

7. Outline, "Well-Tailored ADR: Virginia Rules of Professional Conduct" by Lawrence H. Hoover, Jr., Esq.

WELL TAILORED ADR

Virginia Rules of Professional Conduct

Explaining and Choosing a Process

- *The starting point is a Virginia lawyer's obligation to advise the client about ADR.*
- *A client's objective and the means or process for carrying out that objective are covered by Rule 1.2*
- *The client decides on the objectives of the representation*
- *The lawyer advises the client about the means or process by which the objectives are to be carried out.*
- *Comment (1) to Rule 1.2*
 - *In advising about means or process the lawyer shall advise the client about the advantages, disadvantages and availability of ADR that might be appropriate in pursuing the client's objectives*
 - *The distinction between objectives and means is not clear*
 - *The result is a joint lawyer/client undertaking*

- *To fulfill this requirement to advise about ADR processes the lawyer must have an accurate understanding of the different ADR processes*
- *Understanding the interests of the client (and the other side) is a major component of legal representation in voluntary ADR processes. There is an underlying assumption that all parties can benefit through a creative solution to which each can agree*

Advisor/Counselor Role

- *Rule 2.1 describes one of the most important roles that a lawyer performs for the client – advisor and counselor*
- *The rule requires independent professional judgment and 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 (2) to Rule 2.1*
 - *Cautions about the possible inadequacy of advice couched in narrow legal terms, noting that limiting yourself to legal advice could ignore, to the client's*

disadvantage, the relational or emotional factors driving a dispute

- *The comment then adds that the advice may include the advantages, disadvantages and availability of dispute resolution processes that might be appropriate under the circumstances, in other words, “well tailored ADR”*

Informed Client Decision-Making

- *The continuing duty to keep the client reasonably informed – Rule 1.4 - is fundamental to the lawyer/client relationship*
- *It affects the client’s ability to make informed decisions during the course of the representation*
- *Comment (5) makes clear that this requirement relates to decisions concerning the “objectives of the representation and the means by which they are to be pursued”*
- *Informed decision-making by the client about means or process assumes the lawyer’s accurate understanding of the different ADR processes*
- *Comment (1) notes that the continuing duty to keep the client informed includes a duty to advise about the possible*

use of ADR that might be more appropriate to the client's goals than the initial process chosen

Competence in Negotiation

- *The responsibility to provide competent representation – Rule 1.1, requires the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”*
- *Negotiation Skills – Comment (2a) reminds us of the importance of negotiation skills and choosing the appropriate negotiation 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.”*
- *Maintaining Competence – Comment (6) says a lawyer should engage in continuing study and education to maintain the requisite knowledge and skill.*
- *Interest-based negotiation is described as Best Practice, according to a consensus of negotiation scholars. Here are some of the essential ingredients:*
 - *Empathic listening and open-ended questioning to understand the interests of all parties*

- *Creating value – expanding the pie through brainstorming and evaluating options before dividing it*
- *Balancing empathy and assertiveness: “Seek first to understand, then be understood”*
- *Cultivating awareness of cognitive biases and psychological and emotional barriers*

Zealous Representation in ADR Processes

- *Can we ethically be zealous advocates in a collaborative ADR process?*
- *Rule 1.3 – Diligence – A lawyer shall act with reasonable diligence and promptness in representing a client*
- *Code comparison – Canon 7 – “A lawyer should represent a client zealously within the bounds of the law.” Zealous advocacy is still with us, but it has been redefined in the VRPC as diligence.*
- *Comment (2) “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."