



## Recommending Alternative Dispute Resolution As A Public Agency Attorney: What Attorney Ethical Guidelines Say

*April 2009*

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### California State Bar Guidelines Encourage Attorneys to Discuss Alternative Dispute Resolution with Clients

In 2007, the California State Bar Board of Governors approved guidelines for civility and professionalism for California Attorneys.<sup>1</sup> The purpose of the guidelines is to foster levels of civility and professionalism that exceed the minimum requirements for attorney ethics established in the Rules of Professional Conduct.<sup>2</sup>

The guidelines contain 21 sections, ranging from the notion that attorneys should represent clients in a civil and professional manner (section 3) to the admonition against playing games with serving papers (section 7). In terms of ethical values, the guidelines address an attorney's *responsibilities* to the justice system, the public, the profession and clients. Another key theme is behavior that reflects *respect* to both opposing counsel and the courts. A copy of the guidelines is attached.

An interesting element of these guidelines is section 13, which provides:

An attorney should raise and explore with the client and, if the client consents, with opposing counsel, the possibility of settlement and alternative dispute resolution in every matter as soon as possible and, when appropriate, during the course of litigation.

For example,

- a. An attorney should attempt to advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution.
- b. An attorney should attempt to evaluate a matter objectively and to de-escalate any controversy or dispute in an effort to resolve or limit the controversy or dispute.

- c. An attorney should consider whether alternative dispute resolution would adequately serve a client's interest and dispose of the controversy expeditiously and economically.
- d. An attorney should honor a client's desire to settle the dispute quickly and in a cost-effective manner.
- e. An attorney should use an alternative dispute resolution process for purposes of settlement and not for delay or other improper purposes, such as discovery.
- f. An attorney should participate in good faith, and assist the alternative dispute officer by providing pertinent and accurate facts, law, theories, opinions and arguments in an attempt to resolve a dispute.
- g. An attorney should not falsely hold out the possibility of settlement as a means for terminating discovery or delaying trial.

The Bar notes that the guidelines are not mandatory, nor are they to be used as an independent basis for State Bar disciplinary charges or claims of professional negligence.<sup>3</sup> Instead, the guidelines are aspirational standards designed to promote the administration of justice and conflict resolution.<sup>4</sup>

## **But What about the Duty to Zealously Represent One's Client?**

The guidelines anticipate this issue by noting that compliance with these guidelines does not detract from an attorney's duty of zealous representation.<sup>5</sup> The Bar's reference to this duty is interesting, given that such a duty does not explicitly appear under the California Rules of Professional Responsibility. Under those rules, attorneys have an ethical obligation to *diligently* represent one's client. The rule itself is concerned with attorney *competence*:

### **Rule 3-110. Failing to Act Competently**

(A) A member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently.

(B) To perform legal services competently means diligently to apply the learning and skill necessary to perform the member's duties arising from employment or representation. If the member does not have sufficient learning and skills when the employment or representation is undertaken, or during the course of the employment or representation, the member may nonetheless perform such duties competently by associating or, where appropriate, professionally consulting another member reasonably believed to be competent, or by acquiring sufficient learning and skill before performance is required, if the member has sufficient time, resources, and ability to do so.

(C) As used in this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally, and physically able to perform legal services.<sup>6</sup>

In terms of the ABA Rules, Rule 1.3 also concerns itself with the attorney providing diligent services to the client:<sup>7</sup>

### **Client-Lawyer Relationship**

#### ***Rule 1.3 Diligence***

A lawyer shall act with reasonable diligence and promptness in representing a client.

The reference to “zeal” occurs in the comment to this rule:

#### ***Rule 1.3 Diligence - Comment***

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

The ABA's Model Rules are just that: models to guide the adoption of ethics rules in the states.<sup>8</sup> To be sure, many states and territories have adopted the ABA's Model Rules; however California is not one of them.<sup>9</sup> Many California attorneys are familiar with the ABA Rules as part of the Multistate Professional Responsibility Examination which became part of the California Bar Exam in the 1980s.<sup>10</sup>

However, formal reference to the ABA Rules were removed from the California Rules in 1975 and the California Bar's Committee on Professional Responsibility has opined that the ABA Rules has no direct effect on California lawyers practicing in state and federal courts within California State of law. The Committee said the only role of the ABA rules may be looked to as a collateral source, particularly in those instances where there is no direct authority found under applicable California rules, statutes or California appellate court opinions and there is no conflict with the public policy of California.<sup>11</sup>

That having been said, the ABA Rules also is clearer than the California Rules that part of a lawyer's role is to counsel with a client on the means available to pursue the client's objective: ". . . 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 . . ."<sup>12</sup> In addition, the ABA Rules encourage a lawyer to consider extra-legal considerations in advising the client:

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.<sup>13</sup>

ABA Rule 1.4(a)(2) also requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished."<sup>14</sup>

Indeed, California's encouragement for attorneys to evaluate whether using alternative dispute resolution would serve the client's interests and dispose of a controversy expeditiously and economically<sup>15</sup> is consistent with the ABA Rules encouraging consultation about the means by which the client's objectives will be pursued. So too is the notion that attorneys, as a matter of professionalism, advise a client at the outset of the relationship of the availability of informal or alternative dispute resolution.<sup>16</sup>

## The Anti-Zealots

A number of commentators have criticized the notion of zealous representation as either an ethical aspiration or a professional obligation.

For example, in the white paper "Zealous Representation: No-Win Benchmark for Lawyers," Janis Reinken observes:

As a measure of an attorney's efforts, the ideal of zealous representation is a mercurial benchmark: it is too subjective to be effective in evaluating an attorney's legal services, either for disciplinary or liability purposes. In short, a "zealous representation" standard presents a no-win situation for attorneys either way. Although attorneys still speak of "zealous representation" casually when describing duties owed to a client, more objective language—such as competence, diligence and loyalty—would be a vast improvement.<sup>17</sup>

Interestingly, the author is Director of Risk Management for the Texas Lawyers' Insurance Exchange.

Others have speculated that the adversary process has contributed to the public's low regard of attorneys as a profession as well as attorneys' own dissatisfaction with their

jobs.<sup>18</sup> In fact, the Gallup Poll's annual survey on honesty and ethics in the profession consistently finds that the public has a low opinion of attorneys' ethics.<sup>19</sup>

## But Is Alternative Dispute Resolution Really a Good Idea?

Using alternative dispute resolution offers a number of potential advantages. These include the opportunity to control the outcome to a greater degree than litigation affords. Alternative dispute resolution can result outcomes which are not otherwise available to the parties acting alone or in litigation. Alternative dispute resolution is a voluntary process that can be terminated by one party; no one is required to agree to anything.

Alternative dispute resolution also can have significant benefits in disputes involving public agencies. The adversarial nature of litigation can have a significant downside if a public agency is using taxpayer resources to sue someone within the community or a fellow public agency. Alternative dispute resolution can help preserve the working relationships among public officials who may need to work together to address other pressing community issues.

One set of scholars depicted these advantages graphically in the following Dispute Resolution Continuum:<sup>20</sup>

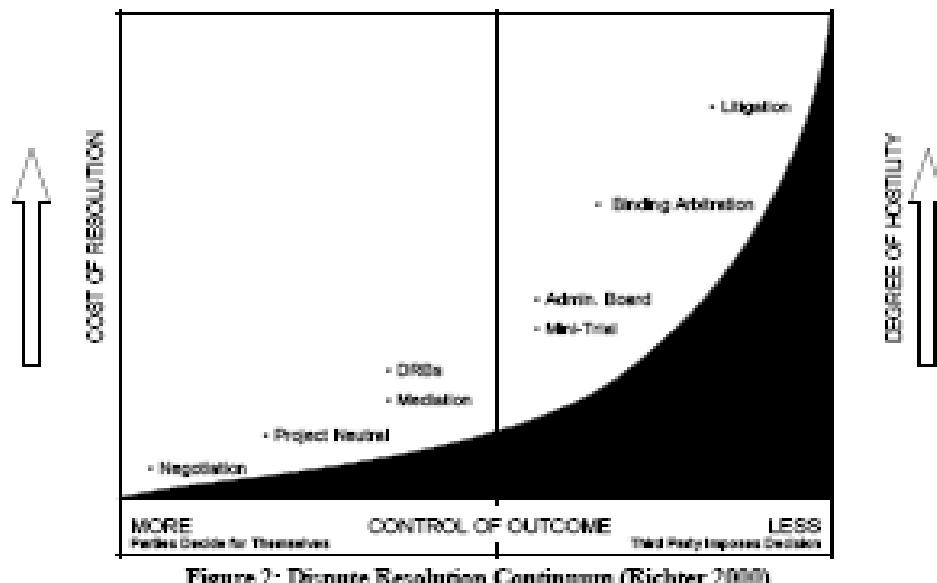


Figure 2: Dispute Resolution Continuum (Richter 2000)

(Note that "DRBs" stands for dispute review boards.)

In addition, although the results of the academic research varies,<sup>21</sup> using alternative dispute resolution has the potential for saving costs. The U.S. Institute for Environmental Conflict Resolution summarized the following from research on ADR:<sup>22</sup>

- **Attorneys Believe ADR Can Save Client Significant Sums.** A national survey of attorneys' attitudes concerning ADR addressed the issue of ADR time and cost savings compared to litigation. "...the survey asked attorneys to specify their client's costs in their most recent ADR case. Amounts mentioned by attorneys ranged from zero to \$500,000, while the average cost to their clients was \$43,000. In comparison, when asked to estimate how much litigation might have cost their clients for the same case, the amounts mentioned by attorneys ranged from \$2,500 to \$2 million, with the average estimated cost of litigation being \$211,000. Hence, the estimated average savings to the client of choosing ADR over litigation in these cases was \$168,000."<sup>23</sup>
- **Benefits Not Just Financial.** The survey results also suggested that "other positive outcomes from the use of ADR include a perceived fairer allocation of costs, a win-win solution that benefited all parties, and agreement as to remedial measures. In addition, attorneys noted that the ADR process led to a greater understanding of opposing parties' interests and the resolution of tough technical issues. Finally, attorneys cited longer-term benefits of ADR, such as environmentally beneficial projects, the resolution of long-term liability issues, and positive corporate-government relations."<sup>24</sup>
- **Benefits Even When ADR Does Not Result in Full Agreement.** "When ADR did not resolve the controversy at hand, positive benefits were nonetheless reported. Attorneys indicated that ADR allowed hostile parties to talk with each other, and as a result, information was exchanged among parties that might not have been shared otherwise. ADR also allowed for better pre-trial preparation and clarification of the issues. Some attorneys considered ADR a 'reality check' for parties. In other words, ADR allowed parties to assess what settlements might be possible, as well as to explore options that might not have been considered otherwise. Finally, ADR allowed parties to become vested in creating a solution of their own."<sup>25</sup>

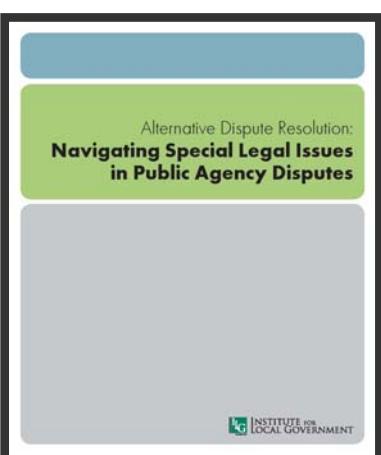
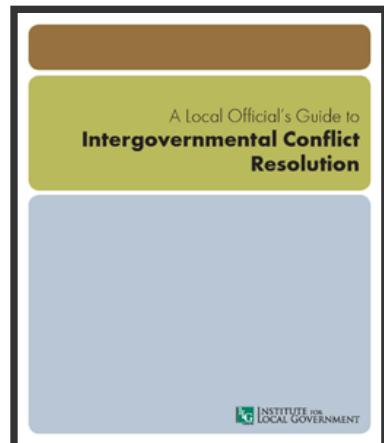
Thus, recommending that clients consider alternative dispute resolution (as suggested by the State Bar's aspirational standards for professionalism and civility) may offer public agencies both budgetary and public policy benefits. These also include the opportunity to work through developing tensions early on, before positions have hardened and statements have been made publicly that are difficult to retract or retreat from.

## Resources Available to Public Agency Attorneys to Achieve Section 13's Goals

The Institute for Local Government has produced two pamphlets to assist public agency attorneys with this task.

One is called *A Local Official's Guide to Intergovernmental Dispute Resolution*. It explains, in plain English, what alternative dispute resolution is and how it can help with public agency disputes.

The second pamphlet is called *Alternative Dispute Resolution: Navigating Special Legal Issues in Public Agency Disputes*. It addresses special issues public agencies face in using alternative dispute resolution, including:



1. Limits on What Authority Can Be Delegated
2. Balancing Confidentiality with Governmental Transparency Requirements
3. Public Records Disclosure Requirements
4. Evidence Code Exemptions
5. Disclosure to Agency Officials
6. Public Hearing Requirements: Their Impact on What Can Be Agreed To

The pamphlet also includes a sample resolution generally outlining the framework that the agency will employ in using alternative dispute resolution and demonstrating that decision-makers will continue to respect decision-making transparency requirements.

Both pamphlets are available without charge in electronic form at [www.calig.org/mediate](http://www.calig.org/mediate).

## Getting Started

Not all disputes may be suitable for alternative dispute resolution. One way to determine is to ask a dispute resolution professional to perform an assessment of a particular dispute. A neutral third party will identify 1) the causes of the conflict, 2) the persons or entities that would be affected by the outcome of the conflict, and 3) the options available (for example, mediation, consensus-building, or a lawsuit) for them to deal with the conflict. The neutral may also help get the parties ready for participation in a dispute resolution process by providing education to the parties on what the selected process will be like.

For intergovernmental disputes involving local public agencies, the Institute for Local Government offers a fee-based assessment program as part of its effort to encourage local agencies to consider alternative dispute resolution.

## Conclusion

The inclusion of Section 13 of the California Bar's Guidelines for Civility and Professionalism to California Attorneys offers public agency attorneys a unique opportunity to encourage their clients to consider alternative dispute resolution as a tool to de-escalate developing controversies, save taxpayer resources and avoid damage to relationships among community leaders.

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## Endnotes

<sup>1</sup> See Press Release "State Bar Approves Civility Guidelines," July 20, 2007, available at [www.calsb.org](http://www.calsb.org).

<sup>2</sup> See California Attorney Guidelines of Civility and Professionalism, Adopted by the State Bar Board of Governors on July 20, 2007, page 3 (introduction).

<sup>3</sup> See California Attorney Guidelines of Civility and Professionalism, Adopted by the State Bar Board of Governors on July 20, 2007, page 3 (introduction).

<sup>4</sup> See California Attorney Guidelines of Civility and Professionalism, Adopted by the State Bar Board of Governors on July 20, 2007, page 3 (introduction).

<sup>5</sup> See California Attorney Guidelines of Civility and Professionalism, Adopted by the State Bar Board of Governors on July 20, 2007, page 3 (introduction).

<sup>6</sup> California State Bar Association, Rules of Professional Conduct, available at [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=14053](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=14053) .

<sup>7</sup> Note that in the old ABA Model Code of Professional Responsibility, Canon 8, contained the exhortation "A Lawyer Should Represent a Client Zealously within the Bounds of the Law." See ABA Model Code of Professional Responsibility (1983), available at [www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM](http://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM). The ABA Model Code has largely been superseded in favor of the ABA Model Rules. See Mark L. Tuft, "New Ethics Rules Affect You," *California Bar Journal* (May 2008) available at [http://calbar.ca.gov/state/calbar/calbar\\_cbj.jsp?BV\\_SessionID=@@@@0543719937.1240009205@@@@&BV\\_EngineID=ccccadegfmjdjiicfnngcfkmdffidfnng.0&sSubCatHtmlTitle=Opinion%20-%20Mark%20L.%20Tuft&sCatHtmlPath=cbj/200805\\_Opinion\\_01\\_Tuft.html&sJournalCategory=YES&sCatHtmlTitle=Opinion&YEAR=2008&MONTH=May&sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/May2008](http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?BV_SessionID=@@@@0543719937.1240009205@@@@&BV_EngineID=ccccadegfmjdjiicfnngcfkmdffidfnng.0&sSubCatHtmlTitle=Opinion%20-%20Mark%20L.%20Tuft&sCatHtmlPath=cbj/200805_Opinion_01_Tuft.html&sJournalCategory=YES&sCatHtmlTitle=Opinion&YEAR=2008&MONTH=May&sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/May2008)

<sup>8</sup> See Description of ABA Rules at [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html)

<sup>9</sup> See [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html) for a list.

<sup>10</sup> See Mark L. Tuft, "New Ethics Rules Affect You," *California Bar Journal* (May 2008).

<sup>11</sup> See The State Bar Of California Standing Committee On Professional Responsibility And Conduct Formal Opinion No. 1983-71(available at [http://calbar.ca.gov/calbar/html\\_unclassified/ca83-71.html](http://calbar.ca.gov/calbar/html_unclassified/ca83-71.html)).

<sup>12</sup> Rule 1.2, ABA Model Rules of Professional Conduct, available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

<sup>13</sup> Rule 2.1, ABA Model Rules of Professional Conduct, available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

<sup>14</sup> Rule 2.1, ABA Model Rules of Professional Conduct, available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

<sup>15</sup> See California Attorney Guidelines of Civility and Professionalism, Adopted by the State Bar Board of Governors on July 20, 2007, pages 10-11 (Section 13, subpart c).

<sup>16</sup> See Guidelines of Civility and Professionalism, Section 13, subpart c.

<sup>17</sup> Janis Reinken, "'Zealous Representation: No-Win Benchmark for Lawyers,'" \_\_\_\_\_ available at [www.tlie.org/newslet/adv0102/art3.htm](http://www.tlie.org/newslet/adv0102/art3.htm).

<sup>18</sup> See Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyers Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 Fordham Urb L J 935, 939 (April 2001) ("Kovach"), available at <http://www.twotracklawyers.com/twotrack/LawyerEthics.pdf>.

<sup>19</sup> See USA Today longitudinal summary at <http://www.usatoday.com/news/polls/tables/live/2006-12-11-ethics.htm>. The 2008 Gallup Survey put attorneys in the bottom category of honesty and trust:

*Least Well-Rated Professions for Honesty and Ethics -- 2008*

■ % Very high/High ■ % Average ■ % Low/Very low



Nov. 7-9, 2008

GALLUP POLL

Available at <http://www.gallup.com/poll/112264/Nurses-Shine-While-Bankers-Slump-Ethics-Ratings.aspx>

<sup>20</sup> G. Edward Gibson, P.E. and Richard J. Gebken II, *Decision Making, Transactional Costs And Dispute Resolution: Is There A Better Way?* at 6 (attributing Richter, I. E. "The Project Neutral: Neutralizing Risk, Maintaining Relationships and Watching the Bottom Line," *Construction Business Review*, (2000) at 52-54), available at [http://adr.navy.mil/adr/DecisionMaking\\_TransactionalCosts.pdf](http://adr.navy.mil/adr/DecisionMaking_TransactionalCosts.pdf).

<sup>21</sup> Deborah R. Hensler, Our Courts Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System, *108 Penn State Law Review* 165-197 (Summer 2003), available as a reprint from the Rand Institute for Civil Justice at <http://www.rand.org/pubs/reprints/RP1090/>.

<sup>22</sup> The U.S. Institute for Environmental Conflict Resolution is a project of the Morris K. Udall Foundation, an educational foundation established by Congress. It provides ADR services to those involved in environmental disputes involving the federal government. See <http://www.ecr.gov/Default.aspx>.

<sup>23</sup> O'Leary, Rosemary and Maja Husar, "What Environmental and Natural Resource Attorneys Really Think About Alternative Dispute Resolution: A National Survey," *Natural Resources and Environment*, 16, no.4 (2002): 262-264.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*