



# BENCHBOOK FOR ARBITRATORS

## NORTH CAROLINA COURT-ORDERED ARBITRATION PROGRAM

PREPARED BY  
OFFICE OF GENERAL COUNSEL AND COURT PROGRAMS DIVISION  
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# BENCHBOOK FOR ARBITRATORS

Serving in the North Carolina Court-Ordered Arbitration Program

## ACKNOWLEDGEMENTS

Carmon J. Stuart chaired the committee that was charged by the Legislature and Supreme Court with establishing Court-Ordered Arbitration for the North Carolina Courts. He co-authored the original program rules with Professor George K. Walker. He also wrote the first Benchbook for Arbitrators in 1987. Much of his original text is still found in this edition today.

Credit also goes to Former Trial Court Administrator Kathy Shuart, Former North Carolina Administrative Office of the Courts Director Dan Becker, Frank C. Laney of the North Carolina Bar Association, and Stevens Clarke of the Institute of Government (now University of North Carolina School of Government) for their dedication and energy in bringing the court-ordered arbitration program to reality.

Current and past amendments have been made to this Benchbook with contributions by the staff in the North Carolina Administrative Office of the Courts Office of General Counsel and the Court Programs Division and also the North Carolina Bar Association.

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### **About the North Carolina Judicial Branch**

The mission of the North Carolina Judicial Branch is to protect and preserve the rights and liberties of all the people as guaranteed by the Constitutions and laws of the United States and North Carolina by providing a fair, independent and accessible forum for the just, timely and economical resolution of their legal affairs.

### **About the North Carolina Administrative Office of the Courts**

The mission of the North Carolina Administrative Office of the Courts is to provide services to help North Carolina's unified court system operate more efficiently and effectively, taking into account each courthouse's diverse needs, caseloads, and available resources.



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# INTRODUCTION

In 1986, the General Assembly enacted legislation authorizing the Supreme Court of North Carolina to establish an experimental program of court-ordered, non-binding arbitration for claims for money damages of \$15,000 or less. The Court adopted rules developed by the North Carolina Bar Association and on January 1, 1987, a controlled arbitration experiment began in three pilot sites designated by the Court: the Third Judicial District (Carteret, Craven, Pamlico and Pitt Counties); the Fourteenth (Durham); and the Twenty-Ninth (Henderson, McDowell, Polk, Rutherford, and Transylvania). Based on this experience, the Supreme Court recommended, and the General Assembly enacted, legislation authorizing court-ordered, non-binding arbitration statewide.

In April 1994, the North Carolina Supreme Court Dispute Resolution Committee, chaired by then Justice Henry E. Frye, undertook an evaluation of the Program's effectiveness at the request of the General Assembly and James C. Drennan, then Director of the NCAOC. That study, which looked at whether the Program was meeting the goals established for it by the legislature, had high praise for the Court-Ordered Arbitration Program, "[A]gainst every measure, court-ordered, non-binding arbitration is a success, enhancing government's responsiveness to its citizens".<sup>1</sup>

In 2011, the Alternative Dispute Resolution Subcommittee of the North Carolina Judicial Council approved amendments to the rules. Those changes were enacted by Order of the Supreme Court of North Carolina and effective on January 1, 2012. The revision included a complete renumbering of the rules and the addition of many subsections and comments in an effort to provide clarity to areas that had proven unsettled since the program's inception. On August 25, 2021, the Supreme Court of North Carolina entered an order amending Rule 6, effective October 1, 2021, authorizing arbitration hearings to be conducted by audio and video transmission (AVT) following the requirements applicable to judicial officials in G.S. 7A-49.6.

Attorneys who offer their services to the court as arbitrators assume a great responsibility. The success of court-ordered arbitration depends to a large degree upon the abilities and dedication of the arbitrators. An arbitrator acts as an arm of the court by judicial appointment, bound by an oath similar to that of a judge. Arbitrators are empowered with the authority of a trial judge to conduct hearings and to decide their outcome. Acting as sole juror in finding the facts, as judge in applying the law, and as arbitrator in rendering an award, the trial lawyers who participate as arbitrators have found the role to be a challenging and rewarding one.

The objectives of this Benchbook are to standardize procedures and to provide guidance for arbitrators in applying the rules. We hope you will find both the Benchbook and the training course which accompanies it helpful as you make the transition from advocate to neutral. More importantly, we hope you will enjoy your work as an arbitrator and derive satisfaction from knowing that you are contributing to the improvement of the North Carolina Courts.



# BECOMING AN ARBITRATOR

## I. Eligibility and Training

All prospective arbitrators must meet the following requirements:

1. Be a member in good standing of the North Carolina State Bar;
2. Have been licensed to practice law for five years,
3. Have been admitted to practice law in North Carolina for at least the last two of the required five-year period,
4. Complete an arbitrator training course,
5. Observe at least one arbitration conducted by a court-approved arbitrator, and
6. Have a valid email address.

Arb. Rule 3(a).

## II. Process for Application

Eligible persons seeking to be qualified as an arbitrator begin the process by submitting the NCAOC form, Application To Be An Arbitrator. All documents showing the eligibility requirements set forth in Arb. Rule 3(a) must accompany the application. The package should be presented to the chief district court judge for each of the counties in which the arbitrator intends to serve. Arb. Rule 3(b).

## III. Oaths of Office

Arbitrators shall take an oath or affirmation and it is recorded on the AOC-CV-808, Oath/Affirmation. The oath is administered by the chief district court judge (or his/her designee) who approved the applicant as an arbitrator. The original oath should be filed with the clerk of superior court in the county where the oath was administered. A certified copy of the oath must be filed with the clerk of superior court's office in each county in which the arbitrator serves. Arb. Rule 3(c).

## IV. Ethical Responsibilities

Arbitrators must comply with the Canons of Ethics for Arbitrators. They are to recuse themselves from any case wherein there is a potential conflict. Arbitrators should inform the court as soon as possible of their recusal, any basis for their disqualification, conflicts of interest, or unwillingness or inability to serve. Arb. Rules 3(d) and (e). Such notification is important to allow time for waiver of disqualification by parties, with judicial consent, or the appointment of a replacement arbitrator. Arb. Rule 4(c).



# PREPARING FOR THE HEARING

## I. Responsibilities of the Arbitration Coordinator

The court will notify arbitrators of their selection and appointment, the case assigned for arbitration and the date, time, and location of the hearing or if the hearing will be conducted using AVT. Arb. Rules 4(a) and 6(a).

The Rules recognize the exclusive authority of the court to schedule and to continue hearings, to rule on pre-trial motions, and to defer consideration of issues raised by motion to arbitrators for determination in the awards. Arbitrators are not to be burdened with pre-hearing administrative or judicial duties. Arb. Rule 6.

The arbitration coordinator will handle all incidental arrangements for hearings and any scheduling changes due to emergencies, thereby relieving arbitrators of all such responsibilities.

## II. Responsibilities of the Arbitrator

Since Arb. Rule 6(k) forbids ex parte contacts with arbitrators by parties and their counsel, it follows that the arbitrator should not initiate such contacts about a case.

Arrive prior to the arbitration in order to have time to collect the file from the arbitration coordinator or the clerk of superior court and review the pleadings and other pertinent information. The arbitrator should arrive before the parties in order to ensure there is a neutral party present as these cases often involve parties with a great deal of animosity. This also gives the arbitrator adequate time to ensure the provided facilities are in order prior to the arbitration.

If the hearing will be held via AVT, the arbitrator should communicate with the arbitration coordinator in advance of the hearing to determine how to access the file.

## III. Responsibilities of the Parties

Arb. Rule 6(d) requires the pre-hearing exchange of witness lists, documents, issues, and contentions to preclude surprise, effect pre-hearing authentication of documents, and expedite proceedings. Failure to comply with Arb. Rule 6(d) should not delay a hearing but may result in the arbitrator's refusal to admit documents into evidence under Arb. Rule 6(d) or a more severe sanction under Arb. Rule 6(o).





# CONDUCTING THE HEARING

## I. Authority; Nature of Proceeding

1. Cases come before arbitrators by order of a court and pursuant to law. Arb. Rule 2. Arbitrators are approved by the court, required to take an oath similar to that of a judge, and empowered to administer oaths, in accordance with statute, to witnesses. Arb. Rules 3(a), 3(c), and 6(g). Arbitrators have the authority of a trial judge in governing the conduct of hearings, except the power to issue contempt orders, issue sanctions, or dismiss the action. Arb. Rule 6(i).
2. Arbitration hearings are official court proceedings, hence the use of court premises for conducting those hearings, the availability of the power of the subpoena, and the ability of parties to call witnesses and enter evidence. Arb. Rule 6(f), (g) and (h). The law of evidence does not apply, except as to privileges, in arbitration, and the arbitrator shall consider all evidence presented. However, the arbitrator may use the rules as a guide when deciding the appropriate weight and effect of such evidence. Arb Rule 6(j).
3. The court may at any time exempt or withdraw any action from arbitration on its own motion, or on motion of a party. Arb. Rules 2(b) and 6(s). Arbitrators may properly regard themselves as exercising delegated judicial authority, which carries responsibility for the manner and result of the hearing, including a duty to report to the court any professional misconduct or violation of any rules or laws, including those warranting sanctions.
4. Given the nature of the cases subject to court-ordered arbitration, the arbitrator may encounter a significant number of pro se, or self-represented, litigants. However, the rules do not establish a separate standard for self-represented litigants. A serious lack of understanding due to, for example, an unfamiliarity with the rules or insufficient preparation by a self-represented litigant or attorney may make it difficult to hold a fair hearing within the limits of the letter and spirit of the rules. This fact alone may mean that initially the arbitrator must explain more about the hearing, which may cause problems during the hearing. For example, a lack of familiarity with the rules may mean the parties or attorneys have not exchanged documents before the hearing. This should not be grounds for a continuance. In such cases, the arbitrator should attempt to resolve the problem by any fair, reasonable, and lawful means. Some options for addressing the problem may be holding a discussion with the parties in the nature of a pre-hearing conference or requiring strict adherence to the rules.



5. Designation of a matter for arbitration does not affect the parties' rights to file motions before the court. The arbitrator may not rule on any pending motions. The court may defer consideration of issues raised by motion to the arbitrator for determination in the award. Arb. Rule 6(s). However, the arbitrator may accept testimony regarding the existence of pending motions. Pending motions are not valid grounds for the continuance of an arbitration unless the court so orders. Instead, the arbitration should take place and the award should resolve all issues.
6. Under Arb. Rule 6(t), the parties may elect, in writing, that the arbitration be binding. This should not change the proceeding. No party is deemed to have consented to binding arbitration unless the consent is on the proper NCAOC form.
7. Arb Rule 6(c) provides the proper procedure for a continuance. A written motion for continuance should be submitted to the court before whom the case is pending at least 24 hours prior to the scheduled arbitration. These motions, like others, should be decided by the court and not by the arbitrator. Arb. Rule 6(s). Any request for a continuance at the arbitration hearing should be denied. The arbitrator should continue with the arbitration unless a continuance was granted by the court prior to the arbitration and the arbitrator was noticed by the arbitration coordinator or other court designee. Additionally, any pre-arbitration settlements should be reported to the court at least 24 hours prior to the start of the arbitration.





## II. The Hearing Ambience

The procedural details and manner of conducting a hearing are left largely to the individual arbitrator's discretion. One caveat, though -- it is important that the hearing be conducted with decorum and that litigants leave feeling they have had their "day in court." As the one in charge, it falls to the arbitrator to set the tone for the hearing and to ensure that other participants conduct themselves appropriately, showing respect for the arbitration process and for others participating in the hearing.

A litigant's perception of the arbitration process will be largely shaped by his or her perception of the arbitrator. Litigants will study their arbitrator and may be influenced in their appraisal and acceptance of the award by factors such as the arbitrator's dress, appearance, general demeanor, courtesy, and manner of greeting or addressing counsel. It is important for an arbitrator to avoid appearing pompous or, at the other end of the spectrum, too casual or "chummy". Somewhere between those two extremes an arbitrator should develop a personal style with which he or she is comfortable, and which suits the arbitrator's temperament.

Arbitration involves litigants more directly and intimately in the proceeding than does a bench trial. Arbitrators have an opportunity to show their concerns for the rights of people and their dedication to the fair administration of justice by the way they treat litigants.

It is appropriate to address an Arbitrator as "Mr./Madam Arbitrator" or "your honor." Arbitrators should not allow participants to smoke, eat or drink, read newspapers, or engage in other disrespectful or disruptive conduct during a hearing.



### III. Opening the Hearing

1. The arbitrator should begin by calling the hearing to order and having parties and counsel introduce themselves. The arbitrator should then spend a few minutes on general information targeted to the litigants: the arbitrator's background (years of practice), role in the proceeding, and a brief explanation of the arbitration process. This is a good time to remind participants of the time limits on arbitrations under Arb. Rule 6(q) and discuss permitted recording under Arb. Rule 6(m).
2. A brief preliminary conference or opening statements by counsel (where the arbitrator is free to ask questions) gives the arbitrator a good chance to identify the essential issues in the case, to clarify existing stipulations, to suggest agreements to obviate some testimony, to help narrow the parties' settlement positions, to resolve procedural problems, such as the authenticity of documents, and to explain any special ground rules in the case.
3. The notes an arbitrator makes during a proceeding are privileged and not subject to discovery. If the arbitrator makes a recording as a substitute for note taking, the arbitrator should explain that what is recorded is also privileged and not subject to discovery and an arbitrator may not be called as witness in a later proceeding. Arb. Rule 9(e).
4. The arbitrator should make sure all parties are present in person or through counsel, if necessary. Arb. Rule 6(n). A litigant may proceed in arbitration pro se, or self-represented, and in forma pauperis in the same manner and with the same rights and responsibilities as in a trial court. Arb. Rule 6(n) and (p). If the party is a business, corporation, limited liability corporation, unincorporated association, or other party that is not a "living human being" as defined in Arb. Rule 1(b), the party is required to appear through counsel. They may not represent themselves in cases except for small claims. G.S. 84-4, G.S. 7A-228(e), *LexisNexis v. TRaviSHan Corp.*, 155 N.C.App. 205 (2002).

If an arbitration is scheduled and a party not permitted to proceed pro se appears without counsel, the arbitration should proceed; this should not be grounds for a continuance. Arb. Rule 6(n) does not mandate that a parties' counsel or representative have authority to make binding decisions beyond those reasonably necessary to present evidence and adequately represent the party in the arbitration. Specifically, the counsel or representative is not required to have settlement authority.



5. If a party who was notified of the arbitration hearing does not appear, the hearing should proceed, and an award may be made against the absent party upon the evidence presented by the parties present but not by default for failure to appear or by dismissing the case. Arb. Rule 6(l). If the party with the burden of proof does not appear, usually an award of \$0 is appropriate. If the defendant does not appear, then an award as indicated by the plaintiff's credible evidence should be made. The arbitrator should also report a parties' failure to appear to the court.



## IV. Hearing Procedures

1. An arbitration proceeding is like a short trial, with one important exception: unless the parties are satisfied their case was heard and considered fairly, they do not have to accept the decision. It is important that, during a hearing, the arbitrator foster a sense of fairness which will encourage respect for the award.
2. Lawyers, accustomed to having unlimited time to examine witnesses and make their arguments during a trial, may need encouragement and guidance from the arbitrator to stay within the one-hour time limit established for arbitration proceedings. Lawyers who persistently ignore requests to move their presentation along or who otherwise refuse to participate in good faith may be sanctioned by the court. Arb. Rule 6(o). It is important that arbitrations are limited to the time provided unless a party has properly filed for an enlargement of time or the arbitrator determines at the hearing that more time is needed to ensure fairness and justice to the parties. Arb. Rule 6(q). An arbitrator is not required to receive repetitive or cumulative evidence. Arb. Rule 6(q)(2).
3. The arbitrator should allow brief closing arguments. Through such arguments, litigants may gain a better understanding of the case and their respective positions and be more willing to accept the arbitrator's award.
4. In exceptional cases, an arbitrator is permitted to receive post-hearing briefs if submitted within three days after the hearing has been concluded, but they should be restricted to specific points. Arb. Rule 6(r). Briefs are submitted only to the arbitrator and not filed with the court.
5. The arbitrator should declare the hearing concluded and consider making suitable closing remarks. Arb. Rule 6(r). Experience has shown that the parties' perception of the fairness of the hearing - and their acceptance of the award - is greatly influenced by the arbitrator's reaction to the evidence. The arbitrator may preface his or her remarks by observing that some point may need additional reflection or research. A recapitulation of the essential evidence and relevant law, coming from the arbitrator, is a valuable contribution toward resolution of the dispute.



# RENDERING THE AWARD

## I. Promptness

Arb. Rule 7(a) requires written awards to be filed with the clerk of superior court within three days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later. While eliminating the possibility of an arbitrator having any prolonged involvement with a case, this deadline also allows sufficient time, when needed, to arrive at a thoughtful decision. It is preferred that the award be entered at the conclusion of the arbitration.

## II. Form of Award

The award should be entered on the form promulgated by the NCAOC and will be provided to each arbitrator by the arbitration coordinator. An arbitrator is not required to make findings of fact or conclusions of law in the award or to explain his or her reasoning. Arb. Rule 7(b). However, experience has shown that litigants' satisfaction with the arbitration process can be enhanced when the arbitrator takes the time to explain his or her decision in understandable language.

The award must resolve all issues raised by the pleadings, including requests for attorneys' fees. Arb. Rule 7(c). The award shall include applicable interest. An incomplete award will be returned to the arbitrator for completion. The award should then be amended immediately and returned. A delay in the completion of an award tolls the time for a trial de novo request.

If the award is given at the conclusion of the hearing, the arbitrator should provide the parties or their counsel with a copy of the award and notate on the award that the parties received a copy. If the award is rendered after the hearing, the arbitrator should provide a copy of the complete award to the clerk of superior court, who shall then serve it on the parties, in accordance with N.C. R. Civ. P. 5. Arb. Rule 7(d).

## III. Arbitrator as Jury and Judge

An arbitrator's award should be based upon (1) what the arbitrator as a sole juror determined the facts to be in a verdict and (2) the application of the law to those facts in the same way a judge would apply it in a bench trial.



## **IV. Requests to Reconsider**

The rules do not permit motions for reconsideration or modification of an award by an arbitrator after it is filed, but they do not preclude the parties from reaching an agreement and filing a consent order on which judgment may be entered. An arbitrator is relieved of all responsibility in a case when the award is filed.

## **V. Costs**

The arbitrator will be governed by the law and Rules of Civil Procedure in determining if costs are to be included in the award. The arbitrator may include costs accruing through the arbitration. Costs may not include the arbitrator fee or any portion of said fee. This fee must be equally divided between the parties. Arb. Rules 5(a) and (b).

## **VI. Damages; Equitable or Declaratory Relief**

The arbitrator may award more than what was demanded in damages but may not grant equitable or declaratory relief. An arbitrator has no power to enforce an injunction. Arb. Rule 7(c).



# ARBITRATION VERSUS TRIAL AND MEDIATION

It is important that arbitrators appreciate the differences between court-ordered arbitration and a traditional trial or mediation and anticipate how they may react to situations which arise that are unique to the court-ordered arbitration process.

## I. Differences Between an Arbitration Hearing and a Traditional Trial

The presentation of the case in a court ordered arbitration hearing differs from that in a traditional trial. Court-ordered arbitration hearings are generally limited to a suggested one-hour time frame which may present a major challenge to attorneys or parties concerned with presenting a clear and complete description of their dispute. Alternatively, attorneys and litigants may not always prepare their cases as thoroughly in an arbitration hearing as would be done in a district court bench or jury trial held before a district court judge. Because the arbitration hearing is expected to be held within 60 days of the filing of the defendant's answer, the hearing may have been scheduled before the attorneys or parties have been able to gather all case information. Another difference is that the law of evidence does not apply in arbitration hearings, except as to privileges, although it shall be considered as a guide. Further, any document exchanged prior to the hearing may be received as evidence without further authentication. Arb. Rule 6(e).

Unlike traditional hearings, no recording or official transcript is made of an arbitration hearing. The arbitrator may permit the arbitration hearing to be recorded if it does not interfere with the proceeding. The arbitrator may determine the manner in which the recording is made. Arb. Rule 6(m).

The most significant difference between a trial and a court-ordered arbitration hearing is that the arbitrator's award is non-binding unless the parties consent to binding arbitration in writing using the appropriate NCAOC form. If the parties do not consent to binding arbitration, parties may demand a trial de novo for the case to be heard by a district court judge. If no trial de novo is requested, the award becomes a judgment of the district court, which shall have the same effect as a consent judgment. Arb. Rule 8(b). Arbitration awards entered as a judgment may be enforced by execution.





## II. Differences Between an Arbitration and a Mediation

The most important distinction between mediation and court-ordered arbitration lies in the identity of the decision-maker. In mediation, a neutral third person, the mediator, acts as a facilitator assisting parties in exploring their dispute and options for settling it. Mediators do not decide cases. Rather, the mediator's role is to help lead parties to their own agreement; the parties decide the outcome. Court-ordered arbitration is very different in this respect. The arbitrator is required, based on the submissions of the parties, to decide the case.

Mediation sessions also tend to be less formal than arbitration hearings. Mediations are not typically held in a courtroom, as are arbitrations. The arbitration process much more closely resembles a trial than does mediation in that typically there are formal opening and closing statements and witnesses may testify.

Arbitrators do not meet privately with individual parties and their counsel. Mediators, on the other hand, frequently separate the disputants and meet with them and their counsel individually.



# PAYMENT AND REIMBURSEMENT

Arbitrators are entitled to the maximum allowable fee as authorized by G.S. 7A-37.1(c1). Payment is not due until the final order has been submitted by the arbitrator. Arb. Rule 4(b).

Process for payment:

1. Complete the NCAOC form, Application and Order for Payment to Arbitrator, in duplicate within 30 days of the filing of the award.
2. The form should be submitted to the chief district court judge or his/her designee for entry. Once the order for payment has been signed by the chief district court judge or any assigned judge exercising the court's jurisdiction and authority in the action, the form should be presented to the clerk of superior court for filing. The clerk of superior court shall forward the entered order for payment to NCAOC for payment.

Any questions regarding payment should be directed to the Financial Services Division at the North Carolina Administrative Office of the Courts, 919 890-1000.

## CONCLUSION

If you have procedural questions after reviewing this Benchbook, the training course, and the Rules for Court-Ordered Arbitration, please contact your local arbitration coordinator or the Court Programs Division at the North Carolina Administrative Office of the Courts at 919 890-1200. Thank you for your interest in the Court Ordered Arbitration Program and offering your services to the courts of North Carolina.

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<sup>i</sup> Interim Report of the North Carolina Supreme Court Dispute Resolution Committee to the Supreme Court of North Carolina and the Administrative Office of the Courts, April 8, 1994 (available through the NCAOC).

