

A PRIMER ON ARBITRATION

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I. ARBITRATION TRENDS

Arbitration is a trend that is here to stay. If anything, the momentum to resolve disputes by arbitration is growing. North Carolina courts recognized decades ago that arbitration has advantages over traditional civil litigation,¹ some of which are a reduction of court congestion, speed, economy, finality, and an opportunity for parties to choose the judges who resolve their disputes.² While judicial enthusiasm for arbitration has continued to increase, the real groundswell of support has taken place in the business world, where arbitration has long been used but not to the extent it is today. As one commentator notes, "A major reason for the surge in consumer arbitration is widespread dissatisfaction with the civil justice system, with its problems of delay, expense, technicality, and judicial gridlock."³ A business world that has grown disillusioned with the courts is attempting to cure a moribund legal system by injecting arbitration into nearly every aspect of consumer life. Mandatory arbitration clauses are now routinely found in residential and commercial rental agreements, banking and credit card applications, stock listings agreements and a variety of insurance policies. Even North Carolina's District Courts are jumping on the bandwagon by mandating non-binding arbitration in certain cases.⁴

Even in disputes where arbitration is not compelled, your opponent may try to persuade you to voluntarily agree to arbitrate. What should you do? In some cases you will welcome the opportunity to arbitrate. In others you will have no choice. This paper attempts to equip you with the tools necessary to seek out and succeed at arbitration when it would help your case, and maximize your opportunities to prevail when you have no choice.

¹ See, e.g., *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984) (citing the even earlier case of *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 411, 255 S.E.2d 414, 418 (1979) for the proposition that "a strong public policy supports upholding arbitration awards").

² *Crutchley v. Crutchley*, 306 N.C. 518, 523, 293 S.E.2d 793, 796 (1982).

³ Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 934 (1999).

⁴ N.C. Gen. Stat. § 7A-37.1 (1999).

A. WHEN TO CONSIDER ARBITRATION

If you wind up in an arbitration hearing, it is because one of the following things has taken place. You either (1) agreed with an adversary to arbitrate a dispute, (2) your client knowingly or unwittingly entered into a contract with an adverse party that contained a provision that makes arbitration the exclusive or an optional means of resolving disputes, or (3) have a case where arbitration is judicially mandated by legislative decree. Whenever you have a choice to arbitrate --that is, under all of circumstances labeled (1) or under those labeled (2) in which you have the option to select arbitration-- you should consider and strategically weigh the following factors.

1. The Parties

The first question to ask in every case where arbitration is an option is this: Which will be better for my client, a jury trial or arbitration?

The first factor to assess in answering this question is the way your client will be viewed, that is whether a jury or arbitrators will more favorably view your client. You will be in a better position to assess how arbitrators will perceive your client because they are usually well known to you or to the community in which they practice. This allows you to do some scouting about them and their views on cases such as your client's. They may have published materials or participated in appeals that will provide you with insight. Also, it is easier to research arbitrators than jurors because they are fewer in number, three instead of twelve or more.

Many practitioners believe that general experience with similar matters will desensitize or soften an arbitrator's emotional reaction to incendiary or volatile issues in a case, such as a drunk driver, or temper their repulsion or anger toward unpopular cases, such as chiropractic or small property damage cases. On the other hand, some practitioners also believe that arbitrators may be apt to "split the baby" and not award verdicts as large as juries in cases with great merit. Plaintiff's and defense lawyers each claim that arbitration favors the other. At this point, all such viewpoints are anecdotal and apparently without empirical support.

2. The Issues

As a result of their training and experience arbitrators may be better equipped to understand complicated cases. Indeed, the arbitration movement started when complicated industry disputes were resolved by panels of intra-industry experts, and is rooted in the idea that specialized expertise makes arbitrators better able to resolve such disputes. Arbitrators with specialized knowledge will more efficiently understand and evaluate evidence in cases involving their area of expertise than lay persons. For example, personal injury lawyers may be better able to digest complicated insurance, medical, or causation issues. The same is true for lawyers who practice construction law, banking law, and securities law when it comes to disputes involving those specialties. Some specialized areas of law even encourage and facilitate arbitration; examples of this include voluntary arbitration programs to resolve internal law firm disputes⁵, domestic litigation⁶, and international commerce⁷.

⁵ N.C.G.S. Annotated Rules, Rules of N.C. State Bar, Section .0400.

⁶ N.C.G.S. § 50-41, et seq. (The North Carolina Family Law Arbitration Act).

There are also laws that provide general guidance with the procedural aspects of arbitration, laws that courts will use in making decisions about arbitration matters and laws that you should consider when questions about arbitration arise. On the state level, there is the Uniform Arbitration Act,⁸ and on the federal level there is the Federal Arbitration Act.⁹

3. Time

Arbitration saves time. Every aspect of arbitration is speedier than litigation. Arbitration hearings usually last hours instead of the days that trials often last. The discovery period that precedes arbitration is almost always shorter as well, and the discovery that takes place is frequently less formal. Agreements about discovery matters, procedures, and evidence are often used to streamline the process. Time is saved most by agreements or stipulations concerning how depositions are taken – or avoided entirely – and in the way documents are produced. The evidentiary rules most often relaxed include those addressing the way documents and testimony are presented at the hearing. For example, parties often agree to admit essential documentary evidence, such as medical records in an injury case, without requiring a doctor to lay a foundation or authenticate them.

The same is often true with regard to expert opinions, which are frequently provided by letters or other documents from the doctor that outlines the doctor's testimony on essential issues of the case. This saves the time and expense of conducting both a discovery deposition and *de bene esse* deposition of the doctors. Of course what is good for the goose is good for the gander, and you can expect your opponent to present letters from experts that you have not had the opportunity to discover or cross-examine. The use of such writings in lieu of actual testimony saves time and money before and after the hearing. Even though such an approach vests more authority in the lawyers arguing the case --authority that at times is manipulated by lawyers who claim knowledge or insight about such bare-bones writings and argue that such writings mean whatever they want them to mean, whether they do or not--it can be a useful and time-saving approach.

Even in those cases where the parties believe expert depositions are indispensable, there are still opportunities to save time. The effort of doing both a discovery and *de bene esse* deposition can be avoided if the parties agree to meet or depose the doctor once, instead of twice, and then in some way memorialize the doctor's testimony. During this single meeting or deposition each party can ask the expert all the questions necessary to preserve the record and lay a foundation. Then, after each party has asked their discovery questions, the parties memorialize the testimony they wish to present to the arbitrators. The testimony is memorialized in one of three ways: (1) by court reporter, in a transcript;

⁷ N.C.G.S. § 1-567.30, et seq. (the North Carolina International Commercial Arbitration Act, which provides in part that it is the policy of the State to promote and facilitate international trade and commerce, and to provide a forum for the resolution of disputes that may arise from participation therein. Pursuant to this policy, the purpose of this Article is to encourage the use of arbitration as a means of resolving such disputes.)

⁸ N.C.G.S. § 1-567 et seq. (1999).

⁹ 9 U.S.C. § 1 et seq. (1994).

(2) by videotape; or (3) in a letter or other writing that the expert executes or signs. The parties can agree to allow each side the benefit of leading questions to further save time, both the doctor's in testifying and the arbitrator's in listening to the testimony at the hearing. By abbreviating the amount of testimony presented at arbitration the panel is spared having to hear the ponderous, hour-long video deposition that often gets played at trial, something experienced arbitrators find unnecessary and may even resent.

4. Cost

Many of the techniques that will save time will also save money. Anything that saves billable hours for attorneys or experts will save money. Arbitration is commonly less formal and less technical than traditional litigation, and as a result, will often save both sides legal fees and other expenses as well.

By contrast, jury trials and pre-trial discovery are often expensive because both sides feel compelled to be fully, if not overly, prepared. Fear of the unknown often leads to comprehensive discovery and preparation that strives to leave no stone left unturned. Costs quickly mount and are often cumulative. For example, to take a series of medical depositions in an injury case you have the following costs: there is a transcript fee for every deposition; to this is added a court reporter's appearance fee; on top of that there are expert witness fees, to prepare for and give discovery depositions and trial depositions, and also to prepare for and appear at the trial. Each of these events also involves attorneys' fees, as does the type of preparation that a jury trial generally requires.

With arbitration, most of these costs are avoided, or at least diminished by a streamlined discovery and hearing process. The very brevity of the process saves time and money. Even more significant, however, are the numerous pre-arbitration devices that can be employed to speed things along, such as arbitration agreements, stipulations, or simple handshake agreements. Such devices expedite the process and facilitate the exchange of information in order to eliminate repetitive depositions, avoid discovery disputes, and remove procedural hurdles. These will be discussed in detail in section III – D.

5. Risk and Uncertainty

A major advantage of arbitration is that the parties have complete control over when their case will be heard and who will hear it. The arbitration date is scheduled in advance. The parties know their case will be heard on that day and, unlike a trial, will not be delayed by a case that is held over from the week before, bumped by another case peremptorily set, or delayed or continued because of cases that have a better calendar setting.

The parties also have a say in who will hear their case. Regardless of the means by which arbitrators are selected, the parties will always have some input in the selection, though the extent of that input will vary by the method of selection¹⁰. This is unlike a trial where you never know what the final jury panel will look like and even the judge you expect may change at the last moment.

¹⁰ See Section II – A.

The finality of arbitration also promotes certainty. All results at arbitration are final; there is no right of appeal. Final results -- even if they are unfavorable, irrational or arbitrary -- are difficult to overturn. This cuts both ways: When the result is good for you, you can take great comfort in its finality. When the result is bad, however, you become aware of one of the true significant drawbacks of arbitration. There are few options available to a party that wishes to undo the damage of a bad result.¹¹

Some practitioners also feel more certainty in some cases because they believe -- rightly or wrongly -- that they can better predict results with arbitrators than juries. This may be true, or it may be because they are more familiar with recent results from arbitrations than juries.

6. Privacy

Unlike trials and litigation, which are matters of public record, arbitration hearings can be kept from public view. Results can be deemed confidential by agreement of the parties. This can be attractive to parties who wish to avoid having their mistakes publicized, or to parties that wish to prevent others from knowing about their mishaps or the amount of their recovery.

B. WHEN ARBITRATION IS MANDATED OR REQUIRED

By now it should be clear that arbitration can be an attractive option to litigation in certain cases and should be sought as a means of resolving disputes if your adversary will voluntarily agree to participate. In some cases, however, one or both parties are forced to arbitrate their dispute even when they would rather not, because of either a statutory mandate or by the terms of a contract. "Contract" is used here in the broadest sense and can encompass a broad range of consumer transactions including sales agreements, insurance policies, leases, and even documents that accompany a consumer purchase. A person that enters into such a contract may not be aware they have entered into a contract, much less agreed to binding arbitration.

Arbitration clauses contained in contracts generally come in three varieties. One compels the parties to arbitrate all disputes, the second allows but does not require either party to select arbitration, and the third allows but does not require only one of the parties the right to select arbitration. The first type, what will be referred to here as "Compulsory" arbitration clauses, requires the parties to resolve disputes solely by arbitration. The right to a jury trial is waived. The second and third type involve "Elective" arbitration clauses that allow one or both parties (depending on the contract language) to demand arbitration. When only one of the parties can demand arbitration -- "unilateral elective arbitration" -- the so-empowered party can demand arbitration and the other must participate and will be bound by the result. When either party can demand arbitration -- "bilateral elective arbitration" -- either party can demand arbitration and the other is forced to participate and bound by the result. The right to a trial is preserved, but only until one of the parties demands arbitration.

Each of these types of contractually required arbitration provisions is discussed below. There is, however, another way a party can be forced to arbitration must also be mentioned: when it is mandated by statute. The best example in North Carolina of statutorily mandated arbitration can be found in

¹¹ See Section II – C and Section III – F.

district court, where non-binding arbitration is required of all civil litigants seeking less than \$15,000,¹² subject to certain exceptions.¹³ A review of the Rules for Court-Ordered Arbitration¹⁴ will give you a place to start and usually cover most things that come up in court-ordered arbitrations. If additional information is needed, this subject has been covered in law review articles¹⁵ and case law.^{16 17}

1. Unilateral Elective Arbitration

Parties with a unilateral right to demand arbitration have a powerful weapon. They can demand arbitration if it is in their interest to do so, or not demand arbitration and try the case if that would be more advantageous. If they choose to demand arbitration, they can do it when it might give them some advantage, such as at a helpful point in the discovery process. Even if they do not demand arbitration, they can often obtain concessions in the litigation process from an adversary that wishes to avoid arbitration. Arbitration clauses that provide for unilateral arbitration can be found in a variety of contracts, but the following are some that are frequently encountered.

a. UM and UIM Provisions for Arbitration

The Uninsured and Underinsured (“UM/UIM”) arbitration provisions contained in the standard North Carolina personal auto and commercial auto policies are contained in the appendix to this manuscript (See Exhibit A and B). This is an example of a unilateral elective arbitration clause, as only the insured may –but is not required to–demand arbitration. It is a one way street, as the insurer cannot compel the insured to arbitrate. If the insured demands arbitration, the insurer must participate and is bound by the result. Under these provisions the insured may demand arbitration, which though not explicitly required should be done in writing. I often ask for arbitration and select my arbitrator when I provide the UIM carrier with 30-day notice of tender of limits by the liability carrier.

b. Fire Policy Provisions for Arbitration

Commercial fire policies most often provide that the insured may seek an appraisal, which is in effect a unilateral binding arbitration concerning the value of the property damaged. Some commercial and many home policies (See Exhibit D) have a clause that provides either party with such right, in essence a bilateral elective provision. In either instance, once one party demands an appraisal,

¹² N.C.G.S. § 7A-37.1.

¹³ N.C.G.S. Annotated Rules, N.C. Ct.-Ord. Arb. (Rule 1 exempts, among others, claims which are class actions, involve a substantial claim for injunctive or declaratory relief, are family law matters, involve real estate, wills, and estates, summary ejectment, and special proceedings.)

¹⁴ N.C. Ct.-Ord. Arb. Rules, *Supra* note 13.

¹⁵ Thomas L. Fowler, *Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure*, 21 Campbell L. Rev. 191 (1999).

¹⁶ See e.g. Mohamad v. Simmons, 534 S.E.2d 616 (2000) (holding that defendant who skipped arbitration can not appeal award).

the other must participate and be bound by the result. Once appraisal has been demanded, there will be no opportunity for a trial on the issue of value.¹⁸

2. Bilateral Elective Arbitration Clauses

An example of a bilateral elective arbitration clause can be found in the Medical Payments provisions from the standard North Carolina personal auto and commercial auto policies, one of which is attached to this manuscript (See Exhibit C). Under these provisions either party may demand arbitration. These provisions favor the insurer because the cost of arbitration in a med pay case will likely outweigh most med pay benefits. Before this provision became standard, an aggrieved insured could sue and hope to recover attorneys' fees if the recovery was for an amount less than \$10,000.¹⁹

3. Compulsory Arbitration Clauses

Modern daily life is full of consumer transactions that contain compulsory arbitration clauses, which consumers accept unwittingly or with no ability to bargain away. A recent *North Carolina Law Review* article points out that “[b]anks frequently include arbitration clauses in their terms for maintaining bank accounts; health maintenance organizations (“HMOs”) routinely have provisions requiring that all disputes between the health consumer and the HMO be arbitrated; employment handbooks often state that employees must utilize arbitration to resolve employment-related disputes; many standard residential and commercial lease forms say that all disputes between the tenant and landlord must be submitted to arbitration; homeowner associations and residential condominiums frequently include arbitration clauses in their charter documents.”²⁰ Some health insurance plans require the insured to resolve all disputes with the plan over coverage by arbitration and for about 75 years stock listing agreements have included arbitration provisions, which may now even cover shareholder derivative actions²¹.

There is little that can be done to stem the flow of such compulsory arbitration clauses. Federal courts favor arbitration, just as state courts do. State legislatures are limited in what they can do, even if they wanted to do something to limit these types of contracts. The Federal Arbitration Act pre-empts state law and greatly limits state legislatures in the ways they can prohibit arbitration clauses in contracts.²²

¹⁸ See *Bentley v. N.C. Ins. Guar. Ass'n.*, 418 S.E.2d 705 (1992) (holding that right to trial by jury not abridged where arbitration on sole issue of value).

¹⁹ N.C.G.S. § 6-21.1.

²⁰ Van Wezel Stone, *supra* note 3, at 934.

²¹ See Jeffrey A. Sanborn, *The Rise of “Shareholder Derivative Arbitration In Public Corporations: In Re Salomon Inc. Shareholders’ Derivative Litigation*, 31 Wake Forest L. Rev. 337 (1996).

²² See Edmond Seferi, *FAA and Arbitration Clauses—How Far Can It Reach? The Effect of Allied-Bruce Terminix, Inc. v. Dobson*, 19 Cambell L. Rev. 607 (1997).

A dramatic local example of such contracts was the subject of newspaper headlines²³ and was also the subject of a ruling by the North Carolina Court of Appeals.²⁴ The case involved a Franklin County man, James Milon, who was paralyzed after a 1988 operation at Duke Hospital. Mr. Milon lost his right to trial by jury when his wife signed a stack of papers presented to her when she accompanied her husband on a monthly checkup to his family doctor. Among the paperwork the Duke-affiliated family practitioner in Louisburg asked Mr. Milan to sign was one document that contained an arbitration clause. According to Duke, patients are not required to sign the paperwork and will not be denied care if they refused to. Mr. Milon did not sign the form. His wife never indicated that she was signing the form for her husband or with his authority. Nonetheless, even though Mr. Milan did not sign the form, the North Carolina Court of Appeals held that the agreement was binding on Mr. Milan and that he waived his right to sue Duke Hospital unless there was mutual mistake, fraud or another equitable ground to set aside the agreement.²⁵ One of the experts hired to testify by the plaintiff was Vanderbilt law professor Ellen Wright Clayton, who holds a medical degree from Harvard, a law degree from Yale, and a bachelor's degree, Phi Beta Kappa and summa cum laude, from Duke. Dr. Clayton is quoted as saying that "the manner and method that Duke and [its physicians' affiliate] have chosen to present the "agreement to alternative dispute resolution" to their patient populations in general and thereafter their attempts to rely on such agreements to the extent it suits their purposes is patently unethical, in violation of their fiduciary duties of honesty, good faith, and fair dealing and, when considered as a whole, is reprehensible."²⁶ The dissenting opinion, provided by judge Thomas, agreed with the plaintiff that Mrs. Milon lacked apparent authority and that Duke did not rely on Mrs. Milon's apparent authority. The North Carolina Supreme Court reversed the decision of the Court of Appeals for the reasons stated in the dissenting opinion.

C. ADVISING CLIENTS ON THE PROS AND CONS OF ARBITRATION

Advising clients about the pros and cons of arbitration involves practical and legal considerations. North Carolina appellate courts have acknowledged both in discussing the benefits of arbitration. You should point out to your client the many advantages to arbitration, including those noted earlier in this paper. At first blush, arbitration may look more attractive than traditional litigation. You need to make sure you look beneath the surface, however, because arbitration is not without limitations. You need to advise your client about potential pitfalls before they are encountered. Such disadvantages were recognized by the North Carolina Court of Appeals in *Sholar Business Associates, Inc. v. Davis*, 138 N.C. App. 298, 531 S.E.2d. 236 (2000), in which the Court noted that:

²³ Anne Saker, *Patient Contracts on Rise*, Raleigh News and Observer, September 30, 2001, at A1, A23.

²⁴ *Milon v. Duke University, et. al.*, 145 N.C. App. 609, 551 S.E.2d 561 (2001), review dismissed, 354 N.C. 364, 556 S.E.2d 573 (2001), review on additional issues denied, 354 N.C. 364, 556 S.E.2d 573 (2001), reversed, 355 N.C. 263, 559 S.E.2d 789 (2002), cert. dismissed, 536 U.S. 979, 123 S.Ct. 14, 153 L. Ed.2d 878, 70 U.S. L.W. 3776 (2002).

²⁵ *Id.* at 565.

²⁶ Saker, *supra* note 23, at A23.

Our Supreme Court has recognized that arbitration also poses disadvantages in that parties to arbitration enjoy limited appellate review, and have no recourse when an arbitrator makes a mistake. *Patton v. Garrett*, 116 N.C. 847, 858, 21 S.E. 679, 682 (1985). Because an arbitrator is not bound by substantive law or rules of evidence, an award may not be vacated merely because the arbitrator erred as to law or fact. *Crutchley*, 306 N.C. at 523, 293 S.E.2d at 797. Where an arbitrator makes such a mistake, "it is the misfortune of the party."

Sholar, 138 N.C. App. At 301, 531 S.E.2d at 239. The Court also noted that an award may only be vacated for the limited reasons stated in the North Carolina Uniform Arbitration Act.²⁷

II. EFFECTIVE ARBITRATION PREPERATION

A. SELECTING ARBITRATORS

Selecting favorable arbitrators is arguably the most important factor in getting a good result at arbitration. Arbitrations are usually decided by one arbitrator or a panel of three arbitrators. With one-arbitrator panels, the arbitrator is selected by mutual agreement or by an impartial third party. Three-arbitrator panels can be selected by one of those same methods, but increasingly are being selected by a different method in which each side picks one arbitrator and the two selected arbitrators then pick the third, neutral arbitrator.

Your selection is critical regardless of how many arbitrators will decide the case, although it will be magnified with fewer arbitrators. In a one-arbitrator panel, the arbitrator hold the key to your fate; in a three-arbitrator panel, such as with UM/UIM cases, your chosen arbitrator not only has a one-third say in the final decision but more importantly has a fifty percent say in deciding who the all-important neutral arbitrator will be. The neutral arbitrator usually heads up the panel and attempts to forge consensus if agreement is possible, or spearheads an effort to break a deadlock if it is not. Even with other methods of selection, such as those where the parties do not have a right to select an arbitrator, but only deselect one or more arbitrators,²⁸ it must be done with forethought and care after doing all possible research about each arbitrator.

Under the rules that govern mandatory non-binding arbitration in District Court, the parties can agree on an arbitrator within the first 20 days after arbitration is ordered or one will be appointed by the court.²⁹ Accordingly, it is wise to take the opportunity to come to quick

²⁷ See N.C.G.S. § 1-567.13 (a)(5) (1999). A party that questions the validity of the underlying mandatory arbitration agreement can ask to have a resulting award vacated if the party (1) has not already questioned and received an adverse ruling on the same issue under G.S. 1-567.3 and (2) participates in the arbitration and (3) raises an objection about this issue at the arbitration.

²⁸ See e.g., American Arbitration Association Accident Claims Arbitration Rules. Each party is provided with nine names of potential arbitrators from which each party can deselect two, AAA appoints one arbitrator from the remaining names.

²⁹ N.C. Ct.-Ord. Arb. Rules, *Supra* note 11, Rule 2(a).

agreement and select one. In arbitrations where the decision will be made by a three-arbitrator panel, some of the same considerations and factors that govern the selection of jurors also apply to the selection of arbitrators, such as their apparent temperament, professional experiences, family backgrounds, and hobbies. For example, you might want to select an arbitrator with a scientific background in a case that involves complicated technical issues or one with a medical background in a case that involves complicated injuries. Arbitration offers advantages over jury selection because most arbitrators are lawyers that practice within your field of legal expertise and you probably already know more about potential arbitrators than you could ever hope to learn about a random juror. Obviously, selecting arbitrators and jurors is more art than science, although selecting arbitrators can be done with somewhat greater precision.

Arbitrators act as a jury, and are similar to juries in that they hear all of the evidence and make a decision based on their experiences and their deliberations. They are, however, different than jurors in three important ways: There will be fewer of them, you will know who they are before the hearing, and they have experience dealing with the legal system and similar legal cases. These differences provide you with an opportunity to determine whom you should pick as your selected arbitrator. They may also help you present your case in a way that will better appeal to the arbitrators that will hear your case. You can get most of the information you need by talking to other lawyers that practice in the same community as the arbitrators in question. Unlike a pool of prospective jurors about which little is known, most arbitrators have a local reputation and some body of appellate or trial work that can be examined for clues about how they might vote in your case.

The best way to find out about potential arbitrators, other than first-hand prior experience, is to ask other practitioners who have had dealings with them, whether as an arbitrator or advocate. Some of the individuals selected may have previously served as arbitrators and many have a long history as litigators. The obvious place to start with out of town lawyers is in their home county. Call lawyers that might have had a case with them.

Also important is how your chosen arbitrator will be perceived, and able to influence, the other arbitrators. Using individuals who are well respected in their field can be useful, as can using individuals who are persuasive or tenacious. Identifying arbitrators who will be able to relate to your client or your case is also very important. Your client, especially in the event of a negative outcome, will appreciate arbitrators who take their job seriously and treat your client courteously and act professionally.

B. ROLE OF THE ARBITRATORS

Arbitrators are the final finders of fact in a case. They are supposed to fairly and justly decide the case³⁰. North Carolina has adopted a Canon of Ethics for Arbitrators -- modeled after the code of ethics developed by the American Bar Association and American Arbitration Association -- that applies to arbitrations in North Carolina or where North Carolina law applies.³¹ It should be consulted whenever

³⁰ See N.C.G.S. Annotated Rules, Canons of Ethics for Arbitrators.

³¹ *Id.* at Canon 8-C.

you have a question about a conflict or other impropriety that may exist concerning the selection of arbitrators³², the way a hearing was conducted³³, or the deliberation³⁴ or the award itself. You should lodge objections about the selection or bias of an arbitrator, or the validity of the underlying contract giving rise to the arbitration, before the arbitration begins. Objections should be made in writing.

The unfettered decision-making process that often takes place at arbitration raises several issues. For example, should an arbitrator that has been selected by one of the parties champion that party's cause during the deliberations, or should all three arbitrators be completely neutral? Once the lawyers and parties leave and the deliberations begin behind closed doors, some arbitrators feel obliged to argue for the party who selected them or even for the industry or type of clients they typically represent. It is not unheard of for an arbitrator to say that someone has to look out for injured people, or another to say that someone has to look out for the insurance companies. Some times, arbitrators will simply feel strongly about a particular client or attorney's argument and feel compelled to champion that cause during deliberation.

When the arbitration is to be decided by one arbitrator, the arbitrator's role is clear, to be neutral and fair to each party. When there are three or more arbitrators, it is a little trickier. The canons suggest that non-neutral arbitrators may engage in a good deal more advocacy than you might expect. When it comes to selecting the neutral arbitrator, the non-neutral arbitrator you appoint may "consult" with you "concerning the acceptability of persons under consideration for appointment as the third-party neutral arbitrator".³⁵ Moreover, the provisions under Canon 1 – D, relating to relationships and interests, do not apply to non-neutral arbitrators.³⁶ When it comes to the deliberations themselves, the "non-neutral arbitrators may be predisposed to the party appointing them" but in all other respects are obligated to act in good faith and with integrity and fairness.³⁷

Another issue that arises concerns the standard by which arbitrators should determine awards, particularly when it comes to damages. For example, it is often asked: whether arbitrators should base an award on their own feelings, or superimpose on the decision-making process some mental construction of what a hypothetical jury in that county would do with the case at hand. In the end, most arbitrators seem to use some hybrid of the two. The only guidance provided in the Canons is that "an arbitrator shall decide all issues justly, exercising independent judgment, and should not permit outside pressure to affect their decision."³⁸

³² *Id.* at Canon 2.

³³ *Id.* at Canon 4.

³⁴ *Id.* at Canon 5.

³⁵ *Id.* at Canon 8–C(1).

³⁶ *Id.* at Canon 7-A (2).

³⁷ *Id.* at Canon 7-A (1).

³⁸ *Id.* at Canon 5-B.

Ex parte communications are not allowed with the neutral arbitrator, except for scheduling and similar logistical matters.³⁹ Even though the Canons provide for limited ex parte communication with the arbitrator you select,⁴⁰ I believe this should be avoided because of its appearance of impropriety. As long as the Canons are followed, and notice about such communications is given, it is not a violation of the rules. A good way to pre-empt any questions about this matter is to discuss this matter with your adversary before the selection process begins and reach an agreement about how you will conduct yourselves.

C. SUBMITTING MATERIALS TO ARBITRATORS

You should always present written materials and visual aids at the arbitration hearing. Almost everyone learns better when they are given visual and verbal information, whether they are visual learners or verbal learners. Some of the same rules that apply to using exhibits at trial also apply to arbitration: do not use too many exhibits; use one exhibit for each major point; keep exhibits simple, uncluttered, and limited to one idea; written materials should be well-organized and complete.

Some advocates like to provide arbitrators with materials before the hearing, which can be valuable in certain cases. The benefits of providing materials to arbitrators before the hearing are that it helps educate them about complex matters and saves time at the hearing. It gives them time to digest technical or complicated materials, lets them organize their thoughts or form questions, and gives them an opportunity to focus on the issues they deem important.

The drawbacks are that it can make the hearing seem stale and repetitive, witnesses seem unimportant, and you lose control of the hearing. You no longer determine when and how the arbitrators hear the evidence. It also adds expense. Arbitrators must be paid to review the materials before the hearing and then paid again to hear the evidence at the hearing again. This issue should always be addressed in arbitration agreements in order to prevent surprises, such as finding out on the Friday before a Monday morning hearing that your opponent sent a package of materials to the arbitrators.

Because there are no motions *in limine* or other evidentiary mechanisms to screen or filter prejudicial evidence, you may also wish to seek agreement before the hearing on what types of exhibits may be used at arbitration. This is because there are virtually no rules about what can be published to the arbitrators at arbitration. None of the rules of evidence are binding at arbitration.⁴¹ Accordingly, all your arguments will in essence go to weight, not admissibility. Opposing counsel may try to use a variety of materials to combat the testimony of your witnesses or experts, such as web site materials, magazine articles, and selected passages from textbooks. All get heralded as authoritative when opposing counsel attempt to substitute their research in place of the cross-examination of your expert or testimony from their expert witnesses that is usually required. Information about prior acts, good or bad, are frequently mentioned.

³⁹ *Id.* at Canon 8-B (1).

⁴⁰ *See Id.* at Canon 8-C (2).

⁴¹ *See* Crutchley, *supra* note 2, at 523, 293 S.E.2d at 797.

D. PREPARING YOUR CLIENTS FOR ARBITRATION

Attorneys should prepare clients for arbitration in two ways, first, by providing them with accurate and complete information about the risks and benefits of arbitration so they will have reasonable expectations, and second, by getting them prepared for the arbitration hearing itself. Some of the previous discussion may help with the first, sitting down with the client and explaining the arbitration process is a starting point for the second. If your client makes a good appearance and can articulate their story, they should briefly speak at the arbitration. You should prepare them somewhat as you would for a deposition.

They should also be prepared for how to act at the hearing when they are not testifying. They will be under great scrutiny, and should avoid dramatic reactions to statements by opposing counsel, should not interrupt anyone else, and should be appropriate at all times. The client must be warned that they are likely to hear the good, the bad, and the ugly about their case. The client should be coached not to react or argue if they hear something they disagree with or do not like. Clients also must be warned about over emphasizing and gilding the lily; help them understand they need to be as honest and accurate as possible about the facts of their case. Arbitrators will be watching your client carefully and often take offense at any inappropriate emotional reactions.

You and your client should meet before the hearing and outline your presentation, thinking through the witnesses and exhibits you will use to present your case. You should also anticipate and explain to your client what they can expect in terms of argument and cross-examination by opposing counsel.

E. THE ROLE OF LEGAL COUNSEL DURING ARBITRATION

Your job is to present your client's case in an abbreviated fashion. It should be brief, but not devoid of passion; it should be concise, but not omit facts that will be persuasive. The key to this is to be organized and to know your case completely. Once you know all there is to know about the case, assembling the critical elements will come naturally. Experienced arbitrators really do need to only hear a fact once; the importance of the fact will not be lost on them.

Provide the arbitrators with a skeleton-like outline of the elements of your case. Spend some time introducing your client, and letting the arbitrators get to know her or him. Amplify the big elements with brief witness testimony and graphic exhibits. The arbitrators need to assess the sincerity of your witnesses. Give them just enough and no more. Provide the details of your case by having the necessary documents available and accessible, but do not make the arbitrators read them all. Use summaries, chronologies and charts to demonstrate the details so that patterns emerge.

Never overreach. You can tarnish your client's image, or enhance it. Overreaching, dishonesty, or unpleasant conduct by lawyer – just as it can by a client -- can doom a case in an instant. The lawyer is expected to reveal all of the facts, particularly if you have the burden of proof and go first. Playing fast and loose with the facts or documents will undermine your credibility and your case. You should be a zealous advocate but not at the expense of your integrity.

III. STAGES IN THE ARBITRATION PROCESS

A. OPENING THE COMMUNICATION PROCESS

Inviting an opponent to voluntarily participate in arbitration should be viewed like any other demand in negotiation: It should be raised and discussed strategically. The ways this can be done are limitless, and must be determined on a case-by-case basis. For instance, you may want to raise the issue at the outset, or not until late in the game after other settlement discussions have failed. You may want to disguise the fact that you want to arbitrate at all, or even play a little cat and mouse with your opponent if you suspect that she wants to arbitrate.

When arbitration is compelled, there are more constraints. You will be bound by the terms of the arbitration clause of a contract, so the areas in which there will be room for dispute are the validity of the underlying contract, the scope of the arbitration clause within the contract, and the terms of the arbitration clause itself. Some review of the pertinent case law in North Carolina may be helpful.

An action compelled to arbitration does not cut off a party's access to the courts. The court retains jurisdiction throughout the entire process. What changes is the extent to which the court is actively involved in the process. The court is active at the outset, for example, to determine the existence or scope of an arbitration agreement, and steps back during the "hands off" period during which the parties arbitrate the case. Then, after the arbitration, the court re-enters the process to confirm the award.⁴²

The threshold issues that a court can decide center on whether a valid contract exists, the scope of the arbitration clause it contains, and the terms of the clause itself. Before a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate.⁴³ Whether a dispute is subject to arbitration is a matter of contract law.⁴⁴ Once you raise the legitimacy of the underlying contract, the trial court must summarily determine whether a valid arbitration right exists.⁴⁵ Failure of the court to resolve this issue when it is properly raised is reversible error.⁴⁶

After the validity of the underlying contract is determined the court can assess whether the disputed issues fall within the scope of the arbitration clause. A recent North Carolina Court of Appeals case discusses the law concerning and test used to resolve this issue:

The question of whether a dispute is subject to arbitration is an issue for judicial determination. *AT&T Technologies*, 475 U.S. 643, 89 L. Ed. 2d 648. The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court. *Tohato, Inc. v. Pinewild Management*,

⁴² See *Henderson v. Herman*, 104 N.C. App. 482, 409 S.E.2d 739 (1991).

⁴³ See *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409 (1960); *LSB Financial Services, Inc. v. Harrison*, ___ N.C. App. ___, 548 S.E.2d 574 (2001).

⁴⁴ See *Reagan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 531 S.E.2d 874, disc. review denied, 353 N.C. 268, 546 S.E.2d 129 (2000).

⁴⁵ *Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991).

⁴⁶ *Burke v. Wilkens*, 131 N.C. App. 687, 689, 507 S.E.2d 913, 914 (1998).

Inc., 128 N.C. App. 386, 496 S.E.2d 800 (1998). The determination of whether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether "the specific dispute falls within the substantive scope of that agreement." *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). This Court has adopted the *PaineWebber* analysis. *Ragan*, 138 N.C. App. 453, 531 S.E.2d 874 (in considering a motion to compel arbitration, the trial court should determine the validity of the contract to arbitrate, and whether the subject matter of the arbitration agreement covers the matter in dispute); *Rodgers Builders*, 76 N.C. App. 16, 331 S.E.2d 726 (arbitrability is determined by relationship between claim and subject matter of arbitration clause).

Raspet v. Buck, 147 N.C. App. 133, 135-36, 554 S.E.2d 676, 678 (2001).

There is a strong public policy in favor of settling disputes by arbitration.⁴⁷ Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.⁴⁸ Courts closely scrutinize any allegation of waiver. Because of the reluctance to find waiver, implied waiver will be found only where there is delay or action inconsistent with arbitration that causes another party to be prejudiced.⁴⁹ The mere filing of a lawsuit is not waiver⁵⁰ nor is the filing of a lien and institution of a law suit.⁵¹ The Court of Appeals has found implied waiver where a party demanded arbitration after taking extensive discovery.⁵² In *Prime South*, for example, the party that demanded arbitration took extensive discovery and then demanded arbitration before the other side had a chance to take further discovery. Additionally, the discovery was extensive, very expensive for the other side, and consisted of discovery that would not have been available at arbitration.⁵³

Orders denying motions to compel may be immediately appealed because they affect a substantial right which might be lost if appeal is delayed,⁵⁴ just like orders that allow a party to

⁴⁷ *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986).

⁴⁸ *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983) (as quoted in *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (footnote omitted) as quoted in *Hackett v. Bonta*, 437 S.E.2d 687 (1993)).

⁴⁹ See *Prime South Homes, Inc. v. Byrd*, 102, N.C. App. 255, 401 S.E.2d 822 (1991).

⁵⁰ *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984).

⁵¹ *Adams v. Nelson*, 313 N.C. 442, 329 S.E.2d 322 (1985).

⁵² *Prime South*, *supra* note 49, at 258, 401 S.E.2d at 825; See also *Douglas v. Mc Vicker*, 150 N.C. App. 705, 564 S.E.2d 622 (2002); But see *Mc Cray v. Byrd*, 148 N.C. App. 630, 559 S.E.2d 821 (2002), review denied, 356 N.C. 674, 577 S.E.2d 625 (2003) (finding no delay or waiver where plaintiff did not go to deposition after giving notice of intent to arbitrate).

⁵³ *Id.* at 258-60, 401 S.E.2d at 825-827.

⁵⁴ *Prime South*, *supra* note 49, at 258, 401 S.E.2d at 825.

withdraw a matter from arbitration and place it on a trial calendar, which are also immediately appealable.⁵⁵

Failing to demand arbitration within the three-year statute of limitations will bar a party's right to arbitrate.⁵⁶

If you question the validity or scope of the underlying contract, the first place to turn to is the North Carolina Uniform Arbitration Act (Act), North Carolina General Statutes section 1-567, *et seq.* In particular, section 1-567.3, which provides that:

(a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing parties refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to determine the issue so raised and shall order arbitration if found for the moving party, otherwise, the application should be denied.

N.C. Gen. Stat. § 1-567.3 (a) (1999).

The Act can also be useful if you claim that a valid contract exists and wish to compel arbitration. The only prerequisite to invoking the Act is that there must be a valid written agreement to arbitrate and a request by one of the parties to invoke the Act.⁵⁷ Once sent to arbitration, the arbitration proceeding may not be stayed for any reason other than a determination that there is not a valid written agreement to arbitrate.⁵⁸ A court cannot stay a matter even to determine if the matter has merit or to determine whether fault grounds have been shown.⁵⁹

B. SETTING ARBITRATION GROUND RULES

Arbitration ground rules concern the timing of events, the procedures to be used, and the way disagreements are resolved. These areas of discussion give rise to questions, not to specific answers. When you begin discussions with your adversary, you will want to craft the answers that best suit your case. What might serve your client's needs in one case may not help in another. Some typical questions follow.

⁵⁵ Sims v. Ritter Construction, Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983).

⁵⁶ Adams, *supra* at 51; But see Register v. White, 587 S.E. 2d 95 (2003), petition for discretionary review allowed, ____ N.C. ____ (2003) (holding latent ambiguity between three year statute of limitations and accrual of right to arbitrate begins with tender must be resolved against statute of limitations), See also, Darroch v. Lea, 150 N.C. App. 156, 563 S.E.2d 219 (2002) (Notice of VIM claim need not be given until tender, even if outside three year statute of limitation).

⁵⁷ N.C.G.S. § 1-567 (1983).

⁵⁸ N.C.G.S. § 1-567.3 (b).

⁵⁹ See Henderson, *supra* note 42.

Timetables: When will arbitration be held, how long it will last, will there be any time restrictions on each side's ability to present their case? How about discovery? What deadlines will be imposed, how detailed will the discovery timeline be demarcated? What about the deliberations, will the arbitrators be limited in how long they have to decide the case?

Procedures: How will evidence be introduced? Will it be solely by written documents? Will discovery be curtailed or abbreviated? Will the number of witnesses be limited? What discussions between counsel and their chosen arbitrators will be allowed?

Disputes: How will the arbitrators decide the case, by majority or consensus? How will discovery disputes or evidentiary disputes be decided? What rules to decide them will be used?

You will need to strategically assess the ramifications of each of these issues. By way of illustration, we can look at what type of agreement is necessary to render a verdict in a three-arbitrator panel. At one time, consensus was favored in certain arbitration clauses, but now majority seems to be the rule of the day in insurance policies⁶⁰ and consumer agreements that mandate arbitration⁶¹. Nonetheless, the parties can agree to whatever they wish if the arbitration is being entered into voluntarily. When majority decision is mandated, the influence of the neutral arbitrator is magnified. The selected arbitrator who is in the majority will greatly affect the verdict and the other selected arbitrator will have almost no say. When unanimity is required, the overall result may be softened because it will often be achieved by compromise. If you believe your selected arbitrator can hold great sway over the neutral one or achieve unanimity, you might favor majority decision. In cases where your only hope is to get one vote, unanimity will be attractive despite the fact that it may yield a watered-down result.

C. DEFINING THE ISSUES AND SETTING THE AGENDA

The issues to be decided must be established at the outset. I suggest using the North Carolina Pattern Jury Instructions as a starting point in every case. You should request that the arbitrators answer formal issues just as a jury would.

This is important when there is a question about the scope of the underlying arbitration clause or the contract that contains the clause. North Carolina courts seem to have adopted a test that determines whether the issues raised at arbitration fall within the scope of the underlying arbitration clause.⁶² If you wish to enforce a mandatory arbitration clause arising from an underlying contract, you

⁶⁰ See Appendix Exhibit A and B, North Carolina Standard Personal and Business Auto Policy UM and Med Pay provisions allowing for binding arbitration.

⁶¹ See Appendix Exhibit C, a health insurance policy provision requiring binding arbitration in the event of a dispute over coverage.

⁶² See *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). (The determination of whether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether "the specific dispute falls within the substantive scope of that agreement.")

will want to draft the issues to be decided at arbitration carefully, making sure they are in harmony with the scope of the underlying arbitration clause.

Another issue that arises in the motor vehicle negligence case context is whether pre-judgment interest is allowed in arbitrations. The North Carolina Court of Appeals has held that while pre-judgment interest was not barred as a matter of law as a remedy in arbitration, because it was not asked for at arbitration, nor provided for in the arbitration agreement the parties entered into, the trial court was without authority to award pre-judgment interest.⁶³ The message is clear. If you seek pre-judgment interest, costs, or any other remedies, cover it in the arbitration agreement if possible and also ask for it at the hearing.

An issue that arises in auto cases is coverage. The standard personal auto policy form is ambiguous enough to argue that coverage can be considered at the arbitration hearing that an insured has a right to demand based on the unilateral elective arbitration clause in the policy.⁶⁴ Unfortunately for insureds under a standard business auto policy, the language in a standard policy is less ambiguous and leaves little doubt that coverage decisions at arbitration cannot be compelled by an insured.⁶⁵

Setting the agenda should also be done, either informally by letter or stipulation, or in a formal arbitration agreement. There is obviously some overlap with prior and subsequent sections about the substance of timing and procedural issues but they should be considered and an agreement about them should be codified in some fashion. Otherwise, one party might stall. What incentive does the insurer have to move forward if there is no agreement that sets a timetable and there is no threat of pre-judgment interest?

D. NEGOTIATING ARBITRATION AGREEMENTS

Under federal and North Carolina law, the interpretation of arbitration agreements is governed by contract principles and the parties may contractually specify the rules under which the arbitration will be conducted.⁶⁶ Most of the matters that have been discussed in this paper can be addressed in an arbitration agreement. In drafting arbitration agreements, you will be striving to achieve the right balance between promoting speed and informality on the one hand, and comprehensively addressing a variety of matters that if left uncovered may be exploited by your adversary. Failure to enter into arbitration agreements at all can lead to delay. Cases in arbitration often do not get the same degree of attention that cases in litigation do, and can languish unless some timetable is in place to keep them moving. Arbitration agreements that address important issues and contingencies save problems down the road. The parties in *Palmer* could have saved pounds of cure if they had only addressed the issue of pre-judgment interest with an ounce of prevention by defining the issues to be arbitrated in an arbitration agreement.

⁶³ *Palmer v. Duke Power Co.*, 129 N.C. App. 488, 499 S.E.2d 801 (1998).

⁶⁴ See Appendix A.

⁶⁵ See Appendix B. ('However, disputes concerning coverage under this endorsement may not be arbitrated.')

⁶⁶ *Futrelle v. Duke University*, 488 S.E.2d 635, discretionary review denied, 494 S.E.2d 41d2 (1997).

Of course, arbitration agreements that are too comprehensive can bog things down. Highly technical agreements can create friction between the parties and slow down the process, eroding many of the benefits of arbitration. A sample arbitration agreement follows this manuscript (See Exhibit E). This is merely an example of what turned out to be a good balance in one case, not a guide in every, or even most cases. You are well advised to think through the specific goals you are trying to achieve in each case and tailor the arbitration agreement in that case accordingly.

E. THE ARBITRATION

Everyone has their own style of arbitrating a case. At arbitration you should provide what one of my law professors used to call—albeit politically incorrectly—bikini coverage: just enough to cover the important parts. To do this you will need a theme, organization, testimony and exhibits.

The theme should be enunciated at the opening of the case, perhaps in a one or two sentence summary after everyone is greeted and introduced. By way of illustration, let us assume you represent the plaintiff in a motor vehicle negligence case. Your summary might be something simple such as: “This is a case about a man who broke something and won’t pay to fix it; he broke Mary Jones’ leg when he ran her off the road, and now he won’t compensate her for her injuries or the loss of her career.” It should be amplified as the case goes on and sounded again at the closing.

Next, you should outline your case. For instance, “I am going to talk about liability, damages and coverage. On the issue of liability, we will call the police officer, an eyewitness, and Mary Jones to testify. They will testify that the accident happened just as it is described in the police report.” Then, hand out the police report. You can get the officer to illustrate his testimony with the accident report; you may not need to call him at all if there is no real dispute about liability. You can have the use the independent witness to introduce pictures of the scene and the vehicles. Your client can describe the collision, and then show photos of her injuries. You can show the pictures and characterize the testimony yourself in lieu of calling witnesses. If you call witnesses, their testimony should be short and to the point. Good witnesses add punch to a case, but not if they go on too long.

Open the section on damages by listing each of the elements of damages that apply in your case. A copy of the bills and records, with an attached summary of medical expenses, can be used to prove medical expenses. A summary of lost wages with appropriate supporting documentation or a chart of yearly earnings can be handed out to cover lost wages and diminished earnings capacity. To develop the other elements of damages requires a medical opinion. This can be provided by in writing, by letter or report, or by videotape, or by live testimony. Then, once the doctor has indicated what limitations your client has, you can use family members and friends to corroborate this and add highlights of the client’s injuries and recovery. Again, these should be short and to the point. Do not call a series of witnesses that will repeat the same things. Piece together some high points and fill in the gaps in closing by reading from the medical records or doctor’s reports. After you have proven your case on liability and introduced evidence of damages, you can deal with any insurance coverage issues.

Once you have made your presentation, your opponent will make hers. You should have anticipated and pre-empted in your presentation most of the arguments your opponent will make. Any points you believe to be worthy of a response can be addressed in a brief rebuttal.

In closing you should weave the facts into the legal elements you previously outlined, keeping with the pattern of your theme. You should itemize and support each item of damage and justify the amount you seek, and write it down on a chalk board or flip chart as you go. The amount of damages you ask for should be discussed in an organized and logical manner. You should flesh out each element, using the elements of damages as a framework. Reading from the North Carolina Pattern Jury Instructions or relevant case law will nicely punctuate the presentation. The amount you seek on each should be supported by the evidence that you provided by with your testimony or exhibits. If the basis of your argument was not covered during your case in chief, but is in some of the documentation you provided, you should direct the arbitrators to the particular summary or document in which it is contained. You can argue and draw reasonable inferences to further define the picture of your client's loss.

The documents you provide should be thorough, complete and clear. A complete set of documents should be provided to each arbitrator and opposing counsel. Never be tempted to play fast and loose with documents or facts just because arbitration is less formal than trial, such as omitting bad records or altering documents. First, it is wrong. You are still bound by the rules of professional responsibility. Second, from a practical standpoint, if such an ethical breach were discovered, the cost to your credibility—in this and every other case with any of the arbitrators or opposing counsel—would greatly outweigh any possible short term benefits.

F. CLOSING THE ARBITRATION PROCESS

Once you have obtained an arbitration award, you should make a motion to the court to enter a judgment in the case if there is any dispute about what is to be paid or who will be paying it. Any issues about credits (for payments made by a liability carrier in a UIM case, for example), set-off's (for payments made under med pay provisions in a UIM or UM case), or pre-judgment interest can be raised at the hearing on your motion. If you already have a pending action, it will be easy to make a motion in the cause. If no tort action has been filed, you can achieve this objective by filing a declaratory judgment.

If you are unhappy with the result, your options are limited. Having agreed to arbitration, the parties will be hard-pressed to avoid the decision of the arbitrator. Modification of the award is disfavored except in narrowly circumscribed circumstances regarding the form rather than the substance of the award.⁶⁷ For example, parties may apply to a court within 90 days to modify or correct clerical mistakes and certain misunderstandings⁶⁸ but are otherwise unable to modify, correct or vacate an award.⁶⁹ A court may only vacate an award for the limited reasons stated in the North Carolina Uniform Arbitration Act,⁷⁰ such as where (1) there is

⁶⁷ *Trafalgar House Construction, Inc. v. M.S.L. Enterprises, Inc.*, 494 S.E.2d 613 (1998); see also *Semon v. Semon*, ____ N.C. App. ____ (2003) (interpreting Family Law Arbitration Act after finding the same to be analogous to N.C. Gen.Stat. §1-567.14).

⁶⁸ See N.C.G.S. § 1-567.14.

⁶⁹ *Crutchley*, *supra* note 2, at 524, 293 S.E.2d at 597; *Sholar Business Associates, Inc. v. Davis*, 138 N.C. App. 298, 301, 531 S.E.2d. 236, 239 (2000).

⁷⁰ See N.C.G.S. § 1-567.13 (a)(5). A party that questions the validity of the underlying mandatory arbitration agreement can ask to have a resulting award vacated if the party and the

corruption, fraud, or other undue means; (2) partiality by a neutral arbitrator or prejudicial misconduct; (3) the arbitrators exceed their powers; (4) a refusal to continue the matter or hear evidence when appropriate; (5) or there is no arbitration agreement [mandating arbitration].⁷¹

Courts are loathe to upset an arbitrator's award as long as it is within his authority and define an arbitrator's authority very broadly.⁷² A judge, however, is not able to act as an arbitrator and then confirm his own award.⁷³

Where there are ambiguous terms that cannot be determined from the record, courts will remand the matter back to the arbitrators for clarification rather than attempt to resolve the ambiguity.⁷⁴ As one publication has noted, this decision raises a host of logistical problems, such as how to re-convene a panel and who will pay for the costs to do so.⁷⁵ The time limits provided under the Uniform Arbitration Act must be adhered to. Under the Act a party seeking clarification must apply to the arbitrators within 20 days.⁷⁶ A modification of the award can only be sought within 90 days of the award from the court that ordered the arbitration.⁷⁷

As previously noted, appellate review is limited. A court may only vacate an award for the limited reasons stated in the North Carolina Uniform Arbitration Act.⁷⁸ The Federal Arbitration Act also favors upholding arbitration awards and also greatly limits the scope of post-award remedies to vacate, modify or correct awards.⁷⁹ Two non-statutory exceptions, the

party (a) has not already questioned and received an adverse ruling on the same issue under G.S. 1-567.3 and (2) participates in the arbitration and (3) raises an objection about this issue at the arbitration.

⁷¹ See Sholar, *supra* note 69, at 301-02; 531 S.E.2d at 239-40.

⁷² See *Howell v. Wilson*, 136 N.C. App. 827, 830 (2000) (holding that arbitrator did not exceed authority in denying claim because plaintiff failed to show medical causation, because an arbitrator only exceeds his authority when he arbitrates additional issues or matters not properly before him).

⁷³ See Henderson, *supra* note 42.

⁷⁴ *General Accident Ins. Co. of Am. v. M.S.L. Enterprises, Inc.*, 143 N.C. App. 453 (2001).

⁷⁵ *Only Arbitration Panel Could Clarify Fuzzy Term in Award*, N.C. Lawyers Weekly, 21 May 2001.

⁷⁶ N.C. Gen.Stat. §1-567.10 (2001).

⁷⁷ N.C. Gen.Stat. §1-567.14 (2001).

⁷⁸ See N.C.G.S. § 1-567.13 (a)(5) (1999). A party that questions the validity of the underlying mandatory arbitration agreement can ask to have a resulting award vacated if the party (1) has not already questioned and received an adverse ruling on the same issue under G.S. 1-567.3 and (2) participates in the arbitration and (3) raises an objection about this issue at the arbitration.

⁷⁹ 9 U.S.C. §§ 10, 11.

“public policy exception” and the “manifest disregard of the law”, have been recognized but have been so narrowly interpreted that they are of limited value in all but a handful of cases.⁸⁰

⁸⁰ See Stephen Buehrer, *A Clash of the Titans: Judicial Deference to Arbitration and Public Policy Exception in the Context of Sexual Harassment*, 6 Am. U.J. Gender Soc. Pol’y & Law 265 (1988); See also Norman S. Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brooklyn L. Rev. 471 (1998).