

Arbitration vs. mediation

How alternative dispute resolution can take the place of litigation

More legal disputes are being resolved through alternative dispute resolution (ADR) in an effort to sidestep the often high cost and long timeline of traditional litigation. ADR is often a mystery, however, because it doesn't receive the same attention that typical courtroom proceedings do through traditional media. Parties considering ADR should know the differences between and benefits of arbitration and mediation.

In addition to often being less expensive and quicker than litigation, arbitration and mediation both rely on a neutral third party to assist the parties. Both proceedings are usually confidential, and the record and resolution do not become a matter for the public. But the similarities end there.

Smart Business spoke with Brian E. Cohen, an associate at Novack and Macey LLP, about when arbitration or mediation is the appropriate solution.

What is arbitration?

Arbitration is like a typical litigation proceeding in that the arbitrator, or arbitration panel, will, in many ways, act like a judge and determine the respective rights of the parties. An arbitrator's ruling is a final, binding resolution.

A growing number of commercial contracts contain arbitration clauses that require the parties to use this 'stripped down trial' process rather than litigating their case in court. The specific form of arbitration differs from case to case, but often involves reduced document discovery, limited witness testimony and fewer

procedural restrictions than accompany a traditional court case.

What is mediation?

Mediation is a less formal process through which the parties attempt to settle their dispute by mutually agreeing on the outcome. The mediator is there to facilitate a conversation that offers the parties an opportunity to express their interests, listen to the other side's point of view, and, in some cases, agree to resolve their dispute.

Mediators do not deliver a judgment, determine the parties' rights or declare one side the winner and one side the loser. He or she does not have the authority to compel the parties to do anything. In mediation, each party retains control over its fate rather than surrender that control to a judge or jury. At the end of the day, only the parties can decide whether or not they want to agree to a particular set of settlement terms.

How should clients prepare to enter into either mediation or arbitration?

As with a trial, the goal of arbitration is to 'win.' Is there anything the client should know about the arbitrator(s)? What are the strengths and weaknesses



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of the case? How can the client be helpful during the proceeding? Of course, attorneys and clients should discuss whether the client, or any of its employees, is going to testify at the arbitration, and be sure to get over that testimony.

Preparing for mediation is different, however, because the goal of mediation is not the same as the goal of arbitration. Attorneys and clients should discuss and agree on their particular goals ahead of time. Is it to settle at all costs? Is it to get close to settling with the hope that the other side's offer might improve a few days later? Is it simply to have an opportunity to be heard by the other side — to hear their perspective?

After the goal has been established, logistical issues remain. Will the client speak to the mediator or to the other side during the mediation? Will the client or attorney make an opening statement? If the client is going to verbally participate, what kind of message would be best for the client to deliver?

In either case, clients should be sure to talk to their lawyers about what to expect from the process and how to best prepare for whichever form of ADR they are using. ●