

Understanding Arbitration versus Mediation

Both arbitration and mediation are voluntary in that neither can occur without the agreement of all the parties to the dispute. Both are private, a significant advantage when parties do not want to air their dirty laundry in public. Both can occur relatively quickly after the dispute arises, and both can be accomplished for a fraction of the cost of court litigation. Beyond these similarities, however, arbitration is markedly different from mediation. When parties to a dispute select arbitration, a person or panel of three acts as an arbitrator to investigate the facts, analyze the dispute, and render a decision on the matter. The parties agree to accept the decision of the arbitrator as final and binding and will be enforced by the courts. In an arbitration, the arbitrator presides over a hearing in which witnesses testify and documents are considered, much like court litigation. Discovery and pre-hearing procedures are typically limited and abbreviated to accelerate the process and keep costs down. By agreement, the parties can institute other cost-saving measures such as eliminating transcripts and briefs. The time periods and the intensity of employment arbitration will depend on the parties and the arbitrator.

Appeals from arbitration decisions are only available on very limited grounds and are rarely successful. Although arbitration is more formal and expensive than mediation, it is still a less expensive and more expeditious than litigation.

In a typical mediation, the disputing parties voluntarily submit their dispute to an impartial third party (mediator) to assist them in reaching a mutually agreeable negotiated settlement. First, both parties present their legal positions to each other and the mediator. The parties are then separated by the mediator who probes each party's position privately in an effort to guide each party to a realistic assessment of his or her position.

A mediator's primary purpose is to facilitate a settlement. The mediator identifies the issues, explores a possible basis for agreement, points out the consequences of not settling, and encourages each party to accommodate the interests of the other party. Mediators cannot impose a settlement on the parties. They merely suggest ways the parties can settle their differences.

One great advantage of mediation lies in the ability of parties, with the assistance of the mediator, to devise creative solutions to their dispute outside the traditional remedies that a court or arbitrator could award. Another advantage is mediation's non-binding nature; if mediation fails, the parties are normally no worse off than before and can proceed to litigate their dispute or (if they agree) arbitrate it.

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