

American Health Lawyers Association Alternative Dispute Resolution Service

Sample Contractual Mediation Provisions

Appendix II to Rules of Procedure for Mediation

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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

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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1.0 ACCESS TO MEDIATION

The parties may provide for mediation under the American Health Lawyers Association Alternative Dispute Resolution Service (Service) Rules of Procedure for Mediation (Rules) by any written agreement to mediate under or to invoke otherwise an application of the Rules or to submit a claim for mediation by the Service. This document contains sample provisions that the parties may wish to consider in providing for mediation 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 mediation under the Rules. However, no particular form is required. The sample provisions are provided for convenience.

Parties considering mediation under the Rules or the use of particular mediation provisions should remember that these decisions may significantly affect their legal rights. In addition, the validity and enforceability of a mediation provision 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 a mediation 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 mediation 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 mediation agreement or clause reflect the intent of the parties concerning mediation. A sample provision may require modification to reflect the intent of the parties with respect to mediation.

Mediation 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 mediation under the Rules.

2.01 Locale, Place, Time or Date of Mediation

The parties may provide for the locale, place, date or time of any mediation session.

2.02 Number and Qualifications of Mediators

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

2.03 Method of Selection

The parties may provide a method of selecting a mediator or mediation panel.

2.04 Payment of Costs

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

2.05 Types of Disputes

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

2.06 Scope of Mediation

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

3.0 SAMPLE PROVISIONS

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

3.01 Sample Basic Provision

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

Mediation. The parties shall in good faith attempt to resolve any controversy, dispute or disagreement arising out of or relating to this Agreement, or the breach thereof, by negotiation. If any such controversy, dispute or disagreement is not resolved by *[Date or Time]*, that controversy, dispute or disagreement shall be submitted to mediation, which shall be conducted in *[City, State]* in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation.

3.02 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 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 mediation with a single mediator pursuant to the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation.

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 days of such written notice, the matter shall be submitted to mediation with a single mediator for mediation in *[City, State]* pursuant to the rules and procedures of the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation.

3.03 Sample Provision on Price or Value

The following sample provision addresses a failure of the parties to agree on a price or value under an agreement. In addition, the sample provision also provides for a mediator with specific qualifications and the division of costs.

Mediation. If the parties have not agreed upon *[Matter Relating to Value or Price]* by *[Date or Time]*, the parties shall submit the matter for mediation by a mediator in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation. The mediator shall be a health attorney with at least five years experience as such. Each party will pay an equal share of the costs associated with the mediation.

3.04 Sample Provision on Rate Modification

The following sample provision addresses an inability of the parties to agree on a rate modification.

Arbitration of Rate Modification. If the parties cannot agree to a mutually acceptable modification to the rates within ninety calendar days after *[Date or Time]*, the party requesting the rate modification shall have the right to submit the matter to mediation in *[City, State]* in accordance with the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Mediation. The mediation shall be conducted by an attorney with at least five years experience representing managed care organizations. The costs of the mediation shall be borne by the party requesting the rate modification.

3.05 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.