

# American Health Lawyers Association

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## Rules of Procedure for Arbitration

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While the American Health Lawyers Association Alternative Dispute Resolution Service prints its Rules for the ease of resolvers and potential parties, the most up-to-date and binding version of the Rules should be downloaded from the American Health Lawyers Association's ADR Website at: [www.healthlawyers.org/adr](http://www.healthlawyers.org/adr)

The Rules of Procedure for Arbitration that will be binding on the parties and the resolver will be the version of the Rules available from the ADR Website on the effective date of the ADR Request for Arbitration Dispute Resolver List form.

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## Introduction

The healthcare industry is under great pressure to contain costs in every way possible. At the same time, federal, state and local governments and consumers of healthcare services are demanding that quality healthcare be provided, that healthcare providers operate efficiently and that the patient be the highest priority on any healthcare agenda.

The use of litigation to resolve disputes arising in the healthcare setting can be inconsistent with these goals. Litigation creates a divisive atmosphere among healthcare providers and tends to increase the cost of healthcare, while diverting managers and providers of care from their real task of providing quality healthcare to patients. The expense is significant. Delays can be interminable. Results are uncertain. Remedies are often inappropriate. Many of these concerns can be addressed by an appropriately designed alternative dispute resolution system.

The American Health Lawyers Association Alternative Dispute Resolution Service (Service) offers various alternative dispute resolution services specifically designed for members of the healthcare industry and those associated with it. An important feature of the Service is the establishment and maintenance of panels of trained healthcare arbitrators, mediators, hearing officers and other dispute resolvers and to make their selection as easy, convenient and informed as possible.

These Rules of Procedure for Arbitration (Rules) describe how to access the arbitration process of the Service, how to select an arbitrator and how to proceed through discovery, a hearing and the decision or award process.

These Rules are tailored to meet the unique needs of the healthcare industry. The Rules are especially useful in resolving the following types of disputes:

1. commercial disputes with vendors;
2. contract disputes with provider groups;
3. joint venture disputes;
4. medical staff/peer review disputes;
5. managed care disputes between providers and payors;
6. employment contract disputes (physician, executive, supervisor or employee);
7. disputes between healthcare providers;
8. disputes within provider groups;
9. disputes between healthcare providers and their vendors;
10. disputes with governmental agencies; and
11. disputes among medical staff departments.

The efficiency of the Rules, like that of any arbitration rules, depends on users of the Rules as well as

applicable law.

These Rules emphasize flexibility, efficiency, and cost effectiveness. Subject to certain limited exceptions, parties may agree upon other rules or procedures, seeking only to draw upon the panel of neutrals maintained by the Service. Alternatively, the parties may be seeking a set of rules to govern the alternative dispute resolution process, for which the Service has several options.

The Service assesses nonrefundable administration fees, the schedule for which is contained in Appendix I. The administration fees cover the administrative services provided by the Service, but do not include arbitrator compensation or expenses, court reporting services, or any other expenses or charges incurred by the parties in advance of or in connection with the arbitration, or enforcing an award.

By invoking these Rules, all parties acknowledge that the Service does not verify the information submitted to the Service by prospective arbitrators nor does the Service certify or in any way attest to the abilities or competence of such persons.

Any party using these Rules or the Service indemnifies, holds harmless, and releases the American Health Lawyers and the Service, their directors and members of their governing boards, and their officers, employees, agents, attorneys, consultants and representatives from any and all liability to the party or to a person or entity claiming through the party by reason of or in any way related to the Service, the arbitrator, the Rules, including the applicable Code of Ethics, or any action taken or not taken with respect thereto.

## **1.0 GENERAL RULES FOR ARBITRATION**

### **1.01 Applicability of Rules**

The parties shall be bound by these Rules whenever they have agreed to arbitration by the Service or under the Rules. The Service will administer a 'consumer health care liability claim' on or after January 1, 2004 only if (1) all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators or (2) a judge orders that the Service administer an arbitration under the terms of a pre-injury arbitration agreement. In limiting the circumstances under which the Service will administer the arbitration of a consumer health care liability claim, the Service does not intend to affect the enforceability of an agreement to apply the Rules—only that the Service will not administer the arbitration. For purposes of the Rules, a 'consumer health care liability claim' means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

*Subject to the limits set forth herein, the parties may vary the procedures set forth in these Rules by written agreement.* If there is a dispute between the parties regarding (a) the existence of an agreement; (b) the existence of an agreement creating an exception to these Rules or the meaning of the exception, or (c) the interpretation of these Rules, the arbitrator has the power to make the decision or the interpretation, and that decision or interpretation shall be final and binding. A party claiming an exception to these Rules has the burden of proving the existence of the exception by a preponderance of the evidence.

Except as specifically provided by these Rules, the parties may not vary (a) the right of a party to be represented by counsel or other authorized representative of that party's choice; (b) the Rules on

communications, service, counting of days, publication and form of the award, release of documents for judicial proceedings and application to court, and exclusions of liability; and (c) the Rules on administration.

When parties agree to arbitrate under these Rules, they thereby accept the terms of these Rules and authorize the Service to administer, as described in the Rules, the process of selecting an arbitrator, to provide copies of these Rules to the parties, and to perform such other functions as are specified herein.

### **1.02 Existence of Agreement to Arbitrate**

Sample contractual provisions that are examples of language that may be used by the parties to provide for arbitration under these Rules are contained in Appendix II. Notwithstanding such provisions, however, any agreement to arbitrate under or that otherwise invokes an application of the Rules or submission of a claim for arbitration by the Service shall be binding on the parties to such agreement.

The provision by the Service of any services to the parties may not be deemed a determination by the Service that an agreement to arbitrate exists.

### **1.03 Meaning of Arbitrator**

The term “arbitrator” in these Rules refers to the arbitration panel, whether composed of one or more arbitrators, and whether the arbitrators are neutral or non-neutral. Party appointed neutrals shall be neutral unless the parties’ arbitration agreement or applicable law provides otherwise.

### **1.04 Number of Arbitrators**

If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator.

### **1.05 Interpretation of Rules**

Except as provided in Section 1.01, the parties may vary or interpret these Rules as they see fit by written agreement between or among all of them. The provisions of these Rules and any exceptions thereto are subject to applicable law. Where there is a difference in interpretation among the parties, the arbitrator shall interpret and apply the Rules. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of the Rules, it shall be decided by a majority vote of the arbitrators. If a majority vote is unobtainable, the arbitrator may refer the question to the Service for final decision in accordance with the procedures then used by the Service for deciding such questions.

## **2.0 RULES ON SELECTION OF ARBITRATOR**

### **2.01 Procedures for Requesting Arbitrator Lists**

If the parties have not provided in writing for any other method of selecting an arbitrator, the selection shall occur in the following manner:

- (a) The Service will provide a list of arbitrators to the parties upon request. While the Service prefers to act upon a joint request, it will submit a list of arbitrators based upon the request of one party. If a request is submitted by less than all the parties, a copy of the request shall be sent to the other parties simultaneously with the sending of the request to the Service. Any

submission of a list of arbitrators should not be construed as anything more than compliance with a request and shall not constitute a determination by the Service concerning the contractual agreement of the parties.

- (b) The parties are urged to use the Request for Arbitration/Mediation Dispute Resolver List form, which may be downloaded from the ADR Website at: [www.healthlawyers.org/adr](http://www.healthlawyers.org/adr) or a party without access to the Website, may request a form by calling the Association at 202-833-1100 and asking for an ADR Service Representative.
- (c) If the ADR Service form is not used, a list of arbitrators may be requested in writing. The written request must include the name, address, and telephone numbers of the parties; the nature of the business of the parties; the requested location of any contemplated hearing; a description of the issue(s) in dispute; the amount(s) in dispute; the nature and extent of the decision sought from the arbitrator; the scope of the arbitrator's authority; and any special qualifications of the arbitrator requested.
- (d) A copy of the arbitration agreement, if any, pursuant to which the request is submitted or otherwise related to the request, shall accompany the request. This agreement may be either an agreement to arbitrate future disputes or an agreement to arbitrate an existing dispute.
- (e) The Service's required administration fee shall be included with the request or other submission.
- (f) If the parties have requested med-arb, in which mandatory, binding arbitration will occur if mediation does not produce an accepted result, and a different neutral than the mediator is to serve as the arbitrator, the Service shall not provide a list of arbitrators until the period of agreed mediation has expired without resolution of the dispute, and a party has requested a Dispute Resolver List from the Service. If the parties have not expressly agreed to a specific period for mediation, they shall be deemed to have agreed to a mediation period of 30 calendar days after the receipt of the notice of selection of the mediator. If the parties have agreed that the mediator and the arbitrator are to be the same person, then the person selected as mediator may perform both functions, subject to applicable law.
- (g) If the request for a Dispute Resolver List is not made by all of the parties, a party who did not join in that request may submit to the arbitrator a written response. The response may set forth a description of additional issues in dispute; additional amounts in dispute; any objections to the requested nature and extent of the decision sought from the arbitrator; any objections to the stated scope of the arbitrator's authority; and any objection to the requested locale of any contemplated hearing. Such response shall be submitted within ten days of the receipt of notice of selection of the arbitrator to the party who did not join in the request for a Dispute Resolver List.

## **2.02 Appointment of Neutral Arbitrator**

Within ten days after receipt of the ADR Request for Arbitration/Mediation Dispute Resolver List form or the written request, the Service shall transmit simultaneously to each party an identical list of ten (10) names of arbitrators chosen from the panel maintained by the Service, together with a copy of the most recent Application Form furnished by each of them to the Service. The Service has not investigated, and makes no representation or warranty with respect to the accuracy or completeness of any information furnished or required to be furnished in any Application Form or with respect to the competence or training of any such arbitrator.

Each party may strike the name of one arbitrator from the list provided by the Service. Each party shall advise the Service of its order of preference of the remaining arbitrators by sequential numbering from one to nine or ten of the names on the list so that preference is given to the lowest number and shall submit the numbered list to the Service within ten days of the effective date of the transmittal of the list without a copy to the other party or parties.

In almost all cases, an arbitrator (or, if specified in the agreement to arbitrate, a panel of three arbitrators) will be chosen from one list. The Service has discretion to amend a list after it has been distributed but before the appointment of an arbitrator if the Service believes that an amendment is in the best interests of the parties and serves the goal of an efficient alternative dispute resolution process. However, if a party requests another list within ten days of the effective date of transmittal of the first list and pays the administration fee for a second list, the Service shall comply with the request by transmitting a second list of ten (10) different arbitrators to all parties. The parties shall evaluate the second list numerically in combination with the first list as if there were a single list of twenty (20) names. Each party may strike the name of two (2) arbitrators from this combined list of twenty (20) provided by the Service. Each party shall advise the Service of its order of preference of the remaining names by numbering each name on the combination of both lists and submitting the combined lists to the Service within ten days of the receipt of transmittal of the second list.

The Service shall contact the person whose name has the lowest sum of the numbers assigned by the parties and whose name has not been stricken by a party to determine if that person is available to serve as the arbitrator and if that person has any conflict of interest and disclosures. The person whose name has the lowest sum of the numbers assigned by the parties, whose name has not been stricken by a party, who is available to serve as the arbitrator, and who does not have a conflict of interest or disclosure that precludes such service will be appointed. If there is a tie, the Service shall subtract the lowest number assigned to the name of each person involved in the tie from the highest number assigned to that person's name. The person with respect to whom this difference is the smallest shall be appointed as the arbitrator. If there is a tie between these differences, the Service will make the selection in its discretion. The Service shall immediately notify the parties and the arbitrator in writing of the selection. If a party fails to transmit its preference on a timely basis as required by these Rules, the Service shall make the appointment taking into consideration the responses of the other party or parties.

### **2.03 Notice to Neutral Arbitrator of Appointment**

Notice of the appointment of a neutral arbitrator shall be transmitted to the arbitrator by the Service. The signed acceptance of appointment by the arbitrator shall be transmitted to the Service within ten days of receipt of the notice given by the Service.

If an arbitrator declines to serve or does not transmit a signed acceptance of appointment within ten days of receipt of the notice given by the Service, the person with the next highest ranking by the parties shall be appointed by the Service as the arbitrator. The selection of the new arbitrator shall be conducted as the selection of an initial arbitrator pursuant to these Rules.

### **2.04 Direct Appointment by a Party**

If the arbitration agreement requires the parties to select unilaterally an arbitrator from the list provided by the Service, the Service shall provide a list as described in Section 2.02. The procedures of Section 2.02 shall be followed except that no names may be stricken nor is any sequential numbering required.

If the arbitration agreement requires a party to appoint an arbitrator from the list provided by the Service and specifies a period of time within which an arbitrator is to be appointed and a party fails to

make the appointment within that period, the Service shall make the appointment, taking into consideration the responses of other parties.

If no period of time is specified in the arbitration agreement, the Service shall notify the party to make the appointment when it sends the list. If within ten days of receipt of transmittal of the list an arbitrator has not been appointed by a party, the Service shall make the appointment, taking into consideration the responses of other parties.

If a directly appointed arbitrator declines to serve or does not send a signed acceptance within 10 days of receipt of the notice given by the Service or by the appointing party, the Service shall request that the appointing party or parties make another selection as described in the arbitration agreement. If the parties cannot decide on the appointment of another arbitrator under the terms of the agreement, the Service shall appoint an arbitrator.

## **2.05 Disclosure and Withdrawal**

All persons appointed as an arbitrator shall disclose to the parties in writing with a copy to the Service any circumstance likely to affect impartiality, including a bias or a financial or personal interest in the result of the arbitration or a past or present relationship with a party or a party's counsel or other authorized representative in accordance with the Service's Code of Ethics for Arbitrators.

Upon objection of a party to the continued service of an arbitrator, the arbitrator shall be guided by The Code of Ethics for Arbitrators in Commercial Disputes as to any withdrawal.

## **3.0 RULES ON TYPES OF PROCEDURES**

The Expedited Procedures shall be applied in a case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs. Parties may also agree in writing to the Expedited Procedures in a case.

All other cases shall be administered in accordance with the Regular Procedures.

## **4.0 RULES ON REGULAR PROCEDURES**

### **4.01 Preliminary Hearing**

At the request of a party or at the discretion of the arbitrator, a preliminary hearing with the parties and/or their counsel and other authorized representatives and the arbitrator may be scheduled by the arbitrator to consider any matters that will expedite the arbitration proceedings. The preliminary hearing may be a face to face meeting or by telephone or by electronic media. The arbitrator may establish at the preliminary hearing (a) the extent of and schedule for the production of relevant documents and other information, (b) the identification of any witnesses to be called, (c) a schedule for discovery or further hearings to resolve the dispute, (d) whether the award is to be a reasoned award, and (e) any other appropriate matters. The arbitrator should reduce to writing and distribute to the parties within five days of the preliminary hearing all agreements between or among the parties to the arbitration and all procedures established by the arbitrator during the preliminary hearing.

### **4.02 Discovery**

The arbitrator may allow the parties to conduct such reasonable discovery and exchange exhibits as the arbitrator believes necessary or appropriate to an efficient resolution of the dispute.

#### **4.03 Fixing of Locale of Hearing**

In the absence of the parties' agreement as to locale, the arbitrator shall select the locale for the arbitration.

#### **4.04 Fixing the Date, Time and Place of Hearing**

The arbitrator shall set the date, time, and place for each hearing and shall transmit to each party notice thereof at least ten days in advance of the hearing, unless the parties agree otherwise.

#### **4.05 Representation**

A party may be represented by counsel or other authorized representative. A party wishing to be represented by counsel or other authorized representative shall notify the arbitrator and the other parties in writing of this representation and shall be bound by the actions of that counsel or other authorized representative until the appointment is revoked in writing. Until a party notifies the arbitrator and the other parties that the party no longer is represented by that counsel or other authorized representative, the arbitrator and the other parties shall direct all papers, notices, process, and other communications intended for that party to that counsel or other authorized representative.

#### **4.06 Record of Proceedings**

A party desiring to make a record of a hearing shall make arrangements directly with a stenographer and shall notify all other parties and the arbitrator of these arrangements at least ten (10) days prior to the hearing. The requesting party or parties shall pay the cost of the record and furnish a copy of any official record to the arbitrator (with the cost thereof to be borne equally by the parties). If the transcript is agreed in writing by the parties to be, or determined by the arbitrator to be, the official record of the proceeding, a copy must be made available to the arbitrator. The other parties shall have the right to inspect the official record at a date, time, and place determined by the arbitrator. If a party objects to any portion of the official stenographic record, that party shall provide a written list of its objections to the arbitrator and the other parties within ten days after the date that the official record is made available for inspection. Such written list shall be attached to the official record. A party shall be entitled to a copy of any official record upon payment therefore including payment for an equal share of the original transcription expense.

#### **4.07 Attendance at Hearings**

The arbitrator shall maintain the privacy of any hearing and shall determine who other than the party and the party's counsel or other authorized representative may be present at the hearing. A party may request the application of a rule requiring all persons other than the parties, the party's counsel or other authorized representative, and the stenographer (if applicable) to be excluded from the hearing except while testifying as a witness. If a party makes such a request, the arbitrator may exclude such persons from the hearing except while testifying as a witness. If this rule is invoked, no witness may discuss the witness' testimony with any other witness until after the hearing is closed.

#### **4.08 Oaths**

Before the start of the first hearing, if any, the arbitrator may take an oath of office. The arbitrator may require witnesses to testify under oath administered by the arbitrator or a duly qualified person.

#### **4.09 Appointment of Panel of Arbitrators**

The parties may agree to resolve their dispute before a panel of arbitrators rather than a single arbitrator. Unless the number is specified in the agreement, the panel shall consist of three arbitrators.

If the parties agree to resolve their dispute before a panel of arbitrators, the selection process for those arbitrators will be the same as in Rule 2.02. The parties will then go through the process described in Rule 2.02 to select the arbitrators. Ties will be broken in the same manner as described in Rule 2.02.

The Service will appoint the chairperson of the panel by assigning the individual who has the lowest sum of the numbers assigned by the parties as the chairperson. In case of a tie, the chairperson will be selected by the tiebreaking process described in Rule 2.02. The Service shall immediately notify the arbitrators and the parties of the choice of the Chairperson.

#### **4.10 Order of Proceedings**

A hearing shall be opened by the taking of the oath of the arbitrator, if any; by announcing of the date, time and place of the hearing, and the presence of the arbitrator, the parties, and their counsel and other authorized representatives, if any; and by announcing the receipt by the arbitrator of the ADR Service form or the letter requesting arbitration and any response.

The arbitrator may, at the beginning of the hearing, ask for oral or written statements clarifying the issues involved. In some cases, part or all of the above actions will have been accomplished at the preliminary hearing or telephonic conference conducted by the arbitrator.

With respect to each claim, the complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator shall have the right to vary this procedure but shall afford a full, fair, and reasonable opportunity to all parties for the presentation of any material, relevant, and non-duplicative evidence.

Exhibits, when offered by either party, may be received in evidence at the discretion of the arbitrator. The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of any stenographic record.

#### **4.11 Failure to Appear**

The arbitration may proceed in the absence of a party or a party's counsel or other authorized representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require each party who is present to submit such evidence as the arbitrator may require for the making of an award.

#### **4.12 Evidence**

The parties may offer such non-duplicative evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of a party or upon the arbitrator's own motion.

The arbitrator shall be the sole judge of the duplicative nature, relevance and materiality of the evidence offered. Conformity to legal rules of evidence shall not be necessary. However, the arbitrator

should refuse to allow the introduction of any evidence that the arbitrator believes would result in the disclosure of confidential information which is privileged under any applicable statute or under applicable law, including, but not limited to, information subject to (a) a quality assurance and/or peer review privilege; (b) a patient-physician privilege; or (c) an attorney-client privilege. All evidence shall be taken in the presence of all of the arbitrators and all of the parties and the parties' counsel and other authorized representatives, except where a party is absent after due notice has been given or that party has waived the right to be present.

#### **4.13 Inspection or Investigation**

An arbitrator finding it necessary for there to be a further inspection or investigation in connection with the arbitration or requested by any party to make a further inspection or investigation, may do so and shall advise the parties of the arbitrator's requirements with ten (10) days' prior written notice to the parties. An arbitrator requested by all of the parties to make a further inspection or investigation shall do so.

#### **4.14 Interim Measures**

The arbitrator may issue such orders for interim relief, including injunctive relief, as may be deemed necessary by the arbitrator or all of the parties to maintain the status quo in the dispute without prejudice to the rights of the parties or to the final determination of the dispute.

#### **4.15 Closing of Hearing or Proceeding**

When satisfied that the record is complete, the arbitrator shall declare the hearing closed. If written statements are to be submitted, the hearing shall be declared closed as of the final date set by the arbitrator for such submission. If there has been no final hearing, the arbitrator shall determine a fair and equitable procedure for receiving evidence and closing the proceeding. The time limit within which the arbitrator is required to make the award shall commence to run upon the closing of the hearing or proceeding by the arbitrator.

### **5.0 RULES ON EXPEDITED PROCEDURES**

#### **5.01 Expedited Procedures**

Where the Expedited Procedures are to be applied, the arbitration shall be conducted in accordance with the procedures set forth below:

- (a) The parties shall accept all notices, process, and other communications (other than the list of arbitrators) from the Service by e-mail. Such notices, process, and other communications to the Service shall promptly be confirmed by e-mail or in writing by the parties.
- (b) The parties shall be entitled to rank the arbitrators from only one list rather than two lists. If for reasons unrelated to the preference of the parties no arbitrator from the first list may serve, then a second list shall be submitted to the parties as soon as possible.

To the extent that the Rules do not conflict with the Rules governing Expedited Procedures, the Rules shall apply to the Expedited Procedures.

#### **5.02 Date, Time and Place of Hearing**

The arbitrator shall set the date, time, and place of any hearing and will notify the parties in writing, at least seven calendar days in advance of the hearing date. Unless mutually agreed upon by the parties,

in no event shall the date of the hearing be later than thirty calendar days from receipt of the notice of selection of the arbitrator.

### **5.03 Discovery**

No discovery shall be afforded under the Expedited Procedures.

### **5.04 Hearing**

Generally, the hearing shall be completed within one day or on two consecutive days. The arbitrator, for good cause shown, may schedule an additional hearing to be held within seven calendar days immediately following the second consecutive hearing day.

## **6.0 RULES ON AWARD AND ENFORCEMENT**

### **6.01 Communications**

Each party shall be deemed to have consented that any notices, process, or other communications necessary or proper for (a) the initiation or continuation of an arbitration under these Rules; (b) any court action in connection therewith; or (c) the delivery of the award or for the entry of judgment on any award made under these Rules may be sent to a party by first class mail, postage pre-paid, registered or certified, return receipt requested, addressed to the party or the party's counsel or other authorized representative at the last known address or made by personal service, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.

The Service, the arbitrator, and the parties may also use (a) facsimile transmission or other written forms of electronic communication, (b) any courier or other delivery service, and (c) in the case of the Expedited Procedures, e-mail, , followed by written confirmation.

All notices, process, and other communications sent by first class mail shall be deemed received five (5) days after they are deposited in the United States mail. All notices, process, and other communications sent or delivered by any other means shall be deemed received upon their actual delivery.

### **6.02 Notices and Service of Process**

When requested by the Service or the Arbitrator, each party shall provide to the Service a copy of any notice, process, or other communication provided by that party to the arbitrator and to every other party unless these Rules specify otherwise. Each such notice, process, or other communication shall contain a written statement by the providing party or the providing party's counsel or other authorized representative that the providing party or the providing party's counsel or other authorized representative has complied with this requirement stating the date of compliance. The Service has no obligation to keep a copy of any notice, process, or other communication provided to it or to act thereon in a timely manner.

### **6.03 Counting of Days**

"Days" for purposes of these Rules mean "*business days*," which do not include Saturdays, Sundays, or United States Postal Service holidays. When Saturdays, Sundays or United States Postal Service holidays are to be counted, the Rules will indicate "*calendar days*."

In instances in which the counting of days is required by these Rules, the day of the event shall count, but the day upon which a notice, process or other communication would otherwise be required sent

shall not count. If the date on which some action is to be taken, a notice, process, or other communication would otherwise be required to be sent or a period would otherwise expire, falls on a holiday, a Saturday, or a Sunday, such action shall be taken, such notice, process, or other communication sent or such period extended to the next succeeding Monday, Tuesday, Wednesday, Thursday or Friday, which is not a holiday. For purposes of the Rules, the term "holiday" means such days as are recognized as holidays by the United States Postal Service.

#### **6.04 Time of Award**

The award shall be made promptly by the arbitrator, but no later than thirty calendar days from the date of closing of the hearing or proceeding and twenty calendar days from the date of closing of the hearing or proceeding under the Expedited Procedures.

#### **6.05 Publication and Form of Award**

The award shall be in writing and shall be signed by each arbitrator approving the award. The arbitrator shall give notice to the Service that an award has been issued within ten (10) days of the signing of the award by the arbitrator.

#### **6.06 Scope of Award**

Submission by the parties to arbitration under these Rules shall constitute these Rules as an agreement between or among the parties. Arbitration pursuant to these Rules shall be the exclusive dispute resolution method between or among the parties regarding any claim which could have been raised that arises out of or relates to any and all matters covered by the arbitration or the subject matter thereof.

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the parties' arbitration agreement, including, but not limited to, specific performance of a contract.

In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial rulings, orders and awards, the arbitrator may assess and apportion the fees, expenses, and compensation related to such partial rulings, orders, or awards as the arbitrator determines is appropriate.

By submitting a dispute to arbitration under these Rules, the parties agree that the arbitrator may not award, and there shall be no claim available, for consequential, exemplary, or special damages. Notwithstanding this limitation, an arbitrator may award consequential, exemplary or special damages in a tort action other than a tort related to employment or the termination of employment, provided that the arbitrator determines, based on the record, that there is clear and convincing evidence that the party against whom such damages are awarded is guilty of conduct evincing an intentional or reckless disregard for the rights of another party or fraud, actual or presumed. In a claim arising out of or related to employment or termination of employment, the arbitrator may grant any applicable statutory remedies and damages available.

The arbitrator may assess reasonable attorney's fees, arbitration fees, expenses, arbitrator compensation, and Service fees in favor of the prevailing party, as determined by the arbitrator. If not assessed and awarded by the Arbitrator, and unless the parties have agreed otherwise, arbitration fees, expenses, arbitrator compensation, and Service fees shall be borne equally by the parties.

The arbitrator's award shall be binding on the parties and shall extinguish all rights pertaining to the subject matter of the dispute that belong to the parties and any other entity controlled by, in control of, or under the common control of a party, unless a party makes a claim in the arbitration.

The arbitrator may award pre-award and post-award interest as allowed by applicable law or as agreed by the parties.

### **6.07 Award Upon Settlement**

If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award upon the written request of the parties.

### **6.08 Reconsideration of Award**

Within five days after the receipt of an award, a party to an arbitration under the Regular Procedures may request, in writing, the arbitrator to reconsider the award. Such request shall contain a concise statement of the reasons that the arbitrator should reconsider the award. Unless the arbitrator notifies all the parties that the arbitrator has decided to reconsider the award within five days of the arbitrator's receipt of the request, the request is deemed denied. Within five days after the award is signed by the arbitrator, the arbitrator may, upon the arbitrator's own initiative, modify the written award to correct typographical, clerical, and numerical errors in the award. The arbitrator shall immediately furnish a copy of the modified award to the parties, and the Service, unless otherwise restricted by the arbitrator. Within five days after receipt of an award modified by the arbitrator pursuant to this Rule, a party may request, in writing, the arbitrator to reconsider the modified award. This request shall be subject to the terms of this Rule.

### **6.09 Release of Documents for Judicial Proceedings**

The Service shall, upon the written request of a party, furnish to the party, at the expense of the party, certified copies of any papers, notices, process or other communications that may be in the possession of the Service that may be required in judicial proceedings relating to the arbitration. This Rule does not require the Service to maintain a complete file of all papers, notices, process or other communications in an arbitration conducted pursuant to these Rules.

### **6.10 Applications to Court and Exclusion of Liability**

- (a) Neither the Service nor an arbitrator in a proceeding under these Rules is a necessary party in judicial proceedings relating to the arbitration.
- (b) Parties using these Rules for binding arbitration shall be deemed to have consented that the claims considered in the arbitration have merged into the award, that the award is the only continuing basis of determining the parties' rights and that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (c) The American Health Lawyers Association and the Service, their directors and members of their governing boards, and their officers, employees, agents, attorneys, consultants and representatives shall not be liable to a party, person, or entity claiming through the party by reason of or in any way related to the Service, these Rules, or any action taken or not taken with respect thereto.

- (d) The arbitrator shall not be liable to a party for any act, error or omission in connection with an arbitration conducted under these Rules.

## **7.0 RULES ON ADMINISTRATION**

### **7.01 Expenses**

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All expenses of the arbitration, including required travel and other expenses of the arbitrator, and any witness or other proof produced at the written request of the arbitrator, shall be borne equally by the parties, unless the arbitrator in the award assesses such expenses or any part thereof against a specified party or parties.

### **7.02 Arbitrator's Fee**

The compensation of the arbitrator shall be determined in accordance with the fee and expense schedule of the arbitrator submitted with the list of arbitrators provided by the Service.

### **7.03 Deposits**

Upon appointment, the arbitrator may require the parties to deposit with the Arbitrator such sums of money as the arbitrator deems reasonable and necessary to defray the expense of the arbitration, including the arbitrator's fee. If such deposits are not made timely, the arbitrator may order the suspension or termination of the proceeding. The arbitrator shall render an accounting to the parties and return any unexpended balance at the conclusion of the case, less fees and costs associated with the matter.

### **7.04 Evaluation**

Each party shall complete and file with the Service an evaluation form supplied by the Service within the time limit specified therein.

### **7.05 Replacement of Arbitrator**

If an arbitrator should die, become incapacitated or otherwise be unable or unwilling to proceed with the arbitration after having accepted appointment, the Service, at its sole discretion, may make a replacement appointment based on the parties' stated preferences with respect to the arbitrator lists submitted to them, or the Service may submit a new list to the parties. Unless the parties agree otherwise or the successor arbitrator determines that it is not necessary to conduct the arbitration on a de novo basis to assure a full and fair resolution of the dispute, the successor arbitrator shall conduct the arbitration on a de novo basis.

If a dispute arises between or among the parties regarding a conflict of interest of the arbitrator, the mental or physical competence of the arbitrator or any similar matter in which the continued service by the arbitrator is challenged and such dispute cannot be resolved among the parties and the arbitrator, the Service, at its sole discretion, may resolve such issue, may remove the arbitrator, and may make a replacement appointment based on the parties' stated preferences with respect to any list submitted to them, or may submit a new list to the parties.

### **7.06 Amendments**

These rules may be amended by the Service from time to time, which amendments thereafter become binding upon the parties to an arbitration pursuant to these Rules. Any reference to these Rules shall

be construed to refer to these Rules as amended from time to time. Such amendments become effective for any arbitration filed after publication by the Service.

#### **7.07 Service Not Operating**

If parties have agreed to resolve a dispute under these Rules and the Service is not operating at the time at which a party submits the dispute to the Service, the parties shall be deemed to have agreed that the dispute will be arbitrated in accordance with these Rules..

# **American Health Lawyers Association Alternative Dispute Resolution Service**

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## **Schedule of Non-Refundable Administration Fees**

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### **Appendix I to Rules of Procedure for Arbitration**

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**American Health Lawyers Association  
Alternative Dispute Resolution Service  
1620 Eye, N.W., 6<sup>th</sup> Floor  
Washington, D.C. 20006-4010  
Phone and Fax: 202-833-0762**

**E-mails: [cbrice@healthlawyers.org](mailto:cbrice@healthlawyers.org)  
[adr@healthlawyers.org](mailto:adr@healthlawyers.org)  
Website: [www.healthlawyers.org/adr](http://www.healthlawyers.org/adr)**

While the American Health Lawyers Association Alternative Dispute Resolution Service prints its Rules for the ease of resolvers and potential parties, the most up-to-date and binding version of the Rules should be downloaded from the American Health Lawyers Association's ADR Website at: [www.healthlawyers.org/adr](http://www.healthlawyers.org/adr)

The Rules of Procedure for Arbitration, Mediation, or Mediation/Arbitration that will be binding on the parties and the resolver will be the version of the Rules available from the ADR Website on the effective date of the ADR Request for Arbitration/Mediation Dispute Resolver List form.

# American Health Lawyers Association Alternative Dispute Resolution Service

## Schedule of Nonrefundable Administration Fees

### Appendix I to Rules of Procedure for Arbitration

<u>Service</u>	<u>Administration Fee</u>
Arbitration (First Panel)*	\$2,750.00
Arbitration (Second Panel)*	\$1,750.00
Arbitration (Third Panel)*	\$2,750.00
Hearing Officer*	\$900.00
Med-Arb*	\$3,250.00
Mediation (First Panel)*	\$2,750.00
Mediation (Second Panel)*	\$1,750.00
Mediation (Third Panel)*	\$2,750.00

\*Add \$475 for each additional party above the two (2) initial filing parties (i.e., with one complainant and one respondent, the filing fee is \$2,750; with one complainant and 3 respondents, the filing fee is \$3,700 [\$2,750 + 2(\$475.00)].

The nonrefundable Administration Fee only covers the administrative services provided by the American Health Lawyers Association Alternative Dispute Resolution Service. It does not include the compensation or expenses charged by the dispute resolver or any other charge incurred by the parties in advance of or in connection with any dispute resolution.

The American Health Lawyers Association Alternative Dispute Resolution Service reserves the right to change the nonrefundable fees at any time and from time to time. Information on the current administration fees can be obtained from:

American Health Lawyers Association  
Alternative Dispute Resolution Service  
1620 Eye Street, N.W., 6<sup>th</sup> Floor  
Washington, DC 20006-4010  
Phone and Fax: 202-833-0762  
E-mails: [cbrace@healthlawyers.org](mailto:cbrace@healthlawyers.org)  
[adr@healthlawyers.org](mailto:adr@healthlawyers.org)  
Website: [www.healthlawyers.org/adr](http://www.healthlawyers.org/adr)

# **American Health Lawyers Association Alternative Dispute Resolution Service**

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## **Sample Contractual Arbitration Provisions**

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### **Appendix II to Rules of Procedure for Arbitration**

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**American Health Lawyers Association  
Alternative Dispute Resolution Service  
1620 Eye Street, N.W., 6<sup>th</sup> Floor  
Washington, DC 20006-4010  
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While the American Health Lawyers Association Alternative Dispute Resolution Service prints its Rules for the ease of resolvers and potential parties, the most up-to-date and binding version of the Rules should be downloaded from the American Health Lawyers Association's ADR Website at: [www.healthlawyers.org/adr](http://www.healthlawyers.org/adr)

The Rules of Procedure for Arbitration, Mediation, or Mediation/Arbitration that will be binding on the parties and the resolver will be the version of the Rules available from the ADR Website on the effective date of the ADR Request for Arbitration/Mediation Dispute Resolver List form.

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# **American Health Lawyers Association Alternative Dispute Resolution Service**

## **Sample Contractual Arbitration Provisions**

### **Appendix II to Rules of Procedure for Arbitration**

#### **1.0 ACCESS TO ARBITRATION**

The parties may provide for arbitration under the American Health Lawyers Alternative Dispute Resolution Service (Service) Rules of Procedure for Arbitration (Rules) by any written agreement to arbitrate under or to invoke otherwise an application of the Rules or to submit a claim for arbitration by the Service. This document contains sample provisions that the parties may wish to consider in providing for arbitration under the Rules. A variety of sample provisions are included in order to demonstrate the manner by which disputes or controversies involving different circumstances, contracts and relationships may be the basis for arbitration under the Rules. However, no particular form is required. The sample provisions are provided for convenience.

Parties considering arbitration under the Rules or the use of particular arbitration provisions should remember that these decisions may significantly affect their legal rights. In addition, the validity and enforceability of an arbitration provision or the award will depend on local law. This document is not a substitute for legal advice. The Service urges parties considering these matters to consult with legal counsel prior to making any decision.

#### **2.0 GENERAL CONSIDERATIONS**

In evaluating or drafting an arbitration agreement or clause, a number of concerns should be considered. First, statutes, regulations and case law in various jurisdictions may affect the validity or enforceability of the arbitration agreement or clause. A particular arbitration agreement or clause may, for example, be void as unconscionable or against public policy in some jurisdictions. Second, it is important that the arbitration agreement or clause reflect the intent of the parties concerning arbitration. A sample provision may require modification to reflect the intent of the parties with respect to arbitration.

Arbitration may take a wide variety of forms. The Rules generally operate as a default mechanism. Unless the parties agree otherwise in writing, the procedures provided by the Rules will apply. However, subject to applicable law and certain limited exceptions, the parties may vary any of these procedures by written agreement. Parties should consider and may vary, among other features, the following features of arbitration under the Rules.

### **2.01 Binding and Non-Binding Arbitration**

The parties may provide for either binding or non-binding arbitration.

### **2.02 Locale, Place, Time or Date of Arbitration**

The parties may provide for the locale, place, date or time of any arbitration proceeding.

### **2.03 Number and Qualifications of Arbitrators**

The parties may provide for a single or multiple arbitrators and may specify the professional or other qualifications that the parties would prefer the arbitrators possess.

### **2.04 Method of Selection**

The parties may provide a method of selecting an arbitrator or arbitration panel.

### **2.05 Payment of Costs**

The parties may provide for the payment for the costs and fees associated with the arbitration.

### **2.06 Types of Disputes**

The parties may specify the types of disputes subject to arbitration. For example, the parties may provide whether arbitration will be required for disputes that may arise in the future or whether an existing dispute will be submitted to arbitration.

### **2.07 Scope of Arbitration**

The parties may provide for the scope of arbitration. For example, the parties may limit arbitration to contractual disputes or include tort claims.

### **2.08 Order and Manner of Proceedings**

The parties may provide for the order and manner of any arbitration proceedings.

### **2.09 Discovery**

The parties may provide for or prohibit the use of discovery. The parties may also limit the types of discovery permitted and the time period in which the parties may conduct discovery.

### **2.10 Relief**

The parties may limit the relief or damages that the arbitrator may award.

### 3.0 SAMPLE PROVISIONS

The sample provisions are intended only to provide examples of the written provisions that parties may use to provide for arbitration under the Rules and to alert parties and their counsel to some of the issues and variations that may be considered in deciding to arbitrate under the Rules and deciding on the provisions that the parties will use.

#### 3.01 Sample Basic Provision

The following sample provision is a basic provision that provides for arbitration under the Rules in a specified location.

**Arbitration.** Any controversy, dispute or disagreement arising out of or relating to this Agreement, the breach thereof, or the subject matter thereof, shall be settled exclusively by binding arbitration, which shall be conducted in *[City, State]* in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and which to the extent of the subject matter of the arbitration, shall be binding not only on all parties to the Agreement, but on any other entity controlled by, in control of or under common control with the party to the extent that such affiliate joins in the arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

#### 3.02 Sample Provision in Connection with Medical Staff Bylaws, Appointment Procedures or Fair Hearing Procedures

Various forms of alternative dispute resolution can be quite valuable in resolving issues between physicians and hospitals upon the medical staffs of which the physicians serve. To the extent that such dispute resolution provisions are included in medical staff bylaws, appointment procedures or hearing procedures, careful attention must be paid to the nomenclature used in the particular document involved, which must be consistent with the terms otherwise used in the document and may not be correctly described below. Also, to the extent that the hospital seeks the safe harbor protection afforded by the Health Care Quality Improvement Act of 1986, as amended, appropriate reference must be made to that legislation and to amendments occurring from time to time with respect to notice and hearing requirements.

The following example is designed to utilize mandatory binding arbitration to resolve disputes arising under medical staff bylaws, appointment procedures or fair hearing procedures other than hearing procedures in physician appointment, disciplinary or credentialing matters.

**Arbitration.** Any controversy, dispute or disagreement arising out of, or relating to (*these medical staff bylaws, the appointment procedure, the fair hearing procedure*), rights arising thereunder or the breach thereof (except for any hearing procedure requested by a physician in connection with matters with respect to which the adequate notice and hearing provisions of the Health Care Quality Improvement Act of 1986, as amended from time to time, apply) shall be settled exclusively by arbitration, which shall be conducted in

*(City, State)* in accordance

with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

In the alternative, the parties may prefer to select arbitration or another form of alternative dispute resolution under rules of the Service to include such a hearing process. In such event, the terms of the underlying document will be substantially different because the detailed hearing provisions would not be included in their entirety. Assuming that other operational provisions are properly addressed in a set of medical staff bylaws or in a fair hearing procedure, an appropriate reference to the Rules of Arbitration of the Service might be as follows:

**Arbitration.** Any controversy, dispute or disagreement arising out of, or relating to *(these medical staff bylaws, the appointment procedure, the fair hearing procedure)*, rights arising thereunder or the breach thereof, including any hearing requested by a physician pursuant thereto, shall be settled exclusively by arbitration, which shall be conducted in *(City, State)* in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration; provided, however, that, with respect to any such physician hearing procedure, said Rules of Procedure for Arbitration shall be modified to the extent necessary to comply with the adequate notice and hearing provision requirements of the Health Care Quality Improvement Act of 1986, as amended from time to time (“Act”), and said Rules of Procedure for Arbitration shall be interpreted and applied consistent with the Act. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Another use of alternative dispute resolution in this context allows a different physician hearing procedure to be provided in the medical staff bylaws or fair hearing procedure, but submits the dispute to mandatory binding arbitration after the completion of the hearing and the final decision made by the board of directors of the hospital, in lieu of any challenge in court. Such a provision might read as follows:

**Arbitration.** Any controversy, dispute or disagreement remaining after the final decision of the Board of Directors of *(Hospital)* in connection with any hearing conducted pursuant to *(these medical staff bylaws, this fair hearing procedure)* shall be settled exclusively by arbitration, which shall be settled exclusively by arbitration, which shall be conducted in *(City, State)* in accordance with the American Health Lawyers Association Alternatives Dispute Resolution Service Rules of Procedure for Arbitration, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

### **3.03 Sample Provisions on Legal Violations**

The following two sample provisions are drafted to address concerns by a party that an agreement violates a federal, state or local law, regulation, order or policy. Such sample provisions might be used, for example, in connection with concerns that an agreement

may violate future Medicare/Medicaid fraud and abuse prohibitions or may raise questions of tax exempt status by reason of later decided cases. The first sample provision focuses on a good faith concern that such a violation may exist.

**Compliance with Laws and Regulations.** In the event any party to this Agreement, in consultation with counsel, develops a good faith concern that any provision of this Agreement or any activity of any other party is in violation of any applicable federal, state or local law or any regulation, order or policy issued under any such law, such party shall immediately notify the other parties in writing of such concern, the specific activities giving rise to such concern and the reasons therefor. If an agreement on a method for resolving such concern is not reached within ten (10) days of such written notice, the activities described in the notice will cease or be appropriately altered until the concern is resolved. If the parties cannot agree on a method of resolving the concern, the matter shall be submitted to a single arbitrator pursuant to the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. The arbitrator shall (i) make a determination of the legality of the provision or activity in question, and (ii) if the provision or activity is determined to be illegal, either (A) amend this Agreement to eliminate the illegal provision or activity and leave the parties as nearly as possible in the same economic positions in which they would have been under the original terms of this Agreement; or (B) if the illegal provision or activity is so fundamental that revision and continuation of this Agreement is not feasible, terminate this Agreement in such a manner as will return the parties as nearly as possible to the economic positions in which they would have been had they not entered into this Agreement, without altering in a material way the economic benefits realized during the period this Agreement was in effect.

In contrast, the second sample provision also addresses changes and developments in judicial interpretations and focuses on a change that prevents a party from receiving an anticipated benefit of an agreement.

**Changes in Law and Regulations.** In the event any applicable federal, state or local law or any regulation, order or policy issued under any such law is changed (or any judicial interpretation thereof is developed or changed) in a way which will have a material adverse effect on the practical realization of the benefits anticipated by one or more parties to this Agreement, the adversely affected party or parties shall notify the other party or parties in writing of such change and the effect of the change. The parties shall enter into good faith negotiations to modify this Agreement to compensate for such change. If an agreement on a method for modifying this Agreement is not reached within thirty (30) calendar days of such written notice, the matter shall be submitted to a single arbitrator for arbitration in *[City, State]* pursuant to the rules and procedures of the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. The arbitrator shall (i) structure an amendment to this Agreement which will leave the parties as nearly as possible in the same economic positions in which they would have been under the original terms of this Agreement, had

the change in the law, regulation, order or policy (or change or development of the judicial interpretation thereof) not occurred; or (ii) if the arbitrator determines that the change is so fundamental that revision and continuation of this Agreement is not feasible, structure a termination of this Agreement that will return the parties as nearly as possible to the economic positions in which they would have been had they not entered into this Agreement, without altering in a material way the economic benefits realized during the period this Agreement was in effect.

### 3.04 Sample Provisions on Price or Value

The following two sample provisions address a failure of the parties to agree on a price or value under an agreement. In addition, the first sample provision also provides for an arbitrator directly appointed by each of the two parties to an agreement, selection of a third arbitrator in certain circumstances and the division of the arbitrators' fees among the parties.

**Arbitration.** If the parties have not agreed upon *[Matter Relating to Value or Price]* by *[Date or Time]*, the parties shall submit the matter for resolution by two arbitrators in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. Each party shall select an arbitrator from a list provided by the American Health Lawyers Association Alternative Dispute Resolution Service ("Service") within ten days after the list is provided. After the two arbitrators are selected, the arbitrators shall meet promptly to resolve the matter. If the arbitrators are unable to resolve the matter within sixty calendar days after the selection of the second arbitrator, then a third arbitrator shall be appointed by the two arbitrators, or if they cannot agree, the third arbitrator shall be selected by the arbitrators from a list provided by the Service. Promptly after the third arbitrator has been selected, the three arbitrators shall resolve the matter. A decision by a majority of the arbitrators shall resolve the matter. A decision by a majority of the arbitrators shall be binding on the parties. Each party will pay the respective fees of the arbitrator appointed by that party and one-half of the cost of appointing and the fees of the third arbitrator.

The second sample provision provides for arbitration by a panel composed of two directly appointed arbitrators and a neutral arbitrator with specific qualifications, a specified method of arriving at the dollar amount of the award and the division of costs.

**Repurchase for Fair Market Value.** Upon notice given by the Hospital before *[Date or Time]*, the Contractor shall repurchase the Medical Equipment from the Hospital for fair market value. The fair market value of the Medical Equipment shall be determined by agreement between the parties. If the parties cannot agree upon the fair market value of the Medical Equipment within thirty calendar days after *[Date or Time]*, then the fair market value shall be determined by a panel of three arbitrators selected pursuant to the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. Each party shall select an arbitrator from a list provided by the American Health Lawyers Association Alternative Dispute Resolution Service ("Service"), and the two arbitrators so selected shall appoint a third arbitrator from a different list so provided. The fair market value as determined by each of the three arbitrators shall be added together and the sum shall be divided by three; the resulting quotient shall be the fair market value of the Medical Equipment. If, however, the lowest value and/or the highest value are more than fifteen percent (15%) lower or higher than the middle value, that lowest value and/or highest value shall be disregarded. If one value is disregarded,

the two remaining values shall be added together and their sum divided by two; the resulting quotient shall be the fair market value of the Medical Equipment. If both the lowest value and the highest value are disregarded, the middle value shall be the fair market value of the Medical Equipment. Each party shall pay the fees and expenses of the arbitrator selected by it, and the fees and expenses of the third arbitrator and all other costs of the arbitration shall be borne equally by the parties.

Consultation with legal counsel is strongly urged before the parties use a provision based on this or a similar type of variation or provision.

### 3.05 Sample Provision on Rate Modification

The following sample provision addresses an inability of the parties to agree on a rate modification. It also provides for a tripartite panel composed of two directly appointed non-neutral arbitrators and a neutral arbitrator, specified arbitrator qualifications and a division of costs.

**Arbitration of Rate Modification.** If the parties cannot agree to a mutually acceptable modification to the rates within ninety (90) calendar days after *[Date or Time]*, the party requesting the rate modification shall have the right to have the matter decided by arbitration in *[City, State]* in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service (“Service”) Rules of Procedure for Arbitration. Each party shall select a person to serve on an arbitration panel from a list of arbitrators provided by the Service. The two arbitrators shall then select a fair and impartial third person to serve as a member of the panel *[from the same list]*. The arbitrators should have experience in the area of managed care plans. The fees of the arbitrator appointed by each party shall be borne by that party, and the fees of the third arbitrator and the costs of the arbitration shall be borne equally by both parties.

### 3.06 Sample Provisions on Med-Arb

The following two sample provisions provide for the use of med-arb, in which mandatory, binding arbitration will occur if mediation does not produce an accepted result. The first sample provision contemplates the use of the same person as the arbitrator and the mediator.

**Resolution of Dispute.** The parties hereby agree to submit any dispute arising under this Agreement to mediation under the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation. If any dispute is not resolved by mediation no later than *[Date or Time]*, the dispute shall be submitted to arbitration in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. The same person shall serve both as the mediator and as the arbitrator.

In contrast, the second sample provision contemplates the use of different persons as the arbitrator and the mediator.

**Resolution of Dispute.** The parties hereby agree to submit any dispute arising under this Agreement to mediation under the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation. If any dispute is not resolved by mediation no later than *[Date or Time]*, the dispute shall be submitted to arbitration in

accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration. The same person may not serve both as the mediator and the arbitrator.

### **3.07 Sample Provision on Arb-Med**

The following sample provision provides for use of arb-med in which arbitration first occurs with the binding decision of the arbitrator maintained by the arbitrator in secret at the conclusion of arbitration, to be disclosed and placed in effect only if the parties fail to reach agreement after a designated period of mediation. In such a procedure, a single dispute resolver serves as arbitrator and mediator.

**Resolution of Dispute.** The parties hereby agree to submit any dispute arising under this Agreement to arbitration in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration; provided, however, that the decision of the arbitrator shall be maintained in confidence by the arbitrator without disclosure to the parties or any other person while the parties engage in mediation in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation for a period of *(two days, 36 hours, 24 hours, two weeks)*. If the dispute is not resolved by mediation by the conclusion of such time period, the arbitrator shall render the award as maintained in confidence since the conclusion of the arbitration proceeding, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The same person shall serve both as the mediator and as the arbitrator in such a proceeding.

## **4.0 MISCELLANEOUS ALTERNATIVES**

The following sample provisions reflect miscellaneous variations that may be possible in connection with arbitration.

### **4.01 Altering Damages**

The available damages may be varied. Examples include:

Damages shall be determined in accordance with the provisions of law applicable to comparable civil actions.

Notwithstanding the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration, a party may be awarded incidental, consequential, special, punitive, or exemplary damages.

Any damages awarded may not exceed the amount of payments made under this Agreement.

If the Patient seeks to recover damages for loss of earnings or impairment of earning ability, evidence may be considered to establish the income taxes and employment taxes which the Patient would have been obligated by law to pay.

The arbitrators may, in awarding damages, consider compensation or payments from a collateral source.

Consultation with legal counsel is strongly urged before parties use a provision based on these or similar types of variations or provisions.

#### **4.02 Altering Remedies**

The available remedies may be varied. Examples include:

The exclusive remedy available in such event shall be specific performance.

In no event may the arbitrators require specific performance or grant other equitable relief.

Consultation with legal counsel is strongly urged before parties use a provision based on these or similar types of variations or provisions.

#### **4.03 Altering Standard of Proof**

The standard of proof may be varied. Examples include:

In any proceedings involving a claim of professional liability by the Physician, the decision of the arbitrator shall be based on evidence which is legally sufficient and which establishes, by clear and convincing proof, every element of the claim.

Consultation with legal counsel is strongly urged before parties use a provision based on these or similar types of variations or provisions.