



## ADR Spectrum

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### ADR Spectrum

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### Alternative Dispute Resolution (ADR)

At JAMS, clients are assisted by expert, professional neutrals (retired judges and attorneys) who use a full range of dispute resolution processes between direct negotiation and litigation to achieve resolution.

In **Direct Negotiation** the parties collectively retain complete formal and informal control over the process and its outcome including:

- the ground rules and the agenda
- the selection of the neutral
- the place and timing of the negotiation
- use of their own negotiation styles and strategies
- when and how they communicate, listen and convey reactions
- whether to obtain outside information, comment, or feedback and if so, whether to introduce it
- the decision to end the process at any time
- the ability to discuss and agree upon issues and solutions that need not relate directly to the subject matter of the dispute
- the acceptance of an outcome unless mutually agreed upon

In **Litigation**, the parties have minimal control over process or outcome:

- the court retains ultimate authority, interpreting and applying the rules of civil litigation
- the court sets discovery deadlines, conference dates and trial dates
- the neutral decision-maker is determined by the court
- the rules of trial practice and evidence in the presentation of the case must be followed
- parties are bound to the facts found and decisions made by judge and jury, subject to limited right of appeal
- only narrow forms of remedies are available—an award of money damages or limited injunctive relief

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### DEFINING THE JAMS ADR SPECTRUM

#### MEDIATIVE PROCESSES

In **Mediative Processes**, a third party neutral works to facilitate a negotiated settlement between the parties. The mediator facilitates the negotiations and evaluates the relative merits of the claims and defenses. The neutral does not have power to impose a solution or decision - **the parties retain ultimate control over the outcome**. The terms of the agreement are limited only by the interests and creativity of the parties and the neutral. By agreement and permission of the parties, the neutral sets the ground rules and may profoundly affect the order of the proceedings, the parties' collective and individual analyses and the general dynamic of the settlement discussion.

**Facilitative Mediation** is a process in which outcome control remains almost entirely in the hands of the parties and counsel. The mediator restores communication and helps to create options for resolution by:

- ensuring that all relevant information is exchanged and heard by the parties or confirms that there is a good reason why it isn't being exchanged
- providing parties the ability to vent
- coaching negotiators on next moves
- helping parties invent settlement options
- transmitting offers and demands
- working to overcome potential impasses

**Evaluative Mediation** occurs when the mediator creates more structure and injects his or her own view or prediction of the trial outcome. It is often used for more difficult cases, where the gap between the parties is large, the issues somewhat complex and the stakes high. The mediator allows the parties to test the reality of their predicted outcomes by:

- working to thoroughly understand the parties' factual and legal arguments
- providing feedback on the relative merits of claims and defenses
- offering his or her prediction of the outcome in court

- in some circumstances, recommending settlement ranges

**Neutral Evaluation** is a non-binding process in which the parties retain a neutral to provide an evaluation based solely on the merits of the case. The neutral:

- reviews the factual and legal positions of the parties either through briefs or oral arguments
- evaluates what the likely jury outcome might be
- provides his or her view of the likely/fair results
- is not retained to facilitate the parties negotiations

**Mini-Trial** is a highly structured, formalized and evaluative mediation process in which the parties cede a great deal of procedural control in order to reframe the dispute from the context of litigation to the context of a business problem. It requires the participation of non-legal party representatives with settlement authority who sit as a panel with the neutral. The neutral advisor:

- works closely with the parties before the hearing to facilitate agreement on procedure and resolve disputes
- oversees the panel of senior business officers
- moderates the mini-trial hearing and then provides an evaluation if necessary
- facilitates settlement between the parties after rendering his or her evaluation

**Non-Binding Arbitration** is a hearing process that looks and feels like arbitration, but is advisory, not binding. The neutral advisor(s):

- sets up and presides over the process
- reviews the factual and legal positions of the parties either through briefs or oral arguments
- evaluates what the likely arbitration outcome might be

**Neutral Expert Fact-Finding** can be a stand-alone, non-binding process, or it can be part of a larger non-binding process. It is used to help resolve a disputed technical issue. The neutral:

- finds facts and provides analysis after hearing presentations by the parties, and their experts
- acts as a substitute for partisan experts
- can conduct an independent investigation into the technical facts and issues

**Court Appointed Special Masters/Discovery Masters** are appointed by sitting judges to assist with disputes that are legally or administratively complex. Discovery masters are selected by the parties rather than appointed. The special master or discovery master:

- assists in designing case settlement options
- may mediate the cases or groups of cases for mass torts
- mediates discovery disputes
- makes rulings on discovery issues that can't be resolved

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## ADJUDICATIVE PROCESSES

In **Adjudicative Processes**, a third party neutral is brought in to hear and consider facts and/or arguments presented by the plaintiff and defendant, and to render a reasoned binding decision or solution based upon an agreed upon standard of legality or fairness. The neutral's role is to issue a solution for the parties, not to help them reach an agreed-upon solution to their dispute.

**Arbitration**, long used as an alternative to litigation in commercial disputes and labor disputes, offers less formal procedures, abbreviated presentations and the undivided attention of the neutral(s). The arbitrator(s):

- establishes the ground rules governing an arbitration in the period immediately following the initiation of the arbitration to ensure an expeditious, cost-effective and fair process
- rules on discovery requests and disputes
- determines whether to apply rules of evidence and to what degree
- hears expert witnesses and cross examinations
- reviews briefs, documents and other exhibits
- entertains argument by counsel before rendering a decision
- administers arbitration according to the JAMS Rules and Procedures for Arbitrations

**Bracketed Arbitration** ("high-low") occurs when the parties structure an agreement to "bracket" or limit the possible range of outcomes. The parties may agree that the arbitrator:

- will decide only the issue of liability with predetermined sums to be paid by the defendant or plaintiff accordingly
- delivers a verdict on liability and damages while agreeing in advance on minimum and maximum payment sums
- is not told the bracketed range, in effect creating "blind bracketed" arbitration

**Final Offer Arbitration** ("baseball") occurs when the plaintiff and the defendant each separately submit a "final" to the arbitrator. The arbitrator:

- chooses an appropriate settlement between the offer or the demand presented based upon the settlement heard

**Private Judging**, a private trial conducted by a former judge, is most similar to a conventional trial in that judgment may be appealed for errors of law, or as against the weight of the evidence. In jurisdictions that permit this process, the neutral:

- is selected by the parties, often because he or she has the necessary expertise for highly complex or technical issues
- is asked to try the issues in a case and to make findings of law or fact
- enters a decision as a judgment which will become a matter of public record
- offers parties the flexibility to exert some control over the timing of the resolution of their dispute

**Med-Arb** offers parties the ability to participate in a mediation having agreed in advance that if unable to reach a settlement, the process will shift to an arbitration. The neutral:

- can serve as both mediator and arbitrator in an **"integrated" process**, acting to facilitate negotiations and also making binding decisions on stalemated issues along the way
- in a **"separate" process** will attempt to achieve a mediated settlement before "switching hats" to decide any unresolved issues
- acts as either the mediator or the arbitrator but not both in a **Med/Arb-Opt Out**
- makes a binding settlement decision between the final offer or final demand given in a **Final Offer Med/Arb**

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