



# Negotiation

©2009 eNotes.com, Inc. or its Licensors. Please see [copyright information](#) at the end of this document.

- [Background](#)
- [The Role of Negotiations in ADR](#)
- [Additional Resources](#)
- [Organizations](#)

## Background

Negotiations consist of written and oral communications undertaken for the purpose of reaching agreement. When undertaken in [GOOD FAITH](#), negotiations include a process of give-and-take, whereby each party to the negotiations presents its position, critiques opposing positions, explores points of common ground, highlights divisive issues, proposes compromises and resolutions, and determines whether a mutually acceptable arrangement can be agreed upon to resolve the matters in dispute. When undertaken in [BAD FAITH](#), negotiations often are reduced to rancorous posturing aimed at assigning blame rather than reaching an amicable [SETTLEMENT](#).

Lawyers are constantly negotiating in civil [LITIGATION](#). Yet negotiation is not always used often enough, or extensively enough, to avoid litigation. Legal observers have suggested that a factor contributing to the high cost of litigation is the fear that the first side to propose settlement weakens its negotiating position. Since appearing eager to settle is taken as demonstrating a lack of confidence in one's case, both sides concentrate on [DISCOVERY](#) and preparing for trial so as to strengthen their hands for future negotiation while legal fees continue to mount.

The same fear does not ordinarily impede alternative dispute resolution proceedings, where a negotiated settlement is typically the goal for both parties. Alternative dispute resolution refers to an array of practices, procedures, and techniques that are used to resolve legal disputes by means other than formal civil litigation. Known more commonly as ADR, alternative dispute resolution is usually less costly and more time-efficient than civil litigation. ADR can also be more confidential than civil litigation. Court proceedings, records, and transcripts are generally open to public scrutiny and inspection in most civil litigation and cannot be sealed from the public absent an extraordinary justification. By contrast, parties to ADR proceedings can agree to insulate their dispute and its resolution from the public.

Early Puritan, Quaker, and Dutch settlers were among the first in North America to employ alternative means in resolving legal disputes. These tightly knit communities of settlers preferred even-tempered negotiations to adversarial litigation and treated litigation as a last resort to try only when procedures such as [MEDIATION](#) and [ARBITRATION](#) (discussed in detail below) failed to produce an acceptable and effective settlement. However, the term "alternative dispute resolution" was not coined in the United States until sometime during the 1970s, when it drew diverse support from influential members of society, including **CHIEF JUSTICE** Warren Berger and consumer rights advocate Ralph Nader. Both Berger and Nader emphasized the perspective of the average citizen, who they said has neither the time nor the money to spend getting bogged down in drawn out court battles. Instead, Berger and Nader argued that average citizens find out-of-court negotiation alternatives to be a more palatable course, at least when done evenhandedly.

Congress helped fuel the ADR movement in the 1980s and 1990s by passing a series of legislative acts. In 1980 it passed the Dispute Resolution Act, which provides financial incentives for state governments and private entities to explore innovative approaches to negotiation and dispute resolution. 28 U.S.C. app. section 1 et seq; Pub. L. No. 96-190, 94 Stat. 17 (1980). In 1990 Congress passed the Administrative Dispute Resolution Act, which encourages federal agencies to use mediation and arbitration for prompt and informal resolution of disputes. 5 U.S.C.A. sections 571 et seq; Pub.L. 101-552, Nov. 15, 1990, 104 Stat. 2738, and renumbered and amended Pub.L. 102-354, Aug. 26, 1992, 106 Stat. 944, 946. Eight years later Congress passed the Alternative Dispute Resolution Act of 1998, which requires all federal district courts to establish an ADR program, making at least one form of ADR available to all federal civil litigants. 28 U.S.C.A. sections 651 et seq; Pub.L. 100-702, Title IX, Nov. 19, 1988, 102 Stat. 4659. By 2001 approximately ninety to ninety-five percent of all legal disputes were being resolved outside of trial by using negotiation through some form of ADR.

### **The Role of Negotiations in ADR**

A wide variety of processes, practices, and techniques fall within the definition of "alternative dispute resolution." Arbitration and mediation are the best known and most frequently used types of ADR, but not the only ones. Minutials, early neutral evaluations, and summary jury trials are less well-known forms of ADR. Many of these ADR techniques have little in common except that negotiation plays a prominent role in each. Parties to ADR procedures generally agree that a negotiated settlement is worth pursuing before investing time and money in full-blown civil litigation.

#### ***Arbitration***

Arbitration is the process of referring a dispute to an [IMPARTIAL](#) intermediary chosen by the parties who agree in advance to abide by the arbitrator's award that is issued after a [HEARING](#) at which all parties have the opportunity to be heard. Arbitration resembles traditional civil litigation in that a neutral intermediary hears the disputants' arguments and imposes a final and binding decision that is enforceable by the courts. One difference is that in arbitration the disputants elect to settle any future disputes by arbitration before a dispute actually arises, whereas with civil litigation the judicial system is generally chosen by a disgruntled party after a dispute has materialized. Another difference is that the disputants to an arbitration select the intermediary who will serve as arbitrator, whereas parties to civil litigation have little to no control over who will preside as the judge in judicial proceedings.

Arbitration also resembles litigation in that many parties use arbitration as a springboard to negotiation. Parties who know that their dispute will wind up in arbitration often fail to commence serious negotiations until shortly before or shortly after the arbitration proceedings have begun. Frequently, negotiations will continue simultaneously with the arbitration proceedings, meaning the parties' representatives will discuss settlement outside the hearing room while the hearing itself is underway inside. Arbitration can even expedite negotiations, since the parties know that once the arbitrator has issued a decision, the decision is typically final and rarely appealable.

There are two different forms of arbitration: private and judicial arbitration. Private arbitration is the most common form of ADR. Sometimes referred to as contractual arbitration, private arbitration is the product of an agreement to arbitrate drafted by the parties who enter a relationship anticipating that disputes will arise, but who mutually desire to keep any such disputes out of the courts. Private arbitration agreements typically identify the person who will serve as arbitrator. The arbitrator need not be a judge or government official. Instead, the arbitrator can be a private person whom the parties feel will have sufficient knowledge, experience, and equanimity to resolve a dispute in a reasonable manner. In some states, legislation prescribes

the qualifications one must satisfy to be eligible for appointment as an arbitrator.

A private arbitrator's power is derived completely from the arbitration agreement, which may also limit the issues the arbitrator has authority to resolve. Private arbitration agreements are supported in many states by statutes that provide for judicial enforcement of agreements to arbitrate and arbitrator-rendered awards. However, statutes governing private arbitration often set forth criteria that must be followed before an arbitration agreement will be binding on both parties and enforced by a court. If those criteria are satisfied, a court will normally deem the arbitrator's decision final and enforceable. The losing party may only appeal the decision upon a showing of [FRAUD](#), misrepresentation, arbitrariness, or capriciousness by the arbitrator.

Private arbitration is the primary method of settling labor disputes between unions and employers. For example, unions and employers almost always include an arbitration clause in their formal negotiations, known as [COLLECTIVE BARGAINING](#) agreements. By doing so, they agree to arbitrate future employee grievances over wages, hours, working conditions, and job security. Many real estate and insurance contracts also make arbitration the exclusive method of negotiating and resolving certain disputes that can arise between the parties entering those types of relationships.

Judicial arbitration, sometimes called court-annexed arbitration, is a non-binding form of arbitration, which means that any party dissatisfied with the arbitrator's decision may choose to go to trial rather than accept the decision. However, most jurisdictions prescribe a specific time period within which the parties to a judicial arbitration may elect to reject the arbitrator's decision and go to trial. If this time period expires before either party has rejected the arbitrator's decision, the decision becomes final, binding, and just as enforceable as a private arbitrator's decision.

Judicial arbitration is usually mandated by [STATUTE](#), court rule, or regulation. Many of these statutes were enacted to govern disputes for amounts that exceed the [JURISDICTION](#) of small claims court but fall short of the amount required for trial in civil court. For example, in New York State claims for over \$3,000 and for less than \$10,000 must be submitted to non-binding judicial arbitration. NY CPLR Rule section 3405. Ten federal district courts also have mandatory programs for non-binding judicial arbitration that are funded by Congress. For example, rule 30 of the Local Rules of Court for the U. S. District Court for the Western District of Missouri provides that cases designated for compulsory, non-binding arbitration are those in which the damage award could not reasonably be expected to exceed \$100,000.

Because judicial arbitration is mandatory but nonbinding, it often serves as a means of facilitating negotiation between the parties to a dispute. Civil court calendars are frequently backlogged with hundreds of lawsuits. States hope that by mandating nonbinding arbitration for certain disputes the parties will see the value of a negotiated settlement where both parties compromise their positions, since their positions would likely be compromised were their dispute to be resolved in civil court. Seldom do litigants receive everything they ask for in their petitions, complaints, and answers.

Private and judicial arbitration are generally less costly and more time efficient than formal civil litigation. It has been estimated that the average arbitration takes 4 to 5 months while litigation may take several years. The cost of arbitration is minimal compared to civil trials as well, since the American Arbitration Association (AAA) charges only a nominal filing fee and the arbitrator may even work without a fee to broaden his or her professional experience.

### ***Mediation***

Mediation is a rapidly growing ADR technique. It consists of assisted negotiations in which the disputants agree to enlist the help of a neutral intermediary, whose job it is to facilitate a voluntary, mutually acceptable settlement. A mediator's primary function is to identify issues, explore possible bases for agreement, discuss

the consequences of reaching impasse, and encourage each party to accommodate the interests of other parties through negotiation. However, unlike arbitrators, mediators lack the power to impose a decision on the parties if they fail to reach an agreement on their own.

Mediation is sometimes referred to as [CONCILIATION](#), or conciliated negotiation. However, the terms are not necessarily interchangeable. Conciliation focuses more on the early stages of negotiation, such as opening the channels of communication, bringing the disputants together, and identifying points of mutual agreement. Mediation focuses more on the later stages of negotiation, exploring weaknesses in each party's position, investigating areas where the parties disagree but might be inclined to compromise, and suggesting possible mutually agreeable outcomes. Conciliation and mediation typically work well when the disputants are involved in a long-term relationship, such as husband and wife, wholesaler and retailer, and manufacturer and distributor, to name a few. Mediation and conciliation also work well for "polycentric" problems that are not easily solved by all-or-nothing solutions, as with certain antitrust suits involving a myriad of complex issues.

Although some jurisdictions have enacted statutes that govern mediation, most mediation proceedings are voluntary for both parties. Accordingly, a mediator's influence is limited by the autonomy of the parties and their willingness to negotiate in good faith. Thus, a mediator can go no further than the parties themselves are willing to go. Since agreements reached by mediation bear the parties' own imprint, however, many observers feel that they are more likely to be adhered to than decisions imposed by an arbitrator or court. Disputants who participate in mediation without representation of legal [COUNSEL](#) are also more likely to adhere to settlements when the alternative is to pursue civil litigation, where attorneys fees consume a significant portion of any monetary award granted to the parties.

### ***Minitrials***

A minitrial is a process by which the attorneys for the parties present a brief version of the case to a panel, often comprised of the clients themselves and a neutral intermediary who chairs the process. Expert witnesses (and less frequently, lay witnesses) may be used in presenting the case. After the presentation, the clients, normally top management representatives who by now are more aware of the strengths and weaknesses of their positions, attempt to negotiate a settlement of the dispute. If a negotiated settlement is not reached, the parties may allow the intermediary to mediate the dispute or render a non-binding advisory opinion regarding the likely outcome of the case were it to be tried in civil court.

Minitrials are increasingly used by businesses to resolve large-scale disputes involving [PRODUCT LIABILITY](#) questions, antitrust issues, billion dollar construction contracts, and mass tort or disaster litigation. The federal government also makes use of minitrials for disputes involving telecommunications. The **CODE OF FEDERAL REGULATIONS** establishes procedures whereby individuals and entities under investigation by the FCC can request a minitrial prior to commencement of more formal administrative proceedings. 47 CFR section 1.730.

Minitrials are often effective because they usually result in bringing top management officials together to negotiate the legal issues underlying a dispute. Early in the negotiation process, upper management is sometimes pre-occupied by the business side of a dispute. Minitrials tend to shift management's focus to the outstanding legal issues. Minitrials also allow businesses to share information with each other and with their attorneys, providing a forum for initial face-to-face negotiations. Management also generally prefers the time-saving, abbreviated nature of minitrials over the more time-consuming and costly civil-litigation alternative. Minitrials expedite negotiations as well, by making them more realistic. Once the parties have seen their case play out in court, even in truncated fashion, the parties are less likely to posture over less relevant or meaningless issues.

### **Summary Jury Trials**

Summary jury trials are an ADR technique used primarily in federal courts, where they provide parties with the opportunity to "try" their cases before an advisory panel of jurors, without having to face the final and possibly adverse decision of a regular jury in civil court. The purpose of the summary jury trial is to facilitate pretrial termination of cases in which a significant impediment to negotiation is disagreement between the attorneys or parties regarding a civil jury's likely findings on liability or damages in the case. Like minitrials, summary jury trials give the parties a chance to reach a preliminary [ASSESSMENT](#) of the strengths and weaknesses of their positions and proceed with negotiations from a common starting point, namely the advisory jury's findings. Both summary jury trials and minitrials can ordinarily be scheduled and completed before formal civil cases would normally reach a court's [DOCKET](#).

Summary jury trials are presided over by a judge or [MAGISTRATE](#) in federal district court. A ten-member jury venire is presented to counsel for consideration. Counsel are provided with a short character profile of each juror and then given two challenges to arrive at a final six-member jury for the proceeding. Each attorney is given one hour to describe his or her client's case to the jury. After counsel's presentations, the presiding judge or magistrate delivers to the jury a brief statement of the applicable law, and the jury retires to deliberate. Juries are encouraged to return a consensus verdict, but they may return a special report that anonymously lists the view of each juror as to liability and damages. After the verdict or special report has been returned, counsel meet with the presiding judge or magistrate to discuss the verdict and to establish a timetable for settlement negotiations. Evidentiary and procedural rules are few and flexible.

### **Early Neutral Evaluation**

Early neutral evaluation is an informal process by which a neutral intermediary is appointed to hear the facts and arguments of counsel and the parties. After the hearing, the intermediary provides an evaluation of the strengths and weaknesses of the parties' positions and the parties' potential exposure to liability for money damages. The parties, counsel, and intermediary then engage in discussions designed to assist the parties in identifying the agreed upon facts, isolating the issues in dispute, locating areas in which further investigation would be useful, and devising a plan to streamline the investigative process. Settlement negotiations and mediation may follow, but only if the parties desire. In some jurisdictions, early neutral evaluation is a court-ordered ADR technique. However, even in these jurisdictions the parties are given the option of hiring their own neutral intermediary or having the court appoint one.

The objective of early neutral evaluation is to obtain an early assessment of the parties' dispute by a credible outsider who has no interest in the outcome of the dispute but who has sufficient knowledge and experience to sift through the facts and issues and find the ground shared by the parties and the ground separating them. Much like in the other forms of ADR, the success of early neutral evaluation depends largely on the disputants' faith in the neutral intermediary. It also depends in large part on the disputants' willingness to compromise and settle the dispute. Successful early neutral evaluations can lead directly to meaningful negotiations.

### **Conclusion: Negotiation, ADR, and Civil Litigation**

The procedures and techniques discussed above are the most commonly employed methods of ADR. Negotiation plays an important role in each method, either primarily or secondarily. However, there are countless other ADR methods, many of which modify or combine the above methods. For example, it is not uncommon for disputants to begin negotiations with early neutral evaluation and then move to nonbinding mediation. If mediation fails, the parties may proceed with binding arbitration. The goal with each type of ADR is for the parties to find the most effective way of resolving their dispute without resorting to litigation. The process has been criticized as a waste of time by some legal observers who believe that the same time

could be spent pursuing the claims in civil court, where negotiation also plays a prominent role and litigants are protected by a panoply of formal rights, procedures, and rules. But many participants in unsuccessful ADR proceedings believe it is useful to determine that their disputes are not amenable to a negotiated settlement before commencing a lawsuit.

Despite its success over the past three decades, ADR is not the appropriate choice for all disputants or all legal disputes. Many individuals and entities still resist ADR because it lacks the substantive, procedural, and evidentiary protections available in formal civil litigation. For example, parties to ADR typically waive their rights to object to **EVIDENCE** that might be deemed **INADMISSIBLE** under the rules of court. **HEARSAY** evidence is a common example of evidence that is considered by the parties and intermediaries in ADR forums but that is generally excluded from civil trials. If a disputant believes that he or she would be sacrificing too many rights and protections by waiving the formalities of civil litigation, ADR will not be the appropriate method of dispute resolution.

## Additional Resources

*American Jurisprudence*. West Group, 1998.

<http://hg.org/adr.html>. Hieros Gamos Guide to Alternative Dispute Resolution.

"*Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*." Ezzell, Bill, 25 *Law and Psychology Review* 119, Spring, 2001.

*West's Encyclopedia of American Law*. West Group, 1998.

## Organizations

### *The Academy of Experts*

2 South Square  
London England WC1R 5HT UK  
Phone: +44 (0)20 7637 0333  
Fax: (0)207637 1893  
URL: <http://www.academy-experts.org>  
Primary Contact: Geoffrey Howe, President

### *Coast to Coast Mediation Center*

715 Hygeia Ave  
Encinitas, CA 92023 USA  
Phone: (800) 748-6462  
Fax: (760) 634-2628  
URL: <http://www.ctcmediation.com>  
Primary Contact: Donald D. Mohr and Elizabeth L. Allen, Co-Founders

### *National Association For Community Mediation*

1527 New Hampshire Avenue  
Washington, DC 20036-1206 USA  
Phone: (202) 667-9700  
Fax: (650) 329-9342

## Encyclopedia of Everyday Law: Negotiation

URL: <http://www.nafcm.org>

Primary Contact: Terry Amsler, Director

### **Copyright Notice**

©2009 eNotes.com, Inc.

ALL RIGHTS RESERVED.

No part of this work covered by the copyright hereon may be reproduced or used in any form or by any means graphic, electronic, or mechanical, including photocopying, recording, taping, Web distribution or information storage retrieval systems without the written permission of the publisher.

For complete copyright information, please see the online version of this work:

<http://www.enotes.com/everyday-law-encyclopedia>