**ADR TECHNIQUES**

There are a variety of ADR techniques to utilize. You can select a particular technique and utilize only one, or you can combine elements to create a unique ADR process. However, by definition, for a technique to be ADR, it must involve the use of a neutral.

**Use of a Neutral**

A Neutral is an impartial third party who assists the parties in resolving the issues in controversy. A Board of Contract Appeals (BCA) judge will serve as a neutral at no cost to the parties. Additionally, BCA judges are authorized to access the Judgment Fund to pay for a settlement.

The ADRA of 1996 authorizes agencies to enter into contracts for the services of neutrals (5 U.S.C. §773(d) & (e)). A neutral must have no official, financial, or personal conflict of interest with respect to issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree to use that neutral (5 U.S.C. §773 (a)).

**Non-Binding versus Binding ADR**

One of the first decisions the parties will need to make is whether they want the ADR to have a binding or non-binding outcome. Some ADR techniques are generally associated with having a binding decision or non-binding decision. Whatever technique the parties elect to use, they must specify in their ADR agreement if they are agreeing to a binding decision or if the ADR is non-binding.

In non-binding ADR, the parties have agreed that the third party neutral offer an opinion, but neither party is bound by that neutral’s opinion. In other words, in non-binding ADR, if the parties cannot reach an agreement, they do not authorize the neutral to decide the outcome of the dispute.

In binding ADR, the parties agree to let the neutral determine the outcome, and to be bound by the neutral’s decision.

**Comparison of Conflict Resolution Techniques**

The table below shows the various types of issue resolution options available, including ADR.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **NEGOTIATION** | ALTERNATIVE DISPTUE RESOLUTION | | | LITIGATION |
| ***Unassisted Negotiations*** | | ***(Non-Binding)***  ***Assisted Negotiations*** | ***(Non-Binding)***  ***Outcome Prediction Assistance*** | ***Binding ADR*** | ***Litigation*** |
| *Unassisted Negotiations*  *Debriefing*  *Extended Debriefing* | | *Ombudsman*  *Fact-finding*  *Facilitative*  *Mediation* | *Evaluative mediation*  *Settlement Judge*  *Mini-Trial* | *Binding Summary Trial*  *Mediation followed by binding summary decision/*  *Summary trial*  *Binding Arbitration* | *Court of Federal Claims*  *Govt. Accountability Office (GAO)*  *Board of Contract Appeals (BCA) such as ASBCA (Armed Services) or CBCA (Civilian)* |
|  | |  |  |  |  |
|  | |  |  |  |  |

# Choosing Appropriate ADR Techniques

This section describes the techniques most commonly used, how they work, some problems that may be encountered in their use, and the relationship of each technique to negotiation and litigation. The table above provides a framework for organizing your thinking about ADR. From left to right is the issue resolution continuum, ranging from unassisted negotiation on the left to litigation on the right. In between these two extremes are a number of resolution forums, collectively referred to as ADR. As indicated in the shaded area near the top of the chart, ADR techniques fall into three broad categories based on the type of assistance the parties need: 1) assisted negotiation; 2) outcome prediction; and 3) a binding decision. Moving from left to right, the chart depicts increasingly adversarial, costly and time-consuming modes of issue resolution. Equally important, moving from left to right, the parties lose some, or all, control of the process and its outcome.

In many ways, effective ADR use depends on the tailoring of the procedures outlined above, alone or in combination, to provide the process and input needed to resolve the issue.

## ADR Techniques Designed to Assist Negotiations—Nonbinding

All too frequently, parties reaching impasse on an issue in controversy can no longer effectively communicate and need a Neutral third person to act as a conduit. In such instances, mediation, facilitation, ombuds, or a structured settlement procedure offers viable options.

### Fact-Finding involves a neutral with subject matter expertise that is chosen by the parties to examine the disputed issues. The neutral helps the parties identify common interests, as well as narrow the issues in dispute. The neutral does not offer any type of outcome prediction.

### Facilitative Mediation

Mediation is an ADR process using the assistance of a neutral third party with no stake in the result and used when the parties have “room to settle” but have been unsuccessful with traditional negotiations. The Neutral in this process is called a mediator. The mediator is not authorized to impose a settlement upon the parties, but rather assists the parties in fashioning a mutually satisfactory solution to resolve the issue in controversy. Parties may seek facilitative mediation, in which the mediator facilitates discussions between or among the parties and does not provide any form of evaluation of the merits of their respective positions. Alternatively, some parties may prefer evaluative mediation, also known as outcome prediction. This technique is discussed in further detail below, but simply stated, it is a technique in which the mediator provides the parties withhis or her views as to the strengths and weaknesses of their respective positions, in conjunction with the mediator's efforts to help the parties fashion a mutually acceptable resolution to the controversy.

Mediation is one of the most widely used ADR techniques in the private sector. Mediation is favored because the flexibility and informality of the mediation process. Typically, mediation begins with all parties meeting in joint “session” where the respective interests and positions are shared. The parties may then separate and each party will have an opportunity to have a private “caucus” session with the mediator to allow further discussion of the case. This permits the mediator to hear the unvarnished opinions of both sides and attempt to balance this information to help the parties reach a resolution. This is particularly effective when emotions run high. The mediator is an objective person will work with the parties to identify common interests and to narrow the gap between the parties' respective positions. The dynamics of mediation process and its unique features are captured in Figure 1, below.

Figure 1 Mediation Process



**Outcome Prediction**

Outcome prediction is very similar to mediation, but it adds a Neutral's: (1) review of the parties' positions and the information they provide; (2) evaluation of the relative strengths and weaknesses of each party's position; and (3) opinion on the likely disposition of the case if it would proceed before the BCA, GAO, or COFC. In this non-binding process, the parties generally select a Neutral with subject matter expertise. Settlement is based in large part on the Neutral’s opinion. Often, the parties will opt to use an BCA judge for outcome prediction because of the BCA judge’s expertise.

There are three basic types of outcome prediction: evaluative mediation, settlement judge, and mini-trials.

Evaluative mediation is a type of mediation where the Neutral will discuss strengths and weaknesses of each party’s position. Depending on the terms of the ADR agreement, the Neutral may offer his or her evaluations in joint sessions, confidentially in caucuses, or both. The Neutral’s outcome prediction is not binding on the parties.

A settlement judge approach is a form of evaluative mediation that has a BCA judge in the role of a Neutral. In the event a BCA judge is not available from the BCA with jurisdiction, another judge from a board of appeals may be acting as the neutral. The settlement judge will evaluate the strengths and weaknesses of each party’s positions, and discuss them with the parties jointly, individually, or both—depending on the terms of the ADR agreement. The settlement judge’s recommendations and opinion are not binding on the parties.

The basic elements of outcome prediction are captured in Figure 2, below:

Figure 2 Outcome Prediction



**Mini-trials**

Mini-trials are an ADR technique that includes the use of senior principals. Despite the name “mini-trial,” it is not an abbreviated version of a trial where the parties remain adversarial. The process and focus of a Mini-trial is different. The process is what the parties agree upon in their ADR agreement. The focus is not about having a “winner” or “loser,” but in fleshing out facts and legal issues in order to reach a resolution. Mini-trials permit the parties to present their case or an agreed upon portion of the case to principals who have authority to settle the issue in controversy, often with the assistance of a third-party neutral advisor. The Neutral may thereafter meet with the principals to attempt to mediate a settlement. The Mini-trial may also be a prelude to the Neutral's issuance of either a formal written non-binding advisory opinion or to the Neutral's rendering of a binding decision. Limited discovery, as outlined in the ADR agreement, ordinarily precedes the case presentation. The structure of the mini-trial is set forth in Figure 3 below.

Figure 3 Mini-Trial Process



At the conclusion of the presentation the decision-makers may adjourn to negotiate the matter in controversy. The Neutral may be called upon to act as advisor, mediator or fact-finder in this subsequent session depending upon the terms of the ADR Agreement and the desires of the parties.

**ADR Techniques—Binding**

**Binding Summary Trial**. A binding summary trial is, in essence, a shortened trial. The parties agree to modifications of traditional hearing procedures and rules to speed up and simplify the process. They also agree to let the neutral, a BCA judge, issue a binding decision at the conclusion of the hearing. The parties typically also agree that the judge’s decision will not contain any findings of fact or conclusions of law and it cannot be appealed.

Figure 4 Summary Trial Process



**Mediation followed by binding summary decision.** This ADR technique starts with evaluative mediation. If the parties are unable to reach a settlement through mediation, the parties agree that the Neutral may issue a binding, non-appealable decision based on the information presented during the mediation.

**Mediation followed by binding summary trial.** This ADR technique starts with evaluative mediation. If the parties are unable to reach a settlement through mediation, the parties agree that they will have a summary trial, which is tried before the Neutral who handled the mediation. The judge then issues a binding, non-appealable decision based on the information presented during the mediation and the summary trial.