NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Benchbook for Arbitrators

March 2012

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BENCHBOOK FOR ARBITRATORS

Serving in the North Carolina Court-Ordered Arbitration Program

ACKNOWLEDGMENTS

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 Kathy Shuart and Dan Becker of the Administrative Office of the Courts, Frank C. Laney of the North Carolina Bar Association and Stevens Clarke of the Institute of Government for their dedication and energy in bringing the court-ordered arbitration program to reality.

Proposed amendments to the rules were drafted by Tammy Smith with the legal division of The North Carolina Administrative Office of the Courts with input from Pete Powell and Pamela Best also with the legal division of The North Carolina Administrative Office of the Courts and by DeShield Smith with the Court Programs and Management Services Division of The North Carolina Administrative Office of the Courts.

This 2012 amended benchbook was drafted by Tammy Smith with the legal division of The North Carolina Administrative Office of the Courts with input from Lori Cole with the Court Programs and Management Services Division of The North Carolina Administrative Office of the Courts and Frank C. Laney of the North Carolina Bar Association.

Revised March 2012

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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 experiment in arbitration 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 of 1994, the North Carolina Supreme Court Dispute Resolution Committee chaired by 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 AOC. 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: "Against every measure, court-ordered, nonbinding arbitration is a success, enhancing government's responsiveness to its citizens".[2]

Proposed amendments to the rules were drafted by Tammy Smith with the Legal Division of The North Carolina Administrative Office of the Courts with input from Pete Powell and Pamela Best also with the legal division of The North Carolina Administrative Office of the Courts and by DeShield Smith with the Court Programs and Management Services Division of The North Carolina Administrative Office of the Courts. They were approved and presented to the North Carolina Supreme Court by The Alternative Dispute Resolution Subcommittee of the North Carolina Judicial Council in 2011. Those changes were enacted by Order of the North Carolina Supreme Court 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. This Benchbook includes those revisions.

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 film 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 making a contribution to improving the courts of this State.

[1] *Court-Ordered Arbitration: Report to the Supreme Court of North Carolina by the North Carolina Bar Association, March* 1989, *pg.33.*

[2] *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 AOC).*

BECOMING AN ARBITRATOR

A. 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 5 years,
3. Admitted to practice law in NC for at least two of the required 5 years,
4. Complete arbitrator training course
5. Observe at least one arbitration conducted by a court-approved arbitrator,
6. Have a valid email address.

Arb. Rule 3(a).

B. Process for Application

Eligible persons seeking to be qualified as an arbitrator begin the process by submitting AOC-CV-819, 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 one of the counties in which the arbitrator intends to serve. Arb. Rule 3(b)

C. Oaths of Office

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

D. Ethical Responsibilities

Arbitrators must comply with the Canons of Ethics for Arbitrators. They are to recuse themselves from any cases 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

A. Responsibilities of the Arbitration Administrator

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

The Rules recognize the exclusive authority of the court to schedule and to continue hearings, to rule on pre-trial motions, or to refer them to arbitrators for determination in their awards. Arbitrators are not to be burdened with pre-hearing administrative or judicial duties. Arb. Rule 4(a).

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

B. 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 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.

C. Responsibilities of the Parties

The pre-hearing exchange of witness lists, documents, issues and contentions is required by Arb. Rule 6(d) 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

A. Authority; Nature of the Proceeding

(1) Cases come before arbitrators by order of a court and pursuant to law. Arb. Rule 2. Arbitrators are approved by the court [Arb. Rule 3(b)], required to take an oath similar to that of a judge [Arb. Rule 3(c)], empowered to administer oaths, in accordance with statute, to witnesses subpoenaed to testify before them [Arb. Rule 6(g)], and authorized to exercise 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, ability of parties to call witnesses and enter evidence. Arb. Rule 6(f), (g) and (h). The laws of evidence do not apply 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 with it 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) The rules do not establish a separate standard for pro se litigants. A serious lack of understanding and preparation by *a pro se* litigant may make it difficult or impossible to hold a fair hearing within the limits of the letter and spirit of the rules. In such cases the arbitrator should attempt to resolve the problem by any fair, reasonable, and lawful means. Some options for addressing the problem might 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, but may consider such motions and arguments supporting or opposing them in making the arbitrator's award. However, the arbitrator may accept testimony regarding the existence of pending motions. Pending motions are not valid grounds for the continuance of an arbitration, instead the arbitration should take place and any award should resolve all issues. Arb. Rule 6(s)(2).

(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 AOC 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.

B. The Hearing Ambiance

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 things 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. By the way they treat litigants, arbitrators have an opportunity to show their concerns for the rights of people and their dedication to the fair administration of justice.

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

C. 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 for 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 lay down 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. A litigant may proceed in arbitration *pro se* and *in forma pauperis* in the same manner and with the same rights and responsibilities as in a trial court. Arb. Ru1e 6(n) and (p). All parties are required to be present in person or through counsel. Arb. Rule 6(n). If the party is a business, corporation, limited liability corporation, unincorporated association or other party 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, 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 go forth and 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 date, time and location of the arbitration hearing does not appear, the hearing should go forward 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 (see

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 creditable evidence should be made. The arbitrator should also report a parties' failure to appear to the Court.

[*Rule citation corrected March 2013]

D. 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 (see 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. Arb. Rule 6(q). An arbitrator is not required to receive repetitive or cumulative evidence. Arb. Rule 6(q)(2).

(3) Observation (in the nature of a jury view) of places outside the hearing room by the arbitrator and the parties may be allowed. Experiments and demonstrations that the arbitrator finds probative and appropriate are permitted.

(4) 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.

(5) In exceptional cases an arbitrator is permitted to receive post-hearing briefs, they should be restricted to specific points. Arb. Rule 6(r). Remember, the **award must be made within three days of the hearing**. Arb. Rule 7(a). As such, briefs should be submitted on the same date and early enough in the three-day period to allow the arbitrator time to read them before filing the award. Briefs are filed only with the arbitrator and not the court.

(6) The arbitrator should declare the hearing concluded [Arb. Rule 6(r)] and consider making suitable closing remarks. 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. Often 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

A. Promptness

Arb. Rule 7(a) require submission of written awards within three days after the hearing is concluded. 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.

B. Form of Award

The award should be entered on the form promulgated by the AOC and will be provided to each arbitrator by the arbitration staff. 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. A summary of the pertinent facts relating to a default for failure of a party to appear--for example, the explanation offered, if any--would be helpful to the court in rendering a judgment on an award against such party.

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 with a copy and notate in the file 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, who shall then serve it on the parties appropriately. Arb. Rule 7(d).

C. 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.

D. 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.

E. 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).

F. Damages; Equitable or Declaratory Relief

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

ARBITRATION VERSUS TRIAL AND MEDIATION

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

A. Differences Between an Arbitration Hearing and a Traditional Trial

Court-ordered arbitration typically involves cases in which the dollar value is modest. The fact that a case involves a relatively small amount of money, however, does not always equate with factual simplicity. In some cases, limiting the proceeding to the suggested one-hour time frame may present a major challenge to attorneys or parties concerned with presenting a clear and complete description of their dispute. Also, arbitrators should anticipate that because the cases they will hear typically involve smaller amounts of money, attorneys and litigants may not always prepare their cases as thoroughly as they might if the stakes were higher. Also, a fair proportion of cases which are arbitrated involve personal disputes characterized by the presence of strong animosity between the parties.

The arbitration hearing, which is expected to be held within 60 days of the filing of the defendant's answer, may have been scheduled before the attorneys or parties have been able to gather all case information.

Given the nature of the cases subject to court-ordered arbitration, there is a significant amount of *pro se* representation. This fact alone may mean that initially the arbitrator must explain more about the hearing. Also, some *pro se* parties or attorneys may not be familiar with the procedural rules controlling the court-ordered arbitration process. This may cause problems during the hearing. For example, 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.

Since arbitrators for the court-ordered program are not screened for any special expertise, an arbitrator appointed to a case may not be familiar with the relevant substantive law or the factual context of a dispute. However, the most significant difference between a trial and a court-ordered arbitration hearing is that the arbitrator's award is non-binding. Unlike a trial, in which the court's decision is final unless a party wants to file a potentially expensive appeal, parties are much freer to ignore the arbitrator's decision. In short, there is no inherent authority compelling parties to adhere to the arbitrator's decision other than their own subjective assessment of the award -- Is it fair?

B. 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 NCGS 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 AOC-CV 804, 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 form has been signed by the chief district court judge or his/her designee, the form should be presented to the clerk of superior court for filing. The clerk of court of superior court shall forward to AOC for payment.

Any questions regarding payment should be directed to the Financial Services Division at NCAOC, 919-890-1000.

CONCLUSION

If after watching the film and reviewing this Benchbook you still have questions, contact your local arbitration administrator or The Administrative Office of the Courts. Following this section of the Benchbook are copies of the statute which established the Court-Ordered Arbitration Program; the Supreme Court Rules implementing that statute; and accompanying forms for use in the arbitration program. Thanks for taking the arbitrator training course and for offering your services to the courts of North Carolina.