

**INTRODUCTION
TO
ALTERNATIVE
DISPUTE
RESOLUTION**

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Negotiation
voluntary discussions to seek a
mutually satisfying resolution

the art of reaching an agreement

Mediation
not binding
third party facilitation

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Arbitration
parties choose either
binding or non-binding

submission to arbitration may be made either
prior agreement
or
at time of dispute (rule in Nebraska)

selection of arbitrators, typically
by you, by me, and then by our

the award

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Federal Arbitration Act
favors arbitration for *commercial* transactions
- intent to exempt from arbitration:
 i.e., enforcement of rights
 no exemption for SEC or RICO

liberally construed to encourage enforcement of arbitration agreements

limited judicial review of process and of award
focus on compliance with arbitration agreement

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Role of Precedence in Arbitration
typically, no precedence;
but, with labor arbitration
 Rule of Shop

Concurrent State and Federal Powers
but
Commerce Clause
Supremacy Clause

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NOTE: the bulk of the material on negotiation comes from the Harvard Negotiation Project.

Negotiation is the art of reaching an agreement.

Mutual understanding is a necessary precondition to reaching an agreement.

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Preparation is the best path to mutual understanding.

Preparation includes much more than **analysis** of each party's interests.

Preparation includes **analysis, perception, prioritization, anticipation,** and development of **objective criteria** as well as **options for mutual gain.**

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Analysis:
often is the simplest part.

Your analysis should identify the **relevant** legal and business **issues.**

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Perception:
means that you "walk a mile in my shoes."
My view of the relevant issues **will not be the same as your view** because the issues will "pinch" me at different points than the issues pinch you.

The **emotional component** of my perception must not be overlooked.

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Prioritization:
is an understanding of the **relative value** of each issue.

Know **yours** and know **theirs**.

Recall, **value is time sensitive:**
"One who gives quickly gives twice."

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Anticipation:
is necessary to **hear opportunity knocking**
and is necessary to **avoid poisoning the well**.

You will most certainly **miss a golden opportunity**
or you will react caustically to
a statement born of frustration
unless you anticipate both
your reactions and your opponent's reactions
to the topics and the sequencing of topics.

Kindness at a critical juncture
establishes the trust upon which
the agreement is built.

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Objective Criteria:
are the building blocks of the agreement.

Objective criteria allow the discussion to progress.

Avoid a focus on positions
(e.g., My patent is worth millions.)
or on persons
(e.g., You stole my idea!),

focus on the parties' interests and
the criteria for analysis and outcome.

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Options for Mutual Gain:
are the cement of the agreement.

Build your opponent
a golden bridge
to retreat across.

When you both have a problem,
a solution is **not a zero sum game.**

Be creative.

This is the most difficult task.

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A negotiator should **identify** the **topics** of discussion
as well as the **sequence** of discussions.

Specific attention should be given to
what the negotiator is willing to **trade**
(and for what!)
in order to obtain the desired **outcomes.**

You should clearly identify your **BATNA**
(**B**est **A**lternative **T**o a **N**egotiated **A**greement)
and
under what conditions you
would resort to your BATNA.

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Everyone has a preferred negotiation style.

Each style can be either **ideal** or **worthless**,
depending upon
the style of the person on the other side of the
table and the duration of the relationship.

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Hard, or **aggressive, negotiators** prefer to **understate** both their **willingness** to settle and their probable **end point**.

Hard negotiators approach the negotiation as **a test of wills in a zero sum game**.

Hard negotiators tend to **excel** against **hard negotiators** in all contexts; and against **soft negotiators** in **one time negotiations**.

Hard negotiators tend to **fail against** soft negotiators who become insulted and resort to **BATNA**; also, hard negotiators tend to do less well in **ongoing relationships**.

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Soft, or **reasonable, negotiators** prefer to **correctly state** both their **willingness** to settle and their probable **end point**; thus leaving little room for future movement.

Soft negotiators approach negotiation as **a path to agreement**.

Soft negotiators tend to **excel against** other **soft negotiators** and to excel in **ongoing relationships**; but soft negotiators tend to **do poorly against** **hard negotiators**, especially in **one time negotiations**.

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