

Mediation and Arbitration... Are They the Same?

It doesn't seem you can pick up a newspaper lately that you don't read something about arbitration or mediation. Sometimes it seems these two terms are being used interchangeably which made me wonder, are they really the same or not. Many times, in our Association's, prior to entering into a lawsuit it is mandatory to try mediation first. So, I thought it might be a good topic to explore and understand if they are different, why they are different.

The legal definition of mediation is: A settlement of a dispute or controversy by setting up an independent person between two contending parties in order to aid them in the settlement of their disagreement.

In the attempt to settle a legal dispute through active participation of a third party (mediator) who works to find points of agreement and make those in conflict agree on a fair result. Mediation differs from arbitration in which the third party (arbitrator) acts much like a judge but in an out of court- less formal setting but does not actively participate in the discussion. Mediation has become very common in trying to resolve domestic relations disputes (divorce, child custody, visitation) and is often ordered by the judge in such cases. Mediation also has become more frequent in contract and civil damage cases. There are professional mediators or lawyers who do some mediation for substantial fees, but the financial cost is less than fighting the matter out in court and may achieve early settlement and an end to anxiety. Most mediators have some training in conflict resolution. Unlike a judge or an arbitrator, the mediator does not take sides or make decisions. The mediator's job is to help the disputing parties evaluate their goals and options and find their own mutually satisfactory solution.

Because the mediator has no authority to impose a decision, nothing will be decided unless both parties agree to it. Knowing that no result can be imposed from above greatly reduces the tension of both parties - and it also reduces the likelihood that someone will cling to an extreme position. Also, if mediation does not produce an agreement, either side is free to sue.

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Many people think that mediation is an informal process, in which a friendly mediator chats with the disputants until they suddenly drop their hostilities and work together for the common good. In fact, mediation is a multi-stage process designed to get results. It is less formal than a trial or arbitration, but there are distinct stages. The final outcome, hopefully is closure, the end of the mediation. If an agreement has been reached, the mediator may put its main provision in writing as the parties listen. The mediator may ask each side to sign the written summary of agreement or suggest they take it to lawyers to review. If the parties want to, they can write up and sign a legally binding contract. If no agreement was reached, the mediator will review whatever progress has been made and advise every one of their options, such as meeting again later, going to arbitration or going to court.

Obviously, the value here is that some association issues involving either contractors or even homeowners could be resolved out of court as opposed to going in that direction immediately. When arriving at a consensus of the parties mutually, the reality is you might just retain the relationship.

Arbitration: the process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision. Also known as alternative dispute resolution. Arbitration can be mandatory or voluntary. Unlike mediation, where the mediator is not charged with making a decision, in arbitration most often the decision is binding, meaning the outcome is final and there are no other steps or options to be taken.

A binding arbitration hearing is set up much like a court hearing: all parties may choose whether or not to hire an attorney and each party is given time to present evidence and call on witnesses. After hearing from everyone involved, the arbitrator makes a final and binding decision; while this decision is legal and usually immediately enforced, it can be disputed to the arbitrator or challenged in court. For everyone involved, a resolution will generally be offered sooner than it would take a judge or jury to hear and decide a case; in general, many arbitration hearings can be finalized in one day.

The controversy surrounding binding arbitration revolves around people's rights with respect to mandatory and voluntary arbitration. With mandatory arbitration, a borrower or consumer must agree to use an arbitrator, rather than the courts to

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resolve any issues. It is often a contractual agreement with a large purchase such as a mortgage or when buying a car. In voluntary arbitration, after a disagreement arises, both the consumer and the company can agree that they find it mutually beneficial to let a third party intervene.

The issue of controversy is that consumers waive their constitutional rights to sue as an individual or with a class action suit when they sign a mandatory binding arbitration clause as part of the contract. Many times, the consumer is unaware they have denied themselves this right under the contract. Consumers may not also be aware that the independent arbitrator may have an interest in siding with the corporation for financial reasons, and may not be entirely neutral.

Given all of the above information, I would say there are two lessons learned here that can apply to our association world. One, that mediation might be an option to consider when trying to resolve issues with members of the community who are not compliant with the declaration and come to a mutually agreeable solution before heading to court. Two, that one should read all contracts entered into by the Association to see what, if anything, is stated about the process by which any disputes between the association and the contractor would be resolved. There's always a lesson isn't there?