PDHonline Course P101 (4 PDH)

Alternate Dispute Resolution

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Module #1
Introduction and Negotiation

1. This Course is intended for:

This course is intended to be taken independently of any other project management course or any other course for that matter. It is suitable for students from all walks of life or professions. No technical or legal expertise is necessary. Enjoy!

2. Introduction

Alternate Dispute Resolution (ADR) is a set of dispute resolution techniques and processes for disagreeing parties to reach an agreement (settlement) without ligation. It can be looked at as a collective way that parties can settle disputes, with or without the help of third parties. Despite resistance to ADR by some, ADR has gained widespread acceptance within the general public and the legal profession. In fact, many courts, both state and federal now require disagreeing parties to engage in some form of ADR before allowing a civil lawsuit to go to trial. The popularity of ADR can be traced to the increasing caseload of traditional courts. In addition, there is a perception that ADR is faster and less costly than litigation. Many times there is a desire by one or both parties for confidentiality and for the parties to have some control over the selection of individuals who will hear the case and determine the outcome of the dispute.

ADR must be either in “the contract” or agreed to by the parties involved, otherwise, the dispute is likely headed to the courts. There are generally five forms of ADR. The three most basic forms are:

1. Negotiation
2. Mediation
3. Arbitration

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Beyond the three basic types of ADR, there are three other not-so-common forms of ADR which are:

1. Case Evaluation - a non-binding process where the parties present the dispute to a neutral case evaluator who then advises each of the parties on the strength and weakness of their position. The evaluator assumes the dispute will go to trial and advises on how likely a jury will rule.

2. Early Neutral Evaluation – Similar to #1 above, but usually occurs after a lawsuit has been filed. Again, a neutral expert is used to advise the parties on their case. This alone may influence the parties towards settlement.

3. Neutral Fact-Finding – A process where a neutral third party is appointed by the parties or by the court. The neutral expert investigates the dispute and reports to the court. The neutral may also testify in court. This method is extremely useful when complex technical issues are involved.

This course explores the three most basic forms of ADR outlined above (negotiation, mediation, and arbitration).

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MODULE #1 - NEGOTIATION

How it Works

Negotiation is a process used to obtain an acceptable agreement **without** the use of third parties. Normally, it is based on a three-stage process. In most cases, the most important stage is left out by one side, the other side, or both sides. That left-out stage is preparation. The second most left out stage is closure. The three stages of negotiation are:

Stage 1 – Preparation

- This is the most important stage.

Stage 2 – Negotiation

- The bargaining process.
- Reaching an agreement.

Stage 3 – Closure

- Formalizing the agreement in writing.

Remember, normally the earlier a dispute is settled and ended, the less it is going to cost you and the other party (both in time and money). If you fail to settle the dispute by negotiation, you are probably headed for litigation, the most expensive, time-consuming, and unpredictable pathway. In most states, attorney fees are not recoverable in contract disputes unless the contract specifically allows for their recovery. So, lacking a specific clause that states otherwise, attorney fees are sunk cost, for both sides. This cost can never be recovered. Your internal people's time and expenses are also probably not recoverable. Therefore, the sooner the settlement is reached, the lower the total overall lifecycle cost for the parties.

Some settlements might take a little time to become "ripe". This means one side or the other might not really be ready to settle. However, if a settlement offer is made at any time, by either side, it should be seriously considered in light of what the parties are facing. It is extremely important for both sides to understand the nature of the dispute, what caused it, the strengths, and the weaknesses of the case. For a settlement to be ripe, both sides have to have a full and complete understanding of their situation and position. Many times organizations filter the

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truth about disputes before it reaches a decision level. It is very important for the dispute decision maker to drill down far enough and long enough to have fully determined the nature of the dispute, along with your and the other sides'

strengths and weaknesses. For negotiation to have a realistic chance of real-time success, each party in the dispute must empower their representative to negotiate and settle the dispute without calling the home office every 15 minutes for approvals and/or instructions.

For large dollar value disputes, the negotiation should occur on a neutral site. For example, an airport conference room or hotel conference room is approximately equal distance from the offices of the parties in dispute.

For negotiation to work both sides must do their homework. It is extremely important to know the truth about the dispute, what caused it, liability, damages, the strengths, and weaknesses of your side of the dispute along with the strengths and weaknesses of the other parties' case/position. If you are unrealistic about the strength of your case and potential settlement terms, negotiations will generally not result in a settlement.

Before we examine the three stages of negotiation, one must consider the question "When does one commit to negotiating or just stop and go to litigation?"

NEOGIATE or LITIGATE?

What does one get when you combine a litigious American Society with an overworked and overburdened court system? Slowdowns, increased cost, unpredictable and unrealistic jury results. So, the question becomes, should you slug it out in court until the bitter end? Will you secure that huge award you think you will? And if so, when? Remember, time is money,

Civil Cases generally follow the sequence below:

1. **PLEADINGS**
    a. Complaint – What the party did wrong and why they are liable.
    b. Answer – General denial, denial of facts and affirmative defenses.

2. **DISCOVERY**
    a. Depositions

b. Document demands
c. Written interrogatories
d. More demands

e. More depositions
f. Witness preparation
g. Development of exhibits
h. More and more

3. TRIAL

a. Plaintiff and Defendant opening statements
b. Plaintiff witnesses
c. Defense cross-examination
d. Plaintiff other evidence
e. Defense witnesses
f. Plaintiff cross examination
g. Defense other evidence
h. Plaintiff and Defense closing arguments
i. Jury deliberations

4. APPEAL (Sometimes)

a. One party or the other does not like the court ruling.
b. One party or the other believes there were errors in the proceedings.

Maybe, you should try and resolve the dispute, and avoid the time, expense, and heartache of litigation. But wait! Are you or are they coming to the table too soon? Is this a sign of weakness? All of these are good questions, which must be answered.

A civil legal dispute is a blend of chess, poker, and resolve. In a way, it is much like the thinking and strategy one engages in when playing chess. But you have to be able to read people, play the game, and yes sometimes bluff. Despite all of these skills, a lot of chance is still involved, just like poker. It is very hard to determine exactly "the right time" to negotiate. But you should consider if the dispute is ripe for settlement and if negotiation has a realistic chance to lead to a settlement that is better or worse than litigation. Much depends on the various parties' strategy, how well they understand the parties' motivations, a little luck, and a lot of experience. Settlement is just a term for the formal resolution of a legal dispute without the case being decided by a court judgment. Usually, this

means one side or the other offers a certain sum of money in exchange for the other side
signing a release of liability in connection with the dispute. There are potentially many reasons to settle rather than litigate. Some of them are:

1. **Cost** – Cases that are litigated consume vast resources
   a. Lawyers (usually more than two)
   b. Expert witnesses
   c. Numerous depositions
   d. Administration/Travel
   e. The project manager and team member's time

2. **Confidentiality** – Settlement details can be kept private. Settlement can incorporate confidentially clauses. Court records are generally public records, open to the public for anyone to see.

3. **Outcomes** – Jury's decisions are not easy to predict. Juries have the potential to make outrageous determinations and awards. Juries can be biased, swayed by emotion, and good lawyers.

4. **Stress** – Trials can produce stress on clients, witnesses, and others. Cross-examination by the other side's lawyer will create stress. Witnesses can be stressed by having to tell their story before a judge, jury, and opposing lawyers. Settlements avoid most of these stress points.

5. **Finality** – Either or both parties can appeal a court judgment. Appeals can extend the process another two to three years or more. Settlements usually cannot be appealed.

Some parties push litigation without much effort at negotiation first. Typically, when attorneys are involved, a "Demand" letter is sent to the other party. The demand letter usually asked for everything possible under the sun whether reasonable or not. This type of letter usually has one of two results. First, it wakes up the other party to there is a real dispute that must be dealt with. The second response is for the other party to dig in their heels for a long fight to the end. Both parties may be irrational with unrealistic expectations of litigation. But is this the second-best time for the parties to negotiate, prior to spending a lot of money,

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time and legal fees? Disputing parties tend to forget about the downside of getting a partial award or even losing. The bottom line: if there is ever a chance to negotiate, DO IT. Nothing ventured is nothing gained.

The three stages of negotiation are:

STAGE 1 – PREPARATION

1. Defining your objectives
2. Establishing the real facts:
   A. Separate the supporting facts from conclusions
   B. Test all assumptions
3. Identifying your real power
4. Estimate your opponent's goals
5. From your opponent's perspective, formulate a reasonable argument
6. Learn as much as you can about your opponents
7. Anticipate your opponent's arguments and develop defenses or counterarguments
8. Develop your tactics
9. Assign roles
10. Select auto visual tools

STAGE 2 – THE ACTUAL NEGOTIATION :

Phase 1 – The Conflict Phase

1. Where you establish your initial position.
2. Where you establish what is **not** going to be discussed.
3. Where you sprinkle your facts around but don't give up much.
4. Where you watch and listen for your opponent's strategy.

During the Conflict Phase Your Goals are:

1. Look for any common ground to agree on.
2. Test your opponent's skills.
3. Gather as much information as possible but give up as little as possible.
4. Identify your opponent's needs and objectives.

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Phase 2 – The Honeymoon Phase –
The Most Dangerous Phase

1. Information is exchanged.
2. Facts are established and agreed upon.

3. Preliminary agreements are made – usually on minor issues.
4. Expectations are changing.
5. The form of an agreement (maybe only mentally) begins to take shape in both parties' minds.

During the Honeymoon Phase Your Goals are:

1. To lower your opponent's expectations on disputed issues.
2. To listen – search for a way to satisfy your opponent's needs while still winning the war.

Phase 3 – The Mutual Respect or the "Gotha" Phase

1. The real gut issues are resolved.
2. Previous "agreements" are reviewed and possibly modified.
3. An overall agreement is reached, hopefully in writing.
4. Egos are satisfied.

During the Mutual Respect Phase Your Goals are:

1. Establish an agreement acceptable to both parties.
2. Maximize everyone's ego gratification.

STAGE 3 – CLOSURE

1. Negotiated agreements are rarely perfect. There is still a lot of work left to be done.

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2. Be aware that the agreement may have to be approved by a higher authority. Hopefully not!
3. Be prepared to make minor adjustments to the agreement.
4. Your goal is to preserve the agreement, not re-negotiate it or lose it.

SEQUENCE OF EVENTS

You should not start the negotiation off by making dumb statements such as the other party owes you one hundred million dollars (even if they do). This type of statement is antagonistic and only serves to harden the other side's position. Do not threaten; everyone should already know the consequences of failure of the negotiation.

The Claimant should start off with a brief statement of the dispute as they see it. It is okay to hand out a brief typed statement outlining the dispute and remedy sought. Be businesslike and matter of fact. Keep emotionalism to a minimum. The Respondent should let the Claimant make his brief statement without interruption.

Then it is the Respondent's turn. After both sides finish their opening statements, it is okay for either side to ask questions so that they better understand the other side's position. The negotiators should also try to agree on as many facts as early as they can.

After both sides have fully stated their position and both sides fully understand the positions (not necessarily agreeing with them); you should schedule a caucus to think about what you heard (if you are alone) or to discuss it with your team. At the next joint meeting, the Respondent should point out weaknesses in the Claimant's position and vice versa. This goes back and forth for a while until the parties begin to repeat their positions. At this time, it is time for another break or caucus.

When the parties reconvene, it is time to start making some progress towards a settlement. No one wants to make the first offer for fear of leaving money on the table or setting up unrealistic expectations. If the dispute is complex and consists of more than one issue, tackle them one at a time. This lowers the fear of leaving large sums of money on the table. Then at the end, you can summarize. It is best to settle as many of the issues as you can, even if some of them are minor. Do not take the attitude that it is all or nothing. This shows a good faith negotiation and gives everyone a sense that you are making progress.

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In order to find a common ground on the remaining issues, if they are significant ones, maybe you should think about ranges. Say to yourself or your team that if so and so were so, then we could think about a number in the range of say $50K to $100K. The other side should do the same. Write it on a piece of paper and show the paper to each other at the same time. If there is overlap, then you have an opportunity to settle. If the ranges do not overlap, but are close, further discussion/negotiation might get you there. If the ranges are far apart, both sides should reconsider their position, the strength and weakness of their position, the cost of not settling (time and money), and decide if further discussions/negotiation is likely to be productive at the present meeting. If you decide not to discuss or negotiate any further, write and sign what you have settled so far. **DO NOT LEAVE TOWN WITHOUT A SIGNED AGREEMENT!**

Schedule the next negotiation meeting within two weeks. Remember the purpose of negotiation **IS** to settle the dispute quickly and for the least cost. Time allows disputes to fester.

SOME USEFUL GUIDELINES AND SUGGESTIONS:

1. Never underestimate the value of preparation. You cannot over-prepare.
2. Never make the first offer. If necessary, talk about ranges.
3. Continually evaluate your power.
4. Understand the importance of time. Use the time to your advantage. Do not get trapped by it.
5. Listen carefully. Your opponent will usually help you.
6. Present your position thoroughly. Make sure your opponent understands it and make sure that you understand theirs. Don’t be afraid to ask clarifying questions.
7. Control your emotions, but don’t be afraid to use them.
8. Never make a unilateral concession. Always get something in return.
9. A successful negotiation requires consent from both parties. You must attend to your opponent’s needs.
10. Never slam-dunk your opponent.
11. In the event of deadlock:
    - Recap the negotiation to date.
    - Review the sticking points.
    - Take time out.

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SOME ADVICE on NEGOTIATION TEAMS:

1. No lawyers.
2. Keep the size of the group to a minimum.
3. Be business-like (No designated attack dogs).
4. Select team members based on their ability to contribute to a settlement (Not over my dead body) people are not allowed).
5. Make sure each team member knows and understands their assignment.

SOME MORE ADVICE:

1. Be empowered to settle.
2. Be realistic.
3. Be willing to compromise.
4. Be professional.
5. Fully understand the consequences of failure.

REMEMBER – IN ANY KIND OF SETTLEMENTS, NEGOTIATIONS WILL ALWAYS BE THE LEAST EXPENSIVE FORM!

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