

**ALTERNATIVE DISPUTE RESOLUTION**

**ITS PLACE IN THE**

**SPECTRUM OF CONFLICT RESOLUTION**



**ARMY ADR PROGRAM**  
**OFFICE OF THE ARMY GENERAL COUNSEL**

[www.adr.army.mil](http://www.adr.army.mil)

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## INTRODUCTION

Over the past several decades, and especially since the 1990's, alternative dispute resolution (ADR) has become a common counterpoint to litigation in the federal sector for resolving a broad spectrum of disputes. Stemming from the Administrative Dispute Resolution Acts of 1990 and 1996,<sup>1</sup> federal agencies have introduced ADR processes as a means of resolving just about every type of dispute, in just about every area of endeavor. The Equal Employment Opportunity Commission mandates the availability of ADR as an option for resolving federal sector EEO complaints,<sup>2</sup> the Merit Systems Protection Board offers internal mediation services for adverse action appeals,<sup>3</sup> the Federal Labor Relations Authority makes ADR available for labor-management disputes through its Collaboration and ADR (CADR) Program,<sup>4</sup> and the Office of Special Counsel offers mediation for select Prohibited Personnel Practice (PPP) cases and Uniformed Services Employment and Reemployment Rights Act (USERRA) claims.<sup>5</sup> The Contract Disputes Act of 1978<sup>6</sup> encourages the use of ADR in government procurement disputes, and this policy is carried over into the Federal Acquisition Regulation.<sup>7</sup> The Armed Services Board of Contract Appeals, like other Boards of Contract Appeals, strongly encourages the parties to utilize ADR to resolve contract appeals fairly and expeditiously.<sup>8</sup> Since 1998, all federal district courts are required to have ADR programs available as part of their civil litigation dockets.<sup>9</sup> In the environmental realm, there are many statutory and policy initiatives to promote collaborative problem-solving approaches to avoid and resolve environmental disputes.<sup>10</sup>

All DoD Components, including the Army, are required to have an ADR policy and program in effect, and to treat every dispute as a candidate for ADR.<sup>11</sup> The Army's current ADR policy was issued by the Secretary of the Army on June 22, 2007. Army Materiel Command and the Army Corps of Engineers have each won awards from the Office of Federal Procurement Policy in OMB for outstanding ADR programs in federal contract disputes. Thus, ADR has been a vital tool in the resolution of Army disputes for many years.

When strategically applied, ADR has proven to be useful in reducing agency costs both in time and money, improving working relationships, and increasing the efficiency of problem solving programs. Used tactically, ADR techniques help parties overcome or avoid impasse; by helping the parties identify creative solutions to daunting problems, a neutral can help turn a difficult negotiation into a satisfying outcome. To be able to effectively employ this weapon, one must be familiar with the spectrum of ADR methods and techniques.

The Administrative Dispute Resolution Act defines alternative means of dispute resolution as "any procedure that is used to resolve issues in controversy, including, but not limited to,

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<sup>1</sup> Public Law 104-320, codified at 5 U.S.C. § 571, *et seq.* The 1996 Act superseded the 1990 statute, which can be found in the *Note* following 5 U.S.C. § 571 in the U.S. Code.

<sup>2</sup> 29 C.F.R. § 1614.102(b)(2).

<sup>3</sup> See MSPB Mediation Appeals Program, at <http://www.mspb.gov/appeals/mediationappeals.htm>.

<sup>4</sup> See FLRA Collaboration and Alternative Dispute Resolution Program, at [http://www.flra.gov/authority\\_cadro](http://www.flra.gov/authority_cadro).

<sup>5</sup> See OSC ADR Program at <http://www.osc.gov/adr.htm>.

<sup>6</sup> CDA, 41 U.S.C. § 7101, *et seq.*

<sup>7</sup> 48 C.F.R. Subparts 33.204; 33.214.

<sup>8</sup> ASBCA ADR Policy at <http://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pgl.pdf#page=24>.

<sup>9</sup> Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651, *et seq.* For a compendium of every federal district court's ADR policy or program, see <http://www.justice.gov/olp/adr/compendium.html>.

<sup>10</sup> OMB and CEQ 2012 Joint Memorandum on Environmental Conflict Resolution. Available from the U.S. Institute for Environmental Conflict Resolution, at <http://www.ecr.gov/Resources/FederalECRPolicy/MemorandumECR.aspx>.

<sup>11</sup> DoD Directive 5145.5, *Alternative Dispute Resolution* (April 22, 1996), ¶ 4

conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination thereof.”<sup>12</sup> More commonly, ADR refers to the spectrum of relatively simple, informal processes without the need for costly and time-consuming litigation.

All ADR processes are voluntary, meaning the parties to the dispute select the process and exercise self-determination as to its ultimate outcome. Just as important, ADR processes do not compete with litigation in a zero-sum game; rather, they complement litigation. In every dispute in which litigation and adjudication are possible, a decision to try ADR first does not negate that possibility, unless the ADR results in settlement of the issues that are subject to litigation. The voluntary nature of ADR, coupled with the continuing availability of the more “traditional” dispute resolution processes and forums, assures the parties the full spectrum of dispute resolution options. We call this “The Dispute Resolution Spectrum.”

### THE DISPUTE RESOLUTION SPECTRUM

UNASSISTED NEGOTIATIONS	ALTERNATIVE DISPUTE RESOLUTION			ADJUDICATION
Traditional Settlement Negotiations  Pre-dispute Early Involvement	<b>PROCESS ASSISTANCE</b>	<b>OUTCOME PREDICTION</b>	<b>PRIVATE LITIGATION</b>	Admin Boards (EEOC, MSPB, FLRA, BCAs)
	Conciliation	Early Neutral Evaluation	Binding Arbitration	
	Facilitation	Non-Binding Arbitration	Summary Proceeding with Binding Decision	Judicial Forums (Federal Courts)
	Mediation	Fact Finding		
	Ombuds	Summary Jury Trial		
Mini-Trial Settlement Judge				
<b>NON-BINDING PROCESSES</b>			<b>BINDING PROCESSES</b>	



As the chart above illustrates, ADR processes occupy a middle ground of the dispute resolution spectrum between informal processes—unassisted negotiations and pre-dispute early involvements—and adjudication in administrative and judicial forums. ADR processes are varied and flexible, responsive to the needs of the parties and the nature of the dispute.

<sup>12</sup> 5 U.S.C. § 571(3).

On the left side of the spectrum are the generally unstructured processes to resolve disagreements informally. These processes include traditional face-to-face negotiations between the parties themselves, without the assistance or intervention of a third party, and one-on-one early involvement with the disputants, to keep a simmering, low-level conflict from developing into something more serious. These processes are simple, informal, and totally within the control of the parties. If they fail to resolve the dispute, as they occasionally do, other, more formal dispute resolution processes are available.

On the right side of the spectrum are the adjudication processes, which use litigation as the means for deciding the appropriate resolution of the dispute. These processes give the parties much less control over the dispute, but they do provide a definitive outcome (even if the outcome is not to one's liking). ADR processes occupy the space between the informal negotiation processes on the left and the formal adjudication processes on the right. ADR is the "sweet spot" that allows the parties to pursue a joint solution without ceding their right to decide what that solution should be.

There are many different procedures and techniques that are grouped under the ADR umbrella, but generally they all involve the selection by the parties of a neutral third party to help them resolve their dispute. Some of these techniques resemble negotiation, with the neutral providing assistance to get over the hurdles. These techniques are called "process assistance," and include facilitation, mediation, and conciliation. These techniques typically employ a neutral using an interest-based approach<sup>13</sup> to reach a settlement. Other ADR techniques use the neutral to evaluate the parties' respective cases and predict the outcome should the dispute end up in litigation. These techniques are called "outcome prediction," and include early neutral evaluation and nonbinding arbitration. Because outcome prediction requires an evaluation of the parties' likelihood of success should the matter go to trial, the neutral must also be a substantive expert in the subject matter of the dispute.

A third category of ADR involves binding processes that strongly resemble litigation, but are invoked by agreement of the parties, who select the neutral and define the issue(s) to be addressed. These are often referred to as "private litigation." A good example of this type of ADR, very common in the private sector, is binding arbitration. Although not quite as formal as litigation before administrative and judicial forums, binding arbitration, once agreed to, requires the parties to give up control over the outcome, in exchange for greater speed, lower cost, and a definitive outcome that in most cases is not amenable to appeal.

The following discussion examines the three major divisions of the dispute resolution spectrum in greater detail, with special emphasis on the distinctions between the major ADR processes and techniques.

### **UNASSISTED NEGOTIATIONS**

Unassisted negotiations are the traditional party-to-party negotiations, commonly used to resolve disputes and avoid litigation. Because they do not employ a neutral third party, they are generally not considered to be ADR.<sup>14</sup> We mention unassisted negotiations here, however, to

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<sup>13</sup> The interest-based approach was first introduced in 1981 by Roger Fisher and William Ury in the perennial best-seller, "Getting to YES." The book is now in its third edition.

<sup>14</sup> The ADRA defines a "dispute resolution proceeding" as a process in which "an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate." 5 U.S.C. § 571(6). This definition is generally understood to require the participation of a third-party neutral for a

keep the reader mindful that negotiation is always a valuable and powerful method of settling disputes, especially when an interest-based approach is employed, and is the logical first choice for resolving the dispute through mutual agreement. A sincere, serious attempt to directly negotiate a satisfactory settlement is always advised before bringing in neutrals and designing ADR processes. The question is not whether to negotiate, but what quality those negotiations should have. If the parties are satisfied with both the process and the progress of their negotiations, there is no reason to employ an ADR procedure (at least not until or unless the negotiation stalls out).

Also included under the Unassisted Negotiations heading are informal, one-on-one discussions with the antagonists in an ongoing, low-level, slow-burning conflict that could develop into something more serious. These include facilitated discussions, conflict coaching, collaborative problem-solving, and other techniques that are designed to improve the communication and problem-solving skills of the interested parties so that they can resolve their differences on their own. We refer to these low-level conflicts as pre-disputes. Parties have total control over the issues and how they want to resolve them. However, given the extreme informality of pre-disputes, any resolution will not be enforceable in a legal sense, so compliance with any terms of an agreement is dependent on the willingness of the parties to live up to those terms. Otherwise, more formal dispute resolution processes may be available.

## **ALTERNATIVE DISPUTE RESOLUTION**

Fundamentally, ADR processes are driven by the parties to the dispute—this is the one feature that differentiates ADR from litigation. Most, though not all, ADR processes can be thought of as an “assisted” negotiation. The type of assistance, however, can vary considerably. In the chart on page 2, the significant distinction is whether the neutral is providing “process assistance” or “outcome prediction,” or is really acting as a “private judge” to render a decision. It is important to understand your problem well enough to know which type of assistance is really needed to solve it. Keep in mind, however, that most ADR procedures are very flexible, and sometimes the line between process assistance and outcome prediction is blurred. For example, the parties may want a mediator not only to facilitate the negotiation, but to evaluate the strengths of their positions as well. Some mediations, particularly in workplace disputes, may also involve a deeper examination of the dynamics of the workplace, or the long-standing relationship between the parties, that go well beyond the basic facts of the instant dispute. In the private sector, it is not at all unusual to see the disputants begin with mediation, only to transition to arbitration if the parties can’t agree. Each of these scenarios can play out in an ADR proceeding, depending on what the parties want to do. As we discuss each of these methods of ADR, you should be able to see how the methods offer certain attributes, the application of which can be more appropriate to certain problems than to others. Regardless of the technique used, ADR is voluntary; it does not obligate the parties to employ a particular procedure, nor bind them to a particular outcome, unless they expressly agree to it.

### **PROCESS ASSISTANCE ADR**

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proceeding to qualify as “ADR.” One possible exception concerns contract disputes under the Contract Disputes Act, which appears to give the parties greater leeway to structure a dispute resolution process with or without a neutral. See 41 U.S.C. § 7102(h)1).

There are many disputes where the inability to settle has little to do with the facts or the law, so an external opinion on the merits from a neutral third party would add little value to the already on-going negotiations. These are the cases where the parties cannot communicate, or are polarized, or do not trust each other, or feel that compromise is defeat. In these cases, developing a mutually satisfactory solution requires the parties to think beyond their positions or demands, abandon blame and recriminations, focus instead on their interests, and generate options to satisfy those interests. The problem is, they cannot get there on their own. These are the types of cases where process assistance is most valuable.

### ➤ **Mediation**

Mediation is undoubtedly the most popular and familiar form of process assistance. It is a process in which a specially trained third party neutral helps the parties to come up with their own solutions to resolve their dispute. Depending on the type of dispute and the wishes of the parties (who maintain significant control over the type of mediation to employ), the mediator may or may not be an expert in the matters giving rise to the dispute. If the purpose of the mediator is to facilitate resolution by encouraging party-to-party communication, for example, subject-matter expertise is usually unnecessary. If the parties want the mediator to evaluate their respective positions or demands in addition to facilitating the search for solutions, subject-matter expertise becomes a critical requirement. Other forms of mediation may focus less on the specific issues at hand, to examine the overall environment or relationship between the parties, in an effort to transform that environment or relationship. This form of mediation, known as transformative mediation, is commonly used in workplace disputes or other disputes in which the relationship between the disputants is of paramount importance. Depending on the skills of the mediator, it is possible to combine the facilitative, evaluative, and transformative modes of mediation into one proceeding, if by doing so the parties can move toward resolution, and if the parties agree to such an approach.

As the above discussion suggests, the parties maintain significant control over the mediation process, and total control over the outcome—whether there is a settlement, and if so, on what terms. This extremely adaptable process can allow the parties the opportunity to address underlying problems that go beyond the dispute at hand. Creativity in designing solutions, especially to the extent that hidden problems are solved, can result in a high rate of compliance with the settlement agreement. The process is entirely voluntary, takes much less time, and is almost always much less expensive than adjudicative processes. Regardless of the mediation method used, the mediator has no power to impose a settlement on the parties; but the value added by the neutral is to get the parties over the barriers they may have developed in their unassisted attempts at negotiation. The mediator does this by allowing the parties to discuss the problems and clarify their issues, vent their emotions, and solve problems together. A key tool for the mediator is the caucus, which provides each side an opportunity (or several) to meet privately with the mediator to discuss issues and solutions in confidence. Mediation is particularly well suited for those cases in which emotions are driving the dispute, and cases where facilitating the relationship between the parties is important. For that reason, mediation is the technique of choice in workplace disputes, with facilitative mediation being the most common technique used.

### ➤ **Facilitation**

Facilitation is an informal, generally unstructured process that varies according to its purpose. The lack of structure is what makes facilitation highly adaptable to the circumstances requiring it. If the purpose of facilitation is to help a group reach consensus on an issue or to achieve an

objective, it keeps the discussion on track and moving forward, with the facilitator serving as sort of a traffic cop to keep the lanes of communication open and moving in the right direction. If the purpose is to resolve or manage internal organizational conflicts, it helps the organization personnel, including its leadership, to work together to identify and resolve sources of conflict before they become the bases for complaints. The facilitator in this scenario may act more as a team builder to empower the participants. Finally, if the purpose is to resolve a specific dispute between discrete parties, facilitation may look much like mediation, only less structured and usually without private caucuses. Regardless of scenario, facilitation is used to help people use communication to achieve a goal, whether that goal is to complete a project, or improve the working environment, or to resolve a specific dispute. Although the skills existing in the successful mediator are similar to those of the successful facilitator, they are not identical; while many mediators also make excellent facilitators, this is not universally the case. However, in facilitation of discrete disputes, as opposed to meetings or group facilitations, a skilled mediator is usually a more than capable facilitator as well.

### ➤ **Conciliation**

Conciliation is a process by which the neutral calls for the assembly of the parties to a dispute, as well as others who may have a stake or an insight into a potential resolution. After discussion of the problems, the neutral builds a common commitment for action by creating an environment in which all are encouraged to express thoughts and propose solutions. From this in-depth exploration, common goals are identified and the parties then brainstorm alternatives together. Fostering participation, and assisting parties to find the common ground by guiding the parties' self-interest toward a general interest, increases the likelihood of buy-in to the ultimate decision by all concerned. Often a new procedure or manner of conducting business is the result of the conciliation process.

## **OUTCOME PREDICTION ADR**

In outcome prediction assisted negotiations, the neutral provides the parties with an opinion on the outcome of the case. The opinion is non-binding, although there are procedures as discussed below in which the parties may agree to treat the opinion as binding. In non-binding outcome prediction processes, the parties either continue to negotiate or prepare their cases for litigation. If negotiations continue, the neutral can remain part of the negotiation to help develop a solution (often acting in a facilitative role), or not. In binding processes, the parties agree in advance to be bound by the neutral's opinion/decision. The methods discussed in this section focus more on the facts and or legal issues in the dispute as opposed to the relationship between the parties (the cornerstone concern in the "process" model).

### ➤ **Early Neutral Evaluation (ENE)**

In this process the parties present their respective cases to a third party neutral with subject-matter expertise over the issues in dispute. The neutral assesses the strengths and weaknesses of each party's case, and provides an opinion of the likely outcome if the dispute goes to litigation. The parties are then free to take this information and reanalyze how they might choose to resolve the case. Early neutral evaluation is appropriate when the parties have unrealistic expectations about the case, or could benefit from narrowing the issue, or are just uncertain about the case value. This tool is especially appropriate for those cases where legal theories are complex or fact-intensive. The key is in selecting a mutually agreeable neutral whose opinion will be valued and respected by both parties. ENE shares similarities with evaluative mediation, except the neutral's role is more limited to providing the parties the case

evaluation, after which the neutral's involvement in the case ends. The Government Accountability Office (GAO) uses a type of neutral evaluation (called outcome prediction) to promote resolution of contract bid and award protests.

➤ **Summary Jury Trial**

A summary jury trial is a forum where the parties present an extremely abbreviated case (generally, a recitation of the facts, short arguments, and clear instructions from the bench) to a mock jury that then deliberates and announces its "verdict." The "verdict" is not official, of course, but the parties and their counsel get an opportunity to see how well or how poorly their case would play out in court. Will that intricate legal point be understood? Will the jury be unpersuaded because of witness credibility problems? If the parties resume negotiations, they are more educated about the strengths and weaknesses of their cases and can be more flexible and more effective negotiating a settlement. If negotiations fail, they know where they have more work to do. Considerable time, cost, and effort goes into preparing and executing a summary jury trial, so this tool would only be used in those cases with significant dollar value or policy implications, where it is critical to see how the case would likely be decided if it went to a jury. In an era of shrinking budgets and dwindling resources, use of this ADR process is rare.

➤ **Fact-Finding**

This ADR tool is similar to early neutral evaluation, but here, the parties only need a determination of the facts. It is well suited for those cases where liability is clear, but the question is quantum; or where the quantum is clear, but the parties are uncertain about who is responsible. The parties present their information to the neutral, who determines the facts underlying the dispute and gives a rationale for those findings. The parties, having agreed to accept the facts as found, use them as the bases for further negotiations on the issues in controversy. Typically, accepting the facts as found applies only to the continuing negotiations; parties are not bound to the facts as found if the case proceeds to litigation, unless they expressly agree to be so bound.

➤ **Non-binding Arbitration**

Non-binding arbitration is similar to binding arbitration in appearance, but the arbitrator does not have power to issue a binding award. Instead, the arbitrator acts as an evaluator or perhaps as a fact-finder to inform the parties of their positions and their options through an advisory opinion. Because of the availability of other outcome prediction processes that serve substantially the same purpose, non-binding arbitration is rare. Far more common is its binding cousin, which is addressed in greater detail in "Private Litigation" below.

**"PRIVATE LITIGATION" ADR**

Litigation in the courts, whether local, state or federal, is an open, public process, that creates an open, public record. ADR processes are generally closed and confidential. Binding ADR proceedings are often called private litigation because they resemble courtroom litigation, without the courtroom and the publicity a courtroom invites. The "judge" is a private citizen, not a public servant, selected (and compensated) by the parties, whose "jurisdiction" is usually limited to the issue(s) specified by the parties for resolution. Because the proceeding is not part of a court's docket, a decision can be had in much less time and at much less cost than traditional litigation. Binding arbitration, discussed below, is the most prevalent form of private



litigation, serving as the dispute resolution procedure of choice in most commercial and private employment agreements, as well as other commercial transactions in the private sector.

### ➤ **Binding Arbitration**

This form of ADR has been around for a long time and is generally considered to be the “granddaddy” of ADR procedures in the United States. It was the first true alternative to courtroom litigation, and has been favored by federal law for nearly a century.<sup>15</sup> Binding arbitration clauses are ubiquitous in the public sector: employment contracts, consumer purchase contracts, and other commercial transactions typically require all disputes to be submitted to binding arbitration in lieu of filing a lawsuit. In the federal sector, binding arbitration is required as the final step in the negotiated grievance procedure of a labor-management collective bargaining agreement,<sup>16</sup> but its use in other federal contexts is extremely limited.

In binding arbitration the arbitrator issues a decision that is binding on the parties. This decision, called an award, is a legal obligation that cannot be rejected or ignored (although limited avenues of appeal may be available). This feature makes binding arbitration an attractive option in many disputes where a definitive ruling is desired quickly and inexpensively, with limited or no appeal options. However, these same features are problematic for government ADR practice and policy, because government agencies generally cannot agree to private adjudication procedures that may bind them prospectively. Accordingly, the Administrative Dispute Resolution Act requires agencies, through their heads, to consult with the Attorney General and issue guidelines for the use of binding arbitration before it can be used.<sup>17</sup> To date, only a handful of agencies (less than 10) have issued such guidelines, and those that have issued guidelines use them rarely.<sup>18</sup> Non-binding arbitration, and other binding procedures under the auspices of a court or board with proper jurisdiction,<sup>19</sup> may be used.

Arbitration closely resembles litigation in appearance (opening statements, witnesses, documents, arguments, etc.) and in procedures (there are prescribed guidelines for the arbitration, the arbitrator can subpoena witnesses to testify and produce documents<sup>20</sup> and the arbitrator has authority to move the case along). While the parties can limit the arbitrator’s role somewhat (explained below) and introduce some flexibility into the process, the arbitrator’s (or panel of arbitrators’) role is to apply the law to the facts as found. Arbitration awards are enforceable under the Federal Arbitration Act, and generally will not be vacated or modified except in the narrow circumstances specified in the statute.<sup>21</sup> Similarly, exceptions to arbitration awards in employee grievances can be appealed under the Federal System Labor-Management Relations Statute, but the matters that can be reviewed are very limited.<sup>22</sup>

Binding arbitration is particularly useful when there is very little likelihood of a negotiated agreement between the parties (with or without the assistance of a third party neutral), or

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<sup>15</sup> The first ADR statute, the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, was enacted in 1925.

<sup>16</sup> See Federal Service Labor Management Relations Statute (FSLMRS), 5 U.S.C. § 7121(b)(1)(C)(iii).

<sup>17</sup> 5 U.S.C. § 575(c).

<sup>18</sup> See Note 14, *supra*.

<sup>19</sup> *E.g.*, the Summary Trial with Binding Decision procedure sanctioned by the Armed Services Board of Contract Appeals, discussed *infra* pp. 7-8, is a permissible ADR procedure.

<sup>20</sup> See Federal Arbitration Act, 9 U.S.C. § 7.

<sup>21</sup> 9 U.S.C. § 10 (vacation of arbitration awards) and § 11 (correction or modification of awards).

<sup>22</sup> 5 U.S.C. § 7122(a); see also, 5 U.S.C. § 7123(a)(1) (limiting judicial review of arbitration awards). Similarly, arbitration awards appealed to the MSPB under 5 U.S.C. § 7121(d) and (e) are accorded a deferential standard of review unless there is a legal error in the interpretation of a civil service law, regulation or rule. *Kirkland v. Dept. of Homeland Security*, 2013 MSPB 3, ¶ 12 (2013).

previous negotiations have resulted in impasse, but both sides wish to avoid litigation. Arbitration is also well suited for those cases where either or both parties would be willing to negotiate an agreement, but are concerned whether the result will withstand scrutiny (both internal and external).

Although parties give up more control in binding arbitration than they do in other ADR processes, they can still wield some control over the process and its outcome by limiting the parameters of the arbitrator's decision. For example, parties define the scope of the arbitrator's authority by dictating the issue to be resolved. They can also limit the award possibilities. Two examples of this are "high-low" and "final offer" arbitration. In high-low arbitration the parties agree in advance that an acceptable award will be in the range between the parties' last best offers. The arbitrator is advised of the agreement, but not the range of an acceptable award. If the award falls outside the range, it is adjusted either upward or downward, as appropriate. This gives parties the incentive to lower their risk by narrowing the range in their negotiations leading up to arbitration. In final offer arbitration, the arbitrator is made aware of each party's last best offer, and is limited to awarding one of these two amounts based on the merits of each case. This type of arbitration is used in salary disputes between baseball players and teams, hence the vernacular "baseball arbitration." Again, this approach gives the parties an incentive to lower their risk by narrowing the difference between the final offer and final demand in their pre-arbitration negotiations. These types of arbitration are less useful when issues other than money are in dispute. Therefore, these types of arbitration are generally not used in workplace disputes or other disputes that involve non-monetary issues.

#### ➤ **Summary Proceeding with Binding Decision**

Though not a "private" litigation process, this ADR procedure is offered by the Armed Services Board of Contract Appeals to expedite disposition of government contract claims. By speeding up the fact-gathering and decision process, this procedure is very similar to binding arbitration, hence its placement in this section. In its ADR rules published in July 2014, the Board describes Summary Proceeding with Binding Decision as follows: A summary proceeding with binding decision is a procedure whereby the resolution of the appeal is expedited and the parties try their appeal informally before an Administrative Judge. A binding "bench" decision may be issued upon conclusion of the proceeding, or a binding summary written decision will be issued by the judge no later than ten days following the later of conclusion of the proceeding or receipt of a transcript. The parties must agree in the ADR agreement that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. Pre-hearing, hearing, and post-hearing procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.<sup>23</sup>

### **HYBRID ADR TECHNIQUES: PROCESS ASSISTANCE/OUTCOME PREDICTION**

As stated earlier, an advantage of ADR is its flexibility. The parties are free to design a process and modify it accordingly to meet their needs. On occasion, the parties to mediation might request an assessment of their positions by a neutral who is a subject matter expert. A neutral hired to provide an early neutral evaluation might be able to see that the parties need more than just "the answer," and might assist the parties in subsequent negotiations. In these examples, the neutral's contribution crosses over from process assistance to outcome prediction, and from

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<sup>23</sup> Rules of the Armed Services Board of Contract Appeals, Addendum II, Paragraph 7(b) (Revised July 21, 2014). Online at <http://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20ppl.pdf#page=24>.

outcome prediction to process assistance, respectively. There are, however, ADR procedures which, by design, provide for both process assistance and outcome prediction. In one, the procedure even accommodates both non-binding and binding elements.

➤ **Mini-trial**

A mini-trial is a process that combines an abbreviated trial presented to senior executives of both parties who are empowered as principals to enter into a binding agreement, typically with a third party neutral moderating the presentations. Following presentation of the parties' cases, the principals begin negotiating the issues. The neutral mediates or provides evaluative assistance in accordance with the agreement of the parties.

The advantage of this process is that the principals are brought into the case early on, getting an opportunity to hear both sides of the issue and attempting to resolve the dispute before large investments of time and money are spent on litigation. The disadvantage is that senior level decision-makers must be willing to devote significant amounts of time to this process, because *they* will be hearing the cases of both sides and engaging in the negotiations. Because the time, effort and costs of such an endeavor are significant, mini-trial, if it is used at all, is most likely proposed as a backup procedure, to be used only if a more informal process, like evaluative mediation or outcome prediction, fails to produce a resolution.

➤ **Settlement Judge**

Settlement judges are commonly used to expeditiously resolve a wide range of disputes, from contract claims before the ASBCA to EEO complaints. The court or board with jurisdiction over the dispute assigns a magistrate or judge to assist the parties' negotiations and to render opinions as to facts, law, or even the ultimate outcome. If the parties fail to settle, another judge is assigned to try the case, and the settlement judge is barred from further involvement in that case. Often the position of the settlement judge as an adjudicator of cases similar to the one being negotiated, as well as the perception of professional neutrality, gives the settlement judge a great amount of credibility with the parties.<sup>24</sup>

➤ **Med-Arb**

Short for "Mediation-Arbitration," this hybrid process is common in private sector labor and other disputes. As the name implies, med-arb combines mediation and arbitration in a single proceeding, should the parties need both. The neutral may serve as both mediator and arbitrator, if the parties agree. The process begins with the parties engaged in traditional, facilitative mediation, a non-binding proceeding in which the parties attempt to voluntarily resolve their dispute through mutual agreement. If they do settle, the process is concluded once the agreement is signed and finalized. If they fail to reach agreement, the unresolved issues in controversy proceed to binding arbitration), in which the neutral's role now switches to that of an arbitrator, who conducts a hearing, finds the facts, and issues an award, which is binding on the parties. Because of this binding feature, med-arb is not common in federal agency disputes. However, in federal labor-management relations, binding arbitration may

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<sup>24</sup> In an extension of the Settlement Judge approach, the U.S. Court of Federal Claims has implemented an ADR "Automatic Referral Program, in which every docketed appeal (except bid protest cases) is automatically referred to an ADR judge for consideration at the time it is docketed with the hearing judge. Parties are encouraged, but not required, to attempt resolution through the ADR judge before pursuing litigation. See USCOFC General Order 44 at [http://www.uscfc.uscourts.gov/sites/default/files/court\\_info/ADR\\_Procedures.pdf](http://www.uscfc.uscourts.gov/sites/default/files/court_info/ADR_Procedures.pdf).

follow voluntary mediation if the union and management agree to include such a procedure prior to invoking binding arbitration.

### **ADJUDICATION**

Adjudication is a process familiar to attorneys as it represents the traditional forums for litigation such as administrative boards and state and federal courts. The judge, jury or other presiding official will decide the outcome for the parties by applying the law to the facts. Remedies are limited according to how the case is filed and the jurisdiction of the court or board. Rules of procedure and evidence control what gets before the decision-maker. The process is adversarial. There is nothing “wrong” with any of this; sometimes litigation *is* the most appropriate method for achieving resolution, especially when the case presents an issue of first impression or otherwise requires a decision to guide future action. On the other hand, when there is great uncertainty in how the case will turn out, when we would like a solution earlier or different than what the court system can offer, or when we would rather have a less adversarial method for getting to the solution, there are alternatives.

### **CONCLUSION**

Although this monograph presents the most common ADR processes, it is by no means exhaustive. The number and characteristics of ADR are limited only by the imagination of the participants. The Army uses a broad array of ADR techniques in almost all areas of practice. Selectively choosing the technique best suited for the dispute, the parties involved, and the environment in which the dispute exists, makes ADR an exceedingly smart and valuable tool for the Army attorney as problem-solver for his or her client. Many of the ADR tools discussed above are readily available for use at the installation level. If you have questions about what ADR tools may be best suited to your dispute or what resources are available to you at the base level, consult the Army ADR website at [www.adr.army.mil](http://www.adr.army.mil), or email us at [usarmy.pentagon.hqda-ogc.mbx.adr@mail.mil](mailto:usarmy.pentagon.hqda-ogc.mbx.adr@mail.mil).