

Your Choices are...

ARBITRATION, MEDIATION or LITIGATION

1. Arbitration is where both sides submit to the decision of a fact finder. Arbitration can either be voluntary and non-binding or mandatory and binding.
2. Mediation is where two sides try to come to an agreement with the assistance of an impartial lawyer acting as mediator.
3. Litigation, or an actual trial, either private or conventional, is one in which the loser pays all damages.

Alternative Dispute Resolution (ADR) is a concept that, while not new, is experiencing a resurgence of interest because it reduces the time and money expended on conventional litigation.

Alternative dispute resolution entails binding and non-binding methods to settle disputes without litigation. Both sides can be represented by lawyers, and a neutral third-party functions as judge. ADR operates by streamlined rules of procedures, which are intended to result in settlements within months instead of years and to save money for all concerned.

Both arbitration and mediation have advantages and disadvantages which must be taken into consideration when ADR is pursued rather than the traditional litigation method.

Arbitration, both binding and non-binding, has been the more traditional form of dispute resolution. Arbitration can be court ordered with formal guidelines. Formal discovery is generally allowed, and scheduling of the arbitration will be at the direction of the court. If the parties cannot agree on a neutral arbitrator, the arbitrator will be selected by the court. While court ordered arbitration can more quickly resolve a lawsuit, its main weakness is its non-binding feature. Either party can reject an award and have the case channeled back into the traditional litigation forum of trial by either judge or jury.

The second form of arbitration is private binding arbitration which is generally used where there is an underlying contract signed by the parties stipulating all disputes arising out of the contract will be arbitrated. Generally, binding arbitration is without right to appeal to the courts in the event the law is incorrectly applied by the arbitrator or the result is out of line with the facts of the case. Private binding ►



arbitration can be agreed to voluntarily by parties to a dispute, even in the absence of a contract which requires such dispute resolution.

THE MAJOR PLUSES OF ARBITRATION, BOTH BINDING AND NON-BINDING ARE:

1. There is less expense as opposed to formal litigation.
2. The parties can choose an arbitrator with expertise in the area of law involved in the dispute.
3. In the case of private binding arbitration, the outcome will be kept confidential, unlike court proceedings or court ordered arbitration.
4. Scheduling is flexible and at the agreement of the parties.
5. A private binding arbitration award is final and not appealable, giving finality to the dispute.
6. Binding arbitration significantly lowers the chance of a "runaway" punitive or compensatory verdict, which can be the result in a trial by jury.

The negative features of either binding or non-binding arbitration is that the arbitrator is not required to follow the law or evidentiary rules established in that jurisdiction. The arbitrator is free to resolve the dispute on the basis of his or her sense of justice of the case, and in doing so may expressly or impliedly reject the claim that a party might successfully have asserted in a judicial action.

MEDIATION is recently the most popular form of ADR to evolve. This involves representatives from each side of a dispute sitting down with an impartial person, the "mediator", to attempt to reach a settlement. The mediator can be an attorney, retired judge, or an

expert in a particular subject matter of the dispute. The role of the mediator is to assist the parties in defining their differences and working towards an acceptable resolution.

The key feature of mediation is that it involves no formal court procedure or rules of evidence and the mediator does not have power to force an agreement on the parties.

MAJOR ADVANTAGES OF MEDIATION ARE:

1. Cases are handled quickly: mediation is appropriate at any time during litigation, and even before a lawsuit is filed, if both parties have enough information to reasonably resolve their dispute. The longer a case is pending, the more likely it is to expand to include more issues or claims. Parties also become more entrenched in their position, making it much more difficult to resolve the dispute.
2. Expensive litigation: mediation is generally a cost effective method to settle cases earlier and before a case goes to trial. Mediation fees are relatively low compared to overall costs of preparing a case for litigation.
3. Unreasonable claims or expectations: it is much more difficult in a face to face negotiation or mediation session to sustain unreasonable positions or expectations. It is the role of the mediator to force each party to describe every claim and position in detail and find common ground to where issues can be resolved.
4. Confidentiality: parties can discuss settlement proposal or options with the mediator in a confidential meeting without that proposal being communicated to the other

side. The mediator can then facilitate proposals between the parties to reach common ground.

5. Multiple parties or issues: in a case where there are co-defendants and/or multiple issues, mediation allows not only negotiation between the plaintiff and the co-defendants, but also among co-defendants who must negotiate between themselves. A mediator will help facilitate settlement negotiations so that all issues can be approached by all parties in an orderly fashion.

A negative of mediation is that once a party agrees to mediation, there is an expectation that the parties try to resolve the case and failing to negotiate in good faith will simply force the case into the traditional litigation forum.



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