

# **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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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.