

Rock, Paper, Scissors and Alternative Dispute Resolution

Article by: Herrick Lidstone, Jr.

Recently a federal judge from Orlando, Florida, brought the children's game of Rock, Paper, Scissors to national attention through Forbes Magazine and CNNMoney.com. Dated June 7, 2006, Fortune writer Roger Parloff describes two lawyers in a federal case who could not agree on the place for a deposition even though their offices were four floors apart in the same building. Rather than deciding the matter, Judge Presnell ordered each attorney to the steps of the federal courthouse on June 30, 2006, accompanied by a paralegal witness, to play one dispositive round of rock, paper, scissors – with the winner to choose the location for the deposition so long as it was in Hillsborough County, Florida. Apparently intimidated by the threat of playing rock, paper, scissors, the World RPS Society (www.worldrps.com) reported on June 9th that “the attorneys have worked out our differences by agreement. We will not have to resort to combat by RPS.” The judge has since withdrawn its order.

One may think that the “Rock, Paper, Scissors” game is an “arbitrary” way to make decisions. In *Hindson v. Allstate Ins. Co.*, 694 A.2d 682, 685 (R.I. 1997) the court was faced with allocating coverage among various insurance carriers where none would admit to primary coverage. The court considered using a “rock, paper, scissors” approach to determine which carriers should provide primary coverage to the claims at issue, but considered that approach to be “arbitrary.” In that case, the court opted to “halt the incessant ‘battle of the draftsmen’ waged by, between, and among the various insurance companies” by finding that the coverage responsibilities of all insurers should be shared on a pro-rata basis.

Notwithstanding the reluctance of the Rhode Island court to use “rock, paper, scissors,” variations of “rock, paper, scissors” have been used for dispute resolution for more than 50,000 years, according to Wikipedia, the free online encyclopedia. According to the Official Rock, Paper, Scissors Strategy Guide (available at Amazon.com), early Homo sapiens played a predecessor game about 50,000 B.C. “to resolve food and mating disputes.” This game only involved a rock (scissors were not invented until sixth century Italy). The ‘thrower’ tried to place the fist-rock on the ‘catcher’s’ body, while the ‘catcher’ tried to avoid this by positioning his hand to catch the rock. After switching positions, the ‘thrower’ who placed the most rocks on the ‘catcher’s’ body won.

It appears that the Japanese invented the modern, tripartite game they call Janken, based on the Guu Choki Paa way of thinking: “the snake fears the slug; the slug fears the frog, and the frog fears the snake.” Moving away from snakes, slugs and frogs, the Japanese developed a new version where “the tiger feared the warrior, the warrior feared his mother, and the warrior’s mother feared the tiger.” Marco Polo reportedly brought this game back to Europe, and the Venetian traders changed it to rock, paper, blade to settle trade disputes. One of the most amusing variations of the game comes from Indonesia and apparently involved an elephant, a person, and an ant. The elephant can crush the person, the person can crush the ant, but how can the ant win against the elephant? It crawls in the elephant’s ear and drives the elephant crazy.

The game may have migrated to the United States via Jean Baptiste. Jean Baptiste was the French general who helped George Washington during the American Revolution. It is unknown as to why this game came to be associated with the Count of Rochambeau, but it does raise questions as to the means by which Washington secured Cornwallis’ surrender in Yorktown. Nevertheless, this theory may explain why the game is often called, “rochambeau,” or, “roshambo.”

In any event, it is clear that Judge Presnell was not the first to use rock, paper, scissors to resolve commercial disputes in modern time. The August 2005 newsletter published by the Institute for Conflict Management (<http://www.icmneutrals.com/news.html>) describes a 75 year-old Japanese businessman who was trying to choose between Christie’s and Sotheby’s to auction off his \$17.8 million art collection – for a commission of more than \$2 million to the successful firm. Believing that both companies were equal and not wanting to insult either, he said that the winner would be determined by a game of rock, paper, scissors. That way, the loser would be considered “unlucky,” not “unworthy.” Sotheby’s said that “this is a game and we really didn’t give it that much thought. We had no strategy in mind.”

The Christie’s representative spent her weekend before the challenge researching the psychology of the game and talking to friends. One had 11 year-old twin girls who offered the following analysis to Christie’s: “Since [Sotheby’s] were beginners, scissors were safest” for Christie’s, because “rock is way too obvious and scissors beats paper.” The girls further explained “that beginners think rock ‘feels’ strong, so they expect you to go for rock, so they choose paper to beat you.” As the girls predicted, Sotheby’s went for paper. Based on the girls’ advice, Christie’s went for scissors and won the \$17.8 million auction contract.

Needless to say, rock, paper, scissors is not a suitable method to resolve all disputes. Where appropriate, though, you may want to consult the World RPS Society, the Official Rock, Paper, Scissors Strategy Guide, your young nieces or nephews, or attend the next tournament near you. You can find listings for tournaments at www.usarps.com (held in June 2006 Las Vegas, Nevada with a \$50,000 grand prize) and www.worldrps.com (to be held in Toronto, Ontario in September 2006). Herrick K. Lidstone, Jr., is a shareholder of Burns Figa & Will, P.C. Mr. Lidstone practices in the areas of business transactions, including corporate law, federal and state securities compliance, mergers and acquisitions, contract law, tax law, real estate law, and natural resources law. Mr. Lidstone’s work includes the preparation of securities disclosure documents for financing transactions, as well as agreements for business

transactions, partnerships, lending transactions, real estate and mineral property acquisitions, mergers, and the exploration and development of mineral and oil and gas properties.