

The Basics: Arbitration vs. Mediation



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Arbitration and mediation are alternative methods for dispute resolution, allowing people or companies to come to an agreement privately about a situation that might otherwise be litigated through the court system. Each process has its own pros and cons to consider.



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by Brette Sember, J.D., July 2019

Arbitration Basics

Arbitration is a dispute resolution method in which parties appear before an arbitrator, who might be a retired judge or someone with experience in the industry in question. The arbitration process is similar to a court case, but less formal, in that each side has the chance to present evidence, offer witness testimony, and make arguments. Each side might each have lawyers representing them.

The parties agree that the arbitrator decides the outcome of the dispute. Arbitration can be binding, where there is no opportunity to go to court if you are not satisfied with the outcome, or nonbinding, where it does not remove your rights to pursue the matter in court.

Many contracts now include arbitration clauses, requiring the parties to use arbitration to resolve any disputes. These kinds of clauses can be detrimental to small companies and consumers **signing a contract** with a large company. For example, the clause usually chooses a location for the arbitration, which may be inconvenient and expensive for the consumer. An arbitration clause is also usually a take-it-or-leave-it situation: if the consumer does not **agree to the arbitration clause**, the deal is over, which can result in an imbalance of power.

Pros and Cons of Arbitration

There are advantages to arbitration, which include:

- The process is faster and less expensive than going through the courts.
- The parties have the power to choose the arbitrator, whereas in court, the case is decided by a judge or a jury.
- The arbitration matter remains private and is not public record.
- An arbitration case is less formal than a court case, with relaxed rules.

There are also some drawbacks:

- If the arbitration is binding, you have no further recourse, meaning you cannot appeal as you can in a court case.
- The arbitrator may not be objective, particularly because arbitration is directly marketed to companies in certain industries, implying the arbitrator may be sympathetic to the company and not to the consumer.
- Because arbitration is not made public, the lack of transparency can cause it to be biased.
- While arbitration is generally less expensive than a trial, arbitration costs have been steadily rising, making it a not inexpensive process.

Mediation Basics

Mediation is a process in which a mediator, a neutral third party, works with the disputing parties to come to a mutually agreed upon resolution. The mediator usually has received mediation training and may be an attorney, retired judge, or in some cases, such as divorce, a therapist. The mediation process is cooperative and focused on working through issues so as to come to a solution that each party is comfortable with. Mediation is sometimes a required step to move forward with a court proceeding: for example, in California, custody cases must go through mediation before moving to a trial.

Mediation is handled through a series of meetings. There are no formal hearings. The mediator may meet with the parties together and/or separately and, rather than make a decision regarding the dispute, writes up the agreement the parties reach. The agreement is nonbinding until it is converted into a court order or judgment.

Pros and Cons of Mediation

There are many advantages to using mediation to resolve a dispute, including:

- The process is less expensive than a court proceeding.
- An outcome can be reached much more quickly through mediation than through court.
- The process is private and not part of the public record.
- The mediation process can be as flexible as the parties need it to be, which means it can be as long or short as needed and be scheduled whenever everyone agrees.
- The creative nature of the process allows the parties to come up with their own solutions to the problem, which can be as out of the box as they like.
- The parties have the opportunity to talk and negotiate directly with each other, which allows them to get to the heart of the matter.
- Mediation encourages conflict-resolution skills, so parties who undergo mediation may be able to later apply those skills on their own, avoiding both court and mediation.
- Mediators remain completely neutral and do not make any decision in the case. Instead, the mediator is there to guide the parties, offer suggestions, and move the process forward.
- No one wins or loses in mediation. Instead, the parties create a mutually agreeable outcome.

As with arbitration, mediation also has some drawbacks to consider, including:

- People who are not comfortable speaking for themselves may find mediation challenging.
- If there is a power imbalance between the parties, mediation may not be a fair process. For example, in families in which domestic violence has occurred, mediation is usually not an appropriate way to resolve a family law issue.
- Mediator training and certification standards vary greatly—and some states have no requirements at all to put out a shingle as a mediator—so you might have to shop around to find a mediator that offers the level of experience you need.
- If the parties are absolutely entrenched in their positions, mediation is unlikely to be successful.
- An agreement reached in mediation is not legally enforceable, so there can be compliance issues.

Arbitration and mediation both provide expedient and more cost-effective alternatives to a traditional court proceeding. However, they are not one-size-fits-all, so it's important to consider what might work best in your situation.

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