

## **IVAMS Arbitration Rules**

June 1, 2009

Scope of Rules: These Rules apply to the procedural conduct and fees relating to all proceedings upon the filing of a notice of arbitration selection of IVAMS. These rules apply to all arbitration proceedings, whether pursuant to contractual provisions, by stipulation to arbitration by the parties and counsel before or after a court action has been filed, or after a motion to compel arbitration has been granted by a court, and IVAMS is either specified in the order, or agreed to by the parties.

### **1 - Commencing the arbitration**

Arbitration initiation under a contractual provision:

An arbitration is deemed commenced when notice of selection of IVAMS, signed by all parties and counsel has been filed with an IVAMS case manager, accompanied by a copy of any contractual provision specifying IVAMS as the arbitration provider, or a stipulation to IVAMS as the provider.

Arbitration initiated following filing of a court action

An arbitration is deemed commenced when, after a court action has been filed, the parties and counsel stipulate to resolve the issues by way of arbitration, and a notice of selection of IVAMS has been received by the IVAMS case manager, from one or more counsel for the parties, accompanied by a copy of the executed stipulation to arbitrate. An arbitration is also deemed commenced when an order of a court, granting a motion to compel arbitration, and specifying IVAMS as the provider, or has been received by the case manager.

An arbitration will also be deemed commenced after a court action has been filed, and a court grants a motion to compel arbitration filed by one or more of the named parties; provided, however, the arbitration will not be deemed commenced until such time as an IVAMS case manager receives a copy of the order referring the action to arbitration and specifically naming IVAMS as the provider, or when the order is accompanied by a stipulation of the parties and counsel to use IVAMS as the provider.

### **2 - Service of documents**

Service of all documents shall be by United States Postal Service mail. If all parties and counsel agree in writing, service may also be accomplished by fax or e-mail transmissions, UPS, or FedEx. Service is deemed accomplished when a document is placed in a mail depository, with proof of service on all parties attached, or, if by facsimile or e-mail, when a notice of successful transmission is

reported to the sender. For arbitrations to be conducted with a tripartite panel of arbitrators, service, to be complete, must be on all counsel, all members of the panel, and upon the case manager at IVAMS. For single arbitrator proceedings, service, to be complete, must be on all counsel, the arbitrator, and the case manager at IVAMS.

### **3 - Representation**

Any party may be represented by a member of the State Bar, or by any other person of his/her choosing. Each party choosing a representative, other than a member of the State Bar, shall give prompt notice to the Case Manager of the representative's name, title, if any, address, together with the telephone and facsimile numbers where the representative can be reached during normal working hours. Representative who are members of the State Bar shall provide the IVAMS Case Manager with his/her firm name, business address, telephone, fax, and e-mail address if service is contemplated to be by e-mail.

### **4 - Ex Parte communications**

Following the selection of a tripartite panel of arbitrators, or of a single arbitrator, no *ex parte* contact between the parties or counsel and the arbitrators, or any of them, shall occur. Communication necessary for the processing of the case within IVAMS, or other administrative matters, shall be with the IVAMS Case Manager only. This includes obtaining subpoenas for witnesses, scheduling telephone conferences, and requesting continuances. If required, the Case Manager will assist the parties and/or counsel in scheduling an appropriate joint conference with the arbitrator or the arbitration panel. As used in these rules, "*ex parte*" communications shall have the same interpretations as that found in the California Code of Judicial Ethics, Canon (3)(B)(7).

### **5- Arbitrator selection**

Within ten (10) days following the commencement of an arbitration, as defined in these rules, the parties may jointly select the arbitrator(s) to preside over the arbitration and notify the IVAMS Case Manager, in writing, of the panel member selected. If, within five (5) days following the commencement of an arbitration, the IVAMS Case Manager has not been notified of the joint selection of the IVAMS arbitrator(s), the Case Manager shall send to all counsel a list of names of five (5) IVAMS panel members from which the parties and/or counsel may select a first and second choice, and inform the Case Manager within ten (10) days. If the parties select common names, either as a first or second choice, then that person shall be designated as the arbitrator. If no common selection is made, the IVAMS Case Manager shall send a second list of names of five (5) different IVAMS panel members from which the parties and/or counsel may select a first

and second choice as described above. If no common names are selected, the parties shall petition the court pursuant to Code of Civil Procedure §1281.6 to select an arbitrator.

Disclosures, as required by law, shall be made by the selected arbitrator(s) and served by the Case Manager upon all parties and counsel within 10 calendar days from the selection of the proposed arbitrator(s). The obligation to disclose shall be deemed a continuing one throughout the process of the arbitration. Objections to the arbitrator(s), based upon information contained in the disclosures, shall be made pursuant to Code of Civil Procedure §§ 1281.9 and 1281.91.

#### **6 - Arbitration Management Conferences, including scheduling and location of hearing**

a. Within 10 days following the final selection of the arbitrator(s), the Case Manager shall set a date for an Arbitration Management Conference between the arbitrator(s) and all counsel for the parties. Notice of such Arbitration Management Conference shall be served upon all counsel by the method of service selected as defined in Rule No. 2; provided, however, if any party is appearing *in propria persona*, that party shall be included in the service. The Case Management Conference shall be telephonic, with the Case Manager specifying in the notice the conference telephone and identification numbers to be utilized in making the appearance.

b. During the Case Management Conference the arbitrator(s) and counsel will confer, and if agreement cannot be obtained, then the arbitrator(s) will determine: (1) The use of these Rules, or the application of the Code of Civil Procedure for procedural matters during the arbitration; (2) Discovery needs, and the timing therefor, anticipated by counsel; (3) The date and location of the hearing; (4) The general nature of the issues to be addressed in the arbitration; (5) Method of service of papers, throughout the arbitration, to be utilized by counsel as well as the IVAMS Case Manager; (6) Methods of obtaining subpoenas; (7) Scheduling of anticipated motions before the arbitration hearing; (8) Timing of, and format for, briefs in support of motions and before the commencement of the arbitration hearing; (9) Timing of the arbitration award following the arbitration hearing; (10) Notification of all claims to be considered in the arbitration; (11) Whether or not a court reporter will be required and provided; (12) A determination whether or not the issues are complex; (13) Any other matter that the parties, or counsel, consider could affect the orderly completion of the arbitration; (14) Whether the arbitration arises out of a contract, a court order, or a pre-litigation agreement.

#### **7 - Notice of Claims**

a. If an arbitration is commenced following the filing of a court action, the parties

shall file, with the Case Manager, copies of the pleadings which were previously filed in the court, including the complaint, the answer, if any, and any cross complaint, and responsive pleadings, together with the proof of service of such documents. The filing of such pleadings and service documents shall be deemed adequate notice to each side of the claims to be addressed in the arbitration. If the arbitration is commenced without a previous filing of a court action, each party shall, within 10 days of the commencement of the arbitration, notify the Case Manager, all other parties, and counsel, of the claims which each party is submitting to be determined in the arbitration. Such notification shall include a statement of the nature of the dispute, the names and addresses of all parties, any claims and cross-claims, the amount involved, if any, the remedies sought, and the hearing locale requested.

b. Unless the parties state otherwise during the Case Management Conference, all claims and cross- claims will be deemed denied by the other parties. Failure to notify the other parties of claims for consideration in the arbitration, and any affirmative defenses asserted, will be deemed a waiver of those claims and no evidence will be received on such claims, nor will any finding or award thereon be made by the arbitrator.

c. After filing of a claim, if either party desires to make any new or different claim or cross-claim, it shall be made in writing and filed with IVAMS. The party asserting such a claim or cross-claim shall provide a copy to the other parties who shall have 15 days from the date of receipt of such claim within which to file an answering statement with IVAMS. Any such new or different filings, or responsive filings, will be deemed to be denied by the other affected parties, whether or not an answer is filed. After the appointment of the arbitrator, however, no new or different claim may be submitted except with the arbitrators consent, after notice to the other parties, and a hearing or stipulation by the affected parties.

## **8 - Discovery / Exchange of Information**

a. Within 15 business days after the notices of claims, as described in these Rules, the parties shall exchange all non-privileged documents, including the names of potential witnesses, including experts, upon which they intend to rely to support their claims in the arbitration. This exchange obligation shall be a continuous one throughout the arbitration, with subsequent disclosures to be made within 15 calender days of the information coming into possession of a party or counsel.

b. Not later than thirty (30) days prior to the scheduled arbitration hearing, all

parties shall serve upon other parties and counsel, the names of all experts who may be called as witnesses at the hearing, together with each expert's findings and reports, which may be submitted into evidence at the hearing.

c. Each party may notice and take the deposition of one opposing party and one expert identified in the pre-hearing disclosure above.

d. At least five (5) business days before the arbitration hearing, the parties shall exchange the names of all witnesses expected to testify at the hearing, together with copies of all exhibits they intend to introduce into evidence at the hearing.

If disputes arise over the exchange of information, as set forth in these rules, the parties shall promptly advise the Case Manager and a conference shall be convened to address the issues. The arbitrator shall determine the need for such information and the burden of producing the same. A hearing to make such determination shall be scheduled at least 14 days prior to the arbitration hearing, and may be conducted by telephonic appearances.

e. Documents that have not been exchanged, or witnesses and experts that have not been disclosed as required by these Rules, shall not be admissible in the arbitration hearing and may not be considered by the arbitrator, unless otherwise agreed by the parties, or upon a showing of good cause.

## **9 - Securing Witnesses and Documentary Evidence for the Arbitration Hearing**

a. Each party may make written demand on any other party participating in the arbitration, to produce for the hearing witnesses disclosed by the witness names exchange required by these Rules, without the need for a subpoena. Subpoenas for the attendance of witnesses, or for the production of documents, at the arbitration hearing or a deposition, may be issued by the arbitrator, upon request, supported by a declaration explaining the need for the request, made through the Case Manager. The issuance of a subpoena shall be governed by the provisions of Code of Civil Procedure §1282.6. In the event an objection to the production of witnesses or documents, as described in the subpoena, filed with the IVAMS, the arbitrator will conduct a hearing, by telephone appearances, or in person, and rule on the objection. In evaluating the objection, the arbitrator will consider the proponent's need for the evidence, and the burden of such production on the objector.

b. Unless otherwise limited by the arbitration agreement between the parties, or by court order, the arbitrator(s) shall be empowered to decide any issue in pre-hearing motions to compel, or restrict, document production and information exchanges, and to take appropriate action, including monetary and evidentiary sanctions, to obtain compliance with any ruling. (See Bak v. MCL Financial

Group, Inc. (2009) 170 Cal.App.4th 1118; David v. Abergel (1996) 46 Cal.App.4th 1281, 1283)

## 10 - Pre-Hearing Submissions

Counsel for the parties are encouraged to submit arbitration briefs at least three (3) days in advance of the hearing, providing a capsulized version of the facts which are anticipated will be presented during the taking of evidence. The brief should also direct the arbitrator's attention to matters of law involved in resolving the issues in dispute. Briefs are not to be submitted as confidential, but are to be served on all opposing counsel, or parties appearing *in propria persona*.

## 11 - The Hearing

a. The arbitrator shall determine the order of proof, which will ordinarily follow the normal procedure used in court trials. The parties, or counsel, shall be given the opportunity to make opening statements, or may submit on the arbitration brief.

b. Counsel shall mark all documentary, photographic, and exemplar evidence prior to the commencement of the hearing. Marking may be alphabetic, sequentially numeric, or a combination of alphabetic and numeric. For example: A, B, C, ...etc. or 1, 2, 3, ... etc., or AA, BB, CC, or A1, A2, A3...etc. Counsel should meet and confer over marking choices sufficiently in advance of the hearing to enable all such evidence to be properly marked. Counsel for each of the participating parties shall prepare an index of the exhibits being offered by his/her for submission to the arbitrator at the time of the commencement of the hearing.

c. Each side shall be entitled to make a brief opening statement; provided, however, such statement may be reserved by respondents until the commencement of their case in chief.

d. All witnesses called to testify will be placed under oath by the arbitrator.

e. Claimant shall present evidence to support the claim, following which presentation the Respondent shall then present evidence to support the defense, and any cross-claims. Claimant will then present evidence in rebuttal of the defense and respond to the cross-claim evidence, if any has been presented. Witnesses shall submit to questions from the adverse party and from the arbitrator.

f. The strict application of the rules of evidence, established by the California

Evidence Code, is not required. However, the arbitrator shall apply applicable law relating to mediation confidentiality and privileges, including attorney work product. All parties shall be afforded the opportunity to present material and relevant evidence, and the arbitrator may limit the evidence to such as is, in the arbitrator's sole determination, material and relevant.

g. An arbitrator finding it necessary to the proper resolution of any issue in the arbitration, to make an inspection of property, an accident scene, material, or other items described in the submissions, shall, personally before closure of the hearing, or thereafter through the IVAMS Case Manager, so advise the parties. The arbitrator shall set a date and time for the inspection, having in mind the schedules and time limitations of the parties and counsel, and the IVAMS Case Manager shall notify the parties and counsel. Any party or counsel who so desires may be present at such inspection. Questions may be asked of parties in attendance at the scene of the inspection by counsel and the arbitrator regarding matters directly related to the inspection, and answers given shall be deemed to augment the body of evidence received during the evidentiary presentation in the hearing. Such evidence may be utilized by the arbitrator in preparing the award.

h. The hearing shall be conducted in a civil and respectful manner giving each party and witness equal treatment and courtesy. The right to a full and fair hearing on the issues shall not be impaired by any arbitrary procedure imposed upon the parties by the arbitrator, or by the discourteous or disruptive conduct of any party or counsel. Discourteous or disruptive conduct, which impairs the ability of any party to obtain a fair and full hearing, may, in the sole judgment of the arbitrator, be deemed the party's consent to the entry of a default against that party, or an evidentiary exclusion. "Discourteous" and "disruptive" conduct shall be determined using the California State Bar Guidelines of Civility and Professionalism.

## **12 - Confidentiality and Privacy**

- a. Arbitrations that are commenced pursuant to a contractual relationship between the parties, including those parties who may be non-signatories to such a contract, will be deemed confidential by the IVAMS Case Manager and the arbitrator(s), including the fact of the arbitration proceedings, the evidence, and the award, except as necessary in connection with a judicial challenge to, or enforcement of, an award, or unless otherwise required by law or binding judicial decision.
- b. Arbitrations that are commenced following a court order stipulated to by the

parties, and not stemming from the enforcement of a contractual agreement to arbitrate, will not be considered as confidential by the IVAMS Case Managers or arbitrator(s), absent a court order or other requirement of law brought to the attention of the arbitrator.

### **13 - Waivers**

Any party who proceeds with the arbitration after obtaining knowledge that any provision or requirement of these rules has not been complied with by another party or counsel, and who has failed to state an objection in writing to such rule non-compliance, shall be deemed to have waived the right to object; provided, however, such waiver shall be in the discretion of the arbitrator, based upon a finding of good cause, and that the finding of the waiver will not result in depriving any party of substantial justice.

### **14 - Interim Measures**

The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief, and measures for the protection or conservation of property, and disposition of perishable goods. Such interim measures may take the form of an interim award, and the arbitrator may require security to be posted by the requesting party for the costs of such measures. Recourse to a court for provisional relief shall not be deemed incompatible with an arbitration agreement, or a waiver of the right to arbitrate after a court has granted a motion to compel an arbitration.

### **15 - Award, including timing, reasoned award, service**

- a. The arbitrator shall render an award within thirty (30) calendar days from the date of the closing of the arbitration hearing. The arbitrator, on motion of any party to the arbitration for good cause shown, or on his or her own motion, re-open the hearing. If the re-opening prevents the rendering of the award within the time limits set, then the time limits will be extended for an appropriate period of time to be set by the arbitrator.
- b. Following the evidentiary hearing the arbitrator may require the parties or counsel to submit additional briefing and/or arguments in writing. In the event of such requirement, reasonable time periods for such submission shall be permitted counsel. If such written briefings are required or permitted, the time for the rendering of an award shall be extended to thirty (30) days following receipt of the final additional briefing.
- c. In cases where the issues are deemed by the arbitrator and counsel as complex, the thirty day period for the rendering of an award may be extended for a reasonable period of time by agreement of the arbitrator, the parties, and counsel.

## **16 - Settlement and Settlement Conferences**

Either before or during an arbitration hearing, the parties may request to participate in a settlement conference and may agree to retain a mediator for that purpose. The arbitrator shall not discuss settlement with the parties or with counsel, at any time after the arbitration management conference, unless all parties agree. In no event shall the arbitrator discuss settlement with parties or counsel separate from the opposing side(s) after the first witness has been sworn. The arbitrator will cooperate in recessing an arbitration hearing in progress if the parties jointly request such a recess for the specific purpose of discussing settlement.

## **17 - Disqualification of Arbitrator as a witness or as a Party**

- a. By engaging IVAMS and/or an IVAMS panel arbitrator for the purposes of commencing an arbitration proceeding, the parties and counsel agree that in no event shall the IVAMS Case Manager, the Arbitrator, or any IVAMS employee or agent be a either a party to, or a witness in, the pending arbitration, or any subsequently related litigation.
- b. By engaging IVAMS and/or an IVAMS panel arbitrator for the purpose of commencing and conducting an arbitration proceeding the parties, and each of them, agree that neither the Arbitrator, the Case Manager, nor any IVAMS employee is an indispensable party in any litigation or other proceeding relating to the arbitration, or the subject matter of the arbitration, for which IVAMS was engaged. The parties and counsel further agree that neither IVAMS, the Arbitrator, the Case Manager, nor any IVAMS employee shall be liable to any Party for any act or omission in connection with any arbitration conducted under these Rules.
- c. By engaging IVAMS and/or an IVAMS panel arbitrator for the purpose of commencing an arbitration hearing that they shall defend and/or pay the costs (including attorneys' fees) of defending the Arbitrator, Case Manager, and/or IVAMS from any subpoenas from outside parties for matters relating to the arbitration for which IVAMS has been engaged.

## **18 - Fees**

- a. Definition of terms:  
Administrative Fees: those fees assessed by IVAMS for case services to compensate for the cost of providing those services, such as initiation of the arbitration proceeding, correspondence with the parties and/or counsel for arbitrator selection, calendar management, photocopying, and other administrative costs attendant to handling the arbitration process. Administrative Fees are not refundable.

Arbitration Fees: those fees which are assessed to the parties for the payment of the arbitrator's time in preparation for pre-arbitration motions, including the reading of briefs from counsel. Arbitration fees are also those which are assessed for the arbitrator's time in the conduct of the arbitration hearing and the preparation of the award following the arbitration hearing, including reviewing exhibits, legal research, reviewing any post-hearing written arguments and briefs submitted by counsel, and the composition of the award itself.

Divisional fees: the fees described herein as "Arbitration fees" are inclusive of the fees which accrue to IVAMS as the business income for the sponsoring Alternative Dispute Resolution institution.

b. Unless otherwise agreed, all arbitration fees, apart from those denominated as Administrative Fees, shall be shared equally between the parties. Such shared fees shall include Case Management Conferences (including conference calling expenses of IVAMS), motion hearings before the start of the arbitration hearing, the arbitrator's preparation time prior to the arbitration hearing, the hearing itself, and the time for award preparation following the arbitration.

c. IVAMS shall prescribe an initial filing and administrative fee (hereafter "Administrative Fees") for case services to compensate it for the cost of providing those services. The Administrative Fees shall be advanced by the party or parties making a claim, cross-claim, or denials, including affirmative defenses, subject to final apportionment by the arbitrator in the award. If the parties require a location for a hearing, outside the normal facilities furnished by IVAMS, the fees for any rental or facility charges levied by the facility owners or lessees, shall be advanced by the parties before the commencement of the arbitration hearing. In the event an arbitration is scheduled outside the normal facilities furnished by IVAMS, additional Arbitration fees may be assessed to cover travel time and costs incurred by the arbitrator.

d. Whenever arbitration fees deposits, paid into IVAMS for hearings, are held by IVAMS in anticipation of a specific number of hours to be spent by the arbitrator, and the estimate of the number of required hours to be used increases, IVAMS will bill the parties for the anticipated increase, in hourly increments, in advance of those additional time periods. When the hearing does not go forward as reserved, whether because of settlement or other decision not to proceed with the arbitration, and no cancellation or continuance is granted by the arbitrator, or agreed to by the Case Manager, the deposited fees are not refundable for the unused time; provided, however, IVAMS will use its best efforts to fill the unused time with other hearings, and, to the extent that the unused time is so filled, the deposited funds will be refunded. IVAMS reserves its right to retain its Divisional Fees, as described above, notwithstanding an arbitrator's decision as to the Arbitrator's

Fees to be refunded.

e. IVAMS agreements for arbitrations are with the parties and counsel jointly and severally. The parties and counsel are jointly and severally liable for the payment of IVAMS total fees and expenses. If one or more parties have failed to pay the fees allocated to those parties, then the arbitration will not go forward until all of the Administrative and Arbitrator's Fees made. Where one or more parties have paid more than their allocated share of the fees and expenses to allow the arbitration to proceed, an award in favor of such parties and against a party not making the required deposit, will include any costs or fees that the prevailing party has deposited in excess of its allocated share to cover the arbitration fees which were paid with respect to the arbitration.

f. IVAMS requires that the anticipated fees and costs of the arbitration will be deposited with IVAMS in advance of the arbitration. Failure of any Party to make the deposits of fees as required may, on motion of any other Party whose deposits have been made, or in the Arbitrator's discretion, be treated by the Arbitrator as a default. In such a circumstance, the Party failing to make the timely fee deposits may be deemed to have waived its right to be present at the hearing, or to present evidence, or to cross examine adverse witnesses.

When the arbitration hearing is anticipated to be of one week or less, the deposits shall be made at least thirty (30) days prior to the first anticipated starting date for the hearing. For arbitrations anticipated to require hearing times exceeding one week, the deposit shall be made at least forty-five (45) days prior to the first anticipated starting date for the hearing.

g. When the deposits have not been timely made in full, IVAMS may require that the calendared arbitration hearing be taken off calendar. Such a removal from the calendar will occur only after a conference between the Case Manager and counsel for all parties. The arbitrator and the Case Manager will discuss the matter of the deposit deficiencies and the arbitrator will decide upon the calendar status of the arbitration. In making a decision, the arbitrator will consider:

1. The financial hardship upon the parties, or any of them, in making the required deposit.
2. The time during which the parties were aware of the IVAMS requirement for deposits to be made.
3. The expenses the parties have incurred in the management of the litigation to the date required for the deposits, including discovery, depositions, document preparation, travel, investigation, expert witnesses' fees and attorney's fees.
4. The possibility of the necessary fees being deposited if a continuance is granted for a reasonable time period.

5. The willingness of the party, or parties, to make the deposits required, if funds were available to do so.
6. Any other explanation that describes an inequitable or unjust result that would occur if the hearing dates were vacated.