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**THE STATE BAR
OF CALIFORNIA** — COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

December 23, 2003

Ms. Audrey Hollins
Office of Professional Competence
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Inclusion of new rule of professional conduct requiring attorneys to advise their clients on ADR

Dear Ms. Hollins:

I have enclosed a report to the Commission for the Revision of the Rules of Professional Conduct (the "Rules Revision Commission"), from the State Bar of California's Committee on Alternative Dispute Resolution (the "ADR Committee"), on a proposal that the California Rules of Professional Conduct include a rule that attorneys advise their clients on ADR. Some members of the ADR Committee believe there should be such a rule and others believe there should not. Among those who believe there should be such a rule, there are differing views on how the rule should be stated. The enclosed report consists of 1) a summary survey of ADR-related requirements from other jurisdictions; 2) the arguments in favor of such a rule; 3) three alternative drafts of a rule, along with a discussion of each; and 4) arguments against such a rule. Current and former members of the ADR Committee, who worked on this report during the 2002-2003 committee year, are available to discuss the issues raised by this report with the Rules Revision Commission.

Please let me know if you have questions or would like any additional information.

Thank you for your consideration of this issue.

NOTE: In addition to the report from the ADR Committee, please refer to the 7/19/03 and 1/6/04 letters from Gerald Phillips following the ADR Committee report.

Very truly yours,

A handwritten signature in black ink that reads "Jonathan Gross" with a stylized flourish at the end.

Jonathan Gross
Chair, ADR Committee, 2003-2004

cc: Ira Spiro, Vice Chair, ADR Committee, 2003-2004
Gerald F. Phillips, Chair, ADR Committee, 2002-2003



THE STATE BAR OF CALIFORNIA

— COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

180 Howard Street
San Francisco, CA 94105-1639
(415) 538-2306

TO: The Commission for the Revision of the Rules of Professional Conduct
FROM: The State Bar of California's Committee on Alternative Dispute Resolution
DATE: December 23, 2003
SUBJECT: Inclusion of new rule of professional conduct requiring attorneys to advise their clients on ADR

INTRODUCTION

This is a report to the Commission for the Revision of the Rules of Professional Conduct (the "Rules Revision Commission"), from the State Bar of California's Committee on Alternative Dispute Resolution (the "ADR Committee"), on a proposal that the California Rules of Professional Conduct include a rule that attorneys advise their clients on ADR. This proposal has been extensively discussed and debated by the members of the ADR Committee.¹

Some members of the ADR Committee believe there should be such a rule and others believe there should not.² Among those who believe there should be such a rule, there are differing views on how the rule should be stated.

The ADR Committee has provided for the Rules Revision Commission 1) a summary survey of other jurisdictions; 2) the arguments in favor of such a rule; 3) three alternative drafts of a rule, along with a discussion of each; and 4) arguments against such a rule.

¹ The ADR Committee consists of a diverse group of attorneys and public members with expertise in ADR, including ADR neutrals (both mediators and arbitrators), and consumers of ADR services. Current and former members of the ADR Committee, who worked on this report during the 2002-2003 committee year, are available to discuss the issues raised by this report with the Rules Revision Commission. In addition, the ADR Committee has designated Ira Spiro, current Vice Chair of the ADR Committee, to be the ADR Committee's liaison to the Rules Revision Commission.

² Of those who felt a new rule was not necessary, there were two major subgroups: those whose opinions are reflected in the section of this report entitled Opposition to Proposed New Rule, and those who felt the present rules may be interpreted to mean that a requirement already exists. Absent explicit language regarding an attorney's obligation to discuss ADR with a client, California has so far not issued any clarifying opinion on the interpretation of the rules with respect to this topic.

BACKGROUND

The Rules Revision Commission, in its charge, states that it is to consider, along with judicial and statutory developments, "other authorities relevant to the development of professional responsibility standards." In this regard, although not an exhaustive review, the following summary of ADR requirements from various jurisdictions is presented to the Rules Revision Commission.

CALIFORNIA

Before reading what others are doing, it is important to understand the state of ADR in California. This state has a long tradition of court-connected ADR programs at the trial and appellate level. Several courts have had ADR programs for over twenty years, and one of the earliest appellate ADR programs in the nation began in 1975 in California's Third Appellate District.³ Since these ADR programs were not initially mandatory, they had minimal use. It was not until the mid-1980s that a few California law schools began to offer ADR courses, and then only as an elective. Not until the 1990s did ADR courses become prevalent in California law schools. For the last several years, the California State Bar exam has included ADR-related issues in both the essay and the performance test. This indicates that the State Bar is placing a higher significance on the use of ADR.⁴ During the past decade, an untold number of articles and book chapters have addressed the topic of lawyers discussing ADR with a client.⁵ On June 5, 2003, Senator Jackie Speier introduced Senate Concurrent Resolution No. 34.⁶ This resolution would "urge the State Bar of California to adopt requirements for the admission to the State Bar to include testing of applicants' understanding of skills relative to resolution of disputes without litigation and would also request the State Bar to adopt associated law school curriculum and continuing education requirements in that regard." These few examples serve to illustrate that the integration of ADR is a part of California's legal fabric.

³ Yeend, N.N., *State Appellate ADR: National Survey with Implementation Guidelines*, 2nd Edition, St. Petersburg, FL: The John Paul Jones Group, 2002.

⁴ Anecdotally, private bar exam preparation tests that ask what else a lawyer should consider when a client does not want to go to trial found that when a student waxed eloquently on ADR the student received a higher score. This appears to indicate a belief that examiners are looking for an understanding of ADR and its application.

⁵ Brand, N., Editor, *How ADR Works*, Edison, NJ: BNA Books, 2002. Chapter 2, written by California attorney, Benjamin Bycel, provides a thoughtful overview of the various perspectives on the topic of advising a client about ADR.

⁶ Appendix 1, Senate Concurrent Resolution No. 34 – Relative to Attorneys.

AMERICAN BAR ASSOCIATION

The Model Rules of Professional Conduct as modified in February 2002 by the House of Delegates of the American Bar Association do not provide explicit guidance on whether or not an attorney has a duty to make the client aware of ADR options.⁷

Rule 1.2 provides in part:

“SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) . . . [A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . .”

Rule 1.4 provides in part:

“COMMUNICATION

(a) A lawyer shall . . . (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; . . .”

The Comment to Rule 2.1 provides in part:

“SCOPE OF ADVICE

(5) . . . Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. . . .”

DEVELOPMENTS IN OTHER STATES

Although there is no explicit requirement in the ABA Model Rules, some states have mandatory rules, requiring lawyers to inform clients of ADR options, other states have hortatory language to encourage such advice, while the majority of states are silent on the issue. However, the states will be considering the new Model Rules of the ABA and therefore will visit the question.

VIRGINIA

Virginia adopted the ABA Model Rules in 2000, and further clarified the scope of representation in its rules. Following Virginia Rule of Professional Conduct, Rule 1.2, Scope of Representation, the first Comment states in part: “In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives.” [Rules of the Supreme Court of Virginia, Part 6, § II, Rule 1.2, Comment 1].⁸ Rule 1.4, Comment 1a provides in part that the “continuing duty to keep the client informed includes a duty to advise the client about the availability of

⁷ Appendix 2, American Bar Association Model Rules of Professional Conduct, Rule 1.2 and Comment, Rule 1.4 and Comment, Rule 2.1 and Comment.

⁸ Appendix 3, Virginia Rules of Professional Conduct, Preamble and Rules 1.1 through 1.4, including Comments.

dispute resolution processes that might be more appropriate to the client's goal than the initial process chosen." This rule has been in place for more than for 2 years, with no complaints made against lawyers for failing to comply and no requests for ethical opinions on the rule.⁹ Virginia State Bar produced a CDROM with relevant ADR information and distributed it to its members to help them educate themselves and their clients about ADR. Virginia has a requirement that mediators must provide free educational orientation to attorneys and their clients before attending a mediation.¹⁰

MICHIGAN

The Michigan Bar has issued two opinions, which clarify an attorney's obligations. First, does an attorney have an obligation to tell a client of an offer to resolve a dispute through ADR? The opinion states in part: "If counsel for the opposing party offers to resolve a pending dispute through alternative dispute resolution forums, a lawyer is required to convey that offer to the client." [Opinion RI-255].¹¹ The second opinion considered the question of whether a lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests. The opinion states in part that "any doubt about whether a possible option is reasonably likely to promote the clients interests, as well as any doubt about whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision." [Opinion RI-262].¹²

GEORGIA

Georgia had a mandatory rule adopted in 1999. However in the last rewrite it was inadvertently left out. The wording may be put back in on the next update. The rule stated: "A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation." [Ga.R. and Regs. for the State Bar of Georgia Rule 3-107, EC 7-5 (1999)].¹³ The initial impetus for this rule came from the Committee on ADR, which is a Committee of the Supreme Court. The rule existed for several years and neither complaints nor malpractice suits were filed against attorneys for failing to so advise. The Georgia Bar requires that lawyers take training on ADR, as part of its continuing effort to enable clients to make informed decision.

⁹ In a letter dated June 13, 2003, the Assistant Ethics Counsel for the Virginia State Bar stated that this comment in the rule "has not generated any comments or requests for committee opinion to date." This was further confirmed in a phone conversation with the Department of Dispute Resolution Director.

¹⁰ Educating the legal community and the members of the public has been a collaborative effort between the State Bar and the Department of Dispute Resolution of the Virginia Supreme Court (entity that regulates Virginia mediators). The DDR received a grant to produce the CDROM, which the Virginia State Bar then initially distributed to its members. These CDROMs are purchased by Virginia lawyers for a very modest fee (approximately \$3), which enables the lawyers to distribute this educational tool to their clients.

¹¹ Appendix 4, Michigan Ethics Opinion RI-255, April 3, 1996.

¹² Appendix 5, Michigan Ethics Opinion RI-262, May 7, 1996.

¹³ Appendix 6 (third page), Rules and Regulations of the State Bar of Georgia, Ethical Consideration 7-5 (1999).

PENNSYLVANIA

The Pennsylvania State Bar clarified the ABA model rules, stating that Rule 1.2 and Rule 1.4 read together obligate a lawyer to inform a client when the opposing counsel suggests mediation. The opinion states in part that Rule 1.2(a) and 1.4 and the Comment thereto "would certainly indicate that an attorney is obligated to communicate to his client a proposal of mediation by the opposing counsel." [Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Opinion 90-125 (1991)].¹⁴

COLORADO and HAWAII

Colorado encourages lawyers to give ADR advice. Rule 2.1 of the Colorado Rules of Professional Conduct states in part: "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought." [Colorado Revised Statutes, Court Rules, Rules of Professional Conduct (Appendix to Chapters 18 to 20), Rule 2.1].¹⁵ Hawaii adopted the same language as Colorado. [Haw. Rules of Professional Conduct, Rule 2.1].

ARKANSAS and FLORIDA

These states establish aspirational goals. Arkansas encourages the use of ADR options. [AR ST. § 16-7-201].¹⁶ Florida has "ideals" and "goals" for professionalism, which address, among other issue, the "Fair and Efficient Administration of Justice." The goals state in part: "A lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible. A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes. A lawyer should counsel the client to consider and explore settlement in good faith." [Florida Ideals and Goals of Professionalism, Sections 4.1 through 4.3].¹⁷ Proposed by the Trial Lawyers Section, and approved by the Florida Conference of Circuit Judges 1995, Florida has Guidelines for Professional Conduct that include guidelines providing that a lawyer should raise and explore settlement, and that counsel should consider if the client's interests are better served by ADR. [Florida Guidelines for Professional Conduct Section K, Subsections 1, 3].¹⁸ Although these examples reflect only hortatory language, they illustrate how the various states have chosen to clarify and stress the principle of the importance of discussing ADR with a client.¹⁹

¹⁴ Appendix 7, Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Opinion 90-125 (1991).

¹⁵ Appendix 8, Colorado Rules of Professional Conduct, Rule 2.1 and Comment.

¹⁶ Appendix 9, Arkansas Code of 1987, Title 16, Subtitle 1, Chapter 7, Subchapter 2.

¹⁷ Appendix 10, Florida Ideals and Goals of Professionalism.

¹⁸ Appendix 11, Florida Guidelines for Professional Conduct.

¹⁹ Texas and New Mexico address the issue of discussing ADR with their clients through a Lawyer's Creed. In Texas it is located in the Mandate for Professionalism section II, subsection 11. (Appendix 12, The Texas Lawyer's Creed). In New Mexico the wording may be found in the Lawyer's Creed, Section B.3. (Appendix 13, Creed of Professionalism of the New Mexico Bench and Bar). Massachusetts adopted a rule, effective February 1, 1999, providing that clerks shall make information about court-connected dispute resolution services available to attorneys and unrepresented parties, and that attorneys shall provide their clients with this information, discuss with their

(footnote continued on next page)

PROPOSERS OF A NEW RULE

In light of (1) the mainstreaming of mediation and arbitration as alternatives to litigation; (2) the adoption of rules by other states to either encourage or require lawyers to present ADR options to clients; and (3) the absence of clear ethical guidelines in California, proponents propose three alternative rules to amend the California Rules of Professional Conduct to create a minimum standard with respect to advising clients about ADR.²⁰

Although other states have adopted rules to inform clients of "alternative forms of dispute resolution" or "alternatives to litigation," these terms may be too broad since they deal with many processes. Given the propensity of courts to order or "refer" cases into either mediation or arbitration, and the reality that the majority of attorneys have little experience or knowledge of ADR processes other than mediation and arbitration, the first two rules are limited to mediation and arbitration, and the third rule to mediation only. In the future, if other processes become popular, the guidelines could be broadened.

Alternative Draft Rule A

(a) In a matter involving or expected to involve litigation, a lawyer shall advise the client of the advantages, disadvantages, and availability of mediation and arbitration as alternative forms of dispute resolution, which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

(b) With respect to such matter, a lawyer shall render such advice at the outset of and at appropriate times throughout the engagement of legal services.

(footnote continued from previous page)

clients the advantages and disadvantages of the various methods of dispute resolution, and certify their compliance with this requirement on the civil cover sheet or its equivalent. (Appendix 14, Massachusetts Rules of the Supreme Judicial Court, Rule 1:18, Uniform Rules on Dispute Resolution, Rule 5). Some courts in California have similar requirements, including the San Diego Superior Court Rules governing family law matters. (Appendix 15, San Diego Superior Court Rules, Division V, Rule 5.5, subdivision A and Appendix B). California Rule of Court, rule 201.9 provides that each court must make available to the plaintiff, at the time of filing of the complaint, an ADR information package including certain minimum information, and that the plaintiff must serve a copy of the ADR information package on each defendant along with the complaint. (Appendix 16, California Rule of Court, rule 201.9). The Case Management Statement in California requires counsel to state whether they have or have not provided the ADR information package to the client and reviewed ADR options with the client. (Appendix 17, CM-110).

²⁰ Gerald F. Phillips, 2002-2003 Chair of the State Bar's ADR Committee, pursuant to authorization of the Beverly Hills Bar Association ADR Committee, has written to the Los Angeles County Bar Association Professional Responsibility, asking it to render an opinion as to whether, under the present California Rules of Professional Conduct, an attorney owes a duty or obligation to the client to discuss ADR.

Discussion of Draft Rule A

1. The legal client bears the greatest consequences in deciding the means of resolving a legal dispute. Yet, typically, the client is not informed of alternatives to litigation unless and until the matter is court ordered, requested by an opposing disputant, or demanded by an opposing disputant pursuant to contractual provisions. When clients know more about litigation, its monetary and non-monetary costs, and the advantages and disadvantages of mediation and arbitration, the clients become better consumers of legal services. Just as a medical provider has a duty to obtain the informed consent of the patient by presenting the benefits and risks of all methods of treatment, so does the lawyer have a fiduciary duty to inform the legal client of the advantages and disadvantages of pursuing mediation and arbitration as alternatives to litigation. This proposed rule ensures that this advice will be given early and at appropriate times throughout the litigation process.
2. California should draw upon the positive experiences of other states that have adopted a similar mandatory rule. Alternative Draft Rule A is not merely a copy of another state's rule, but is a reflection of the California ADR culture, tradition and present court usage and thus tailored specifically for California.
3. The proposed rule is not onerous since it creates a minimum standard, which is limited in scope and is consistent in that regard to current California Rules of Professional Conduct that address specific practice requirements (e.g., the solicitation rule, 1-400, and its Standards; the rule on communicating written settlement offers, 3-510; the rule on how to represent an organization as client, 3-600; and the trust account rule, 4-100, and its Standards).
4. The fears of some that this rule will subject the lawyer to malpractice lawsuits and attendant increased insurance premiums are unfounded, since there is no evidence of any claims filed or lawsuits initiated in those other states with similar mandatory rules. Furthermore, the Rules of Professional Conduct are meant to protect the client not the lawyer.
5. Many lawyers have not studied ADR in law school and do not understand the benefits of mediation and arbitration. The proposed rule will result in lawyers becoming better educated in these processes. If a lawyer has a duty to inform a client of the advantages and disadvantages of mediation and arbitration, by necessity, the lawyer will have to acquire sufficient knowledge of these processes and understand their inherent differences.
6. Mediation and arbitration offer a faster, less costly, and more private means of dispute resolution than litigation. Accordingly, there may be an inherent conflict of interests between attorney and client in pursuing such alternative processes. A lawyer's interest in generating billable hours, maintaining a "hardball" image, or seeking professional publicity may conflict with a client's interest in quick resolution, limiting cost, public exposure or preserving relationships. The proposed rule will address this conflict and help the client better understand this potential conflict and make an informed decision. Even competent counsel may waiver under the weight of economic and office political pressures.

7. Although some local court rules, limited California case law, and a strained reading of the current Rules of Professional Conduct may in part address the instant issue, the proposed rule will provide an explicit and unambiguous duty and create a uniform standard throughout the state.

Alternative Draft Rule B

(a) In a matter involving or expected to involve litigation, a lawyer should advise the client of the advantages, disadvantages, and availability of mediation and arbitration as alternative forms of dispute resolution, which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

(b) With respect to such matters, a lawyer should render such advice at the outset of and at appropriate times throughout the engagement of legal services.

Discussion of Draft Rule B

Proponents of this Draft Rule B agree in principle with the arguments presented with respect to Draft Rule A, except:

1. A "best practices" rule to encourage a lawyer giving such advice would achieve the same goals of an informed legal client and a better educated lawyer without subjecting the attorney to a possible discipline offense.

2. Other states have adopted similar hortatory language and California can draw upon their positive experience. Although California's Rules of Professional Conduct have not heretofore provided rules to encourage aspirational goals, official discussions of some rules use the word "should" and nothing prevents the Rules Revision Commission from utilizing such hortatory language in the body of a rule.

Alternative Draft Rule C

(a) If a member ["member" as the term is used in the Rules of Professional Conduct to denote a California lawyer] represents a client in "litigation dispute" as defined in paragraph (b) below, the member shall advise the client of the possibility of mediation of the dispute, and shall advise the client in general as to what mediation is. The advice shall be given once as early as the member can, as a practical matter, give it, before litigation or arbitration begins, if practical.

(b) "Litigation dispute," as used in paragraph (a) above means each of the following:

- i. a lawsuit or other court proceeding to which the client is a party;
- ii. binding arbitration to which the client is a party;
- iii. a dispute in which the client or member plans to initiate a lawsuit, court proceeding or binding arbitration;

- iv. a dispute in which the client has been threatened with initiation of a lawsuit, court proceeding, or binding arbitration against the client as a party.

OFFICIAL DISCUSSION

Advising the client of the statutory definition of mediation in Evidence Code § 1115(a) as it read during the year 2002 is sufficient to meet the requirement of advising the client in general of what mediation is, although more extensive advice is encouraged.

Discussion of Draft Rule C

Proponents of this Draft Rule C agree in principle with the arguments presented with respect to Draft Rule A, except:

1. This proposed rule is very limited. It requires advice only once about mediation, and in closely defined situations (in general where there is actual or threatened litigation or binding arbitration). Arbitration, the other main candidate for a rule, has many advantages, but also many disadvantages. But mediation has very great advantages, and very few if not minor disadvantages.
2. This modest rule is of so little burden that there is no harm in making it mandatory and the Rules of Professional Conduct do not have hortatory, "should" rules. This rule does not require a writing but as a practical matter, an attorney could meet the requirement by incorporating such advice into the fee agreement. Even boilerplate advice is better than none.
3. Although the proposed rule requires advice about mediation, it is likely, in at least a number of situations, to lead to consideration of mediation more than once during the course of a dispute, lawsuit, or arbitration.
4. Advising a client about the possibility of mediating a dispute is important in cases involving binding arbitration as well as litigation.
5. Although the Rules of Professional Conduct disavow that they are standards for malpractice, they inevitably become standards. This proposed rule could provide at least a partial safe harbor for a malpractice suit.

OPPOSITION TO PROPOSED NEW RULE

The following comments were made in opposition to the proposal that advise on ADR or even only on mediation should be a Rule of Professional Conduct:

1. Lawyers should advise their clients about ADR, but should not be required to do so. Good practitioners will advise about ADR at a time that they, in their professional judgment, believe it is appropriate. Others are likely to honor a requirement in the breach. The rapidly increasing acceptance of ADR is more likely to bring good practice than is a rule of professional conduct.

2. There is no dispute over whether giving information on ADR is a good practice. Like returning phone calls, charging reasonable fees, and fully communicating the status of the ir case, advising a client on ADR is good practice. The issue is whether it should be a Rule of Professional Conduct. The Rules should not micromanage the practice of law. Law is a profession, which, like others such as a medicine, requires frequent exercise of judgment under hugely varied and changeable circumstances.

“If you cannot keep your own counsel, how can you expect another person to keep it.”

Proverb

3. A Rule of Professional Conduct might be useful as a stick with which to beat some lawyer (probably because of something else), but it would not advance the cause of ADR or client access to it. Encouragement and education are the keys.

“I pray thee cease thy counsel,

Which falls into mine ears as profitless

As water in a sieve.”

William Shakespeare, *Much Ado about Nothing*

4. A substantial enforcement obstacle results. The violation will only come forward via a disgruntled client. And then, should it be a basis for disgorgement of all fees, responsibility to rescind all that has occurred, perhaps disciplinary action by the State Bar, or a malpractice cause of action? If a disgruntled client reported to the State Bar that his or her lawyer failed to advise on ADR, what would be the response by the State Bar? If none of the above, would not the rule and a violation become meaningless for lack of credibility. The State Bar aside, a malpractice cause of action can exist apart from a violation of a Rule of Professional Conduct. Yet the new rule could be considered a new or at least an absolute standard of care.

“Laws are like cobwebs that entangle the weak, but are broken by the strong.” Solon

5. Advising a client regarding ADR options may not be in the client's best interest, such as where a client has diminished capacity, or where a client's case must set a precedent for the prevention of some sort of untoward behavior. There must be a myriad of other circumstances where early ADR is inadvisable. The issue becomes one of whether substantial regulation of the practitioner would fail to include the nuances of specific clients and specific cases who/which require the lawyer to exercise discretion. The basic issue is professional responsibility and accountability. One size does not fit all. A canned requirement should not replace professional trust and responsibility.

6. On the other side of the above point, if advise on ADR is worthy of a Rule of Professional Conduct, surely there are hundreds of other good practices which deserve such a rule. Returning telephone calls, reporting settlement discussions, providing an accurate

assessment of the value of a client's case, taking on only cases and not causes etc., etc., seem equally deserving of a Rule. Absence of a Rule on these matters may seem to condone them, or regard these practices as less important.

"Zeal is like fire, it needs both feeding and watching." *Proverb*

7. There is concern over what constitutes compliance with the rule. Does the rule require a discussion with the client, which would allow the client to ask questions? Or could the requirement be met by a short paragraph or sentence in the fee agreement, or in a brochure automatically provided to the client by the receptionist, perhaps? If the rule could be observed by meaningless form language, the worth of such a rule seems greatly diminished.

8. Those who feel that the subject is already covered cite the affirmative rules, which require a lawyer to keep the client reasonably informed regarding the case. California has Rule 3-500 and a supporting section of the Business and Professions Code, Section 6068(m), that require the lawyer to communicate with the client. Communication is almost a fiduciary duty, say this group, because a client has a right to expect loyalty and confidentiality. If ADR in a litigation matter is never discussed, those expectations go unfulfilled. "One of an attorney's basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives." *Nichols v. Keller* (1993) 15 Cal. App 4th 1672. Rule of Professional Conduct 3-110 requires competency of members of the State Bar. Alternative methods of dispute resolution, which can be less costly, less time consuming, quicker, and offer more flexible solutions, surely are tools of competent counsel.

Introduced by Senator Speier

June 5, 2003

Senate Concurrent Resolution No. 34—Relative to attorneys.

LEGISLATIVE COUNSEL'S DIGEST

SCR 34, as introduced, Speier. Attorneys: alternative dispute resolution.

This measure would urge the State Bar of California to adopt requirements for the admission to the State Bar to include testing of applicants' understanding of skills relative to resolution of disputes without litigation and would also request the State Bar to adopt associated law school curriculum and continuing education requirements in that regard.

Fiscal committee: no.

- 1 WHEREAS, In the interest of promoting justice, securing the
- 2 civil liberties, and ensuring the equal protection of the laws for the
- 3 people of California, it is the goal of the Legislature to promote
- 4 fair, efficient, swift, and economical means by which California
- 5 residents may resolve claims, conflicts, and disputes, and
- 6 effectively assert defenses, in matters actually or potentially under
- 7 the jurisdiction of the civil courts; and
- 8 WHEREAS, While litigation may be the most appropriate
- 9 means for resolution of certain of those claims, conflicts, and
- 10 disputes, or assertion of defenses, in many cases litigation is not
- 11 the most cost-effective or efficient means to those ends; and
- 12 WHEREAS, The costs of litigation may, in many cases, limit
- 13 the public's access to the means of just resolution of claims,
- 14 conflicts and disputes, or effective assertion of defenses, and may

1 impose avoidable economic burdens upon individuals and
2 businesses both large and small, to the detriment of the economic
3 and social well-being of the people of California; and

4 WHEREAS, Even where parties to a conflict or dispute can
5 afford the costs of litigation, in many cases litigation is a less
6 efficient means of resolution of conflicts and disputes, and its use
7 may, by taxing the resources of the judicial system, operate to
8 impede unnecessarily the progress of other matters that necessarily
9 require adjudication and the skilled advocacy of trial attorneys;
10 and

11 WHEREAS, Use of alternative methods of dispute resolution,
12 particularly voluntary third party mediation, is often a more
13 efficient and cost-effective means of conflict and dispute
14 resolution and contributes to more efficient administration of civil
15 justice; and

16 WHEREAS, Third party mediation has been increasingly
17 encouraged by the rules and procedures of the state and federal
18 judiciaries; and

19 WHEREAS, Every California attorney, upon admission to the
20 State Bar of California, is required to swear or affirm an oath to
21 "support the Constitution of the United States and the Constitution
22 of the State of California, and faithfully discharge the duties of an
23 attorney and counselor at law to the best of my knowledge and
24 ability," pursuant to Section 6067 of the Business and Professions
25 Code; and

26 WHEREAS, An attorney's duty as a counselor to clients has
27 been recognized to include consideration of the most judicious and
28 economical means by which a client's interests may be served in
29 the resolution of disputes to which the client is a party, including
30 not only considerations of the law, but of other considerations such
31 as moral, economic, social, and political factors that may be
32 relevant to a client's situation, pursuant to Rule 2.1 of the
33 American Bar Association's Model Rules of Professional
34 Conduct; and

35 WHEREAS, The majority of litigated cases are in fact settled
36 or resolved without trial, so that negotiation of conflicting claims
37 in fact commonly engages more of the professional time attorneys
38 (including trial attorneys) spend than use of skills for actual trial
39 or appeal of cases; and

1 WHEREAS, Law school courses in California should provide
2 students with actual case studies of successful dispute resolution
3 without litigation, and, in fact, successful negotiation,
4 conciliation, and mediation experiences of practicing attorneys
5 (including trial attorneys), counselors, and mediators, provide
6 abundant material for those case studies; now therefore be it

7 *Resolved by the Senate of the State of California, the Assembly*
8 *thereof concurring*, That is the policy of the Legislature to foster
9 in California law students, and expand in legal practitioners, skills
10 in negotiation, conciliation, problem-solving, and peacemaking
11 through the character and content of primary and continuing legal
12 education, no less than the skills of litigation and appellate
13 advocacy; and to this end, to promote required training, as part of
14 all core courses offered in California public law schools and law
15 schools receiving public funds, and in continuing legal education
16 of admitted attorneys, in mediation analysis and practice,
17 including the skills of negotiation, conciliation, problem-solving
18 and peacemaking in the resolution of civil disputes and conflicts,
19 until their use is reasonably determined to be ineffective, and
20 litigation becomes reasonably necessary to ascertain the relevant
21 law of the case, protect a client's rights or interests against injustice
22 or oppression, or for other just, appropriate, and reasonably
23 necessary causes; and be it further.

24 *Resolved*, That the State Bar of California, under the
25 supervision of the Supreme Court of the State of California, is
26 urged to adopt, within a reasonable period of no more than three
27 years, requirements for the admission to the State Bar of California
28 to include testing of applicants' understanding and acquisition,
29 through their legal education and training, of skills required to
30 assess factors in a client's situation (other than and in addition to
31 relevant rules of law) that may facilitate resolution of disputes
32 without litigation, including specifically skills promoting
33 harmonization of conflicting claims through conciliation,
34 negotiation, and voluntary third party mediation; and be it further

35 *Resolved*, That the State Bar of California, under the
36 supervision of the Supreme Court of the State of California, is
37 urged to adopt, within a reasonable period of no more than three
38 years, continuing education requirements for attorneys admitted to
39 the State Bar of California, expanding the skills of California
40 attorneys to assess factors in a client's situation (other than and in

1 addition to relevant rules of law), that may facilitate resolution of
2 disputes without litigation, including specifically skills promoting
3 harmonization of conflicting claims through conciliation,
4 negotiation, and voluntary third party mediation; and be it further
5 *Resolved*, That the Secretary of the Senate transmit copies of
6 this resolution to the author for appropriate distribution.

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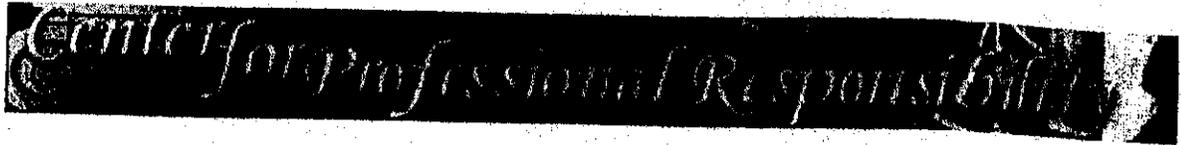
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Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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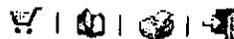
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CLIENT-LAWYER RELATIONSHIP RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

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Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

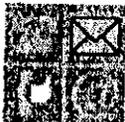
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Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

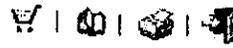
[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

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Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP RULE 1.4 COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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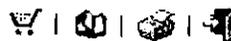
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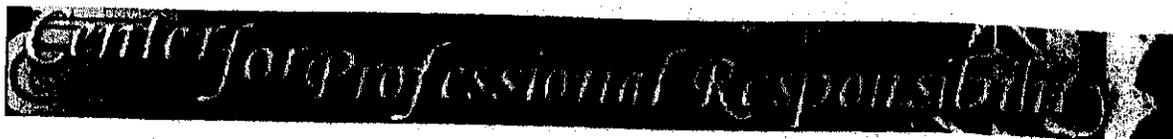
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CLIENT-LAWYER RELATIONSHIP RULE 1.4 COMMUNICATION

Legal Ethics

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

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[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

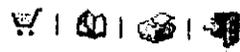
[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

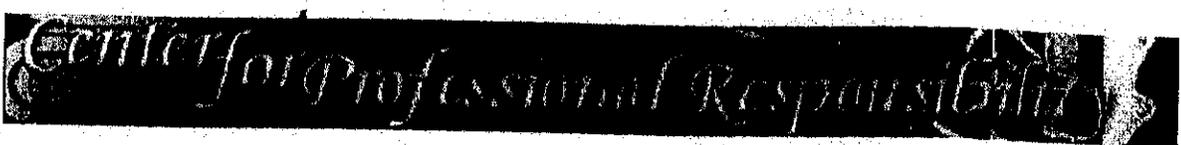
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Model Rules of Professional Conduct

COUNSELOR RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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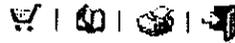
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COUNSELOR RULE 2.1 ADVISOR

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Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client.

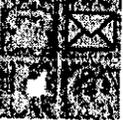
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However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

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PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients or a neutral third party, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

A lawyer may perform various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As third party neutral, a lawyer represents neither party, but helps the parties arrive at their own solution. As evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

RULES OF PROFESSIONAL CONDUCT

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

These Rules follow the same format as the current American Bar Association Model Rules of Professional Conduct ("ABA Model Rules"), rather than the former American Bar Association Model Code of Professional Responsibility ("ABA Model Code"), or the former *Virginia Code of Professional Responsibility* ("Virginia Code"). Although interpretation of similar language in the ABA Model Rules by other states' courts and bars might be helpful in understanding Virginia's Rules, those foreign interpretations should not be binding in Virginia.

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

These Rules apply to all lawyers, whether practicing in the private or the public sector. However, under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General and the commonwealth attorneys in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

RULES OF PROFESSIONAL CONDUCT

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has either a limited discretion or a limited obligation to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Preamble and this note on Scope provide general orientation. The text of each Rule and the following Terminology section are authoritative and the Comments accompanying each Rule are interpretive.

Terminology

- "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
- "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
- "Firm" or "law firm" denotes a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization. See Comment, Rule 1.10.
- "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.
- "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- "Partner" denotes a member of a partnership or a shareholder or member of a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.
- "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- "Should" when used in reference to a lawyer's action denotes an aspirational rather than a mandatory standard.
- "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

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DR 7-105 (B)	Disclosing Representation to Court	***
DR 7-105 (C)	Trial Conduct	Rule 3.4
DR 7-106	Trial Publicity	Rule 3.6
DR 7-107	Communication With or Investigation of Jurors	Rule 3.5 (a)-(c)
DR 7-108	Contact With Witnesses	Rule 3.4
DR 7-109	Contact With Officials	Rule 3.5 (d), (e)
DR 8-101	Action as Public Official	Rule 1.11 (a)
DR 8-102	Special Responsibilities of a Prosecutor	Rule 3.8
DR 9-101	Avoiding Even the Appearance of Impropriety	Rule 1.11
DR 9-102	Preserving Identity of Funds and Property of Client	Rule 1.15
DR 9-103	Record Keeping Requirements	Rule 1.15

CLIENT-LAWYER RELATIONSHIP

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

- [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
- [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
- [2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.
- [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.
- [4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

- [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake: major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

- [6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

VIRGINIA CODE COMPARISON

Rule 1.1 is substantially similar to DR 6-101(A). DR 6-101(A)(1) provided that a lawyer "shall undertake representation only in matters in which . . . [t]he lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters." DR 6-101(A)(2) also permitted representation in matters if a lawyer "associated with another lawyer who is competent in those matters."

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* verbatim, but added the third paragraph of the Comment to make it clear that legal representation, in which a lawyer is expected to be competent, involves not only litigation but also negotiation techniques and strategies.

In addition, the Committee added the second sentence under *Maintaining Competence* Comment section to note Virginia's Mandatory Continuing Legal Education requirements.

RULE 1.2 Scope of Representation

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer may limit the objectives of the representation if the client consents after consultation.
- (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.
- (d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
- (e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT

Scope of Representation

- [1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a

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client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

- [2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

- [3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means

- [4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.
- [5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

- [6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
- [7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16.
- [8] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.
- [9] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. See also Rule 3.4(d).

VIRGINIA CODE COMPARISON

Paragraph (a) has no direct counterpart in the Disciplinary Rules of the *Virginia Code*. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . ." EC 7-8 stated that "[I]n the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of

nonlegal factors is ultimately for the client In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provided that a lawyer "shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law. . . . A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics"

With regard to paragraph (b), DR 7-101(B)(1) provided that a lawyer may, "with the express or implied authority of his client, exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or position of his client."

With regard to paragraph (c), DR 7-102(A)(7) provided that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-105(A) provided that a lawyer shall not "advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal . . . but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 stated that a lawyer "should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

Paragraph (d) had no counterpart in the *Virginia Code*.

With regard to paragraph (e), DR 2-108(A)(1) provided that a lawyer shall withdraw from representation if "continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules." DR 9-101(C) provided that "[a] lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official."

COMMITTEE COMMENTARY

The Committee adopted this Rule as a more succinct and useful statement regarding the scope of the relationship between a lawyer and the client. However, the Committee moved the language of paragraph (b) of the *ABA Model Rule* to the Comment section styled "Independence from Client's Views or Activities" since it appears more appropriate as a Comment than a Rule. Subsequent paragraphs were redesignated accordingly.

The Committee added the fourth sentence in Comment [1] requiring lawyers to advise clients of dispute resolution processes that might be "appropriate."

In Comment [7], the Committee used the verb "shall" to match the mandatory standard of the *Virginia Code* and these Rules.

RULE 1.3 Diligence

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

COMMENT

- [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.
- [1a] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.
- [2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer over-

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looks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

- [3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."

Paragraphs (b) and (c) adopt the language of DR 7-101(A)(2) and DR 7-101(A)(3) of the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added DR 7-101(A)(2) and DR 7-101(A)(3) from the *Virginia Code* as paragraphs (b) and (c) of this Rule in order to make it a more complete statement about fulfilling one's obligations to a client. Additionally, the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy.

RULE 1.4 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

COMMENT

- [1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.
- [1a] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.
- [2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client

before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

- [3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

VIRGINIA CODE COMPARISON

Rule 1.4(a) is substantially similar to DR 6-101(C) of the *Virginia Code* which stated: "A lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered."

Paragraph (b) has no direct counterpart in the *Virginia Code*. EC 7-8 stated that a lawyer "should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

Paragraph (c) is identical to DR 6-101(D) of the *Virginia Code*.

COMMITTEE COMMENTARY

The *Virginia Code* had already substituted the essential notion of paragraph (a) as DR 6-101(C), thus specifically addressing a responsibility omitted from the *ABA Model Code*. The Committee believed that paragraph (b) specifically addressed a responsibility only implied in the *Virginia Code* and that adding DR 6-101(D) as paragraph (c) made the Rule a more complete statement regarding a lawyer's obligation to communicate with a client. Additionally, the Committee added a new second paragraph to the Comment to remind lawyers of their continuing duty to help clients choose the most appropriate settlement process.

RULE 1.5 Fees

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

RI-255

April 3, 1996

SYLLABUS

If counsel for the opposing party offers to resolve a pending dispute through alternative dispute resolution forums, a lawyer is required to convey that offer to the client.

References: MRPC 1.2(a), 1.4, 2.1.

TEXT

The Committee has been asked whether a lawyer is required to convey to a client an offer from the opposing party to resolve the pending dispute between the parties through alternative dispute resolution forums.

MRPC 1.2(a) provides as follows:

"(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. . . . A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter."

The Comment to MRPC 1.2 states that a client has a right to consult with the lawyer about the means to be used in pursuing the objectives of the representation of the client. The lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client with regard to what expense will be incurred in the use of various means. Even if the client has given the lawyer authority to determine all procedural matters, the settling of a dispute through alternative dispute resolution forums is not a technical or legal tactic the use of which can be determined by the lawyer independent of consulting with the client with regard to the various elements of the forum, including the cost of the procedure. By offering to settle the dispute through means other than the public forum of trial, the proposal is akin to an offer of settlement which must be conveyed to the client.

The lawyer is obligated to keep the client informed. The duty to communicate is stated in MRPC 1.4 as follows:

"(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

"(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Emphasis added.*

The Comment to MRPC 1.4 suggest that the lawyer is to provide a client with sufficient information which will allow the client to make reasonable decisions concerning matters of the objectives to be achieved and the means by which the objectives are to be pursued, and to make informed decisions about the representation. The lawyer is obligated to communicate to the client an offer to settle by an alternative dispute resolution forum and further to communicate to the client all information regarding the particular forum, sufficient to allow the client to determine whether the client wishes to proceed in that manner. Information such as the cost, whether the decision-maker is a single individual or panel of individuals, the format of the presentation to the forum, whether the decision is binding, the length of time before a decision is rendered, and the general objective of the forum all have a bearing on the client's decision. The lawyer as an advisor to the client must give straightforward honest statements regarding alternative dispute resolution forums.

MRPC 2.1 states:

"In representing a client, a lawyer shall exercise independent professional judgment and shall render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."

A decision to accept or reject an offer of alternate dispute resolution may be weighed in the context of other considerations than simply the contested legal matter. A lawyer should alert a client to all those factors.

The Pennsylvania Bar Association considered a similar question and in Pennsylvania Op 90-125 stated that a lawyer must inform the client when opposing counsel proposes mediation of the matter and must abide by the client's decision to accept or reject the offer to mediate, unless the client has instructed the lawyer to make all procedural decisions in the case. To emphasize the duty of the lawyer to inform the client of this offer, the Pennsylvania Opinion stated:

"If the lawyer fails to convey the mediation proposal to the client, he may not charge the client the expense of trial preparation if these expenses are incurred as a result of the lawyer's failure to communicate the offer."

We agree. Therefore, if counsel for the opposing party offers to resolve the pending dispute through alternative dispute resolution forums, a lawyer is required to convey that offer to the client.

RI-262

May 7, 1996

SYLLABUS

A lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests, or if the lawyer has any reason to think that the client would find the alternative desirable.

References: MRPC 1.2(a), 1.4(a) and (b), 2.1.

TEXT

The Committee has been asked whether lawyers have an ethical obligation to inform their clients of alternatives to litigation?

There is generally an ethical duty to inform the client of any options or alternatives which are reasonable in pursuing the client's lawful interests. MRPC 1.4. While not all options which are theoretically available need be discussed, any doubt about whether a possible option is reasonably likely to promote the client's interests, as well as any doubt about whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision. This decision should be rendered with the assistance of the lawyer's best advice and judgment.

MRPC 1.2(a) states:

"(a) A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules. A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics. A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client."

"Reasonably available means" include those options permitted by law. There is no limitation to means involving litigation, and certainly no reason to conclude such a limitation was intended.

The Comment to MRPC 1.2 further notes that it is the client who has the ultimate authority to determine the purpose to be served by legal representation provided such purposes are within the law, and a lawyer's ethical obligations.

MRPC 1.4 states:

"(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.

"(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The spirit and intent of these rules is to see to it that the client's subjective desires and objectives are the goal of the lawyer, as long as they are not illegal or fraudulent, or involve the lawyer in violations of the Rules of Professional Conduct. MRPC 1.2 (c) and (d). The lawyer must communicate any and all information necessary to allow the lawyer to be confident that these goals and objectives are those which the lawyer seeks to accomplish. If a course of action reasonably available may accomplish these ends, then that course of action must be communicated to the client, together with information to allow the appropriate exercise of the client's judgment. MRPC 2.1. The cost of any available option as well as the likely benefits of

such an approach are factors to consider in determining if the alternative is a "reasonably" available means.

Hypothetical options which are unlikely to satisfy the client's objectives need not be communicated. However, specific options available by offer, or which are known to the lawyer to represent a possible means to obtain the desired objectives of the client should be communicated.

ALTERNATIVE DISPUTE RESOLUTION RULES¹

The Georgia Constitution of 1983 mandates that the judicial branch of government provide "speedy, efficient, and inexpensive resolution of disputes and prosecutions." As part of a continuing effort to carry out this constitutional mandate the Supreme Court of Georgia established a Commission on Alternative Dispute Resolution under the joint leadership of the Chief Justice of the Georgia Supreme Court and the President of the State Bar of Georgia on September 26, 1990.

The Supreme Court charged the Commission to explore the feasibility of using court-annexed or court-referred alternative dispute resolution (ADR) processes to complement existing dispute resolution methods. The order creating the Commission directed that the Commission gather information, implement experimental pilot programs, and prepare recommendations for a statewide, comprehensive ADR system.

This court has now received the recommendations of the Commission and promulgates the following rules to establish a statewide plan for the use of alternative dispute mechanisms by the courts of Georgia.

I. DEFINITIONS.

The term Alternative Dispute Resolution (ADR) refers to any method other than litigation for resolution of disputes. A definition of some common ADR terms follows.

Neutral. The term "neutral" as used in these rules refers to an impartial person who facilitates discussions and dispute resolution between disputants in mediation, case evaluation or early neutral evaluation, and arbitration, or who presides over a summary jury trial or mini trial. Thus, mediators, case evaluators, and arbitrators are all classified as "neutrals."

Mediation. Mediation is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a mediation session, any settlement is entirely voluntary. In the absence of settlement the parties lose none of their rights to a jury trial.

Arbitration. Arbitration differs from mediation in that an arbitrator or panel of arbitrators renders a decision after hearing an abbreviated version of the evidence. In non-binding arbitration, either party may demand a trial within a specified period. The essential difference between mediation and arbitration is that arbitration is a form of adjudication, whereas mediation is not.

Case Evaluation or Early Neutral Evaluation. Case evaluation or early neutral evaluation is a process in which a lawyer with expertise in the subject matter of the litigation acts as a neutral evaluator of the case. Each side presents a summary of its legal theories and evidence. The evaluator assesses the strength of each side's case and assists the parties in narrowing the legal and factual issues in the case. This

¹ The Georgia Supreme Court Alternative Dispute Resolution Rules were adopted 1/27/93, effective 10/22/92, as amended by the Georgia Supreme Court, 1/8/93.

As amended by the Georgia Supreme Court, 5/24/99.

court-referred ADR process may be subpoenaed or otherwise required to testify concerning a mediation or case evaluation or early neutral evaluation conference or, unless otherwise provided by court ADR rules, a non-binding arbitration, in any subsequent administrative or judicial proceeding. A neutral's notes or records are not subject to discovery. Notes and records of a court ADR program are not subject to discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the program.¹²

B. Exceptions to Confidentiality:

Confidentiality on the part of program staff or the neutral does not extend to the issue of appearance.¹³ Confidentiality does not extend to a situation in which

- a) there are threats of imminent violence to self or others; or
- b) the mediator believes that a child is abused or that the safety of any party or third person is in danger.¹⁴

Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process.¹⁵ Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program. Nothing in the above rule negates any statutory duty of a neutral to report information. Parties should be informed of limitations on confidentiality at the beginning of the conference. Collection of information necessary to monitor the quality of a program is not considered a breach of confidentiality.

C. Immunity:

No neutral in a court-annexed or court-referred program shall be held liable for civil damages for any statement, action, omission or decision made in the course of any ADR process unless that statement, action, omission or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process.

VIII. EDUCATION.

In order to educate the bar about the benefits of ADR and the specifics of ADR processes, each member of the State Bar of Georgia shall be required to complete a one-time mandatory three hour CLE credit in dispute resolution. The ADR requirement shall be completed before March 31, 1996. Lawyers admitted to the bar after July 31, 1995, may satisfy this requirement by attending the Bridge-the-Gap seminar

¹² ADR Rule VII was amended by the Georgia Supreme Court on 11/8/96 to make notes and records of a court ADR program immune from discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the program.

¹³ ADR Rule VII was amended by the Georgia Supreme Court on 11/8/96 to add that confidentiality on the part of program staff or the neutral does not extend to the issue of appearance.

¹⁴ ADR Rule VII was amended to add the exceptions to confidentiality contained in sub-parts a and b of this paragraph by the Georgia Supreme Court on 2/8/95.

¹⁵ ADR Rule VII was amended by the Georgia Supreme Court on 11/8/96 to add an exception to confidentiality when a disciplinary complaint has been brought against a neutral or an ADR program and has arisen out of an ADR process.

As amended by the Georgia Supreme Court, 5/24/99.

conducted by the Institute of Continuing Legal Education in Georgia.¹⁶

Lawyers who have taken a class essentially devoted to the study of ADR in law school are deemed to have satisfied the above requirement. Lawyers who have been trained as a neutral in a training which was approved for CLE credit or would now be eligible for CLE credit are deemed to have satisfied the above requirement. Lawyers who have previously taken an approved CLE seminar devoted to ADR are deemed to have satisfied the above requirement. The Georgia Commission on Dispute Resolution will review requests for exemption from the CLE requirement on the basis of law school course work.

The Georgia Supreme Court recommends that the Bridge-the-Gap seminar required for every new member of the State Bar of Georgia incorporate an introduction to ADR processes. This court further recommends that information concerning ADR be incorporated into CLE ethics and professionalism seminars. Sponsors and seminars designed to satisfy the ADR CLE requirement must be approved by the Commission on Continuing Lawyer Competency and the Georgia Commission on Dispute Resolution.

The Rules and Regulations of the State Bar of Georgia are hereby amended to add the following sentences to the beginning of Ethical Consideration 7-5: "A lawyer as adviser has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation."¹⁷

¹⁶ Rule VIII of the ADR Rules was amended by the Georgia Supreme Court on 1/25/96 to provide that lawyers admitted to the bar after July 31, 1995 may satisfy the ADR CLE requirement by attending the Bridge-the-Gap seminar conducted by ICLE.

¹⁷ The Rules of the State Bar of Georgia were amended by the Georgia Supreme Court to add this language 2/19/93.

As amended by the Georgia Supreme Court, 5/24/99.

Pennsylvania Bar Association Committee on Legal Ethics and Professional
Responsibility

Informal Opinion Number 90-125
Inquiry No. 90-125
January 21, 1991

Please excuse our delay in responding to your original inquiry of August, 1990 to the Pennsylvania Bar Association Ethics Coordinator.

The fact pattern you present describes a case in which defense counsel requested that plaintiff's counsel agree to submit the dispute to a third party neutral to mediate the case in an attempt to settle the matter. While defense counsel offered to bear all costs of this settlement session, the plaintiff's attorney rejected the offer without discussing the defense request with his client. The case settled one year later after the plaintiff's attorney spent \$5,000.00 in pre-trial costs. Defense counsel informed the plaintiff's attorney that he had been authorized to settle the case one year earlier at the time of the mediation proposal, for the same amount as the ultimate settlement.

You have asked a number of questions to which we will respond seriatim:

1. Question: Whether the plaintiff's attorney is ethically obligated to inform his or her client that mediation was proposed by the opposing side?

Response: While the Rules of Professional Conduct do not explicitly address mediation, there are a number of rules which would appear to apply to the situation you have described. Specifically, Rule 1.2(a) indicates that "a lawyer shall abide by a client's decisions concerning the objectives of representation, . . . , and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

Also, Rule 1.4 provides as follows:

(a) a lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.

(b) a lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.

At the Comment to Rule 1.4, it is indicated that:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent that the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy... should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to a lawyer, the client should be kept advised of the status of the matter... The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's

best interests, and the client's overall requirements as to the character of representation. [emphasis added].

*2 Rule 1.2(a) and Rule 1.4 and the Comment thereto would certainly indicate that an attorney is obligated to communicate to his client a proposal of mediation by the opposing counsel. As mediation is a procedure by which parties are able to expedite litigation and, if successful, settle the case, it would certainly seem that the attorney is obligated to take reasonable steps that permit the client to make a decision about whether or not to mediate.

2. Question: Whether it is the decision of the client or of the attorney to accept or reject mediation?

Response: Rule 1.2(a) and Rule 1.4 and the Comment thereto lead to the conclusion that it is the client's decision to accept or reject mediation, unless the client has previously advised the attorney to make all decisions of a procedural nature in the conduct of the case.

3. Question: Whether the attorney should charge the expenses of trial preparation to his client as the case could have been settled earlier for the same amount?

Response: From the facts of your case, it appears that the expenses in settlement of the case were incurred after the attorney rejected the offer to mediate. Thus, it is likely that the expenses of trial preparation may not have been incurred, had the attorney conveyed the offer to mediate to his client.

Under Rule 1.3, "a lawyer shall act with reasonable diligence and promptness in representing a client." Under Rule 1.7, a lawyer's own interest should not be permitted to limit his or her representation of the client.

Rule 3.2 indicates that "a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The Comment to Rule 3.2 indicates that, "Realizing financial or other benefits from otherwise improper delay in litigation is not a legitimate interest of the client." While the attorney in the matter at hand did not necessarily "realize financial benefit", he may have been able to save the client \$5,000.00 in expenses had the case been submitted to mediation. The attorney probably should not charge expenses of trial preparation to the client if the attorney's refusal to convey the request for mediation to the client may have been the cause of his or her incurring the expenses of trial preparation. This, however, is a judgment question which would depend on whether the plaintiff's counsel originally knew that defense counsel was prepared to settle for a reasonable amount at the time of the offer of mediation. Also, we do not know whether the plaintiff would have agreed to mediate. All of these are factors which must be taken into account in the determination of whether to charge the client or not.

4. Question: Whether a plaintiff and/or plaintiff's attorney's refusal to mediate could be a possible defense to any bad faith claim made by a plaintiff?

Response: First, it is our assumption that you are referring to a possible bad faith claim made by the defendant, not the plaintiff. Assuming a bad faith claim by the defendant, the answer to this question again depends upon whether or not defense counsel indicated to plaintiff's counsel that (s)he was prepared to make an offer to settle the case at the time (s)he requested the mediation. While the plaintiff's counsel may have assumed mediation might lead to some settlement, (s)he had no way of knowing whether defense was prepared to make a reasonable settlement offer unless defense indicated that an offer had been authorized as well as the

amount of the offer. Thus, it would appear that whether or not an offer to mediate could be used as a defense to a bad faith claim depends on what other information defense counsel had conveyed to the plaintiff's counsel during or prior to the discussion about mediation.

*3 CAVEAT: EACH PERSON REQUESTING AN OPINION FROM THIS COMMITTEE MUST BE INFORMED THAT THIS IS NOT AN OFFICIAL OPINION OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA AND THAT ANY OPINION RENDERED WILL BE AFFORDED ONLY AS MUCH WEIGHT AS THE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT. FURTHERMORE, THIS IS THE OPINION OF ONLY ONE MEMBER OF THE COMMITTEE AND IS NOT A FORMAL OPINION OF THE FULL COMMITTEE.

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COLORADO BAR ASSOCIATION

For other Colorado Legal Ethics resources go to the [CBA Ethics Committee Website](#)

Search the Colorado Rules of Professional Conduct:

Search

COUNSELOR

RULE 2.1 ADVISOR

(Table of Contents)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

COMMENT

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another

profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act as if the client's course of action is related to the representation. A lawyer ordinarily has no duty to mitigate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

A lawyer should exert the lawyer's best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise each client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision making process the fullness of the lawyer's experience as well as the lawyer's objective viewpoint. In assisting a client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. The lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for the lawyer. In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

The last sentence of Rule 2.1 addresses the issue of alternative dispute resolution ("ADR"). Common forms of ADR include arbitration, mediation, and negotiations. Depending upon the circumstances, it may be appropriate for the lawyer to discuss with the client factors such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitation, and relevant procedural rules and statutes.

Committee Comment

This provision is consistent with the Code except that it raises the consideration of the providing of non-legal advice to a rule, while the Code treats the subject matter only as aspirational, in EC 7-8, which provision has been added as the penultimate paragraph of the Comment.

C

ARKANSAS CODE OF 1987 ANNOTATED
TITLE 16. PRACTICE, PROCEDURE, AND COURTS
SUBTITLE 1. GENERAL PROVISIONS
CHAPTER 7. DISPUTE RESOLUTION
SUBCHAPTER 2. DISPUTE RESOLUTION PROCESSES

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Current through the 2003 Regular Session

16-7-201 Legislative purpose and intent.

It is the intent of the General Assembly to:

- (1) Encourage and authorize the use of dispute resolution processes throughout this state to resolve disputes, cases, and controversies of all kinds. Such processes include, but are not limited to, negotiation, mediation, conciliation, arbitration, private judging, moderated settlement conferences, med-arb, fact finding, mini-trials, and summary jury trials;
- (2) Encourage the development of new and the improvement of existing processes in this state;
- (3) Encourage the courts, the officers and employees of the courts of this state, state and local officers, departments, state and local governments and administrative agencies, state and local enforcement officers and agencies, prosecuting authorities and public defenders, and all other state and local officials, agencies, districts, and authorities to become versed in, accept, use, develop, and improve processes appropriate to the fair, just, and efficient resolution of disputes, cases, and controversies of all kinds in this state.

History. Acts 1993, No. 641, § 1.

<General Materials (GM) - References, Annotations, or Tables>

A.C.R.C. Notes. This section was formerly codified as § 16-7-101.

A.C.A. § 16-7-201

AR ST § 16-7-201

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The Florida Bar

➔ **Center For Professionalism,**
 ➔ **Ideals and Goals of Professionalism**

These aspirational guidelines were adopted by the Board of Governors of The Florida Bar on May 16, 1990.

As The Florida Bar grows, it becomes more important to articulate our ideals of professionalism and to emulate such ideals by deed. To The Florida Bar, Lawyer Professionalism includes:

1. committing to serve others;
2. being dedicated to the proper use of one's knowledge to promote a fair and just result;
3. endeavoring always to enhance one's knowledge and skills;
4. ensuring that concern for the desired result does not subvert fairness, honesty, respect and courtesy for others with whom one comes into contact, be they fellow professionals, clients, opponents, public officials, including members of the judiciary, or the public;
5. contributing one's skill, knowledge and influence as a lawyer to further the profession's commitment to serving others and to promoting the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system;
6. educating the public about the capabilities and limits of the profession, specifically what it can achieve and the appropriate methods of obtaining those results; and
7. accepting responsibility for one's own professional conduct as well as others in the profession, including inculcating a desire to uphold professional standards and fostering peer regulation to ensure each member is competent and public-spirited.

To reinforce and communicate the ideals of lawyer professionalism among our members, and particularly, to take the "abrasions" out of our conduct with others, particularly our colleagues at the Bar, The Florida Bar adopts the following statement of ideals and aspirational goals:

1. Commitment to Equal Justice Under Law and the Public Good

Ideal:

A Florida lawyer should, in both professional and personal conduct, recognize that a license to practice law is a privilege which gives the lawyer a special position of trust, power and influence in our society. This privilege brings corresponding duties, for which the lawyer is accountable to the public, namely, to use that position and power in an honest and fair manner which respects the dignity of others, promotes the public good, and protects our system of equal justice under the law.

Goals:

- 1.1 A lawyer should at all times avoid the appearance of impropriety.
- 1.2 A lawyer should counsel and encourage other lawyers to abide by these ideals of professionalism.
- 1.3 A lawyer should at all times promote in the general public an understanding of the role of the legal profession in our system of equal justice under law.
- 1.4 A lawyer should encourage and support only those judicial candidates who by skill, knowledge, experience, integrity, temperament and commitment to public service are qualified to hold such positions.
- 1.5 When considering whether to advertise and what methods of advertising to use, a lawyer's first goal should be

to promote and protect public confidence in a just and fair legal system founded on the rule of law.

1.6 Upon being employed by a new client, a lawyer should discuss fee and cost arrangements at the outset of the representation, and promptly confirm those arrangements in writing.

1.7 In any representation in which the fee arrangement is other than a contingent percentage-of-recovery fee or a fixed, flat-sum fee or in which the representation is anticipated to be of more than brief duration, a lawyer should bill clients on a regular, frequent interim basis.

1.8 When a fee dispute arises that cannot be amicably resolved, a lawyer should endeavor to refer the dispute to the appropriate fee arbitration panel.

2. Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play

Ideal:

A lawyer should at all times be guided by a fundamental sense of honor, integrity, and fair play, and should counsel his or her client to do likewise.

Goals:

2.1 A lawyer should not impose arbitrary or unreasonable deadlines for action by others.

2.2 A lawyer should not make scheduling decisions with the motive of limiting opposing counsel's opportunity to prepare or respond.

2.3 A lawyer should not unreasonably oppose an adversary's application for an order or an adversary's request to insert a term or provision in a document.

2.4 A lawyer should never permit nonlawyer support personnel to communicate with a judge or judicial officer on any matters pending before the judge or officer or with other court personnel except on scheduling and other ministerial matters.

2.5 A lawyer should notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters.

2.6 When submitting any written communication to a court or other tribunal, a lawyer should provide opposing counsel with a copy of the communication, and sufficiently in advance of any related hearing to assure both the court and opposing counsel have a reasonable opportunity to review it beforehand.

2.7 A lawyer should promptly comply with requests to prepare proposed orders.

2.8 When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is truly calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

2.9 A lawyer should immediately notify all counsel of any hearing time that the lawyer has reserved with the court or tribunal.

2.10 When there has been pre-trial disclosure of trial witnesses, a lawyer should make a reasonable, good-faith effort to identify those witnesses whom the lawyer believes are reasonably likely to be called to testify.

2.11 During trials and evidentiary hearings the lawyers should mutually agree to disclose the identities, and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual-aid equipment.

2.12 When there has been pre-trial disclosure of trial exhibits, a lawyer should make a reasonable good-faith

effort to identify those exhibits that the lawyer believes will be proffered into evidence.

2.13 A lawyer should not mark on or alter exhibits, charts, graphs, and diagrams without opposing counsel's permission or leave of court.

2.14 A lawyer should abstain from conduct calculated to detract or divert the fact-finder's attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.

3. Honesty and Candor

Ideal:

A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone.

Goals:

3.1 In drafting a proposed letter of intent, the memorialization of an oral agreement or a written contract reflecting an agreement reached in concept, a lawyer should draft a document that fairly reflects the agreement of the parties.

3.2 In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.

3.3 A lawyer should not withhold information from a client to serve the lawyer's own interest or convenience.

4. Fair and Efficient Administration of Justice

Ideal:

A lawyer should always conduct himself or herself to assure the just, speedy, and inexpensive determination of every action and resolution of every controversy.

Goals:

4.1 A lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible.

4.2 A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes.

4.3 A lawyer should counsel the client to consider and explore settlement in good faith.

4.4 A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

4.5 A lawyer should not invoke a rule for the purpose of creating undue delay.

4.6 A lawyer should never use discovery for the purpose of harassing or improperly burdening an adversary or causing the adversary to incur unnecessary expense.

4.7 A lawyer should frame reasonable discovery requests tailored to the matter at hand.

4.8 A lawyer should assure that responses to proper requests for discovery are timely and complete and are consistent with the obvious intent of the request.

4.9 In civil cases, a lawyer should stipulate all facts and principles of law which are not in dispute, and should promptly respond to requests for stipulations of fact or law.

4.10 After consulting with the client, a lawyer should voluntarily withdraw claims defenses when it becomes apparent that they are without merit, are superfluous or merely cumulative.

4.11 A lawyer should appear at a hearing before a court or other tribunal fully prepared to submit the matter at issue to the court or tribunal for adjudication.

4.12 A lawyer should not use the post-hearing submission of proposed orders as a guise to argue or reargue the merits of the matter to be determined.

4.13 A lawyer should not request rescheduling, cancellations, extensions, and postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

5. Courtesy

Ideal:

A lawyer should treat all persons with courtesy and respect and at all times abstain from rude, disruptive and disrespectful behavior. The lawyer should encourage the lawyer's clients and support personnel to do likewise even when confronted with rude, disruptive and disrespectful behavior.

6. Respect for the Time and Commitments of Others

Ideal:

A lawyer should respect the time and commitments of others.

Goals:

6.1 Before scheduling a hearing on any motion or discovery objection, a lawyer should endeavor to resolve or narrow the issue at hand.

6.2 In scheduling depositions upon oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.

6.3 Unless circumstances compel more expedited scheduling, a lawyer should endeavor to provide litigants, witnesses, and other affected persons or parties with ample advance notice of hearings, depositions, meetings, and other proceedings, and whenever practical, schedule such activities at times that are convenient to all interested persons.

6.4 A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.

6.5 Upon receiving an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer should promptly agree to the proposal or offer a counter suggestion.

6.6 A lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal, as soon as they become apparent to the lawyer.

6.7 A lawyer should avoid last-minute cancellations of hearings, depositions, meetings, and other proceedings.

6.8 A lawyer should promptly notify the court or tribunal of any resolution by the parties that renders a scheduled court appearance unnecessary.

6.9 A lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.

6.10 A lawyer should respond promptly to inquiries and communications from clients and others.

7. Independence of Judgment

Ideal:

A lawyer should exercise independent judgment and should not be governed by a client's ill will or deceit.

Goals:

7.1 A lawyer should counsel the client or prospective client, even with respect to a meritorious claim or defense, concerning the public and private burdens of pursuing the claim as compared with the benefits to be achieved.

7.2 A lawyer should at all times provide the client with objective evaluations and advise without purposefully understating or overstating achievable results or otherwise creating unrealistic expectations.

7.3 A lawyer should not permit the client's ill will toward an adversary, witness, or tribunal to become that of the lawyer's.

7.4 A lawyer should counsel the client against the use of tactics designed: (a) to hinder or improperly delay the process involved; or (b) to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics.

7.5 In contractual and business negotiations, a lawyer should counsel the client concerning what is reasonable and customary under the circumstances.

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The Florida Bar

➤ **Center For Professionalism** ➤ **Guidelines for Professional Conduct**

Foreword

In 1993 the Executive Council of the Trial Lawyers Section of The Florida Bar (which represents over 6,000 trial lawyers in Florida) formed a professionalism committee to prepare practical guidelines for professional conduct for trial lawyers. After reviewing the numerous aspirational and model guidelines from both Florida and around the country, the professionalism committee determined that, with minor modifications, the guidelines which had been prepared by the Hillsborough County Bar Association were the best model for the entire state. Therefore, in 1994, at the request of the professionalism committee, the Executive Council of the Trial Lawyers Section unanimously approved the Guidelines For Professional Conduct. The Trial Lawyers Section sought the endorsement of the Guidelines from the Florida Conference of Circuit Judges, and at its meeting held in September 1995, the Conference approved the Guidelines. In so doing, the Conference wishes to make clear that the Guidelines do not have the force of law and that trial judges will still have the right and obligation to consider issues raised by the Guidelines on a case by case basis. Nevertheless, both the Trial Lawyers Section and the Florida Conference of Circuit Judges hope that publication and widespread dissemination of these Guidelines will give direction to both lawyers and judges as to how lawyers should conduct themselves in all phases of trial practice. The adoption of the Guidelines by the Trial Lawyers Section is also intended to express support for trial judges who require that lawyers conduct themselves professionally.

For most lawyers, these Guidelines will simply reflect their current practice. However, it is hoped that the widespread dissemination and implementation of these Guidelines will result in an overall increase in the level of professionalism in trial practice in Florida.

Preamble

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks, few of which are easy, most of which are exacting. In the final analysis, a lawyer's duty is always to the client. But in striving to fulfill that duty, a lawyer must be ever conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor, diligence and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties, however, is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves.

In furtherance of these fundamental concepts, in recognition that they must be applied in a manner consistent with the interests of one's client and the Rules of Professional Conduct, and in keeping with the long tradition of professionalism among and between members of the Trial Lawyers Section of The Florida Bar, the following Guidelines for Professional Conduct are hereby adopted. Although we do not expect every lawyer will agree with every guideline, these standards reflect our best effort at encouraging decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics.

A. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME.

Scheduling and Continuances

1. Attorneys are encouraged to communicate with opposing counsel prior to scheduling depositions, hearings and other proceedings, in order to schedule them at times that are mutually convenient for all interested persons. Alternatively, if an attorney does not communicate with opposing counsel prior to scheduling a deposition or hearing, the attorney should be willing to reschedule that deposition or hearing if the time selected is inconvenient for opposing counsel.

APPENDIX 11

2. Upon receiving an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer should promptly agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible.
3. A lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal, as soon as they become apparent to the lawyer.
4. Attorneys should cooperate with each other when conflicts and calendar changes are necessary and requested.
5. Counsel should never request a calendar change or misrepresent a conflict in order to obtain an advantage or delay. However, in the practice of law, emergencies affecting our families or our professional commitments will arise which create conflicts and make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes, and should make such request of other counsel only when absolutely necessary.
6. Attorneys should endeavor to provide opposing counsel, parties, witnesses, and other affected persons, sufficient notice of depositions, hearings and other proceedings, except upon agreement of counsel, in an emergency, or in other circumstances compelling more expedited scheduling.
7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is truly calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

Extensions

1. A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.
2. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted between counsel as a matter of courtesy unless time is of the essence.
3. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.
4. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."
5. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.
6. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving the right to seek reciprocal scheduling concessions. However, a lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.
7. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

B. SERVICE OF PAPERS.

1. The timing and manner of service should not be used to the disadvantage of the party receiving the papers.
2. Papers and memoranda of law should not be served at court appearances without advance notice to opposing counsel and should not be served so close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or to respond to the papers.
3. Papers should not be served in order to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.
4. Service should be made personally or by courtesy copy facsimile transmission when it is likely that service

by mail, even when allowed, will prejudice the opposing party.

C. WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS.

1. Written briefs or memoranda of points of authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic or sociological data if such data appear in or are derived from generally available sources but only if these would be subject to judicial notice and if sufficient backup data and its sources are presented contemporaneously.
2. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

D. COMMUNICATION WITH ADVERSARIES.

1. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.
2. Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.
3. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.
4. Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.
5. A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom.
6. During the course of representing a client, a lawyer should not communicate on the subject of the representation with a party known to be represented by a lawyer in that matter without the prior consent of the lawyer representing such other party unless authorized by law to do so.

E. DEPOSITIONS.

1. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.
2. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.
3. In scheduling depositions upon oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.
4. When a deposition is noticed by another party in the reasonably near future, counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.
5. Counsel should not attempt to delay a deposition for dilatory purposes but only if necessary to meet real scheduling problems.
6. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.
7. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner intended to harass the witness, such as by repeating questions after they have been answered, by raising the questioner's voice or by appearing angry at the witness.
8. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Rules of Civil Procedure or applicable case law. Counsel should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought. When objecting to the form of a question, counsel should simply state "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are then stated they should be stated succinctly and only what is necessary to state the grounds

should be stated.

9. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers. Should any lawyer do so, the courts are urged to take stern action to put a stop to such practices and to serve as a deterrent to others.
10. Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information.
11. Counsel for all parties should refrain from self-serving speeches during depositions.
12. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

F. DOCUMENT DEMANDS.

1. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.
2. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case. If a document request is objectionable only in part, the documents responsive to the unobjectionable portion should be produced in a timely manner.
3. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.
4. Documents should be withheld on the grounds of privilege only where appropriate. Where documents are withheld, the withholding party should immediately provide a list of the privileged documents showing the date, author and general description and a statement of the basis for withholding the document.
5. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.
6. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

G. INTERROGATORIES.

1. Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.
2. Interrogatories should not be read by the recipient in an artificial manner designed to assure that answers are not truly responsive.
3. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.
4. A lawyer should never use discovery for the purpose of harassing or improperly burdening an adversary or causing the adversary to incur unnecessary expense.

H. MOTION PRACTICE.

1. Before setting a motion for hearing, counsel should make a reasonable effort to resolve the issue.
2. A lawyer should not force his or her adversary to make a motion and then not oppose it.
3. Following a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should immediately be submitted to the court. Attorneys should promptly provide, either orally or in writing, proposed orders to opposing counsel for approval prior to submitting them to the court. Opposing counsel should then promptly communicate any objections and at that time, the drafting attorney should immediately submit a copy of the proposed order to the court and advise the court as to whether or not it has been approved by opposing counsel. The order must fairly and adequately represent the ruling of the court.

I. DEALING WITH NON-PARTY WITNESSES.

1. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition or to obtain necessary documents in the possession of a non-party witness.
2. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.
3. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available as soon as possible to the adversary at his or her expense even if the deposition is canceled or adjourned.

J. EX PARTE COMMUNICATIONS WITH THE COURT AND OTHERS.

1. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom such case is pending.
2. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application. A lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced if the application or communication is made on regular notice.
3. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters. Counsel should always notify opposing counsel of dates and times obtained from the court for future hearings on the same day that the hearing date is obtained from the court. Copies of any submissions to the court (such as correspondence, memoranda of law, case law, etc.) should simultaneously be provided to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, at the same time a copy should be hand-delivered or faxed to opposing counsel. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel at the time the material is submitted to the court.
4. A lawyer should be courteous and may be cordial to a judge but should never show marked attention or unusual informality to a judge, uncalled for by their personal relations. A judge should be referred to by surname in court. A lawyer should avoid anything calculated to gain, or having the appearance of gaining, special personal consideration or favor from a judge.

K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION.

1. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.
2. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
3. In every case, counsel should consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

L. PRE-TRIAL CONFERENCE.

1. A lawyer should carefully read the order setting trial and complete the pre-trial conference statement in full to the extent it can be agreed to by the parties.
2. A lawyer should be familiar with the evidence in the case.
3. A lawyer should be sure discovery is completed or address the need for additional discovery with opposing counsel well in advance of the pre-trial conference. All counsel should use due diligence in preparing the

case for trial and should file a motion for continuance of the pre-trial conference or of the trial only if counsel has been unable to complete preparations in spite of diligent efforts.

4. A lawyer should evaluate the case and have a figure in mind at which the case could reasonably settle with authorization from the client to do so.
5. A lawyer should determine if the court needs to, and agrees to, hear any motions at the pre-trial.
6. The attorney who will try the case must appear at the pre-trial conference, unless excused by the court.
7. A lawyer should not ask for a continuance unless the client agrees and signs the motion.

M. TRIAL CONDUCT AND COURTROOM DECORUM.

1. A lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility and avoid undignified or discourteous conduct which is degrading to the court.
2. Be punctual and prepared for any court appearance.
3. Stand as court is opened, recessed or adjourned; when the jury enters or retires from the courtroom; and when addressing, or being addressed by, the court.
4. Examination of jurors and witnesses should be conducted from a suitable distance. A lawyer should not crowd or lean over the witness or jury and during interrogation should avoid blocking opposing counsel's view of the witness.
5. Counsel should address all public remarks to the court, not to opposing counsel.
6. A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel.
7. Counsel should refer to all adult persons, including witnesses, other counsel, and the parties by their surnames and not by their first or given names.
8. Only one attorney for each party shall examine, or cross examine each witness. The attorney stating objections, if any, during direct examination, shall be the attorney recognized for cross examination.
9. Counsel should request permission before approaching the bench. Any documents counsel wish to have the court examine should be handed to the clerk.
10. Have the clerk pre-mark the potential exhibits.
11. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a witness for examination. Any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.
12. In making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the court.
13. Generally, in examining a witness, counsel shall not repeat or echo the answer given by the witness.
14. Offers of, or requests for, a stipulation should be made privately, not within the hearing of the jury, unless the offeror knows or has reason to believe the opposing lawyer will accept it.
15. In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue.
16. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.
17. During trials and evidentiary hearings the lawyers should mutually agree to disclose the identities, and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual-aid equipment.
18. A lawyer should not mark on or alter exhibits, charts, graphs, and diagrams without opposing counsel's permission or leave of court.
19. A lawyer should abstain from conduct calculated to detract or divert the fact-finder's attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.
20. A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone.
21. A charge of impropriety by one lawyer against another in the course of litigation should never be made except when relevant to the issues of the case.
22. A lawyer should not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. A lawyer, however, may advance, guarantee

or acquiesce in the payment of:

- a. expenses reasonably incurred by a witness in attending or testifying;
 - b. reasonable compensation to a witness for his lost time in attending or testifying;
 - c. a reasonable fee for the professional services of an expert witness.
23. In appearing in his or her professional capacity before a tribunal, a lawyer should not:
- a. state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;
 - b. ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;
 - c. assert one's personal knowledge of the facts in issue, except when testifying as a witness;
 - d. assert one's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
24. A question should not be interrupted by an objection unless the question is patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.
25. A lawyer should address objections, requests and observations to the court and not engage in undignified or discourteous conduct which is degrading to court procedure.
26. Where a judge has already made a ruling in regard to the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although he is at liberty to make a record for later proceedings of his ground for urging the admissibility of the evidence in question. This does not preclude the evidence being properly admitted through other means.
27. A lawyer should not attempt to get before the jury evidence which is improper.
28. A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience or the like.
29. A lawyer should never attempt to place before a tribunal, or jury, evidence known to be clearly inadmissible, nor make any remarks or statements which are intended to improperly influence the outcome of any case.
30. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.
31. Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the court or to opposing counsel and shall not mislead by inaction or silence.

Further, if this occurs unintentionally and is later discovered, it should immediately be disclosed or otherwise corrected.



MEMBERSHIP CONTACTUS SITEMAP

ABOUT THE CENTER COURSES & EVENTS REFERENCES RESOURCES BOOKSTORE

THE TEXAS LAWYER'S CREED

A Mandate for Professionalism

Promulgated by The Supreme Court of Texas and the Court of Criminal Appeals
November 7, 1989

REFERENCES

PROCEDURAL &
CONDUCT RULES

TEXAS
PROFESSIONAL
ETHICS OPINIONS

I am a lawyer; I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to

grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.

11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
11. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
12. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
13. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
14. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
15. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
16. I will refrain from excessive and abusive discovery.
17. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying

- or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.
18. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
 19. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, witnesses, the Court, and members of the Court staff with courtesy and civility and will not manifest by words or conduct bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Order of the Supreme Court of Texas and the Court of Criminal Appeals

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession's broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics, instead of being part of the solution, have become part of the problem.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion, and finally when necessary by enforcement

by the courts through their inherent powers and rules already in existence.

These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt "The Texas Lawyer's Creed - A Mandate for Professionalism" described above.

In Chambers, this 7th day of November, 1989.

The Supreme Court of Texas

Thomas R. Phillips, Chief Justice
Franklin S. Spears, Justice
C. L. Ray, Justice
Raul A. Gonzalez, Justice
Oscar H. Mauzy, Justice
Eugene A. Cook, Justice
Jack Hightower, Justice
Nathan L. Hecht, Justice
Lloyd A. Doggett, Justice

The Court of Criminal Appeals

Michael J. McCormick, Presiding Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge
Marvin O. Teague, Judge
Chuck Miller, Judge
Charles F. (Chuck) Campbell, Judge
Bill White, Judge
M. P. Duncan, III, Judge
David A. Berchelmann, Jr., Judge

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State Bar of New Mexico

A Creed of Professionalism of the New Mexico Bench and Bar

Judge's Preamble

As a judge, I will strive to ensure that judicial proceedings are fair, efficient and conducive to the ascertainment of the truth. In order to carry out that responsibility, I will comply with the letter and spirit of the Code of Judicial Conduct, and I will ensure that judicial proceedings are conducted with fitting dignity and decorum.

A. With respect to parties, lawyers, jurors and witnesses:

- I will be courteous, respectful and civil to parties, lawyers, jurors and witnesses. I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner;
- I will not employ hostile, demeaning or humiliating words in opinions or in written or oral communications;
- I will be punctual in convening all hearings, meetings and conferences;
- I will be mindful of time schedules of lawyers, parties and witnesses;
- I will make all reasonable efforts to decide cases promptly;
- I will give all cases deliberate, impartial and studied analysis and consideration;
- I will be considerate of the time constraints and pressures imposed on lawyers by the demands of trial practice;
- Within practical time limits, I will allow lawyers to present proper arguments and to make a complete and accurate record;
- I will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents;
- I will do my best to ensure that court personnel act civilly and professionally;
- I will not adopt procedures that needlessly increase litigation expense;
- I will be open to constructive criticism and make such changes as are consistent with this creed and the Code of Judicial Conduct when appropriate.

B. With respect to other judges:

- I will be courteous, respectful and civil in my opinions;
- In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge;
- I will endeavor to work with other judges to foster a spirit of cooperation and collegiality.

Lawyer's Preamble

As a lawyer, I will strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers, and I will also conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts, and any other person involved in the legal system, including the general public.

A. In all matters: "My Word is My Bond."

B. With respect to my clients:

- I will be loyal and committed to my client's cause, and I will provide my client with objective and independent advice;
- I will work to achieve lawful objectives in all other matters, as expeditiously and economically as possible;

- In appropriate cases, I will counsel my client regarding options for mediation, arbitration and other alternative methods of resolving disputes;
- I will advise my client against pursuing matters that have no merit;
- I will advise my client against tactics that will delay resolution or which harass or drain the financial resources of the opposing party;
- I will advise my client that civility and courtesy are not weaknesses;
- I will counsel my client that initiating or engaging in settlement discussions is consistent with zealous and effective representation;
- I will keep my client informed about the progress of the work for which I have been engaged or retained, including the costs and fees;
- I will charge only a reasonable attorney's fee for services rendered;
- I will be courteous to and considerate of my client at all times.

C. With respect to opposing parties and their counsel:

- I will be courteous and civil, both in oral and in written communications;
- I will not make improper statements of fact or of law;
- I will agree to reasonable requests for extensions of time or waivers of formalities when legitimate interests of my client will not be adversely affected;
- I will consult with opposing counsel before scheduling depositions and meetings or before rescheduling hearings;
- I will cooperate with opposing counsel's requests for scheduling changes;
- I will not use litigation, delay tactics, or other courses of conduct to harass the opposing party or their counsel;
- I will refrain from excessive and abusive discovery, and I will comply with reasonable discovery requests;
- In depositions, negotiations and other proceedings, I will conduct myself with dignity, avoiding groundless objections and other actions that are disrupting and disrespectful;
- I will not serve motions and pleadings that will unfairly limit the other party's opportunity to respond;
- In the preparation of documents and in negotiations, I will concentrate on substance and content;
- I will clearly identify, for other counsel or parties, all changes that I have made in all documents.

D. With respect to the courts and other tribunals:

- I will be a vigorous and zealous advocate on behalf of my client, but I will remember that excessive zeal may be detrimental to my client's interests or the proper functioning of our justice system;
- I will communicate with opposing counsel in an effort to avoid litigation or to resolve litigation;
- I will voluntarily withdraw claims or defenses when they are superfluous or do not have merit;
- I will refrain from filing frivolous motions;
- I will voluntarily exchange information and work on a plan for discovery as early as possible;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- When hearings or depositions are cancelled, I will notify opposing counsel, necessary parties, and the court (or other tribunal) as early as possible;
- Before dates for hearings or trials are set, or immediately after dates have been set, I will verify the availability of participants and witnesses, and I will also notify the court (or other tribunal) and opposing counsel of any problems;
- In civil matters, I will stipulate to facts when there is no genuine dispute;
- I will be punctual for court hearings, conferences and depositions;
- I will be respectful toward and candid with the court;
- I will avoid the appearance of impropriety at all times.

E. With respect to the public and to other persons involved in the legal system:

- I will be mindful of my commitment to the public good;

- I will keep current in my practice areas, and, when necessary, will associate with or refer my client to other more knowledgeable or experienced counsel;
- I will willingly participate in the disciplinary process;
- I will strive to set a high standard of professional conduct for others to follow;
- I will respect and protect the image of the legal profession, and will be respectful of the content of my advertisements or other public communications;
- I will commit to the goals of the legal profession, and to my responsibilities to public service, improvement of administration of justice, civic influence, and my contribution of voluntary and uncompensated time for those persons who cannot afford adequate legal assistance.

<< Back

WEST'S MASSACHUSETTS RULES OF COURT
RULES OF THE SUPREME JUDICIAL COURT
CHAPTER ONE. GENERAL RULES
RULE 1:18 UNIFORM RULES ON DISPUTE RESOLUTION

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Current with amendments received through 9/1/2003

RULE 5 EARLY NOTICE OF COURT-CONNECTED DISPUTE RESOLUTION SERVICES

Clerks shall make information about court-connected dispute resolution services available to attorneys and unrepresented parties. This information should state that selection of court-connected dispute resolution services can occur at the early intervention event or sooner, and that no court may compel parties to mediate any aspect of an abuse prevention proceeding under G.L. c. 209A, § 3. Insofar as possible, information should be available in the primary language of the parties. Attorneys shall: provide their clients with this information about court-connected dispute resolution services; discuss with their clients the advantages and disadvantages of the various methods of dispute resolution; and certify their compliance with this requirement on the civil cover sheet or its equivalent.

Adopted May 1, 1998, effective February 1, 1999.

Pub. Note: Pursuant to the order adopting the Uniform Rules on Dispute Resolution, this rule was to be effective October 1, 1998. A subsequent order, however, dated July 28, 1998, and effective that same date, changed the effective date of this rule to February 1, 1999.

S.J.C. Rule 1:18, Uniform Rules on Dispute Resolution, Rule 5

MA R S CT RULE 1:18 URDR Rule 5

END OF DOCUMENT

		Securities (and Order) (G or C)
GC-075	98	Petition, Sale Personal Property (and Order) (G or C)
GC-380	98	Petition, Give Consent for Medical Treatment
GC-140	98	Order, Appointing Temporary Guardian or Conservator
GC-240	98	Order, Appointing Guardian
GC-340	98	Order, Appointing Conservator
GC-065	98	Order, Confirming Sale
GC-330	98	Order, Appointing Court Investigator
GC-385	98	Order, Authorizing Conservator to Consent to Medical Treatment
GC-021	98	Order, Dispensing with Notice (G or C)
GC-022	98	Order, Prescribing Notice
GC-020	98	Notice of Hearing (G or C)
GC-320	98	Citation for Conservatorship and Proof of Service
GC-150	98	Letters, Temporary (G or C)
GC-250	98	Letters, Guardianship
GC-350	98	Letters, Conservatorship
GC-211	98	Consent of Guardian, Nomination, Waiver of Notice
GC-335	98	Capacity Declaration
GC-040	98	Inventory & Appraisal (G or C)
GC-041	98	Inventory & Appraisal, Attachment (G or C)
GUARDIANSHIPS AND CONSERVATORSHIPS		
Form #	Year	Description or Title
DE-111	98	Petition, for Probate (Decedents dying after December 31, 1984)
DE-221	98	Petition, Spousal Property
DE-260	98	Petition, Report of Sale (Real Property)
DE-270	98	Petition, Ex Parte; Sale Securities (and Order)
DE-275	98	Petition, Ex Parte; Sale Personal Property (and Order)
DE-310	98	Petition, Determine Succession to Real Property
DE-140	98	Order, for Probate
DE-226	98	Order, Spousal Property
DE-265	98	Order, Confirming Sale (Real Property)
DE-315	98	Order, Determining Succession to Real Property
DE-200	98	Order, Prescribing Notice
DE-120	98	Notice of Hearing (Probate)
DE-121	98	Notice of Petition to Administer Estate
DE-157	98	Notice of Administration to Creditors

DE-122	98	Citation and Proof of Service
DE-125	98	Summons Probate
DE-131	98	Proof of Subscribing Witness (Decedents Dying after December 31, 1984)
DE-135	98	Proof of Holographic Instrument
DE-147	98	Duties & Liabilities of Personal Representative Letters
DE-160	98	Inventory & Appraisal
DE-161	98	Inventory & Appraisal (Attachment)
DE-165	98	Notice of Proposed Action (Objection-Consent)
DE-166	98	Notice of Proposed Action, Waiver of and Revocation of Waiver
DE-172	98	Creditor's Claim (Estates after June 30, 1988)
DE-174	98	Creditor's Claim, Allowance or Rejection
DE-305	98	Affidavit re Real Property of Small Value
DE-154	98	Request for Special Notice

Division V - Family Law**CHAPTER ONE. GENERAL****RULE 5.1 APPLICABILITY OF RULES**

These rules are intended to provide uniformity of practice and procedure among all departments involved in family law matters in San Diego County. These rules should be considered as guidelines to which the court will generally adhere. Variations between divisions are noted within the body of these rules.

Attorneys and unrepresented litigants (also called "pro pers") shall comply with all applicable statutes in addition to these rules and the California Rules of Court (especially rules 1200 et seq.). Where these rules refer to Superior Court forms (e.g. SUPCT D-1), the court will also accept the equivalent Judicial Council form.

Unrepresented litigants shall be treated in the same manner as counsel and shall be held to the same standards. All references to counsel in these rules apply equally to unrepresented litigants.

(Eff. July 1, 1998; Rev. Jan. 1, 2000; Rev. and Renumbered July 1, 2001)

RULE 5.2 COURT LOCATIONS

The Central Division, Family Law Courthouse (Central Division) is located at 1501 Sixth Avenue, San Diego. The South County Division (South County) located at 500 Third Avenue, Chula Vista, and the East County Division (East County), located at 250 East Main, El Cajon, are divisions, not separate venues. North County Division (North County) is a separate venue, located at 325 South Melrose Drive, Vista. Support enforcement actions filed by the Department of Child Support Services (formerly known as the District Attorney's Bureau of Child Support Enforcement) are heard at the Central Division, County Courthouse, located at 220 West Broadway, San Diego. Domestic Violence Protection Act cases for the Central Division are filed and heard at the Central Division.

sion, Madge Bradley Building, Family Court Annex, located at 1409 Fourth Avenue, San Diego.
(*Eff. July 1, 1998; Rev. Jan. 1, 2000, Rev. and Renumbered July 1, 2001, Rev. Jan. 1, 2003*)

RULE 5.3 WORK OF THE FAMILY LAW DIVISION

This division of the court hears all trials and motions in family law matters, including warrants in lieu of writ of habeas corpus, warrants for arrest in child custody matters, motions to determine arrearages due on support orders, motions for support, custody, restraining orders and attorneys' fees, applications under the Domestic Violence Prevention Act, Uniform Parentage Act cases, Marvin actions, and related discovery motions.

(*Adopted Eff. 1-1-89; Renumbered Eff. 1-1-90; Amended Eff. 1-1-92; Amended Eff. 4-1-95; Renumbered Eff. 7-1-98.*)

CHAPTER TWO. CASEFLOW MANAGEMENT

RULE 5.4 CASE ASSIGNMENT

New cases are randomly assigned to a judicial officer for all purposes. All appearances in the case must be made before the assigned judicial officer, unless otherwise ordered. Appendix A contains a list of phone numbers for each department. The petitioner/plaintiff will receive a notice of case assignment when the petition or complaint is filed. The petitioner/plaintiff must serve the respondent/defendant with a copy of the notice of case assignment with the petition or complaint.

Should a judicial officer's caseload be reassigned, notice of this reassignment will be posted at the courthouse and/or mailed by the court on form SUPCT D-133. Pursuant to Code of Civil Procedure section 170.6, subdivision (2), peremptory challenges are due 10 days after actual notice of the case reassignment, or if the party has not yet appeared in the action, within 10 days after the appearance.

(*Eff. 7-1-98; Rev. Jan. 1, 2000, Rev. and Renumbered July 1, 2001.*)

RULE 5.5 ALTERNATIVE DISPUTE RESOLUTION

The Family Law Act and the California Rules of Court encourage alternative dispute resolution of family matters. The family law court promotes mediation of family law cases and, when appropriate, the selection of judicial case management as a means of alternative dispute resolution.

A. Mediation. Upon being retained, attorneys representing family law litigants (except in cases of domestic violence) are encouraged to provide their clients with the informational notice set forth in Appendix B and to advise their clients of the availability of mediation as an alternative means of dispute resolution. Parties wanting to participate in mediation shall advise the court as soon as possible by submitting a written stipulation signed by both parties and attorneys.

B. Judicial Case Management. Attorneys representing family law litigants are encouraged to advise their clients of the availability of judicial case management under Family Code section 2032, subdivision (d).

(*Adopted Eff. 4-1-95; Renumbered Eff. 7-1-98, Rev. Jan. 1, 2000, Renumbered July 1, 2001*)

RULE 5.6 FILING LOCATIONS

Family law cases must be filed in the division in which the petitioner and/or the respondent reside or, in paternity cases, where the child resides. Appendix 1A reflects the division boundaries within the county, sorted by zip code. Original petitions must bear the proper filing location and be filed in the appropriate division.

(*Eff. 7-1-98; Rev. Jan. 1, 2000, Rev. and Renumbered July 1, 2001, Rev. Jan. 1, 2002*)

RULE 5.7 MARVIN ACTIONS

Any family law related action not specifically authorized by the Family Law Act (e.g., Marvin complaints) must initially be filed as a separate proceeding in the Family Law Division. Upon the court's own motion, or if a timely request for a jury trial is made and granted, the assigned judicial officer shall consult with the supervising judge to determine whether the matter will remain in the Family Law Division for trial. On the court's own motion or upon noticed motion, the action may be consolidated with a pending family law case pursuant to California Rule of Court, rule 367. (See also rule 5.8.)

(*Adopted Eff. 1-1-92; Renumbered & Amended Eff. 4-1-95; Renumbered Eff. 7-1-98, Rev. Jan. 1, 2000, Rev. and Renumbered July 1, 2001.*)

RULE 5.8 CONSOLIDATED CASES

If the court consolidates a case, the case of broader jurisdiction, or the lower case number if the cases are of equal jurisdiction, shall be designated as the lead case and the originals of all papers thereafter filed shall be placed in the lead case file. (Cal. Rules of Court, rule 367.) Any hearing date in any case other than the lead case shall be vacated or reset, and all future hearing dates will be noticed under the lead case number.

(*Adopted Eff. 4-1-95; Renumbered Eff. 7-1-98, Rev. Jan. 1, 2000, Renumbered July 1, 2001*)

RULE 5.9 STATUS CONFERENCE

The court shall calendar a status conference 150 days after the filing of the petition, unless the parties have requested that the status conference be held earlier.

A. Scheduling and Notice.

The court will provide notice of the status conference to all parties. Each party may request one continuance telephonically at least fifteen days before the scheduled conference date. Additional continuances may be requested with an ex parte declaration of good cause. Good cause may consist of, but is not limited to, a showing that significant progress has been made by the parties toward a resolution of the case through settlement, mediation and/or reconciliation. Both counsel and the parties must agree that the status conference should be continued.

B. Preparation for Conference.

1. No later than 30 days prior to the conference, the parties must serve a completed Schedule of Assets and Debts and the Income and Expense Declaration and lodge in the courtroom no earlier than 24 hours before the conference.

2. Prior to the conference, the parties shall

meet and confer over a suggested timetable for resolution of the case. Such timetable shall include suggested motion and discovery cut-off dates and trial dates. Parties shall make a good faith effort to obtain written agreements from any experts that the requisite evaluations can be performed within the time specified.

C. Attendance at Conference. Parties shall be present at the status conference and shall be fully prepared to discuss the timetable for resolution and other issues raised by the pleadings. Parties to the action must appear even if represented by counsel. Any attorney making a special appearance for counsel of record must have actual knowledge of the facts and procedural history of the case. If one party fails to appear, the court will set the matter for case management and/or trial.

D. Orders. The court shall make the following orders at the status conference:

1. Set a trial date for short cause matters (i.e., those cases which will take 3 hours or less to try)
2. Set a date within approximately 6 months of the status conference for a case management conference ("CMC") in long cause matters.
3. Set a date for the exchange of Declarations of Disclosure.
4. Set a discovery cut-off date.
5. Set a date for the exchange of expert witnesses information.
6. Set a Family Court Services ("FCS") date in cases where custody/visitation is at issue and no evaluation or private mediator is involved.
7. Select expert psychological, appraisal and other witnesses.
8. Resolve appointment of a Special Master requests made pursuant to Code of Civil Procedure section 639 and California Rules of Court, rules 244.1 and 244.2.
9. Determine any issues to be bifurcated.
10. Any other orders the court deems appropriate for the expeditious resolution of the case.

E. SANCTIONS FOR NONCOMPLIANCE. FOR ANY NONCOMPLIANCE WITH THIS RULE, THE COURT WILL SET AN ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE IMPOSED PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 575.2.

(Adopted Eff. 1-1-92; Renumbered & Amended Eff. 4-1-95; Renumbered Eff. 7-1-98; Rev. Jan. 1, 2000, Renumbered July 1, 2001, Rev. Jan. 1, 2003)

RULE 5.10 CASE MANAGEMENT CONFERENCE

Unless excused by the court, counsel must jointly complete a Case Management Conference (CMC) Questionnaire (SUPCT D-134) and file it with the court at or before the CMC.

All discovery, except expert witness depositions, must be completed by the date of the CMC.

At the CMC the court shall make the following orders:

Set a date for a Mandatory Settlement Conference to be conducted no later than 60 days from the date of the CMC.

At the CMC, counsel shall exchange and file with the court 1) a list of settled issues; and 2) a list of issues to be litigated. Absent leave of court, a par-

ty may not present an issue for trial that was not set forth in the CMC list of issues to be litigated.

The mandatory settlement conference date will be set at the time of the CMC. However, no mandatory settlement conference will be set until counsel certify all discovery is complete, no law & motion matters are pending or anticipated, and all expert reports have been exchanged or upon court order.

If a mandatory settlement conference is unable to proceed because counsel have improperly certified the case, the matter will be returned for another CMC before the assigned judge, who may impose monetary sanctions against counsel for improperly certifying the case as being ready for the mandatory settlement conference.

(Eff. 7-1-98; Rev. Jan. 1, 2000, Rev. and Renumbered July 1, 2001, Rev. Jan. 1, 2003)

RULE 5.11 MANDATORY SETTLEMENT CONFERENCE

A. Calendaring. No long cause case will be tried until the parties participate in a mandatory settlement conference (MSC). The MSC in long cause cases will be set at the final case management conference.

Absent a court order allowing a party to appear telephonically, both parties and their counsel of record must personally attend the MSC. Failure to comply will result in monetary sanctions.

Counsel and parties must be present for the calendar call, during which time the court will explain the settlement process and assign locations for the settlement conferences. Because of the time settlement judges spend reading the briefs and preparing for the conference, there shall be NO continuances granted on the day of the mandatory settlement conference.

B. Attorney Participation on the Settlement Conference Panel. Whenever possible, an experienced family law attorney will be assigned as a temporary judge to each case to assist the parties and trial counsel in reaching a settlement (where possible, two attorneys will be assigned for cases at the Central Division). The supervising judge and any judges not otherwise engaged may be available for additional assistance.

Approximately six months before the date(s) of service, the court will mail invitations to family law attorneys to participate on the settlement conference panel. If an invited attorney wishes to participate, he or she shall mail their written acceptance to the court forthwith and calendar the date(s) of service. The court will telephone confirmations to the panelists not later than the Monday immediately preceding the Thursday settlement conference date.

An experienced panelist will be assigned to sit with each new panelist as a co-panelist during the new panelist's first two settlement conferences.

The minimum qualifications for service on a settlement conference panel hearing most cases are:

1. Certified Family Law Specialist; or
2. Seven years of legal practice, of which at least 75 percent is in family law; AND
3. Attendance in the CFLS-sponsored settlement conference seminar; or commitment to attend the next CFLS-sponsored settlement conference seminar to be presented or a comparable seminar, or to

Appendix B - Alternative Dispute Resolution Informational Notice

Mediation is a form of Alternative Dispute Resolution available to you at any stage of the proceedings in your action for dissolution, legal separation or annulment of your marriage.

Mediation is a voluntary settlement process in which the parties meet with an impartial mediator. The mediator assists the parties to clarify issues, facilitate communication and consider options for settlement, and to reach a mutually acceptable agreement. This process is different from the court controlled process because, in the mediation, the parties make the decisions instead of a judge. In mediation, the parties control the division of their assets, the provisions for child and spousal support and the sharing of their children.

Discussions take place in the privacy of the mediator's office and no court appearances are necessary. When mediation is completed, a formal agreement is prepared and filed and a Judgment is entered by the court.

The mediation process is not suited for every case or individual. You are advised to seek the advice of counsel regarding mediation and all forms of resolving your issues. It is suggested that you utilize the services of a mediator who is a family law attorney. If you have a need for emergency restraining orders, mediation is not appropriate at this time.

A list of attorneys who are available to do family law mediation is maintained at the office of the San Diego County Bar Association at 1333 Seventh Avenue, San Diego, California (619-231-0781) and at the North County Bar Association, 640 Escondido Avenue, Vista, California 92084 (760-758-4755). You may also consult your telephone directory. The charge for mediation must be determined directly between you and the mediator you choose.

You are encouraged to serve a copy of this fact sheet when you serve the Petition for Dissolution/Legal Separation/Annulment in this matter.

Appendix C

Appendix C has been deleted and is superceded by Appendix 1-A in Division I.



2003 California Rules of Court

Rule 201.9. Information About Alternative Dispute Resolution

(a) **[Court to provide information package]** Each court must make available to the plaintiff, at the time of filing of the complaint, an Alternative Dispute Resolution (ADR) information package that includes, at a minimum, all of the following:

(1) General information about the potential advantages and disadvantages of ADR and descriptions of the principal ADR processes. The Administrative Office of the Courts has prepared model language that the courts may use to provide this information.

(2) Information about the ADR programs available in that court, including citations to any applicable local court rules and directions for contacting any court staff responsible for providing parties with assistance regarding ADR.

(3) In counties that are participating in the Dispute Resolution Programs Act (DRPA), information about the availability of local dispute resolution programs funded under the DRPA. This information may take the form of a list of the applicable programs or directions for contacting the county's DRPA coordinator.

(4) An ADR stipulation form that parties may use to stipulate to the use of an ADR process.

(Subd (a) amended effective July 1, 2002.)

(b) **[Court may make package available on Web site]** A court may make the ADR information package available on its Web site as long as paper copies are also made available in the clerk's office.

(Subd (b) adopted effective July 1, 2002.)

(c) **[Plaintiff to serve information package]** The plaintiff must serve a copy of the ADR information package on each defendant along with the complaint. Cross-complainants must serve a copy of the ADR information package on any new parties to the action along with the cross-complaint.

(Subd (c) amended and relettered effective July 1, 2002; adopted as subd (b) effective January 1, 2001.)

Rule 201.9 renumbered and amended effective July 1, 2002; adopted as rule 1590.1 effective January 1, 2001.

Drafter's Notes

2001-See note following rule 1580.

2002-See note following rule 201.7.

FOR COURT USE ONLY

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):

TELEPHONE NO.:

FAX NO. (Optional):

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

PLAINTIFF/PETITIONER:

DEFENDANT/RESPONDENT:

CASE MANAGEMENT STATEMENT

(Check one):

UNLIMITED CASE
(Amount demanded
exceeds \$25,000)

LIMITED CASE
(Amount demanded is \$25,000
or less)

CASE NUMBER:

A CASE MANAGEMENT CONFERENCE is scheduled as follows:

Date:

Time:

Dept.:

Div.:

Room:

Address of court (if different from the address above):

INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.

1. Party or parties (answer one):

a.

This statement is submitted by party (name):

b.

This statement is submitted jointly by parties (names):

2. Complaint and cross-complaint (to be answered by plaintiffs and cross-complainants only)

a. The complaint was filed on (date):

b.

The cross-complaint, if any, was filed on (date):

3. Service (to be answered by plaintiffs and cross-complainants only)

a.

All parties named in the complaint and cross-complaint have been served, or have appeared, or have been dismissed.

b.

The following parties named in the complaint or cross-complaint

(1)

have not been served (specify names and explain why not):

(2)

have been served but have not appeared and have not been dismissed (specify names):

(3)

have had a default entered against them (specify names):

c.

The following additional parties may be added (specify names, nature of involvement in case, and the date by which they may be served):

4. Description of case

a. Type of case in

complaint

cross-complaint

(describe, including causes of action):

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

4. b. Provide a brief statement of the case, including any damages. (If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.)

(If more space is needed, check this box and attach a page designated as Attachment 4b.)

5. Jury or nonjury trial

The party or parties request a jury trial a nonjury trial (if more than one party, provide the name of each party requesting a jury trial):

6. Trial date

- a. The trial has been set for (date):
- b. No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint (if not, explain):

c. Dates on which parties or attorneys will not be available for trial (specify dates and explain reasons for unavailability):

7. Estimated length of trial

The party or parties estimate that the trial will take (check one):

- a. days (specify number):
- b. hours (short causes) (specify):

8. Trial representation (to be answered for each party)

The party or parties will be represented at trial by the attorney or party listed in the caption by the following:

- a. Attorney:
- b. Firm:
- c. Address:
- d. Telephone number:
- e. Fax number:
- f. E-mail address:
- g. Party represented:

Additional representation is described in Attachment 8.

9. Preference

This case is entitled to preference (specify code section):

10. Alternative Dispute Resolution (ADR)

- a. Counsel has has not provided the ADR information package identified in rule 201.9 to the client and has reviewed ADR options with the client.
- b. All parties have agreed to a form of ADR. ADR will be completed by (date):
- c. The case has gone to an ADR process (indicate status):

PLAINTIFF/PETITIONER:	CASE NUMBER:
DEFENDANT/RESPONDENT:	

17. Discovery

- a. The party or parties have completed all discovery.
- b. The following discovery will be completed by the date specified (*describe all anticipated discovery*):
- | <u>Party</u> | <u>Description</u> | <u>Date</u> |
|--------------|--------------------|-------------|
|--------------|--------------------|-------------|

- c. The following discovery issues are anticipated (*specify*):

18. Economic Litigation

- a. This is a limited civil case (i.e., the amount demanded is \$25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90 through 98 will apply to this case.
- b. This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed (*if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case*):

19. Other issues

- The party or parties request that the following additional matters be considered or determined at the case management conference (*specify*):

20. Meet and confer

- a. The party or parties have met and conferred with all parties on all subjects required by rule 212 of the California Rules of Court (*if not, explain*):
- b. After meeting and conferring as required by rule 212 of the California Rules of Court, the parties agree on the following (*specify*):

21. Case management orders

Previous case management orders in this case are (*check one*): none attached as Attachment 21.

22. Total number of pages attached (*if any*): _____

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and ADR, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date:

(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Additional signatures are attached

THE LAW OFFICES OF
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July 19, 2003

Randall Difuntorum
State Bar of California
180 Howard street
San Francisco, CA 94105

Dear Randy,

I want to thank you for inviting me to attend the meeting of the Revision Committee when we met at Whittier. I enjoyed attending. I wrote to Harry and told him that I was tremendously impressed by the discussion. A copy of my letter to Harry is attached.

Harry has asked me to send to you Chapter 2 of "How ADR Works." It is an excellent discussion of whether attorneys are or should be required by law to advise their clients of ADR options. I would appreciate your circulating the article to the members of the Commission.

Please advise when is the next meeting of the Commission and the topics that may be discussed. Could I be put on the mailing list of communications sent to the Commission. You know that I am particularly interested in the ADR subject and now as a result of the last meeting, should the new Rules provide guidance for lawyers as to how they should bill their clients.

Once again thank you for opening my eyes as to the important work of the Commission.

Sincerely yours,


Gerald F. Phillips

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July 15, 2003

Harry B. Sondheim
16115 Northfield Street
Pacific Palisades, CA 90272

Dear Harry,

Thank you for permitting me to speak at the Revision Committee meeting last week. I was tremendously impressed by the discussions. You kept things moving along. I now have a better realization as to what important work you and your committee are doing. No one can truly appreciate what you and your committee will certainly accomplish. The bar should be very grateful to all of the efforts being expended. I certainly shall return to future meetings.

I am enclosing a copy of Chapter 2 in a new book, "How ADR Works." Please circulate a copy to your committee. I will want to discuss this when the committee takes up the Beverly Hills Bar ADR Section's request that the future Rules provide that attorneys have an ethical duty to their clients to discuss ADR. Please advise when you know you will discuss this subject. I know that members of the Beverly Hills Bar ADR Section would like to attend. Others will also like to attend. As much notice as possible would be appreciated.

I have some thoughts on the suggestion that Tony Voogd and Ellen Pecks have put before the Commission. I will convey them to both of them. I think that it is very important that there be some Rule mandating that lawyers are required to properly, accurately and honestly account to their clients. This includes more than keeping accurate records. From the public's perspective no ethical rule is more important than a Rule assuring clients that bills rendered on an hourly basis are accurate and honest.

The Rule should not only be in reference to keeping accurate time records but also that billing statements be clear, unambiguous and understandable to the client. I have in mind incremental billing which is often not understood by clients. I have recently seen in an arbitration that the attorney never advised the client that he was billing on a quarter hour basis. I have also seen a lawyer who billed on a half hour basis. The client never knew or understand that this was the manner in which the billing statements were calculated. It took me to uncover this practice.

*

July 15, 2003

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I have also in mind the practice of block billing which some of our most ethical practitioners believe is perfectly proper because there is nothing in the Rules which requires that the lawyer show on the billing statements the time spent on each task.

I think all of these improper practices would be covered if the Rule stated that a lawyer must account, accurately and honestly. I think this is what some of those on the committee were seeking. I will suggest that the comments to the Rule cover these other improper practices.

I have just gotten carried away and will give these views directly in more concrete form to Tony and Ellen.

One again it was truly a privilege to attend your meeting.

Sincerely yours,

Gerald F. Phillips

Chapter 2

**Ethical Obligations to Inform
Clients of the ADR Option**

*Benjamin Bycel**

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I. INTRODUCTION

This chapter focuses on whether attorneys are, or should be, required by law to advise their clients of ADR options and, if they do *not*, whether they should be subject to discipline or be liable for malpractice. Of all the ethical issues that arise in ADR, this one occurs most often. From discussions with attorneys across the country, I have concluded that most practicing attorneys have given little thought to these questions. Only a few ethics experts and academics have given significant thought to this area of liability. Consequently, I have relied on their analysis in reaching some tentative conclusions. This chapter will not discuss the merits of ADR or its effect on the court system. Nor will it discuss the ethical requirements of attorneys who act as neutrals in ADR proceedings. My focus is the practicing lawyer.

II. RULES AND STATUTES THAT GOVERN ATTORNEY CONDUCT

Ethical rules, statutes, and court rules govern attorney conduct in every jurisdiction in the nation. The framework for most of the rules and laws on professional responsibility and ethics is the American Bar Association Model Code of Professional Responsibility (ABA Code) approved in 1969, and the 1977 American Bar Association Model Rules of Professional Conduct (ABA Model Rules), which were approved in 1983.¹ The Model Rules were designed to replace and modernize the ABA Code. As of fall 1998, 41 states and the District of Columbia had adopted all

¹While the concept of legal ethics is broader in scope than the rules of professional conduct, the terms are often used interchangeably. S. GILLERS & R.D. SIMON, REGULATION OF LAWYERS, AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT & MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1999).

or significant portions of the Model Rules. There are significant variations from state to state, even in those states that have adopted the basic structure of the Model Rules.² Some states still follow the ABA Code.

On the national level, the ABA's Special Committee on the Evaluation of the Rules of Professional Conduct, known as the "Ethics 2000 Committee," held hearings to determine if the ABA Model Rules needed updating. This is discussed in more detail below. Meanwhile, the American Law Institute's (ALI's) Restatement of the Law Governing Lawyers is nearing completion.³ While neither of these will have a direct impact on state jurisdictions, they may well influence changes in the future. Neither the ABA nor the ALI addresses the main issue of this chapter.⁴

In addition, larger local bar associations have professional responsibility committees that write opinions on significant ethical issues. The opinions are not binding on any court or disciplinary body, but courts often use them for guidance.⁵ I have not identified any local bar associations that have addressed the issue of whether attorneys are, or should be, subject to discipline or liable for malpractice for not advising their clients of ADR options.

Even though the Model Rules are just that, they still have a pervasive influence on almost every state jurisdiction. Therefore, any discussion of attorney ethics always begins with an examination of the ABA Model Rules. There is no language in the Model Rules specifically mentioning a duty to advise clients of ADR alternatives. A number of commentators, however, maintain that there are sections of the Model Rules that create an implied obligation for lawyers to advise clients on the use of ADR. For example, Professor Marshall J. Breger, in a comprehensive and thoughtful paper written for the ABA Dispute Resolution Section,

²GILLERS & SIMON, *supra* note 1, at XIX.

³Minutes of the ABA's Special Committee on the Evaluation of the Rules of Professional Conduct, known as the "Ethics 2000 Commission," can be obtained from the ABA offices in Chicago. The draft report of the ALI's Restatement of the Law Governing Lawyers is available in most major law libraries. Many materials from the Ethics 2000 Commission are available at <<http://www.abanet.org/cpr/ethics2k.html>>.

⁴The ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Responsibility issued a final report in November, 2000. It does not address this issue.

⁵AMERICAN BAR ASS'N/BUREAU OF NAT'L AFFAIRS, *LAWYERS MANUAL ON PROFESSIONAL CONDUCT* (2000).

wrote: "It is only if one posits that ADR is outside the normal scope of legal practice that one would not consider ADR consultation to be part of an attorney's 'normal' consultation duties."⁶ Similarly, Professor Frank E.A. Sander, Jr., suggests that the Model Rules—though not explicitly—require an attorney to advise his client of ADR options.⁷ Monica Warmbrod writes: "Attorneys may have an ethical obligation to advise clients of ADR methods."⁸

These authors argue that the duty is directly or indirectly required by five sections of the Model Rule sections. Warmbrod finds the duty to advise about ADR inherent in Model Rule 1.1, which states in pertinent part:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁹

Warmbrod maintains that the minimum competence required by Model Rule 1.1 is knowledge of ADR options. She suggests that the competence requirement may, in the future, require attorneys to advise clients of alternatives to litigation.

Professors Breger, Warmbrod, and others point to Model Rule 1.2(a) as an indication that an obligation to advise clients of ADR options may already exist. Model Rule 1.2(a) states: "A lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."¹⁰

Warmbrod writes: "Therefore, under Rule 1.2, clients should have the opportunity to decide if an ADR method would best serve their needs."¹¹ Professor Robert F. Cochran, Jr., writes that a comment under 1.2(b) "appears to move closer to a duty to

⁶Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options? Some Observations*. Discussion paper for the ABA Dispute Resolution Section (June 1998). This author is indebted to Professor Breger's excellent summary and analysis of the law.

⁷Frank E.A. Sander, Jr., *Yes: Aid to Clients, in At Issue: Professional Responsibility—Should There Be a Duty to Advise of ADR Options?*, 76 A.B.A. J. 50 (1990).

⁸Monica L. Warmbrod, *Could an Attorney Face Disciplinary Actions or Even Legal Malpractice Liability for Failure to Inform Clients of ADR?* 27 *CUMB. L. REV.* 791 (1996-1997).

⁹*Id.* at 809.

¹⁰Model Rule 1.2.

¹¹Warmbrod, *supra*, at 811.

allow clients to choose ADR . . . but, unfortunately, this comment also contains hortatory, rather than mandatory language.¹² The comment that Professor Cochran refers to does not mention ADR. Nor does it lead to any reasonable inference that an attorney must advise a client of her ADR options or be subject to discipline.

Model Rule 1.2 also requires an attorney to give his client adequate information to understand and accept, or reject, a settlement proposal. Stuart M. Wildman, writing in *The Professional Lawyer*, notes that "[p]ursuing ADR often is part of a settlement proposal, and thus the client, to fully exercise his or her rights, must be told of the benefits and risks of ADR."¹³ While most competent attorneys would agree with this statement, once again there is nothing in Model Rule 1.2 that suggests that attorneys must advise their clients of ADR options or face consequences. Breger and Warmbrod suggest that Model Rule 1.4(b) imposes a duty on lawyers to present ADR options to clients. It states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹⁴ Warmbrod maintains that "[i]f a lawyer fails to present an accurate picture of ADR to clients, he may risk a claim that he has not adequately 'consulted' with the client."¹⁵

Warmbrod also sees the duty to inform a client about ADR in one of the vaguest of Model Rules. Rule 2.1 states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.¹⁶

According to Warmbrod, "[t]o follow Rule 2.1, a lawyer needs to advise a client about ADR options that may be in line with their interest rather than just advising them about legal factors."¹⁷

The ABA recently undertook a complete review of all the Model Rules. The Commission on Evaluation of the Rules of

¹²Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?* 48 *ARB. J.* 8, 9 (1993).

¹³Stuart M. Wildman, *Attorney's Ethical Duties to Know and Advise Clients About Alternative Dispute Resolution*, 29 *PROF. LAW.* 31 (1993 Symposium Issue).

¹⁴Model Rule 1.4(b).

¹⁵Warmbrod, *supra*, at 811; Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options? Some Observations*, at 2. Discussion paper for the ABA Dispute Resolution Section (June 1998).

¹⁶Model Rule 2.1.

¹⁷Warmbrod, *supra*, at 812.

Professional Conduct (known as the "Ethics 2000 Commission") was charged with reviewing the ABA Model Rules of Professional Conduct and formulating recommendations for action. The commission, which is composed of scholars and practitioners, held hearings around the country for 3 years and took testimony on the existing Model Rules. The only mention of ADR in this context occurred in a public discussion draft for proposed Rule 2.1 issued by the group on November 2, 1999. While proposing no change to the text of the rule, the Commission proposed an addition to Comment 5 of the rule, which reads:

Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

In the Public Discussion Memorandum that accompanied the proposed change in Comment 5, the following statement was made by the Commission: "This addition is proposed in recognition of the increasingly important role being played by [ADR] in litigation today."¹⁸

Few competent attorneys would disagree with either Wambrod's statement or the Commission's suggestion, but the argument that an inference can be drawn that this rule creates an actual duty for attorneys to inform clients about ADR or face a malpractice lawsuit seems far-fetched.

Finally, Breger asserts that Model Rule 3.2 is relevant to the issue of whether an attorney is required to advise a client about ADR options. The rule states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client."¹⁹

Most competent attorneys would advise their clients about their ADR options without any of these Model Rules. The notion that there is a strong inference anywhere in the ABA Model Rules that would obligate an attorney to do so, however, is no more than wishful thinking on the part of some supporters of ADR.²⁰ Professor Breger, who notes that for many the Model Rules are sufficient to create an inherent obligation to advise

¹⁸Materials sent to author by Sue Campbell of the Ethics 2000 Commission, Dec. 1999.

¹⁹Model Rule 3.2.

²⁰The reader should keep in mind that the author of this chapter is a strong supporter of ADR.

clients on the use of ADR, still concludes that "[t]he Model Rules do not settle the matter."²¹

Not only do the Model Rules not settle the matter, in my opinion they hardly even begin to deal with it. In contrast to the Model Rules, a number of states have either mandatory or permissive language concerning an attorney's duty to advise his clients about ADR options. Part I discusses how a number of state jurisdictions currently deal with the question. Part II analyzes a number of critical issues raised by attempts to regulate how attorneys interact with their clients on the subject of ADR.

III. SURVEY OF JURISDICTIONS THAT REQUIRE MANDATORY ATTORNEY CONSULTATION WITH CLIENTS REGARDING ADR OPTIONS

The Massachusetts Supreme Court adopted a rule, effective February 1999, that states:

Attorneys shall: provide their clients with this information about court-connected dispute resolution services; discuss with their clients the advantage and disadvantages of the various methods of Dispute Resolution, and certify their compliance with this requirement on the civil cover sheet or its equivalent.²²

Judge John Cratsley, associate justice of the Superior Court of Massachusetts and chairman of the Supreme Judicial Court Standing Committee on Dispute Resolution, said in September 1999 that the draft ADR form would be circulated for comment to the seven different trial courts of limited jurisdiction for recommendations on exceptions or modifications that might be needed to adapt to the subject matter jurisdictions of the courts. The ADR form requires completion at the time of the filing for plaintiffs and upon the filing of a response to the complaint by defendants. At this point, there have not been discussions about disciplining attorneys who fail to complete the new ADR form.²³ While not mandatory, the recently revised Massachusetts Rules of Professional Conduct and Comments state that "[t]here will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution

²¹ Breger, *supra*, at 4.

²² MASSACHUSETTS SUPREME COURT RULES RULE 1:18; UNIFORM RULES OF DISPUTE RESOLUTION RULE 5 (1999).

²³ Telephone conversation with Judge John Cratsley, Aug. 26, 1999.

options in order to permit the client to make informed decisions concerning the representation."²⁴ At this point, neither the Massachusetts Courts nor the Office of Bar Counsel for Massachusetts has attempted to reconcile the requirement of the mandatory form or the suggestive language of the revised rules.

The state followed the lead of the U.S. District Court for the District of Massachusetts. Beginning in 1992, the District Court required attorneys to certify at the first scheduling conference with a judge that they had discussed ADR options with the client. The certification must state that the "parties and counsel have conferred to consider the resolution of the litigation through the use of [ADR] programs."²⁵

The timing for the required ADR discussion differs between the state and federal courts in Massachusetts. The state rule requires a discussion about ADR before the first court papers are filed. The local federal rule requires that the attorneys in the case file a "certification signed by counsel and by an authorized representative of each party" that affirms, among other things, that the parties considered "the resolution of the litigation through the use of alternative dispute resolution programs. . . ." This declaration must be filed when the judge convenes a scheduling conference, which can be as soon as "practicable, but in any event within [90] days after the appearance of a defendant and within [120] days after the complaint has been served on the defendant."

The difference between the state and federal rules in Massachusetts raises the issue of when an attorney should outline the client's ADR option. Professor Jay E. Grenig and others maintain that ADR options should be given at the earliest appropriate stage: "This may include the time of drafting an agreement or when a client is contemplating litigation."²⁶ Others have argued that it is a waste of time and money to inform clients of their ADR options in the early stages of litigation, because the attorney needs a better understanding of the facts and legal issues before advising the client about ADR.

Michigan has dealt with this issue in two separate ethics opinions. The first opinion, by the Michigan Ethics Commission,

²⁴MASSACHUSETTS RULES OF THE SUPREME JUDICIAL COURT ch. 3: ETHICAL REQUIREMENTS & RULES CONCERNING THE PRACTICE OF LAW Rule 3:07: RULES OF PROFESSIONAL CONDUCT & COMMENTS. CLIENT-LAWYER RELATIONSHIP RULE 4.1.

²⁵LOCAL RULES OF THE U.S. DIST. COURT FOR THE DIST. OF MASS. RULE 16.1(d)(3)(b). See Appendix A for an example of such a certification.

²⁶JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION (2d ed. 1997).

answered the question of whether an attorney must convey an offer to resolve the dispute through ADR. The answer was, clearly, yes. According to the opinion, "if counsel for the opposing party offers to resolve a pending dispute through alternative dispute resolution forums, a lawyer is required to convey that offer to the client."²⁷ The opinion also stated that "[t]he lawyer, as an advisor to the client, must give straightforward honest statements regarding alternative dispute resolution forums."²⁸

In a second opinion, the Michigan Ethics Committee dealt with the issue of whether a lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interest. In a less categorical decision, the Ethics Committee said:

While not all options which are theoretically available need be discussed, any doubt about whether a possible option is reasonably likely to promote the client's interests, as well as any doubt whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision.²⁹

The Pennsylvania Bar Association considered a similar question and decided that a lawyer must inform the client when opposing counsel proposes mediation and must abide by the client's decision to accept or reject the offer to mediate, unless the client has instructed the lawyer to make all procedural decisions in the case. To emphasize the duty of the lawyer to inform the client of the offer, the Pennsylvania opinion stated that "if a lawyer fails to convey the mediation proposed to the client, he may not charge the client the expense of trial preparation if these expenses are incurred as a result of the lawyer's failure to communicate the offer."³⁰ There appears to be a rather loose requirement for causation between the failure to "convey the mediation proposed" and any actual damages caused to the client. How could anyone know how the mediation would have turned out? It is difficult to imagine what proof a client would muster to support her claim that expenses were incurred as a result of not having the mediation.

²⁷State Bar of Michigan, Standing Committee on Professional & Judicial Ethics, Opinion No. RI-255 (Apr. 1996).

²⁸*Id.*

²⁹State Bar of Michigan, Standing Committee on Professional & Judicial Ethics, Opinion No. RI-262 (May 7, 1996).

³⁰Pennsylvania Bar Association, O.P. 90-125 (1991).

By statute, Oregon courts must provide all civil litigants with written information about the mediation process and the court's mediation opportunities.³¹ The information, which was developed by the Oregon Dispute Resolution Commission, is initially supplied at the time a civil action is filed. According to the statute, "[r]esponding parties receive the information from the filing party along with the initial service of process."³²

Texas and New Mexico lawyers are professionally obligated to advise clients of ADR by virtue of their lawyers' creeds. Texas requires that all attorneys advise their clients "regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes."³³ New Mexico's creed states that, "[i]n appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes."³⁴

Georgia amended its ethical rules to state that "[a] lawyer as adviser has a duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation"³⁵

Minnesota court rules require a certificate of disclosure by the attorney that he gave the client ADR options "within sixty days after an action is filed."³⁶ This statement must contain the agreement (or lack of agreement) to use ADR processes, the timing of a chosen process, and the identity of the neutral.

Tennessee requires that, at the initial case management conference, the parties be prepared to discuss "[t]he propriety of utilizing other dispute resolution techniques."³⁷ Illinois has a

³¹"[A]ll civil disputants shall be provided with written information describing the mediation process, as provided by the Dispute Resolution Commission, along with information on established court mediation opportunities." OR REV. STAT. §36.185 (Supp. 1993).

³²OR. REV. STAT. tit. 3.36.185 (1998).

³³TEXAS LAWYERS CREED. A MANDATE FOR PROFESSIONALISM §II, subsection 11.

³⁴NEW MEXICO COURT RULES. A LAWYERS CREED OF PROFESSIONALISM OF THE STATE BAR OF NEW MEXICO.

³⁵RULES & REGULATIONS OF THE STATE BAR OF GEORGIA RULE 3-107, ETHICAL CONSIDERATION 7-5.

³⁶MINNESOTA RULES OF PRACTICE FOR DISTRICT COURT COURTS RULE 11.1.02.

³⁷Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options? Some Observations*, at 5. Discussion paper for the ABA Dispute Resolution Section (June 1998).

similar requirement.³⁸ While not specifically mandating that the attorney advise the client about ADR alternatives, Kentucky and Connecticut require that attorneys be prepared at trial status conferences to discuss ADR.³⁹

A number of years ago, a committee of the California State Bar proposed that attorneys be required to inform clients of ADR options. To date, the proposal has not become law. There are no statewide rules in California related to this issue. Some local courts have instituted standards mandating that attorneys advise clients "at the outset of the availability of ADR and explain in simple language what effects the various ADR techniques . . . might have on the case."⁴⁰ Another California jurisdiction encourages attorneys in family law cases to "advise their clients of the availability of mediation as alternative means of dispute resolution."⁴¹ In some federal courts, attorneys must advise their clients of ADR options at prescribed times in the course of the litigation.⁴²

IV. SURVEY OF JURISDICTIONS THAT RECOMMEND ATTORNEY CONSULTATION ON ADR OPTIONS

There are at least 8 states that have rules suggesting that an attorney advise her client concerning ADR options. Each of the states differs in its approach to encouraging attorneys to advise their clients of ADR options.

For example, Arkansas merely "encourages" attorneys to advise their clients about ADR methods and to assist them in choosing appropriate procedures.⁴³ In contrast, the Kansas Bar Association Ethics Advisory Committee opined at length on whether it is ethical for a lawyer *not* to advise a client of ADR options, if, in the lawyer's professional judgment, ADR is not warranted. The Kansas Bar Committee issued the following

³⁸ILLINOIS STATE SUPREME COURT RULES ch. 110, §218.

³⁹KENTUCKY RULE 709 C; CONNECTICUT ch. 9 §265.

⁴⁰LOCAL RULES FOR THE SACRAMENTO SUPERIOR AND MUNICIPAL COURTS, app. A.

⁴¹LOCAL RULES OF COURT FOR SAN DIEGO COUNTY SUPERIOR COURT, §1. SUPERIOR COURT FAMILY RULES.

⁴²U.S. DIST. COURT FOR THE SOUTHERN DISTRICT OF TEXAS, COST & DELAY REDUCTION PLAN, app. E.

⁴³ARK. CODE ANN. §16-17-104 (Michie 1994).

guidelines "that should be used when encountering ADR questions." They read:

1. Lawyers should keep reasonably informed of ADR options in the jurisdictions in which they practice, including knowledge of ADR mechanisms, time and cost considerations, and the likelihood that ADR would achieve success.
2. When the lawyer's professional judgment indicates ADR is a viable option, the lawyer should discuss that option with the client, whether or not opposing counsel or the court raises the issue.
3. If an ADR technique is proposed by opposing counsel or the court, lawyers must advise their clients of the benefits and disadvantages of the proposal, and provide professional advice regarding its use in the particular case.⁴⁴

The Kansas Ethics Committee opinion is among the clearest direction that attorneys have received from ethics committees that have dealt with the ADR issue.

Hawaii has adopted ethical rules with similar language: "In a matter involving or expected to involve litigation, a lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."⁴⁵ Colorado has adopted language similar to Hawaii. The Colorado Rule added the following:

Common forms of ADR include arbitration, mediation and negotiations. Depending upon the circumstances, it may be appropriate for the lawyer to discuss with the client factors such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitations and relevant procedural rules and statutes.⁴⁶

Ohio attorneys have been told that they must "aspire to counsel clients about all forms of dispute resolution."⁴⁷ In New Jersey, lawyers are advised to become familiar with ADR programs and advise their clients of such options.⁴⁸

⁴⁴Kansas Ethics Opinion 94-01 (Apr. 15, 1994).

⁴⁵HAWAII RULES OF PROF. CONDUCT RULE 2.1.

⁴⁶COLORADO RULES OF PROF. CONDUCT RULE 2.1 (1997).

⁴⁷STATEMENT OF PROFESSIONALISM, A LAWYER'S CREED, & A LAWYER'S ASPIRATIONAL IDEALS app. V.

⁴⁸N.J. COURT RULES 1.40-1.

V. CRITICAL ISSUES

Both the mandatory and advisory language of the various state laws raise important questions about an attorney's obligation to advise clients of ADR options.

A. What Must Attorneys Do to Fulfill the Requirement to Advise Clients About ADR Under the Mandatory Rules?

There are really two issues involved in this question: (1) what an attorney must say or do to fulfill the notice requirement, and (2) when the attorney should do it. The attorney has two very different choices, according to Professor Breger, as to how he may inform the client. The attorney can carefully analyze the client's case file and lay out a detailed explanation of the ADR options. Or the attorney can merely, early in the attorney-client relationship, inform the client in a "generic" manner that she has ADR options.⁴⁹ While the attorney may meet the requirements of the law by simply handing the client an ADR brochure, it remains to be seen how this helps the client reasonably understand the relationship between ADR options and his case. On the other hand, if the attorney is obligated to completely analyze the case before advising on ADR options, the client may have additional fees and time delay. For example, what if certain discovery would indicate which ADR alternative is best, but is not the discovery the attorney wants to engage in at the outset of the matter? Should the attorney alter the tactics of the case to seek this information? This relates to the timing of the notification. Many times, even when an attorney files a complaint, she does not know all the issues and facts of a case. A client may be better served having his attorney outline the ADR options when the case is closer to trial. At that time the attorney is more able to point out all the consequences of traditional litigation versus an ADR alternative.

⁴⁹Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options? Some Observations*, at 4. Discussion paper for the ABA Dispute Resolution Section (June 1998).

B. In Jurisdictions That Require Notifying Clients of Their ADR Options, How Do Attorneys Prove That They Have Fulfilled the Requirement?

In Massachusetts, the law simply states that the attorney has to check a box on a form, indicating that he consulted with his client about ADR prior to filing a lawsuit. The form is still in the process of being drafted and approved.⁵⁰ In states that require proof that an attorney has completed the requirement to consult with a client, it is likely that a standard consent form will be developed requiring the client to attest that she was informed of the ADR options available. Will the form also have a box to check that indicates that the client rejected his ADR options? What if circumstances change? For example, when conflicts of interest arise later in a case, attorneys must, in almost every jurisdiction, send their clients an additional letter describing the new conflict of interest and asking for a waiver. Will the attorney be obligated to have the client sign a new form? If consent forms are not used, the attorney in a state that makes consulting about ADR options mandatory would be well advised to keep good notes of the conversation with the client about ADR and to confirm the discussion in a letter.

C. Can Attorneys Legitimately Bill a Client for Evaluating the Case for Its ADR Possibilities and for the Actual Consultation With the Client?

In the normal course of evaluating any case, an attorney should develop strategies that may well encompass ADR options. It is perfectly reasonable for an attorney to bill a client for a preliminary or detailed discussion of ADR alternatives, depending on the circumstances and phase of the case. However, if an attorney decided on her own to develop a complex and detailed strategy for ADR without first consulting the client, it may be reasonably perceived—whatever the good intentions of the attorney—that she was trying to run up legal fees.

⁵⁰MASSACHUSETTS SUPREME COURT RULES RULE 1:18; UNIFORM RULES OF DISPUTE RESOLUTION RULE 5 (1999).

D. What Should Attorneys Do in Jurisdictions That Have Language Suggesting Consultation With Clients on ADR Options?

An attorney should always keep accurate notes of all conversations and interactions with the client relating to ADR options. If there is suggestive language in the jurisdiction, the attorney should, at some point in the matter, advise the client in writing about ADR options. While I do not subscribe to the notion that the Model Rules or their state versions require ADR notification, a competent attorney should consider writing a letter to her clients outlining their ADR options.

Professor Breger has suggested that attorneys develop a consent form for clients to sign, saying they have been advised of ADR options. Whatever consent forms are developed will be compared to consent documents in other areas of the law. Among the questions likely to be asked are: Was consent given with full and complete knowledge? Did the client have an opportunity to consult with another attorney? I believe that rather than a consent form, a detailed letter from the attorney to his client describing the discussions between the attorney and the client concerning ADR options and the choice made by the client is superior to any type of form.

E. Will Attorneys Who Do Not Fulfill Mandatory Consultation Requirements Be Subject to State Bar Disciplinary Actions?

An attorney may be subject to discipline. Given the limited resources of most state discipline agencies, I seriously doubt that it would be a high priority prosecution. In a survey of disciplinary agencies in the states with mandatory language, I have not come across any disciplinary actions that have taken place or that are pending.⁵¹ If Professor Breger is correct when he points out that "[t]here is no point in adding mandatory ADR consultation to the code unless it would be enforced,"⁵² then, given the limited resources of most enforcement agencies, the requirement of mandatory ADR consultation should not be added to the code.

⁵¹Checking all 50 jurisdictions is almost an impossible task. However, my review of all the ABA/BNA Manual of Professional Conduct and other reliable sources indicated there were no such actions pending. Professor Breger cites no disciplinary cases.

⁵²Breger, *supra*, at 6.

F. Could an Obligation to Advise Clients of ADR Options Be a Basis for Malpractice Liability?

Theoretically the answer to this question is yes, but it is not likely. In these times, while all attorneys can reasonably fear malpractice suits or disciplinary actions if the outcome of the case is not favorable to the client, there is no reason to believe that a failure to inform a client of ADR options will increase the possibility of a malpractice lawsuit.⁵³ In fact, Ron Mallen, arguably one of the foremost experts in the country on malpractice litigation, reports that he knows of no case in which a lawyer was sued for malpractice for the mere failure to advise about ADR options.⁵⁴ Professor Breger acknowledges that there has been "little case law on this point as of yet."⁵⁵ The fact is, there has been none. It is unlikely that any attorney would bring a malpractice case based on an attorney not properly informing a client concerning ADR options.

Breger, Cochran, and Sander, however, do see the possibility of malpractice lawsuits. Breger maintains that "the real risk for an attorney who fails to advise clients about ADR options is the possibility of a malpractice claim."⁵⁶ To support his argument, he cites Cochran and Wrambrod, who list no actual cases of malpractice actions.⁵⁷ Cochran maintains that "[t]here is some risk of attorney discipline for the failure to present ADR options to a client, but the greater risk to attorneys may be the risk of attorney malpractice."⁵⁸ Cochran believes that medical malpractice's informed consent cause of action creates a precedent for a cause of action against attorneys. He cites no cases but adds that, "[i]n many respects, litigation is to the client what surgery is to the patient. An attorney malpractice cause of action would be based, as is medical informed consent, on the individual's dignity. To the extent possible, individuals should control deci-

⁵³The ABA Model Rules make it clear that a "violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." Many states, however, do allow the state's rules of professional conduct to be used as evidence in a discussion about the common law duty of care.

⁵⁴Telephone conversation with Ron Mallen (Mar. 1999). See RON MALLEN, *LEGAL MALPRACTICE* (4th ed. 1996).

⁵⁵Breger, *supra*, at 7.

⁵⁶*Id.*

⁵⁷*Id.* n.21.

⁵⁸Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?* 48 *ARB. J.* 8, 10 (1993).

sions that affect them.⁵⁹ I think almost any comparison between informed consent in a medical procedures context and one in a legal context makes little sense. While it is obvious that before a surgeon performs a procedure she must get written informed consent, that is not the case in the overwhelming majority of decisions that an attorney makes in a case.

Cochran also points out that attorneys may be subject to malpractice suits because of conflicts of interests—a lawyer may attempt to persuade a client not to pursue an ADR course because it is not as “financially rewarding as representation of a client who litigates.”⁶⁰ While this may be true, a malpractice lawsuit based on this accusation is far different from one that accuses the attorney of merely not telling the client his options. Cochran also points out that an attorney’s ego may override good judgment: “Some attorneys may want to litigate in order to further their reputation as fighters. Just as some doctors like to operate and some generals like to fight, some lawyers like to litigate. Just as war is too important to be left to generals, the decision to litigate is too important to be left to lawyers.”⁶¹ Few attorneys would argue with this conclusion, but this still does not make the case that an attorney could be disciplined or sued for failure to adequately advise clients of ADR options.

Cochran admits that the proof of causation needed in a malpractice case may be a difficult hurdle for the client. As in any legal malpractice case, a client in a lawsuit based on failure to inform about ADR options would have to prove not only that she would have selected an ADR option, but that the opposing litigant would have agreed. More importantly, she would have to prove that the ADR option selected would have been successful.⁶² What if it is binding arbitration? Couldn’t you argue that, win or lose, it would have been cheaper?

Again, as in all malpractice cases, the litigant must prove damages. Cochran suggests two possibilities: “a litigant might seek to recreate a mediation. The parties to the original action could testify how they would have responded to the idea of mediation and to various settlement alternatives. There are likely, however, to be difficulties in recreating mediation.”⁶³ This is a

⁵⁹*Id.*

⁶⁰*Id.* at 7.

⁶¹*Id.* at 12.

⁶²*Id.* at 10.

⁶³*Id.* at 12.

creative but absolutely impractical solution to proving damages. Given that the parties can easily forget what they said or have selective memories as to what they said, it would be virtually impossible to create a record that would be acceptable. Cochran's other suggestion for proving damages is equally impractical: "A second method that the client might use to identify the likely results of mediation is to present the testimony of experienced mediators. Mediators could draw on their experience in similar case, as well as empirical studies of mediation, to determine the likely result of mediation under the facts of the law."⁶⁴ There is no body of empirical evidence on the value of mediated as opposed to litigated cases. Moreover, any mediator would have to testify that an opinion on how a case would have turned out is speculation, not the application of abstract expertise. Sander writes that he can "readily envision a court holding a lawyer liable for malpractice because he failed to apprise his client of possibly cheaper, faster and less polarizing ways of achieving his objectives than via litigation."⁶⁵ While Professor Sander is highly respected, he offers no empirical basis for this opinion.

It is more likely there will be a risk of malpractice suits if an attorney uses an ADR option and does not possess the necessary knowledge or skills. For example, an attorney may not know how to use or exclude evidence in arbitration, or may be a positional bargainer who doesn't allow a mediator to convey an offer. As the use of ADR increases, it is not unreasonable to believe that an attorney who does not possess the degree of skill, knowledge, and judgment ordinarily possessed by members of the legal profession may open himself to a malpractice lawsuit.

Edward Dauer wrote:

Not employing ADR in cases to which it could have made a contribution more favorable than what came from whatever was done, is not actionable error itself. The knowledge base about the pros and cons of various methods of ADR has not progressed to the point at which errors in the diagnosis and selection of the resolution technique may themselves be negligence or the failure of some professional duty. However, it very well may be negligent for an attorney to fail even to consider ADR in any case, or to discuss it with the client, or to be sufficiently knowledgeable and skillful in the most basic proce-

⁶⁴*Id.*

⁶⁵Frank E.A. Sander, Jr., *Yes: Aid to Clients, in At Issue: Professional Responsibility—Should There Be a Duty to Advise of ADR Options?*, 76 A.B.A. J. 50, 50 (1990).

dures, or to *guide* the client toward litigation simply because that is the lawyers preference.⁶⁶

G. Should There Be Explicit Language in Ethics Laws Dealing With Attorney Notification of ADR Options? If So, Should the Language Be Hortatory or Mandatory?⁶⁷

Professor Breger argues that if we want lawyers to advise clients of their ADR options, it must be an explicit mandatory obligation. If it is not a specific requirement, given human nature, attorneys will simply not do it. Breger also believes, however, that the mandatory requirement to advise about ADR options must be flexible: "Mandatory, however, need not mean in every time, place, in every matter. Mandatory approaches differ."⁶⁸ He advocates an approach that has an attorney consulting with his clients in "appropriate circumstances." The attorney's decision to consult with the client would be objectively reviewed for its reasonableness and appropriateness in the same manner that disciplinary bodies and courts currently review "whether an attorney has failed his ethical obligations in the course of consultation."⁶⁹ I would agree that if there is going to be explicit language making it mandatory for attorneys to consult with their clients concerning ADR options, the requirement must be a flexible one.

Professor Sander argues that the best way to create broader acceptance for ADR is through an explicit disciplinary rule that makes attorneys responsible for telling clients about ADR. This duty, argues Sander, should be the same as a doctor's obligation to educate patients on health care alternatives and to help them make informed choices. Professor Sander believes that attorneys should be required to hand out brochures describing ADR options and to discuss these options with clients.⁷⁰

The argument against explicit language requiring an attorney to inform her client of ADR options is that it places an unreasonable burden—given the vast range of legal cases—on

⁶⁶2 EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION* cmt. 3, n.7 (*emphasis added*).

⁶⁷See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options? Some Observations* (discussion paper for the ABA Dispute Resolution Section (June 1998)), for an excellent discussion on this issue, although this author disagrees with his conclusions.

⁶⁸*Id.* at 12.

⁶⁹*Id.* at 13.

⁷⁰Sander, *supra*, at 52.

the attorney to determine how and when to make an ADR presentation. Breger himself points out one argument: "[I]t is early to raise the notion of mandatory enforcement as we are still in a period of becoming 'acclimated' to the ADR concept."⁷¹ New Jersey attorney Michael L. Prigoff, debating Professor Sander in the *ABA Journal*, argued that "[w]hile the bar and public should be better informed about ADR, the proposal to make this responsibility a matter of professional discipline or malpractice is overkill and unfair micromanagement of the practice of law."⁷²

VI. CONCLUSION

All attorneys, regardless of the nature of their practice, should be aware of ADR options and of court requirements in their jurisdiction that oblige an attorney to notify a client of his ADR options. Even in states that have mandatory requirements, there is little or no factual evidence to indicate that state disciplinary agencies will soon begin to punish attorneys who do not obey these rules. Nor is there any reason to believe that unhappy litigants will soon be claiming "failure to notify of ADR options" as an additional cause of action in a malpractice lawsuit. Cochran argues that once attorneys are sued for malpractice for failure to discuss ADR options, "lawyers would quickly learn of a few malpractice verdicts and begin to present clients with ADR options."⁷³ His argument, however, assumes what needs to be proved: that a malpractice lawsuit for failure to notify of ADR options is winnable.

This does not mean that lawyers should not follow the admonition in the Preamble to the Model Rules: "a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideal of public service."⁷⁴ With this in mind, lawyers should always consider ADR options and advise their clients of such options, even if not required and even if it conflicts with the attorney's economic interests. It is simply the right thing to do.

⁷¹Breger, *supra*, at 12.

⁷²76 A.B.A. J. 50 (Nov. 1990).

⁷³Robert F. Cochran, Jr., *Must Lawyers Tell Clients About ADR?* 48 *ARB. J.* 8, 13 (1993).

⁷⁴Preamble to ABA Model Rules (6).

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January 6, 2004

Randall Difuntorum
State Bar of California
180 Howard Street
San Francisco CA 94105

Dear Randy,

I would like to suggest along with the suggestion of Tony Voogd and Ellen Peck that there be a New Rule - Recording Time that the Revision Commission consider that the rules provide "Guidance to Attorneys with Respect to Billing Clients- Block Billing and Incremental Time." I have written an article, which is still in draft, on this subject which sets forth my views in this regard.

I particularly call to your attention in my article the reference to the article by Bion Gregory, which I quote on page 21. (I am enclosing the full article by him) I strongly believe that if the bar does not endeavor to improve the ethics of its members the legislature will take over and provide harsh rules of conduct. We do not want this to happen. We can take note of what happened last year when the legislature passed laws with regard to ADR perhaps because the ADR community and ADR providers did not police itself.

There is nothing more important and more obvious to the public than how lawyers bill clients. The ABA has said that a major factor to the low image of lawyers is the billing practices of some lawyers. Yet there is no guidance in the Rules to help practitioners with respect to their billing practices. See also in this regard my reference to the studies made by the ABA which show that the "greatest number of complaints arise around lawyers' fees."

Please keep me advised when the Commission will discuss this issue and the other subject dear to my heart that is advocating a Rule requiring an attorney to discuss ADR with the client. I do not remember if I sent to you another article that I have written on this subject which will be published by the ABA Professional Lawyer.

May I wish you and your dear ones a year of peace of mind.

Sincerely yours,



Gerald F. Phillips

THE OBLIGATION OF ATTORNEYS TO INFORM CLIENTS ABOUT ADR

by
Gerald F. Phillips

On February 2, 2002, the American Bar Association House of Delegates adopted the Final Report and Recommendation of the ABA Ethics 2000 Commission in regard to amendments to the Model Rules of Professional Conduct ("Model Rules"). In response, most states are considering whether and how they should modify their rules to reflect the new and amended Model Rules. Some states have already codified in their rules of professional conduct provisions relating to a lawyer advising a client about alternative dispute resolution ("ADR"). There appears to be a growing view that lawyers should discuss ADR with clients. The controversy is not whether an attorney should discuss the advantages and disadvantages of ADR with the client but whether a professional rule should require an attorney to do so. This article will discuss that issue in the context of the states' current reexamination of their rules.

THE EMERGENCE OF ADR

The emergence of ADR was one of the most significant developments in the resolution of disputes in the latter half of the 20th century. In 1976, U.S. Supreme Court Chief Justice Warren Burger called for "the institutionalization of ADR" within the U.S. legal system.¹ More recently, John Ferrick, Dean of Fordham Law School, urged lawyers to "fully embrace ADR and make its values blossom in their practice. They should be leaders and not pulled along by the public, parties to disputes, and courts overburdened with cases and controversies to resolve."² Ferrick added that: "In the world of disputes people seek less trauma, less expense, less delay, greater simplicity, fewer public embarrassments and more options for reaching agreement. ADR offers a just response to these needs."

Many trial lawyers have come to consider themselves as "resolvers of disputes," not merely gladiators to do combat in the courts. And though ADR is now central to the practice of law, there will not be complete acceptance of ADR until clients, the public and all members of the profession fully understand the advantages and disadvantages of the various forms of ADR. (See sidebar regarding the advantages of mediation.)

THE ETHICS 2000 HEARINGS

The Model Rules of Professional Conduct, as they existed before the work of the Ethics 2000 Commission, did not directly address the necessity of communicating about ADR. However, as Professor Kimberlee K. Kovach, then chair of the ABA Section of Dispute Resolution, testified at an Ethics 2000 Commission hearing, "As the practice of law evolves, so must the ethical and professional guidelines which govern and shape the parameters of such practice change."³ Thus Professor Kovach urged that the Commission "recognize the need for, existence, use and growth of other, very different alternative

approaches to problem solving and dispute resolution. And, as we explore the different processes, a consequence is the modification of the role of the lawyer and corresponding revisions in professional obligations." Thus she also urged, as did others, that the Commission incorporate into the Model Rules a duty for a lawyer to "inform his or her client about the existence of ADR processes and procedures."⁴ She proposed the following language for consideration by the Commission:

A lawyer has a duty to inform his client about the existence and availability of alternative dispute resolution procedures.⁵

The notes of the reporter of the Commission, dated April 18, 1999, show a proposed amendment to Rule 1.2, which the Commission did not adopt:

2. Advising clients of ADR options. A number of commentators have recommended that the Rules specifically address the need for lawyers to advise clients of suitable ADR options. ... A Joint Initiative of the CPR-Georgetown Commission and ABA Dispute Resolution Section... recommends that Rule 1.2(a) be amended to read: A lawyer shall... consult with the client as to the means by which [the client's objectives] are to be pursued, including discussion of the process by which those objectives are to be achieved...

Professor Robert F. Cochran likewise testified before the Commission, and concluded that: "In my view, the ABA should amend the Model Rules to require lawyers to present ADR options to clients."⁶

However, the Commission finally recommended only the following addition to the Comment to Rule 2.1:

when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.

Professor Cochran stated his concern for this recommendation.

[I]t leads nowhere . . . [Rule 2.1] states that the lawyer *may* be required under Rule 1.4 to inform clients of alternative means of dispute resolution, but, as we have seen, neither the current nor the proposed versions of MR 1.4 require the lawyer to give such information. They merely require that clients be sufficiently informed to make the decisions that they are entitled to make and they do not give clients the right to choose ADR.⁷

In a subsequent article Professor Cochran wrote:

My first concern is with the weakness of the Comment's language. The Commission's proposal says merely that MR 1.4 *may* require the lawyer to

inform the client of ADR. That language fails to give the lawyer any guidance.⁸

Professor Cochran in his conclusion states:

What would the result of such a rule be? I do not think that it would put a great burden on lawyers. Standard forms for instructing clients about the various types of dispute resolution would evolve. Lawyers would give such forms to clients as part of their standard package of client materials. Clients could look such material over at their leisure. Some clients who are not informed of ADR options today would choose to pursue them. ADR would be more heavily used, there would be less litigation and less conflict within our society, and clients would have greater sense of control over their lives.⁹

THE CURRENT MODEL RULES OF PROFESSIONAL CONDUCT

With the addition of the language to the Comment to Rule 2.1, the relevant Model Rules and Comment now provide as follows:

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) . . . a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued....

Rule 1.4: Communication

(a) A lawyer shall: . . . (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . .

Rule 2.1: Advisor

Comment

Offering Advice

[5] Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. . . .

Despite the fact that no explicit mandate was adopted, some find that the language creates an implicit obligation to advise clients regarding the ADR option. They point out that these Rules require an attorney to "consult with the client as to the means" and to "explain a matter" and to "render candid advice." This, they argue, would appear to be consistent with the duty to consult with the client.

Others have opined that these Rules collectively provide only fuzzy guidance to the attorney with respect to the issue of advising about ADR alternatives. There is debate

as to whether the “means” referred to in Rules 1.2 and 1.4 above encompass ADR. Comment [5] to Rule 2.1 provides that it “may be necessary” under Rule 1.4 to inform the client about forms of alternative dispute resolution. Do the words “may be necessary” enhance or diminish any ADR disclosure requirement that may be gleaned from Rule 1.2 and/or Rule 1.4? Professor Christopher Fairman has stated that:

arguably, the new Model Rules slightly strengthen the options, to advise clients about ADR.... Taken as a whole, these changes [MR 1.2, MR 1.4 Comment to Rule 2.1] may enhance the duty to advise. However, the changes have been challenged as ‘weak’ due to the lack of specific guidance, weak use of language, and poor location.¹⁰

It should not be necessary to engage in a tortured analysis of the Model Rules to discern the existence or non-existence of a duty to disclose about ADR. Benjamin Bycel has suggested that the argument that an inference can be drawn that the Model Rules create an actual duty for lawyers to inform clients about ADR is far fetched or is no more than wishful thinking.¹¹ There is no explicit guidance regarding any requirement of the lawyer to inform the client about ADR.

STATE RULES

Lawrence M. Watson, in his recent essay “Initiating the Settlement Process-Ethical Considerations,” concluded that “[c]urrent ethical standards signal a duty for the trial lawyer to advise the litigant client as to available ADR options. Many states have adopted procedural rules or policies making ADR such a significant part of their dispute resolution landscape that the requirements both to advise the client of ADR options and to perform appropriately during ADR processes have become issues of professional competence. By explaining to clients that ADR offers a commendable means of achieving valuable goals that advance clients’ interests, trial lawyers can not only satisfy their duties but also develop better ways of providing successful representation.”¹²

Even as many states continue to study possible post Ethics 2000 changes to their professional responsibility rules, some already have addressed the ADR issue, adopting a rule that mandates or encourages attorneys to advise their clients of the alternatives or suggesting the obligation in an ethics opinion.¹³

Virginia

Virginia addresses the issue in mandatory terms in a Comment to its Rule 1.2 - Scope of Representation:

[A] lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives [of the representation].¹⁴

It also has inserted a Comment to Rule 1.4 - Communication. The Comment provides:

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. . . .

[1a] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial processes chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute.

Another Comment has been added to Rule 2.1- Advisor

In representing a client, a lawyer shall exercise independent judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice.

**** In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances.

Massachusetts

A Massachusetts Comment to its rule on communication states that: "There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation."¹⁵

Michigan

A Michigan ethics opinion interprets the Michigan rules of professional conduct similarly, as suggesting that "[a] lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests, or if the lawyer has any reason to think that the client would find the alternative desirable."¹⁶

The opinion says that:

While not all options which are theoretically available need be discussed, any doubt about whether a possible option is reasonably likely to promote the client's

interests, as well as any doubt whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision.¹⁷

Colorado

Prior to 1992, when the Colorado Supreme Court adopted its present Rules of Professional Conduct, there were discussions as to what would be the purpose of the Rules. The purpose of the state's prior Code of Professional Responsibility was both as an aspirational guide for the members of the profession and as a basis for disciplinary action. The new Colorado Rules, however, except for an occasional "should" were not designed to be inspirational guides. The Rules generally contain either the imperatives "shall" and "shall not" or the discretionary "may." One of the few times that the Rules use "should" is in Rule 2.1, which provides that lawyers should advise the client of ADR.

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Comment

Offering Advice

The last sentence of Rule 2.1 addresses the issue of alternative dispute resolution. ("ADR) Common forms of ADR include arbitration, mediation, and negotiations. Depending on the circumstances, it may be appropriate for the lawyer to discuss with the client factors such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitations, and relevant procedural rules and statutes."¹⁸

Hawaii

Hawaii has the same language as Colorado in its Rule 2.1, although not in its Comment.

Rule 2.1 Advisor

In a matter involving or expected to involve litigation, a lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.¹⁹

California

The current California Rules of Professional Conduct appear to provide little guidance as to whether there is any duty on the part of an attorney to advise the client regarding ADR alternatives. Nevertheless, Diane Karpman concluded in a recent article that "a mandatory rule requiring information regarding ADR would seem unnecessary since a lawyer already has obligations of communication and a duty of competency. It is already tucked within the folds of the "penumbra" of good lawyering."²⁰

However, a reading of Rule 3-500 - Communication, to which Ms. Karpman refers, does not in clear language support her contention that it requires that a lawyer communicate with the client about ADR because the lawyer owes a fiduciary duty to the client. Rule 3-500 provides:

A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Furthermore Rule 3-110 - Failure to Act Competently, adds little to support her contention.

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

The California Bar has formed a Commission for the Revision of the Rules of Professional Conduct. The State Bar had asked the Commission to evaluate in its entirety the State's current Rules of Professional Conduct and consider the developments in the practice of the law since its last comprehensive revisions, in 1989 and 1992, and specifically the ABA 2002 Model Rules of Professional Conduct. The ADR Section of the Beverly Hills Bar Association sent a letter on April 15, 2003 to the Commission, in reply to the Commission's public request for written comments. The ADR Section suggested that the Commission incorporate the following language into a new black letter rule to preserve the right of the client to decide whether to use mediation and arbitration.

“A lawyer shall inform his or her client of the advantages, disadvantages and availability of mediation and arbitration processes.”

This provision could also be made part of Rule-3-500- Communication, or Rule 3-110- Failing to Act Competently.

The Section further suggested that if the Commission believes that this obligation of lawyers should be covered in a discussion, under one of the Rules, language should be added to the discussion of Rule 3-500, which Rule presently provides: “A member shall keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information.”

Either of these proposals would give greater guidance to the profession and needed protection to the public and would promote greater respect and confidence in the legal profession. The obligation of the attorney is only to inform or discuss the ADR processes that are available. The attorney is not required to recommend the use of ADR. A basic principle underlying the proposals was one of client education and decision-making. Clients are most often in the best position to determine what is in their best interests. Clients know how important it may be to preserve the relationship with the other party. A court decision may destroy a relationship that may be very important to the client. The client, not the attorney, should decide whether to use mediation. The attorney may, for legal, strategic or other reasons, want the matter to go to court while the client may desire that an effort be made to settle the controversy through mediation. The client is often unable to make such a decision without the attorney explaining the processes. Some clients do not even know that mediation and arbitration are available. For the decision to be meaningful the client must have a full understanding of the various ADR options.

THE MEDICAL MODEL

It appears that the legal profession's ethics rules do not follow the path that the medical profession has forged. Generally speaking, before the 1970's, paternalism (“the doctor knows best”) was the widely accepted model for the doctor-patient relationship. The doctor used his or her skill to determine the patient's medical condition and presented the patient with selected information to encourage the patient to consent to the treatment the physician deemed best. It is now clear that the physician has a duty to reasonably inform an ailing patient as to the alternative treatments available in place of surgery and their risks. Adequate disclosure and informed consent are, of course, two sides of the same coin-the former a sine qua non of the latter. It is normally impossible to obtain informed consent, worthy of the name, unless the physician first elucidates the options and the perils for the patient's edification. This duty to inform is more than a requirement that the doctor respond to questions from the patient. It is a duty to volunteer the information that the patient needs to make an intelligent decision.

The legal profession is still in a paternalistic mode with respect to providing full disclosure regarding alternatives to litigation, mediation and arbitration. The model used in the medical profession should rightfully be applied to attorneys with respect to

advising the client about alternatives to court litigation. The need for the client to be the ultimate decision maker in this regard is perhaps more important than the need for the medical patient to be the decision-maker. The lawyer faces a built-in conflict. Court litigation is more lucrative for the lawyer than employing mediation and arbitration.

ARGUMENTS FOR AND AGAINST REQUIRING A LAWYER TO ADVISE A CLIENT ABOUT ADR

The client faces the greatest consequences of any decision regarding the means of resolving a legal dispute. Yet typically the client is not informed of alternatives to litigation unless the matter is court ordered, requested by an opposing disputant or required by a contractual provision. It is the poorer, less-informed clients who need Rules of Professional Conduct to protect their rights of self-determination. The market does a pretty good job of protecting the dignity of the wealthy and educated clients who have experience dealing with lawyers. When clients know more about litigation, its monetary and non-monetary costs, and the advantages and disadvantages of mediation and arbitration, the client becomes a better consumer of legal services.

Some allege that incorporating such a duty into the Rules would be onerous on the attorney. The rule in Virginia is not onerous since it creates a minimum standard, which is limited in scope and is consistent in that regard with current Rules of Professional Conduct that address specific practice requirements e.g. the California rule on communicating written settlement offers.²¹ In addition some believe that the Model Rules already provide for such a duty. If so a new Rule would only make it clear that there is this duty.

Some fear that a rule mandating that lawyers inform the client about ADR will subject lawyers to malpractice lawsuits and attendant increased insurance premiums. This concern is unfounded. There is no evidence of any claims filed or lawsuits initiated in those states with similar mandatory rules.²² Furthermore, the Rules of Professional Conduct are meant to protect clients not lawyers.

It is argued that many lawyers did not study ADR in law school and do not understand the benefits of mediation and arbitration. The proposed rule will result in lawyers becoming better educated in these processes. If a lawyer has a duty to inform a client of the advantages and disadvantages of mediation and arbitration, by necessity, the lawyer will acquire such knowledge.

Mediation and arbitration offer a faster, less costly, means of dispute resolution than litigation and provide a private and confidential process of resolving controversies. Accordingly, there may be an inherent conflict of interest between the attorney and the client in determining whether to utilize such procedures. A lawyer's interest in generating billable hours, maintaining a "hardball" image or seeking professional publicity may conflict with the client's interest in quickly resolving the dispute, limiting costs, preventing public exposure and preserving relationships. The suggested Rule or the suggested language in the comment to a Rule will help the client to make an informed decision.

Some who argue against such a rule agree that lawyers should advise their client about ADR but assert that good practitioners will do so even if there is no rule and will

do so at a time that they, in their professional judgment, believe is appropriate. They, however, admit that others are likely to honor the requirement in the breach. This certainly is no reason not to have such a Rule. They further argue that the rapidly increasing acceptance of ADR is more likely to bring about its use than any rule of professional conduct will. If this were generally so there would not be any need to have many of our laws, such as buckling up in a car. The rule proposed herein is necessary because too many attorneys will not inform their clients about ADR.

An argument often advanced is that law is a profession and should not be micro-managed. The courts nevertheless have determined that the doctor must inform the patient about alternatives to an operation and have rejected the argument that because medicine is a profession a doctor has no duty to advise the patient as to various alternatives available and require the patient's informed consent.

It also has been asserted that some clients, because of various reasons such as diminished capacity, should not be informed about ADR. The same argument was made about the doctor advising the patient. In such cases a family member is brought in to help make the decision. If the client is unable to make the decision as to whether to use mediation or arbitration, a member of the family or a legal advisor could likewise help make the decision.

A ridiculous argument has been advanced that if creating such a duty were worthy of a Rule of Professional Conduct there are many other good practices that similarly deserve a Rule. The argument uses as an analogy, returning phone calls. Just mentioning this should dispel the validity of this argument.

Another reason advanced against such a rule is the concern as to what constitutes compliance. Compliance with the rule can easily be accomplished by the attorney giving the client a brochure that explains mediation and arbitration or by a recitation in the retainer letter that the attorney advised the client about ADR. The Beverly Hills Bar Association ADR Section is now preparing such a brochure for lawyers to give to clients. Likewise the ADR Committee of the State Bar of California is preparing its own brochure. This should answer those critics. Frank Sander, dean of ADR, said the duty to tell the client would parallel a doctor's obligation to educate patients on health care alternatives and help them make informed choices. He explains that such an obligation could be fulfilled by the attorney giving a brochure to the client that describes the most common alternatives.²³

CONCLUSION

The practice of law was once referred to as a "noble profession." Today, however, the public has lost respect for our judicial system and, partly because of that, the lawyers who serve it.²⁴ This is largely due to the fact that litigating is very costly. Overcrowded court calendars and the length of time it takes to prepare and try a case make litigation appear endless, thereby breeding disrespect for trial lawyers. An article in *The Professional Lawyer* a few years ago stated: "The documented public cynicism about lawyer ethics and trustworthiness is, therefore, no mere trifling concern. It is a valuable measure of how well the profession is performing its responsibilities of self-regulation."²⁵

The task forces and commissions appointed in each state must, therefore, recognize that the failure to ensure that lawyers advise clients about ADR may lead lawyers to act in ways the public finds repugnant. In commenting on a book written by Deborah L. Rhode, Kathleen Maher stated: "The premise of the book is that too much regulation of attorneys has been designed by and for attorneys, and too often, they serve their own interests and the interests of their clients at the expense of broader public interest." She further stated that Ms. Rhode "makes a compelling argument that the current regulatory system must be replaced by an oversight structure that puts the public's interest ahead of the profession's economic interests."²⁶ The legal profession and those that design rules of professional conduct must be aware of such comments and not succumb to having rules of professional conduct that are designed to protect attorneys, while not considering the rights of the clients. Anthony Kronman in his book *The Lost Lawyer* states in the first sentence that there is a crisis in the American legal profession, "the profession now stands in danger of losing its soul".²⁷

Clients often are not advised about mediation and arbitration by their attorneys until huge pretrial costs have been incurred and only learn about ADR when a court orders the matter to mediation. This late advice that there are alternatives to litigation causes great distrust of the lawyers and our judicial system. Clients ask why they were not advised by the lawyer about mediation before the lawyer ran up a huge bill. The profession of law has no place for the lawyer, who, for self-interest, does not inform the client about ADR. Those who are responsible for changing the rules of professional conduct fail in their fiduciary duty to the public when they are motivated by a desire that the profession should not be further regulated. The bar should consider the rights of clients to know. Those who create rules of professional conduct are there to serve the public and not to protect the lawyer. Sol M. Linowitz, in his book *The Betrayed Profession*, stated that lawyers must rekindle pride in our profession and restore the practice of law to the respected position it once occupied.²⁸ The failure of the bar to require attorneys to inform their clients about ADR is losing an opportunity to help rekindle pride in the profession. Frank E.A. Sander, over ten years ago, said that one of the reasons that lawyers do not discuss ADR with clients is that the lawyers are unfamiliar with the subject.²⁹ Unfortunately the same may be true today. He concluded that if lawyers themselves do not take this step others will do it for them. "But if as we repeatedly assert, our mission is to help clients find the best way to handle their disputes-not merely by litigation but also by a variety of other available techniques-why shouldn't it be part of our explicit professional obligation to canvass those options with clients?"

The ABA Model Rules are too ambiguous to be meaningful in regard a duty to inform clients about ADR. The task force or commission of each state should ensure the client's fundamental right to be advised about ADR.³⁰ Following the model of the clear and unambiguous language of, for example, Virginia's Rules of Professional Conduct is a far better path for states to take.

ENDNOTES

¹ Warren E. Burger, *Agenda for 2000 A.D.-A need for Systematic Anticipation*, 70 F.R.D. 83, 93-96 (1976)

(suggesting alternatives to litigation). *See also* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 286-81 (1982).

² John D. Ferrick, ADR: Worthy of the Appellation 'Justice', Into the 21st Century Thought Pieces on Lawyering, Problem-Solving and ADR (CPR Institute for Dispute Resolution) (2002). No record of this on their site – is it a book or an article?

³ Professor Kimberlee K. Kovack, as Chair of the Section of Dispute Resolution, in 1998 testified at a public hearing of the Ethics 2000 Commission, in Montreal Quebec, Canada, urging the adoption of a Rule that *An Attorney has a Duty to Inform his Client About the Existence and availability of Alternative Dispute Resolution*.

⁴ *See* Testimony of Kimberlee K. Kovach, Ethics 2000 Public Hearing in Montreal Quebec, Canada, May 29, 1998, available at <http://www.abanet.org/cpr/kovach.html>.

⁵ *See supra* note 3.

⁶ Professor Robert Cochran Jr. of Pepperdine School of Law, Testimony before the Ethics 2000 Commission in July 2000, available at <http://www.abanet.org/cpr/cochran10.html>.

⁷ *Id.*

⁸ Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L. J. 895, 909 (April 2001).

⁹ *Id.* at 914.

¹⁰ Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, OHIO STATE JOURNAL ON DISPUTE RESOLUTION Vol.18:2 2003.

¹¹ NORMAN BRAND, HOW ADR WORKS, BNA Books 2002; Benjamin Bycel, *Ethical Obligations to Inform Clients of the ADR Option*, in HOW ADR WORKS, BNA Books 2002.

¹² Lawrence M. Watson, *Initiating the Settlement Process*, DISPUTE RESOLUTION ETHICS - A COMPREHENSIVE GUIDE, ABA Section of Dispute Resolution (2002) at page 18 of Chapter 1, edited by Phylliss Bernard and Bryant Garth.

¹³ *See* Robert Cochran Jr., *Educating Clients on ADR Alternatives*, 52 LOS ANGELES LAWYER, October 2002. *See also* Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L. J. 895, 906-909 (April 2001); Gerald F. Phillips, *The Client Has the Right to be Advised by Counsel About ADR*, DRS NEWSLETTER, Winter 2002 and Gerald F. Phillips, *Moving Forward-The State Bar's Revised Rules of Professional Conduct Should Direct Lawyers to Advise Clients About Mediation and Arbitration*, DAILY JOURNAL, November 18, 2002.

¹⁴ VA. CODE ANN. R. Pt. 6 par. II R 1.2 (1) (Michie 2000). Adopted January 25, 1999, effective January 1, 2000.

¹⁵ MASS. RULES OF PROF. CONDUCT, RULE 1.4, Comment [5].

¹⁶ State Bar of Michigan, Standing Committee on Professional & Judicial Ethics, Opinion No. RI-262 (May 7, 1996).

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- ¹⁷ *Id*
- ¹⁸ COLO. REV. STAT. CR. R. chs 17-20 app, R.2.1 (2000).
- ¹⁹ HAWAII RULES OF PROF. CONDUCT, RULE 2.1.
- ²⁰ Diane Karpman, *Professional Responsibility Ethics-Rule Aficionados and ADR*, COUNTY BAR UPDATE, Los Angeles County Bar Association, December 2002, Vol. 22, No. 11. "Lawyers are also duty bound to perform services for their clients in a competent manner, pursuant to Rule of Professional Conduct 3-110 (Competency Rule). Competency would seem to suggest that a lawyer be conscious of cost-saving methods to assist clients in obtaining their overall objectives. Many, but not all, cases employing alternative dispute resolution are economic and can result in sizeable savings for the client."
- ²¹ Rule of Professional Conduct 3-510.
- ²² John A. Humbach, *Abuse of Confidentiality and Fabricated Controversy: Two Proposals*, THE PROFESSIONAL LAWYER, Summer 2000. – **I don't see anything in this article that relates to the text?** Letter in the file from Robert Benson an attorney practicing in Colorado "No ethics opinions have been issued, no reported disciplinary proceedings and no reported malpractice decisions." Letter in the file from Larry Hoover, "I spoke with Jim McCauley, State Bar Ethics Counsel, and he confirmed that there have been no complaints to his knowledge, formal or informal, about the Virginia Rules requirements to advise the client about ADR."
- ²³ Frank E.A. Sander, *Should There be a Duty to Advise of ADR Options?*, 76 A.B.A. J. 50, November 1990.
- ²⁴ SOL M. LINOWITZ, THE BETRAYED PROFESSION, Charles Scribner's Sons New York (1994). *See also* CATHERINE CRIER, THE CASE AGAINST LAWYERS, Broadway Books (2002).
- ²⁵ Humbach, *supra* note 22 at 1.
- ²⁶ Kathleen Maher, *Book Review - In the Interest of Justice: Reforming the Legal Profession*, by Deborah L. Rhode, THE PROFESSIONAL LAWYER, Winter 2001.
- ²⁷ ANTHONY T. KRONMAN, THE LOST LAWYER-FAILING IDEALS OF THE LEGAL PROFESSION, The Belknap Press of Harvard University Press (1993) at p 1.
- ²⁸ SOL M. LINOWITZ, THE BETRAYED PROFESSION, Charles Scribner's Sons (1994).
- ²⁹ Sander, *supra* note 23.
- ³⁰ Gerald F. Phillips, *A Client's Bill of Rights*, CALIFORNIA LAWYER, Feb. 2003 p. 72.

MEDIATION- A WIN-WIN PROCESS
"TRY IT YOU'LL LIKE IT"
By Gerald F. Phillips

'To mediate or not to mediate
That is the question
Whether 'tis better to keep the mouth quiet
about dispute resolution
or to inform the client of the availability of
ADR and thereby risk
the end of lawyering as we know it.

by Melancholy Jacques, (Dispute Resolution Magazine, Fall 1997)
and with apologies to William Shakespeare

Abraham Lincoln gave wise counsel that should be heeded by all trial lawyers:
"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser-in fees, expenses and waste of time. As a peacemaker the lawyer has the superior opportunity of being a good man. There will still be business enough."

Although mediation can be employed for all cases, lawyers often do not explain to their clients its process and its advantages. As a result the parties embark on the road to litigation without any consideration of alternatives.

Mediation expedites the resolution of disputes in a far less costly manner than litigation, or arbitration. Moreover, while the parties often do not find favor with a court's decision, they do appreciate a mediated agreement that is their own creation that settles a dispute. Most often the parties feel that the mediation achieved a fair resolution.

MISCONCEPTIONS ABOUT MEDIATION

In a survey conducted by the author, 78% of trial lawyers stated that their clients were not knowledgeable about mediation.² As discussed below, this lack of knowledge has created many misconceptions. Counsel should enlighten their clients that there are alternatives to litigation and should dispel the misconceptions that have grown up about mediation. There really are no disadvantages to mediation, for it is truly a win-win situation. If there is no settlement, the parties walk away and go to arbitration or to the courthouse to resolve the controversy.

Misconception #1: "Mediation does not work. It is a waste of time." A survey conducted a few years ago at the Kellogg Graduate School of Management at Northwestern University on the "Effectiveness of Mediation" concluded that mediation was successful in reaching settlement in 78% of the cases.³ In a survey that was part of a joint initiative at Cornell University School of Industrial and Labor Relations, 81% of the respondents stated that they used mediation because it provides "a more satisfactory process" than litigation and 66% said it provides more "satisfactory settlements."⁴

The result often depended upon the choice of mediator. The hallmark of a good mediator is effectiveness in obtaining a fair settlement. One of the great advantages of mediation is that the

parties choose their mediator. Selecting a mediator is not like selecting a jury. Counsel has the opportunity to learn a fair amount about potential mediators. In doing so, counsel should not overlook the important qualities that a mediator must possess—experience, optimism and creativity. In some cases the personal attributes of the mediator may be critical. Personality clashes can be a detriment to successful mediation. The mediator must be able to communicate with counsel and the parties.

Some mediators believe that the knowledge of the mediator in the area of the law at issue is critical. Others believe that a good mediator is one who is experienced in the art of mediating and can work effectively in any dispute. Both of these views are valid. The mediator with prior experience in the field may bring special insight to resolving the dispute. It depends on the area of the law involved. Certainly it is an advantage to the parties if the mediator in a family law dispute, in a construction matter or in an entertainment controversy is knowledgeable in the complex legal issues that arise in such cases. On the other hand, in a personal injury case arising from a car accident, most experienced and competent mediators can effectively help the parties resolve the dispute. Choosing the correct mediator for a particular case may be critical.

Misconception #2: “Mediation is costly.” The Cornell study concluded that “for many the use of mediation is a strategy they hope will reduce the cost of their legal disputes Nearly 90 percent of the respondents report that they view mediation as a cost-saving measure....” The Northwestern survey found: “Median cost for mediation was \$2,750 contrasted with \$11,800 for arbitration.” Obviously litigation would be more costly. The respondents to a survey conducted by the author stated: “It settled what would have been an expensive litigation.” “In almost each case we were able to reach a settlement which we believe was reasonable and equitable to both sides while avoiding the expenditure of high litigation costs.”

Misconception #3: “Mediation is not good for all disputes.” There is no indication that mediation should not be employed in any kind of controversy. Patty Glaser, a leading litigator in Los Angeles, when asked, on a panel discussing ADR, what matters should not be mediated, replied, “I cannot think of any such case. I’ve found that people with experience tend to be very effective, but mediation has to be done early on.” The Northwestern survey concluded: “This study indicates that there are compelling reasons to use mediation. Most important, mediation is capable of resolving disputes. More than 78% of the cases that went to mediation were settled in mediation. Most court cases are eventually settled. Through mediation the settlement can be achieved sooner and with less cost. It is a useful tool to avoid costly and uncontrolled litigation.” The Northwestern survey concluded: “This study indicates that there are many compelling reasons to try mediation first: costs, time, satisfaction of the parties and settlement rate.”

Misconception #4: “It’s too early to mediate.” Comments to the survey conducted by the author included: “My recommendation is to do it early—sooner the better.” “The court system is slow and inefficient. Ninety-five percent of the times, cases settle. Why not go straight to the chase and get the dispute resolved.” “To begin early even if no resolution in sight can help parties communicate. Take a chance with it.” “In many courts in the country there is mandatory mediation. Eventually you will end up in mediation. Try it early with a mediator of your choice.”

The Northwestern survey concluded that “parties would be well advised to use mediation, either instead of arbitration, or as a step proceeding arbitration. Seventy-eight percent of the cases settled in mediation, the cost and time of mediation were far less than those of arbitration, and the respondents’ satisfaction with mediation was greater than arbitration... Further, if mediation is not successful in resolving a dispute, arbitration can still be used...” The Cornell

study concluded: " Respondents in general believe mediation has more widespread applicability and is more likely to save time and money."

TAKING AN ACTIVE ROLE

The key to resolving many disputes is the ability to conceptualize possible solutions that meet the real interests of the parties in ways that may not have been considered in prior negotiations. Today, more attorneys are prepared to participate in mediations with greater confidence that they have the experience and skills necessary to be an integral part of the mediation process. Lawyers in mediation should play an active role and participate fully. They should not leave it only to the mediator to be creative. Creativity is one of the primary factors that distinguish excellent attorneys in mediation from other attorneys. The lawyers for the parties should determine the interests that underlie positions being taken by the parties and search with the mediator for a resolution that satisfies the interests of each party sufficiently that agreement can be reached.

ENDNOTES

¹ *Notes for a Law Lecture*, THE COLLECTED WORKS OF ABRAHAM LINCOLN, edited by Roy P. Basler, Volume II, (July 1, 1850?) at p. 81.

² Gerald F. Phillips, *Survey Shows Hollywood Warming up to ADR*, DISPUTE RESOLUTION JOURNAL, February 1998.

³ Jeanne M Brent, Zoe I Barsness and Stephen B. Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, June 1996. STUDY

⁴ DAVID B. LIPSKY and RONALD L. SEEBER, *THE USE OF ADR IN U.S. CORPORATIONS*. CORNELL UNIVERSITY SCHOOL OF INDUSTRIAL AND LABOR RELATIONS, a joint initiative of Cornell University, Foundation for the Prevention of Early Resolution of Conflict (PERC) and Price Waterhouse LLP (1997).

