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## Where Can I Lean More About Arbitration And Mediation?

Contact the Pennsylvania Bar Association at 800-932-0311 or visit the PBA ADR Committee's page on the PBA Web site at [www.pabar.org](http://www.pabar.org). You also can contact your local county bar association for additional information.

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## How Can I Locate An Attorney?

Call the Pennsylvania Bar Association Lawyer Referral Service toll free at 800-692-7375. Many counties have this same service at the local level. Look in your Yellow Pages under "attorneys" for more details.

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# Arbitration and Mediation

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## Consumer Legal Information Pamphlets

*by the*

PENNSYLVANIA BAR ASSOCIATION



More and more frequently, parties and their lawyers are exploring alternatives to litigation to resolve a dispute without the need for a judge or jury. This trend toward solving problems outside the litigation process is called **Alternative Dispute Resolution** or "ADR." Two important ADR processes are arbitration and mediation.

**Arbitration** is similar to a court trial except there is no jury. The arbitrator (or panel of three arbitrators) is a neutral body that listens to all sides and decides the case based on the evidence presented by the parties and their lawyers. An arbitration hearing is less formal than a trial and the presentation may be streamlined. This procedure is usually simpler, faster and less expensive than litigation in a full-blown court setting. It is generally, but not always, final and binding upon the parties.

**Mediation** is a confidential process where a neutral person, the mediator, is chosen by the parties to assist them in reaching a mutually acceptable settlement of their dispute. The mediator has no power to decide the case but instead helps the parties come to their own agreement. Matters can be mediated at any time before a lawsuit has been filed or after litigation has been started. Sometimes parties who have agreed to arbitrate a dispute will first attempt to resolve the matter between themselves with the help of a mediator. If no settlement is reached, the parties can continue on to arbitration or litigation.

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## Why Would I Choose ADR Over Litigation?

Litigation is an entirely adversarial process. Typically, once a lawyer is hired, the parties themselves stop talking to each other and the lawyers employ litigation strategies designed to present their client's case in the way most advantageous to the client and most likely to favorably influence a judge or jury. Litigation is time-consuming, expensive and, in some jurisdictions, it can take a long time to get a trial date. It also can be emotionally stressful and have detrimental effects on any continuing relationship between the parties.

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## Why Would I Choose Mediation Over Litigation?

Sometimes, for reasons of expense, maintaining a productive environment, or the need to preserve a business or personal relationship between the parties, it may be important to resolve the matter quickly through mediation. Mediation is a problem-solving technique that allows the parties to work together to form their own resolution of the case. Often the result a party wants, such as outplacement counseling after an employment termination or the revision of a business agreement that is not working out as planned, cannot be obtained in litigation. In most civil litigation matters, a court may only be able to award money damages or an injunction. Mediation allows the parties, with the help of a third party neutral called a mediator, to solve the problem in a mutually acceptable fashion by focusing on the needs and interests of the parties rather than their positions.

*Special Note: This pamphlet has been issued to inform and not to advise. It is based on Pennsylvania law. The statements are general, and individual facts in a given case may alter their application or involve other laws not referred to here.*

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## If I Choose Mediation, Will My Lawyer Still Be There To Protect Me?

You clearly have the right to have your lawyer present. Your lawyer can play an important role in mediation. Although the parties are present at the mediation and have the opportunity to talk to each other and to the mediator, your lawyer can outline your case to the mediator and, more importantly, will be present to advise you on the legal impact of any settlement that you may reach. Your lawyer will be the one who, in cooperation with the opposing lawyer, drafts the terms of the settlement agreement, which, when signed by all parties, becomes a binding agreement. Many lawyers are trained in counseling clients about mediation advocacy, which is quite different from courtroom advocacy.

While you have the right to have your lawyer present, you are not required to do so. Sometimes, if the case involves a relatively small amount in controversy or there are not complex issues of law involved, the parties may elect to go to mediation without their lawyers present. In those instances, it is wise to consult a lawyer before a mediation session to discuss your legal rights and obligations as well as strategy and to reserve, at the mediation session, the right to have your lawyer review and approve any agreement before signing it. By consulting your lawyer first, you and your lawyer can determine together whether the lawyer should be present at the mediation session.

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## If I Choose Mediation, What Can I Expect The Procedure To Be?

First, you need to choose a mediator. You will want to talk to your lawyer and get his or her opinion as to who the right mediator is for your case. You want to make sure that person has good natural skills, has had adequate mediation skills training, is capable of readily familiarizing himself or herself with the subject matter of your dispute and follows the Model Standards of Conduct for Mediators. You also may want your lawyer to check out the mediator's references.

Once you have chosen your mediator, the mediator should make sure that all people who are necessary to making a decision about your dispute are present. These people will include the plaintiff, the plaintiff's lawyer and sometimes the plaintiff's business advisors or family members to whom the plaintiff may turn for advice or support. The defendant and all defense counsel must be present, and if it is a dispute that is being defended by an insurance company, then a company representative who knows the case, has been assigned the file and has settlement authority, should attend.

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## When Everyone Assembles For The Mediation, What Does The Mediator Do?

The mediator should make sure everyone is introduced so that you know who is attending the mediation for each side. There should be no surprises at mediation. The mediator will ask everyone to read and sign a confidentiality agreement that says that all statements made by a person attending the mediation are confidential and cannot be used in litigation. No one who attends the mediation, including the mediator, can be forced to testify about the settlement discussions that take place at the mediation. Title 42 of Pennsylvania Consolidated Statutes Section 5949 states that mediation communications are privileged.

The mediator will ask each party to explain its case or its position to all the other parties. Each party will state its position and why they are suing or defending. After each party has spoken, the mediator may meet privately with each side and discuss in total confidence their real interests and needs. The purpose of these private discussions is to help the parties work toward a mutually acceptable settlement. Sometimes this may take more than one meeting, and the mediator will call a halt only where he or she has decided the parties cannot reach a settlement agreement by continuing to negotiate.

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## What Kind Of Dispute Is Appropriate For Mediation?

Any dispute where the parties want to avoid court or a formal litigation process. Cases that may decide constitutional

rights or challenge or set an important legal precedent may not be appropriate, but most business, family, neighborhood, environmental, consumer or personal injury cases can be settled by a mediator acting as a neutral third party.

Mediation is not limited to resolving disputes in the litigational context. It can be very effective in transactional matters where parties are attempting to strike a bargain or put together a deal but are stuck on one or more issues.

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## Why Would I Choose Arbitration Over Litigation?

Arbitration is similar to a court trial except there is no jury. The arbitrators (or panel of three arbitrators) are neutrals that listen to all sides and decide the case based on the evidence presented by the parties and their lawyers. An arbitration hearing is less formal than a trial and the presentation may be streamlined. This procedure may be simpler, faster and less expensive than litigation in a full-blown court setting.

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## What Kinds Of Cases Are Arbitrated?

In Pennsylvania, all civil lawsuits involving a claim for money damages only and for \$50,000 or less in larger counties and \$35,000 or less in smaller counties must be heard by an arbitration panel of three lawyers chosen from the local county bar association. Their decision is filed in the courthouse and can be legally enforceable. If a party disagrees with the finding of the panel, the party may appeal the decision to the court. This is called an appeal "de novo."

By law, some cases must first be privately arbitrated. These involve public employees (such as state or local municipal workers and those working for school districts) as well as cases involving uninsured or underinsured motorists. Your lawyer will explain the process and will represent you if you must appear before an arbitrator or arbitrators in a similar situation.

Arbitrations may also take place privately by agreement of the parties before an arbitrator or panel of arbitrators who have been mutually selected. The result is kept confidential and is generally binding. This means you may not appeal the decision except in very limited circumstances. Many businesses include clauses in their contracts to arbitrate disputes in

order to take advantage of a generally quicker and less expensive procedure than litigation.

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## How Does Arbitration Work And Will My Lawyer Represent Me?

Even though arbitration is less formal than a court trial there are procedures to be followed, both before a hearing and during the presentation of evidence. Your lawyer plays an important role in the arbitration and he or she will explain to you the process and what you must do to be prepared. Generally your lawyer will give an opening statement explaining the nature of the dispute and what the evidence is expected to show. Then the party bringing the case will testify along with any other witnesses for that side. The lawyer for the other party will have an opportunity to ask questions of these witnesses. The process repeats itself for the party defending against the claim.

After all the evidence has been presented, the lawyer for each side will usually give a closing statement to sum up the case. The arbitrators (if there was a panel) will meet privately after the hearing to review the evidence and must give a decision within a specified amount of time.

As in mediation, you are not required to have a lawyer present. Given that arbitration is a more formal process than mediation, however, and in most instances the decision is final and binding on the parties, it is wise to have your lawyer represent you at the hearing.

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## What Types Of Disputes Are Appropriate for Arbitration?

In addition to those matters that must by law be arbitrated, almost any kind of dispute where the parties want to avoid a formal court trial is appropriate. Parties can decide prior to a dispute arising that they will arbitrate in that event, or they can make that decision after a controversy has developed. Cases that may decide constitutional rights or challenge or advance an important legal precedent may not be appropriate but most business, neighborhood, consumer, personal injury and some family and environmental cases may be arbitrated.