

## ADR METHODS AND TECHNIQUES

Some of the primary ADR techniques used by Government and industry include the following:<sup>1</sup>

1. **Arbitration** is one of the oldest forms of ADR. Arbitration involves a formal adversarial hearing before a neutral, called the arbitrator, with a relaxed evidentiary standard. The arbitrator is usually a subject matter expert. An arbitrator or an arbitration panel of two or more arbitrators serves as a "private judge" to render a decision based on the merits of the dispute. Arbitration decisions can be binding or non-binding.
  
2. **Conciliation** is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. The conciliator may or may not be totally neutral to the interests of the parties. Successful conciliation reduces inflammatory rhetoric and tension, opens channels of communication and facilitates continued negotiations. Frequently, conciliation is used to restore the parties to a pre-dispute status quo, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.
  
3. **Convening** serves primarily to identify the issues and individuals with an interest in a specific controversy. The neutral, called a convenor, is tasked with bringing the parties together to negotiate an acceptable solution. This technique is helpful where the identity of interested parties and the nature of issues are uncertain. Once the parties are identified and have had an opportunity to meet, other ADR techniques may be used to resolve the issues.
  
4. **Early Neutral Evaluation** involves an informal presentation by the parties to a neutral with respected credentials for an oral or written evaluation of the parties' positions. The evaluation may be binding or non-binding. Many courts require early neutral evaluation, particularly when the dispute involves technical or factual issues that lend themselves to expert evaluation. It may also be an effective alternative to formal discovery in traditional litigation.
  
5. **Facilitation** improves the flow of information within a group or among disputing parties. The neutral, called a facilitator, provides procedural direction to enable the group to effectively move through negotiation towards agreement. The facilitator's focus is on the procedural assistance to conflict

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<sup>1</sup> Adapted from Alternative Dispute Resolution, A Resources Guide, published by the United States Office of Personnel Management and the Equal Employment Opportunity Commission, pages I-1 to I-6.

resolution, compared to a mediator who is more likely to be involved with substantive issues. Consequently, it is common for a mediator to become a facilitator, but not the reverse.

6. **Fact-Finding** or **Neutral Fact-Finding** is an investigative process in which a neutral "fact finder" independently determines facts for a particular dispute usually after the parties have reached an impasse. It succeeds when the opinion of the neutral carries sufficient weight to move the parties away from impasse, and it deals only with questions of fact, not interpretations of law or policy. The parties benefit by having the facts collected and organized to facilitate negotiations or, if negotiations fail, for traditional litigation.

7. **Interest Based Negotiation** or **Interest Based Bargaining** is an established negotiating technique through which the parties meet to identify and discuss the issues at hand to arrive at a mutually acceptable solution. It is a positive effort by the parties to collaborate, rather than compete, to resolve a joint dispute. The focus of negotiations is on common interests of the parties rather than their relative power or position. The goal is to reduce the importance of how the dispute occurred and create options that satisfy both mutual and individual interests. Interest based negotiations are also referred to as "principled" or "win-win" negotiations. This informal process is one of the most fundamental methods of dispute resolution, offering parties maximum control over the process. It does not necessarily require the use of neutrals.

8. **Litigation**, although not an ADR technique, is intertwined with ADR. Not every case can or should be settled. However, each case proceeding toward litigation benefits by an evaluation for resolution. Consideration of using ADR techniques for resolving an aspect of a case such as merit, quantum, attorney fees, or future obligations is common.

9. **Masters** or **Special Masters** are neutrals appointed by a court in accordance with judicial rules. The master assists the parties to manage discovery, narrow issues, agree to stipulations, find facts, and, occasionally, reach settlement. In non-jury actions, the court may accept the master's findings of fact.

10. **Mediated Arbitration (Med-Arb)** is a combination of mediation and arbitration. Initially, a neutral third party mediates a dispute until the parties reach an impasse. After the impasse, a neutral third party issues a binding or non-binding arbitration decision on the cause of the impasse or any unresolved issues. The disputing parties agree in advance whether the same or a different neutral third party conducts both the mediation and arbitration processes. Use of the same person for both processes creates a problem when the mediator turned arbitrator must ignore previously acquired confidential information.

11. **Mediation** involves a neutral, called a mediator, who assists the parties in negotiating an agreement. The mediator serves as an "agent of reality" to help the parties frame the issues, structure negotiations, and recognize self interests as well as the interests of the other side. Mediators may be, but are not necessarily, subject matter experts concerning the substantive issues in dispute. The parties may meet with the mediator together or individually as the circumstances dictate. A meeting between one party and the mediator, called a caucus, allows the party to privately express emotions and core interests. These private sessions avoid alienation between the parties that might otherwise inhibit open communications. Mediators are not vested with any decision making authority and cannot impose resolution on the parties; the parties make decisions themselves. However, the mediator, like a facilitator, serves as the proponent of the process to keep discussions moving on track.

12. **Minitrial (Mini-trial)** is a misnomer. This technique provides for a summary presentation of evidence by an attorney or other fully informed representative for each side to decision makers, usually a senior executive from each side. After receiving the evidence, the decision makers privately discuss the case. "Minitrial" is not a small trial; it is a sophisticated and structured settlement technique used to narrow the gap between the parties' perceptions of the dispute and which "facts" are actually in dispute. This hybrid technique can occur with or without a neutral's assistance, but neutrals frequently facilitate the processes for presentation of evidence and discussion among the decision makers, and serve as a mediator to reach a settlement. Mini-trials can be more expensive than most other ADR techniques because the cost of presenting even summary evidence to senior executives is high. Therefore, this process is generally reserved for significant cases involving potential expenditure of substantial time and resources in litigation.

13. **Ombudsman (Ombudsperson)** is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints. The ombudsman may interview parties, review files, and make recommendations to the disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants.

14. **Partnering** is a preemptive technique to avoid disputes before they arise by building a strong relationship between parties. The goal is for the parties to avoid a major dispute, or alternatively, minimize disruptive impact, by focusing on the development of a cooperative working relationship rather than an adversarial one. Partnering is a relatively new hybrid form of dispute resolution.

15. **Peer Review Panels** or **Dispute Resolution Panels** use groups or panels to conduct fact-finding inquiries, assess issues, and present a workable resolution to resolve disputes. In workplace personnel disputes the panel is generally composed of knowledgeable employees and supervisors. Panels may be standing groups or formed ad hoc from a pool of qualified employees and supervisors. In contract disputes, the panel is often composed of two or more neutral subject matter experts selected by the disputing parties. Decisions of the panel may or may not be binding, depending on the advance agreement of the parties. This method attempts to resolve disputes at their inception to avoid traditional litigation.

16. **Private Judging**, also called "rent-a-judge", is an approach midway between arbitration and litigation in terms of formality and control of the parties. The parties typically present their case to a judge in a privately maintained courtroom with all the accouterments of the formal judicial process. Private judges are frequently retired or former "public" judges with subject matter expertise. This approach is gaining popularity in commercial situations because disputes can be concluded much quicker than under the traditional court system.

17. **Settlement Conference** is an ADR technique either permitted or required by statute in many jurisdictions as a procedural step before trial. An assigned or jointly selected "settlement judge" typically applies mediation techniques to strongly suggest a specific settlement range based on his or her assessment of the case. However, these judges play a much stronger authoritative role than mediators since they also provide the parties with specific substantive and legal information.

18. **Summary Jury Trial** is a formal but abbreviated trial involving a presentation by the disputing parties to a panel of jurors. This process "reality tests" the case with a non-binding jury verdict to encourage the parties to negotiate for a settlement based upon their new assessment of litigation risk.

19. **Hybrid ADR** is any creative adaptation of ADR techniques for dispute resolution. ADR has found its niche as an adjunct to traditional litigation because of the financial and emotional cost as well as the other aggravations of formal litigation. Processes leading to less litigation cost or risk may be considered ADR, regardless of the labels used to identify them. The distinguishing characteristic is that the techniques enable parties to acquire sufficient information to evaluate litigation risk and voluntarily negotiate resolution directly with each other. The techniques can be applied in any sequence as long as the parties are moving in good faith toward resolution of all or part of a dispute. Identical fact patterns with different parties may be resolved through different techniques and, conversely, identical parties with different fact patterns may successfully apply the same ADR techniques.