

ADVOCACY IN NEGOTIATION, MEDIATION, AND ARBITRATION
Texas A&M Law School
August 20, 2016
By John Allen Chalk, Sr.¹

INTRODUCTION

- I. “Advocate” is a noun and a verb.
 - A. As a noun it is a person who “publicly supports or recommends a particular cause or policy” or “who argues for or supports a cause or policy.”
 1. Champion.
 2. Upholder.
 3. Backer.
 4. Promoter.
 5. First used in the 14th century and from an Anglo-French word “advocare” – to call, to summon, to give voice to.
 - B. As a verb it means to recommend or support.
 1. Recommend.
 2. Prescribe.
 3. Urge.
 4. Support.
 5. Back.

- II. Advocacy has ethical implications for the lawyer.
 - A. There is an entire Section III (“Advocate”) in the Texas Disciplinary Rules of Professional Conduct (“TDRPC”).
 - B. “[E]mployment in a legal matter” must not be “beyond the lawyer’s competence.” TDRPC rule 1.01(a).
 1. Act with competence, commitment, and dedication. TDRPC rule 1.01(a), Comment 6.
 2. Neglect and procrastination are not only “widely resented” but often affect adversely the client’s interests by “the passage of time or the change of conditions.” TDRPC rule 1.02(a).
 - a. Limitations of representation must be with client’s consent “after consultation.” Rule 1.02(b).
 - b. No assistance in client’s fraud or crime. Rule 1.02(c).
 - C. Lawyer must keep client “reasonably informed” and provide information to the client upon “reasonable requests” from the client. Rule 1.03(a).
 1. Information that permits “informed decisions” by the client about the representation. *Id.*

¹Equity Member and Executive Committee Member, Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas. With special thanks to Tave Parker Doty, third-year law student at Texas A&M University Law School, Fort Worth, Texas, for research and drafting assistance.

- D. Lawyer required to “exercise independent professional judgment and render candid advice.” TDRPC Rule 2.01.
- E. Lawyer required to advocate when the lawyer “reasonably believes that there is a basis for doing so that is not frivolous.” TDRPC Rule 3.01.
- F. Lawyer cannot make a knowingly false statement of material fact or law to a third person in representation of a client. TDRPC Rule 4.01(a).
- G. Lawyer must “disclose a material fact to a third person where disclosure necessary to avoid the lawyer being a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.” TDRPC Rule 4.01(b).
- H. Advocate’s “task is to present the client’s case with persuasive force” and with “duty of candor to the tribunal.” TDRPC Rule 3.03, Comment 1.
- I. “In all professional functions, a lawyer shall zealously pursue clients’ interests within the bounds of the law.” TDRPC Preamble ¶3.²
 - 1. “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” *Id.* ¶2.

III. There is a line between “zealous advocacy and plain pettifoggery.” *In re Saldana*, 531 B.R. 141, 165 (N.D.Tex. 2015).

- A. “Pettifogger” = “a lawyer whose methods are petty, underhanded, or disrespectful: shyster; one given to quibbling over trifles.”³
- B. Texas Supreme Court, citing to TDRPC Preamble ¶1 states: “An attorney has ethical obligations to both his client and to the judicial system as an officer of the court.” *Nathan v. Texas Children’s Hospital*, 446 S.W.3d 355, 367 (Tex. 2014).
 - 1. “Zealous advocacy” is “a professional obligation.” TDRPC Preamble ¶2.
 - 2. But “client desires” do not “supersede the attorney’s obligation to maintain confidence in our judicial system.” *Id.*
 - 3. Lawyer’s various functions “as a representative of clients” include the following:
 - a. “As **Advisor**” = provide clients “an informed understanding of the client’s legal rights and obligations” and “practical implications.” *Id.*
 - b. “As **Advocate**” = “zealously asserts the client’s position under the rules of the adversary system.” *Id.*
 - c. “As **Negotiator**” = “seeks a result advantageous to the client but consistent with requirements of honest dealing with others.” *Id.*
 - d. “As **Evaluator**” = “examining client’s affairs and reporting about them to the client or to others [subject to limitations].” *Id.*
 - e. “As **Intermediary Between Clients**” = not applicable here and very limited role. *Id.*

IV. The Texas Lawyer’s Creed has two sections (II and III) on “Lawyer to Client” and “Lawyer to Lawyer” that affect advocacy for clients.⁴

²Herring, Chuck. *Texas Legal Malpractice & Lawyer Discipline*, 13th Ed. (2014), Appendix A, page 689.

³*Merriam-Webster’s Collegiate Dictionary*, 11th Ed., page 927.

⁴Herring, pages 785-787.

- V. The Aggie Code of Honor: An Aggie does not lie, cheat or steal or tolerate those who do.⁵

ADVOCACY IN NEGOTIATION

VI. Advocacy in Negotiation Requires the Following of the Advocate.

- A. Recognition of the unique process that is “negotiation.”
1. *Negotiation* – describes win-win situations in which parties attempt to find “a mutually acceptable solution to a complex conflict.”⁶
 - a. Unlike bargaining, which describes competitive, win-lose situations,⁷ although most people believe bargaining and negotiation are the same thing.
 2. *Need to negotiate* – created by our interdependent relationships with one another, which are characterized by “interlocking goals.”⁸ Remember that the parties need each other.
 - a. Conflict results from the interaction of interdependent people who perceive incompatible goals and interference from each other in achieving those goals.⁹
- B. Informed (know the context, the players, the objectives).
1. *Interdependence* of goals and structure of situation shapes negotiation process and outcomes.
 - a. *Zero-sum or distributive* situation – when the goals of two or more people are interconnected so that only one can achieve the goal—such as running a race in which there will be only one winner.¹⁰
 - b. *Mutual-gains or non-zero-sum or integrative* situation – when parties’ goals are linked so that one person’s goal achievement helps others to achieve their goals.¹¹
 - c. Evaluating the benefits of interdependence requires closely examining the “desirability of alternatives to working together,” i.e., each party’s understanding of its “best available alternative” to working together.¹²
 - d. “Mutual adjustment” occurs over time to both parties in the negotiation process and is one of the key changes that occur in a

⁵ Aggie Code of Honor, *Student Rules*, TEXAS A&M UNIVERSITY, <http://student-rules.tamu.edu/aggiecode> (last visited Aug. 15, 2016).

⁶ EON 3.

⁷ EON 3.

⁸ Interdependence is the relationship between people and groups that most often leads them to need to negotiate. Folberg et al., *Resolving Disputes Theory, Practice, and Law* 25 (2nd Ed. 2010) (“Folberg”).

⁹ EON 18.

¹⁰ EON 10.

¹¹ EON 10.

¹² Fisher, Ury, and Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (BATNA = best alternative to a negotiated agreement).

negotiation.¹³

2. *Relationships in Negotiation* – there are key differences among negotiators; can use these to create value.¹⁴

- a. Difference in interests: negotiators seldom value all items in a negotiation equally.
- b. Differences in judgments about the future: people differ in evaluation of an item's future worth.
- c. Differences in risk tolerance: people differ in amount of risk they are comfortable assuming.
- d. Differences in time preference: one negotiator may want to realize gains now, while the other may be happy deferring gains into the future.

C. Aware (each party's objectives and reasons therefor).

1. *Awareness* – Be aware of the other party's bargaining strategy and negotiation style.¹⁵

- a. Distributive bargaining: aka competitive or zero-sum; goal: claiming of value.
- b. Integrative bargaining: collaboration or integrative negotiation; goal: creation of value.
- c. Most negotiations are a combination of these two types.
- d. Signs you are dealing with aspects of one strategy or the other.
 - i. Distributive: limited time/resources; other party is likely to be competitive; no likelihood of future interaction with the other party.
 - ii. Integrative: most other situations.

2. *Negotiating* – the point at which there is a movement from the difference that brought the parties to the table toward the agreement that will resolve the dispute or create a deal. Both parties will likely have to make concessions to the other.

- a. Concessions – A “concession” occurs when one party makes a change in his or her position in negotiation.
 - i. Restrict the range of options for the party making that concession.
 - ii. Restrict or constrain the bargaining range between each party's preferred acceptable settlement.

¹³ EON 12.

¹⁴ EON 17.

¹⁵ The five categories of negotiating styles are: (1) Avoiding – low assertiveness, low cooperation, (2) Competitive/Adversarial – high assertiveness, low cooperation, (3) Accommodating – low assertiveness, low cooperation, (4) Compromising – moderate assertiveness, moderate cooperation, (5) Collaborative/Non-Adversarial – high assertiveness, high cooperation. Folberg 87.

- iii. Skilled negotiators develop plans for managing the process of making concessions. Conceding without a plan can doom you to failure in negotiation.
 - iv. Whether to concede, when to concede, what to concede, and how to concede are among a number of considerations to keep in mind when dealing with concessions.
 - v. No concessions should be made unless they are demanded by the other side.
 - vi. Concessions should be made in the context of trades or exchanges rather than give simply to see if the other side's point of satisfaction might be found.
3. *Ethics* – broadly applied social standards for what is right or wrong in a particular situation, or a process for setting those standards.¹⁶
- a. Different from *morals*, which are individual and personal beliefs about what is right and wrong.
 - b. Advocates must be aware of the innate desire to win within themselves, their opponents, and their clients.¹⁷
 - c. Several negotiation tactics that bring up ethical issues.¹⁸
 - i. Traditional competitive bargaining – not disclosing your walkaway; making an inflated opening offer.
 - ii. Emotional manipulation – faking anger, fear, disappointment; faking elation, satisfaction.
 - a) Ex: A negotiator deceives the other party about what she wants on the common-value issue and then grudgingly agrees to accept the other party's preference, which in reality matches what the negotiator wanted.
 - iii. Misrepresentation – distorting information or negotiation events in describing them to others.
 - iv. Misrepresentation to opponent's networks – Corrupting your opponent's reputation with his or her peers.
 - v. Inappropriate information gathering – bribery, infiltration, spying, etc.
 - vi. Bluffing – insincere threats or promises.

D. Focused (what your client wants from the process).

¹⁶ EON 172.

¹⁷ There is in every one of us, even those who seem to be most moderate, a type of desire that is terrible, wild, and lawless. PLATO, THE REPUBLIC (George Stade ed., Benjamin Jowett trans., Barnes & Noble Classics 2004) (n.d.).

¹⁸ EON 180; Table 8.2.

1. *Before beginning negotiations* – establish your realistic starting, target, and resistance points, and BATNA¹⁹ (with your client and do not disclose these to the other side).
 - a. Starting point: initial price.
 - b. Target point: point at which the negotiator would like to conclude the negotiation.
 - c. Resistance point: the bottom line—the point beyond which a person will not go and would rather break off negotiations.
 - d. BATNA: Best Alternative to Negotiated Agreement; consider the alternatives to reaching an agreement with the particular negotiating partner; select the most promising; improve it to the extent possible.

- E. *Prescient* (map your pre-vision of each development or step in the process).²⁰
 1. *Define your objectives (goals)* – should be your highest legitimate expectation of what you should achieve; should be specific, difficult but achievable, and verifiable; must consider substantive, intangible, and procedural goals.
 2. *Relationship building* – getting to know the other party, understanding how you and the other are similar and different, and building commitment toward achieving a mutually beneficial set of outcomes.

- F. *Follow through* (achieve closure and ensure agreement is memorialized in writing).
 1. *Closure* – build commitment to the agreement achieved. Both the negotiator and the other party have to assure themselves that they reached a deal they can be happy with, or at least accept.
 - a. Ensure your client understands the agreed upon terms of the negotiated agreement.
 2. *Implementing the agreement* – determining who needs to do what once the agreement is reached.
 - a. Ensure the agreement is in writing.
 - b. Better solution: draft the final agreement because it is unlikely that the other negotiator would employ identical language to memorialize the specific terms agreed upon.
 - i. Each party would probably use slightly different terminology to represent his or her own perception of the matter.
 - c. Review the specific terms agreed upon within the agreement before ending the negotiation.

¹⁹ Best Alternative to Negotiated Agreement

²⁰Foreknowledge of events, human anticipation of the course of events: Foresight.” *Merriam-Webster’s Collegiate Dictionary*, 11th ed., page 981.

- i. Compare each provision with notes and recollection of the negotiation to be positive that your understanding of the negotiation is accurately represented.
 - ii. Make certain that nothing agreed upon has been omitted and nothing not agreed upon has been included.
- 3. *Remember: The power of an elegant solution* – the power of a negotiator often comes from working out an ingenious solution that reasonably reconciles the legitimate interests of both sides.

THERE ARE SITUATIONS WHEN PARTIES SHOULD NOT NEGOTIATE.²¹

- When you could lose everything.
- When you are “sold out” or running at capacity.
- When other party’s demands are illegal, unethical, or morally inappropriate.
- When you don’t care (i.e. no stake in the outcome).
- When you don’t have time.²²
- When other party acts in bad faith.²³
- When delay or waiting would improve your position.
- When you are not prepared to negotiate.

ELEVEN “BEST PRACTICES” FOR ALL NEGOTIATORS.²⁴

- *Be prepared.*
- *Diagnose the fundamental structure of the negotiation.*
- *Identify and work the BATNA.*
- *Be willing to walk away.*
- *Master the key paradoxes of negotiation.*
- *Remember the intangibles.*
- *Actively manage coalitions.*
- *Savor and protect your reputation.*
- *Remember that rationality and fairness are relative.*
- *Continue to learn from your experience.*
- *Follow up in Writing.*

NEGOTIATION MISTAKES²⁵

- Never Negotiate Against Yourself.
- Don’t Fall for the “Hurry up and Sign!”
- Don’t Negotiate with Someone Who Doesn’t Make the Decisions.

²¹ Roy J. Lewicki et al., *Essentials of Negotiation* (5th Ed. 2011) (“EON”).

²² If the time pressure works against you, you will make mistakes, you will give in too quickly, and you may fail to consider the implications of your concessions.

²³ If you cannot trust their negotiation, you cannot trust their agreement.

²⁴ EON Chapter 12.

²⁵ *Basic Negotiating Tips Anyone Can Use*, <http://mariabrophy.com/written-agreements/basic-negotiating-tips-anyone-can-use.html> (last visited Mar. 25 2014).

- Don't Agree to Something That Feels Wrong.
- Don't Regret your Decision Later.
- Don't fall for the "But it's a great Promotion for you" Line.

ADVOCACY IN MEDIATION

VII. **Advocacy in Mediation** Requires the Following of the Advocate.

- A. Recognition of the unique process that is "mediation."
- B. Prepared (interests vis-à-vis positions; costs versus benefits; risks assessed).
- C. Respectful (no demonization of parties or disrespect for mediator).
- D. Evaluative (honest assessment of all claims and defenses).
- E. Patient (allow the "process" to work and produce its results).
- F. Persistent (know your case and the adverse party's case better).
- G. Nimble (sensitive to new information and responsive to new opportunities).
- H. Conscious of the client's BATNA.²⁶
 - 1. Three (3) steps to a BATNA.
 - a. Invent a list of actions the client might conceivably take if no agreement is reached.
 - b. Improve some of these actions and convert them to practical alternatives.
 - c. Select, tentatively, the one alternative that seems best for the client.²⁷
 - 2. The BATNA is not a "bottom line."
 - a. A "bottom line" involves high costs.
 - b. Limits benefits learned during mediation.
 - c. "Bottom line" is a position that is not to be changed.
 - d. It also inhibits imagination.
 - e. It is likely to be set too high and be too rigid.²⁸
- I. Study the differences between Daniel Kahneman's Systems 1 and 2.²⁹
 - 1. System 1 is fast and works with WYSIATI ("what you see is all there is") and means that "only the evidence at hand counts."³⁰
 - 2. Be aware of the "cognitive biases" such as "the illusion of validity,"³¹ "confidence by coherence,"³² "the optimistic bias,"³³ and "anchoring effects."³⁴³⁵

²⁶Fisher, Roger; Ury, William; and Patton, Bruce. *Getting to Yes*. 2nd ed. (1991), Chapter 6.

²⁷*Id.* at page 103.

²⁸*Id.* at page 99.

²⁹Daniel Kahneman, *Thinking, Fast and Slow* (2011).

³⁰*Id.* at page 209.

³¹*Id.* at page 211.

³²*Id.* at page 212 ("Confidence is a feeling, which reflects the coherence of the information and the cognitive ease of processing it.").

³³*Id.* at page 255 ("[A] pervasive optimistic bias" that is "the most significant of the cognitive biases.").

³⁴*Id.* at page 126 ("The psychological mechanisms that produce anchoring make us far more suggestible than most of us would want to be."); *see also* Chapter 11 ("Anchors"), pages 119-128.

³⁵ Appearance tyrannizes over truth. PLATO, *THE REPUBLIC* (George Stade ed., Benjamin Jowett trans., Barnes & Noble Classics 2004) (n.d.).

ADVOCACY IN ARBITRATION

VIII. Advocacy in Arbitration Requires the Following of the Advocate.

- A. Recognition of the unique process that is “arbitration.”
- B. Information (know the facts, claims, defenses, damages, and the applicable law).
- C. Clarity (all essential elements of all claims and defenses and the damages).
- D. Logic (connect the facts to the elements of all claims and defenses and damages).
- E. Definition (eliminate obfuscation and confusion with bright-line presentations).
- F. Organization (all necessary elements are identified and connected).
- G. Conclusions (all questions are answered and the answers are located and presented).
- H. Persuasion (the equities that arise from the facts and the law).