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COURT-ORDERED ARBITRATION IN NORTH CAROLINA: SELECTED ISSUES OF PRACTICE AND PROCEDURE

THOMAS L. FOWLER*

I. COURT-ORDERED ARBITRATION IN NORTH CAROLINA

In June of 1985 the Task Force on Dispute Resolution recom- mended that North Carolina establish in three judicial districts a pilot project of court-ordered arbitration to resolve civil disputes involving $15,000 or less. The Task Force’s report found that sixteen states and nine federal courts had, by 1985, adopted some form of mandatory, non-binding arbitration and that crowded court dockets were the primary motivation. The Task Force noted that the high cost and delay that typify traditional litigation often defeat the goals of parties with relatively small civil actions. The Task Force found that alternatives to litigation in these small civil suits may not only be more efficient in terms of time and money but may also “result in less alienation, produce a feeling that the dispute was really heard, and fulfill a need to regain control by not handing the problem over to lawyers, judges and the intricacies of the legal system.” Based largely upon the Task Force’s report,

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1. The Task Force was created by then North Carolina Bar Association President Charles L. Fulton in November 1983 to study and propose “new and promising” methods for resolving disputes other than conventional litigation. In addition to arbitration, the Task Force studied mediation, summary jury trials, fee shifting devices, reference to special masters, dispute settlement centers, etc. NORTH CAROLINA BAR FOUNDATION, DISPUTE RESOLUTION: A TASK FORCE REPORT (1985) [hereinafter N.C. BAR FOUND].

2. Id. at 19.

3. Id. at 10, quoting NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PATHS TO JUSTICE, 10 (1986); see also NORTH CAROLINA BAR ASSOCIATION, COURT ORDERED ARBITRATION: REPORT TO THE SUPREME COURT OF NORTH CAROLINA 2 (1989) [hereinafter N.C. BAR ASS’N] which sought to qualify the reasons for investigating the usefulness of court-ordered arbitration: “In supporting the court-ordered arbitration program, the North Carolina Bar Association was not
the General Assembly authorized an experimental program of
court-ordered, non-binding arbitration for claims under $15,000.4
The enabling legislation granted to the Supreme Court of North
Carolina the power to establish the pilot programs and to adopt
rules of arbitration to govern the proceedings.5

The arbitration rules adopted by the Supreme Court in
August of 1986 followed most of the principles proposed in the
Task Force's report.6 Under the Rules, civil claims for $15,000 or
less are subject to mandatory arbitration but the arbitration
award is not binding and either party can seek trial de novo.7
Arbitrators are experienced attorneys, trained as arbitrators, who
can be chosen by mutual agreement of the parties, and who are

reacting to any perceived crisis or seeking to meet the needs of any special
interest group. . . . [T]here is no widespread belief that the present system is
somehow failing. Rather, this program was recommended based upon a wide-
ranging consensus that the court-ordered arbitration process had shown
sufficient promise elsewhere in improving the administration of justice that its
use in North Carolina should be conditionally explored." N.C. BAR
FOUND. supra note 2 at 10.

of mandatory, nonbinding arbitration of small cases may help reduce costs in the
trial division of the General Court of Justice and make the operation of these
divisions generally more efficient, the Supreme Court of North Carolina may, by
such rules as it shall determine appropriate, provide for an experimental, pilot
program in three judicial districts selected by the Court, of mandatory,
nonbinding arbitration of all claims for money damages of fifteen thousand
dollars or less. The rules shall make all such claims subject to decision initially
by arbitration; but the rules must also insure that no party is deprived of the
right to a jury trial and that any party dissatisfied with the arbitration award
may receive a trial de novo. . . ." Id.

5. Id.; see also N.C. Bar Ass'n supra note 4, at 1-2.

6. Two significant differences between the Task Force recommendations and
the Rules adopted by the Supreme Court concern the initial scheduling of the
arbitration hearing and the length of the hearing. The Task Force recommended
scheduling the arbitration within 150 days of the last responsive pleading. N.C.
BAR FOUND. supra note 2, at 2. Rule 8, of the North Carolina Rules for Court-
Ordered Arbitration, requires the arbitration to be scheduled within 60 days of
the last responsive pleading. N.C. CT.-ORD. ARB. R. 8 (1986). The Task Force
recommended that the arbitrator should "ordinarily allow each side up to one
hour for presentation of its case." N.C. BAR FOUND. supra note 2 at 2. Rule 3(n),
Rules for Court-Ordered Arbitration, states that arbitration hearings "shall be
limited to one hour unless the arbitrator determines . . . that more time is
necessary." N.C. CT.-ORD. ARB. R. 3(n).

7. This contrasts with commercial or contractual arbitration where the
decision to engage in arbitration is generally voluntary while the arbitration
award is usually binding.
compensated by the state at the rate of seventy-five dollars per arbitration. The arbitration hearings are relatively informal, are generally to be completed within a one hour time period, and the rules of evidence are not strictly followed but serve only as a guide for the arbitrator in hearing or excluding evidence.\(^8\) The role of the arbitrator is limited to presiding at the hearing and rendering an award,\(^9\) whether or not one or both parties appear.\(^{10}\) The arbitrator does not schedule hearings, hear or grant motions to continue, hear or grant pre-trial or post-hearing motions.\(^{11}\) The responsibility for notifying the parties of the selection of their case for arbitration, selecting the presiding arbitrator, scheduling the hearing, and general administrative functions resides with the "arbitration coordinator" who is appointed to oversee the arbitration process in each district with an arbitration program.\(^{12}\) Motions for continuances, other pre-trial motions, motions for rehearings, etc. are made to the "court," which may be either the senior resident superior court judge, the chief district court judge or another superior or district court judge who has been assigned to handle the matter.\(^{13}\)

In January of 1987 court-ordered arbitration began in North Carolina. Three judicial districts were chosen as pilot sites for arbitration: the Third Judicial District (Carteret, Craven, Pamlico, and Pitt Counties); the Fourteenth Judicial District (Durham County); and the Twenty-Ninth District (Henderson, McDowell,

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8. For more detail, the Arbitration Rules themselves should be consulted and there are excellent overviews found in the following articles: William Kinsland Edwards, "No Frills" Justice: North Carolina Experiments With Court-Ordered Arbitration, 66 N.C. L. Rev. 395, 402-408 (1988); George K. Walker, Court-Ordered Arbitration Comes to North Carolina and the Nation, 21 Wake Forest L. Rev. 901 (1986).

9. The arbitrator's duties are complete upon filing the award. N.C. Ct.-Ord. Arb. R. 2 (commentary).

10. See infra, Part III. D.

11. See N.C. Ct.-Ord. Arb. R. 3(a) (arbitration hearings shall be scheduled by the "court"); Id. at R. 3(q) (the "court" may consider and determine any motion at any time; pendency of a motion shall not be cause for delaying an arbitration hearing); Id. at R. 8(b) (the "court" shall schedule hearings and the hearing may be continued only by the "court"); Id. at R. 8(f) (definition of "court" as used in Rules). Rule 3(i) also makes clear that all ex parte communications by the parties or their counsel with the arbitrator are prohibited. Id. at R. 3(i).

12. Rule 8(e) provides the basis for delegating these administrative functions to the arbitration coordinator. N.C. Ct.-Ord. Arb. R. 8(e).

The Institute of Government at the University of North Carolina at Chapel Hill evaluated these pilot programs on the basis of eligible cases filed from January through June of 1987. The results of the Institute's study were included in a report to the Supreme Court by the North Carolina Bar Association. These results showed that the experimental program had met its goals of resolving eligible cases faster than did standard procedures, reducing the number of cases that required a trial, and being favorably regarded by the litigants and the attorneys who participated in the arbitration proceedings. In addition, surveys of attorneys practicing civil law in each of the pilot districts indicated that a large majority favored continuation and expansion of the program.

Based on the Institute’s study and the support of the North Carolina Bar Association and the Supreme Court, the General Assembly in 1989 adopted section 7A-37.1 which authorized “court-ordered nonbinding arbitration as an alternative civil procedure.” The statute also provided that although the Supreme Court may adopt rules governing arbitration procedure, such rules should provide that no party may be deprived of the right to a jury trial, that arbitration should be available in civil actions where the claims do not exceed $15,000, and that arbitrators shall have the same immunity as judges from civil liability for their official conduct. Subsection (d) of the statute also makes clear that judicial districts are not required to establish a court-
ordered arbitration program in their district but that the decision to establish, continue or terminate a program should be made by the Director of the Administrative Office of the Courts and the district’s senior resident superior court judge and chief district court judge. Since 1989, court-ordered arbitration has expanded as state funding has allowed so that as of this writing, thirty-one of the state’s forty-six judicial districts have court-ordered arbitration programs. As recently as 1994, based on a survey undertaken by the Supreme Court Dispute Resolution Committee chaired by Justice Henry E. Frye, the court-ordered arbitration program was found “[a]gainst every measure” to be a success... [that enhanced] government’s responsiveness to its citizens.”

Despite the apparent success of court-ordered arbitration, the process is not without its detractors. Some object that interposing the arbitration process between filing the complaint and proceeding to trial and requiring the additional payment of a seventy-five dollar fee to secure trial de novo, interferes with the constitutional right to a jury trial. Some object that the informality of

21. Id. at 1(d).


24. Requiring participation in arbitration as a precondition to a jury trial and requiring an additional payment to “appeal” an arbitration award may chill the right to a jury trial but most commentators have concluded that this effect is not unconstitutional. See Dwight Golann, Making Alternative Dispute Resolution Mandatory: The Constitutional Issues, 68 OR. L. REV. 487, 502-521 (1989); see also, Sharon A. Jennings, Court-Annexed Arbitration and Settlement Pressure: A Push Towards Efficient Dispute Resolution of “Second-Class” Justice?, 6 OHIO ST. J. ON DISP. RESOL. 313 (1991) (review of various sanctions used to increase settlement pressure in court-annexed arbitration); Kimbrough v. Holiday Inn, 478 F.Supp. 566 (E.D. Penn. 1979) (holding that application of local experimental rule providing for compulsory nonbinding arbitration as a prerequisite to jury trial in certain civil suits for recovery of money damages of $ 50,000 or less does not violate right to jury trial or equal protection). Nevertheless, the issue may be raised. Some parties have added the following language on their request for trial de novo: “Please be advised that Plaintiff objects to the payment of the seventy-five dollar filing fee as an unconstitutional restriction on plaintiff’s right to jury
the hearing and the one hour time limitation diminish the importance of the evidence and the law's normal rights-based or fault-based resolution of conflicts and elevates the importance of and pressure to compromise. Indeed, North Carolina's one hour court-ordered arbitration hearing could be viewed more as a settlement device rather than a true adjudicatory procedure. After all, even if the parties do not negotiate their own settlement after the arbitrator's award, if neither party demands trial de novo the arbitrator's award is their de facto settlement. Perhaps the adjudicatory guise of court-ordered arbitration, if that is what it is, is

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25. "[W]hen we speak of law courts and adjudication, we speak of institutions and procedures that aim not merely to resolve disputes, but to do so by enforcing the rights and duties of the parties; rights and duties that they could and perhaps should have known, and may have been relying upon, when they fell into a quarrel." Paul D. Carrington, ADR and Future Adjudication: A Primer on Dispute Resolution, 15 REV. LITIG. 485, 486 (1996).

26. "Because the presentations are generally shorter, it is argued court-annexed arbitration considers fault a lesser issue and de-emphasizes the importance of evidence. . . . Court-annexed arbitration programs are often criticized as an overly-oppressive tool for encouraging settlement. Because over ninety percent of all cases in federal court reach a settlement without going to trial, court-annexed arbitration and other ADR programs are often seen as merely providing the inevitable." Smith, supra note 23, at 470-71.

27. See generally, Jennings, supra note 25. "One concern of alternative dispute resolution (ADR) programs is the propriety of using settlement pressure to eliminate cases from the docket. Tension exists between pushing parties to settle earlier than on the courthouse steps and unduly discouraging them from pursuing their rightful claims in court. Although some ADR programs perform an adjudicative function, the results are not binding and, thus, ADR resolves disputes only if the parties reach an agreement. Sanctions are used to increase the cost-effectiveness of alternative dispute resolution by creating an additional incentive to adopt the ADR result, instead of proceeding to trial." Id.

28. One commentator has concluded that the goal of court-ordered, nonbinding arbitration is "to produce a settlement figure that may be considered by the parties in future settlement discussions." Weinzierl, supra note 24, at 596. "Characterizing the process as a settlement device in no way detracts from its legitimacy. Since the current settlement rate is ninety to ninety-five percent, protesting the use of court-annexed arbitration on the grounds that it merely encourages settlement ignores the realities of our judicial system. Given the high settlement rate, court-annexed arbitration simply encourages the most probably result and introduces an element of objectivity not present in traditional settlement negotiations. A well-designed program encourages those parties that will settle to do so at an earlier time, but leaves others free to pursue their litigation in court without undue penalty." Jennings, supra note 25, at 317.
nevertheless important in convincing the parties that they have had their day in court and that they should acquiesce in the arbitrator's decision. As one commentator has noted:

Some argue... that court-annexed arbitration should be considered a mechanism for achieving settlement and that arbitrators should not be content with simply rendering an award; rather like para-judicial personnel assigned to other programs of alternative dispute resolution they should view their function as one of promoting settlements. [However] there are substantial risks involved with this approach. Litigants are often willing to accept an informal tribunal as a legitimate alternative to the formalities and technicalities that are the hallmark of the courtroom, provided it has been charged with determining the merits of a claim or defense and provided it offers a fair hearing focused on legal rights. But this is very different from viewing the hearing as a means of exerting pressure on the parties to avoid the merits in order to reduce expense and delay. To make court-annexed arbitration little more than a mechanism for achieving settlement is to run the risk of diminishing its effectiveness in terminating cases and reducing litigant satisfaction with the process.29

In any event, it is interesting to note that despite the apparent success of court-ordered arbitration the General Assembly has consistently declined to increase funding of the program to allow an increase in the fee paid to arbitrators, or to increase the amount in controversy for the civil actions that are subject to arbitration. Both amounts remain at the same level that was selected in 1986.30 Other states with court-ordered arbitration programs have chosen to increase the amount in controversy limitation in

30. Arbitrators are paid seventy-five dollars per hearing, N.C. Ct.-ORD ARB. R. 2(c). By statute, cases eligible for court-ordered arbitration are civil actions seeking $15,000 or less. N.C. GEN. STAT. § 7A-37.1. Some counties have chosen, by local rule, to expand the use of court-ordered arbitration to cases seeking in excess of $15,000. For instance, the local rules of Gaston County require the parties in every superior court civil case to participate in one of three alternative dispute resolution procedures: court-ordered arbitration, mediated settlement conference, or private arbitration or mediation. If the parties do not timely select one of the alternatives, “the parties are considered to affirmatively agree, and the court to have approved, the case being ordered into the Civil Arbitration Program regardless of the amount of monetary relief sought pursuant with Rule 1(b) of the Supreme Court’s “Rules for Court Ordered Arbitration in North Carolina.” Gaston County, N.C. CIVIL LOCAL R. 22.
order to expand the number of civil cases that are subject to arbitration.\footnote{31}

It should be noted that at least some of this resistance to expanding court-ordered arbitration in North Carolina may arise from the creation and the popularity of the system of court-ordered mediated settlement conferences for superior court civil actions. In 1991 the General Assembly authorized a pilot program of court-ordered mediated settlement conferences for civil actions in superior court\footnote{32} and the program was adopted for statewide implementation in 1995.\footnote{33} There are several differences between the mediation program and court-ordered arbitration.\footnote{34} Aside from the significant differences in the duties of the arbitrator and the mediator, it is important to note that mediators are paid substantially more than arbitrators and the cost of mediation is born entirely by the parties themselves, whereas in arbitration the state pays the arbitrator’s fee. There may be legitimate debate as to the relative merits of mandatory mediation versus non-binding arbitration as a means of efficiently resolving disputes,\footnote{35} but North Carolina’s court-ordered arbitration program

\footnote{31. In 1993, Illinois amended its statute authorizing mandatory arbitration to raise the amount in controversy for civil cases subject to arbitration from $15,000 to $50,000. 735 ILL. COMP. STAT. 5/2-1001A (West 1993). California’s Judicial Arbitration Rules for Civil Cases also provides for arbitration in all actions “where the amount in controversy does not exceed $50,000 as to any plaintiff.” CAL. CT. R. 1600. (1998). In Rhode Island the amount in controversy for claims subject to court-ordered arbitration is $100,000. R.I. ARB. R. 1 (1998).}


\footnote{33. N.C. GEN. STAT. § 7A-38.1 (1995).}

\footnote{34. The mediator does not resolve disputed issues of fact, make conclusions of law and render an award, rather the mediator meets with the parties, both together and separately, to discuss and facilitate a resolution of the civil action. The mediator has no authority to impose a resolution or settlement on the parties. There is no time limit on the mediation proceeding, it continues until the mediator determines that further discussion is not warranted. Court officials or employees are not involved in scheduling the mediation or in paying the mediator. Instead, the mediator, selected or appointed to the case, schedules the mediation conference and is paid by the parties. Unless the mediator and the parties agree otherwise, the mediator is paid an administrative fee of $100 for each mediation and $100 per hour for the duration of the mediation conference. \textit{Id.}}

\footnote{35. See the discussion of the Florida Model (primarily mediation) and the Illinois Model (primarily arbitration) contained in Weinzierl \textit{supra} note 23, at 598-604.}
may be unlikely to expand into the territory now subject to the mandatory mediation program.\textsuperscript{36}

\section*{II. \textsc{interpretation of the rules for court-ordered arbitration}}

Although North Carolina's court-ordered arbitration system has been functioning since 1987, there is only one reported case from our appellate courts in which the Rules for Court-Ordered Arbitration are cited.\textsuperscript{37} The reason the Arbitration Rules have not been and will not often be cited, interpreted or applied by our appellate courts is found in the Rules themselves. If a dissatisfied party does not "appeal" an arbitration award by timely demanding a trial de novo,\textsuperscript{38} the court enters judgment on the award "which shall have the same effect as a consent judgment in the action."\textsuperscript{39} This judgment entered on the arbitrator's award is not appealable. It is after all a consent judgment and "there is no record for review by an appellate court."\textsuperscript{40} The award is avoided only by filing a demand for a trial de novo, and the trial de novo is conducted as if there had been no arbitration proceeding at all,\textsuperscript{41} in which case the arbitrator's award is simply a nullity. Thus, the various interlocutory decisions made by the arbitrator during the arbitration hearing that culminate in the final arbitration award, e.g., findings of fact, legal analyses, interpretations of the procedures and the arbitrator's authority under the Rules for Court-Ordered Arbitration, will generally escape appellate review for error.

Exempting the arbitrator's decision from review for error is justified in light of the purposes and policies behind court-ordered

\begin{footnotesize}
\begin{enumerate}
\item This is not to claim that there are not other legitimate reasons for not expanding North Carolina's court-ordered arbitration program. For instance, North Carolina's rule limiting arbitration hearings to one hour may weigh against subjecting more complicated civil actions (e.g., those with damages claims greater than $15,000) to court-ordered arbitration's summary adjudication. North Carolina's one hour time limitation for arbitration hearings may be unique among the states with such programs. A review of the court-ordered arbitration rules for Arizona, California, Illinois, Pennsylvania, Rhode Island, Utah and Washington revealed no comparable time limitation.
\item N.C. CT.-ORD ARB. R. 5.
\item . \textit{Id.} at R. 6(b).
\item \textit{Id.} at R. 6 (commentary).
\end{enumerate}
\end{footnotesize}
It is not of great importance to determine whether the arbitrator erred in a factual determination or legal interpretation if those issues will be litigated de novo before a judge or jury. Likewise it makes little difference if the arbitrator erred in the details if both parties are satisfied enough with the award to waive their right to trial de novo. However, like any body of law the Arbitration Rules do not clearly and unambiguously address all questions concerning arbitration procedure or an arbitrator's authority that arise during a proceeding. Occasionally the meaning of the Rules must be interpreted or the application of the Rules interpolated. Without appellate review to resolve conflicting interpretations, the Rules may not be interpreted uniformly across the state. Perhaps equally as important, with no case law to refer to, each interpretive question will appear to be a matter of first impression instead of an issue that has been addressed and resolved hundreds of times by other arbitrators, arbitration coordinators and supervising judges. Thus some have perceived the usefulness of a vehicle for sharing some of the issues that arise in arbitration proceedings that require interpretation of the Rules and explaining each issue's resolution and supporting reasoning. This article is intended as that vehicle which will identify some of these issues and offer insight into their resolution.

The author's interest in this area of the law arises from his experience with court-ordered arbitration as both the attorney representing parties in arbitration and as the arbitrator presiding over the hearings themselves, and his present position with the Administrative Office of the Courts in which capacity he is regularly referred questions about the Arbitration Rules. The author

42. "The purpose of these [arbitration] rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes . . ." Id. at R. 1 (commentary).

43. The values of predictability of the law and judicial efficiency, often associated with the justifications of stare decisis, would also seem to be important to the arbitration process. See Earl Maltz, The Nature of Precedent, 66 N.C. L. Rev. 367, 368-72 (1988) (listing the justifications for following precedent as certainty and reliance, equality, efficiency, the appearance of justice and the avoidance of arbitrary decision making).

44. From 1987 to 1992, the author presided as arbitrator in over 250 arbitrations in the Pilot Program in Durham County. The author was also the arbitrator in Bass v. Goss, 109 N.C.App. 242, 412 S.E.2d 145 (1992) discussed in section III(e) and has been a certified mediator in North Carolina's pilot Superior Court Mediation Program since 1992.

45. Questions are often forwarded to the AOC from arbitrators, judges and arbitration coordinators. The author has had the invaluable opportunity to
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has had the opportunity to learn which are the most commonly asked and/or perplexing questions concerning court-ordered arbitration and has attempted to select these for inclusion below. It should, of course, be noted that the resolutions and supporting reasoning of the issues that follow are in no way binding on the attorneys, arbitration coordinators, arbitrators or supervising judge involved in court-ordered arbitration. These resolutions and rationales are offered for whatever use and consideration parties or court officials involved in arbitration wish, and they should be followed only to the extent they logically assist in answering the issue. 46

III. THE ISSUES
A. Pre-trial Motions and Arbitration

Pursuant to Arbitration Rule 8(b), the arbitration hearing is scheduled to occur within sixty days47 of the docketing of the appeal from small claims court, the filing of the last responsive pleading or expiration of the time allowed to file such pleading. Thus the arbitration hearing may often be held before the parties’ discovery is complete or before pre-trial motions, such as a motion for summary judgment, have been filed or decided. Incomplete discovery or pending motions will not, in general, be grounds to delay the arbitration hearing.48 Such a result is not unreasonable in light of the relatively less complicated issues typical of civil actions involving claims for $15,000 or less, the informal and summary nature of the arbitration proceeding itself,49 the non-review and discuss many of these questions with AOC Counsel Thomas J. Andrews, AOC Associate Counsel Pamela W. Best, and AOC Court Management Specialist Miriam Saxon.

46. This is borrowed from one definition of dicta: dicta should not influence a later decision unless it logically assists in answering the new question. Muncie v. Insurance Co., 253 N.C. 74, 79, 116 S.E.2d 474, 477 (1960).

47. N.C. CT.-ORD. ARB. R. 8(b). In the 1985 report, the Task Force recommended that the arbitration hearing be scheduled within 150 days of the date of the last responsive pleading. N.C. BAR FOUND. supra note 2, at 2. This was based in part on Rule 8 of the General Rules of Practice for the Superior and District Courts which provided, at the time, for a discovery period of 120 days. Rule 8 has since been amended to require simply that discovery be initiated “promptly.”

48. “Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.” N.C. CT.-ORD ARB. R. 3(q)2.

49. Arbitration hearings are generally limited to a one hour duration and the law of evidence does not apply except as to privilege. Id. at R. 3(h), (n).
binding nature of the arbitration award, and the policies underlying the creation of mandatory court-ordered arbitration. Although a party may seek a continuance of the arbitration pending completion of discovery or a judge’s ruling on a motion for summary judgment, in most cases the purposes of court-ordered arbitration are served by proceeding with the arbitration hearing.

Nevertheless it is possible for a party to raise its summary judgment arguments before the arbitrator. First, Arbitration Rule 3(q)(1) allows the court to “defer consideration of issues” raised by a party’s pre-trial motion “to the arbitrator for determination in his award.” This rule allows a judge to decline temporarily to rule on a motion for summary judgment presented to her prior to the arbitration hearing and to direct the party to present the “issues” raised by the motion to the arbitrator. After the arbitration hearing is completed and the arbitrator submits his award, if neither party demands a trial de novo, the arbitration award is entered as a judgment and the motion for summary judgment becomes moot. If trial de novo is demanded then the motion for summary judgment is still pending before the court and the arbitration award is a nullity. Second, regardless of whether a summary judgment motion is pending or a judge has expressly

50. Any party dissatisfied with the arbitration award may have a trial de novo as of right. Id. at R. 5(a).

51. “The general goal of court-ordered arbitration is to create an efficient, economical alternative to traditional civil litigation for prompt resolution of cases. . . .” “Rather than heavy reliance on traditional discovery, full trial preparation and briefing, and the rules of evidence, arbitration encourages prehearing stipulations, relatively informal statements of issues, and receipt of all relevant evidence that is assessed by the arbitrator for its relative worth.” Walker supra note 9, at 904. In the North Carolina Bar Association’s report, the authors state that “part of the possible benefit of court-ordered arbitration is in simply having an established timetable for resolving the dispute. Imposing time deadlines encourages the parties to at least consider resolving disputes more quickly. . . . [T]he mere existence of a scheduled hearing on the merits helps spur the parties and their attorneys to action.” N.C. BAR ASS’N supra note 2, at 6.

52. Any motion for a continuance must be made to the court and not the arbitrator, and the movant must demonstrate a strong and compelling reason for the continuance. N.C. CT.-ORD ARB. R. 8(b)2.

53. “One goal of these rules is to expedite disposition of claims involving $15,000 or less. . . .” “A motion to continue a hearing will be heard by a judge mindful of this goal.” Id. at R. 8 (commentary).

54. Id. at R. 3(q).

55. See infra notes 7-10.
deferred consideration of the motion to the arbitrator pursuant to Rule 3(q)(1), the parties can always argue, and the arbitrator can always consider, that a party is or is not entitled to judgment as a matter of law. The arbitrator sits as both fact-finder and judge, and appropriately considers legal bars to recovery.

This does not mean, however, that an arbitrator has authority to grant a motion for summary judgment. The arbitrator's only authority is to enter an arbitration award which "must resolve all issues raised by the pleadings" and which requires no findings of fact or conclusions of law.\textsuperscript{56} Arbitration Rule 3(q)(1) does not authorize the judge to delegate to the arbitrator the authority to decide the summary judgment motion, it only allows the arbitrator to consider the issues raised by the motion when determining the terms of the arbitration award. The arbitrator should hear the legal arguments and the evidence offered by each party within the time constraints mandated by the arbitration rules and then reach a decision as to what parties are entitled to recover and the amount of such recovery. This decision can be based entirely on conclusions of law or on applying the law to disputed facts but the decision must be, in form and substance, an arbitration award as defined by the rules.

Arbitration hearings are intended to be held at an early stage of a litigation and to proceed as scheduled despite pending pre-trial motions or outstanding discovery. The parties are not, however, prevented from arguing at the arbitration hearing the issues underlying their pending or future summary judgment motion. Although the arbitrator is not authorized to grant a motion for summary judgment, the arbitrator can and should consider whether a party is entitled to judgment as a matter of law in determining the arbitration award.

\textbf{B. The Pre-hearing Exchange of Information}

Arbitration Rule 3(b) provides that at least ten days before the arbitration hearing the parties shall exchange a list of the witnesses each expects to call at the hearing, copies of exhibits each expects to offer in evidence, and a brief statement of the issues and the related contentions.\textsuperscript{57} The Arbitration Rules do not specify the consequences if a party fails to file this Pre-hearing Exchange of Information or if a party seeks to offer a witness or

\textsuperscript{56} N.C. CT.-ORD ARB. R. 4.
\textsuperscript{57} Id. at R. 3(b).
exhibit at the hearing that was not listed on the Exchange of Information. The Rules are reasonably interpreted, however, to allow the presiding arbitrator the discretion to hear evidence even if it was not properly included in the Exchange of Information.

The Rules direct the arbitrator to hear the evidence and arguments of the parties within a sixty minute time period. To meet this demanding limit, while allowing for full understanding of each party's evidence and argument, the arbitrator must have and must exercise control over the parties' presentations. Arbitration Rule 3 provides for this authority. Subsection (g) gives arbitrators "the authority of a trial judge to govern the conduct of hearings", except for the power of contempt. Subsection (h) provides that the law of evidence is a guide but does not control what evidence the arbitrator allows at the hearing. The arbitrator has discretion to decide what evidence to hear and to consider "all evidence presented" giving it the "weight and effect the arbitrator determines appropriate." The arbitrator is also not required to hear "repetitive or cumulative evidence." Rather than being bound to exclude evidence on technical grounds, these provisions establish that the arbitrator has wide discretion to hear or refuse to hear evidence offered by the parties based upon the arbitrator's opinion of the evidence's significance to resolution of the case. The fact that the arbitrator is not required to exclude evidence for violation of the rules of evidence supports the interpretation that the arbitrator is not required to exclude evidence that was not included in the Pre-hearing Exchange of Information disclosure.

Thus technical grounds for exclusion of evidence are simply factors, but not dispositive factors, the arbitrator should consider in determining whether to hear that evidence. When a party has failed to timely disclose the evidence it intends to offer at arbitration, the importance or significance of the evidence offered should be balanced against the unfair or prejudicial effect of allowing the evidence against the party against whom it is offered and the arbitrator's evaluation of the offering party's motives in failing to disclose the evidence. This conclusion is consistent with Arbitration Rule 3(c) which provides that documents not properly exchanged under Rule 3 are receivable into evidence unless "to do so would,
in the arbitrator's opinion, constitute unfair, prejudicial surprise." It would seem reasonable to apply this same rule to the testimony of witnesses who were not listed on the Pre-hearing Exchange of Information, i.e., that the arbitrator is not prevented from allowing the witness to testify unless the arbitrator determines that the opposing party was unfairly prejudiced. This might be the case if the opposing party can demonstrate that it would have subpoenaed other witnesses or brought other evidence to the hearing if it had known in advance what witnesses or evidence the other party would offer at the hearing.

This conclusion is also consistent with subsections (b) and (l) of Rule 3. The last sentence in subsection (b) is the only place in the Rules that specifies a consequence for a general failure to comply with the Pre-hearing Exchange of Information requirement. This consequence is not mandatory or even discretionary exclusion of the evidence, but possible sanction under subsection (l). Subsection (l) provides that a party failing to participate in the arbitration proceeding "in a good faith and meaningful manner" shall be subject to sanction by the court on motion of a party or report of the arbitrator.

The conclusion that admission of evidence at arbitration hearings is always in the arbitrator's discretion is also supported by the nature of court-ordered arbitration itself. As discussed above in section II, any decision made by the arbitrator during the hearing that a party did or did not comply with Rule 3(b) is not reviewable for error. In deciding whether or not to seek a trial de novo the parties to an arbitration are likely to focus more on the specific result contained in the arbitration award and their sense of the

63. Id. at R. 3(c).
64. Id. at R. 3(b).
65. Although the Rules themselves do not address this authority, the Official Comment to Arbitration Rule 3 does state that failure to comply with the Pre-hearing Exchange of Information requirement "may justify a sanction of limiting of evidence otherwise admissible." N.C. Crt.-Ord. Arb. R. 3 (commentary). This language clearly supports the interpretation that the arbitrator is not required to exclude evidence simply because it was not included in the Pre-hearing Exchange of Information, although suggesting that the arbitrator can apply a "sanction" is inconsistent with subsection (l) which indicates sanctions should be determined by "the court," i.e., a judge. Id. at 3(l). It also is more in keeping with the goals of court-ordered arbitration to base decisions whether or not to exclude evidence on fairness grounds rather than as a punishment/sanction for failure to follow the rules.
fairness of the proceeding. Arbitration is designed to give the parties a chance to be heard and then propose a result which the parties can either agree to or reject. The purpose of arbitration is better served by allowing the parties to be heard rather than limiting the relevant evidence presented because of technical violations of the Rules.\textsuperscript{67} Intentional violations of the Rules unless deemed too unfair to the opposing party are best responded to outside of the arbitration proceeding.

The Pre-hearing Exchange of Information mandated by Arbitration Rule 3(b) is intended to be "exchanged" by the parties at least ten days before the hearing and \textit{not} filed with the court.\textsuperscript{68} Since there is no record made of the arbitration hearing and no evidence of the arbitration is admissible at the trial de novo, there is no reason to file the document. The parties may present their Pre-hearing Exchange of Information to the arbitrator at the hearing but the arbitrator should return such documents to the parties at the conclusion of the hearing. The Official Comment to Arbitration Rule 3 states that the rule "contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made."\textsuperscript{69} This should include the Exchange of Information unless the arbitrator expressly incorporates it by reference into the award as the basis for the arbitrator's recommendation of sanctions pursuant to Arbitration Rule 3(1).

It is not uncommon, however, for the arbitrator's copy of the Pre-hearing Exchange of Information to find its way into the clerk's file after the hearing. This document should not be retained in the file. The parties should retrieve the copies submitted to the arbitrator either at the hearing or after the award is filed. If this is not done the arbitration coordinator or clerk should promptly return the Exchange of Information found in the file to the party that submitted it. As discussed above, this is because the arbitration rules make clear that no evidence of the arbitration proceeding should be admitted in any subsequent proceeding.

\textsuperscript{67} The arbitration award is likely to be accepted by the parties only if each party perceives the hearing as having been conducted fairly. While excluding relevant evidence on technical grounds may undermine this perception of fairness, allowing a party to violate the rules can do the same. Whether the arbitrator decides to admit or exclude the evidence, the arbitrator should explain the decision to the parties and focus on why such decision will result in a better informed and more considered arbitration award.

\textsuperscript{68} N.C. Ct.-Ord. Arb. R. 3(b) (emphasis added).

\textsuperscript{69} \textit{Id.} at R. 3 (commentary).
In the post-arbitration de novo proceedings, parties have attempted to use the Pre-hearing Exchange of Information of the opposing party that was left in the clerk’s file as an admission or as an affidavit to support a motion for summary judgment. This clearly violates the intent of the Arbitration Rules, yet once a part of the court’s file, the documents may not be subject to summary removal. The best practice is to ensure the return of the Pre-hearing Exchange of Information to the party who submitted it at the conclusion of the arbitration hearing.

C. Corporations Proceeding Pro Se at the Arbitration Hearing

Arbitration Rule 3(p) provides that all parties shall be present at the arbitration hearing, in person or through a representative, and that although all parties may be represented by counsel, “[o]nly individuals may appear pro se.” This is consistent with the rule in many states that corporations can be represented in court only by an attorney admitted to the practice of law. North Carolina does not, however, appear to follow the majority rule. The incongruous result is that in North Carolina corporations may represent themselves in proceedings before a magistrate, a district or superior court judge, but not in court-ordered arbitration proceedings. The author is unable to formulate any basis for treating arbitration differently from other court proceedings in this regard. Elimination of this limitation in Rule 3(p) should be considered.

The conclusion that North Carolina law permits corporations to proceed pro se is based on several appellate opinions interpreting the relevant statutes and the formal opinion of the Con-
sumer Protection Committee of the North Carolina State Bar.\textsuperscript{74} In \textit{State v. Pledger},\textsuperscript{75} the court held that a lay person who is an officer, agent or employee of a corporation may prepare legal documents for the corporation when the corporation has a primary interest in the transaction for which the documents are prepared, since his act is the act of the corporation in furtherance of its own business. Thus the lay person did not violate section 84-4 which provided that it “shall be unlawful for any person . . . except members of the Bar . . . prepare for another person, firm or corporation, any . . . legal document,” because the corporation for which he worked was not “another” corporation within the meaning of the statute.\textsuperscript{76} If a corporation’s lay employees can perform legal services for the corporation in the course of their employment, can those legal services include representation of the corporation in court? This issue was mentioned but not resolved in \textit{Gardner v. N.C. State Bar}.\textsuperscript{77} \textit{Gardner} stated that “\textit{Pledger} is not authority for the proposition that a corporation may appear in court for someone else.”\textsuperscript{78} By implication \textit{Pledger} could then stand for the proposition that the corporation can appear in court for itself.

In \textit{Duke Power Co. v. Daniels},\textsuperscript{79} the corporate plaintiff’s lay employee signed the complaint filed in the small claims action. The court of appeals found that the plaintiff corporation had not practiced law in violation of section 84-5 because the main purpose of the statute was to prohibit corporations “from performing legal services for others.”\textsuperscript{80} The \textit{Daniels} court also noted that the expediency and simplicity of the small claims court system was intended to benefit “corporate as well as individual” citizens—including the option to use the forum “without obtaining a lawyer, if they choose to do so.”\textsuperscript{81}

Based on \textit{Pledger} and \textit{Daniels}, the Consumer Protection Committee of the North Carolina State Bar has determined that a non-attorney employee of a corporation may represent the corporation in proceedings in small claims court, district and superior court and that such representation does not constitute the unauthorized

\begin{footnotes}
\item[74] Letter from Daniel B. Dean to Thomas Fowler (July 28 1998) (on file with the \textit{Campbell Law Review}).
\item[75] 257 N.C. 634, 127 S.E.2d 337 (1962).
\item[76] \textit{Id}. at 638
\item[77] 316 N.C. 285, 341 S.E.2d 517 (1986).
\item[78] \textit{Id}. at 291.
\item[79] 86 N.C. App. 469, 358 S.E.2d 87 (1987).
\item[80] \textit{Id}. at 472 (emphasis added).
\item[81] \textit{Id}. 208
\end{footnotes}
practice of law. In response to a question from the author, the Committee expressly stated that: "[i]n the absence of Rule 3(p) of the Rules for Court Ordered Arbitration in North Carolina, the Committee would not interpret section 84-4 as prohibiting an employee of a corporation from appearing on behalf of the corporation in District Court arbitration."\textsuperscript{82}

Corporations should be represented by an attorney at arbitration hearings not because representation by a lay employee would be an unauthorized practice of law but because Arbitration Rule 3(p) expressly forbids such representation. Until Rule 3(p) is changed it should be followed. It is not unreasonable, however, to argue as in Section III, B above, that violation of a provision of Arbitration Rule 3 should not necessarily require exclusion of that party's evidence. For instance, if a corporate defendant appears at the arbitration hearing without an attorney, is the arbitrator required to prohibit the corporate defendant from cross-examining plaintiff's witnesses, presenting evidence and arguing its contentions to the arbitrator? Such a result would seem to damage needlessly the purpose and usefulness of the arbitration hearing. Perhaps, following the analysis in Section III, B, the arbitrator should have discretion to waive the requirement of Rule 3(p) or perhaps the opposing party might agree to waive the rule in order to have a meaningful hearing. If so, such waiver would not involve the unauthorized practice of law.

\textbf{D. Arbitration Awards by Arbitrators}

There is no requirement that the written arbitration award contain any findings of fact, conclusions of law or statements supporting the award.\textsuperscript{83} The written award must, however, resolve all issues raised by the pleadings\textsuperscript{84} in order for it to serve as the basis for the consent judgment that the court will enter if neither party files a demand for a trial de novo within the time allowed. Thus in every case the award should specify the amount, if any, to be paid by each party.

If a plaintiff or defendant, or both, fail to appear at the arbitration hearing, the arbitrator should nevertheless proceed with the hearing and reach a decision based on the evidence

\textsuperscript{82}. \textit{See infra} notes 17, 63.  
\textsuperscript{83}. N.C. CT.-ORD. ARB. R. 4(b).  
\textsuperscript{84}. \textit{Id.} at R. 4(c).
presented. The arbitrator should not continue the hearing, enter a default or default judgment, or decline to rule on the matter because of a party's absence. Scheduling, rescheduling and continuing an arbitration case are matters for the court and not the arbitrator, as are entry of defaults. If a party failed to appear at the arbitration hearing for reasons beyond the party's control, the party must move for a rehearing before the court and not the arbitrator, within the time allowed for demanding the trial de novo.

Arbitration awards that do not make any award but instead state that "[t]he arbitrator could not make an award due to the absence of [defendant] and the insufficiency of the record" or that "[n]either party was present for hearing [and] [a]rbitrator waited entire hour and no one showed" are problematic. First, the arbitrator should have made an award based on the evidence presented at the hearing whether or not either party or both parties appeared and presented any evidence. Second, it is not clear where the case stands procedurally after this "award." Either

85. Id. at R. 3(j). Thus if plaintiff fails to appear and present evidence, the plaintiff will have failed to carry the burden of proof and should be awarded nothing by the arbitrator. This rule is consistent with that followed in Pennsylvania, the state with the oldest court-ordered arbitration program. According to the Explanatory Note to the Pennsylvania Rules of Compulsory Arbitration: "When a case is called for hearing, if the plaintiff appears but the defendant does not, the arbitrators shall hear the case and proceed to an award . . .. Conversely, if the defendant appears but the plaintiff does not, the arbitrators shall enter an award in favor of the defendant. If plaintiff appears but fails to prove a claim, the arbitrators, without hearing the defendant, shall likewise enter an award for defendant." PA. COMP. ARB. R. *(date).*

86. N.C. CT.-ORD. ARB. R. 8(b). The author agrees with language in the Benchbook for Arbitrators that states that "[t]he Rules recognize the exclusive authority of the court to schedule and to continue hearings . . .." ADMIN. OFFICE OF THE COURTS, BENCHBOOK FOR ARBITRATORS 2 (1997). The author disagrees with, or at least considers misleading, the statements on page 4, of the Benchbook, that if a party fails to appear or appears unprepared that the arbitrator has the option of "considering a continuance" or "canceling the hearing and reporting the facts to the court." Id. at 4. In the author's opinion, the arbitrator's only option is to proceed with the hearing and to enter an award based on the evidence presented. Motions for continuances and for re-hearings must be addressed to the court.

87. N.C. CT.-ORD. ARB. R. 3(j).

88. Id.

89. These examples were taken verbatim from actual awards entered by arbitrators on the AOC form.
party might move for a rehearing pursuant to Rule 3(j)\(^\text{90}\) or might demand a trial de novo pursuant to Rule 5(a),\(^\text{91}\) but what is the status of the case if neither party takes any action prior to the expiration of thirty days from the arbitrator's "award?"

Judgment cannot be entered on the "award" because what the arbitrator stated cannot be construed as a judgment. The judge might order a rehearing sua sponte but there is no evidence that any failure to appear was "beyond the party's control" as required by Rule 3(j).\(^\text{92}\) If it was the plaintiff who failed to appear, an involuntary dismissal on failure to prosecute grounds might be considered, however, there may be insufficient evidence to justify such an order. A final option might be to find that the failures to appear coupled with the arbitrator's actions constituted strong and compelling reason to exempt the case from arbitration so that the matter would proceed to district court following the standards of Rule 1(d).\(^\text{93}\)

A similar problem can occur when the arbitrator attempts to mediate the case before her. As discussed in Section I, mediation differs significantly from arbitration and an arbitrator assigned to preside at a court-ordered arbitration is not authorized to transform the proceeding into a mediated settlement conference as defined in section 7A-38.1. That does not mean, however, that the arbitrator is not authorized during the arbitration proceedings to encourage and to participate in the parties' settlement negotiations. Although the Arbitration Rules do not expressly grant this authority to the arbitrator, the Official Comment to Arbitration Rule 3 provides that an arbitrator may "at any time" allow settlement negotiations and may participate "if all parties are present in person or by counsel."\(^\text{94}\) This authority is consistent with the view that an arbitrator presides at the hearing with the same authority that a judge would have except for the power of contempt.\(^\text{95}\) In general, a judge has authority to encourage settlement discussions.\(^\text{96}\)

\(^{90}\) N.C. CT.-ORD. ARB. R. 3(j).
\(^{91}\) Id. at R. 5(a).
\(^{92}\) Id. at R. 3(j).
\(^{93}\) Id. at R. 1(d).
\(^{94}\) Id. at R. 3 (commentary).
\(^{95}\) "[T]he arbitrator has the authority of a judge except for the contempt power." N.C. CT.-ORD. ARB. R. 2 (commentary).
\(^{96}\) N.C. GEN. STAT. § 1A-16 (1990); compare N.C. GEN. STAT. § 15A-1021(a) (1997) (trial judge is authorized to participate in plea bargain discussions).
Thus, if the parties are in agreement, the arbitrator might decide to utilize a part of the time allowed for the arbitration hearing to investigate a settlement, and might briefly undertake the role of mediator. But it is still an arbitration hearing that must result in an arbitration award. If the parties reach a settlement at the arbitration hearing, with or without the help of the arbitrator, it will remain the parties’ responsibility to file a stipulation of dismissal or consent judgment within 20 days after the arbitration award is entered. The arbitrator must enter an award based on the evidence, stipulations or representations of the parties. The award might be that plaintiff recover nothing or it might be for the amount of the settlement. If subsequently the parties fail to follow through with their settlement and dismissal, the aggrieved party must either accept the arbitration award or file a timely demand for trial de novo and pursue any appropriate claims for compromise and settlement, or accord and satisfaction. Even if the parties prepare and execute a settlement agreement during the arbitration hearing, the arbitrator is not authorized to dismiss the case; the arbitrator must enter an award.

If a plaintiff or defendant, or both, fail to appear at the arbitration hearing, the arbitrator should nevertheless proceed with the hearing and reach a decision based on the evidence presented even if no evidence is presented. The arbitrator is not authorized to continue or cancel the arbitration hearing, or otherwise avoid entering an award in the matter properly set for arbitration.


98. An arbitrator who dismisses a case without entering an award may not be entitled to the seventy-five dollar fee. Rule 2(c) of the Rules for Court-Ordered Arbitration states that arbitrators shall be paid for each hearing “when they file their awards with the court.” Additionally, it is clear that the arbitrator who transforms the arbitration hearing into a mediation, even if the mediation lasts several hours and even if the mediation results in a successful settlement of the matter, is entitled only to be paid as an arbitrator and not as a mediator pursuant to the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions. See N.C. Super. Ct. Med. Set. Conf. R. 7(B) (parties shall pay mediator a $100 administrative fee and an hourly rate of $100 for the mediation.).

99. Compare I.L.C.S. S.Ct. R. 91 (1998) (“The arbitration hearing shall proceed in the absence of any party who, after due notice, fails to be present. The panel shall require the other party or parties to submit such evidence as the panel may require for the making of an award.”).

100. Several states’ arbitration rules expressly provide that a party who fails to appear at the arbitration hearing waives its right to demand trial de novo. See
E. Consideration and Award by Arbitrator of Attorney's Fee Claim

Section 6-21.1 of the North Carolina General Statutes provides that in a personal injury or property damage suit where the judgment of recovery for damages is ten thousand dollars or less, the “presiding judge” may, in his discretion, allow plaintiff's attorney a reasonable attorney fee for representing plaintiff in the lawsuit. Because of a 1992 Court of Appeals case, Bass v. Goss, there has been some question as to whether a plaintiff who prevails at arbitration in a small personal injury case may ask for and the arbitrator may award an attorney's fee as authorized by section 6-21.1. The issue was specifically addressed in a recent North Carolina Court of Appeals case, Taylor v. Cadle, in which the court clearly stated that the arbitrator had the authority to award attorney's fees. But the Taylor decision is inconsistent with the holding in Bass and some of the statements in Taylor could be interpreted as dicta. For these reasons it is useful to review both cases and the policies behind court-ordered arbitration.

Court-ordered arbitration is intended to be “an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims.” If at the arbitration hearing the plaintiff seeks attorney's fees and the arbitrator resolves the matter and includes the amount in her award then each party can determine whether or not to appeal based on complete knowledge of its total liability or recovery. If no party

I.L.C.S. S.CT. R. 91 (“The failure of a party to be present, either in person or by counsel, at an arbitration hearing shall constitute a waiver of the right to reject the award and a consent to the entry by the court of a judgment on the award.”); 17B A.R.S. UNIF. ARB. R. 4(j), (“Failure to appear at a hearing or to participate in good faith at a hearing... shall constitute a waiver of the right to appeal absent a showing of good cause.”); WASH. SUPER. CT. MAR 5.4 (“A party who fails to participate [in the arbitration hearing] without good cause waives the right to a trial de novo.”).

103. __ N.C.App. __, 502 S.E.2d 692 (8-4-1998).
104. N.C. CT.-ORD. ARB. R. 1 (commentary); N.C. GEN. STAT. § 7A-37.1(a); see generally, George K. Walker, Court-Ordered Arbitration Comes to North Carolina and the Nation, 21 WAKE FOREST L. REV. 901, 904 (1986)(“The general goal of court-ordered arbitration is to create an efficient, economical alternative to traditional civil litigation for prompt resolution of cases...”)
105. The AOC Arbitration Award and Judgment Form, AOC-CV-802, includes a space for the award of attorney's fees.
appeals within thirty days, the case is resolved and there are no further hearings.\textsuperscript{106} If there is an appeal, both the liability issue and the attorney's fee issue will be relitigated de novo.\textsuperscript{107}

If, on the other hand, the plaintiff does not seek attorney's fees at the arbitration hearing and the matter is not addressed by the arbitrator, the total liability or recovery is not known before the decision to appeal must be made, and, in any event, a further hearing must be scheduled before a District or Superior Court judge to hear the section 6-21.1 motion. Such a result undermines court-ordered arbitration's ability to resolve disputes efficiently, economically and promptly.

The Arbitration Rules direct the arbitrator to "resolve all issues raised by the pleadings" in her award.\textsuperscript{108} Indeed, in the Official Comment to Rule 3, the court is directed to "defer to the arbitrator's consideration motions addressed to the merits of a claim requiring a hearing [or] the taking of evidence . . . "\textsuperscript{109} The clear spirit of the Rules for Court-Ordered Arbitration is that the arbitrator is exercising the delegated authority of the trial judge to resolve all matters, except contempt, that would arise if a regular trial was held.\textsuperscript{110} The Arbitration Rules themselves, then, coupled with the liberal construction of section 6-21.1 required by case-law,\textsuperscript{111} support a conclusion that the arbitrator is functioning as the "presiding judge" as that phrase is used in section 6-21.1 and thus has authority to include in the arbitration award attorney's fees.

The court of appeals decision in \textit{Bass v. Goss},\textsuperscript{112} does not conflict with this analysis of the Arbitration Rules because \textit{Bass} did not address the authority of an arbitrator to award attorney's fees pursuant to section 6-21.1. \textit{Bass} was a personal injury claim, brought in Superior Court, in which the arbitrator awarded the plaintiff $2,559 in damages.\textsuperscript{113} Although the plaintiff had asked for reasonable attorney's fees in her complaint, the plaintiff's attorney did not expressly ask the arbitrator at the hearing for

\textsuperscript{106} N.C. CT.-ORD. ARB. R. 6(b).
\textsuperscript{107} \textit{Id.} at R. 5(a).
\textsuperscript{108} \textit{Id.} at R. 4(c).
\textsuperscript{109} \textit{Id.} at R. 3 (commentary).
\textsuperscript{110} \textit{See} N.C. CT.-ORD. ARB. R. 3(g) (Arbitrators shall have the authority of a trial judge to govern the conduct of hearings).
\textsuperscript{111} Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40 (1973).
\textsuperscript{113} \textit{Id.} at 243, 412 S.E.2d at 145.
attorney's fees pursuant to section 6-21.1. Although the arbitrator did not consider the substance of the attorney's fee request, the arbitrator did draw a horizontal line through the blank on the arbitration award that indicates the amount of attorney's fees awarded. Neither party filed for a trial de novo within the thirty day limit and judgment was entered on the award. The plaintiff's attorney then moved for attorney's fees under section 6-21.1 before the superior court. The superior court judge denied the motion pending a remand back to the arbitrator for a determination of the costs. The plaintiff appealed this denial of his motion. On remand, the arbitrator declined to consider the motion for attorney's fees on the basis that under Arbitration Rule 2(c) the filing of the award is the final act of the arbitrator and the arbitrator has no authority to reopen a matter or hold subsequent hearings.

On appeal the defendant argued that the arbitrator had the power to award attorney's fees and the plaintiff had the opportunity to ask the arbitrator for the award, but having failed to do so and having failed to appeal the arbitrator's award, the plaintiff was barred from making a subsequent section 6-21.1 motion for attorney's fees and was limited to the recovery specified in the arbitration award. The plaintiff's position was that the arbitrator never had the power to award attorney's fees and that such award was the exclusive province of the Superior Court Judge. The Bass opinion adopted neither of these positions.

In Bass, the court held that "the judge has discretion whether to and in what amount to award attorney's fees in this type of case." The Bass opinion does not state that the arbitrator has no authority to award attorney's fees. Indeed, as there was no award of attorney's fees by the arbitrator in the Bass case, the Court of Appeals had no reason to consider the validity of such an award. Because the Court was not concerned with the validity of a hypothetical award of attorney's fees by an arbitrator there was no need to interpret or refer to the Rules for Court Ordered Arbitration which are not mentioned in the opinion. The opinion does state that the "action of the arbitrator after ... 13 December 1990

114. Id.
115. Id. at 243, 412 S.E.2d at 146.
was a nullity."\textsuperscript{118} However, this holding was procedural only. Notice of appeal of the superior court judge's order had already been entered, thus depriving the trial courts of jurisdiction to proceed—and not a denial of the arbitrator's substantive authority to award attorney's fees. Finally, as noted above, even upon remand from the superior court judge the arbitrator did not award attorney's fees.\textsuperscript{119}

Thus \textit{Bass} did not address, in dicta or otherwise, the authority of arbitrators to award attorney's fees. \textit{Bass} does establish that the rights created by section 6-21.1 are not lost simply because the plaintiff failed to avail himself of the opportunity to seek the award at arbitration. \textit{Bass} does allow the plaintiff's attorney to present his motion for attorney's fees pursuant to section 6-21.1 to a district or superior court judge subsequent to the arbitration hearing if the issue was not raised and resolved at the arbitration hearing.\textsuperscript{120} Nevertheless, \textit{Bass} was interpreted by many to prohibit the practice of arbitrators of including attorney's fees in their arbitration awards. The Administrative Office of the Courts promulgated a memorandum, on February 7, 1992, in response to \textit{Bass} that was distributed to court officials and concluded that the award of reasonable attorneys fees pursuant to section 6-21.1 was "not subject to arbitration under the Rules of Court Ordered Arbitration."\textsuperscript{121}

In \textit{Taylor v. Cadle},\textsuperscript{122} the arbitrator awarded damages to plaintiff in an amount less than $10,000. At the arbitration hearing, the plaintiff asked for and presented evidence on his claim for attorney's fees pursuant to section 6-21.1, but the arbitrator

\textsuperscript{118} Id.

\textsuperscript{119} The arbitrator's order of February 8, 1991, on remand from the superior court judge stated: "It appearing to the court that the motion for attorney's fees should have been made at the time the Arbitration Hearing was held; Plaintiff now seeks further arbitration which is contrary to Arbitration Rules." This is consistent with the position advocated in the Benchbook for Arbitrators which states "the rules do not permit motions for reconsideration or modification of an award by an arbitrator after it is filed . . . An arbitrator is relieved of all responsibility in a case when the award is filed." \textsc{Admin. Office of the Courts supra} note 87, at 7.

\textsuperscript{120} 105 N.C. App. 242, 244, 412 S.E.2d 145, 146 (1992).

\textsuperscript{121} Memorandum from AOC Counsel Thomas J. Andrews to Kathy Shuart (February 7, 1992) (on file with \textit{Campbell Law Review}), advising arbitrators that "motions for attorney's fees under section 6-21.1 must be heard by a judge of the trial division in which the case is pending."

\textsuperscript{122} __ N.C.App. __, 502 S.E.2d 692 (1998).
declined to award attorney's fees. The arbitrator indicated his decision on the AOC Arbitration Award and Judgment Form, AOC-CV-802, by a horizontal line drawn through the blank space for attorney's fees. Neither party timely appealed the arbitrator's decision and the chief district court judge entered judgment adopting the award. The defendant then paid the judgment and the clerk noted the judgment satisfied on the judgment docket. Approximately one month later the plaintiff filed a motion for attorney's fees under section 6-21.1.

The motion for attorney's fees was heard in district court. The district court judge awarded attorney's fees to the plaintiff and appeared to base this decision on two grounds: first, that the arbitrator had not considered plaintiff's substantive claim for attorneys fees but instead had felt compelled to refuse consideration of the claim based on the "AOC policy set forth in its Memorandum of February 7, 1992"; and second, that in adopting the arbitrator's award the chief district judge had made no findings of fact with regard to the attorney's fee claim, that such findings of fact were required, and that the judgment was thus subject to correction pursuant to Rule 60 of the Rules of Civil Procedure.

The court of appeals tackled the important issue not addressed in Bass by reversing the trial court's award of attorney's fees and expressly interpreting the Rules for Court-Ordered Arbitration to authorize the arbitrator to "decide all monetary claims raised by the pleadings ... including those claims for attorney's fees and costs where permitted by law" - the important issue not addressed in Bass. The remainder of the court's holding in Taylor, however, was more obscure.

The Taylor court did not address the trial court's determination that the arbitrator's decision not to award attorney's fees was based on the arbitrator's conclusion that he lacked jurisdiction to consider such an award. As a general rule, when a motion addressed to the discretion of the court is denied upon the ground that the court has no power to grant the motion in its discretion,

123. Id. at 693.
124. Id.
125. This also occurred in Bass, i.e., the defendant paid the judgment as entered by the court and the clerk marked it paid in full—prior to any award of attorney's fees.
127. Id. at 696.
128. Id. at 693.
the ruling is reviewable. The court’s silence on this issue is, however, not inconsistent with the analysis in Section II above that errors by the arbitrator, even errors as to jurisdiction, are not directly reviewable on appeal but only by seeking a trial de novo.

The Taylor court purports to avoid conflict with Bass by limiting Bass to its facts, but the salient facts of Bass and Taylor appear indistinguishable. Both were personal injury cases in which plaintiffs had the opportunity to request an award of attorney’s fees under section 6-21.1 at the arbitration. In each case, the arbitrator did not consider the substance of the plaintiff’s attorney’s fee request in Bass because plaintiff failed to raise the matter at the hearing, and in Taylor because the arbitrator concluded he had no authority to consider the request. In each case, the arbitrator drew a horizontal line through the attorney’s fee blank on the arbitration award form. In each case, the plaintiff did not appeal the arbitrator’s award but later, after the arbitrator’s award was adopted and entered as a judgment, each plaintiff moved for a judge to award the attorney’s fees. The Bass court held that the judge had the authority to consider and award attorney’s fees while the Taylor court found the judge lacked this authority. If this analysis is correct, then the Taylor holding in this regard should not stand because the Supreme Court has held that a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless that decision has been overturned by a higher court.

Taylor’s resolution of the findings of fact issue is also less than satisfactory. Plaintiff had argued and the trial judge had agreed that case law required findings of fact to support any award of attorney’s fees under section 6-21.1. Because the chief district court judge’s judgment adopting the arbitration award did not include such findings of fact, the trial judge held that the judgment was “correctable under Rule 60(a).” This conclusion appears erroneous on several grounds.

130. In each case the plaintiff’s complaint included a request for an award of reasonable attorney’s fees.
133. Id.
First, Arbitration Rule 6(b) requires the clerk or the court to enter judgment on the arbitrator's award if no timely demand for trial de novo is filed.\textsuperscript{134} There is no authority to modify or alter the arbitrator's award; indeed the chief district court judge, having heard no evidence, could not have made any findings of fact with regard to the attorney's fees or any other aspect of the case. Any requirement that the chief district court judge's judgment on the arbitrator's award contain findings of fact would amount to a requirement that the arbitrator's award contain findings of fact, which would contradict the express language of Arbitration Rule 4(b).\textsuperscript{135}

Second, the cases that require findings of fact to support attorney's fees awards address situations and concerns clearly distinguishable from arbitration proceedings. In \textit{United Laboratories, Inc. v. Kuykendall},\textsuperscript{136} the court explained that without findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney, the reviewing court is unable to make a determination as to the reasonableness of the trial court's award of attorney's fees. Such findings of fact are unnecessary in arbitration awards that are adopted by the court because such judgments are \textit{not} subject to review by an appellate court. The judgment so entered has "the same effect as a consent judgment,"\textsuperscript{137} and by so consenting, the parties waive their right to appeal.\textsuperscript{138}

Unfortunately the \textit{Taylor} court did not choose to resolve this issue on the grounds set forth above. Instead \textit{Taylor} reasoned that \textit{United Laboratories} required findings of fact regarding the basis for attorney's fees only if attorney's fees were actually awarded and that since, on the facts in \textit{Taylor}, no attorney's fees were awarded by either the arbitrator or the judge, there was no requirement that the chief district court judge's judgment contain findings of fact.\textsuperscript{139} While narrowly resolving the \textit{Taylor} facts, this holding is based on the premise that \textit{United Laboratories} applies to arbitration awards that the parties have consented to and to which the parties have waived any right to appeal. Thus when an

\textsuperscript{134} N.C. CT.-ORD. ARB. R. 6(b).
\textsuperscript{135} Id. at R. 4(b).
\textsuperscript{137} N.C. CT.-ORD. ARB. R. 6(b).
\textsuperscript{138} Id. at R. 6 (commentary).
\textsuperscript{139} Taylor, \textsuperscript{__} N.C.App. \textsuperscript{__}, 502 S.E.2d 692, 696 (1998).
arbitration award includes an award of attorneys fees but no find-
ings of fact, and that award is properly entered as a judgment pur-
suant to Arbitration Rule 6(b), it is expected that parties will
argue the Taylor rationale as a basis to challenge the attorney's
fee award. In these situations, the Taylor holding should be
restricted to its facts, that is that findings of fact are unnecessary
when there is no award of attorneys fees. These cases should be
resolved by determining that United Laboratories does not apply
to arbitration awards that the parties have consented to and to
which the parties have waived any right to appeal.

The arbitration rules give the arbitrator authority to include
attorney's fees, if otherwise appropriate, in the arbitration award.
This conclusion is consistent with both Bass and Taylor.\footnote{140}
Despite arguments to the contrary that can be inferred from cer-
tain analysis in Taylor, there is no requirement that the arbitra-
tor include in his or her award findings of fact concerning the
reasonableness of the attorney's fee award. There remains some
uncertainty as to the authority of a judge to consider, post-arbitra-
tion, a motion for attorney's fees. Even if Bass and Taylor are not
harmonizable, however, some conclusions appear sound. If the
arbitration award indicates that the arbitrator considered the
attorney's fee request and exercised his or her discretion to grant
or deny the request, then that award or denial, if entered as a
judgment upon the parties' failure to timely seek a trial de novo,
should be res judicata on that issue.\footnote{141} A judge should not reopen

\footnote{140. Because in neither case did the arbitrator actually award attorney's fees it
is arguable that neither case could have held that the arbitrator has authority to
award attorney's fees. The holding in Taylor, narrowly construed, could be
simply that it was error to use Rule 60 of the N.C. Rules of Civil Procedure to
correct a Kuykendall error when Kuykendall was not applicable so that there
was no Kuykendall error. Even if dictum, however, Taylor's statement that
arbitrators have this authority is a sound interpretation of the Arbitration Rules
and should be followed. Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C.
230, 242 (1985) (stating that dictum is properly considered if it logically assists in
answering the new question).}

\footnote{141. If no timely demand for trial de novo is filed, the arbitration award is
entered as a consent judgment and consent judgments are generally entitled to
claim preclusive, although not issue preclusive effect. "[A consent] judgment
results from a basically contractual agreement of the parties. . . . [I]t is to be
enforced in accord with the intent of the parties . . . . The basically contractual
nature of consent judgments has led to general agreement that preclusive effects
should be measured by the intent of the parties. In most circumstances, it is
recognized that consent agreements ordinarily are intended to preclude any
further litigation on the claim presented but are not intended to preclude further}
a matter that has been finally resolved. Even if the arbitrator did not expressly consider the attorney's fee claim, as was the case in both *Bass* and *Taylor*, the matter could still be considered finally resolved under res judicata principles because the plaintiffs had the opportunity to ask for attorney's fees at the arbitration but failed to do so.\textsuperscript{142} It is also reasonable to conclude that the de facto settlement, which results when no party seeks trial de novo within the time allowed, has conditions that are implied by law; and that one of these conditions is that all issues raised by the pleadings will be deemed resolved by the arbitration award.\textsuperscript{143}

Although not articulated by the *Taylor* court, these rationales seem supportive of and consistent with the ultimate *Taylor* conclusion that: "Whenever a party requests attorney's fees and the arbitrator awards or denies attorney's fees or fails to consider the issue, the dissatisfied party must timely appeal the award, even though it is satisfactory in all other respects. Failure of the dissatisfied party to timely preserve the issue will result in a waiver of this issue on appeal."\textsuperscript{144} In any event, court-ordered arbitration is clearly more efficient and economical when all relevant issues are presented by the parties, considered by the arbitrator and resolved by the arbitration award.

This was also the conclusion of an Illinois appellate court which considered the issue. In *Kolar v. Arlington Toyota*,\textsuperscript{145} although the plaintiffs had asked for attorney fees in their com-

\footnotesize{litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion." Wright & Miller, *Federal Practice and Procedure*, Stipulations and Consent Judgments, § 4443, at 383-88 (1998). Because in *Taylor* the parties waived their right to appeal, the arbitration award became a final judgment on the merits and thus a proper subject for res judicata principles. *Compare* First Union National Bank v. Richards, 90 N.C. App. 650, 653, 369 S.E.2d 620 (1988) (holding that magistrate's judgment was not entitled to res judicata consideration because it was not a final judgment as party had demanded trial de novo).

\textsuperscript{142} See *Caswell Realty Associates I v. Andrews Company*, 128 N.C. App. 716, 496 S.E.2d 607 (1998) (strict identity of issues is not absolutely required and the doctrine of res judicata has been accordingly expanded to apply to those issues which could have been raised in the prior action but were not); *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 306 S.E.2d 513 (1983).

143. Thus the de facto settlement option allowed under court-ordered arbitration carries with it the presumption that the parties intended that all issues raised by the pleadings be resolved by the arbitration award which became a consent judgment when neither party sought trial de novo.


plaint, they did not request attorney fees at the court-ordered arbitration hearing. Neither party sought trial de novo within the time allowed and the court entered the arbitrator's award as the judgment in the case. Plaintiffs then filed a petition for attorney fees in the circuit court and the court granted the petition awarding $8,323 in attorney fees.\textsuperscript{146} The defendant appealed and the appellate court reversed the trial court. \textit{Kolar} held that the arbitration award is "an all or nothing proposition, that must either be accepted or rejected in its entirety."\textsuperscript{147} The court based this conclusion on Illinois' arbitration rules that provide that the arbitration award shall dispose of all claims for relief.\textsuperscript{148} The court noted that the main goal of the arbitration process was to reach a final resolution of the dispute, not to allow piecemeal resolution of issues.\textsuperscript{149}

F. Consideration and Award by Arbitrator of Punitive Damages or Unfair Trade Practice Claims

Pursuant to Arbitration Rule 1(a) \textit{all} civil actions are subject to court-ordered arbitration except: (1) class actions; (2) claims for injunctive or declaratory relief; (3) cases involving family law, title to real estate, wills and decedents' estates, or summary ejectment; (4) special proceedings; (5) claims for damages in an unspecified amount "in excess" of $10,000 in compliance with Rule 8(a)(2) of the Rules of Civil Procedure; (6) claims for damages in an unspecified amount if the claimant certifies the claim will actually exceed $15,000; and (7) claims certified by a party to be related to similar actions pending in other courts.\textsuperscript{150} Civil actions that are otherwise subject to court-ordered arbitration are not exempted simply because they include claims for punitive damages or unfair trade practice. Upon its own motion or the motion of a party, the court can exempt any civil action from court-ordered arbitration including actions that include claims for punitive damages or unfair trade practice. However, the basis for the exemption must be either that the monetary claims exceed $15,000 or that there is some other "strong and compelling reason" to exempt the claim.\textsuperscript{151} The decision to exempt is made by the district court or superior

\textsuperscript{146} \textit{Id.} at 964.
\textsuperscript{147} \textit{Id.}, at 965.
\textsuperscript{148} I.L.C.S. S.Ct. R. 92(b); see also I.L.C.S. S.Ct. R. 92(a).
\textsuperscript{149} Kolar, 675 N.E.2d at 965.
\textsuperscript{150} N.C. Ct.-Ord. Arb. R. 1(a).
\textsuperscript{151} \textit{Id.} at R. 1(d).
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The parties should not raise exemption issues at the arbitration hearing and exemptions under Rule 1(a) or (d) should not be considered by the arbitrator at the arbitration hearing.

G. Demand for Trial De Novo: Several Issues

Suppose plaintiff has sued two defendants, the arbitrator has ruled that the defendants are jointly and severally liable to plaintiff for a sum certain, but that each party is dissatisfied with the award and each has decided to demand a trial de novo if the matter cannot be settled. Plaintiff files written demand for trial de novo and pays the seventy-five dollar filing fee to the clerk. Satisfied that the matter will be retried and preferring to avoid paying another seventy-five dollar filing fee the defendants do not file a written demand for trial de novo. After the thirtieth day from the date the award is filed has expired, the first defendant learns that plaintiff and the second defendant have reached a settlement and that plaintiff has filed notice that it has withdrawn its demand for trial de novo. Will the arbitration award be entered as a judgment against the first defendant?

Although neither the Rules nor the related statutes expressly allow a party to withdraw a filed demand for trial de novo, this is probably an option within the thirty days after the arbitrator's award has been filed. As a general rule, an appellant has the right to dismiss an appeal with leave of court although such right is not absolute but is subject to the sound discretion of the court. Application to withdraw the appeal must be made, however, to the proper court having jurisdiction to dismiss. In the case of arbitration, it would appear that for the thirty day period following the filing of the arbitration award, the court, as defined

152. Id. at R. 1(d) and R. 8(f).
153. In actions designated for arbitration, the parties are free to file motions and the court is free to consider and decide such motions at any time; however, the pendency of a motion "shall not be cause for delaying an arbitration hearing unless the court so orders." N.C. CT.-ORD. ARB. R. 3(q).
by Arbitration Rule 8(f), would have jurisdiction to consider a party's motion to withdraw its demand for a trial de novo.

This period is determinative because during this time the arbitration award is a potential judgment of the court and not yet a nullity. Even if one party has filed a timely demand for a trial de novo, other parties may, within the thirty day period, move for a rehearing pursuant to Arbitration Rule 3(j), file a stipulation of dismissal pursuant to Arbitration Rule 6(a), or file their own demand for trial de novo pursuant to Arbitration Rule 5(a). Thus the matter remains subject to the Arbitration Rules for the entire thirty day period even after a party files written demand for trial de novo. For this reason, it is reasonable to conclude that it is the court, as defined by Arbitration Rule 8(f), that would have jurisdiction to consider a party's motion to withdraw its demand for a trial de novo. If the motion to withdraw the demand for a trial de novo is allowed, then the clerk or court would enter judgment on the arbitrator's award if otherwise proper.

The Arbitration Rules do not allow this result if the motion to withdraw the demand for a trial de novo is not made until after expiration of the thirty day period. With the expiration of the 30 day period the arbitration award must either be entered as a judgment or it becomes a nullity and legally no longer exists for any purpose. The only authorization for the clerk or the court to enter judgment on the arbitrator's award is Arbitration Rule 6(b). If a party does file a demand for trial de novo within thirty days after the award is filed, the arbitrator's award cannot be entered as a judgment. This interpretation is consistent with subsections (c), and (d) of Arbitration Rule 5, which state that the trial de novo "shall be conducted as if there had been no arbitra-

157. It is assumed that the party seeking to withdraw its demand for trial de novo must give notice to the other parties and that those parties have the right to be heard. Compare Rule 1310 (Discontinuance), Rules of Civil Procedure for Compulsory Arbitration, Pennsylvania: "No appeal may be discontinued except by leave of court after notice to all parties or upon the filing of the written consent of all parties."
159. Id. at R. 6(a).
160. Id. at R. 5(a).
161. Id. at R. 8(f).
162. See discussion in Section II supra.
ion proceeding" and "[n]o evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial . . . or any subsequent proceeding involving any of the issues . . . or parties."

This conclusion is also supported by the case of First Union National Bank v. Richards, which began in small claims court where the magistrate held that plaintiff had failed to "to prove [its] case by the greater weight of the evidence" and "due to statutes of limitations." Plaintiff gave notice of appeal for a trial de novo and then filed a voluntary dismissal without prejudice pursuant to Rule 41 of the Rules of Civil Procedure. When plaintiff refiled the lawsuit, defendants moved to dismiss on the grounds that the magistrate's judgment was reinstated by plaintiff's voluntary dismissal of the original action. The trial judge agreed and also concluded that the magistrate's judgment was res judicata to the present action. The Court of Appeals reversed, holding that once plaintiff gave notice of appeal for trial de novo, "it was as if the case had been brought there originally" and the magistrate's judgment was annulled and not thereafter available for any purpose. Thus the dismissal of the trial de novo did not constitute a dismissal of the appeal from small claims court. There was no "appeal" to be dismissed.

164. Id. at R. 5(c).
165. Id. at R. 5(d).
169. "When an appeal as of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose." Id. at 653, 369 S.E.2d at 622 (1988), quoting State v. Sparrow, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970).
170. This analysis is entirely different from that involved in determining jurisdiction to consider motions to withdraw notice of appeal in regular appeals. For instance in State v. Byrd, 4 N.C. App. 494, 167 S.E.2d 95 (1969), the trial judge had no authority to allow defendant to withdraw his appeal once the appeal had been docketed in the court of appeals. Once docketed only the court of appeals had the authority to consider and grant defendant's motion to withdraw the appeal. Compare, State v. Emanuel, 17 N.C. App. 164, 193 S.E.2d 120 (1972) (after docketing of appeal court of appeals considered and denied defendant's motion to withdraw appeal). The distinction is that in regular appeals the "appeal" is still pending throughout, while in matters subject to trial de novo, once the demand for trial de novo is executed there is no "appeal" still pending.
Applying this analysis to court-ordered arbitration, it would appear that once the thirty day period has expired and a party has filed a written demand for trial de novo, the case is indistinguishable from cases pending in district or superior court that were not eligible for court-ordered arbitration and there is no longer any "appeal" to be withdrawn and no alternative judgment to be reinstated.

If true that a party may be allowed to withdraw a filed demand for trial de novo within the thirty days after the filing of the arbitrator's award, then other parties can ensure the trial de novo only by filing their own written demand. Must each party filing a demand for trial de novo pay the seventy-five dollar filing fee mandated by Arbitration Rule 5(b)? Although the Rules could be reasonably interpreted either way, the better interpretation, for largely practical reasons, is that the total filing fee paid to secure a trial de novo should not exceed the compensation paid to the arbitrator in the case. Thus the first party to file a demand for trial de novo should pay the filing fee. Other parties who subsequently file demands should not be charged a filing fee.

171. In limited circumstances, i.e., when the appellant fails to appear at the trial de novo, there is an express statutory basis in N.C. GEN. STAT. § 7A-228(c) for reinstating or "affirming" the magistrate's judgment. This exception is discussed in subsection H. below. Although subsection (c) describes this action as "dismiss[ing]" the "appeal" this seems inconsistent with First Union National Bank. In any event, no such statutory exception exists for reinstating arbitration awards if an appellant fails to appear at the trial de novo. It should also be noted that the statutes provide one other situation where a demand for a trial de novo can be withdrawn with the consequence that the lower court's judgment is reinstated: N.C. GEN. STAT § 15A-1431(g) and (h), which concerns the right of criminal defendants convicted in district court to "appeal" to superior court for a trial de novo.


173. This analysis is based largely on a memorandum from AOC Counsel Thomas J. Andrews to Kathy Shuart. The memo notes that Arbitration Rule 5(a) ties the amount of the filing fee to the arbitrator's compensation, that the arbitrator's compensation in most cases is seventy-five dollars, and that requiring a flat seventy-five dollar filing fee not only satisfies the apparent intent of the Rules but also avoids significant bookkeeping and audit problems for the clerks if the filing fee could vary from case to case. Memorandum from AOC Counsel Thomas J. Andrews to Kathy Shuart (August 29, 1994) (on file with Campbell Law Review).

174. In his memo, AOC Counsel Andrews states: "No demand should be accepted for filing until a fee has been paid. Once that fee has been paid, no
Upon completion of the trial de novo, Arbitration Rule 5(b) provides that the party that paid the fee can seek a return of the amount paid if, in the opinion of the trial judge, that party's "position . . . has been improved over the arbitrator's award." Even when more than one defendant demanded trial de novo, the defendant who paid the filing fee should generally be refunded the fee if his position improved and denied the fee if his position did not improve, without regard to the improvement of the position of the other defendant. Even in cases where the defendant who paid the filing fee improved his position while the defendant who also demanded trial de novo but did not pay a filing fee did not, it would be fair to return the fee to the first defendant. In such case the trial judge could arguably order the second defendant to pay the seventy-five dollar fee to the court.\textsuperscript{175}

A final issue underlying the discussion in this section is whether the demand for trial de novo by only one of multiple defendants voids the arbitration award as to all parties and sets the entire civil action, as originally filed, for trial de novo. The discussion herein has been based on this assumption but there is not universal agreement on this point. Nevertheless, the Arbitration Rules are properly interpreted to so provide.

Arbitration Rule 6(b) provides the only authority for the court to adopt or enter the arbitration award as a judgment. This authority can be exercised only if: (a) "the case is not terminated by agreement of the parties," and (b) "no party files a demand for trial de novo within thirty days after the award if filed."\textsuperscript{176} This language is not ambiguous. If any party timely files a demand for trial de novo the court is not allowed to enter judgment on the award. There is no provision for a partial adoption or partial entry of the arbitration award. If the award is not entered as a judgment pursuant to the terms of Arbitration Rule 6(b), the further fee should be accepted. A second or subsequent demand for trial de novo should be filed without further payment of a filing fee. The clerk should not prorate responsibility for the fee or refund any part of the fee paid at the first filing." \textit{Id.} at 2.

\textsuperscript{175} In his memo, AOC Counsel Andrews also states that in this situation the court could decide not to refund the fee but instead to "order the non-prevailing party to reimburse the prevailing party [who paid the fee]." \textit{Id.} at 3. Similarly if the party that paid the filing fee is subsequently allowed to withdraw his demand for trial de novo while another demand for trial de novo has been filed by a party who did not pay a filing fee, the judge should consider these same options. \textit{Id.}

\textsuperscript{176} N.C. CT.-ORD. ARB. R. 6(b).
award becomes a nullity and is no longer available for any purpose.177

This interpretation does not prevent a defendant who is satisfied with the arbitration award from using the award as the basis for affirmatively settling the plaintiff's claim against him and having the plaintiff dismiss him from the suit prior to the trial de novo. All it prevents is the "de facto" settlement option that occurs under the Rules when no party demands trial de novo and the arbitration award is entered with "the same effect as a consent judgment in the action,"178 i.e., as if the parties had expressly settled the matter on the terms as set out in the award. Under the Rules, this de facto settlement option is available only if all parties acquiesce to the arbitration award in its entirety.

Other jurisdictions with court-ordered arbitration have similar approaches. Pennsylvania, the state that began court-ordered arbitration, adopted Rule 1309, of the Rules Governing Compulsory Arbitration, in 1981. This rule provides that: "An appeal by any party shall be deemed an appeal by all parties as to all issues unless otherwise stipulated in writing by all parties."179 This rule was first proposed in 1975 by a Pennsylvania judge who sought to end the complicated and "interminable" litigation that resulted from a rule which provided that "[i]n order to maintain an appealing party's right to jury trial on all issues involved in a case, his appeal from arbitration may in certain cases carry with it other parties to arbitration who have not technically filed appeals."180

177. The arbitration award is not an adjudication suitable for adoption by the court in the court's discretion. The arbitration award is generally not susceptible of treatment as anything but a consent judgment because awards will usually not contain any findings of fact or conclusions of law supporting the awards from various defendants or on various claims. There is no basis for concluding that Rule 54 of the N.C. Rules of Civil Procedure somehow revives an arbitration award and authorizes the court, at some later date, to enter a final judgment based on a part of an arbitration award.

178. N.C. CT.-ORD. ARB. R. 6(b).


180. In a concurring opinion, in the case of Mitchell v. City of Pittsburgh, Judge Price stated: "The case law concerning appeals nunc pro tunc from compulsory arbitration is rapidly complicating this area of jurisprudence. Our courts have stated: '(i)t is settled law that the mere appeal of one defendant in compulsory arbitration is of no avail to another defendant, so that a judgment entered after the lapse of appeal time will not be opened or stricken.' . . . However, this general rule is weakened by exceptions developed on a case by case basis. These exceptions have been less than clear, leading to uncertain results. This method is not calculated to promote uniformity nor to insure equal and fair
The Pennsylvania rules also provide that once filed no appeal for trial de novo may be withdrawn "except by leave of court after notice to all parties or upon the filing of the written consent of all parties." \(^{181}\)

In Illinois, the arbitration rules provide that: "[i]n the event none of the parties files a notice of rejection of the award and requests to proceed to trial within the time required herein, any party thereafter may move the court to enter judgment on the award." \(^{182}\) Again it appears that the arbitration award may not be entered as a judgment unless "none of the parties" seeks trial de novo. This "all or nothing" interpretation is consistent with the case of *Kolar v. Arlington Toyota, Inc.*, discussed in Section III(E) herein, which stated that the arbitration award must be accepted or rejected in its entirety.

In California, Rule 1615(c) of the Judicial Arbitration Rules for Civil Cases provides that: "The clerk shall enter the award as a judgment... if no party has [timely] served and filed a request for trial as provided in these rules." \(^{183}\) If any party does request a trial, "[t]he case shall be restored to the civil active list" and shall be tried "as though no arbitration proceedings had occurred." \(^{184}\) Case law has confirmed this interpretation of the California rules. In *Muega v. Menochal*, \(^{185}\) passengers injured in an automobile accident had sued both the driver of the vehicle in which they rode and the motorist who struck them from behind. After arbitration the passengers requested a "limited" trial de novo, rejecting the arbitration award as to the driver but accepting the award as to the motorist who struck them from behind. The court held that the passengers' request for a limited trial de novo operated to "vacate the arbitration award in its entirety, putting the case at large as though no arbitration proceedings had occurred." \(^{186}\) Further treatment for all. I believe a far better approach would be to establish the rule that an appeal by one party from compulsory arbitration acts as an appeal by all parties on all issues." 335 A.2d 403, 404-405 (1975)

181. PA. R.C.P. No. 1310 (1998). There would be no need to notify all other parties unless the entire matter was subject to trial de novo.
183. CAL. RULES OF CT. R. 1615(c) (1997).
184. *Id.* at R. 1616(b), (c).
185. 57 Cal.Rptr. 697 (App. 1 Dist. 1996).
186. *Id.*; see also Trump v. Superior Court, 173 Cal.Rptr. 403 (App. 3 Dist. 1981) ("If plaintiff's claims against the various defendants were totally unrelated, both legally and factually, a better argument could be made in favor of a subsequent partial trial de novo. [But where] the claims emanate from a single
thermore, in Rhode Island, Rule 5(c) of the Superior Court Rules Governing Arbitration of Civil Actions, provides that in "consolidated cases and in those involving multiple parties, cross-claims, counterclaims and third-party claims, a rejection by any one party will cause the entire civil action or actions to proceed to trial in the normal course." 187

A party who has timely filed a written demand for trial de novo will occasionally have second thoughts and will seek to withdraw the "appeal" of the arbitrator's award and thereby reinstate the arbitration award. The court has authority to allow a withdrawal of a written demand for trial de novo in the thirty days following the filing of the arbitration award and if the withdrawal is allowed the arbitration award may be entered as a judgment pursuant to Arbitration Rule 6(b). 188 After the thirty days the court has no authority to consider such a withdrawal request and the arbitration award is also no longer available for entry as a judgment. Thus any party who is dissatisfied with the arbitration award and who wants to proceed with trial de novo should file its own written demand for trial de novo and not rely on the fact that another party had previously filed a demand for trial de novo.

integrated set of facts, and where resolution of a factual issue may affect several theories of liability, the resulting award is more appropriately treated as indivisible for purposes of subsequent trial.

187. Sup. Ct. Arb. R. 5 (1998). Compare Rule 6.3 of the Washington Court Rules for Superior Court Mandatory Arbitration ("If within twenty days after the award is filed no party has sought a trial de novo . . . , the prevailing party . . . shall present to the court a judgment on the award of arbitration for entry as the final judgment.") Wash Super. Ct. Mar. 6.3 (1998). The U.S. District Court for the Middle District of North Carolina also appears to have followed this rule. Former Rule 610 of the Rules for Court-Annexed Arbitration provided that "any party may file with the court a written demand for trial de novo" within thirty days after the filing of the sealed arbitration award, and that "(u)pon such a demand for a trial de novo, the action shall be placed upon the court's trial calendar." Use of the term "action" clarifies that this rule referred to the entire "civil action" that is subject to court-annexed arbitration under Rule 602 of the Rules of the Middle District.

188. Even if a written demand for a trial de novo has been timely filed, the "appeal" should also be dismissed if the party fails to "perfect the appeal" by paying the seventy-five dollar filing fee at the time of filing or at least within the thirty days allowed for filing the written demand. N.C. Ct.-Ord. Arb. R. 5(b), 2(c), and 6(b). The better practice is for the clerk to refuse to file the written demand for trial de novo if not accompanied with the filing fee.
H. Dismissal for Failure to Appear at Trial De Novo

As discussed above, once the demand for trial de novo becomes final, the status of the case is the same as if it had never been through arbitration and the plaintiff has the right to take a voluntary dismissal pursuant to Rule 41 of the Rules of Civil Procedure and the arbitration award is not thereby revived. Similar question arise when one or both parties fail to appear at the trial de novo. For instance, if the plaintiff had prevailed at arbitration and the defendant timely sought trial de novo but failed to appear at the trial de novo, the plaintiff might reasonably ask the judge simply to adopt the arbitrator's award. Although it might seem fair or good policy for the judge to adopt, affirm or reinstate the arbitration award when the party who sought the trial de novo fails to appear for the trial, the rules and applicable statutes do not allow it. The Rules are clear that no new judgment of the district or superior court can be based on the arbitration proceeding or the arbitrator's award.\[189\] Once before the district court or superior court judge, the plaintiff may not rely on the arbitration proceeding in any way but is obliged to proceed de novo with plaintiff's evidence.

If it is the plaintiff who sought the trial de novo but fails to appear and prosecute, the judge may respond with appropriate sanctions, for instance, dismissal under Rule of Civil Procedure 41(b) for failure to prosecute.\[190\] A judge has the power ex mero motu to dismiss a claim pursuant to Rule 41(b) for failure to prosecute,\[191\] although the specific facts of each case should be considered before determining that dismissal of the matter is appropriate.\[192\] Rule 41(b) expressly states that the dismissal can be with or without prejudice.\[193\] Thus, in cases where both parties fail to appear and where the plaintiff may be less blameworthy than the defendant, the judge might choose, despite plaintiff's fail-

\[189\] N.C. Ct.-Ord. Arb. R. 5(c) and (d), see also R. 6 (commentary).

\[190\] N.C. Gen. Stat. § 1A-41(b).


\[192\] See Jones v. Stone, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15, disc. rev. denied, 304 N.C. 195 (1981); Green v. Eure, 18 N.C. App. 671, 672, 197 S.E.2d 599, 600 (1973) (dismissal for failure to prosecute is proper only when the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion.)

\[193\] N.C. Gen. Stat. § 1A-41(b).
ure to appear, to continue the case rather than dismiss it, or to dismiss without prejudice rather than with. 194 In any event, as discussed above, a Rule 41(b) dismissal for failure to prosecute is a dismissal of the action itself and not a dismissal of the “appeal.” 195 A Rule 41(b) dismissal with prejudice would be an adjudication on the merits and a Rule 41(b) dismissal without prejudice would allow plaintiff to refile, as would a Rule 41(a) voluntary dismissal. 196 However, in neither event would the arbitrator’s award resurface.

This analysis changes significantly if the civil action at issue originated as a small claims action under section 7A-228 of the North Carolina General Statutes. 197 In perfected appeals from small claims court, if the appellant fails to “appear and prosecute his appeal” the presiding judge “may” dismiss the appeal and affirm the judgment of the magistrate, pursuant to section 7A-228(c). 198 The court's authority to dismiss an action for plaintiff's failure to prosecute pursuant to Rule 41(b) is not identical with the power expressly created by section 7A-228(c) to dismiss the

194. If it is the defendant who demands trial de novo but then fails to appear, the defendant does successfully avoid the arbitration award and is not subject to a dismissal for failure to prosecute. Yet there is a serious cost for such defendant. It seems likely that the absent defendant would lose his seventy-five dollar filing fee and possibly be subject to additional costs. See N.C. Ct.-Ord. Arb. R. 7. Additionally, unless the parties have mutually agreed not to appear at the scheduled trial, the absent defendant risks the likelihood that the plaintiff will appear to prosecute the case and possibly receive a larger judgment against the defendant which would seem more likely without defendant present to balance the evidence presented to the judge or jury. If the parties had mutually agreed not to appear, then the parties should have filed a stipulation with the court, Arb. Rule 6(a), to aid the court in efficiently disposing of cases. N.C. Ct.-Ord. Arb. R. 6(a). Thus this approach does not appear to encourage a losing party at arbitration to appeal for a trial de novo but then fail to appear at the trial, and neither does it penalize the winning party at arbitration.

195. Compare First Union National Bank v. Richards, 90 N.C. App. 650, 653, 369 S.E.2d 620, 621 (1988) (After appeal from a magistrate's order in small claims court, plaintiff's voluntary dismissal of the action pursuant to Rule 41(a) held not to function as an abandonment, withdrawal or dismissal of the appeal.).


198. A similar provision could have been included in the Arbitration Rules but was not. Although it can be argued that the small claims appeal is analogous to an appeal from arbitration, there are also significant differences (see discussion of Arbitration Rules in Section 1 supra).
appeal when the appellant fails to prosecute the appeal. Rule 41(b) does not empower a judge to do anything with regard to a defendant who has no counterclaim but simply fails to appear at trial.

The question remains whether section 7A-228(c) would apply to a party who, after participating in a small claims proceeding, appealing the small claims award, participating in court-ordered arbitration, and demanding a trial de novo, failed to appear at the trial de novo. If section 7A-228(c) did apply, the effect would be not to affirm the arbitrator's award but to affirm the magistrate's award. As discussed above, the arbitration award, and indeed the entire arbitration proceeding, is a nullity once a party has properly demanded a trial de novo pursuant to Arbitration Rule 5(a), and no judicial official is authorized to enter judgment on the arbitration award pursuant to Arbitration Rule 6(b). Thus the matter must be "conducted as if there had been no arbitration proceeding." Following these directives, the trial de novo is properly viewed then as the actual "appeal" from small claims court as contemplated and described in sections 7A-228, 7A-229 and 7A-230. If this analysis is correct, then upon the defendant's failure to appear at the trial de novo that resulted from defendant's "appeal" of the arbitration award, section 7A-228(c) would apply to allow the judge to dismiss defendant's appeal because of defendant's failure "to appear and prosecute his appeal" and to affirm the judgment of the magistrate.

The result would also be different if the judge dismissed the lawsuit pursuant to Rule 41(b) because of plaintiff's failure to appear or if the plaintiff took a voluntary dismissal pursuant to Rule 41(a). In these cases, if the dismissal is without prejudice, the slate is wiped clean and the plaintiff is free to refile the lawsuit and to proceed as if for the first time. The magistrate's judgment and the arbitrator's award are nullities and of no effect. This was the result in First Union National Bank, in which the defendants contended that the magistrate's judgment became a final judgment when plaintiff took a voluntary dismissal of its first


action. After the magistrate's judgment was entered, plaintiff exercised its right to appeal for trial de novo in the district court pursuant to section 7A-228(a). If plaintiff had failed to appear at that trial and prosecute its appeal or if plaintiff had withdrawn or dismissed its appeal, the appeal would have been dismissed and the magistrate's judgment affirmed. However, plaintiff did not abandon, dismiss or withdraw its appeal but rather took a voluntary dismissal of the action pursuant to Rule 41(a). Defendants' contended that the magistrate's judgment became a final judgment when plaintiff took a voluntary dismissal of the first action, that the magistrate's judgment was thus entitled to res judicata effect barring the second action that plaintiff filed. The Court of Appeals rejected this argument.

CONCLUSION

Alternative dispute resolution is often praised because it allows disputing parties to focus on equitable considerations, maintaining relationships, and compromise rather than the less accommodating or friendly enforcement of rights that is the focus of traditional adjudication. The ADR approach is generally accomplished by reducing the need for legal representation which in turn is accomplished by streamlining the rules of civil procedure that complicate and extend the time and effort required to complete traditional litigation. Yet ADR is criticized for its avoidance of the legal representation and civil procedures that have developed to enhance the accuracy, fairness and predictability of traditional adjudication.

203. Id.
204. Id.
205. Id.
206. In an often quoted speech to the American Bar Association, Chief Justice Warren Burger described the American legal system as "too costly, too painful, too destructive, too inefficient for a truly civilized people." Chief Justice Warren Burger, Speech to the American Bar Association (Feb. 12, 1984). In the Dispute Resolution: A Task Force Report by the North Carolina Bar Foundation (June, 1985), the Task Force identified the benefits of ADR as including the following: (1) it may provide an opportunity to deal with underlying issues in a dispute; (2) it may build among disputants a sense of accepting and owning their own eventual settlement; (3) it has a tendency to mitigate tensions and build understanding and trust among disputants, thereby avoiding the bitterness which may follow adjudication; and (4) it may provide a basis by which parties negotiate their own dispute settlements in the future. Id., at page 11.
207. See discussion infra, n 23-29.
As Carrington states:

Settlement is likely to occur when both disputing parties foresee a particular, official disposition that is imminent. Settlement so induced and thus reached 'in the shadow of the law' may be the best possible method of resolving disputes; it is, or at least may be, agreeably just, speedy, and cheap. It is not aptly described as ADR, but is a direct consequence of formal adjudication. Still better, enlightened procedure, when it works as intended, induces citizens to avoid quarrels by performing their duties and observing the rights of others in order to avoid the lash of the law. In this way, effective, predictable adjudication hopes both to prevent disputes and to limit abuses of power as well as to resolve disputes that must inevitably occur. In this respect, the bickering of litigants can serve the interests of others, including the public interest, by preventing many other disputes from arising and by conforming at least some individuals' conduct to the law. When we think of the social cost of a particular lawsuit, we ought therefore think of it in relation to the bulk of other disputes that were settled in the shadow of the one case that is fully contested, and in relation to the still larger bulk of disputes that never arose because conduct was shaped to avoid them and the consequences of resolution according to law. When we speak of alternatives to adjudication, we may speak of institutions or methods of resolving disputes having less, or in some circumstances no, concern for the law or its rights and duties. To the extent that ADR methods lack concern for accurate application of law to fact, they resemble trial by ordeal, or other ancient methods. There is nothing novel about deciding disputes without regard for the legal entitlements of the parties. Common sense and a millennia of experience with such methods suggest that they tend to be less effective at inducing parties to settle their differences in the shadow of the law, or to conform their behavior to the law's commands. Thus, in general, if we want citizens to perform their legal duties and settle their disputes in accordance with one another's rights, well-conducted formal adjudication is the method of dispute resolution best suited to that want. 208

Of all the ADR options, 209 court-ordered arbitration may come closest to addressing the concerns of both ADR proponents and critics—but only if the arbitrator performs her proper function and

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if the arbitration award performs only its limited function. The arbitrator must take seriously her job as adjudicator and resolve the matter based upon the rights and liabilities of the parties. The arbitrator must communicate the basis for her adjudication/award to the parties so that the parties will feel that they have had a day in court. The arbitration award must not be a compromise or a proposed settlement. It should be perceived as a legitimate forecast of the likely outcome of the matter if subjected to formal adjudication. The challenge for the arbitrator is to achieve at least the appearance of a formal adjudication in the context of a sixty minute proceeding in which the arbitrator must ensure that each party presents its relevant evidence without regard to technical or procedural flaws unless basic fairness requires exclusion.

The parties can still benefit from legal representation at the arbitration hearing, so long as the attorney does not proceed as if the arbitration hearing was a traditional trial, but the parties are not seriously disadvantaged if they proceed pro se. Likewise the Rules of Evidence and other procedural rules are relevant and can help the arbitrator direct the proceeding, but the arbitrator can dispense with the rules if the rules interfere with a full and fair presentation of the evidence. Clearly much depends on the arbitrator's discretionary decisions during the arbitration, decisions that can only be judged in the unique context of each arbitration.

Once she explains the decision to the parties and enters the award, the arbitrator's job is finished. The parties have an adjudication based on an application of the law to the facts as found by the arbitrator—albeit a less formal adjudication than a traditional trial would produce. And the parties have a deadline "in the shadow of the law," that will require some reflection on settlement and some action if settlement is not desired. This is the modest goal of court-ordered arbitration, i.e., that early in the progress of a litigation the parties are given a day in court that produces a resolution of the dispute that models the resolution that traditional litigation would produce, and the resolution will automatically settle the case unless a dissatisfied party takes affirmative action to continue the litigation. At least for relatively small civil cases, this procedure seems to help settle cases.