The Legal Ethics of Seeking Cooperative Resolutions versus Fighting Till the Bitter End

Presentation to the Idaho State Bar Dispute Resolution Section

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MATERIALS FROM THIS PRESENTATION SHALL NOT BE REPRODUCED WITHOUT THE EXPRESS PERMISSION OF THE AUTHOR.

Legal Ethics of Cooperative Resolutions

- Advantages of ADR
  - Traditional approaches of arbitration and mediation
  - New approaches
  - New applications, e.g. health law

Legal Ethics of Cooperative Resolutions

- Early Intervention

  ECH – early case handling

  PEDR – planned early dispute resolution

  PEN – planned early negotiation

  HCCM – health care conflict management

Legal Ethics of Cooperative Resolutions

New roles for lawyers:

*Lawyer as ADR gatekeeper

*Interest based counseling

**Is there an ethical duty to advise clients about ADR?

Legal Ethics of Cooperative Resolutions

- **Knowledge of legal subject matter, e.g., health law, to tailor the appropriate resolution method:**

- **Rule 1.1: Competence**
- ***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.

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- ABA Rules of Professional Conduct
- **Rule 2.1: Advisor**
- ***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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- **Comment on Rule 2.1: Advisor**
- ***Counselor***
  Rule 2.1 Advisor - Comment
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- [5] 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, 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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- Duty to counsel about ADR:
- *Excerpted from American College of Trial Lawyers Code of Pretrial Conduct and Trial Conduct (2009)*
- "… Settlement and Alternative Dispute Resolution
- A lawyer must never be reluctant to take a meritorious case to trial if the dispute cannot otherwise be satisfactorily resolved. However, a lawyer must provide the client with alternatives to trial when to do so would be consistent with the client's best interests. A lawyer should educate clients early in the legal process about various methods of resolving disputes without trial including mediation, arbitration and neutral case evaluation. "

Legal Ethics of Cooperative Resolutions

Diligence v. zealousness

Virginia ethics interpretation:

- "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."

Legal Ethic of Cooperative Resolutions

Roles in the lawyer-client relationship:

- **Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer**
- ***Client-Lawyer Relationship***
  Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer
- … 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.

Legal Ethics of Cooperative Resolutions

Duty to keep client informed:

- **Rule 1.4: Communications**
- ***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.

Legal Ethics of Cooperative Resolutions

Concluding points:

- A fresh appreciation of ethical rules to support alternative dispute methods
- A way to better serve clients