What is arbitration? Mediation?

Arbitration and mediation are two types of Alternative Dispute Resolution (ADR), which is a way to resolve conflicts outside of traditional lawsuits and courtrooms. Sometimes attorneys are involved and sometimes not.

ADR may be used in:

Divorce or child custody/visitation disputes;

Personal injury or accident cases;

Consumer complaints (such as car sales);

Business and commercial disagreements;

Complaints against financial and brokerage companies;

Landlord-tenant fights;

Minor criminal matters.

Mediation is conducted by a "mediator," arbitration by an "arbitrator" (or in special cases, more than one arbitrator acting together, called a "panel"). Arbitrators and mediators are neutral and have no interest in the outcome of the proceeding, they are usually retired judges or lawyers being paid by the hour by the parties involved.

To proceed to arbitration or mediation the parties generally use a private ADR company. The ADR session typically is held in a private office, rather than a courthouse. An agreement is signed, committing to follow that company's arbitration or mediation rules.

New York's Civil Practice Law and Rules provides at Section 7501:

> **Effect of arbitration agreement** A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

The difference between arbitration and mediation is that arbitration is binding and final and mediation is not – if the parties mediating can not be made to agree, nothing is resolved.

Mediation can be helpful in bringing two (or more) sides together. Mediation procedures vary, but the parties usually meet first with the mediator to explain their positions. The mediator may then meet with each party separately, going back and forth to reach a resolution. Most disputes

are settled, and often the parties are asked to sign a written "settlement agreement," which is binding and final.

Arbitration is more like going to court; it's a "mini-trial." An arbitrator hears evidence and listens to witnesses and makes a decision, acting as a private judge and jury. The arbitrator makes a decision, called an "award." The arbitrator's award is final, may not be appealed, and may be enforced like a court judgment under Article 75 of New York's Civil Practice Law and Rules.

Why ADR? Because: it's inexpensive and fast. Stress tends to be reduced because the result is quick and final. The case is over and done with.

To resolve New York personal injury and accident cases, either mediation or arbitration may be used.

In mediation the plaintiff or claimant will send an attorney who may or may not have the client attend. The defense will either produce an insurance company representative or an attorney who can telephone in to the insurance company for settlement authorization as the parties near agreement. Either side may submit hospital reports, medical reports, photographs, or other materials to assist the mediator in understanding the nature of the case.

In arbitration, the parties present witnesses or evidence, although the neither side need have doctors or other expert witnesses appear and testify, instead submitting their reports. This can result in tremendous cost savings.

A device often used in New York accident arbitrations is the high/low agreement. This means that the parties will agree, in advance, that the arbitration award will not exceed a certain amount, and not go below a different amount. For example, if the parties agree to a $50,000/$100,000 high/low (more accurately it could be called a low/high), than if the arbitrator awards an amount below $50,000, the plaintiff would still get $50,000. If the arbitrator awards more than $100,000, the plaintiff would only get $100,000. If the arbitrator awards an amount between $50,000 and $100,000, the plaintiff would get that exact amount. The existence of a high/low agreement is generally not disclosed to the arbitrator. The smart plaintiff's attorney will have the client sign off on arbitration and the high/low agreement, because the client is limiting his or her potential monetary recovery, and giving up both the right to a trial in court and the right to appeal an unsatisfactory award.

Advantages of a high/low agreement: The insurance carrier for the defendant can ensure that an award will not exceed its available insurance company. The plaintiff can ensure that he or she gets something, and will not walk away empty-handed.

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