

Welcome

Sometimes, despite everyone's best efforts, an issue will arise that cannot be resolved by the interested parties.

That's where third-party assisted ADR comes in.

This lesson describes third-party assisted ADR, and how to use it to help resolve these types of issues.

Upon completion of this lesson, you should be able to:

- Define third-party neutral, accurately, without reference.



Long Description

Collage of a piece of keyboard, a business woman, a hand holding a pen, and a federal building

What is "Third-Party" ADR?

Third-party ADR is a type of ADR that is often used to resolve difficult or particularly contentious disputes.

If the parties are unable to resolve the dispute themselves, the next alternative is to use a third-party – a person, business or government agency not actively involved in the dispute – to help the parties work toward a resolution.

This third-party often brings to the process skills and objectivity that neither of the parties involved in dispute possess.

The third-party can assist the parties in identifying underlying needs and help to negotiate a settlement that is mutually agreeable to all of the parties involved in the dispute.



When is Third-Party ADR Appropriate?

Three questions will help you to determine if third-party ADR is appropriate (Select each question to learn more):

1. [What are the business objectives regarding the issue\(s\)?](#)
2. [Why did negotiation reach an impasse?](#)
3. [Are there pragmatic concerns about whether ADR will work?](#)

People can often look at the same "facts" and see different things. Look at the picture on the right. Which do you see? An old woman or a young woman?



Popup Text

What are the Business Objectives Regarding the Issue(s)?

Contracts are about reaching business objectives, both from the point of view of the Government and the point of view of the contractor. Sometimes it takes a neutral party to help the parties involved in the dispute figure out how they can resolve the dispute with minimal or no affect on their ability to reach their business goals.

Why Did Negotiation Reach an Impasse?

Once an impasse – a deadlock – has been reached, no further progress on resolving the dispute can be made. A neutral party can often facilitate communication and help each side to see the other's point of view.

A neutral party can also serve as a sanity check for the parties involved. The neutral party carries credibility because he or she had nothing personal to gain or lose and is, therefore, an impartial voice in resolving the dispute.

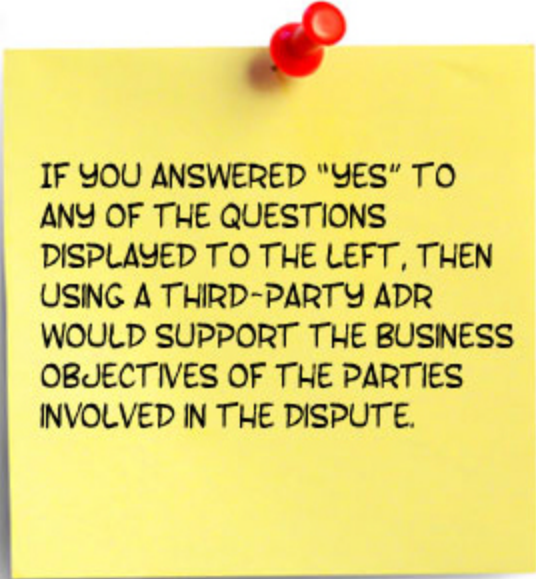
Are There Pragmatic Concerns About Whether ADR Will Work?

In some cases, it is clear, because of the relationship and history between the parties that ADR cannot work on its own. Neither party is willing to trust what the other says. Facts of the situation are in dispute, laws and regulations are being interpreted differently, and/or one or both parties have unrealistic expectations of concessions the other party should make to resolve the dispute. A neutral party can provide an unbiased interpretation of laws or point out unrealistic expectations of a party because the neutral party has no unfortunate history with either of the parties and nothing to gain.

What are the Business Objectives Regarding the Issues?

To determine if third-party ADR would support the business objectives of the parties involved in the dispute, ask:

- Does the relationship between the parties need to be maintained - perhaps because of other contracts or the expertise this contractor brings to the contract?
- Are the parties open to a creative solution to the problem?
- Are the parties flexible in their ability to shape relief?
- Is there a need for a swifter resolution than could be achieved by litigation?
- Is there a need to minimize disruption to other programs or mission?



IF YOU ANSWERED "YES" TO ANY OF THE QUESTIONS DISPLAYED TO THE LEFT, THEN USING A THIRD-PARTY ADR WOULD SUPPORT THE BUSINESS OBJECTIVES OF THE PARTIES INVOLVED IN THE DISPUTE.

Long Description

Yellow sticky note that reads:

"If you answered "yes" to any of the questions displayed to the left, then using a third-party ADR would support the business objectives of the parties involved in the dispute."

What are the Business Objectives Regarding the Issues?, Cont.

Let's look at a case in which third-party ADR seems to support the business objectives. Read the scenario below and look for clues that suggest business objectives would be served by third-party ADR.

Scenario:

The government awarded a \$2.5 million contract for modifications made to housing located on a military base located in the mid-west. These modifications were to be made by Brock Construction. Initially, there was a very productive relationship between the government and the contractor. But as time went on, the contractor continued to bring to the attention of the government officials, errors in the modifications plans.

Conversation between the two parties ended and the only communication is in written documentation. The contract timeframe is about 80% but the contractor has barely completed 50% of the work. In one correspondence, the contractor has said that they will be submitting information to support a project delay and cost increases justified by the errors they have discovered and which have not been addressed by the government. To date, nothing has been submitted.

[Click here to view what objectives would be served by third-party ADR.](#)

Popup Text

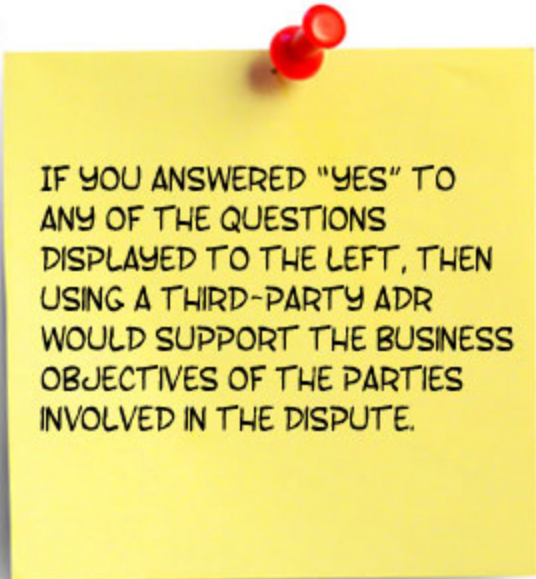
Objectives Served by Third-Party ADR

- Continuing relation between the parties needs to be maintained.
- A swifter resolution than could be achieved by litigation is needed.
- Disruption to other programs or mission needs to be minimized.

Why Did Negotiation Reach an Impasse?

To determine why negotiation between the parties reached an impasse, the following questions should be asked:

- Are there communication difficulties between the parties?
- Are there communication difficulties between the lawyers and their clients?
- Is there factual or technical complexity or uncertainty in the dispute?
- Is the ultimate outcome uncertain?



IF YOU ANSWERED "YES" TO ANY OF THE QUESTIONS DISPLAYED TO THE LEFT, THEN USING A THIRD-PARTY ADR WOULD SUPPORT THE BUSINESS OBJECTIVES OF THE PARTIES INVOLVED IN THE DISPUTE.

Long Description

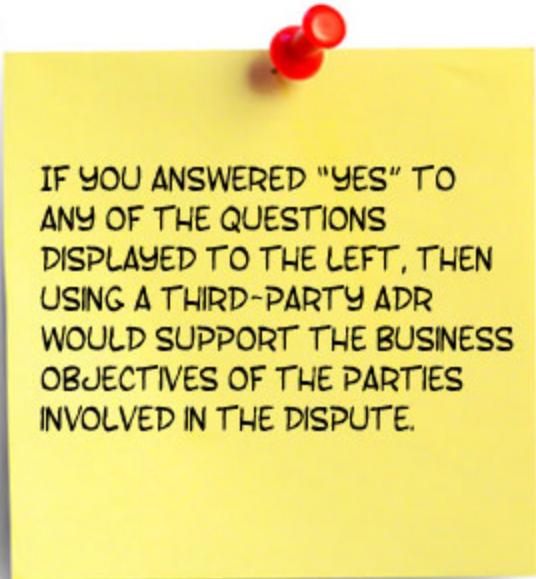
Yellow sticky note that reads:

"If you answered "yes" to any of the questions displayed to the left, then using a third-party ADR would support the business objectives of the parties involved in the dispute."

Why Did Negotiation Reach an Impasse?, Cont.

The American Bar Association determined the following four items account for the most common reasons negotiations reach an impasse:

1. [Communication Difficulties Between or Among Parties](#)
2. [Communication Difficulties Between Lawyers and Their Clients](#)
3. [Factual or Technical Complexity/Uncertainty](#)
4. [Ultimate Outcome Uncertain](#)



IF YOU ANSWERED "YES" TO ANY OF THE QUESTIONS DISPLAYED TO THE LEFT, THEN USING A THIRD-PARTY ADR WOULD SUPPORT THE BUSINESS OBJECTIVES OF THE PARTIES INVOLVED IN THE DISPUTE.

Popup Text

Communication Difficulties Between or Among Parties

Impasse has been reached or is likely to develop because of personality conflicts or a history of poor or non-existent communications among the participants (including attorneys). A skilled ADR neutral can bridge the parties' communication gap.

Communication Difficulties Between Lawyers and Their Clients

Clients may be resistant to settlement overtures, even if their counsel endorses them, without first obtaining an impartial, neutral or candid appraisal of the merits and the parties' respective legal positions.

Factual or Technical Complexity/Uncertainty

The parties would benefit from reliance on the expertise of a third-party expert for technical assistance and/or fact-finding. Obtaining such expert neutral assistance could facilitate more meaningful discussion and resolution of a complex matter.

Ultimate Outcome Uncertain

The parties are confused about the likely outcome, should the matter proceed through litigation.

Negotiations, to be productive, require a better grasp of litigation risks. A knowledgeable ADR neutral can provide the parties with needed insights as to those risks.

Long Description

Yellow sticky note that reads:

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Why Did Negotiation Reach an Impasse?, Cont.

Let's look at a case to see if we can determine if the parties have reached an impasse – and why. As you read the case, look for clues that suggest that an impasse was reached and why.

Case:

A contractor has submitted an invoice for payment. DoD refuses to pay the invoice on the grounds that all of the contract requirements have not been met. During negotiations, it becomes clear that one requirement was not met. The contractor claims that DoD did not provide the required information, so the contractor was unable to meet this requirement. DoD disagrees.

Clues that suggested that an impasse was reached include:

- There are factual issues in dispute.
- The ultimate outcome is uncertain.

Knowledge Review

To determine if third-party ADR would support the business objective of the parties involved in a dispute, which of the following are good questions to ask? (Select all that apply.)

- ☒ Is there a need for a swifter resolution than could be achieved by litigation?
- ☒ Are the parties flexible in their ability to shape relief?
- ☒ Is there a need to minimize disruption to other programs or missions?
- ☒ Does the relationship between the parties need to be maintained?
- ☒ Are the parties open to a creative solution to the problem?

Check Answer



All of the choices are good questions to ask to determine if third-party ADR would support objectives of the parties involved in a dispute.

Are There Pragmatic Concerns about Whether ADR Will Work?

To determine if there are pragmatic concerns about whether ADR will work, ask:

- Is there a need for factual or legal interpretation by a neutral party to break an impasse?
- Is one party's view of the case unrealistic and a realistic view from a neutral party may help?



Neutral Party

A "neutral party" is an impartial third-party, who serves as a mediator, fact-finder, or arbitrator, or otherwise functions to assist the parties to resolve the issue in controversy. (FAR 2.101.)

A neutral can perform a variety of functions, including:

- Facilitating discussions
- Providing parties with a "reality check" on the merits and value of their claims
- Assisting with creative problem solving
- Writing agreements that reflect the needs of the parties



Who Can be a Neutral Party?

According to the FAR (2.101.), a neutral person may be anyone who is mutually agreed upon by both parties in the dispute.

Characteristics of a neutral include:

- A permanent or temporary Federal Government officer or employee
- Any other individual accepted by the parties
- A person with no official or personal conflict of interest with respect to the issues in controversy, unless the interest is fully disclosed in writing to all parties and all parties agree that the neutral person may serve



Selecting a Neutral Party

When selecting a neutral, it is important to look for someone with the specific qualifications. With these qualifications, there should be questions that you need to ask.

Click each "neutral person" below to learn about his/her qualification and the question to ask about that qualification.



Popup Text

Person 1

Substantive Knowledge

Does the neutral need to be a technical or legal expert?

Person 2

Experience

Does the neutral's previous experiences play a role in reaching a successful outcome?

Person 3

Skills

Listening, questioning, communicating, and patience

Person 4

Intervention Approach

What is the neutral's role?

Person 5

Level of Neutrality

Must the neutral have had no previous relationship with either party?

Person 6

Credibility with the Parties

Is trust in the neutral important?

Person 7

Integrity of the Neutral

Is it important for the neutral to keep confidences?

Knowledge Review

In the list of qualifications for a neutral party below, select the three that are the most important for a neutral to possess?

- ☐ Substantive Knowledge
- ☐ Experience
- ☐ Skills
- ☐ Intervention Approach
- ☒ Level of Neutrality
- ☒ Credibility with the Parties
- ☒ Integrity of the Neutral

Check Answer



Level of Neutrality, Credibility with the Parties, and Integrity of the Neutral are three qualifications most critical to the success of the ADR process.

Additional Questions to Ask

Here are some additional questions to ask when selecting a neutral party:

- What type of process is appropriate to this situation and why?
- How important is the neutral's substantive role versus his or her procedural role?
- How removed from the situation should the neutral be?
- How much actual dispute resolution experience has the neutral had?
- How much familiarity does the neutral have with the specific subject area?



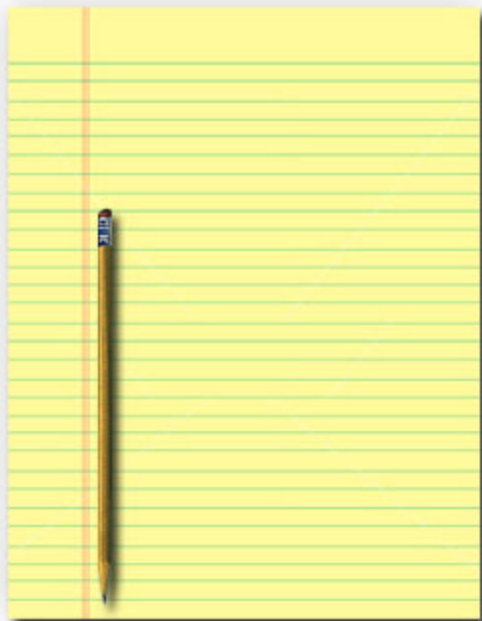
Long Description

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Additional Questions to Ask, Cont.

Here are more questions to ask when selecting a neutral party:

- What role has the neutral played in previous disputes concerning these issues?
- What specific dispute resolution procedures is the neutral familiar with, and what is his or her approach to these procedures?
- Who can attest to the neutral's work?
- What is the personal credibility of the neutral with each of the parties?
- What is the relative importance of neutrality, personal credibility, procedural background and substantive knowledge?



Selecting a Mediator

Matching the skills of a neutral to the needs of the dispute are essential to the success of the ADR process.

The American Institute of Architects Forum on the Construction Industry Survey 2001, asked members to rank the importance of various factors to the success of a mediator.

- [Selection Factors of a Mediator](#)
- [Ranked Selection Factors of a Mediator](#)

Select the links above to learn more.



Popup Text

Selection Factors of a Mediator

- Mediator's mediation style
- Size of the claim
- Mediator's acceptability to all parties
- Mediator's legal expertise
- Mediator's reputation
- Expense of the mediator
- Mediator's mediation experience
- Mediator's subject-matter expertise

Ranked Selection Factors of a Mediator

- Mediator's subject-matter expertise
- Mediator's reputation
- Mediator's mediation experience
- Mediator's acceptability to all parties
- Mediator's mediation style
- Size of the claim
- Mediator's legal expertise
- Expense of the mediator

Knowledge Review

Using the information you just learned about the characteristics most desired in a mediator, which of these two candidates would you select to help resolve a dispute using the ADR process?

Mediator A	<i>Lawyer</i> <ul style="list-style-type: none">• 20 years of legal experience• Has received numerous awards• Has written a number of books on legal matters• Tends to think he/she has all of the answers
Mediator B	<i>Professional, but no law degree</i> <ul style="list-style-type: none">• 20 years experience in the business world• Creative• Intuitive• Has common sense• Impartial• Patient

☐ Mediator A

☒ Mediator B

Mediator B would probably be a better choice. Usually the best mediators are those who you can trust and respect, who will listen, and are patient and creative. They do not have to be highly educated.


Check Answer

Acquiring Neutrals

A variety of resources are available to help you find a neutral to assist in a dispute resolution. You do not have to go through the competitive process to procure the services of an expert or neutral for use in any part of the ADR process.

Sources for neutrals include:

- The Federal Mediation and Conciliation Service maintains rosters of neutral and arbitrators for use in the ADR process.
- Neutrals are usually available, free of charge, from the Board of Contract Appeals (BCA). The BCA judges are available prior to or after the filing of an appeal.
- Your agency's Dispute Resolution Specialist (DRS) can provide assistance and guidance in locating a suitable neutral.



"THE HEAD OF AN AGENCY MAY
USE PROCEDURES OTHER THAN
COMPETITIVE PROCEDURES TO
PROCURE THE SERVICES OF AN
EXPERT OR NEUTRAL FOR USE IN
ANY PART OF AN ALTERNATIVE
DISPUTE RESOLUTION PROCESS..."

10 U.S.C. G. 2304(C)(3)(C) AS
AMENDED BY THE ADRA OF 1996

Long Description

Graphic depicts a yellow sticky note with the following text:

"The head of an agency may use procedures other than competitive procedures to procure the services of an expert or neutral for use in any part of an alternative dispute resolution process..."

"10 U.S.C. G. 2304(C)(3)(C) As amended by the ADRA of 1996"

Acquiring Neutrals, Cont.

Services ADR websites include:

- **Air Force:**
<http://www.adr.af.mil/>
- **Navy:**
<http://www.adr.navy.mil/>
- **Army:**
http://ogc.hqda.pentagon.mil/Practice_Groups/ADR.aspx
- **DLA:**
<http://www.dscc.dla.mil/offices/legal/adr/default.asp>



Summary

This lesson defined third-party ADR and neutral. It explored the characteristics that contribute to a successful neutral.

This lesson also described how to find a neutral and identified those that can be of assistance with this process.

You should now be able to:

- Define third-party neutral, accurately, without reference.



Lesson Completion

You have completed the content for this lesson.

To continue, select another lesson from the Table of Contents on the left.

If you have closed or hidden the Table of Contents, click the Show TOC button at the top in the Atlas navigation bar.