

New skills for lawyers as ADR counselors and gatekeepers

By Jeanne F. Franklin

Editor's Note: This article originally appeared in, and is reprinted with permission of, *Virginia Lawyers Weekly*.

The ADR Joint Committee twice this year, in January and June, presented a program on the crucial role of Virginia attorneys as counselors under the Virginia Rules of Professional Conduct. Because the subject of the program, presented in concert with the VSB Education of Lawyers Section and the VBA Corporate Counsel Section, is so important, here are some key points for the benefit of those Virginia attorneys who did not attend the sessions.

Attorneys as a practical matter are gatekeepers for timely client access to the appropriate dispute resolution process for any dispute for which the attorney is consulted. This gives rise to the expectation that attorneys will fulfill this function effectively in service of the client's best interests.

In Virginia, such expectation actually rises to the level of an ethical requirement – a requirement that can best be dispatched by honing the knowledge and skills necessary for compliance.

Simply listed, the relevant Virginia Rules of Professional Conduct (VRPC) discussed in the program, with regard to counseling clients, are these:

- Rule 1.2 and Comment (1);
- Rule 2.1 and Comment (2);
- Rule 1.4 and Comments (1) and (5);
- Rule 1.1 and Comments (2a) and (6);
- Rule 1.3 and Comment (2).

A theme throughout the CLE program was the importance of attorneys understanding ADR processes and their different potentials in order to advise clients about the best process choices for their situation.

Value for Contract Drafters

The ADR gatekeeping function applies to transactional attorneys as

well as to litigators. Attorneys negotiating deals and preparing contracts should be savvy and proactive to shape process(es) for use should problems arise in a deal or a contractual relationship. As explained by panelist Chuck McPhillips, well thought-out strategies and process, carefully drafted in the contract, can do a lot to enhance the durability of the deal. Knowing the different processes available, the merits of each, and fitting them to the parties and the issues can conserve time, money and relationships for the client.

According to panelist John O'Brien, attorneys today should not allow contracts to leave their offices without well-crafted ADR provisions in them that the attorneys and the parties understand and can expect to use, should the need arise.

Once a dispute has moved into or toward litigation, the litigator is also bound to offer his/her client access to ADR as appropriate. That includes counseling the client and might include persuading opposing counsel to use an ADR process. Panelist and litigator Rick Witthoefft concluded that leading people to ADR is facilitated by counseling clients about possible use of an ADR option early and repeatedly throughout the course of a case.

Panelist Larry Hoover, who participated in the drafting of the VRPC, offered additional insight into the counseling skills that lawyers should have to discern client objectives, needs and interests, and to strategize with the client about the best routes to achieve those objectives in light of the client's needs and interests. A passing salute to the ADR counseling requirements, a quick mention of ADR as an option, or a failure to raise the ADR options early in the dispute before entrenchment of posi-

tions, may be inadequate.

Resolution and problem solving skills, including interest based and collaborative negotiation, may be especially relevant in order to meet the VRPC's requirement for competence. Lawyers, already analytical and articulate, may still need to hone communication skills and familiarity with how different ADR processes work to help the client make the best use of any process chosen.

Increasing Client Satisfaction

The ethical rules that address the counseling of clients, and awareness of a de facto ADR gatekeeping function of attorneys are not a cause for alarm. While they signal an evolution in what is expected of the legal profession, they do not detract from the highest and best uses of litigation as appropriate, or from support for the Rule of Law. Moreover, a client satisfied by competent ADR counseling and execution is good news for practicing attorneys. The quality of the relationship developed with the client through counseling and team work certainly can increase client satisfaction levels.

Just as evolving expectations of lawyers as ADR gatekeepers may call for some reflection, self-assessment, and law practice management by individual practitioners, law firms might examine mechanisms or processes in place to assure that firm clients are provided the right access at the right time in the right circumstances to an ADR process. This includes helping lawyers in the firm strategize about specific disputes and handling resistance from opposing counsel. Settlement counsel in law firms and in-house coaching clinics are two possible ways to serve the purpose.

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The speakers discussed specific tips based on their personal experience and evolving practice of helping clients avail themselves of ADR options. While the full substance and flavor of the panel discussion cannot be replicated here, the ADR Joint Committee, chaired by Bruce Wallinger of Harrisonburg, is interested in examining ways to stimulate similar discussion among Virginia attorneys. The handout package for the program alone was substantial and substantive. Stay tuned for follow-up initiatives that the Joint Committee might undertake, and please feel free to contact Bruce Wallinger or Jeanne Franklin with your ideas for such initiatives.

About the Author

Jeanne Franklin (phone: 703-684-3550; email: Jfranklaw@aol.com). served as moderator of the discussion among John H. O'Brien, Jr., of The McCammon Group, Charles F. "Rick" Witthoefft of Hirschler Fleischer in Richmond, Charles V. McPhillips of Kaufman & Canoles in Norfolk, and Lawrence H. Hoover of HooverPenrod in Harrisonburg. Joan S. Morrow of Williamsburg led the development of program content.

As a public service to all Virginia lawyers, we have posted on the Joint Committee's webpage the foregoing article, together with selected hand out materials from the CLE ethics programs. <http://www.vba.org/comm/adrtcom.htm>. We ask that you consider this material, and share it with your own colleagues. We welcome any feedback you have on our outreach efforts.