



PDHonline Course P101D (4 PDH)

Alternate Dispute Resolution

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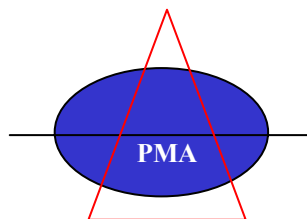
Presents

Alternate Dispute Resolution

via

WEB BASED LEARNING

BY: William J. Scott



MODULE #1

Negotiation and How it Works

Negotiation is a process used to obtain an acceptable agreement without the use of third parties. It is normally a three-stage process:

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 you settle or bring a dispute to a close, the less it is going to cost you. In most states, attorney fees are not recoverable in contract disputes unless the contract specifically allows for their recovery. So, lacking a specific clause which states otherwise, attorney fees are sunk cost. This cost can never be recovered. Your internal time and expense is also not recoverable. Therefore, the sooner the settlement is reached, the lower the total cost.

Now, some settlements might take a little time to become “ripe”. However, if a settlement offer is made, you should seriously consider it in light of what you are facing. It is extremely important to absolutely understand the nature of the dispute and the weaknesses of your case regardless of being the claimant or respondent. Believe it or not, many times organizations filter the truth before it comes to the decision level.

In order for negotiation to have a realistic chance of success, each party in the dispute must empower their representative to negotiate and settle the dispute without calling the home office every 5 minutes.

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

In order for negotiation to work you must do your homework. It is extremely important to know the truth about the dispute, 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 not work.

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 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 counter arguments.
8. Develop your tactics.

STAGE 2 – The actual negotiation is a three-phase process consisting of:

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 listen for your opponent's strategy.

During the Conflict Phase your goals are:

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

Phase 2 – The Honeymoon Phase – The most dangerous phase.

1. Information is exchanged.
2. Facts are established.
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.

During the Honeymoon Phase your goals are:

1. To solidify any common ground.
2. To lower your opponent's expectations on disputed issues.
3. To listen – search for a way to satisfy your opponent's needs.

Phase 3 – The Mutual Respect or the "Gotcha" Phase.

1. The 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 to be done.
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 ten million dollars. This type of statement is antagonistic and only serves to harden the other side's position. Do not threaten; everyone already knows 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 business like 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 consist 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 good faith negotiation and gives everyone a sense that you are making progress.

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 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 up. If the ranges do not overlap, but are close, further discussion/negotiation might get you there. If the ranges are really 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 lowest cost. Time allows disputes to fester.

SOME USEFUL GUIDELINES AND SUGGESTIONS

1. Never underestimate the value of preparation. You can not over prepare.
2. Never make the first offer. Talk about ranges.
3. Continually evaluate your power.
4. Understand the importance of time. Use it to your advantage and; 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 by 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.

Some advise 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).

Some more advise

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