

WHEN SHOULD YOU CHOOSE MEDIATION OR ARBITRATION?

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People often confuse the terms mediation and arbitration and aren't sure which process they are using or what the difference is between the two. A key difference between mediation and arbitration is that mediation is a voluntary negotiated settlement and arbitration is just a different form of litigation where someone else makes a binding decision that the parties are obligated to live with.

In mediation, the parties decide if they want to resolve the conflict and they have to agree to whatever the terms of the settlement may be. It is a voluntary process and under Minnesota law it is a confidential process in which there is no public record and the agreement of the parties need not be disclosed to a court system or any publication. The mediator is called a "neutral" because their role is to be impartial, with a balanced responsibility to both parties to assist them in reaching an informed resolution. The mediator does not represent either party and cannot be called as a witness if the matter isn't resolved. Mediation is typically a process that lasts most of the day, allows the parties to share their perspectives, emotions and concerns about the dispute and attempt to find a resolution that both sides find acceptable. It's a "deal" between the parties which often means both parties typically leave partially satisfied and partially dissatisfied but with the dispute resolved.

In arbitration, the decision is made by a third party neutral who in this case is a decision-maker and not someone who tries to facilitate a mutual resolution. In mediation, the mediator has no power to make a decision and can't require the parties to accept any resolution if they don't agree with it. In arbitration, the arbitrator's job is to make a decision and the parties are required to accept it regardless of whether they like the result. Arbitration typically takes the place of a court or jury trial and has certain advantages, such as short timelines to get a decision, potentially lower costs and attorney's fees, and a decision-maker who may be more knowledgeable in the subject matter. It also has disadvantages, most notably the lack of ability to appeal the decision and have a higher court review any errors in law the arbitrator may have made.

I believe that in almost every dispute, mediation is worth a try in order to find a resolution before committing to the time and expense of going to trial. The risk of mediation is simply that you may spend some money on the process if it doesn't work. But statistics suggest that the vast majority of cases that go to mediation settle. Nothing that is said in mediation can be used against a party and often times both parties learn facts that help them better assess their situation. There are sometimes questions of when you should go to mediation, but rarely are there cases that aren't appropriate to mediate.

Choosing arbitration is a more difficult decision because it does have a binding impact and there is typically no appeal. Each situation and type of case needs to be analyzed based upon factors such as cost, need for a speedy decision, confidentiality and complexity to assess whether arbitration is an appropriate means of resolving the dispute.