CHAPTER FIVE

ETHICS, ETIQUETTE, EFFECTIVENESS, ETC!

DISTINCTIONS, DIFFERENCES, DISCERNMENTS:

The twin subjects of ethics and professionalism are somewhat intertwined and appear to be closely related. The former seems to have a connotation of and include, right and wrong decisions made, within and as to, ones personal and professional, moral behavior and conduct. The latter may also include ethical and moral behavior and conduct but also stresses the improvement of the art and aims of effectiveness and efficiency and the highest use of skills and techniques that characterize or mark a profession or a professional person. Both subjects are of vital importance in the utilization of ADR options and procedures.

It could be argued that where an attorney receives high marks in professionalism this would also always embrace and include good grades in ethics while the reverse might not always be true. Its conceivable that one could possess the highest of ethical standards as an attorney without exerting the extra efforts to attain the effectiveness, efficiency and proficiency as a true professional. One could pass the bar exam and become an attorney and hold themselves out as a professional, but, without additionally embracing high ethics,

development of skills, possession of integrity, and a conscientious commitment to ones client and contributions made to ones community, may never attain what may be called "true professionalism".

MALUM PROHIBITUM AND MALUM IN SE:

Seeking to draw the fine line of demarcation between the two is almost similar to identifying certain crimes that include "moral turpitude" and crimes that do not. "Moral turpitude has often been defined as 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'...the courts of Tennessee have held that 'the offense of escape does not involve moral turpitude'...the term 'morals' (and other duties that one person owes another) is still included in the test used to determine turpitude: 'Further applying the facts of the instant case, does the sale of cocaine, disregarding its felony punishment, meet the test as being contrary to justice, honesty, modesty, good morals or man's duty to man?"...Legal philosopher John Austin, in The Province of Jurisprudence Determined, divides law into four types...Austin includes in the second category laws that appear to be morally neutral, that is, containing only (1) the naked command of the sovereign and (2) punishment if the duty or command is not fulfilled (e.g., for violating the speed limit or escaping, which would be laws malum prohibitum). These are laws of utilitarian policy not embracing ethics or morals. In the third category, the legislative enactment seems to embrace, as Austin says, etiquette, ethics, values, morals, standards or norms of the community, which seem to be malum in se. In short, the third category appears to consist of cases involving moral turpitude while the second appears to consist of cases

not involving moral turpitude unless they also constitute a felony in Georgia. The judicial determination as to which category a case may fall within seems to be subjective and a case by case process." NORLEY v THE STATE, 170 Ga. App. 249. This case was a whole court case in the court of Appeals of our state in which it was pointed out that some legal philosophers and writers have, although unsuccessfully, tried to separate all law from morals and ethics.

CONFLICT RESOLUTION IS NOT WAR BUT PEACE:

In time of war one may become a professional soldier and at the same time be considered unethical or in error if he fails to take the life of his enemy. The writer was in the U.S. Marine Corps during WW II and was expected to use a bayonet or an automatic weapon upon his adversary when making a beachhead landing on some of the South Pacific Islands. When the war ended we of course were once again expected to be and act as a professional and ethical soldier or person toward the citizens of the same country. In time of war it may be said that professionalism is expected but that ethics toward the enemy are placed on the back burner. A lawyer during the heat of litigation might consider he is at war and that ethics may be placed on the back burner. This is not true. "Litigation though contest, is not war but peace; its rights are pacific, and so are its methods and morality. It accepts the service of art in the sense of skill and in the sense of address, but not in the low sense of artifice, trick, trap, subterfuge and chicanery."

ARBITRATION IS OUTPATIENT SURGERY; MEDIATION, PREVENTIVE MEDICINE:

I equate major litigation in the courthouse with major

surgery in the hospital. Both are necessary at times when lives and rights hang in the balance in serious situations and circumstances. Out patient surgery is still surgery but you get to go home the same day. Arbitration is still litigation but the parties and attorneys get to go home the same day. If the patients and clients are apprised of the alternatives they will usually choose the most convenient, least risky and the less expensive of the several possibilities given. I equate mediation, early neutral evaluation, mini trials, and summary jury trials as preventive medicine. With proper exercise, diet, and rest, and, in consultation with, and following the advise of ones doctor the health may be restored and worked out without surgery. The parties and attorneys working together with the mediator might bring about reconciliation and settlement without litigation of any kind. Lawyers have no less a duty than doctors to inform their client (patient) of all the risks involved as well as alternatives available.

THE LAWYER AS A ROLE MODEL:

(A) ADR ETHICS...The Lawyer

The lawyer is an attorney, an advocate, and a counselor at law. The attorney as an advocate is trained to litigate and ethics is an important part of this process. When the lawyer acts as a counselor there exists a duty to fully inform and counsel clients about all forms of dispute resolution alternatives. Aspirational ethical standards of the "Lawyers Creed" offers to opposing parties and their counsel fairness, integrity, civility and reconciliation. If litigation is necessary the attorney under the creed assures all that the dispute will be litigated in a dignified manner.

The Supreme Court of Georgia has adopted the following ADR Ethical Consideration: "A lawyer as advisor

has a duty to advise the client as to all forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation." A 1988 case in California held that an attorney might be liable for malpractice if they do not pursue settlement negotiations when appropriate, even if the client is initially opposed to settling. Medical Doctors are required to fully inform their patients as to other reasonable alternatives to surgery so that the patient may make an informed consent. Lawyers appear to have the duty of informing their clients as to reasonable alternatives to litigation so that their client may make an intelligent and informed consent.

Ethical considerations at mediation sessions require that attorneys remind their clients that this session is a non-adversarial process to seek out possibilities of both parties settling their case. It is emphasized that all are participating in good faith and that fault and blame must be placed on the back burner in this final effort and endeavor for reconciliation and settlement. If the mediation session involves domestic conflict a full disclosure of assets and liabilities is to be made and neither side will transfer or dispose of property during the process without the consent of the other side. An attorneys accountability and behavior of not engaging in deceit and dishonesty or in making false statements of law and fact is no less important in mediation negotiation sessions as they are when as an advocate in a court of law.

Arbitration hearings are adversarial procedures but require approximately the same high ethical standards applicable to mediation sessions. Where the plaintiff is required to provide a written statement of claim which

includes a summary of the facts and issues within 20 days prior to the hearing date it would be unethical to fail to provide a copy to the adverse party's attorney. The latter must file their response within 10 days and of course if they never receive their copy from the plaintiff they might not send in their statement of position. The arbitrator needs both statements in advance of the hearing if at all possible. Good ethics and professionalism require that attorneys at arbitration provide the adverse party with copies of all documents in advance of the hearing. Each attorney must advise the other side in advance the names of all parties that will testify and surprise affidavits from witnesses not named in advance generally will not be admitted.

THE NEUTRAL LEADS BY EXAMPLE:

(B) ADR ETHICS...The Neutral

Mediators and arbitrators are generally referred to as neutrals and facilitators. This is because they are impartial and objective in seeing that fairness reigns in the sessions and hearings conducted. They do not give legal advice but simply assist the parties if possible in reaching a settlement or to hear evidence and arguments and render a decision. It is the writers opinion that since neutrals do not give legal advice, prepare papers and documents, or take action for either of the parties neither mediators or arbitrators are practicing law. Neutrals must make sure in accepting assignments that any conflicts of interest, bias, relationships to the parties or their counsel or other social or financial reasons be disclosed and considered as to possible disqualification in the case. If in doubt the neutral should immediately disqualify themselves.

The neutral has an ethical obligation to assure all of confidentiality of what is said and done during the proceedings

of the sessions and hearings conducted with the exception of a duty to report knowledge learned of a crime committed or about to be committed or conduct such as child abuse. ADR offers privacy, promptness and inexpensiveness in cases undertaken. Good ethics requires reasonable promptness in Arbitration. The writer in the vast majority of cases provides 24 hour service. In mediation, when and if the time arrives that a definite impasse exists, and, this fact is realized by the mediator, it would be ethically improper to prolong unproductive discussions that would increase the cost to the parties. While the mediator has to be equally fair to both sides if one party is not represented by counsel and appears at a disadvantage the neutral might have to give some help to the weaker party so that a meaningful participation in the negotiations may proceed.

Neutrals should not have ex parte communications with the parties or counsel other than agreement as to time, place and location of the session or hearing and as to statement of what their charges will be. Ethically neutrals should always expect their fees or charges will be split and shared equally by the parties unless there is an agreement to the contrary in advance by the parties. Any prior agreements of this nature should be treated similar to any confidential "high--low" agreements in arbitration, that is, never disclosed to the neutral. Ethical standards for neutrals are in addition to those set forth for lawyers, judges and other professionals. The Society for Professionals in Dispute Resolution (SPIDR) has its own standards of responsibility applicable to all neutrals. The ADR Rules of the Supreme Court of Georgia, Court-Annexed Circuit ADR Rules, The Georgia Arbitration Code, The U.S. Arbitration Act, certain commercial arbitration rules and private ADR providers all have certain

rules and regulations embracing ethical guidelines governing the neutral's participation in ADR. No one rule seems to be more of a high standard of ethics for all than what is known as the Golden Rule. When reconciliation and settlement or resolution of disputes is sought all should treat others as they would like to be treated.

THE PARTIES PUTTING THEIR BEST FOOT FORWARD:

(C) ADR ETHICS...The Parties

Litigation and ADR often are strange proceedings to the parties involved. Most are reluctant to enter voluntarily into any part of our judicial system including serving as a witness or as a member of the grand or petty jury. Most parties will listen carefully to the advice of counsel as a participant in ADR. This is as it should be as the lawyer has an important opportunity as well as a duty to represent their client in ADR procedures. The parties must be told that they have a rare, possibly, once in a lifetime opportunity to be their own juror and have a direct voice in his case during the mediation session to help mold their own verdict and solve their own problem and dispute. It is ethically important that all parties who have the ultimate authority to settle the case be present in the mediation session. To send someone to the mediation session with very limited authority sometimes compounds the problem. Those with ultimate authority on each side should eyeball and listen to carefully to those on the other side in seeking to evaluate the claim. Not allowing the plaintiffs to participate in the mediation session or sending someone on defendants side with less than full authority may result in less than a fruitful session to say nothing of possible violation of highest mediation standards.

PLACING FAULT ON THE BACK BURNER:

Leaving fault, blame and emotions out of mediation sessions is the best ethical approach for parties. This observation should also be noted by counsel. At arbitration hearings, of course fault, blame and liability are appropriate issues. It is ethically improper for parties and their counsel to do a lot of whispering, talking to each other and making a lot of noise while the session or hearing is underway. Parties and their counsel should not interrupt the other party when they are talking, even though they may disagree with what is being said. The parties must be patient and wait their turn to comment on the facts. Of course objections may be made at the arbitration hearing if the other side is introducing into evidence irrelevant matters or seek to make arguments having no bearing on the case. It is ethically improper for parties to seek to contact the neutral prior to or subsequent to the ADR proceeding in an effort to discuss the case in any manner. If the parties or counsel discover they have a subrogation problem applicable to the claim this should be worked out with the third party prior to ADR procedures or at least have the third party join as a participant in the process. It is helpful if defendant insurance company insuring parties would bring their checkbook with them to the mediation session along with proper releases for use, if needed. This indicates they are ready, willing and able to settle and may have a favorable good will psychological effect on the other side.

YOU KNOW IT AND CAN TELL IT WHEN YOU SEE IT:

When discussing ethics, whether applicable to ADR, or otherwise, its always easier to identify the negative than the affirmative. You can usually tell what is unethical when you hear it. For example, you might recall the anecdote where the

lawyer drew the will for one of his clients. He told the lady to read over the will while he was working on another case. He told her he would make any revisions later and if it was worded about like she wanted she could leave his fee of a $100.00 on the desk. Later when he looked on the desk he realized that she had mistakenly left a $1,000.00 instead of the $100.00. Quickly the lawyer said to himself, this really raises a serious ethical question! The question I must decide is... whether I should, and whether I must, reveal this... to my three law partners? When we recognize an ethical question of course we must ask ourselves what is the correct solution in order to properly address the issue at hand. This is true in every day life as well as in litigation or ADR. Most of our ethics are learned and instilled before we become adults. A persons character and ethical behavior and conduct in the law cannot really be separated. Our dealings in ADR and in the law must add up to and remain above reproach.