the amount of trial time needed to fully litigate the case;
- provide a significant degree of privacy for those clients who do not relish the thought of a public trial, so long as the trial is not conducted in a public building.

Other benefits include:

- There is no requirement to attend mediation.
- The ability of the parties to craft abbreviated discovery schedules to meet the rapid trial setting.
- Combining VTR with using the VTR judge as a special magistrate creates one fact-finder who has all the knowledge of the case.
- The ability to quickly obtain all the pretrial hearing time the case requires.
- Reduction in fees and costs for clients by eliminating repetitive docket calls, wasted repetitive trial preparation, and the reduction of motion and discovery hearings that will not be heard because the case is resolved earlier in time.
- More flexibility and certainty in scheduling your expert witnesses, and reduced fees since the expert only needs to prepare for a trial or hearing once.
- Witnesses only need to be subpoenaed once rather multiple times necessitated by multiple docket calls.
- A faster trial reduces the risk of witnesses who can't be found, faded memories, and the complete loss of testimony from more elderly witnesses.
- Greater ability to deal with the unforeseeable problems: a sick witness, client or attorney; a witness who misses their flight or a cancelled flight, etc. Scheduling additional time to accommodate the problem is easier and faster.
- Trials are conducted in a more relaxed atmosphere, with less pressure than in a public courtroom.
- Trials can be conducted in your conference room, in an outside rented space, or in the office of the VTR judge. If conducted in the office of the attorneys the trial can rotate back and forth between offices so that no litigant has the perception of being at a disadvantage. Trials can also be conducted in rental space such as the conference room at a local hotel, or rental space in public buildings such as community centers. (However if conducted in a public building the trial may lose the privacy component.)

That list doesn't take into account the intangibles including:

- The stress to business men and women who have to wait for the outcome of their business dispute thus delaying or preventing them from moving forward on projects, or engaging in business planning.
- The stress of the parties in waiting for their divorce.
- The inability of parties to a real estate dispute to move forward until the dispute is resolved, and the overall uncertainty.
- The client's loss of work productivity which could be cured by holding a trial in the evening or on weekends.

Your client's case will come to conclusion in a fraction of the time it would take in the court system.

Although there is a financial cost associated with VTR and hiring a special magistrate, that should be weighed against the likely fees and costs associated with cases taking longer to conclude and the intangibles. The longer a case is pending in the courts, the more hearings, docket calls, and multiple times the attorneys may have to prepare for trial only to learn that another case will be tried first. All of that generates fees for clients. Due to docket pressures in the courts, clients face less certainty in scheduling, less trial and hearing time availability, and a longer wait for trial and hearing time that ultimately may be less than the time actually needed. Of course none of this is intended by, nor caused by any judge. It is the unfortunate reality of the court system.

The potential negatives with using VTR are cost and somewhat limited appellate rights (discussed below). In addition the parties may still need to resort to the court for orders compelling discovery and imposing sanctions for failure to comply with discovery or other court orders. The calculus of whether the benefits to VTR outweigh the negatives will need to be assessed on a case-by-case basis by the attorneys for each of the parties.

APPELLATE RIGHTS

Appeals from VTR after entry of the final judgment by the circuit judge are to the District Court of Appeal. The factual findings are not appealable. Fla. Stat. 44.104(11), *Gen. Star Indem. Co. v. W. Fla. Village Inn Inc.*, 874 So.2d 26, 29 (Fla. 2nd DCA 2004), *Merritt* at 561. Per the statute, unless a constitutional issue is raised on appeal, there is no appeal beyond the DCA. Fla. Stat. 44.104(11) and (12). Counsel will need to assess whether those two limitations are of significance in the specific case.

FEES AND COSTS

Florida Statute section 44.104(3) provides that the "trial resolution judge shall be compensated by the parties according to their agreement." It is important to spell out the fees and costs associated with the private trial, and who is responsible to pay them. Specific points will be addressed below.

OPEN QUESTIONS

With the scarcity of appellate cases dealing with VTR, there are a number of unanswered questions. As noted, Judge Altenbernd in his concurring opinion in *Merritt* raised several: he questioned the use of a jury, the use of a public courtroom, and the use of government paid court personnel. His points are well taken. The statutory language does not provide for utilization of a jury or government provided space and personnel. In addition, the wording of section 44.104(8) strongly suggests that the fact-finding role rests with the VTR judge alone, not with a jury.

The statute does not address the role of the circuit court judge when presented with a final decision from the VTR judge and a motion for final judgment. Judge Altenbernd raised the question of whether the role of the circuit judge is one of review and discretion or only performing the ministerial act of entering the final judgment. The process is specifically described and limited in section 44.104(11) which provides:

Any party may enforce a final decision rendered in a voluntary trial by filing a petition for final judgment in the circuit court in the circuit in which the voluntary trial took place. Upon entry of final judgment by the circuit court, any party may appeal to the appropriate appellate court. Factual findings determined in the voluntary trial are not subject to appeal.

The wording of the statute does not provide for a review of the final decision by the circuit court judge. Florida Rule of Civil Procedure 1.490(i), Florida Family Law Rule of Procedure 12.492(g) and Florida Probate Rule 5.095(h) each provide a specific method to challenge fact-finding and analysis where those tasks were performed by someone other than the circuit judge. There is no comparable rule or statute providing for a circuit court review of the final decision. In this writer's humble opinion the entry of the final judgment is a ministerial act under the statute. Anything beyond that would essentially amount to an additional level of appellate review. As a practical matter you may be able to eliminate the issue by including in your VTR stipulation that the parties agree that the circuit court's role in entering the final judgment adopting the final decision is ministerial.

Due to the lack of specificity in the statute, and the lack of appellate cases there are additional unresolved issues in using VTR:

- Whether VTR is available in probate disputes.
- Whether VTR is available for trials in county court. (The wording of section 44.104(11) suggests that VTR is limited to circuit court cases. However there is some language that would permit an argument, at least, that VTR is useable in county court civil trials. The issue of whether parties could or should stipulate to use VTR in county court is beyond the scope of this article.)
- Whether the parties in their agreement can authorize the VTR judge to award fees and costs under a prevailing party theory in civil cases. This is

an important question if one party agrees to initially pay all the fees and costs associated with VTR (and use of a special magistrate), with a concurrent agreement to permit the shifting of fees and costs in the final decision and final judgment.

- Whether a party can appeal discovery, evidentiary or other rulings made during trial that resulted in the admission or exclusion of evidence, or whether it is foreclosed due to the inability to appeal factual findings in the final decision.

There are undoubtedly other questions that are unanswered and counsel in evaluating the use of VTR in a particular case will need to look out for them and weigh them in deciding to use VTR.

PUTTING THIS INTO PRACTICE

A. Making The Decision Whether To Use VTR

Counsel and the client will need to engage in an in-depth evaluation of the case they are considering for VTR.

The first question is whether the case can be tried using VTR under section 44.104. If it is not, then of course the analysis is concluded.

If the answer is yes, the second question is whether the client's civil dispute or divorce would benefit from a faster resolution than waiting for hearings and trial in the court system.

If the answer is yes, then the third question is whether the civil dispute is one that would provide a right to trial by jury. If there is no right to a jury trial, then of course the client would not be waiving one by using VTR. If there is a right to trial by jury then an assessment needs to be made whether the benefits of using VTR outweigh the benefit to a jury trial. Some factors to consider are:

- Do juries in the venue have a track record with respect to verdicts in cases of the type in the litigation?
- Do juries in the venue have a track record of being liberal or conservative? Favoring plaintiffs or defendants? Favoring individuals or corporations? In cases involving insurance companies?
- What is the track record in the venue regarding the size of jury verdicts?

The assessment should also include a determination of how long it will take to obtain a trial by jury and whether the speed of a VTR trial would be a benefit that outweighs the trial by jury.

The fourth question will require an educated "best assessment" evaluation. If the case is tried in circuit court is it likely to yield a viable appeal on factual findings, and if so,

what is the likelihood of a reversal on factual findings? (It is respectfully submitted that such successes are rare given the deference accorded trial judges in making factual findings.) If a reversal based on factual findings is unlikely, then the loss of the appellate right to review of factual findings is not a meaningful loss.

As noted, if the case contains a constitutional issue to be decided at the trial court level section 44.104(1) precludes use of VTR. If the case does not contain a constitutional issue to be tried, is there a potential that one will develop during the trial that could be appealed? This too will require an educated “best assessment” evaluation. On occasion (but not often) a constitutional issue arises during the course of a trial. That does not preclude use of VTR, and in fact would open up the appellate pathway to the Florida Supreme Court. If that does not occur, there will be no ability to appeal the case to the Supreme Court. Counsel in each case will need to evaluate whether the loss of a potential appeal to the Supreme Court is a factor of significance to the client.

The greater your confidence in the proposed VTR judge’s ability to make detailed, impartial, and accurate factual findings based on the evidence, the lower the risk of the inability to appeal factual findings. Further, if the case is not one that is likely to be taken to the Florida Supreme Court due to finances, lack of an anticipated viable issue, or for any other reason, then the loss of the ability to appeal to the Supreme Court would not be significant.

Of course the process is not as simple as one attorney and one client deciding to use VTR in a case. Your case will likely fall into one of these categories:

1. All the parties agree to try the case using VTR (or have a contractual provision that requires it), agree on the VTR judge, and have a written agreement with the VTR judge. This is the easiest scenario to work with. All parties and their attorneys sign an agreement with the VTR judge. The parties and attorneys sign the application and obtain a court order of appointment of the VTR judge.
2. All the parties agree to try the case using VTR (or have a provision in a contract that requires it), but have not agreed on the VTR judge. All parties and their attorneys sign the application. A hearing will need to be held for the circuit judge to select the VTR judge. The parties will then need to contract with that fact-finder.
3. The parties do not agree to try the case with VTR but a contractual provision requires it. All the parties would either jointly agree to waive that contractual provision and pursue their trial in circuit court, or one or more parties will need to file a motion to compel VTR in the circuit court. If the circuit judge orders the parties to utilize VTR, the circuit judge will need to select the VTR judge if the parties can’t agree on a selection. The parties will then need to contract with that fact-finder.
4. If all the parties are not in agreement to use VTR, and there is no contractual agreement that requires VTR, or the case falls into one of the statutory prohibitions (including unwilling third parties), you won’t be using VTR in the case.

If you and your client decide to utilize VTR it would be advisable to maintain in your records a document signed by your client that clearly details and explains the VTR/special magistrate process that will be used, the benefits and potential pitfalls, including the limits on appeal, the name of the VTR judge, and the fees and costs associated with the process.

B. Choosing Your Fact-Finder.

You will need to choose the person you want to be your fact-finder (VTR judge). (The same analysis applies to choosing a special magistrate. If the VTR judge and special magistrate will be the same person, this analysis will cover both roles.) The key is to identify a person that you feel comfortable has a track record of unbiased, even-handed, accurate fact finding. Will it be a qualifying attorney, a retired magistrate, or a retired judge?

If you opt to use a retired magistrate, check with other attorneys who have practiced before the magistrate to assess his or her track record. Did they have a record of unbiased, even-handed, accurate fact finding as a magistrate? How often were their reports the subject of objections requiring review by the judge and what were the outcomes of the objections? If you opt to use a retired judge, check with attorneys to assess the track record of that judge. Do they have a record of unbiased, even-handed, accurate fact finding? You can run their name in Westlaw and Lexis to determine their appellate record. How often were their factual findings a subject in appeals? What was the outcome? If you opt to use an attorney you will have a more difficult analysis based on the fact that you will not be able to examine any objective track record in the relevant areas of inquiry unless they have created a record by acting as a special magistrate. Effective advocacy requires a different skill set than that required for effective neutral fact-finding.

While you are engaging in the evaluation to select your VTR judge (and special magistrate) you will also need to determine if the person under consideration has a good track record of sound legal analysis.

Due to the seriousness of the endeavor, and the fact that the factual findings in the VTR final decision can't be appealed, question your proposed VTR judge and special magistrate to determine whether they have had experience, training or educational courses to equip them to effectively act in those roles, and if so the nature and extent of that training.

If you elect to use a person as your VTR judge or special magistrate based on their expertise in the subject matter of the litigation exercise caution. This is a significant benefit in mediation where the mediator is not a fact-finder. In hearings before a special magistrate or in VTR this is a dual edged sword. You will be getting someone who understands the subject matter, however you risk a situation where the fact-finder substitutes their knowledge of the subject matter for the testimony of your witnesses. There is a difference between having a fact-finder who will easily understand a topic,

with a fact-finder who will substitute their own knowledge in assessing witness credibility, and testimony, and in making factual findings. That is a risk in arbitration, VTR, and utilizing special magistrates.

If the parties agree to use VTR or have a contract provision that requires resolution of the dispute by VTR, but the parties can't agree on the selection of the VTR judge, upon application to the circuit court the judge will make the appointment. Fla. Stat. 44.104(2). This would require a noticed hearing to allow the parties to present evidence about the qualifications of the fact-finder they wish to have appointed. It would assist the judge in making the decision if the parties were prepared to present evidence regarding why their choice is the appropriate one. The evidence at a minimum should include the fact-finder's training and experience in matters that are relevant to acting as a VTR judge, fees, availability, and flexibility in scheduling. There is no provision in the statute for the court to compel a VTR judge to accept the role. This could arise as an issue where one or more parties do not agree with contract provisions required by the VTR judge or their fee structure. The statute is silent on the court's ability to impose the fee or other contract provisions on the parties.

C. Timing The Filing The Application For VTR

As noted earlier, the application for VTR, whether filed pre-suit or after the subject litigation is pending, is filed with the clerk. Check with your clerk of court. The clerk is required by section 44.104(5) to handle these matters as civil actions, however they are required to keep the records separate from all other civil actions. Thus if your application is filed with or after the litigation itself is filed, the clerk may assign a separate case number to the application and all paperwork associated with it. If you check with the clerk first, you may make their job and yours easier from the initiation.

If the application is filed to resolve litigation that is already pending in the court system, the process will be relatively straightforward. If the VTR trial is held before the litigation is filed with the court there are a number of issues for the attorneys to address:

- How will the issues be framed in a due process fashion? How will each party know what is being pursued or what they are defending against?
- How will a VTR judge know what the issues are and how they are limited?
- How will motions directed to a complaint, counterclaim, cross-claim, etc. be addressed?
- Will discovery be engaged in? If there are disputes, who will decide them in a binding fashion or enter orders compelling production?
- Who will hear and decide any other pre-trial issues?

If the pleadings for the litigation (complaint, counterclaim, crossclaim, answers, motions to dismiss, etc.) are filed shortly after the filing of the application, the questions posed above are not an issue. However if the pleadings are not filed with the clerk, those issues will need to be addressed.

Whether the application is filed before or after the actual litigation is filed, the parties will need to address who will maintain the trial exhibits at the conclusion of the trial. Will they be filed with the clerk or returned to the parties at the conclusion of the trial?

It is difficult to envision a scenario where the parties are better served in using VTR pre-filing except in either a situation where the pleadings are filed with the court shortly after filing the application, or where the parties wish to structure the litigation in a completely private fashion. While I can conceptualize a framework for a completely private civil trial where the dispute, evidence, trial, and outcome are purely private, the reality is that if the parties wish to avail themselves of the court's authority under section 44.104(7), the enforcement provisions under section 44.104(13), and a remedy on appeal, at some point prior to the entry of the final decision, the pleadings will need to be filed with the court.

D. Employing The VTR Judge (And Special Magistrate)

It would be wise for the attorneys and parties to enter into their agreement with the VTR judge before filing an application with the court. At a minimum, the terms should address:

- Fees. Will the parties be paying an hourly rate or by the day? What are the rates? If by the day, what hours does the day encompass? Will the parties be paying for travel? For work by the VTR judge to prepare for the trial? To prepare the final decision? What other fees are involved? What expenses will the parties be responsible for? What fees and expenses will the parties be responsible for if the case settles, if all parties agree to withdraw from VTR, or the VTR judge becomes disqualified?
- What will the start and end times be each day? Will the trial be held in the evening or on weekends? If so, is the fee for the VTR judge different for evening and weekend sessions?
- Will there be costs associated with the trial? If so, who is responsible to pay them?
- Where will the trial be heard? In the offices of the attorneys? Will the trial rotate between the offices? Will outside "neutral" space be obtained? At whose expense? What city and county will the trial be heard in?
- Will a court reporter be used? At whose expense?
- Who will provide any technology that is needed? Will there need to be testimony by technology? How will that be handled and at whose expense?
- How will the fees and costs be paid? Daily? At the conclusion of the trial? Upon entry of the final decision? If the fees or costs are not paid equally, will they be paid in the blind to avoid an appearance of favoritism?
- If enforcement orders are needed under section 44.104(7), and the VTR judge applies to the circuit court for an order, who will schedule the hearing in the circuit court and pursue the order? (You should *not* have the VTR judge take on that role. It will turn the VTR judge from a neutral to an advocate.)

- How will the evidence be dealt with? Will it be held by the VTR judge at the end of the case? Will it be filed with the clerk? Will it be returned to the parties to preserve? (Since factual findings are not appealable, the parties have the flexibility to agree that all exhibits would be returned to the parties after entry of the final decision, rather than filing them in the public court file.)
- How will the parties address a desire to withdraw from the VTR trial, or to disqualify the VTR judge?

It is recommended that the parties incorporate into their agreement that the VTR judge can only be removed by joint agreement of all parties, or based on grounds for disqualification that would be legally sufficient if the case were being heard by a sitting circuit judge. This is critical at a minimum to prevent one party deciding to stop the process because of adverse rulings during trial or before the trial. However if all parties agree to removal, provision should be made for that potential. The parties should also be sure that the agreement with the VTR judge spells out what fees if any would be due if that occurs.

Florida Statute section 44.107 provides immunity for mediators and arbitrators. Florida Statute section 682.051 provides immunity for arbitrators. Chapter 44 does not provide immunity for VTR judges. The VTR judge may require an immunity provision in their contract.

Many of these same points need to be addressed for the role of special magistrate.

E. Content Of The Application For VTR

Like any pleading the application should include the usual heading as required by the rules of court (See e.g. 12.900(a), 1.901(a) and 2.510(b)). You will need to determine what case style and case number to use for the application. Determine if the circuit you are filing in has an administrative order dealing with VTR, and whether that order addresses filing and content of the application. If the application is filed for a pending case the question will be whether the style of the application mimics the style of the litigation and contains the same case number in light of the “separate records” requirement in section 44.104(5).

If the application is filed prior to filing the actual litigation, or if the clerk provides a different case number for the VTR portion of litigation that has already been filed, a suggestion for style of the application is as follows:

IN THE CIRCUIT COURT OF THE ____ JUDICIAL CIRCUIT
IN AND FOR ____ COUNTY, FLORIDA

[Case number provided by the clerk]

IN RE THE APPLICATION FOR
VOLUNTARY TRIAL RESOLUTION

_____,

v.

_____.

APPLICATION FOR VOLUNTARY TRIAL RESOLUTION

If the application is filed for a case that is already filed and pending, and the clerk maintains the documents in the case dealing with VTR separately without opening a new file or issuing a new case number, you would need to use the case style and number of the existing litigation.

The statute is silent on the actual content of the application. Whichever method the clerk uses for case filing, suggested content of the application includes:

- That the parties have agreed in writing that the dispute will be resolved utilizing VTR pursuant to Fla. Stat. 44.104, or that a contractual provision requires it.
- Attach the written agreement to use VTR signed by all the attorneys and all the parties. If the agreement is by prior written contract provision, consider attaching the relevant sections of the contract.
- If the VTR application covers existing litigation but is assigned a separate case number, insert the case style and case number of the pending litigation in a paragraph in the application and a statement that the pending litigation will be tried in its entirety using VTR. If the VTR application is filed using the same case style and case number as the pending litigation, then insert a statement that *all issues in this case* will be tried using VTR.
- If the application is filed for litigation not yet filed in the circuit court, it is suggested that the parties be *very* specific regarding the parties to the litigation, and the specific matters submitted for trial using VTR. (Spend the time and effort to be specific at the front end to avoid potential significant problems and additional costs later if one of the parties were to contend that a topic was not in the VTR agreement thereby permitting or creating subsequent litigation.)
- Whether the parties have agreed on the selection of the VTR judge to try the case. If the parties have agreed, consider attaching your written agreement with the VTR judge. This will identify the VTR judge, provide the contact information, and the details of the fee agreement. (The order of referral to VTR can then direct the parties to comply with the terms of the contract. Your VTR judge may require this in his or her contract.)

- That the proposed VTR judge is a member of the Florida Bar in good standing for over five years.
- That no constitutional issue is involved in the litigation. In a civil case, that the dispute does not involve the rights of third parties not a party to the voluntary trial resolution. In a family case, that the litigation does not involve issues of child custody, visitation, or child support.
- A prayer for a court order referring the case to VTR for trial of the disputes outlined in the VTR agreement or contract provision, appointing the VTR judge, incorporating the terms of the contract with the VTR judge, and directing the parties to comply.

F. Appointment Of A Special Magistrate

If the parties have agreed to use a special magistrate it is advisable to obtain the appointment by way of stipulated motion at the same time the application for VTR is filed. The mechanism to address the appointment may depend on the stage of the actual litigation.

If the underlying litigation is already filed, the parties can file a motion for appointment that complies with the applicable special magistrate rule. If the parties intend for the special magistrate to hear all pretrial matters, the parties' stipulation to engage in VTR should include that agreement. Counsel will need to determine from the presiding judge whether he or she will enter an omnibus appointment order to eliminate the need to obtain a referral order from the court for each magistrate hearing. If all the parties stipulate to the appointment of the special magistrate and agree that *all* hearings will be heard by the special magistrate without the need for individual referral orders, the circuit judge may find that acceptable and not require a referral order for every hearing. Otherwise you will be faced with obtaining individual orders for each magistrate hearing.

If the underlying litigation has not been filed, you may be faced with an issue and two choices. There is an argument using Rules 1.010 and 1.050 that the filing of the application for VTR as a "special statutory proceeding" makes the relevant civil rules applicable to the action, including the magistrate rule. The same is true using Rules 12.010(1), 12.010(2) and 12.050. As an alternative the parties can determine if they wish to include in their stipulation, the application for VTR, and the order of referral to VTR, a provision reciting that the parties agree that the VTR judge will hear all pretrial matters and the parties agree to be bound by the rulings. Of course this second method eliminates the ability to have exceptions heard by the circuit court.

If the parties agree, remember to include in the order appointing the special magistrate that the magistrate hearings will be held in the county where the case has been filed, *or in such other locations as agreed to by all parties.* (See Fla. R. Civ. P. 1.490(d) and Fla. Fam. L. R. P. 12.492(c).)

G. Location Of The Trial

In deciding the location for the VTR trial, keep section 44.104(11) in mind. That section provides that the petition for final judgment will be filed in the circuit court in the circuit *where the trial occurred*. If for convenience reasons you decide to try the VTR trial in a circuit that is different from the circuit you filed your application and litigation in, it may cause your appeal to end up in a DCA other than the one you anticipated. The appeal will go to the DCA that serves the circuit that entered the final judgment. You don't want to create a split in your case between circuits, having your litigation filed in one circuit and the final judgment entered in another. This split will create an issue of which court will issue orders to compel or production under section 44.104(7), and which court will enter enforcement orders pursuant to section 44.104(13). On the other hand, section 44.104(11) does not specify which county in multicounty circuits the filing must occur in. Thus in those situations the trial could occur in a more convenient county in the same circuit without causing a change in DCA.

H. Post-Trial

One of the parties (or both by way of stipulation) will need to obtain a final judgment from the circuit court. The statute does not specify content. As with the application something simple should suffice that declares that by agreement of the parties the case was tried before a VTR judge, the VTR judge has entered his/her final decision, and pursuant to Florida Statute section 44.104(11) the parties seek entry of the final judgment incorporating it. It is recommended that you attach the final decision to the motion, and that the final decision be attached to the final judgment which specifically recites that the final decision is incorporated as the final judgment in the case.

I. General Considerations

If the parties elect to use VTR, take the time and expend the effort needed to craft the stipulation of the parties for using VTR. Recite specifically what is being tried, and if the parties agree on the choice of the VTR judge specify it. Outline any agreements regarding payment of fees and costs. If the parties are using a special magistrate include agreements regarding it. In lieu of using a special magistrate, if the parties are agreeing to have the VTR judge hear some or all of the pretrial motions, and agree to be bound by the rulings, be specific. Address what will be done with the exhibits at the end of the trial. If the parties agree that the entry of the final judgment is a ministerial act, include that fact in the stipulation. Address where the trial and hearings will be held: in the attorney's offices; rotated between offices; in the VTR judge's office; in public rented space; or private rented space? What city and county will the special magistrate hearings and the trial be held in? Do one or more of the parties need evening or weekend trial time and do the other attorneys agree? The more specific the parties are in anticipating issues and addressing them in the agreement, the smoother the trial process will be, and the lower the ultimate cost will be. Spending 30 minutes at the front end is always easier and less expensive than spending days at the back end to clean up a problem that was preventable.

A note of great caution - if the parties engage in mediation I *strongly* recommend that you not use the mediator as your special magistrate or VTR judge. This can't be emphasized too strongly. A neutral fact-finder should never be exposed to what occurs in mediation. A mediator comes in direct contact with the litigants in a meeting that specifically involves the case, is involved in confidential discussions with each party about the case, the content of which likely includes information that would be inadmissible at a trial or hearing. The mediator is exposed to statements by the parties or the attorneys regarding the merits of their positions, and the lack of merit of the other parties' positions. This conduct is routine in mediation and doesn't raise any issue in mediation. Deciding litigation is a completely different creature. The individual interaction is a problem if the mediator is ultimately a fact-finder as a VTR judge or special magistrate for the case. If this occurred in a case to be tried in circuit or county court, as an advocate your first two thoughts would be disqualification of the judge or magistrate, and a referral of the attorney to the Bar. There is no effective difference between the sitting judge and the sitting magistrate, and the special magistrate and VTR judge. In both instances your case would be decided by a fact-finder who had been compromised. *Do not combine these two roles.*

A few general litigation pointers. When I heard cases as a judge I observed these issues often. As in any hearing or trial, make your opening, present your evidence, and make your final argument in as linear a fashion as possible. This makes it substantially easier for your fact-finder to evaluate the evidence, make factual findings, and produce a logical coherent ruling. If due to witness scheduling you will not be able to make a linear presentation, address that in your opening statement to the VTR judge to enable him or her to clearly understand the total picture and how the witness or witnesses will fit into the complete picture. This can be done without turning over all your cards. As in any trial, if you are seeking a specific amount of damages, alimony, or any other financial component, be specific. Give your fact-finder the amounts and how you arrive at the figures rather than hoping that they will come up with the same numbers. In addition, you know your case, the critical facts and the critical issues better than anyone else. Be clear and specific with the magistrate and the VTR judge and advise them exactly what facts you are asking them to find, and the specific issues you want to have addressed. All of this is particularly critical in the VTR trial. If the final decision does not address an issue, or does not address certain facts, you will be without a remedy.

Do not forget to establish in the record of the trial by way of a printout from the Florida Bar website or otherwise, how long the VTR judge has been a member of the Florida Bar in good standing, and ask the VTR judge to include the finding in the final decision.

J. In Conclusion

In an appropriate case this is a dream for litigators – a custom-made trial. Utilizing VTR and special magistrates can dramatically speed the progression of your case to conclusion. It provides great flexibility to structure trial dates, hours, location and conduct to suit your needs, and the needs of your clients and the witnesses. It permits the parties considerable latitude in crafting how their case will be tried. In many cases it

will be more cost effective than the combined cost of a case that moves slowly and drags on.

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