

## Welcome

Section 33.214 of the FAR states that ADR may be used if an agreement on [the] alternative procedures and terms to be used in lieu of formal litigation, is put in place.

This lesson describes the elements of an ADR agreement and introduces the seven ADR procedures.

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

- Describe the elements of an ADR agreement.



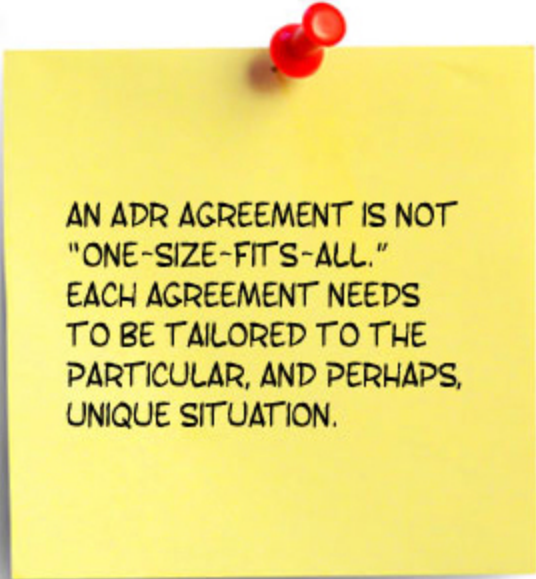
## ADR Agreement

### What is an ADR Agreement?

An ADR agreement is a formal agreement, signed by the participating parties, that describes, as completely as possible, how conflicts and disputes in the contract will be handled.

It is a description of the conflict resolution system.

If a partnering agreement is in place, the parties will use the ADR procedure included in the partnering agreement.



AN ADR AGREEMENT IS NOT  
"ONE-SIZE-FITS-ALL."  
EACH AGREEMENT NEEDS  
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PARTICULAR, AND PERHAPS,  
UNIQUE SITUATION.

### **Long Description**

Graphic of a yellow sticky note with the following text:

"An ADR agreement is not 'one-size-fits-all'. Each agreement needs to be tailored to the particular, and perhaps, unique situation."

## Elements of an ADR Agreement

At a minimum, an ADR agreement should contain the following elements:

- Issues to be discussed
- ADR procedures
- Role of the neutral
- Procedure for neutral selection
- Payment of the neutral
- Duration of the process
- Scope of information exchange (discovery)
- Procedure for conducting the process
- The use of information in subsequent adjudication
- Confidentiality requirements
- Preservation of parties' rights regarding further legal action
- Right of either party to withdraw
- Payment of ADR procedure cost

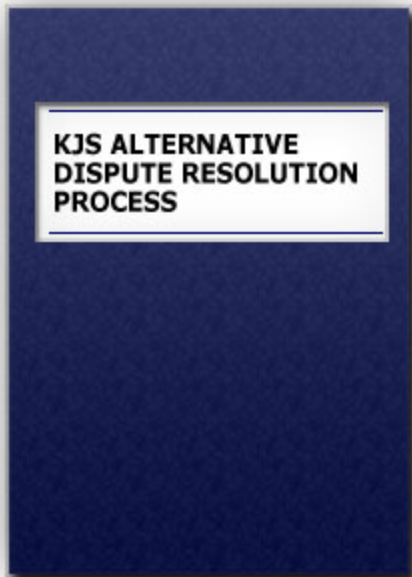
### Exploring the Elements of an ADR Agreement - ADR Procedures

An ADR Agreement is an essential tool to ensure that, if a dispute occurs, both parties will be assured of a fair and unbiased method for resolving the dispute.

These procedures should be carefully considered and included in contracts, partnering agreements, etc.

[Click here to to see an example ADR Agreement.](#)

Let's explore the different elements of an ADR Agreement.



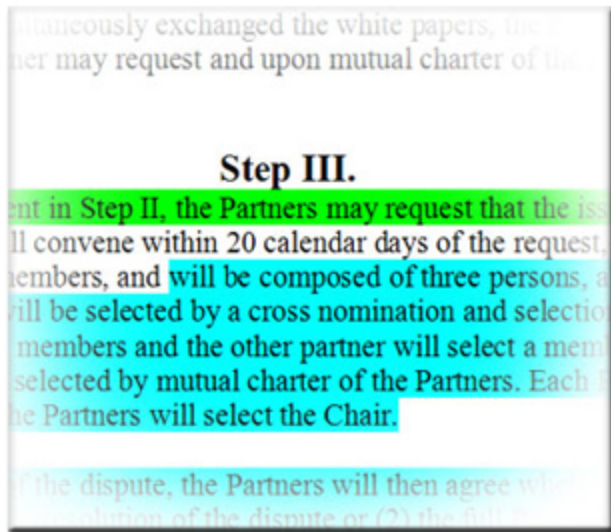
### Exploring the Elements of an ADR Agreement - Neutrals

An ADR Agreement should include, as clearly as possible:

1. The conditions under which a neutral will be used
2. The role of the neutral
3. The procedure for selecting a neutral
4. Information about how the neutral will be paid

The ADR Agreement should address the appointment, role, and payment of the neutral. (Keep in mind that costs of a private sector neutral can range from \$1,000 to \$9,000 per day.) The costs should also include the costs of the facilities used and other similar expenses.

[Click here to see an example of neutrals in an ADR Agreement.](#)



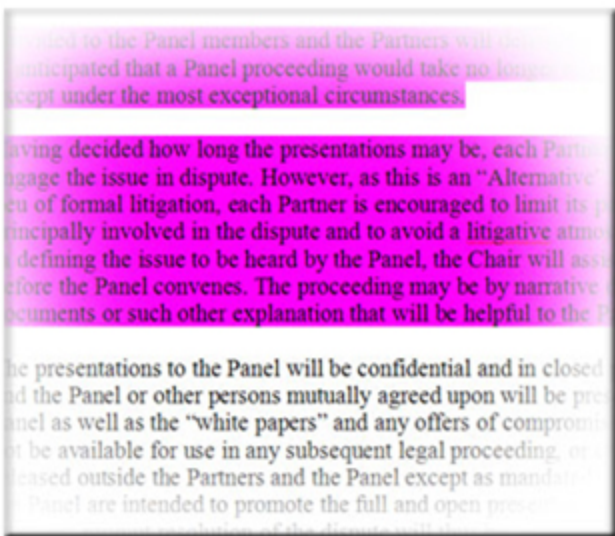
### Exploring the Elements of an ADR Agreement - Neutrals, Cont.

The agreement should spell out the role the neutral is anticipated to fulfill (mediator, fact finder, arbitrator, etc.).

In the case of a mediator, the parties may specify whether the mediator is expected to be evaluative (active) or facilitative (passive). The neutral should also be disqualified as a witness in subsequent litigation.

It should be noted that the neutral cannot participate in subsequent litigation. Any meeting notes or similar type of documentation created by the neutral cannot be used in subsequent litigation and needs to be destroyed by the neutral.

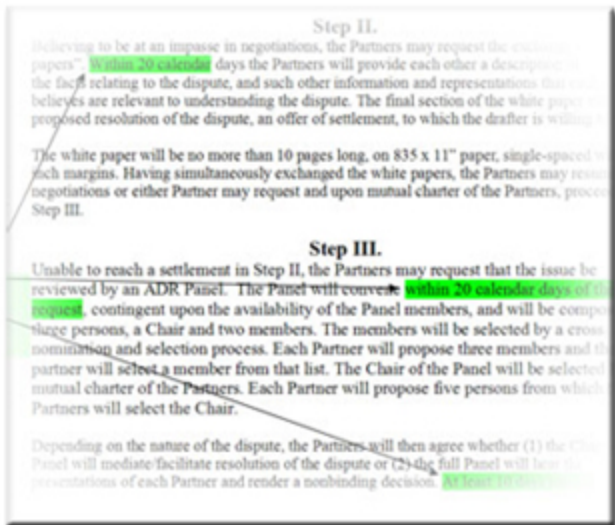
[Click here to review the example of neutrals in an ADR Agreement.](#)



## Exploring the Elements of an ADR Agreement - Duration

The ADR Agreement should contain information about the duration of the process and each step in the process as applicable.

[Click here to see an example of duration in an ADR Agreement.](#)





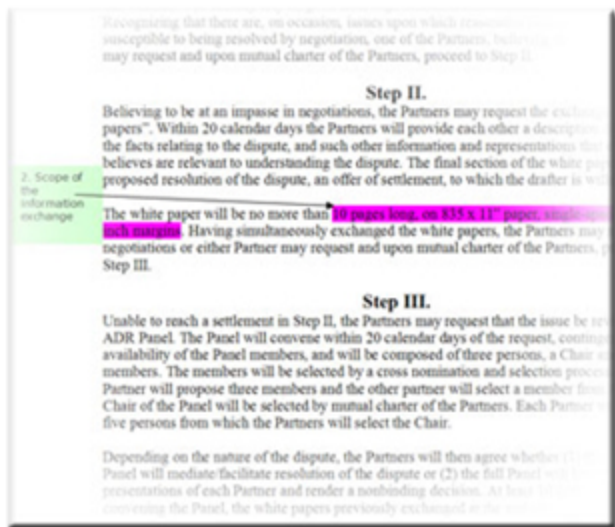
## Exploring the Elements of an ADR Agreement - Scope

The ADR Agreement should contain information about the scope of information exchange (discovery).

When defining the scope of information exchange, remember:

- Include identification of the details surrounding the dispute, including the parties, contracts, definition of issues and amounts at dispute.
- Ask yourself and your team of advisors whether decision-quality information can be developed using available resources and within the timeframes contemplated by the ADR process.
- Using ADR does not change the burdens of proof. ADR will not weaken a strong case or strengthen a weak case.

[Click here to see an example of scope in an ADR Agreement.](#)

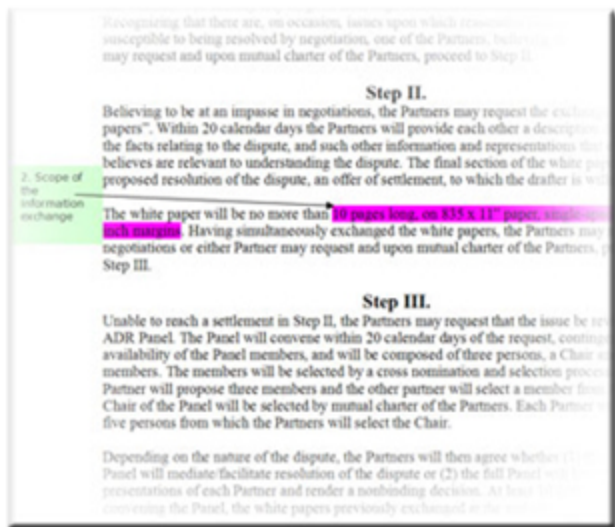


## Exploring the Elements of an ADR Agreement - Scope, Cont.

When defining the scope of information exchange, remember:

- Be sure your submission agreements have a cut-off date for the submission of evidence.
- Decide if witnesses previously deposed may be deposed again.
- Take care that your ADR agreement does not allow the other side to overwhelm you with discovery requests.

[Click here to review an example of scope in an ADR Agreement.](#)



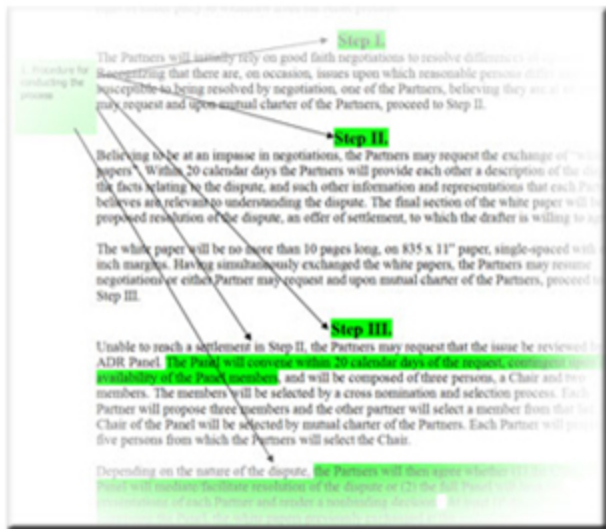
## Exploring the Elements of an ADR Agreement - Procedures

The ADR Agreement should contain information about the procedure for conducting the ADR process.

Remember to address:

- The type of limits (e.g., schedule, time, relevance to issues/subjects, etc.) that are provided
- Records retention, future use and the effect on future access/discovery, and how discovery disputes, if any, will be resolved (e.g., can matters disclosed be used in future litigation?)
- Provisions for control of statements, briefs, opening offers or position papers (e.g., Do the parties submit confidential position statements only to the neutral? What about length and format?)

[Click here to see an example of procedures in an ADR Agreement.](#)



### Exploring the Elements of an ADR Agreement - Procedures, Cont.

The Step Action Table shows the logical steps that could be included in an ADR procedure.

It is important to plan how you will proceed through the ADR procedure to ensure that the order of activity is appropriate and that you have planned for different possible outcomes.

Click the Step Action Table on the right to see a completed example.

STEP ACTION TABLE

STEP	ACTION
1	
2	
3	
4	
5	

## Popup Text

### Sample Step Action Table

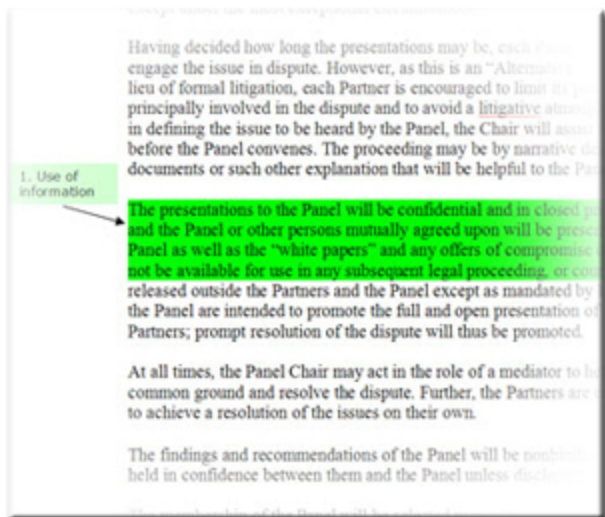
STEP	ACTION
1	Meet and Discuss (Government Only): <ul style="list-style-type: none"><li>• Identify the Government players (DCMA, DVAA, ACO, PCO, engineers, lawyers, etc.)</li><li>• Discuss roles and responsibilities</li><li>• Availability of funds</li></ul>
2	Meet and Discuss (All Parties): <ul style="list-style-type: none"><li>• Contractor's willingness to use ADR</li><li>• What ADR procedure will be used</li><li>• The role of a third party neutral, if any</li><li>• How to exchange information</li><li>• Stay of proceedings (COFD/appeal)</li><li>• The schedule for resolution</li><li>• Draft ADR Agreement &amp; Selection of Third Party Neutral</li></ul>
3	Stay of Proceedings
4	Statement of Issues
5	Exchange of Documents
6	Compilation of Facts and Documents
7	ADR Procedure
8	Identification of Unresolved Issues
9	Employ additional ADR Mechanisms
10	Negotiate Agreement
11	Draft Settlement Document

	<b>12</b>	Obtain Judgment (if necessary)	
	<b>13</b>	Modify the Contract and Make Payment	

## Exploring the Elements of an ADR Agreement - Procedures, Cont.

The ADR Agreement should contain statements explaining how information may be used in subsequent adjudication.

[Click here to see a use of information example in an ADR Agreement.](#)



Having decided how long the presentations may be, each Partner will engage the issue in dispute. However, as this is an "Alternative" to formal litigation, each Partner is encouraged to limit its presentation to the issue in dispute and to avoid a litigious atmosphere. In defining the issue to be heard by the Panel, the Chair will assist the Partners before the Panel convenes. The proceeding may be by narrative description, by documents or such other explanation that will be helpful to the Panel.

1. Use of information

The presentations to the Panel will be confidential and in closed session. The Panel or other persons mutually agreed upon will be present. The Panel as well as the "white papers" and any offers of compromise will not be available for use in any subsequent legal proceeding, or confidentially released outside the Partners and the Panel except as mandated by the Panel. The Partners are intended to promote the full and open presentation of the dispute; prompt resolution of the dispute will thus be promoted.

At all times, the Panel Chair may act in the role of a mediator to help the Partners find common ground and resolve the dispute. Further, the Partners are expected to achieve a resolution of the issues on their own.

The findings and recommendations of the Panel will be confidential and held in confidence between them and the Panel unless disclosure is required by law.

## Exploring the Elements of an ADR Agreement - Confidentiality

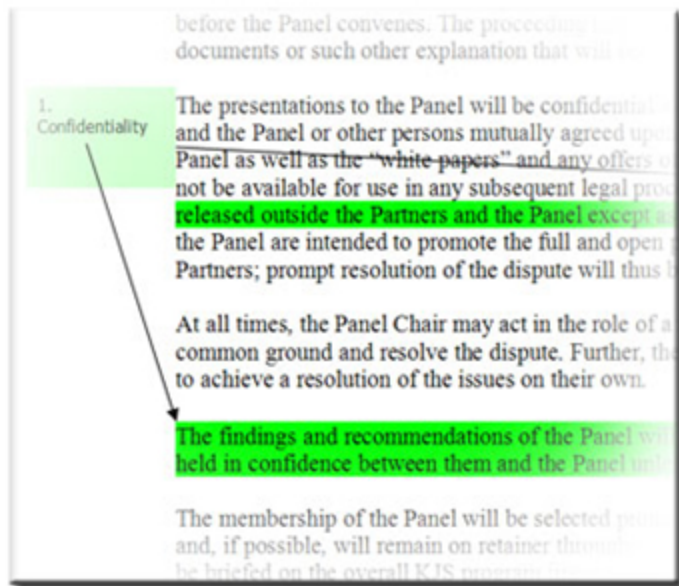
The ADR Agreement should address the confidentiality requirements. The ADRA generally provides for the non-disclosure of:

1. Confidential communications to a neutral
2. Dispute resolution communications

A disputes resolution communication is "any oral or written communication prepared for the purposes of a dispute resolution proceeding..."

Unless otherwise agreed, a neutral may not disclose a confidential communication or dispute resolution communication, and a party may not disclose a dispute resolution communication.

[Click here to see an example of a confidentiality statement in an ADR Agreement.](#)





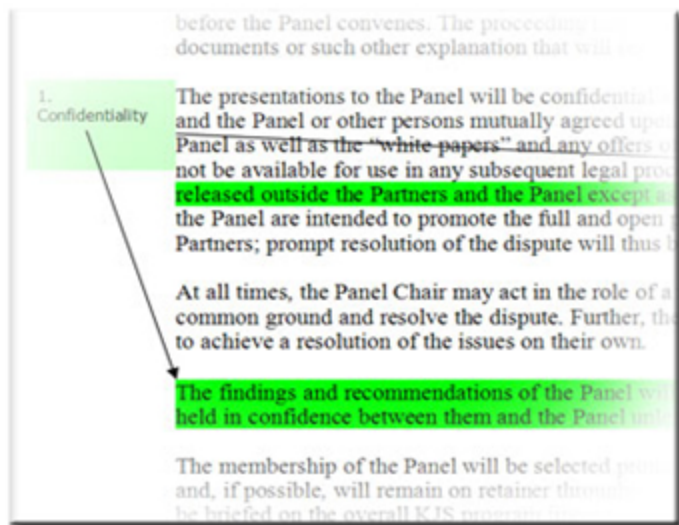
### Exploring the Elements of an ADR Agreement - Confidentiality, Cont.

Exceptions to the non-disclosure requirements include court order, waiver, statute, public knowledge, and matters otherwise discoverable.

The ADRA's confidentiality provision exempts the dispute resolution process from the Freedom of Information Act (FOIA).

As a precaution, you should engage the services of your lawyer to ensure that any confidentiality concerns are properly addressed.

[Click here to review the confidentiality statement example in an ADR Agreement.](#)

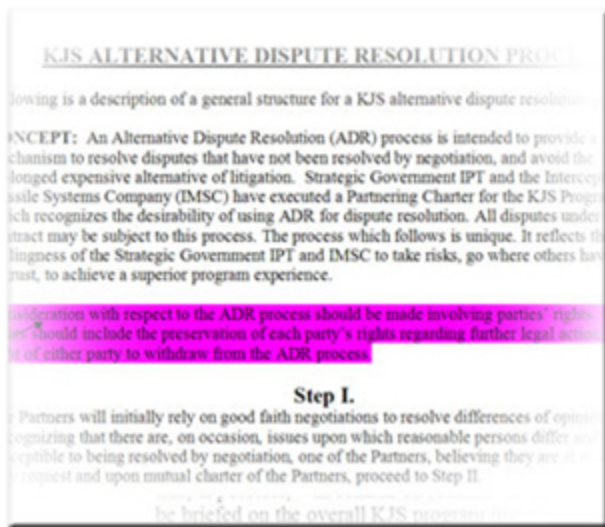


## Exploring the Elements of an ADR Agreement - Rights

The ADR Agreement should address the parties' rights with respect to the ADR process, including:

1. Preservation of each parties' rights regarding further legal action
2. The right of either party to withdraw from the ADR process

[Click here to see an example statements of rights in an ADR Agreement.](#)



## Exploring the Elements of an ADR Agreement - Payment

The ADR Agreement should address how the costs of executing the ADR procedure will be met.

[Click here to see a payment statement example in an ADR Agreement.](#)



## Knowledge Review

An ADR Agreement contains the following statement:

"When the conflict is not resolved at Step 1, the conflict will be addressed at the daily meeting between the Cabinet's Resident Engineer and the General Contractor's Project Manager; or between the Subcontractor's and General Contractor's Project Managers."

This statement is an example of which element that should be included in an ADR Agreement?

- ☐ Neutral's role
- ☐ Process Duration
- ☒ Procedure for conducting the process
- ☐ Confidentiality requirements

Check Answer

This statement is an example of the **procedure for conducting the process** that should be included in an ADR Agreement.

## Knowledge Review

An ADR Agreement contains the following statement:

"At all times, the Panel Chair may act in the role of a mediator to help bring the Partners to common ground and resolve the dispute."

This statement is an example of which element that should be included in an ADR Agreement?

- ☒ Neutral's role
- ☐ Process duration
- ☐ Procedure for conducting the process
- ☐ Confidentiality requirements

Check Answer

This statement is an example of the **neutral's role** which should be included in an ADR Agreement.

### The ADR Agreement - Another Example

Now let's see if you can find the different recommended elements in another example ADR agreement.

If you need a reminder of the elements, they are listed on the graphic to the right.

[Click here to see another ADR Agreement example.](#)

Remember to look for all of the recommended elements!

- ITEMS TO BE DISCUSSED
- ADR PROCEDURES
- NEUTRAL (ROLE, SELECTION PROCEDURE, PAYMENT)
- DURATION OF THE PROCESS
- SCOPE OF INFORMATION EXCHANGE
- PROCEDURE (STEPS IN ADR PROCESS)
- USE OF INFORMATION
- CONFIDENTIALITY REQUIREMENTS
- PARTIES' RIGHTS (PRESERVATION OF RIGHTS, RIGHT TO WITHDRAW)
- PAYMENT

## **Long Description**

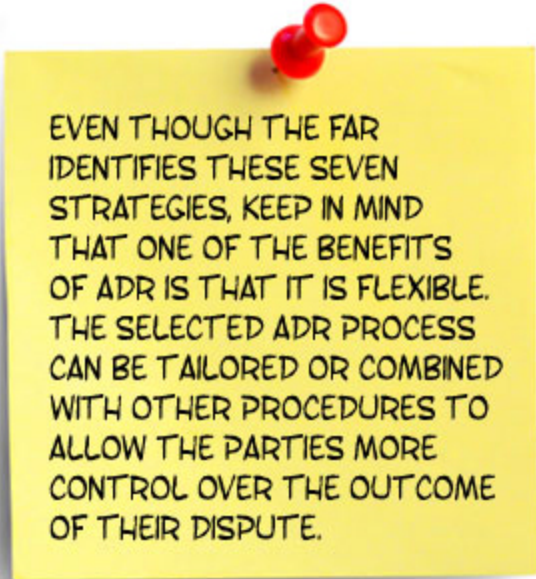
Graphic of a yellow legal notepad with elements of an ADR Agreement written on it:

- Items to be discussed
- ADR procedures
- Neutral (role, selection procedure, payment)
- Duration of the process
- Scope of information exchange
- Procedure (steps in ADR process)
- Use of information
- Confidentiality requirements
- Parties' rights (preservation of rights, right to withdraw)
- Payment

## ADR Procedures

Federal Acquisition Regulation (FAR) identifies a variety of "procedures" that may be used to assist parties in resolving their disputes. These procedures may include, but are not limited to:

- Conciliation
- Facilitation
- Mediation
- Fact-finding
- Mini-trials
- Arbitration
- Use of ombudsmen



EVEN THOUGH THE FAR IDENTIFIES THESE SEVEN STRATEGIES, KEEP IN MIND THAT ONE OF THE BENEFITS OF ADR IS THAT IT IS FLEXIBLE. THE SELECTED ADR PROCESS CAN BE TAILORED OR COMBINED WITH OTHER PROCEDURES TO ALLOW THE PARTIES MORE CONTROL OVER THE OUTCOME OF THEIR DISPUTE.



### **Long Description**

Graphic of a yellow sticky note with the following text:

"Even though the FAR identifies these seven strategies, keep in mind that one of the benefits of ADR is that it is flexible. The selected ADR process can be tailored or combined with other procedures to allow the parties more control over the outcome of their dispute."

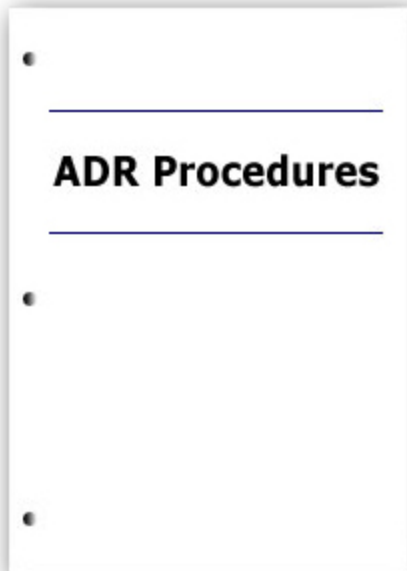
**ADR Procedures, Cont.**

The table below describes how each of these procedures serves different needs and offers different levels of assistance to the parties in dispute.

<b>Cooperative Decision-Making</b>	<b>Third-Party Assistance with Cooperative Problem-Solving</b>			<b>Third-Party Decision-Making</b>	
Parties are Unassisted	Relationship Building Assistance	Procedural Assistance	Advisory Non-Binding Assistance	Substantive Assistance	Binding Assistance
Cooperative Decision-making procedures are generally more conducive to resolving non-complex controversies. In general, the parties involved in the dispute are unassisted, although a third-party neutral may provide needed assistance if the parties get bogged down. Conciliation is an example of a cooperative decision-making ADR procedure.	Third-party assistance is necessary as the complexity of issue of controversy increases. The third-party - the neutral - can offer relationship building assistance, procedural assistance, and substantive assistance, as needed by the parties in dispute. Some common methods of offering procedural assistance include facilitation and mediation. Some common methods of offering substantive assistance include mini-trial and fact-finding.			In highly complex issues, the third-party - the neutral - generally takes a more active role in decision-making. The neutral can offer assistance in brokering a non-binding agreement or a binding agreement, as required by the ADR agreement and the circumstances surrounding the issue of controversy. A common method of offering advisory non-binding assistance is non-binding arbitration. A common method of offering binding assistance is binding arbitration.	

**ADR Procedures, Cont.**

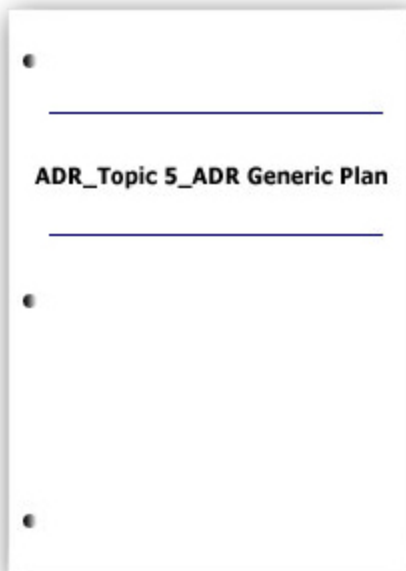
Remember, you are not limited to the ADR Procedures explored in this module. The point is to use the best combination of procedures - tailored as necessary - to allow the parties more control over the outcome of their dispute.



## **Generic ADR Agreement**

Finally, let's look at a Generic ADR Agreement that is used for a non-binding ADR Process.

This plan provides information on draft ADR agreement and selection of third-party neutrals, stay of proceedings, statement of issues, etc.



### Knowledge Review

Which of the following are the three main ADR procedures?  
(Select all that apply.)

- ☐ Litigation Assistance
- ☒ Third-Party Decision-Making
- ☒ Third-Party Assistance with Negotiations or Cooperative Problem-Solving
- ☒ Cooperative Decision-Making
- ☐ Withdrawal from the Process

Check Answer



The three main ADR procedures consist of: **third-party decision-making, third-party assistance with negotiations or cooperative problem-solving, and cooperative decision-making.**

## Summary

This lesson explored the different elements that need to be included in an ADR Agreement. It also described how these elements appear in ADR Agreements by providing two examples of agreements. The seven ADR procedures were also introduced in this lesson.

You should now be able to:

- Describe the elements of an ADR agreement



### ADR Agreement

## 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.