

A GUIDE TO
Mediation and Arbitration
for Business People

Amended and Effective September 1, 2007



American Arbitration Association
Dispute Resolution Services Worldwide

www.adr.org

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A Guide to Mediation and Arbitration for Business People

Introduction

In the normal course of day-to-day business affairs, disputes are often inevitable. Parties might disagree as to their individual rights and obligations no matter how carefully a contract is written. This can lead to delayed shipments, complaints about the quality of merchandise, claims of nonperformance, and similar misunderstandings. The resolution of such disputes, however, need not be costly and acrimonious. Alternative means of dispute resolution can save time and money, and can help to put the dispute behind you while preserving valuable business relationships.

The American Arbitration Association (AAA) administers a broad range of dispute resolution services, which address the needs of businesses and individuals mired in conflict. These services include:

Mediation

Mediation is a meeting among disputants, their representatives, and a mediator to discuss settlement. The mediator's role is to help the disputants explore issues, needs, and settlement options. The mediator may offer suggestions and point out issues that the disputants may have overlooked, but resolution of the dispute rests with the disputants themselves. A mediation conference can be scheduled very quickly and requires a relatively small amount of preparation time. The conference usually begins with a joint discussion of the case, followed by the mediator working with the disputants both together and separately, if appropriate, to resolve the case. Many cases are resolved within a few hours. Perhaps most important is, mediation works! Statistics show that 85% of commercial matters and 95% of personal injury matters end in written settlement agreements.

Arbitration

Arbitration is referral of a dispute to one or more impartial persons for final and binding determination. Private and confidential, it is designed for quick, practical, and economical settlements. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, through the modification of certain aspects of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information used; evidence, locale, number of arbitrators; and issues subject to arbitration, for example. The parties may also provide for expedited arbitration procedures, including the time limit for rendering an award, if they anticipate a need for hearings to be scheduled on short notice. All such mutual agreements will be binding on the American Arbitration Association as well as the arbitrator. The AAA has also developed special Procedures for Large, Complex Disputes for cases in which the disclosed claim of any party is at least \$500,000.

Prior to the initial hearing in a case, the AAA may schedule either an administrative conference with the parties or a preliminary hearing with the arbitrator(s) and the parties to arrange for such matters as the production of relevant documents and the identification of witnesses, and for discussion of and agreement by the parties to any desired rule modifications. AAA administration is guided by those decisions that the parties make as to how to handle such sensitive issues as privacy of proceedings, confidentiality, trade secrets, evidence, proprietary information, and injunctive relief.

The National Roster of Neutrals

To serve the community with mediators and arbitrators representing all fields of specialization, the AAA maintains a national roster of approximately 8,000 trained experts throughout the United States and the rest of the world.

The AAA requires that applicants have a minimum of ten years of senior level business or professional expertise or legal practice prior to being considered for the roster.

Selected qualities in arbitrators and mediators for which the AAA looks are:

- > commitment to impartiality and objectivity;
- > dispute management skills;
- > judicious temperament: impartiality, patience, and courtesy;
- > respect of bar or business community for integrity, patience, and courtesy; and
- > strong academic background and professional or business credentials.

The American Arbitration Association is committed to maintaining an ongoing review of the quality of its roster of neutrals. Current panelists and new applicants are evaluated by regional office committees to guarantee neutrals' possession of superior management skills, commitment, ethics, training, and suitability to the caseload. Then, external review committees evaluate the neutrals according to a number of criteria including substantive expertise, preeminence in the field, fairness, and the manner in which they conduct proceedings. A final internal review by the Association monitors the integrity of the process, the quality of roster composition, and balance in terms of gender, racial, and ethnic diversity. The bottom line is a roster of neutrals crafted to meet the needs of the parties.

An AAA Glossary of Dispute Resolution Terms

Some of the commonly used terms follow.

Arbitration is submission of a dispute to one or more impartial persons for a final and binding decision.

Awards are the decisions of arbitrators. Awards are made in writing and are enforceable in court under state and federal statutes. Enforcement actions, when necessary, are brought by the parties to the arbitration.

Case managers are the AAA staff persons assigned to administer cases. The case manager is responsible for the general management of a particular case, including panel selection, scheduling and exchange of information among the parties, and all of the other administrative details involved in moving cases through the system.

Caucuses are meetings in which a mediator talks with the parties individually to discuss the issues.

Claimants are filing parties, also known as plaintiffs.

Counterclaims are counter demands made by a respondent in his or her favor against a claimant. They are not mere answers or denials of the claimant's allegations.

Demands for Arbitration are unilateral filings of claims in arbitration, based on a contractual or statutory right; also, the forms used.

Fact finding is a process by which parties present the arguments and evidence to a neutral person who then issues a nonbinding report on the findings, usually recommending a basis for settlement.

Hearing is a proceeding in which evidence is taken for the purpose of determining the facts of a dispute and reaching a decision based on evidence.

Mediation is a process in which a neutral assists the parties in reaching their own settlement but does not have the authority to make a binding decision.

Mini-trial is a confidential, nonbinding exchange of information, intended to facilitate settlement. The goal of mini-trial is to encourage prompt, cost-effective resolution of complex litigation. Mini-trial seeks to narrow the areas of controversy, dispose of collateral issues, and encourage a fair and equitable settlement.

Negotiation is a process in which disputants communicate their differences to one another and with this knowledge try to resolve them.

Parties are the disputants.

Respondents are responding parties, also known as defendants.

Submission is the filing of a dispute by all parties to a dispute resolution process after it arises.

A Guide to Mediation for Business People

How Does Mediation Differ From Arbitration?

Arbitration is less formal than litigation, and mediation is even less formal than arbitration. Unlike an arbitrator, a mediator does not have the power to render a binding decision. A mediator does not hold evidentiary hearings as would an arbitrator but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties. The separate meetings are known as caucuses. In contrast, arbitrators hear testimony and receive evidence in a joint hearing, on which they render a final and binding decision known as an award.

In joint sessions or caucuses with each side, a mediator tries to obtain a candid discussion of the issues and priorities of each party. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information derived from each side to:

- > reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;
- > open discussions into areas not previously considered or inadequately developed;
- > communicate positions or proposals in understandable or more palatable terms;
- > probe and uncover additional facts and the real interests of parties;
- > help each party to better understand the other party's view and evaluation of a particular issue, without violating confidences;
- > narrow the issues and each party's positions, and deflate extreme demands;
- > gauge the receptiveness for a proposal or suggestion;
- > explore alternatives and search for solutions;
- > identify what is important and what is expendable;
- > prevent regression or raising of surprise issues; and
- > structure a settlement to resolve current problems and future parties' needs.

Types of Disputes Resolved by Mediation

Any type of civil dispute can be resolved by mediation. The kinds of conflicts brought to AAA mediations have been as varied as the types of industries and business specialties using the process. Just about any type of dispute that parties want resolved quickly and inexpensively can be submitted to mediation.

The Benefits of Mediation

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are that:

- > parties are directly engaged in the negotiation of the settlement;
- > the mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own;
- > as mediation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation;
- > parties generally save money through reduced legal costs and less staff time;
- > parties enhance the likelihood of continuing their business relationship; and
- > creative solutions or accommodations to special needs of the parties can become a part of the settlement.

In the interest of swift and low-cost dispute resolution, arbitrations pending under the rules of the American Arbitration Association can be submitted to mediation under the applicable mediation rules at no additional administrative fee. The parties are responsible for compensating the mediator at his or her published hourly rate.

Occurrence of Mediation

Mediations can originate in different ways. First, mediation can occur when a dispute initially arises and before a lawsuit is ever filed. Second, mediation can occur as an adjunct procedure to pending litigation. That is, as soon as the parties file a lawsuit, they can use mediation in an effort to resolve the dispute at the inception of litigation or at any time thereafter, but prior to a trial being held. Third, mediation can occur during or immediately after a trial but before a decision is announced by a judge or jury. Fourth, mediation can occur after a judgment has been rendered in litigation. There might be a disagreement over the meaning or manner of carrying out a judgment, or concern about the possibility of lengthy court appeals. The parties can seek the assistance of a mediator to help them resolve these problems.

The Mediators

AAA mediators are carefully selected attorneys, retired judges, and experts in various professional and business fields. Each candidate has been trained by the AAA in mediation skills and closely evaluated to determine the level of skills attained. Only highly respected and experienced individuals are selected and trained by the AAA to be mediators. The mediators on the panel are chosen to serve on a particular case based on their expertise in the area of the dispute.

Scheduling a Mediation

Once parties have agreed to submit their dispute to mediation and have executed the appropriate forms, a mediation can be conducted on the first mutually available date. Of course, the parties may agree to have their mediation set for an earlier or later date depending on the circumstances of their case.

