



The Appropriate Dispute Resolution (ADR) Perspective

Edited By Robert N. Dobbins and Joshua Berkowitz

"Building Bridges Between Disputes and Resolutions" SM

December 9, 2004 Volume 1, Issue 1

Welcome: to the inaugural issue of the Newsletter...

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some of the mediation
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**Useful Link: The ADR
Lawyer's Tool Box**

Appropriate Dispute Resolution has been serving the legal community for three years now. From simple ADR contract drafting to advanced hybrid process delivery, we have everything you need to bring the best resolutions to your client's disputes. This Newsletter, for and about dispute resolution counsel, was established to support attorneys who want to maintain their reputation as zealous advocates and competent counsel.

So, consider this: would it not be great to relieve the ugliness and delays of the litigation process, and restore the civil pursuit of dispute resolution? Agonizing over the litigation process, one Fifth Circuit Appeals Judge colorfully suggested that, "cases flow through the courts like a rat through a python". It's not the gentlest description of litigation I've read. Many of you have commented to me about the exacting struggles and negativity through which you suffer in litigation daily.

Hence, I have constructed this Newsletter to respond to those concerns and address some of the ADR "science" that I think may help ease the pain. Through case summaries, dialogue and "For Your Eyes Only" checklists, I will explore the science, and help demystify some of the mediation magic needed to reach the best result. I plan to regularly include general information and occasional humor. I trust you will find the Newsletter contents useful, informative and entertaining.

In this first issue I bring you the second installment of the "Education" series: Educating your client as part of your important pre-mediation preparation process. As part of a regular "DR Case Law of Interest" Column, I have summarized the recent California Supreme Court decision in *Rojas* about the fundamental concept of mediation confidentiality.

Please see *Welcome* on page 5

The Education Series: Preparing Your *Client* for Mediation

By Robert N. Dobbins, LL.M.

In our first introspective piece we talked about the opportunity to educate the folks who sit across from you at the mediation table. As you will recall, the notion is that mediation affords you the litigator the chance to become the eloquent negotiator by educating rather than alienating the “other side”.

This second installment shifts our perspective from across the table to the chair next to you – the one occupied by your client.

Recently, plaintiff’s counsel told me at a Friday mediation session that he was attending his fifth mediation that week. Mediation is gradually becoming and should be more a part of every litigator’s case management plan. For you the process is becoming more familiar, more comfortable and an integral part of how you maximize your client’s chances for a positive result to her legal dispute.

To your client, however, anticipation of the mediation is as frightening as a deposition, a court hearing or arbitration. I frequently hear from the client as the session begins that she is nervous and uneasy about the proceedings. Even the adjuster may be anticipating an uncomfortably unfamiliar process, though mediation is increasingly part of her handling of litigation claims.

Through my opening remarks I try to put all who have invited me to the table at ease; you can be enormously helpful here, too. Here are a few things to consider talking over with your client *before* the first session.



“For Your Eyes Only”: ADR Client Education Checklist

- *Recall the Eloquent Negotiator...*
- *Ease Your Client’s Pre-session Jitters: Educate Her!*
- *Show Your Client Your Strength: Know All sides*
- *Manage Your Client’s Expectations*

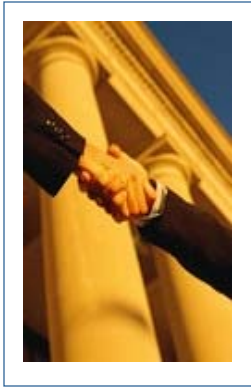
Please see *Client Education* on page 4

Please see *Checklist* page 4

APPROPRIATE DISPUTE RESOLUTION	APPROPRIATE DISPUTE RESOLUTION
<p>PROACTIVE pre-dispute planning</p> <p>SKILLFUL guidance from dispute to resolution</p> <p>PATIENT demeanor so parties are heard, understood and satisfied</p>	<p>CREATIVE solutions</p> <p>EFFECTIVE, efficient discussion facilitation</p> <p>PERSISTENCE in overcoming obstacles to agreement</p>

“BUILDING BRIDGES TO RESOLUTION AND ACHIEVING CLOSURE WITH INTEGRITY.”

DR Case Law of Interest – CA Supremes Speak on Mediation Confidentiality



In preparing for mediation, we'd better know what the CA Supremes view as confidentially protected material.

Depending upon your perspective, in July of this year, the California Supreme Court confirmed, re-affirmed, or finally established the extent of mediation confidentiality in its much-anticipated decision, *Rojas v. Superior Court* (33 Cal 4th 407 (2004)). The Court held that materials, having been "...prepared for the purpose of, in the course of, or pursuant to, [the] mediation" are protected under Evidence Code §1119.

Rojas involved photographs, "raw test data" and statements prepared for mediation in a construction defect case that settled at mediation. The parties had signed a confidentiality agreement. Other plaintiffs brought a subsequent case against the same defendant, during which they sought production of those photographs, raw data and statements through discovery.

The Court acknowledged the importance of confidentiality to the mediation process: to dispense with confidentiality would cause people to stop mediating, which would be contrary to public policy. The Court also refused to find a good cause exception to §1119's mediation confidentiality that would have permitted discovery of derivative materials.

Disclaimer: These comments are not intended as a legal opinion on *Rojas*. Given the importance of confidentiality to you and your client, study this seminal case and draw your own conclusions.

...And now, for something entirely different: *The Farmer and the Lawyer*

When negotiating from a position of strength, perhaps one might try the "Three Kick Rule" to achieve resolution.

Season's Greetings:



May the forthcoming year bring you joy and resolution...and above all, remember the Farmer.

While duck hunting in rural North Dakota, a big city lawyer shot and dropped a bird that fell into a farmer's field on the other side of a fence. As the lawyer attempted to climb the fence to retrieve the bird, an elderly farmer drove up on his tractor to angrily greet him.

"This is my property," the old farmer said, "and you are not coming over here to get that duck."

The indignant lawyer said, "I am one of the best trial attorneys in the United States and if you don't let me get that duck, I'll sue you and take everything you own!"

The old farmer smiled and said, "Apparently, you don't know how we settle disputes in North Dakota. We settle small disagreements like this with the "Three Kick Rule." Because the dispute occurs on my land, first I kick you three times and then you kick me three times, and so on back and forth until someone gives up."

The attorney quickly thought about the proposed contest and decided that he could easily take the old codger. He agreed to abide by the local custom.

The old farmer slowly climbed down from the tractor and walked up to the attorney. His first kick planted the toe of his heavy steel-toed work boot into the lawyer's groin and dropped him to his knees. His second kick to the midriff sent the lawyer's last meal gushing from his mouth. The lawyer was on all fours when the farmer's third kick to his rear end sent him face-first into a fresh cow pie.

The lawyer summoned every bit of his will and managed to get onto his feet. Wiping his face with the arm of his jacket, he said, "Okay, you old coot. Now it's my turn."

The farmer smiled and said, "Naw, I give up. You can have the duck."

Client Education from page 2

Mediation is a process that works best when all the folks involved understand it and what impedes its success. Remember, your *client* may not be as skilled in the art and science of negotiation, nor as experienced in mediation. So, explain to her the unique value of the initial joint session (explored in our first installment). Help her understand that true negotiations do not begin until the first reasonable demand and responsive offer have been expressed. Prevent the “I’m offended” reaction to high demand/low offer negotiation, and plant the seeds for creative solutions. Emphasize the value of a steady hand in achieving the ultimate goal – a successful solution to the dispute.

You know that managing expectations is part of every negotiation; and nobody’s expectations are more importantly managed than those of your client. We shy away from telling her the “downside” of his case for fear of appearing weak, or that she will think we have lost confidence in her case. Maybe, it is a matter of approach. Reframe the situation to show your strength and demonstrate how well you have prepared. You have worked hard preparing her case. Go one step further and draw your client a roadmap of both her case *and* the other side’s. Analyze the obstacles to settlement and show your client how mediation can get you to yes.¹

Tell her: “Here is what we can expect their position to be; here is why they will take this position; here is our response; here is how a jury may view it...” The goal here: to help your client view her case not solely through her own lenses. You know - *and your client needs to know* - that in the shadow of the law, until final resolution, there is another side.

Thus, Lesson 2: View part of your preparation as the time to prepare your client for the mediation, to educate her about what’s coming. *And*, be sure to call on your mediator early in this preparation stage. As part of my “mediator oath” to you I make time in this valuable stage to listen and provide you with the tools you need to prepare your client, so that we can together construct a process that maximizes her possibilities for resolution.

¹ With special thanks Roger Fisher, William Ury, Bruce Patton, authors of *Getting to Yes*

Checklist from page 2



Show Your Strength to Your Client:

- Draw a roadmap of her case and the other side’s case.
- Analyze obstacles to settlement.
- Explain how mediation gets you to yes.



Manage Your Client’s Expectations:

- Help him walk a mile in the other side’s shoes.
- Help her understand the other side’s view of her case.
- Understand and explain the different approaches to case valuation.
- Appreciate the other side’s negotiation style and prepare for it.
- Prevent the “I’m offended” reaction to high demand/low offer negotiation.

“OUTSIDE THE MEDIATION BOX”: HERE YOU’LL FIND PEOPLE WHO ARE IMPORTANT TO US



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←—————→

CHARITY OF THE MONTH:



Welcome from page 1

Appropriate Dispute
Resolution Introduces:



Joshua A. Berkowitz,
JD/MDR

Now, with great pleasure this first issue introduces you to Joshua Berkowitz, the newest member of Appropriate Dispute Resolution. Josh brings to us and to you an exceptional educational background, including a Master of Dispute Resolution degree from the Straus Institute for Dispute Resolution at Pepperdine Law School, a JD degree from Emory School of Law, and a BA in International Relations from USC. A member of the California Bar, Josh has mediated many disputes involving a broad range of civil litigation matters and worked for the California Attorney General. I think you will find him to be both an effective resolution facilitator and enjoyable fellow with whom to be working possessing intelligence, wit and sensitivity beyond his years.

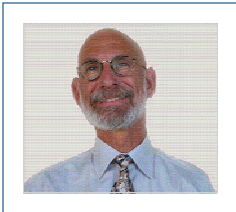
Josh and I intend for the Newsletter to provide an opportunity for dialogue, and plan to include a section derived from your comments. We encourage and look forward your participation with anticipation.

Your continuing support of Appropriate Dispute Resolution and of me is a great inspiration. We hope to continue growing our relationship and better providing you with the spectrum of dispute resolution services and training. This Newsletter is part of our continuing commitment to help you hone your dispute resolution skills, which enhances the value of your services to your clients.

Yours,

Robert N. Dobbins, LLM

Robert's Biography



Robert has served as mediator, arbitrator, discovery referee and facilitator in hundreds of matters. Robert's experience spans more than twenty-five years, during which he has

advised profit and non-profit organizations on effective communication, joint problem solving, and negotiation. He specializes in domestic and trans-national business/commercial, real estate, employment, insurance, "Lemon law" and major injury/death disputes.

A proud member of the prestigious Adjunct faculty at Straus, Robert currently teaches the International Commercial Dispute Resolution and Cross-Cultural Dispute Resolution courses. Robert frequently lectures and conducts trainings in dispute resolution to mediators, lawyers, judges and professional organizations.

Among his accomplishments, Robert served as a Visiting Scholar at the United Nations Commission on International Trade Law (UNCITRAL) in Vienna, Austria. There, he assisted in the completion of the Model Law on International Commercial Conciliation. More recently, the Centre for International Legal Studies featured Robert as its mediation speaker at the symposium on "Negligence and Damages in an International Setting".

Robert completed his Master of Laws in Mediation (emphasis in international dispute resolution), as part of the Straus Institute's inaugural LL.M. class. He received his JD in the SCALE program at Southwestern Law School.

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