

Article Excerpt

ADR Process Design

Why Can't We Settle Disputes Like Children?

BY RICHARD S. WEIL

Remember how we resolved disputes as kids? No, not the way that resulted in bloody noses. The more peaceful way, like –

- Ro-sham-bo (Rock Paper Scissors)
- Eeny-meeny-miny-mo
- Flipping a coin
- Guess which hand the rock is in
- Choosing sides or first-ups by tossing a baseball bat
- Drawing straws
- One potato, two potato
- Odds and evens
- Arm wrestling



- An art collector could not decide whether to let Sotheby's or Christie's sell his collection, so he asked them to settle it between themselves. When they couldn't agree, the collector suggested they play Rock Paper Scissors. Christy's young employees advised choosing Scissors because everyone expected it to choose Rock. They won the game and the right to sell the expensive collection.
- Under British law, if a local or national election ends in a tie after three

recounts, the winner can be decided either by drawing straws/lots, flipping a coin or drawing the high card in a pack of cards. In 2011, when two candidates for Bury Council were still tied after three recounts, they settled the election by drawing straws after one candidate declined to toss a coin "because I always lose." Florida 2000, anyone?

- Two Oregon pioneers wanted to name their new city after their hometowns. One was from Boston, Massachusetts, the other from Portland, Maine. With neither

Why can't we use these children's games to solve grown-up disputes? They might not be workable in every situation, but they're worth considering in some. For instance, once arbitrating parties have learned enough to set high and low settlement numbers, as in baseball arbitration, they could short-cut the arbitration by playing ro-sham-bo. Or when mediating parties have reached an impasse, instead of requesting a mediator's proposal, they could draw straws.

If you consider this impractical and doubt that any serious litigator or business person would ever agree to such childishness, consider these real world examples:

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PAST AND PRESENT METHODS OF RESOLVING DISPUTES: A CONCISE COMPARISON

Rick Weil's article prompted *Alternatives* to take a look at the pros and cons of other historical and less conventional dispute settlement methods. The chart below was adapted by Vancouver neutral—and CPR panelist—Kenneth Glasner, QC, from a version appearing in the Canadian publication, *The Lawyers Weekly*. This version of the chart accompanied Ken's article, "Contract Disputes: The Role of ADR," 55 *Disp. Res. J.* 50, 52 (Aug./Oct. 2000), and is reprinted here with permission.

| Method | Cons | Pros |
|---------------|--|--|
| 1. Dueling | <ul style="list-style-type: none"> • out of fashion • might get killed | <ul style="list-style-type: none"> • usually done at dawn, so won't interfere with work day |
| 2. War | <ul style="list-style-type: none"> • might get killed • world might end • determine not who is right, but who is left | <ul style="list-style-type: none"> • good for business • great stories for grandchildren |
| 3. Bare Fists | <ul style="list-style-type: none"> • might need cosmetic surgery afterwards • dry-cleaning costs for blood on clothing | <ul style="list-style-type: none"> • good exercise • cheap |
| 4. Coin Toss | <ul style="list-style-type: none"> • arbitrary | <ul style="list-style-type: none"> • cheap • simple • a penny will do |
| 5. Litigation | <ul style="list-style-type: none"> • expensive • drags on forever | <ul style="list-style-type: none"> • respectable • great fees (if you can collect them) |
| 6. ADR | <ul style="list-style-type: none"> • used to be seen as flaky • misunderstood by those who are not on the inside | <ul style="list-style-type: none"> • cheaper than litigation • quicker than litigation • pick your own decision maker or mediator • private and confidential • increasingly popular • most parties prefer the system, once they understand it • client driven |

willing to budge, they decided to flip a coin three times. You know who won.

- Two Florida litigators couldn't agree on anything, not even where to hold a deposition, notwithstanding their offices were only four floors apart in the same building. The federal judge, fed up with both attorneys, ordered them to the steps of the courthouse, accompanied by a paralegal witness, to play one dispositive round of Rock Paper Scissors, winner to choose the place of deposition. The lawyers, probably very embarrassed, worked out an agreement.
- Perhaps most audacious was an arm wrestling match to decide a dispute between two airlines. In 1992, when tiny Stevens

Aviation discovered that Southwest Airlines was using its slogan "Plane Smart," it decided to take action. Considering litigation a waste of money and a lost opportunity for publicity, its chairman challenged Southwest's CEO to an arm-wrestling match, winner to get the slogan, loser to make a charitable contribution. Southwest's unconventional CEO loved the idea. He believed a lawsuit would cost \$500,000, take several years to decide, and might not succeed, since Stevens had the slogan first. The match, tagged "Malice in Dallas," was held before a huge crowd with extensive media coverage. Stevens prevailed in two out of three, and both executives agreed

that settling the dispute this way was a publicity bonanza that saved a huge amount of money. Stevens subsequently quadrupled its earnings, and Southwest's stock price doubled, which both companies attributed in part to their creative problem-solving extravaganza. You can check out "Malice in Dallas" on YouTube; bit.ly/1tqd0OH.

So, the next time you're locked in a seemingly irresolvable dispute, consider playing a children's game. Even if it isn't used, suggesting it might lighten things up enough to lead to a negotiated settlement. ■

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