



"Building Bridges Between Disputes and Resolutions" SM

ROBERT DOBBINS' RND REPORT (Resolutions with Negotiated Dialogue)

Edited by Robert N. Dobbins & Joshua Berkowitz

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Mediation • Arbitration • Facilitation • ADR Instruction • Trainings • Negotiation • Systems and Process Design

Welcome!

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ROBERT



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Background

The RND Report is one of the nation's few newsletters devoted exclusively to the discussion of contemporary and original ideas for resolving and preventing disputes. Its focus is on the legal practitioner and professionals who use ADR processes.

Robert Dobbins is a 26 year legal practitioner, a professional mediator, an adjunct professor and the current Orange County Director of the Straus Institute for Dispute Resolution. He holds advanced graduate degrees in both dispute resolution and law; and trains, teaches, and writes on how to use ADR to maximize the process and the outcome of your client's case.

The RND Report is published three times per year by the Dispute Resolution professionals at Appropriate Dispute Resolution. Requests to reprint articles published in the RND Report should be sent to Robert Dobbins, at: dobbins@appropriatedisputeresolution.com.

- **Education Series: Convening Your Mediation** provides you with an analytical tool that details solution-oriented approaches to pre-session problems including, calendaring relief, choosing your neutral, getting all of the right parties to the table, and maximizing your resources in the settlement process.....p. 2,5
- **ADR Case Comment** deals with an ADR process gone awry in the Diocese Priest-child sex abuse cases.....p. 3
- **And Now for Something Entirely Different...A Negotiation Manifesto** shares part of our approach to conflict resolution and introduces our forthcoming "Series on Negotiation" with a collection of negotiation-based musings, misfit negotiations and the meaning of life.....p. 4

LETTERS: Send a letter to the editor.

Send letters by e-mail to dobbins@appropriatedisputeresolution.com or josh@appropriatedisputeresolution.com, by fax to (949) 266-8034, by mail to:

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Be sure to include your name, city and state, and your e-mail address. Letters must concern articles published in the *RND Report*. They may be edited for clarity or space.

Useful Link:
The ADR
Lawyer's
Tool Box

- Request for Services:**
- Mediation
 - Arbitration
 - Facilitation
 - Training
 - Instruction
 - System Design

The Education Series: Convening Your Mediation

By Robert N. Dobbins, LL.M.

We explore in this the third in our “Education” series, the concept of Convening, identifying some key problems and then offering convening solutions. *Convening* is the foundational step of bringing us together to find resolution. Referred to sometimes as “calendar,” *convening* is a special, integral and often overlooked part of the resolution process. Convening is a service we provide to help make your life easier.

Convening **problems** arise before you have made your first demand or offer, putting your office on the merry-go-round and keeping your client from a meaningful settlement process. Convening as we describe it will help to relieve many process impediments. **Solution:** Let your resolution services provider handle the convening process.

THE DICTIONARY:

Con·vene (kən·vĕn'); **con·vened**, **con·ven·ing**, **con·venes**

- The act of bringing together the parties for the purposes of dialogue, discussion and eventual resolution of a legal or other dispute. Convening includes calendarizing a session with the Neutral and getting the decision-makers to the table. It also covers Neutral selection and calling together the parties or their representatives to determine the best resolution process to serve their needs. In lawsuits, convening begins the process of disembarking from the litigation train.

CONVENING PROBLEMS:

1. Suggesting mediation to the other side signals an unintended sign of weakness and makes your client uneasy about your confidence in her case.
2. Your secretary is pulling her hair out as her frustration grows because she cannot get all of the players to agree on a date to mediate or arbitrate.
3. The other side opposes Mary Mediatoré solely because you suggested her, despite her LL.M. in dispute resolution, 26 years of experience as a lawyer, and an exemplary reputation for bringing even the most contentious parties to resolution.
4. An early evaluation of *in limine* evidentiary issues is the missing piece of the risk analysis puzzle in the final push toward resolution. Positions remain entrenched as both sides ponder their view of the outcome of the motions.
5. After many hours in session you learn that the real decision makers needed to reach resolution are not at the mediation table.

SOLUTIONS: THE NEUTRAL SELECTION CONTEXT.

- Rather than set yourself up for another layer of negotiations by using the common “list of three” approach, let us, your dispute resolution provider, make the calls and set up the settlement session or facilitation.
- Giving us the information so that we can set up the session, relieves you and your staff of the burden
- Having us convene for you, begins sooner the critical rapport building process with “the other side”.

SOLUTIONS: PROCESS DESIGN & THE CONVENING CONFERENCE.

- The Convening Conference allows customization of the process for you, your client and your colleagues.
- We handle the logistics: who should attend the conference; by phone or in person; amount of time – the full spectrum of considerations to make the conference productive and the ultimate process effective. (For examples, see page 3)
- Lay the foundation for resolution by focusing

ADR CASE LAW SECTION

TRAVELERS GROUP WINS CHALLENGE CLAIMING COURT-APPOINTED SETTLEMENT JUDGE EXCEEDED AUTHORITY AS A NEUTRAL

A clash between the black robe, creative settlement processes, confidentiality and coercion was just the latest controversy stemming from of the Diocese Priest-child sex abuse cases. On a second visit to the 2nd District, the court ruled that the court-appointed settlement judge stepped over the line in his role as Neutral.

The Players

The Diocese of Orange County, with insurer Travelers, was defending a 90 plaintiff child sex abuse case. Travelers and several co-insurers agreed to defend under a reservation of rights, allowing withdrawal and denial of coverage. The Trial court appointed Judge Peter Lichtman as the settlement judge, who *ordered* the parties into a “Valuation Hearing” (“VH”), at which he would determine the likely verdict and the reasonable settlement value. That order prompted visit one to the 2nd; the court allowed the VH to proceed provided it was not in the nature of an adjudication but only a tool to assist in the settlement process.

The Problem

Judge Lichtman held the VH, issued a “Valuation Order” and then opined that Travelers’ and its cohorts’ threats of coverage forfeiture were an impediment to the settlement efforts. He also ordered that his findings were “an actual trial for purposes of precluding a declaration of coverage forfeiture by the insurers.” The 2nd found that Judge Lichtman “exceeded his authority by making factual findings and otherwise preparing a coercive order in violation of the fundamental principles governing mediation proceedings.”

The Judge had essentially attempted to abrogate confidentiality and abandon his neutrality when he “...dangled over the insurers' heads the threat of a bad faith action that was already fortified with the weight of a judge's findings. This left the insurers backed into a corner where the easiest way out would be to withdraw their reservation of rights and pay money to settle the cases. In short, the Valuation Order's factual findings and future use provisions were coercive.” The court ruled that the Judge’s approach placed him

beyond the pale of a neutral mediator; thus, the court ordered the trial court to vacate and seal the Valuation Order. [*Travelers, etc. v. Superior Ct. 126 CA4th 1131*]

The Solution

You can and should retain control of the process. By employing the Neutral’s help in the case management plan and process design before mediating, you can make certain that the needs of all the parties involved are met. With your Neutral on board from the start, you can negotiate process design, get early buy-in from all involved, and clearly define the extent of the mediator’s role throughout the process. You can address issues upfront: will you have strict consensual and voluntary participation or “teeth” in the process; is confidentiality or publicity preferred. By designing with your Neutral a process that best meets the needs of all parties involved – including as here the Court - you give your client the best chance for a meaningful process and of achieving a lasting out-of-court settlement.

LAWSUIT CLAIMS STRIPPER WAS 'RECKLESS'

We hesitated whether to share here the following case summary in light of its sensitive material; however, recognizing its value as a case model for confidentiality we reconsidered...

Case Summary: A Vancouver strip club has been sued for unspecified damages by a Canadian man, claiming he was kicked in the face by a "reckless" exotic dancer.

Greg Bonnett claims the Barnet Motor Inn failed to post the appropriate signs warning customers of the risk of sitting too close to the stage. Mr. Bonnett’s lawsuit also seeks damages from exotic dancer, "Jane Doe," for allegedly "dancing in a negligent and reckless manner."

According to Mr. Bonnett’s lawsuit, his nose was fractured when the female dancer swung around a pole and kicked him.

..And now, for something entirely different: “A Negotiation Manifesto”

Robert asked me to introduce our forthcoming series on negotiation with special attention to our approach to negotiating conflict. Developing an understanding of how your dispute resolution provider, mediator, arbitrator, etc., approaches conflict is a critical antecedent to selecting your neutral.

In the Negotiation Series, we will address how communication, risk assessment, risk management and cross-cultural issues effect negotiation. We provide you with the musings that follow to informally acquaint you with our approach to those important negotiation issues. As we give you a piece of our minds in “ADR’s Negotiation Manifesto”, pay special attention to the synergistic relationship between golf, baseball and negotiation theory:

Principal #1: **We do not see negotiation as a metaphor for life...that honor belongs to baseball.** Negotiating is how we make our living when clients come to us for help.

The baseball-to-life metaphor was clear this Spring when a wheelchair-bound 15 year-old friend of rarely injured centerfielder Juan Pierre, expressed deep concern over the ballplayer’s month-long leg problems...as a suddenly humbled Pierre wheeled his friend through the outfield before a game.

For a contra-example involving baseball negotiation, see the year-long impasse over Uber-prospect Jared Weaver’s signing bonus. Despite comprehensive factual analysis, Arte Moreno, owner of the Super Cali-fragilous Angels of Extra-ridicul-ocious, and powerful uber-agent Scott Boras have failed to recognize the basics to negotiating in life; And, their position-based power principles have left the talented Mr. Weaver without a bonus, without a contract and presently out of baseball. (Note: That last part *is* life.)

Principal #2: **Anyone negotiating on principles rather than supportable facts puts more at risk than the economic value of the principle.**

Principal #3: **Even a good negotiator can not be effective with one hand tied behind his back.** Consequently, we will never know if Colin Powell could have been a negotiation somebody. Both Bush Administrations have overreached with their factual support concerning Iraq. Both Bushes and Sadaam Hussein “negotiate” using position-based power principles. What net result?...the conflict in Iraq is unresolved and Colin Powell is out of W. Bush’s Cabinet.

Put me in Coach:



Perhaps, Juan Pierre now firmly understands the baseball-to-life principle

Principal #4: **For purposes of conflict management, negotiation and communication, understanding the cultural context does not mean finding out everyone’s hometown.** Government culture is as distinct from corporate culture, as management culture is from employee, and Korean is from Italian.

Principal #5: **Weak conflict management skills yield high litigation costs...not good business cents.**

Principal #6: **What makes good legal sense does not always make good business cents.** Rejecting an \$80,000.00 negotiated offer for *even a 70% chance* at \$100,000.00 net return in court (or vice-versa) does not make good business cents, irrespective of the principles involved.

Principal #7: **Most negotiations are more like “minimum loss-minimum loss” than “win-win.”** Failing to understand that principle leads to what golfers call poor course management. Trying to hit a 3-wood 295 yards off the fairway in the final round of the Doral Open is poor course management...unless you are Tiger Woods, and even then it is a risky move most times.

Principal #8: **Parties who feel railroaded by a runaway jury put themselves in that position when they remain on the litigation train.** Thus, a Midwest party who fails to factor in the higher damages potential in a California-lawsuit negotiation, might just as well have thrown a belt-high fastball to last year’s home run king in the thin air of Coors Stadium.

Principal #9: **During a negotiation everyone bleeds a little. During a trial everyone bleeds a lot.**

Principal #10: **Finally, a sense of humor is the lost art of negotiation. Drama is commonplace.**

OK, one more muse with feeling this time...

Last week, I saw a unique negotiation over an impossible-to-find Los Angeles parking spot. With each driver stubbornly positioned to block the other from the spot, drama seemed inevitable. Instead, a surprisingly effective negotiation unfolded, because the drivers agreed to a best of five rock-paper-scissors series and settled the dispute.

Rather than a road-raged fight, one driver left waving and laughing. No drama, just plain and simple negotiation...one of the classiest, most absurd and effective negotiation approaches I have seen. These folks understand the basics to negotiating in life...and with a healthy sense of humor they escaped without too much drama.

---Joshua Berkowitz, JD/MDR

Convening from page 2

on the principal issues as we design the dispute resolution process.

- Set the process scope with a “conference agreement” that covers process purpose, confidentiality, impact on discovery and admissibility of materials prepared for the mediation (see the Inaugural Newsletter discussion on *Rojas*), and identifies the neutral and her compensation.
- Allowing us to convene produces an intended by-product – eliminating wasted time and expense by your office. Use your valuable time to better prepare for the process.

SOLUTIONS: OUTSIDE THE PROVERBIAL BOX.

- When drafting your contracts, revisit your dispute resolution clause. Circumvent the convening difficulties: draft this section to include a convening conference covering the selection of the Neutral *and* process design.
- Integrate convening into your case management plan.
- Allow us to customize the service to fit everyone’s needs: your client and her opponent, you and your colleague on the other side of the table.
- A well-designed *convening* with active participation primes the engine that will drive the dispute resolution session toward resolution.

CONVENING CONFERENCE BENEFIT EXAMPLES

Example 1: The *in limine*-risk-analysis puzzle mentioned in the “Problems” section.

- At the convening conference, we explore with everyone the value of, and can arrange for an early neutral evaluation of the motions by an experienced third party (other Neutral or a retired judge). As a result, we get a valuable settlement tool: one objective view of the likelihood of a “granted” or “denied” ruling to help move the disputants toward resolution.

Example 2: Your case involves a property owner suing all 100 of his neighbors and the association for violations of the community CC&R’s. *Davis-Sterling* may compel mediating each claim before litigation. You could face the proverbial three-ring circus just trying to handle the logistics; the time and monetary costs could be devastating.

- We can intervene and convene, relieving you and your staff of that burden, and extracting you from the procedural quagmire.

Appropriate Dispute Resolution provides conflict management, conciliation and resolution services. We use mediation techniques, particularly in the caucus setting, to restore trust, rebuild relationships and reach agreement. We also provide facilitation services to restore a team building atmosphere through dialogue. By developing preventive and reactive tools, we help organizations deal effectively with conflict through the creation of internal procedures and processes that support their ability to constructively manage and minimize the harmful effects of conflict. We believe that the bridges that we build with you today will help build you a better tomorrow.

Josh and I intend for the RND Report to provide an opportunity for dialogue. We are committed to helping you hone your dispute resolution skills, enhancing the value of your services to your clients. We plan to continue growing our relationship and better providing you with the spectrum of conflict management, conciliation and resolution services.

Best Regards,

Robert N. Dobbins, L.L.M.