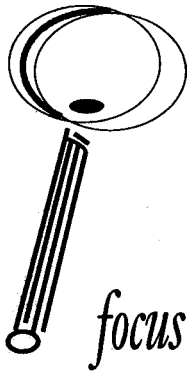
1

What Is ADR



Learning Objectives

By the end of this chapter, you should be able to:

- Identify the goals of ADR.
- List the most common forms of ADR.
- Explain the importance of an ADR pledge.
- Describe when ADR can be initiated.
- Identify who serves as a decision-maker.
- Explain how to find an ADR provider.

Alterative dispute resolution (ADR) is an efficient and effective method for resolving a variety of disputes, ranging from minor disagreements to serious business disputes. For businesses, ADR provides a cost-efficient alternative to the traditional legal system, which is plagued by high costs and delays. Professionals who use ADR enjoy a competitive advantage. This chapter introduces various alternative dispute resolution methods.

INTRODUCTION

In the current business environment, litigation and litigation costs have become major problems. for many businesses and professions. Defending a serious lawsuit can mean tens or even hundreds of thousands of dollars in legal costs, even when the suit is eventually dismissed

Many large companies are already realizing substantial cost savings by using ADR techniques in place of traditional litigation. For example, Motorola, Inc. has been one of the leaders in implementing ADR on a company wide basis. Motorola reports that its use of ADR, combined with using in-house lawyers rather than outside law firms, has cut its legal bills in half.

Other companies are realizing that cost savings can be substantial and that ADR is an effective strategy for increasing profitability. As part of its benchmarking efforts, General Electric (GE) has instituted a systematic ADR program throughout the company.

Alternative dispute resolution techniques offer a means of controlling upwardly spiraling legal costs, while resolving the underlying` legal problems. All managers and their advisers need to understand how these techniques can help them save time and substantial sums in legal costs.

Goals of ADR

The primary goal of ADR is the resolution of disputes without the need for litigation. Most alternative dispute resolution techniques are entered into voluntarily. Although ADR agreements are nonbinding and can be appealed in court, attorneys who specialize in ADR report that very few end up in court. This demonstrates that the parties in ADR proceedings almost always come away satisfied with the results.

Although the goal of ADR is not a fifty-fifty split, in fact most ADR proceedings do result in some sort of compromise reached through a structured negotiation process. The satisfaction rate is a product not only of the final decision but of the fairness of the process itself.

ADVANTAGES OF ADR OVER LITIGATION

ADR enjoys a number of advantages over litigation. Although cost savings is probably the most frequently-mentioned advantage, other goals can be just as important or even more important, depending on the dispute. The list in Exhibit 1-1 summarizes these advantages.

Lower Cost

ADR almost always costs only a fraction of traditional litigation. ADR procedures are streamlined and cost-effective.

Exhibit 1–1
Advantages of ADR

1. Quick resolution
2. Lower cost
3. Confidentiality
4. Fairness
5. Flexible remedies
6. Choice of decision-maker
7. Preservation of relationships

Litigation is costly. Even small disputes can grow into costly legal battles. The longer a court case drags on, the higher the legal costs. Besides the out-of-pocket expenses for outside counsel, managers need to consider the opportunity costs involved in resolving the dispute. Litigation typically takes over a year, during which time managers must give depositions, educate the attorneys about the dispute, and deal with other time-consuming tasks related to the case. The time devoted to the lawsuit is time taken away from the managers' regular duties. Further, because managers must devote so much-even most-of their time to solving an old problem, they can't focus on managing the business for the future. Although difficult to measure, this lost time is an opportunity cost that needs to be managed.

QUICK RESOLUTION

Speed is a primary advantage of ADR. While a dispute brought to court may take over a year to resolve, the same dispute could be disposed of in a few months using ADR.

All court systems have to abide by speedy trial rules, which require that criminal cases be heard first. Accordingly, business disputes, which tend to deal with civil rather than criminal matters, have to wait. In most states this means that a lawsuit will not reach a courtroom for at least a year, and in some states the wait is much longer. If the parties really want to resolve their dispute expeditiously, mediation or other ADR techniques are the only realistic alternatives.

Confidentiality

Unlike legal proceedings that are open to the public, ADR is a private confidential proceeding. One very real benefit of ADR is confidentiality.

Lawsuits are a matter of public record. This means that everyone, including reporters, has access to the documents. These court documents may contain allegations unsupported by evidence as well as unpleasant facts that may be taken out of context. These court documents remain in the public record for a number of years, and damage to the firm's reputation may be permanent.

Companies spend thousands and even millions of dollars in public relations efforts each year. These expensive efforts can be undermined by bad publicity generated by a lawsuit, whether or not the charges have substance. When a party brings a lawsuit the allegations are often widely publicized. Even if the lawsuit is later dismissed as groundless, the news that the lawsuit has been dismissed may be published with little fanfare or not at all. Even those who see the news of the dismissal are more likely to remember the fact that the lawsuit was brought, long after they remember that the matter was promptly dismissed.

Mediation, on the other hand, is a private process and is carried out without public access to the proceedings. Further, the parties' final agreement can specify that neither party will disclose details about the dispute or its resolution.

Fairness

ADR can accommodate power imbalances. Many disputes are characterized by power imbalances, where one side has vastly superior financial resources. In a lawsuit, the wealthier party has a great advantage because it can buy high-priced legal talent and thus prevail even with a weak case. With ADR the party with the stronger arguments, not the fattest wallet, is likely to win.

Flexible Remedies

In ADR the parties are usually free to fashion their own remedy rather than being limited to what a jury might award. Many business disputes fall into this category.

For example, consider the dispute among members of the CPA firm Arthur Andersen. The original partner agreement, drawn up nearly one hundred years ago, described the relationships among the partners and specified methods of resolving disagreements and even of terminating the partnership. Times changed, and the accounting firm became more and more involved in consulting activities; in fact the consulting activities became more profitable than the traditional accounting practice. Some of the partners wanted to renegotiate the profit-sharing system, others wanted to spin off the consulting business entirely, and still others wanted no change. Although a court could legally terminate the partnership, this would hardly be advantageous for any of the partners. This type of business dispute is best settled without litigation. Andersen's dispute did not proceed to ADR because their partnership agreement was drafted decades before ADR was recognized as a legitimate dispute resolution technique.

Choice of Decision Maker

In ADR, the parties normally select their own neutral decision-maker. To help resolve their dispute, they pick someone with specific experience or expertise. If the matter went to court, the judge or jury would probably not have any special expertise in the subject matter of the dispute.

Preservation of Relationships

Unlike litigation, ADR is facilitative rather than adversarial. It allows disputing parties to work together to find a solution to a common problem.

When parties litigate an issue, the dispute takes on a life of its own. Tempers can flare over even trivial matters. Animosity of the opposing attorneys can escalate the hostility level. When parties sue one another, their relation ship is permanently altered, for the worst, although in rare cases the parties may continue to deal with one another after the lawsuit. For example, this might happen with a manufacturer and supplier who are equally dependent on one another. But in most cases, the parties' business relationship ends the day the lawsuit is filed.

In Exercise 1-1 you can apply these concepts to a practice situation.

Exercise 1–1: Advantages of ADR over Litigation

INSTRUCTIONS: ☛ Using the list of advantages found in Exhibit 1–1 as a guide, list the advantages of using ADR in place of litigation in the following two situations.

SITUATION A

ABC Corporation hired away one of its competitor's product designers. The competitor alleges that the individual is using confidential techniques, in violation of his former employment contract. ABC's preliminary investigation has revealed that the competitor's claims are essentially correct. Should ABC suggest using ADR?

SITUATION B

XYZ Corporation purchased a parcel of land, where it wants to build a new distribution center. Because XYZ lost the lease on its present location it needs to get construction moving. Although the parcel was surveyed before the acquisition, a dispute has arisen between XYZ and the company that owns the building on the adjacent lot concerning the exact boundary line of the parcel and the use of the existing driveway between the two parcels. The size of the area in dispute is extremely small compared to the size of the total parcel. XYZ would be willing to buy the disputed land for $50,000 if they find it belongs to the other company. XYZ has considered going to court to resolve its rights to the disputed property. Would ADR be a better solution?

Suggested answers to this exercise can be found at the end of this chapter.

TYPICAL OBJECTIONS TO ADR

There are a number of common objections to using ADR. None of them are persuasive. The more common ones are listed in Exhibit 1-2.

Suggesting ADR Is a Sign of Weakness

Perhaps the most common objection is that suggesting ADR is a sign of weakness. The logic behind this objection is that a party with a strong case will want an outright win rather than a negotiated compromise. While this may be true in a criminal trial, it is seldom the case in a business dispute. Even parties with a dispute may want or need to continue a mutually advantageous business relationship. For this reason, more and more companies are adopting formal policies stating that ADR is their preferred method of resolving disputes.

ADR Favors the Better-Financed Party

Another objection to ADR is that it favors the better-financed party. The logic behind this argument is that the party with the deeper pockets will use

Exhibit 1–2

Typical Objections to ADR

1. Suggesting ADR is a sign of weakness.
2. ADR favors the better-financed party.
3. ADR won't work when issues are complex.
4. ADR won't work when issues are emotional.

ADR to wage a war of attrition, so the less wealthy party will be more apt to settle on terms favorable to the wealthy party. Although some parties undoubtedly use ADR in bad faith, for the vast majority the primary motivation is to end the dispute as efficiently as possible.

ADR Won't Work When Issues Are Complex

Litigators sometimes suggest that ADR is inappropriate when complex factual or legal issues are in dispute. They argue that the courtroom is the best place to resolve such matters. This argument ignores the fact that in ADR the parties are free to select their own decision-maker(s) and can specify a decision-maker with subject matter expertise. Additionally, in ADR the parties are not bound by the strict rules of evidence imposed in the courtroom, which makes it more likely that the arguments can be fully aired.

ADR Won't Work When Issues Are Emotional

A final objection to ADR is that it will not work when a dispute is emotionally charged. Just the opposite is true. ADR techniques have the potential to defuse an emotionally-charged dispute as the parties get to work together to find a resolution. In the courtroom the parties are adversaries and emotions can run high. In ADR the parties suddenly have a common goal-finding an agreement that will be acceptable to both. This process has the potential to sooth rather than enflame emotions.

COMMON FORMS OF ADR

Almost any means of resolving disputes without litigation could be described as an ADR technique. Any negotiation between parties would fall under this definition, since by its nature negotiation involves bringing the parties together to resolve a dispute. However, this course covers the formal ADR techniques typically used to resolve business disputes, such as arbitration, mediation, and several other nontraditional techniques.

Arbitration

Perhaps the oldest traditional ADR technique is arbitration. In arbitration a neutral-the arbitrator-is the decision maker. Although arbitration is typi-

cally highly structured and somewhat inflexible, it is far more flexible than litigation.

Arbitration has been in wide use for decades in maritime contract, international trade, and labor disputes. It has increased in popularity in the last few years. Many contracts contain an arbitration clause that requires the parties to arbitrate rather than litigate any dispute under the contract.

Major League Baseball uses arbitration to end salary disputes between players and their clubs. When a professional baseball player and his agent cannot come to terms with a team over salary, the dispute is resolved by an impartial arbitrator. Although the results are not always "fair" to either side, both the players and the teams recognize that arbitration provides an efficient way to resolve disputes and minimizes hard feelings generated by the dispute.

Although parties typically must agree to use arbitration rather than litigation, a growing number of courts require litigants to use "court annexed" arbitration for smaller cases. Parties do not receive a full trial but have their disputes settled by an arbitrator. Arbitration is discussed in more detail in Chapter 3.

Mediation

Mediation is probably the second-best-known ADR technique. Mediation differs from arbitration in that the neutral-the mediator-does not decide the issue in dispute. Rather the mediator works to bring the parties together so that they can find common ground and fashion their own agreement. The final agreement is devised by the parties themselves, not by the mediator.

Nontraditional ADR Techniques

In addition to arbitration and mediation, a number of nontraditional ADR techniques are growing in popularity. Perhaps the best-known is the mini-trial. A mini-trial is a structured event that can help parties in negotiating their disputes. A mini-trial does not decide any issues itself, but merely works to open the eyes of one or both sides about the merits of a particular case. Armed with this knowledge, the parties can often negotiate a mutually agreeable settlement.

Another ADR technique that can enhance settlement is factfinding. Factfinding is similar to but less structured than a mini-trial. Instead of presenting the parties' arguments to managers, the parties present their arguments and evidence to a neutral party. The neutral assesses the parties' arguments and issues a nonbinding report on the findings, which normally recommends a solution to the dispute. The neutral may find that one party or the other is totally in the right, or the report may suggest a compromise solution. The parties can then use this report as a basis for settling the dispute themselves.

A similar technique is the summary jury trial, in which a jury hears a shortened version of a case and reaches an advisory jury verdict. Once the officers of the companies have the jury verdict in hand, they are better able to negotiate a

settlement. A similar result can occur when a case is submitted to early neutral evaluation. In early neutral evaluation an experienced lawyer listens to both sides with a view to encouraging settlement or narrowing the issues for trial.

Two lesser-used ADR techniques are also worthy of study. Med-arb is a combination of mediation and arbitration, in which, at a prearranged point, the mediator switches roles and becomes an arbitrator. Accordingly, unlike mediation, med-arb ensures a decision. Another technique is called rent-a judge and involves using a private court system to resolve legal disputes.

All of these alternate ADR techniques are discussed in more detail in Chapter 5.

WHO SERVES AS DECISION-MAKER

ADR involves the use of a neutral who either decides the matter or helps the parties resolve the dispute. In arbitration the neutral is the arbitrator. The arbitrator essentially functions like a judge and has the power to decide the dispute.

In mediation the neutral is the mediator. In pure mediation the mediator does not have the power to decide the dispute. The mediator's role is to bring the parties together, and the parties themselves work out a solution. In mediation the neutral has no power to serve as decision-maker.

Mini-trials, summary jury trials, and early neutral evaluation do not result in decisions and thus do not require a decision-maker. They produce additional information that the parties use to reach a settlement. Although a judge or jury reaches a decision about the merits of the parties' cases, the parties are left to resolve the dispute. In this sense these techniques are more similar to mediation than to arbitration.

In med-arb, the process starts as mediation but switches to arbitration. The neutral starts as a mediator with no power to decide the matter. If the parties fail to agree, the neutral's role shifts and the neutral becomes an arbi trator, with power to hand down either a compromise decision or a decision favoring one party.

ROLE OF LAWYERS IN ADR

Although ADR is a substitute for traditional litigation, this does not mean that lawyers are completely eliminated from the process. Most business disputes do concern legal rights and responsibilities. Accordingly, lawyers are usually present or even take the lead in ADR proceedings. At the very least, parties consult with their lawyers before finalizing their agreements. When lawyers are involved in the process they must change their roles from zealous advocates to advisors who help their clients work toward rational solutions, acceptable to both sides.

GROWING USE OF ADR IN BUSINESS

More and more businesses are recognizing that legal expenses are a cost that needs to be managed. Many progressive organizations have come to realize that using ADR techniques not only saves money but can also provide better results.

Companies like BankAmerica, Borden, DuPont, Frito-Lay, W.R. Grace, Kraft General Foods, and McDonald's are all committed to using ADR as a first choice in resolving their disputes.

USE OF ADR IN A CPA PRACTICE

ADR can also be successfully used in a CPA practice. Accountants are subject to frequent litigation involving clients, employees, former employees, and third parties. Legal costs for busy CPA practices can be substantial, but these legal costs can also be managed by using ADR, when appropriate.

Contracts with clients can include the provision that disputes over the quality of a service or over fees can be submitted to ADR rather than be settled in court. Employment contracts can also specify that disputes over the terms and conditions of employment or other employment matters be resolved using ADR. Finally, partnership agreements-a frequent source of dispute-should also contain an ADR clause, to keep the matter out of court and out of the newspapers. The use of ADR in CPA practices is discussed in Chapter 7.

ADR PLEDGE

A number of companies, both large and small, have adopted ADR pledges, which state that the company's preferred method of settling disputes is through ADR rather than through traditional litigation. The pledge, a brief statement signed by the chief executive officer and general counsel on behalf of the company and its subsidiaries, costs the company nothing. However, it does establish a company-wide policy to use ADR first in resolving disputes.

CPR Institute

The CPR Institute for Dispute Resolution, which developed the pledge, is a . leading nonprofit alliance of international corporations, law firms, academics, and public entities. The CPR Institute estimates that ADR is currently used in resolving disputes totaling upwards of $8 billion annually.

Sample Pledge

Exhibit 1-3 is a pledge designed by the CPR Institute that has been adopted by more than 800 corporations and over 3,200 of their subsidiaries. Together these pledge signers produce over one half of the gross national product of the United States.

Exhibit 1–3
ADR Pledge

CORPORATE POLICY STATEMENT ON ALTERNATIVES TO LITIGATION

We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. . . .

In the event of a business dispute between our company and another company which has made, or will then make, a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR ("alternative dispute resolution") techniques before pursuing full-scale litigation.

The CPR Institute is a nonprofit initiative of 500 general counsel of major corporations, leading law firms and prominent legal academics whose mission is to install alternative dispute resolution (ADR) into the mainstream of legal practice.

A list of corporations that have adopted an ADR pledge is available from the CPR Institute in New York City. Call (212) 949-6490.

After reading the sample pledge, complete Exercise 1-2, which asks you to think about your own organization.

Exercise 1–2: Think About it

INSTRUCTIONS: ☛ Based on your experience and the material presented in this chapter, answer the following questions about ADR.

1. Has your organization adopted an ADR pledge? What does it say?

_____

2. If yes, what effect has the policy had on the manner in which the way your organization handles legal disputes?

_____

_____

_____

_____

3. **List any lawsuits or other major disputes involving your employer during the last five years.**

4. **Could ADR have been used to resolve or at least minimize the consequences of those lawsuits or disputes? Explain why or why not.**

5. **How does your organization use ADR to resolve disputes?**

6. **What are your organization's primary reasons for using ADR in place of litigation?**

WHEN CAN YOU INITIATE ADR?

ADR is almost always a voluntary procedure, since both parties must agree to use it to settle a dispute. One exception to this rule is court-annexed ADR.

Some courts require parties to use ADR to settle certain kinds of disputes rather than resorting to traditional litigation. For example, some courts require ADR in child custody cases or for disputes involving sums under a certain dollar amount.

Generally ADR can be initiated at almost any phase of a dispute. After reading this section of the chapter, complete Exercise 1-3, which asks you about ADR in your own organization.

In the Contract

The easiest and probably most common way to initiate ADR is by invoking an ADR clause in a contract. An ADR clause requires the signers of the contract to use ADR to resolve certain problems.

Although ADR clauses can vary, they typically provide that a dispute under the contract be settled using arbitration or mediation and specify the rules to be used for the process. For example, a very common clause provides that, in the event that there is a disagreement arising out of the contract, the dispute be submitted to arbitration supervised by the American Arbitration Association.

When a contract contains an ADR clause, only disputes that relate to the subject matter of the contract are to be decided using ADR. Other matters between the parties not explicitly covered by the clause are still subject to litigation. A typical ADR contract clause is illustrated in Exhibit 1-4.

When a Dispute Arises

Even when a contract does not include an ADR clause, either party can propose that the dispute be submitted to ADR. This can be done at any time, but one party usually has to take the initiative and make a concrete proposal.

A party receiving such a proposal might assume that the party proposing ADR is in a weak position. This is a mistaken perception, sometimes suggested by a company's attorneys. Lawyers tend to be biased against nonlitigation alternatives-after all, they play a far smaller role and receive far lower fees when disputes are resolved using ADR.

Exhibit 1–4

Sample ADR Contract Clause

Any controversy or claim arising out of or related to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof.

Source: American Arbitration Association (included by permission)

During Litigation

Even after litigation has already begun, ADR can be used-right up to the start of a trial and even afterward. Judges want parties to settle their own disputes whenever possible and actively encourage the use of ADR. In fact, in some courts the use of ADR is mandatory. Even after litigation is underway, a judge may grant a stay (postponement) to allow the parties to try to use ADR to settle the dispute.

Exercise 1–3: Think About It

INSTRUCTIONS: ☛ Answer each of the following questions with reference to your own organization by writing "yes," "sometimes," or "no" in the space provided.

1. _____ We view dispute resolution as a manageable cost.
2. _____ Our managers and staff are well-versed in the value of mediation as a tool to manage costs.
3. _____ Our managers and staff have had formal training in mediation as a means of controlling dispute costs.
4. _____ Our employment contracts include a mediation clause.
5. _____ Our contracts with clients include a mediation clause.

WHERE DO YOU FIND ADR SERVICES

Finding ADR services is not as simple as it may sound, since they are generally not listed in telephone directories. Most ADR practitioners are retained on the basis of personal recommendations or referrals from other professionals.

Court-Annexed Arbitration

If a dispute is already in court and the judge or local court rules mandate arbitration or mediation of a dispute, the court can provide a list of approved ADR practitioners. In fact, the court may automatically appoint one from the list. The court will ensure that the person is qualified and knowledgeable, and the practitioner will work under the supervision of the court to resolve the matter. Typically, parties who use court-annexed ADR must pay a fee for the service, but the fee is lower than the market rate for the services.

Private Services

Parties not involved in court-annexed ADR must find their own practitioner. The first step is to decide which type of ADR is appropriate. In many cases this is spelled out by the contract. For example, the contract may require that any dispute be submitted to arbitration. The agreement may even go further and specify that it is to be arbitrated by a particular group, such as the American Arbitration Association. In some cases a contract may specify that each party is to select its own neutral and that the two neutrals in turn select a

third neutral, making up a panel to resolve the dispute.

When the contract is silent about who will act as a neutral or when there is no contract, the parties must select a neutral. Many neutrals work through or are employed by arbitration services or mediation services. These services often employ retired judges and former litigation attorneys, as well as professional arbitrators and mediators.

Currently most such services are local, although some have a broader practice, like Judicial Arbitration & Mediation Services, Inc. QAMS), which has offices in a number of cities. Typically an ADR service charges a slightly higher fee than an independent practitioner, to cover its overhead expenses. One advantage of using an ADR service is that the service can provide a greater range of neutrals and may have several on staff who can handle your problem. Additionally, they can provide a substitute if the first neutral you select cannot perform for one reason or another.

Most ADR services let the parties jointly select a neutral. They provide resumes so the parties can select someone with experience and subject matter knowledge that matches their needs.

Private Practitioners

Although many neutrals work with services, a number of highly skilled neutrals work independently and have their own office staff. They may specialize in arbitration or mediation or both. Some concentrate in specific areas, like construction claims.

HOW DO YOU FIND A QUALIFIED DECISION-MAKER

Neutrals come from many walks of life. Many, though not most, are attorneys. Attorneys are generally known for their combativeness, but this trait is not helpful in ADR, where compromise and working together with an opponent may be the only way to forge a solution. Accordingly, attorneys who work as neutrals have to adopt a far different style in bringing parties together. When a dispute involves serious legal issues, an attorney neutral may have the background to understand the case and the nuances involved. When the case involves a financial transaction, a neutral familiar with financial statements and business transactions might be a better choice.

Currently, there is no national certification for ADR neutrals. This may change as ADR becomes more widely accepted. Some states have licensing requirements for those working with the courts, but generally anyone is free to call him or herself an arbitrator or mediator, just as anyone is free to call him or herself an accountant. Accordingly, parties need to be careful in making their selection because neutrals come with a wide range of experience and abilities. Those seeking an experienced neutral can ask associates for recommendations, ask for references, or ask whether the neutral is a member of SPIDR, the Society of Professionals in Dispute Resolution, a national society

which limits its membership to those who have a number of years of experience as ADR neutrals.

Experience

Parties should seek out a neutral with a sufficient amount of experience. Dispute resolution is more of an art than a science, and experience in dealing with many different parties gives a neutral an edge. Of course, experience alone does not guarantee that the person will do an exceptional job. An experienced, competent neutral who happens to be extremely busy may not have sufficient time to give the matter the attention it deserves.

Subject-Matter Expertise

When a dispute involves a technical question, it is helpful to have a neutral who is familiar with the subject. For example, a professional firm receives a retainer from a client in return for performing all regular and necessary professional services each month. Suppose the client decides it wants to go public and asks the firm to do a substantial amount of additional work in preparation for its IPO, contending that the additional work is covered by the monthly retainer. The professional firm objects that the additional work is not a "regular and necessary" service and it should receive additional compensation. If this dispute goes to arbitration it would be helpful, although not essential, for the neutral to have experience with professional services and retainer agreements. Even in mediation, subject matter expertise can be quite helpful, since the neutral typically will be asked to give an opinion about the reasonableness of arguments.

Referrals

Perhaps the best source of information about neutrals is a referral from a trusted party. A first-hand testimonial is often more valuable than an impressive resume. Attorneys frequently use or are acquainted with neutrals and can be quite helpful in recommending specific neutrals for a particular job. State and local bar associations also have ADR sections, whose members specialize in this area.

ADR Services

A good source of neutrals is a local arbitration or mediation service. Neutrals are either hired by or associate with a service to provide ADR services to the public. The service checks the neutral's credentials and provides back-up support in the event a substitute is necessary. For example, the parties may discover that a mediator has a potential conflict of interest that wasn't apparent at the outset. It should be easy for the service to find a substitute to take the original mediator's place.. Dealing with a established local ADR service can save the parties time and effort because the service will have prequalified its neutrals. Typically the parties can view a number of resumes and select the neutral that best fits their needs.

A list of ADR services and their addresses appears in the appendix.

American Arbitration Association

The American Arbitration Association (AAA) is one of the oldest organizations in the ADR field. Despite its name it is involved in various facets of ADR, not just arbitration. The AAA, a nonprofit organization with offices nationwide, specializes in providing ADR services for commercial businesses. The AAA has developed extensive model rules that prescribe the procedures in arbitrations and mediations. Many arbitration clauses in business contracts specify that disputes will be handled either by AAA arbitration and/or that a hearing will be conducted under AAA rules by AAA-qualified neutrals. The address of the AAA appears in the appendix.

Society of Professionals in Dispute Resolution

Neutrals with substantial professional experience are often members of the Society of Professionals in Dispute Resolution (SPIDR). Members of SPIDR have to have a minimum number of years of experience in the ADR field and must agree to abide by SPIDR's code of ethics. SPIDR can refer of professionals who provide various ADR services. SPIDR's address appears in the appendix.

Alternative dispute resolution (ADR) is a method for resolving serious business disputes in a efficient and effective manner. It is a cost-efficient alternative to the traditional legal system. Alternative dispute resolution is a term that actually describes a number of techniques, including arbitration and mediation, as well as some non-traditional techniques, such as mini-trials and summary jury trials.

ADR has a number of advantages over litigation, including speed, flexibility, and cost savings. Although there are a number of common objections to using ADR, none of them is persuasive.

Although ADR is a substitute for traditional litigation, lawyers are sometimes involved in the process. However, they generally need to abandon their adversarial role in favor of a problem-solving role.

A number of companies, both large and small, have adopted ADR pledges, which state that the company's preferred method of resolving disputes is through ADR.

ADR neutrals come from many walks of life and either practice individually or are affiliated with ADR providers.

Suggested Answers to Exercise 1–1

SITUATION A

This case lends itself to ADR. If the matter went to court ABC could suffer some very embarrassing publicity. What's more, it is likely that ABC could get a better result in ADR, based on the facts. Even in the unlikely event that ABC should prevail in court, litigation would be an expensive way to end the dispute.

SITUATION B

The problem here is minor but is holding up construction of XYZ's building. If the matter goes to court it may take years to resolve. If the matter is settled through ADR it could be resolved quickly, with the same or similar result. Since XYZ is already willing to compromise, ADR will merely give XYZ its answer faster and at lower cost.

Review Questions

1. The primary goal of ADR is to: 1. (b)
   (a) arrive at a compromise solution for all disputes.
   (b) resolve disputes without litigation.
   (c) ensure that the matter is decided by a neutral person.
   (d) achieve a fifty-fifty solution.

2. Which ADR technique provides a "private court system"? 2. (a)
   (a) Rent-a-judge
   (b) Summary jury trials
   (c) Mini-trials
   (d) Med-arb

3. Which ADR technique is closest to traditional litigation? 3. (c)
   (a) Mediation
   (b) Med-arb
   (c) Arbitration
   (d) Early neutral evaluation

4. ADR techniques can be used to settle a dispute between two parties: 4. (b)
   (a) only if ADR is specified in the parties' contract.
   (b) at any stage in the life of the dispute.
   (c) at any Rime before a lawsuit is commenced.
   (d) only after a lawsuit has concluded.

5. Which of the following statements about lawyers' roles in ADR is correct?
   (a) Lawyers participate in the advocacy stage but are eliminated from the decision-making process.
   (b) Lawyers are more in control of the process than they are in traditional litigation.
   (c) Lawyers are eliminated completely and replaced by managers.
   (d) Lawyers often have to change their approach from zealous advocacy to problem-solving.

5. (d)