Practicing Zealous Advocacy by Using Effective Non-Adversarial Negotiation Skills
ABOUT OUR SPEAKERS

**Frank West Morrison**, Phillips, Morrison, Johnson & Ferrell / Lynchnburg

Frank Morrison's practice is concentrated in family law and mediation. He has been trained to provide collaborative family law services as an attorney representing parties in a collaborative negotiation process. Mr. Morrison has served as chair of a number of organizations, including the Virginia State Bar Family Law Section, the Virginia State Bar/Virginia Bar Association Joint Committee on Alternative Dispute Resolution, the Lynchburg Bar Association, and the Young Lawyers Section of the Virginia State Bar. He has been a frequent lecturer to attorneys through various continuing legal education programs and bar seminars, lecturing on more than fifty occasions over the last fifteen years to attorneys about family law and mediation. Mr. Morrison currently teaches negotiation and mediation at Washington & Lee Law School. He has served as a co-trainer of family attorney mediators on numerous occasions, taught a course at the Central Virginia Community College in Lynchburg for ten years on domestic relations, been a Commissioner of Chancery for the 24th Judicial District since 1984 and a judge pro tempore and arbitrator in family law cases since 1992, and sat as a substitute judge in the 24th Judicial District Juvenile and Domestic Relations District Courts for over twenty years.

**Lisa L. Schenkel**, Schenkel & Donaldson, P.C. / Lynchnburg

Lisa L. Schenkel is an attorney who has practiced family law for 28 years in the Central Virginia area. She graduated from Cornell University with a B.S. and from William & Mary School of Law with a J.D. Ms. Schenkel was trained as a collaborative attorney in 2004 and has engaged in the collaborative process since that time. She is a member of the IACP, the VaCP, and the VaCP of Lynchburg; additionally she is on the Council for the Virginia Collaborative Professionals. Ms. Schenkel has served as the president of the Family Law Section of the Lynchburg Bar Association. She is a member of the Virginia State Bar 24th Circuit Committee on Resolution of Fee Disputes, and has served as a substitute judge in the 24th Judicial District for 14 years. Ms. Schenkel has assisted with mediation and collaborative practice training at the Washington & Lee University School of Law. She has attended numerous programs pertaining to the collaborative process; was a facilitator at the Bridgewater Basic Collaborative Training program in October 2008, and a co-lead trainer for the 30-hour Interest Based Negotiations and Mediation Skills training in Lynchburg in February 2009 and in November 2009, and was a trainer for the 3-Day Collaborative Practice Team Training in Norfolk in May 2009. Ms. Schenkel is also a founding member of the Collaborative Practice Training Institute.
Dillina Wimer Stickley, Hoover Penrod, PLC / Harrisonburg

Dillina Wimer Stickley maintains a diverse general civil practice focused on business, employment, personal injury, and domestic relations. She regularly presents seminars for business clients, volunteer emergency services organizations, and others on a variety of topics including discrimination avoidance and diversity training, and pre-hospital care reports and volunteer emergency services legal liability. Ms. Stickley’s practice emphasizes counseling and risk management in business - and employment-related issues. She was adjunct professor at Bridgewater College, teaching Business Law for several years. In addition, she has extensive experience and skills in domestic cases focusing on complex equitable distribution. Ms. Stickley uses negotiation and a collaborative law approach to domestic relations issues and uses those same skills representing plaintiffs for personal injury. She is experienced in trial and appellate practice before state courts and the Virginia Supreme Court.

P. Marshall Yoder, Wharton Aldhizer & Weaver, PLC / Harrisonburg

P. Marshall Yoder has more than 17 years experience representing a wide variety of clients, ranging from individuals and family-owned businesses to Native American tribes to Fortune 500 companies. His experience includes serving as a general legal counselor, troubleshooter, and problem-solver for clients, both in and out of litigation. Mr. Yoder has a growing collaborative law practice in which he assists clients in identifying their real interests and achieving their goals. He joined Wharton Aldhizer & Weaver PLC from Poyner & Spruill LLP in Charlotte, North Carolina, where he served as co-head of that firm’s litigation section.
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OUTLINE

Practicing Zealous Advocacy by Using Effective Non-adversarial Negotiation Skills

I. The Ethics of Non-adversarial Negotiations

A. Role plays - initial interview (2 different styles)
   1. Mary (Dillina) interviewed by Marshall Gladiator
   2. Mary (Dillina) interviewed by Lisa Advisor

B. Discussion of ethical considerations involved
   1. Rule 1.3 - diligence and zealous advocacy - What is “zealous advocacy” and what is the purpose for “zealous advocacy”? 
   2. Rule 1.2 - duty to consult client concerning advantages and disadvantages of various processes available to best achieve client’s objectives of representation 
   3. Rule 1.2 - description of lawyer’s role as advisor 
   4. Rule 1.1 - competent representation includes necessary negotiation skills 
   5. Rule 1.4 - lawyer’s continuing duty includes to keep client reasonably informed, to include possibility and availability of more appropriate processes to resolve dispute than initial process chosen 
(See Attachments 1 and 2)

II. Overview and Theory of Non-adversarial Negotiations

A. General overview - most, if not all, negotiations have distributive elements (how to divide pie) and problem solving/creating value elements (how to expand size of pie to be divided)

The non-adversarial theory recognizes that the judges in a negotiation are the clients and not someone wearing a robe or sitting in a jury box. It also recognizes that in most cases, a non-aggressive but appropriately assertive style of negotiation balanced by the use of empathy and the use of various non-adversarial techniques is normally the most effective method to negotiate both the distributive and the value creation aspects of most disputes. It is neither a hard nor soft approach to negotiations, rather it is a process which in the words of William Ury “is soft on the people but hard on the problems”

In this portion of the program, we will first deal with the theory behind this non-adversarial negotiation process; then delve into the skills necessary to be most effective in this negotiation process, then discuss some of the techniques
used in this process, style or approach to negotiation and finally give some
general negotiation tips, discuss dealing with hard-ball tactics and have a brief
discussion of collaborative practice.

B. Theory of effective non-adversarial negotiations

1. In General

The theory of non-adversarial negotiation recognizes that there are
distributive, adversarial interests and competing interests in most
negotiations as well as elements of possible creation of value and win/win
situations. It is our conclusion that in most negotiations an effective
non-adversarial style which is persuasive, open, probing, cordial, civil and
flexible is preferable to an adversarial style of negotiation which is
aggressive, combative, obnoxious and sarcastic in dealing with both the
distributive elements of a negotiation as well as the value-creating
elements of a negotiation. The latter style is largely characterized by
bargaining in which the parties lock themselves into positions which
creates a frame in which future actions must be reconciled with previous
positions. Therefore, the focus of the negotiations turns from meeting
underlying interests and goals to justifying and arguing for positions and
“winning” the negotiation. In other words, we believe that the
non-adversarial style of negotiation best allows for the creation of value
which is usually not possible in an adversarial negotiation, without in any
way being harmful to the distributive portions of a negotiation. In fact,
we believe a non-adversarial approach is the most effective way to also
deal with the distributive elements of a negotiation and that certainly if
viewing the entire negotiation as a whole, a non-adversarial style is the
best approach in attempting to achieve the best overall results for your
clients, both in terms of value creation (growing the pie) and in
distribution (dividing the pie). In sum, we believe that an effective
non-adversarial style not only results in better settlements but also
increases the chances of settlement when compared to adversarial
negotiations.

We believe that negotiation techniques and skills are very different in
many ways from litigation skills and that lawyers who represent their
clients in negotiation as if they were trying an adversarial case are not the
most effective negotiators. This style of negotiation in the shadow of
litigation has been coined as “litigotiation” by Marc Galanter.
Negotiations are little more than an extension of the litigation model in
which limited information is shared and arguments are framed solely by
the law (and not what clients may really need or desire). In other words,
negotiations are largely driven by an event (the trial) that is highly
unlikely to even occur. Even where a negotiation becomes very
positional and competitive, the job of the negotiator is to persuade the other side as to the reasonableness of their client's positions, goals and needs and why their client's proposals are a better alternative to the other lawyer's client in going to court, but the job of the negotiator is not to argue the case as one would before a judge and a jury in trial. It is very important to recognize that negotiation is primarily a communication skill. Negotiation should be a dialogue in which you are attempting to persuade the other side to reach an acceptable agreement on the issues and problems being negotiated.

(See Attachment 3)

2. Balancing empathy and assertiveness - this is important because the first barrier to effective negotiations is your reaction to the other side; your reaction can perpetuate difficult behavior from the other side

(a) Assertiveness

(i) Assertiveness is important in advocating the client's interests, goals, needs, positions and the strengths and reasonableness thereof in a way that the other side can hear and understand the same and understand how important these interests, goals, needs and positions are to your client and how strongly your client feels about them. It is a way of expressing interests by being neither a jerk or a wimp.

(ii) The other side is better able to hear and understand your client's interests, goals, needs and positions when they are not at the same time being attacked, threatened, maligned, etc., even though it is perfectly appropriate in the assertiveness portion of a negotiation to discuss the strengths of your client's case were the case not to settle and the trial risk to the other side if the case were not to settle.

(iii) The key to assertiveness is not to "pull any punches" or show weakness and lack of resolve but rather to put forth such interests, goals, needs and positions in a way that the other side is able to hear, understand and give appropriate weight thereto as opposed to reacting in a defensive and reactive and aggressive manner.

(iv) Assertiveness is not belligerence or submissiveness; it assumes that the client's needs are valid and seeks to satisfy
them. Assertiveness indicates self-confidence but not dominance.

(b) Empathy

(i) Demonstrating and understanding of other side’s needs, interests and perspectives without agreeing or disagreeing

(ii) Value neutral mode of observation; listening to understand and not to respond (which as lawyers is what we are hardwired to do)

(iii) Not sympathy and not feeling the other person’s pain or emotions but rather understanding the emotions and feelings of the other and demonstrating your understanding

(iv) No downside to empathy; helps value creation and in the distribution of assets in negotiation

(v) We need to understand other side’s positions and perspectives better to improve our ability to negotiate; need to know what is important to other side and why; need to know what is not important; help clarify similar interests and differing interests

(vi) Corrects misconceptions of the problems

(vii) Loosens up and gains trust from the other side

(viii) Helps to diagnose situation in order to make the negotiation more effective

(ix) In the words of Daniel Goleman, empathy creates resonance which allows you to move others in a positive direction

3. Creation of Value - getting beyond positions to interest, goals and needs, option development and evaluation and finding creation elements in the negotiation

(a) In General

There are almost no zero-sum negotiations so it is extremely important to create value (growing the pie, if possible, prior to distributing value (dividing the pie and deciding
who gets what slices). A non-adversarial negotiation strategy creates an atmosphere and condition where interest-based negotiations can lead to the creation of value and where options can be developed to help create value and distribute value through the process of brainstorming and option valuation.

(b) Develop interests, goals and needs, brainstorming and evaluation (discussed later in outline under Techniques)

(c) Possible value creation elements of dispute

(i) differences between the parties; different resources; different time preference; different risk preference of valuation, different concerns and fears re future – contingencies and conditions, different interests

(ii) noncompetitive similarities between the parties

(a) similar interests, goals and needs
(b) economics of scales and scope

(iii) possible expansion of existing resources

(iv) reduction of transaction cost

III. Skills Needed for Non-Adversarial Negotiations

A. Communication skills

1. In general - effective/successful negotiations occur most often when a negotiator uses the communication skills set forth below (See Attachment 4)

2. Active listening skills, paraphrasing and summarization skills

3. Question-asking skills

4. Organization and clarification skills

5. Persuasion skills

6. Closing the deal skills - getting past impasse; working out details

7. Drafting skills

IV. Techniques for Non-adversarial Negotiations

A. Development of parties, interests, goals and needs

1. What is the difference between positions and interests, goals and needs?
positions are what parties want
interests, goals and needs are why they want them and what their underlying reasons are for wanting them
interests, goals and needs are what is really important to the parties

2. How do you get to interests, goals and needs?
(a) ask why questions
(b) be curious
(c) ask open-ended questions
(d) practice active listening skills, listening to understand
(e) reframe and summarize
(f) help clarify what’s important to them
(g) don’t limit to only legally relevant interest but also emotional relationship and process interests

(See Attachment 5)

3. Getting to interests, goals and needs is like peeling an artichoke by getting to the heart of the matter (CPTI motto - See brochure - Attachment 8)

B. Clarification and organization of issues

1. Determine the similarities and the differences between the disputants and check it out with the disputants and negotiators
2. Determine the issues between the disputants and check it out with the disputants and negotiators
3. Develop a game plan as to the order that the issues will be determined
4. Determine whether agreements reached are tentative agreements subject to an agreement on all the issues being reached or whether such agreements are legally binding partial agreements (in other words, is it a package deal or not?)
5. Allow a great deal of flexibility, not only in changing the game plan as negotiations go forth between disputants but also be willing to return to earlier steps in the process, where necessary, such as prospective sharing, identifying similarities and differences between disputants and issues to be resolved
6. Don’t just assume negotiation has failed, explore opportunities to continue the discussions

C. Brainstorming

1. Define issue or problem to be brainstormed as precisely as possible
2. Produce multiple ideas and options to solve problems and issues
3. No criticism, approval or evaluation of ideas and options
4. Ideas and options (good or bad) may stimulate other ideas and options (known as “stacking”)
5. No ownership of ideas and options
6. Use of flip charts or poster board will keep the parties focused on the problem and not the people
7. Keep brainstorming exercise focused on particular problem or issue; if other issues or problems come up, write the issue, problem and possible option generated on separate flip chart sheet and come back to it later
8. Brainstorming should be fast moving, creative
9. Offer silly options to loosen up process
10. Professionals can offer ideas and options also but should allow clients to take the lead
11. Do not label which person came up with each option and idea
12. Good brainstorming is like making popcorn

D. Evaluation

1. As a first step either have clients: (i) eliminate the options and ideas generated that do not meet client’s interests, goals, needs or (ii) have the parties pick those options and ideas which are the most promising ones to meet their interests, goals and needs
2. Once options and ideas are chosen under either of the above methods, they should be fairly evaluated and expanded and the details of how the options would work should be developed as well as the consequences of those options
3. Continue to focus on the interests, goals and needs of the parties when evaluating options
4. Try to improve the options parties are evaluating and keep them future-focused
5. Parties then compare the best options that they have developed and chosen and complete the evaluations of the best option. They then either choose the option or decide to develop other options and go through the brainstorming and evaluation process again
6. This may be the stage where the lawyers can play the strongest role through reality checks based upon their experience

E. Coming to an acceptable agreement

1. After pie has reached its maximum size, help parties divide the pie by assisting them in:

(a) taking out slices that one wants and the other doesn’t and determine value of those slices;
(b) taking out those slices where parties have joint interest in a way that maintains the mutual benefits thereof;

(c) dividing the rest of pie in an acceptable and equitable way by helping them do a risk and BATNA analysis of the positions of both parties and by helping them determine what is the most acceptable division in meeting the interest, goals and needs of the parties and creating a win/win solution

(See Attachment 6)

F. Alternative techniques for distributive part of negotiation if not resolved through the above process

1. Decide whether or not to make the first offer (remember first offers serve as anchors)
2. Make first offers a reasonable distance from where you want to end up, but not so unreasonable that other side refuses to negotiate or starts out at unreasonable place themselves
3. First offer should be at least one that you can defend on a rational basis
4. Response to first offer somewhat depends on how reasonable is the first offer - if first offer is reasonable, then the first counter offer can be more reasonable. If first offer is totally unreasonable, then the counter offer should be less reasonable or rather than making a counter offer, try to get the other side to explain their unreasonable offer and possibly make a different opening offer although this may be seen as you are trying to get the other side to bid against themselves
5. Don’t just horse trade (split the difference each time) but make counter offers based on rational points and try to influence the other side’s BATNA
6. Be open to changing your own BATNA depending on how the negotiation goes and what new information you may receive
7. Enter into an agreement at the end of negotiation if proposed agreement is better than BATNA; otherwise, end negotiation
8. Don’t be worried that the other side may also be reaching an agreement that is better than their BATNA, especially since the saving of litigation in addition to possible value creation in the negotiation even where it is primarily distributive makes an agreement a win/win result
9. Note that under this alternative way of reaching a settlement of the distributive part of a negotiation that the techniques of balancing assertiveness with empathy, of development of interests, goals and needs of the parties and of clarification and organization should still be used even if it is decided not to brainstorm and evaluate the options developed during a brainstorming process
V. Random Negotiation Tips

A. Fully prepare and support client – it all begins with the initial interview (see Attachment 7)

B. Prepare for the negotiation thoroughly with your client, not only looking at your client’s interests, goals, needs and positions but also the expected interests, goals, needs and positions of the other party

C. Despite all the preparation, be flexible and open to changing strategies and modifications of interests, goals, needs and positions once the negotiation begins

D. Look for opportunities to use apologies where appropriate. Timing, sincerity and forbearance are important in making apologies

E. A good apology usually contains an element of regret, sympathy and responsibility for future actions

F. The apology must be sincere; be careful of the word “but” in an apology. Most apologies are undone by using the word “but” and whatever follows thereafter

G. Be aware of your body language and one, as well as the other attorney’s; check in with your client by staying aware of your client’s body language and tone also

H. Use silence where appropriate

I. Give information only if getting information from other side; information sharing needs to be a give and take and reciprocal

J. Discover your client and the other side’s best alternative to a negotiated settlement, worst alternative to a negotiated settlement and most likely alternative to a negotiated settlement (BATNA, WATNA, MLATNA)

K. Gather and exchange as much information as possible and generate options and evaluate them, in most cases, before making initial settlement proposals

L. Where necessary, use neutral principles as guidelines for decision-making; i.e., agreed-upon criteria, appraisals, etc.

M. Make appropriate use of deadlines
N. Use empathy loop

(i) inquire - ask open-ended questions
(ii) response of other side
(iii) demonstrate your understanding of the other side’s response
(iv) check out your understanding with other side
(v) if corrections or additions, go back to (ii) (iii) and (iv) above until you get it right

O. Recognize and deal effectively with the emotional aspects of negotiation. Allow time for venting and give empathic responses; venting is often necessary and an empathic response allows the disputants to move on to a more rational and substantive area of negotiation

P. Realize that in some cases after using your best efforts, it’s just best to walk away and end negotiations

Q. Don’t give up easily - no wine or settlement before its time

R. Be aware of “phantom advisors” and others who feel they have a stake in your client’s outcome; i.e., friends, boyfriends/girlfriends, parents

S. Be self aware of your personality type, negotiation style and the triggers that may come up in negotiation which might cause you to lose focus on the effectiveness in the negotiation

T. View conflicts and disputes more as problems to be solved cooperatively rather than battles to be won

U. Recognize that you can win the battle but lose the war for your client; that there are ramifications of all settlements other than the purely legal aspects

VI. Dealing with Hard-ball Tactics and the Adversarial Attorney

F. Pre-negotiation meeting with other attorney

1. Attempt to negotiate a non-adversarial process with the adversarial attorney in advance of negotiation
2. Try to help adversarial attorney focus on the interests, goals and needs of the attorney’s client and not just positions prior to negotiation.

G. Dealing with hard-ball tactics during the negotiation - when dealing with hard-ball tactics, consider the following:

1. Recognize and understand hardball tactics. Don’t go there and play hard ball yourself, but rather name the game and suggest another approach (don’t fight fire with fire).
2. Briefly show that you can play hard ball yourself and demonstrate how that will lead nowhere.
3. Elicit your adversary’s input in the selection of another process.
4. Try to establish a non-interrupting rule and demonstrate non-interrupting of the other side and why such a rule is helpful to the process.
5. Stress reciprocity and inform in an assertive way when you are not getting it.
6. Continue to practice empathy and assertiveness even without reciprocity as it is important for the other side to know that you have correctly understood their interests, goals and needs. Otherwise, they will continue to bring them up throughout the negotiation.
7. Don’t agree or remain silent if you don’t agree with a position the other side is taking; and if you respond, state, “we will deal with that later” or “we have a different perspective or position on that; let’s just agree or disagree rather than argue the point.”
8. Silence can be very powerful where somebody is making an unreasonable argument or setting forth an unreasonable position and it may be more effective than any words you can use.
9. Watch your body language and tone and, as stated earlier, be very self-aware.
10. Use and demonstrate your anger in a controlled way in appropriate situations; it is never effective to erupt into anger or to let your anger control your thoughts and actions.
11. Change the players by (a) changing lawyers (preferably within the same law firm) where new lawyers could bring new perspective to the table and remove personality deadlocks; or (b) consider bringing in clients if the clients weren’t present during the hardball stage or removing clients if clients were present during the hardball stage; (c) and/or also bring in a neutral third party, other lawyers, mediators, neutral experts, etc.
12. “Help me understand questions” are effective in dealing with hardball tactics.
13. Use breaks and time out periods effectively.
14. Use assertiveness, rather than a hardball attitude, help the other side better assess their positions and risks and try to get the other side to recognize their interests, goals and needs and how their positions may not serve those interests, goals and needs.
15. Ask open-ended questions and try to gather information from other side
16. Stay with your game and try to reframe hardball tactics
17. Be prepared to walk away from the negotiations if their final offer is worse than your client’s best alternative to a negotiated settlement

VII. Brief Description of Collaborative Process

A. Cornerstones of the collaborative process
1. Training for all professionals in the collaborative process and interest-based negotiation
2. Withdrawal of professionals when collaboration ends and parties go to adversarial process
3. Total transparency - full voluntary and good faith exchange of all relevant information
4. Legal advice given in honest, straight, and candid manner either in presence of other party or if collaboration continues, shared at the next collaborative meeting
5. Interest-based negotiation without any private strategizing with clients
6. Goal is to reach an acceptable agreement where both parties are better off than going to court
1. No positional and private negotiation strategizing done between lawyers and clients

B. Various team approaches to collaborative practice
1. 2 clients 2 lawyers
2. 2 clients, 2 lawyers, 1 communication coach, 1 financial specialist
3. 2 clients, 2 lawyers, 2 communication coaches, 1 financial specialist, 1 child specialist
4. all of the above plus a mediator
5. no one size fits all so that the team should be decided on a case-by-case basis which is needed and which will work best and be most cost-effective for the clients

VIII. Other Suggested Readings


RULES OF PROFESSIONAL CONDUCT

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<td>Disclosing Representation to Court</td>
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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.

ATTACHMENT 1
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 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.


[4] 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

[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, 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

[6] 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.

[7] 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 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

[9] 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.

[10] 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.

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

[12] 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 retain 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...
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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. The amendments effective January 1, 2004, added present paragraph (d) and redesignated former paragraph (d) as present paragraph (e).

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 workload should be controlled so that each matter can be handled adequately.

[2] ABA Model Rule Comment [2] not adopted. Virginia comment [2] is as follows: 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.

[3] 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 overlooks 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.

[4] 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.

[5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity.

**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.

The amendments effective February 28, 2006, added Comment [5].

**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] 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.

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. 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.

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

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.
THE LAWYER’S ROLE IN ADR

4.1 INTRODUCTION

In mediation the lawyer’s role is multifaceted and challenging. It might include advisor, counselor, negotiator, problem-solver, peacemaker, and advocate. The role assumed in any given case depends on the context and the strategy that is planned by lawyer and client. In other alternative dispute resolution (ADR) processes, such as arbitration, neutral evaluation, or mini-trial, the lawyer assumes the more traditional role of advocate.

The context within which the dispute has arisen and its history up to the date of the mediation are important in mediation. The nature of the dispute, the interests, goals, experience, and skills of the client, the attitude of the other party or parties, and the experience and skills of the lawyer must be considered in defining the roles of the lawyer and client. These same factors must be addressed when choosing which process is appropriate. Once the appropriate process has been chosen, it is the lawyer who usually takes responsibility for preparing the client to participate effectively in resolving the dispute.

4.2 ADVISING THE CLIENT ABOUT ADR

4.2.01 Generally. The Virginia Rules of Professional Conduct (the Rules) provide a broad framework and specific guidelines for the lawyer’s role in mediation and ADR. As described in Chapter 3 of this handbook, one of the ethical requirements included in the Rules is that a lawyer must advise the client about the appropriateness and availability of ADR. The Rules also include references to collaborative problem-solving strategies that might be appropriate in pursuing the client’s objectives. The Rules are broadly descriptive of the lawyer’s role, not just as advocate, but as problem-solver, advisor, intermediary, third-party neutral, and mediator. These roles are central to a vision of professionalism that promotes a more civil profession and contributes to a more civil society.

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1 See Chapter 2 of this handbook.

2 The Rules were adopted in 1999 by the Supreme Court of Virginia and became effective on January 1, 2000.

3 See Virginia Rules of Professional Conduct, Rule 1.2 cmt. [1].

4 Id., Preamble.

5 For a more comprehensive Westbook, Dispute Resolut Counselor-at-Law: A Collab.
4.202 The Lawyer’s Role Under the Rules of Professional Conduct

A. The Lawyer’s Duty To Consult with the Client about Dispute Resolution Processes. Rule 1.2 requires that a lawyer "abide by a client's decisions concerning the objectives of representation" and "consult with the client as to the means by which they are to be pursued." The interpretive comment to Rule 1.2 states that, in the context of a client's right to consult with the lawyer about the means to be used in pursuing the client's objectives, the lawyer "shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives."  

B. The Lawyer’s Duty To Keep the Client Informed: Rule 1.4 (Communication) requires that a lawyer "keep a client reasonably informed" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

As in the comment to Rule 1.2, the interpretive comment to Rule 1.4 refers to the lawyer's ongoing duty to "advise the client about the availability of dispute resolution processes that might be more appropriate to the client than the initial process chosen." Since information and knowledge about the case are developed over the course of representing a client, it is not at all unlikely that continuing work on a case will reveal the appropriateness of using an ADR process after traditional litigation is underway. The comment gives an example of where information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, in which the parties themselves could be more directly involved in resolving the dispute.

C. The Lawyer as Advisor. Another significant provision is Rule 2.1, which describes the lawyer as advisor. In giving "candid 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." The comment to the Rule suggests that this advice should include "practical considerations, such as cost or effects on other people," making it more valuable to the client than "advice couched in narrow legal terms." Such narrow legal advice "could ignore, to the client's disadvantage, the relational or emotional factors driving a dispute. In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances."

This Rule recognizes the importance of factors beyond the purely legal that affect clients’ decisions regarding particular courses of action. Lawyers tend to focus on the legal aspects of the case, because that is what they are trained to do and are particularly skilled at doing. It is, lawyers reason, why clients come to them in the first place. At the same time, the Rules recognize that there are other considerations.

6 The Virginia Bar Association’s Creed has, since 1964, included as a tenet the lawyer’s duty to consult with his or her client about the means by which the client’s goals will be pursued, including ADR.

7 The question of which dispute resolution process is “appropriate” in a particular case is for the client to decide. See Committee Commentary to Rule of Professional Conduct 1.4, which reminds lawyers of their continuing duty to help clients choose the most appropriate settlement process. (Emphasis added).
that play important roles in how clients view the dispute and in how they choose to proceed toward its resolution. This is, for many people, the only time they will be involved in a dispute resolution process and, for most, it is not a very positive experience.

Some clients may suffer because of the negative feelings generated by a dispute; others may have issues about expending precious resources such as time, money, and energy on the case. Still others may, in fact, find the very existence of the conflict morally repugnant. The Rules acknowledge the importance of encouraging clients to consider all of these nonlegal elements as they approach decision-making about their case.

This does not mean that lawyers have to become experts in all the other fields listed, but rather that lawyers must raise their own level of consciousness about the motivations, interests, and goals of their clients—legal and nonlegal.

D. Collaborative Lawyering and the Third-Party Neutral Role. In addition to the requirements discussed above, the Rules: (1) contain several references to situations where problem-solving or collaborative strategies are appropriate in a representational role; and (2) set forth guidelines for the role of the lawyer when serving as a third-party neutral, including the role of the lawyer as mediator. The inclusion of these rules provides acceptance of and guidance for the lawyer as problem-solver.

1. Problem-Solving Strategy. Rule 1.1 requires a lawyer to "provide competent representation to a client." "Competent representation" is defined as having the "legal knowledge, skill, thoroughness and preparation necessary for the representation." The comment to Rule 1.1 notes that these skills may be used in the context of negotiation. "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." Since an estimated 85 to 95 percent of cases are settled through lawyer-to-lawyer negotiation, it is not surprising that the Rules now specifically encourage the use of collaborative skills in the negotiation context. They are simply recognizing that all cases are not the same and that lawyers need to have a range of tools and skills at their disposal.

Rule 1.3 covers diligence, which incorporates the concept of zealous advocacy from Canon 7 of the Code of Professional Responsibility. The comment to this Rule also refers to a "collaborative, problem-solving approach," which "is often preferable to an adversarial strategy .... The client can be represented zealously in either setting." This reference is particularly relevant to the lawyer's representation of clients in mediation, which is characterized by lawyers who act responsibly in their clients' best interests by working with opposing counsel to try to reach an agreement that satisfies the needs and interests of both clients. While the concept of working "with" the other side may be seen by some lawyers as "selling out" their clients,
lawyers who have participated in mediation often realize that the value of collaboration lies in crafting agreements that maximize their clients' interests. Using their negotiation skills in a nonadversarial manner, while initially foreign to many lawyers, can actually be a very effective way to reach a more creative result than is available in litigation and that is often elusive in traditional lawyer to lawyer negotiation.