

The Art of Negotiation and Arbitration

Presented by
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The art of negotiation is perhaps what most deeply distinguishes man from the animals, and it is this art and this will to negotiate that has brought man forward, elevated him beyond the animals. Harry Martinson

I. Negotiation

A. Defining Negotiation

1. The process of achieving agreement through discussion. (Wiktionary)
2. To arrange for or bring about through conference, discussion, and compromise. (Merriam-Webster's Online Dictionary)
3. A discussion with the goal of resolving a difference of opinion or dispute, or to settle the terms of an agreement or transaction. (BNET Business Directory, dictionary.bnet.com)

B. Effective Negotiating

1. Have a goal.
2. Identify your bottom line.
3. Understand the alternatives to a negotiated agreement.
4. Focus on interests instead of positions.
5. Ensure your assumptions are sound.
6. Develop a "collaborative" environment, build trust through credibility.
7. Keep the process in mind, it may take several attempts to reach a result.
8. Have accurate information available throughout the negotiation, don't guess at details.
9. Be willing to take a step backwards.
10. Be patient.

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C. Recommended Reading

1. Bargaining for Advantage: Negotiation Strategies for Reasonable People, 2nd Edition, by G. Richard Shell.
2. Harvard Business Essentials Guide to Negotiation.
3. Getting to Yes: Negotiating Agreement Without Giving In, by Roger Fisher, William L. Ury, and Bruce Patton.
4. Negotiation Genius: How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond, by Deepak Malhotra and Max Bazerman.
5. The Truth About Negotiations, by Leigh L. Thompson.
6. Effective Negotiating Skills Websites, list of online negotiation sites.
(<http://www.helpself.com/directory/negotiate.htm>)

II. Arbitration

A. The Basics

1. What is Arbitration?
 - a. Binding Arbitration (Florida Statutes (FS), Chapter 6820)
 - b. Non-Binding Arbitration (FS 44.103)
 - c. Voluntary Binding Arbitration and Voluntary Trial Resolution (FS 44.1030)
2. When is Arbitration Required?
3. What Rules Apply to an Arbitration Proceeding?

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B. The Rules

1. Federal Arbitration Code (9 U.S.C. 1)
2. The Florida Arbitration Code (FS, Chapter 682)
3. Contract Provisions
4. The Arbitration Forum
5. The Arbitrator

C. Sources for Arbitrators

1. The American Arbitration Association
2. The National Arbitration Forum
3. Florida Qualified Arbitrators (Rule 11, Florida Rules for Court – Appointed Arbitrators)
4. Private Arbitrators

D. Key Issues Under the Florida Arbitration Code

1. Inadvertently waiving arbitration by active participation in litigation or other acts inconsistent with the right to arbitrate. *Marine Envtl Ptnrs, Inc. v. Johnson*, 863 So. 2d 423 (Fla. Dist. Ct. App. 4th Dist. 2003)
2. Arbitrator determines if an agreement to arbitrate is illegal and the arbitration clause unenforceable. *Charles Boyd Constr. Inc. v. Vacation Beach Club, Inc.* 959 So. 2d 1277 (Florida Dist. Ct. Appeal. 5th Dist. 2007)
3. A party has the right to be represented by an attorney. (FS 682.07)
4. Arbitrators may issue subpoenas, require production of documents and administer oaths. (FS 682.08)

5. Fees and Costs

- a. Arbitrator's fees and expenses shall be paid as provided for in the award. (FS 682.11)
- b. Attorney Fees:
 - i. Parties to arbitration have the right to have attorney's fees, when available, decided by the court unless there is an express waiver. Powell v. Carey Int'l, Inc., 558 F. Supp. 2d 1265 (S.D. Fla. 2008)
 - ii. If the prevailing party is entitled to award of attorney fees, the court cannot award fees unless the arbitrator's award clearly states the theory upon which the award was based so that court may determine award of attorney fees. Moser v. Barron Chase Secs., 783 So. 2d 231 (Fla. 2001)

(Key point: Under FS 682.10, an application for clarification of the award must be submitted to the arbitrator within 20 days of the delivery of the award to the applicant. If the award is unclear as to entitlement to attorney fees, you must request clarification.)

6. In order to avoid running of the Statute of Limitations, file suit and a Motion to Abate pending completion of arbitration. Courts cannot confirm arbitration awards if they do not have jurisdiction over the dispute. (FS 682.12)
7. Arbitration awards may be vacated (FS 682.12) or modified/corrected (FS 682.14) provided an application is made to the court within 90 days of the award.

(Note: This procedure cannot be used to clarify an award that has insufficient detail to allow a court to determine the prevailing party to award attorney fees. Only the arbitrator can provide that detail. As noted above, a Motion to Clarify must be submitted within 20 days of the award.)

D. Practice Pointers

1. Take the initiative.
2. Be first to file.
3. Make a clear, concise and compelling position in your demand for arbitration.
4. Focus on your strengths. Don't risk losing the arbitrator's interest by pursuing weak claims.
5. Work to establish rules that will minimize the time and expense of arbitration. (i.e. limited discovery, submit the bulk of the case "on the record," limit witnesses, limit time for testimony).
6. Be frank with arbitrator.
7. Understand your arbitrator's background.
8. Use the informal nature of the proceeding to your advantage.
9. Be ready to re-consider your strategy at all times.
10. Give the arbitrator alternatives to work with.
11. Provide the arbitrator with a statement of facts that will compel the arbitrator to rely on your documents.

III. Wrap-up and Questions