

## **BEST PRACTICE NUMBER 7**

### **GET HELP FROM A THIRD PARTY NEUTRAL<sup>99</sup>**

As we have seen, good labor-management relations are often not possible based on intuition alone. They require effort, discipline, objectivity and a long-term view that is difficult to achieve given the many divergent interests between labor and management. In a great majority of cases, it is helpful to have an outside third-party to initially bring the parties together, teach them the skills and processes that have worked to improve relations in other contexts, and then keep the process on track.

In the case studies, we see the use of third-party neutrals in several places. Where the case studies focus on economy-wide initiatives, we see the increasing use of government agencies to provide mediation and conciliation services. (Please see the [case studies](#) from **Canada, Indonesia, New Zealand, Philippines** and the **United States**.) These governments have realized the tremendous economic, political and social benefits to improved labor relations and the excellent return that mediation and conciliation services provide for the public's investment.

#### **A. What Services Do Third Party Neutrals Provide?**

Above and beyond the specific services she provides, a third-party neutral must serve as the visible advocate for labor-management cooperation in an organization. She must be its principal cheerleader and facilitator. She must "sell" the process to both sides, emphasizing the benefits for each.

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<sup>98</sup> [Grupo Resistol](#), at p. 2; [Grupo Resistol PowerPoint Slides](#) at at [http://www.gnzlz.com/case\\_studies\\_in\\_bp.htm](http://www.gnzlz.com/case_studies_in_bp.htm).

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She must have relentless energy, gaining a multi-faceted understanding not only of all the issues affecting the relationship, but a sense of the history behind them as well. She must display leadership and at the same time empower new leaders to take her place, and make the cooperative programs she is launching eventually become self-sufficient. She must stay abreast of developments internal and external to the organization, and keep track of them in case they threaten the relationship that she has worked so hard to engender among the parties.

Above and beyond serving as the moral and spiritual force in favor of LMG cooperation in an organization, third-party neutrals perform concrete functions that we will detail in the three sections to follow.

### **1. Facilitator of Communications**

Simply put, parties with divergent interests find it easier to engage in problem solving with the assistance of a third-party. This is not surprising. Third parties, among other things:

- (1) offer important logistical support by scheduling discussions and providing appropriate locations for them;
- (2) ensure that all parties have a chance to be heard and that one side is not silenced by differences in power, position, or persuasive ability;
- (3) establish ground rules to keep discussions civil and focused on the problem at hand;
- (4) assist the parties to express their interests, exchange information, jointly problem solve, and set up mechanisms for the timely implementation of agreements; and

- (5) incorporate discussions at the table into written and signed documents.

While the above functions are among the most basic performed by third-party neutrals, it is important to emphasize that third-party assistance comes in a wide variety of forms ranging from most facilitative/least adjudicative to least facilitative/most adjudicative. Since the field of Alternative Dispute Resolution (ADR) is still evolving, the processes described below sometimes come with different names, or processes with the same name have different descriptions in different contexts. Therefore it is not important to match the correct name with the correct ADR process, but it *is* important to have an intuitive grasp of the range of ADR services from most facilitative/least adjudicative to least facilitative/most adjudicative. With that in mind, the following is a sample of ADR services performed by third-party neutrals:

- (1) Facilitation: In facilitation, the third-party neutral simply provides logistical support, helps parties “break the ice” to get down to substantive discussions, stay on track, and record the discussions. Facilitation is generally performed in groups greater than six people, so the techniques of a facilitator apply mainly to large-group dynamics.
- (2) Mediation:<sup>100</sup> In contrast to a facilitator, a mediator takes her intervention one step further and actively works with the parties to jointly problem solve and reach a concrete agreement. This active intervention is harder to sustain as the number of people at the table rises. With higher numbers of people, a mediator may have to employ the techniques of a facilitator, or break the group up into smaller committees in order to work at the level of detail required.

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<sup>100</sup> In some economies, the terms “mediator” and “conciliator” are used interchangeably, while in other economies the two terms take on different meanings. This Tool Kit will treat the terms as synonymous.

- (3) Early Neutral Evaluation: An Early Neutral Evaluator is a facilitator who is also an expert in the subject matter at hand. The Evaluator gives his opinion as to which party is more likely to legally prevail on the issues in dispute, and uses this information as pressure points to encourage parties to reach an agreement using mediation techniques.
- (4) Non-binding Arbitration: In a non-binding arbitration, the arbitrator listens to the legal arguments of both sides, examines evidence, and then renders an opinion that the parties are not obligated to follow, but which they can use in negotiations.
- (5) Binding Arbitration: In binding arbitration, the parties present their case to a subject matter expert who renders an opinion that the parties contractually agree to abide by. An arbitrator's opinion is enforceable in a court of law except in the rare circumstance in which an arbitrator has somehow violated the law, abused her discretion, or acted arbitrarily or capriciously.
- (6) Mediation/Arbitration ("Med-Arb"): The parties present their case to a mediator, who works with them to reach an agreement using mediation techniques. If no agreement is reached, then the mediator renders a non-binding or binding opinion. The advantage of med-arb is that the parties must be as forthright as possible, and not hold any arguments or evidence "in their pocket" because at the same time they are working with the mediator to reach an agreement, they are also trying to influence the outcome of an arbitration.

## **2. Trainer in Cooperative Labor-Management Techniques**

As several case studies demonstrate, one of the most important services that a modern third-party neutral performs is to train parties in cooperative labor-management techniques and related negotiation skills.

Under the rubric of cooperative labor-management techniques, we include methods to help organizations develop workers that have a greater

personal stake in the quality, productivity and efficiency of their work. This is the “owner’s mentality” that we have alluded to in several places in this Tool Kit. While at first blush this may seem to be a one-sided management initiative, upon closer examination we see that it involves empowering workers way beyond what many organizations are comfortable with. In order to get to the point where much of an organization’s workforce has an owner’s mentality, workers need to be trusted with the freedom to create, a mechanism to incorporate their input, and appropriate incentives for going beyond what is called for in their job description. As was discussed in the introduction, it is this type of empowerment that stands to provide the most humanizing force for working life in the global workplace.<sup>101</sup>

For example, as we saw in [Chapter 4](#), third-party neutrals have helped many organizations to establish mechanisms for empowering workers by devolving decision-making power to the lowest levels of an organization. This is counter-intuitive to many organizations. A third-party neutral can

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be immensely helpful in assisting the organization to achieve the necessary paradigm-shift required for it to trust its workers enough to empower them in this way and thereby reap the great benefits of doing so. Part and parcel of

this paradigm-shift is training in methods of non-threatening communication, Interest Based Negotiations, and policy and process changes that an organization can make to lower the barriers to productive interchange between workers and managers.<sup>102</sup>

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<sup>101</sup> See the Introduction, at Section III.

<sup>102</sup> See, e.g., [Miller Dwan](#), at pp. 7-9; Harley Davidson Case Study, <http://www.capi.uvic.ca/publications.html>, at *passim*.

Even for organizations that are not quite ready to devolve too much decision-making authority to their front-line workers, third-party neutrals perform important training to improve the labor relations climate. For example, third-party neutrals train labor and management representatives in the legal and institutional framework of their relationship – i.e., the applicable labor law, the institutions responsible for enforcing and resolving disputes under it, and some of their most important rights under it.<sup>103</sup> Such training gives parties a road map upon which to base a more formal, objective and respectful relationship. Third-party neutrals also train labor and management representatives in techniques for improving cooperation and communication within that framework.<sup>104</sup>

Third-party neutrals also help organizations align the goals and objectives of workers and managers alike, and engage in strategic planning based on their common goals and objectives. While there is no doubt that their interests diverge in many cases, their interests also converge in many cases. Third-party neutrals can use their dispute resolution skills to foster the type of interest-based discussions that are conducive to alignment of goals and of strategic planning.<sup>105</sup>

In the next sub-section, we will see that third-party neutrals also provide consulting and technical assistance to labor and management in order to institutionalize mechanisms to carry out their strategic planning and resolve disputes on an ongoing basis. And once those mechanisms are in place, they provide ongoing training in methods to make them more effective. For example, in the [Atlantic Baking Group](#) case study,

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<sup>103</sup> [Quebec Labor Relations](#), at pp. 12-14.

<sup>104</sup> See, e.g., [Atlantic Baking Group](#), at pp. 9-10.

<sup>105</sup> [Philadelphia Zoo](#), at pp. 4-7.

Commissioner Robert Ditillo conducted a diagnostic assessment with the [Atlantic Baking Group](#)'s LMC to help its members determine the areas of group dynamics and interpersonal communications that they needed to work on in order to make their LMC more successful. Following the assessment, Commissioner Ditillo conducted a two-day workshop on the following modules:

1. Effective Planning
2. Effective Meetings
3. Group Problem Solving
4. Consensus Decision Making
5. Effective Communications
6. Understanding Self and Others
7. Interpersonal Skills
8. Group Dynamics & Shared Leadership<sup>106</sup>

Finally, and most importantly related to their third-party mediation work, third-party neutrals often provide training in negotiation techniques that are more likely to produce an agreement: namely IBN techniques. A common practice is to provide joint training to negotiating committees from both sides just prior to negotiations.<sup>107</sup> This provides an important bonding experience between the parties, which sets a positive tone for negotiations. It also makes it more likely that the parties will still have a grasp of the interest-based techniques and a conciliatory attitude when they sit down at the bargaining table.

### **3. Consulting and Technical Assistance to Establish Permanent Mechanisms for Labor Dispute Resolution**

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<sup>106</sup> [Atlantic Baking Group](#), at p. 9.

<sup>107</sup> See, e.g., [Miller Dwan](#), at pp. 7-9; [Ottawa Transpo](#), at pp. 4, 7-8; [Philadelphia Zoo](#), at p. 7; [Quebec Labor Relations](#), at p. 16.

In addition to just training labor and management representatives, more and more third-party neutrals are working with organizations in a consulting capacity to institutionalize the cooperative processes that they either establish through negotiations or incorporate into their joint Labor-Management training. We have already discussed various joint committees and mechanisms for information sharing and feedback that have been made permanent by the organization. Third-party neutrals work with parties to set up such mechanisms, training them in how to start and maintain them. In many cases they actually facilitate the first few meetings, modeling good behavior and techniques as well as making sure that the relationship does not fall apart before it has a few successes under its belt.<sup>108</sup>

In other cases, the Third Party Neutral serves as a consultant to help set up an informal dispute resolution system within the organization. In these cases, he helps the organization set up intake procedures, criteria for when conciliation is appropriate, ethical guidelines for both conciliators and parties, and appeals procedure, and a procedure for processing complaints about conciliator misconduct. In addition, the Third Party Neutral will advise the organization on how to best internally promote the program so that all workers and managers understand what it entails, trust it, and feel comfortable using it.

In some cases, an organization's cooperative initiative is too ambitious to be dealt with by just a committee, and a more extensive "partnership" is established. A partnership involves an agreement between the highest union officials and the highest levels of management in an organization to

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<sup>108</sup> See, e.g., [Miller Dwan](#), at p. 9; [Quebec Labor Relations](#), at p. 17.



change the organizational culture for their mutual benefit. It involves periodic high-level meetings, several ongoing smaller committees, as well as mechanisms for evaluation and feedback on the success of the initiative. These types of initiatives require a high level of intervention on the part of the third-party neutral.<sup>109</sup>

On the sectoral level, organizations such as the [Canadian Steel Trade & Employment Congress](#) and the **Garment Industry Development Corporation** promote cooperation between labor and management to promote common interests such as demand-driven training, worker readjustment, health and safety, and the economic well being of the sector.<sup>110</sup> These organizations, which in effect are the third-party neutrals, play a vital role in facilitating dialogue so that the parties can advance their common interests.

Finally, on the economy-wide level, organizations such as the Philippine National Mediation & Conciliation Board,<sup>111</sup> the Korean National Labor Relations Commission,<sup>112</sup> the Federal Mediation and Conciliation Services of both Canada<sup>113</sup> and the U.S.,<sup>114</sup> and the New Zealand Mediation Service,<sup>115</sup> serve their constituents generally free of charge. While all of them provide dispute resolution services of the kind described in Section (A)(1), above,

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<sup>109</sup> See, e.g., the Kaiser-Permanente Labor-Management Partnership, highlighted at the June 1999 APEC Victoria Colloquium on Successful Human Resources Practices in the Workplace: Contributions from Labor, Management and Government, at <http://www.capi.uvic.ca/publications.html>, at p.4; See also [Matsushita](#), *passim* and [Thai Honda](#), *passim* (Numerous committees, policies and structures Developed based on underlying principles of labor-management cooperation.)

<sup>110</sup> [Canadian Steel Case Study](#), *passim*; See also, Garment Industry Development Corporation Case Study, at <http://www.capi.uvic.ca/publications.html>.

<sup>111</sup> See the [NCMB Case Study](#).

<sup>112</sup> See the Korean NLRC Website at <http://nlrc.molab.go.kr/nirc/main.htm>

<sup>113</sup> See the FMCS Canada Website at [http://labou-travail.hrdc-drhc.gc.ca/sfmc\\_fmcs/message/index.cfm/doc/english](http://labou-travail.hrdc-drhc.gc.ca/sfmc_fmcs/message/index.cfm/doc/english)

<sup>114</sup> See the U.S. FMCS Website at [www.fmcs.gov](http://www.fmcs.gov)

<sup>115</sup> See the [New Zealand Case Study](#), at pp. 6-8.

they also provide training and institutional consulting services to varying degrees. In recent years, there has been an increased emphasis on training programs, not just to resolve but also to prevent labor-management conflict and to institutionalize those preventive mechanisms.<sup>116</sup>

While, clearly, there are numerous benefits of calling upon the assistance of a third-party to improve the labor relations climate within an organization, it should be emphasized that without a willingness to collaborate on the part of labor and management, even the most skilled mediator will not be able to create peace. Thus, in the end it is not a matter of technique or strategy to create labor peace, rather it is a matter of the willingness of both sides to collaborate for mutual benefit. If organizations can call upon third parties for assistance in channeling their preexisting willingness into concrete actions, they will have utilized one of the most valuable Tools in this Tool Kit.

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<sup>116</sup> See, e.g., [Atlantic Baking](#), at pp. 9-10; [Lapanday](#), at p. 4; [Ottawa Transpo](#), at p. 4;