



Gary Michael Smith, Esq.

Arbitration? Mediation? 12 Questions Answered

My law firm does a lot of litigation, so I regularly get asked about arbitration and mediation. Since I hear the same questions so often, I guess it is safe to assume that not too many people really know the differences. So, here are my top 12 answers to questions about arbitration and mediation.

1. What is arbitration?

Arbitration is a method of resolving a dispute in which an impartial third party selected by the parties, called a neutral, listens to the facts and arguments presented, and makes a decision as to how the issues in dispute will be resolved.

2. What is mediation?

Mediation is a method of resolving a dispute in which an impartial third party selected by the parties, called a neutral, listens to the facts and

arguments presented and provides evaluative and facilitative input about the strengths and weaknesses in the parties' cases, in an effort to get the parties to settle their dispute on their own terms. By its nature, mediation is non-binding and does not result in any decisions for or against any party.

3. What is the difference between arbitration and court?

In arbitration, the parties can usually choose who their arbitrator will be, whereas, in court, the parties cannot choose their judge. Court proceedings are held in public, whereas arbitration is held in private. Arbitration, in theory, is faster and less expensive than court. Court is held at a time and place dictated by the court, whereas arbitration proceedings are held at a time and place convenient to the parties.

4. Why arbitrate?

Arbitration is often faster than going to court. By way of example, the average time from filing of a

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lawsuit to trial in Maricopa County Superior Court is one-and-a-half years. Voluntary arbitration can occur in as quickly as 60 days. Likewise, arbitration can reduce the amount of discovery on a case, thereby reducing the lawyer bills. Further, arbitration can afford the parties more privacy than an open court proceeding, as the filings are not on the public record and the arbitration is not held in a public court of law. Also, arbitration can take place just about anywhere, as opposed to only at the courthouse.

5. Why mediate?

Mediation is best when the parties are not so committed to litigation and are willing to settle, but just can't get there on their own. Oftentimes, parties just need to vent to a third party who can give them an honest outsider's impression of their dispute. Mediation often works great for people who need a third party's validation of their own willingness to compromise.

6. Do the parties to arbitration or mediation need lawyers?

No, but it is generally a good idea to have

counsel, since most lay people are not familiar with the applicable procedures and rules. Most important, trained lawyers can help focus the arguments to get right to the heart of the real issues.

7. Should the arbitrator or mediator be a lawyer?

Although it is probably best to have someone with legal training, such as a lawyer or retired judge as the arbitrator or mediator, persons with a background in the area that is to be arbitrated or mediated, such as a contractor or accountant, can work well, too.

8. Is arbitration confidential?

Sort of. The only people present at arbitration are the parties, the arbitrator, and whoever else they invite and agree upon. Unlike most court cases, the public and the media cannot sit and listen to what is said or the decision. Only the parties and their lawyers receive copies of the arbitrator's decision. However, due to the need for a confirmation proceeding in the Superior Court, as well as the parties' right to have court reporters present to document the arbitration proceedings, it is possible that what is revealed at arbitration can make it to the public eye.

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Business News

from page 61

9. Is mediation confidential?

Yes. Mediation sessions are held behind closed doors and are typically cloaked under a confidentiality agreement.

10. How much does arbitration or mediation cost?

The costs of arbitration or mediation are wide and varied. Some neutrals charge by the hour, whereas others charge a flat rate. In addition, there are many arbitration and mediation organizations that also charge administrative fees. Whatever the method of charges, you may safely assume that the longer the proceeding, the greater the cost. Worthy to note, though, is that unless your contract provides expressly for recoupment of attorney fees and costs, you are unlikely to have those sums awarded to you at the conclusion of arbitration. So, if you are serious about having arbitration clauses in your contract, make certain you have competent counsel review your arbitration provisions.

11. Who pays for arbitration or mediation?

The expense of mediation is typically split between the parties. Arbitration also can be split. However, most often in matters of arbitration, loser pays.

12. Is an arbitration award final?

Yes, but there is always a catch. By statute, to be enforceable, arbitration awards must be confirmed before the Superior Court. In practical terms, this is typically just a formality, as awards are almost universally "rubber stamped." However, under very rare and limited circumstances, arbitration awards may be appealed. In my 10+ years of law practice, I have never seen anyone successfully defeat an arbitration award.®

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