

NM ADR NEWS

Encouraging communication through mutual respect

July – September 2011

About the OADPR

The 2007 Governmental Dispute Prevention & Resolution Act (GDPR) created the OADPR to promote early dispute resolution and positive collaboration among state employees and agencies through the development and support of effective and efficient programs and policies. The Office operates as a Bureau of the Risk Management Division (RMD) of the General Services Department (GSD).

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State of New Mexico
General Services Department

ADR CURRENT EVENTS AND TRAINING

UPCOMING NM ADR SYMPOSIUM FOR STATE AGENCY ADR COORDINATORS & PROGRAM MEDIATORS:

During the month of October, the American Bar Association and the Association for Conflict Resolution promote the use of ADR and raise awareness about the benefits of collaborative-problem solving; the state of New Mexico will also spotlight ADR this month. The State Office of Alternative Dispute Prevention & Resolution is partnering with Santa Fe Community College to present a **NO COST** two-day training event of educational workshops, resources / practice development materials, and excellent networking opportunities on Tuesday, October 25th & Wednesday, October 26th at SFCC. Seating is limited. If you are an agency ADR Coordinator or a program mediator interested in attending, please contact the ADR Bureau at ADR.Bureau@state.nm.us.

ADR ADVISORY COUNCIL MEETING: On Tuesday, October 25th, the state Alternative Dispute Prevention & Resolution Advisory Council will meet from 11:30 a.m. – 1:15 p.m. in Jemez Room A at the Santa Fe Community College located at 6401 Richards Ave., Santa Fe, New Mexico 87508. All agency ADR Coordinators and interested parties are encouraged to attend. For more information, please contact Maria Voyles at maria.voyles@state.nm.us.

MEDIATION TRAINING AT NMSU / DOÑA ANA COMM. COLLEGE IN LAS CRUCES: On Nov. 14, 15, 16, 30, & Dec. 1, 2, 2011, NMSU/DACC will present *Beginning Level Mediation Training*. The instructor will be Cynthia Olson. For information, contact NMSU/DACC Customized Training Program, (575)527-7776, toll-free at 888-827-7776. or by e-mail at ctp@nmsu.edu.

SO YOU BOTH AGREE THAT THIS TOWN ISN'T BIG ENOUGH FOR THE TWO OF YOU. WELL, I THINK THAT SHOWS WE'RE MAKING PROGRESS HERE...



MEDIATION
at the
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NEGOTIATE OR LITIGATE?

BY DEEPAK MALHOTRA

Whenever a dispute flares up, the parties involved must ask themselves which course of action will yield the best outcome. Should they negotiate, litigate, or simply walk away and accept the status quo?

In fact, litigation and negotiation are not mutually exclusive. Both can—and often should—be pursued simultaneously. Speaking with regard to the Middle East conflict (and paraphrasing David Ben-Gurion's famous quotation), former Israeli Prime Minister Yitzhak Rabin often remarked that he would fight terror as if there were no peace process and make peace as if there were no terror. In other words, he would give up neither negotiation nor the use of military force. Although clearly controversial in the realm of global politics, Rabin's two-pronged strategy illustrates the fact that dispute resolution sometimes requires both a *power-based* and an *interest-based* approach, such as the simultaneous pursuit of litigation (the use of legal power) and negotiation (attempts to reconcile each party's interests).

Here are some strategies that can help disputants keep interest-based bargaining alive even after legal action has been initiated:

1. Keep communication lines open. If you and the other party have a preexisting relationship (as business partners, family members, or friends), it's important to communicate regularly regarding alternative ways to resolve your dispute. As legal bills accumulate, disputants often begin to soften their positions, and new openings for agreement can emerge. In addition, if the dispute was due in part to miscommunication or misinformation, keep working to clarify your perspective and understand the other side's point of view. Just because legal action was pursued prematurely doesn't mean it must be seen through to the bitter end. While it's not easy to negotiate in the midst of legal maneuvers, you should at least leave open the possibility.

2. Ask other parties to mediate. When communication with the opposing side is strained or difficult, consider bringing in a mutually trusted third party to serve as a go-between. Mediators

can facilitate information exchange, vouch for good-faith efforts, and propose ways to resolve the dispute. Third parties can also help provide a reality check by reminding disputants of the costs and likely repercussions of litigation.

3. Don't lose sight of your underlying interests. Far too many people view negotiation as a battle in which the goal is to win, a misperception that's accentuated by litigation. When you think you're in the right, both morally and legally, the desire to win can distract you from pursuing your true underlying interests. Revisit the following questions often during your dispute: What are my true underlying interests? How can I best achieve them? How much am I willing to pay just to be able to say that I won? It's important to recognize that when you lose sight of your interests, you lose the possibility of negotiation.

4. Understand your lawyer's role and perspective. Your lawyer's job is to educate you and advocate for you. He or she is not—and should not be—the primary decision maker on your behalf. As the disputant, you must understand not only your rights but also your options—especially your non-litigation options. The best lawyers will help you comprehend all of those alternatives. But the fact remains that lawyers make their living by giving legal advice and pursuing litigation. As a result, your incentives will never be completely aligned with those of your lawyer.

Furthermore, your lawyer's expertise is probably restricted to the domain of law. It's incumbent on the disputants to educate themselves about other ways of resolving their differences, such as through mediation or negotiation. One way to do this is by getting second opinions from legal experts who have no financial stake in the case.

The decision to litigate should not be taken lightly, and the power of negotiation should not be underestimated. You should pursue litigation only as a last resort, staying focused on the pursuit of negotiation, underlying interests, and the goal of preserving and strengthening relationships.

SOURCE: Program on Negotiation at Harvard Law School, *Negotiation Special Report* ("The New Conflict Management: Effective Conflict Resolution Strategies to Avoid Litigation") posted at www.pon.harvard.edu.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses and waste of time." - Abraham Lincoln (1809 – 1865)