Arbitration – Mediation – What is the Difference?

People, including lawyers, frequently conflate arbitration and mediation as interchangeable. If you do that too, you are wrong.

Mediation

Mediation (unless ordered by a Judge) is generally a voluntary process where the parties, with the assistance of a neutral third party "mediator," try to settle their differences. Mediation can take place before a court proceeding, during a court proceeding, or instead of a court proceeding.

Mediators are trained in conflict resolution techniques. For example, mediators learn about how to "set the stage" for a successful outcome. This includes, on the mediator's part, assessing who should participate in the mediation, where it should take place and how many rooms there should be, what submissions the parties should make and whether they should exchange their submissions with each other.

No less important than setting the stage is what happens during the mediation. Mediators should first provide ground rules and set an agenda. Once underway, mediators will use their skills to engage in active listening, generate options, as well as try to re-frame parties' statements so that they are less inflammatory and more conducive to moving matters in a positive direction. Mediators must also decide when the mediation should conclude.

A common mediator technique is to install the parties in separate rooms and engage in "shuttle diplomacy" where the mediator conveys offers and counter offers back and forth until resolution is reached. Another, and perhaps a mediator's most important technique, is to engage in 'reality checking' parties who do not appear to appreciate the uphill battles they will face if the case does not settle. In other words, it is preferable (but not mandatory) that the mediator be a practicing attorney with the necessary litigation experience (and, hopefully, a wealth of relevant war stories) to be able impress upon the parties and their counsel (or at least upon the recalcitrant party and his or her counsel) the likely judicial outcomes if mediation fails. This type of education is best done in a separate room, outside of the presence of the other party.

A successful mediation outcome is not only the responsibility of the mediator. It is a result of the combined efforts of the mediator, counsel and the parties. Attorneys must prepare their clients for what to expect, learn how to frame the issues and bridge the likely gaps, and help clients decide on the range of acceptable results.

Arbitration

Arbitrations may best be described as trials before a private judge. Unlike the role of a mediator, which is to facilitate a resolution that the parties themselves reach, the role of the arbitrator is to actually decide who wins/who loses/ who pays/ who collects. Thus, it is very important to undertake a thorough arbitrator selection process in order to make sure that the arbitrator has no conflicts of interest preventing her/him from accepting the assignment.

Although arbitration is most similar to litigation, there are also many significant differences from litigation. First, is the absence of a jury. That absence helps streamline proceedings in innumerable ways, from the lessened emphasis on motions such as summary judgment motions and the reduced significance of decisions whether to admit or exclude exhibits.

Second, unlike courtroom trials, arbitrations are confidential and the public has no access to the hearings.

Third, the stated goals of arbitration are speed, efficiency and a commitment to a just and fair resolution of all controversies. Seasoned arbitrators are free to adopt a variety of techniques to achieve those goals, many of which may not be available to public judges. Such techniques can include a requirement of first obtaining permission before filing a motion, or a requirement that direct examination proceed through written questions and answers and only cross examination may be conducted "live." There are many other techniques available to arbitrations that are only subject to limits of fairness and imagination.

Arbitrators have the power and authority of a public judge in a civil context. They can award damages, grant injunctive and declaratory relief, award attorneys' fees and costs. The injunctive relief may be preliminary and well as permanent. Indeed, an arbitrator has, to some extent, even more power than a public judge. A public judge may be reversed on appeal; an arbitrator may not be reversed by a higher court. His or her award may, however, be vacated or set aside by a judge under the Federal Arbitration Act under limited circumstances, such as, when the award was procured by corruption, fraud, or undue means, when there was evident arbitrator partiality or corruption, when the arbitrator refused to postpone the hearing or to hear evidence pertinent and material to the case, or when the arbitrator exceeded his or her powers or so imperfectly executed them that a mutual, final and definite award was not made.

How do parties initiate either a mediation or an arbitration?

There are a variety of ways to initiate mediation. One way is for the parties to agree upon the mediator, who will present the parties with a mediation agreement to execute, that, among other terms, describes the mediator's fees, and agreed-upon timing and procedures. Another path forward is to utilize one of the court's personnel to conduct the mediation, such as using a magistrate judge in federal court. Another possibility is to utilize one of the dedicated mediation services. An attorney who also mediates would be a good source of recommendations if s/he is not available due to conflicts of interest or for any other reason.

Arbitration is normally initiated as a result of an alleged breach of an agreement that contains an arbitration clause. Agreements that contain arbitration clauses may include settlement agreements, license agreements, intellectual property assignments, website and mobile apps' Terms and Conditions, general consumer contracts, international agreements, labor agreements, stockbroker agreements, employment agreements and credit card agreements. Such provisions are usually mandatory. Arbitration may also be initiated at the request of the parties once a dispute arises. As with mediation, the parties may agree upon the specific arbitrator, or use one of the alternative dispute resolution service providers such as the American Arbitration Association to help with finding an arbitrator and managing the case, including the billing and collection of arbitrator fees.