

## What is Non-Adversarial Advocacy?

**By:** Deanne Sowter

There is no provision in the Federation of Law Societies [Model Code](#) that specifically regulates non-adversarial advocacy. The Code has an Advocacy section (R 5.1) and it distinguishes advocacy in an adversarial process, but it does not have a corresponding section for advocacy in a non-adversarial process. There is no universal definition of non-adversarial advocacy. In 2016, I conducted empirical research on advocacy in the family law context, and drawing from that I argued that the Code needs to be updated to include non-adversarial advocacy. (See [here](#).) In that [study](#), I talked to collaborative lawyers and family lawyers who have a settlement-oriented practice. Those processes inform the type of advocacy expected and required. However, not all dispute resolution processes can be neatly packed into one category or the other, nor do all disputes involve sides that subscribe to the same approach to advocacy. In this post, I question whether it is the process that distinguishes adversarialness.

### Adversarial Advocacy

The Model Code distinguishes an adversarial proceeding. The Code provides that a lawyer working in an adversarial proceeding must “raise fearlessly every issue, advance every argument, and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to obtain for the client the benefit of every remedy and defence authorized by law.” (R 5.1-1[1]) It is obvious that this guidance is directed towards litigation. The Code shapes what a lawyer can and cannot do relative to her obligation to the tribunal (which includes an arbitrator or mediator) hearing the matter and her duty to the administration of justice. For example, a lawyer must not “deceive a tribunal”, offer “false evidence”, misrepresent evidence, or refrain from providing a relevant adverse authority. (R 5.1-2) An advocate must fiercely and single-mindedly argue her client’s case. (R 5.1-1[3])

Even though lawyers have always negotiated and do so on a daily basis, the Code does not specifically reflect advocacy in a process where there is no third party decision-maker. (In contrast, the ABA (American Bar Association) has issued guidelines for settlement negotiations. See [here](#).) Pursuant to the Model Code, a lawyer is required to encourage settlement and be skilled in negotiation and alternative dispute resolution processes. (R 3.1-1(c)(v), R 3.1-1(c)(vi) and R 3.2-4) So she is required to encourage and represent her client in interest-based processes, but no rules specifically apply to them. Mediation is treated the same way as litigation throughout the Code, and some rules are applicable to any process. For example, a lawyer needs to avoid sharp practice. (R 7.2-2)

The limit on how adversarial a lawyer can be in any dispute resolution process is imposed by the law. The role of an advocate is to pursue her client’s objective within the bounds of legality. A

lawyer facilitates her client's ability to make decisions about how to live relative to what the law allows. A lawyer's authority is drawn from the law, and her role is to provide access to the law. She cannot try to work around the law to get away with as much as possible for her client. Instead, a lawyer should pursue what the law provides, not what it can be made to give. (Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010) at 49-59; Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Burlington, ON: Ashgate, 2009) at 4-5 and 74-80.)

## **The Dispute Resolution Process**

With the rise of alternative dispute resolution (ADR), there was a corresponding call for a need to change the way lawyers advocate in those processes. This led to new terms being used: “[peacemaker](#)”, “[problem solver](#)”, or “[conflict resolution advocate](#)”. These terms seem to imply a less adversarial role, one limited by something other than the law. For example, Carrie Menkel-Meadow emphasizes that the goal in an ADR process is to obtain a “joint gain or betterment of the condition of all parties” instead of a single “winner or loser”. She argues that this goal creates a different role for lawyers, that of “[dispute resolvers and resolution facilitators](#)”. Her argument is rooted in a postmodernist rejection of the capacity for the adversarial system to determine truth and justice. This type of advocacy is less adversarial, but not because the law, or ideas of what morality or justice requires, imposes limits.

Julie Macfarlane posits that the lawyer's role is to be a problem solver. She supports resolute advocacy, but argues that a “conflict resolution advocate” also has to work with the other side to reach a consensual resolution. Advocacy is about fighting for the “best possible client outcome” but also evaluating “what outcomes are most durable, realistic, and cost-effective” and weighing the client's needs and interests that lie behind the client's position. Macfarlane emphasizes that a lawyer should try to find a joint resolution before resorting to rights-based options. For her, there are two types of advocacy and the difference between them stems from the process the lawyer is working in. (Julie Macfarlane, *The New Lawyer: How Clients are Transforming the Practice of Law* (Vancouver, BC: UBC Press, 2017) at 115-117.)

Mediation is captured by the Model Code, but the Code does not distinguish between types of mediation. The Code treats mediation the same way as it does litigation. Three of the most popular types of mediation are facilitative, evaluative, and transformative mediation. Both facilitative mediation and transformative mediation are aimed at resolving the underlying conflict between the parties. For example, they may involve negotiating for parties to apologize, forgive, or hear one another for the first time – things the law does not provide. The mediator is neutral and she will try to help the parties solve a problem (including a legal problem) by helping them find a resolution that meets their interests. A lawyer representing a client in a facilitative or transformative mediation is not emphasizing rights in an adversarial way, not the way she would be during litigation.

In contrast, evaluative mediation can be very adversarial. It involves the negotiation of a settlement in accordance with the parties' rights. There can be a winner and a loser. It often involves a judge or senior member of the profession informing the parties of what a likely outcome will be in court, and guiding the parties towards that opinion. Evaluative mediation does

not address the underlying conflict. In some ways, evaluative mediation is controversial because there is little client autonomy (which is a priority in transformative and facilitative mediation), and the mediator is not neutral – she imposes her views on the parties. So the Code seems to capture evaluative mediation, even though a mediator does not decide the outcome in a binding way, but it overlooks facilitative and transformative mediation.

In the absence of regulation, private non-adversarial processes design their own voluntary professional codes and standards (e.g.: [mediation](#), [collaborative practice](#)). It is obvious that a tremendous amount of work goes into ensuring these standards are thorough and geared towards creating a professional process. But they are voluntary, and violation of those standards has ramifications that are not enforceable by law societies or courts. Moreover, collaborative professionals and some mediators require that the parties sign an agreement prior to the process commencing which sets out the terms of the negotiation. In this way, the contract itself imposes the limits on how adversarial a lawyer can be within that process. In the absence of regulation, these lawyers, mediators, and their clients make their own rules.

### **What is the problem with one type of advocacy?**

Since the Model Code treats all advocacy the same way, and the Code does not specifically deal with issues that are only relevant when the objective is to resolve a conflict or reach a consensual resolution, it implies that objectionable behaviour that is not captured is fair game. A lawyer can mislead opposing counsel ([except in Alberta, see R 7.2-2](#)) or be manipulative, she can leverage emotional interests, and use tactics designed to misrepresent the importance of interests if it is in her client's best interests to do so. It is possible to be adversarial in a non-adversarial process. Every lawyer has a story of a negotiation with a “bully” who refused to concede anything and “won” – perhaps because they simply exhausted the weaker party. There are weaker parties for a variety of reasons (including family violence) and a lack of regulation exposes those who are vulnerable.

Negotiation theory demonstrates that in a process designed to resolve a problem, so-called “zeal” usually won't get an advocate very far because the other side needs to agree. In an interest-based process it is commonly understood that both parties need to consider the other side's interests in order to find a resolution that satisfies them both. To be clear, a client's interests are the reasons why a client wants what he does. As Fisher and Ury famously said, “interests define the problem”. (Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (London, UK: Penguin Books, 2011) at 42.) Generally speaking, if someone is going to consent to something, his interests need to be met to do so. Parties are also more likely to comply with terms that are in their interests. So, sometimes “good” advocacy is less adversarial in a process designed to meet a consensual resolution, and the process itself will impose those limits.

The level of effective adversarialness is going to be influenced by many things – the lawyer on the other side (if there is one), the client's interests, the other party's interests, the process, the lawyer's skills, and the law. Given that disputes resolved through a non-adversarial process

typically lead to an agreement on consent, the law of contract plays a significant part in ensuring agreements are not fraudulent, contrary to the law, or entered into under duress, undue influence, or are unconscionable.

In my view, we only know two things: (1) non-adversarial advocacy is a thing – there is no universal definition as to what it is; (2) non-adversarial advocacy is unregulated, or put another way, all advocacy is regulated the same way. Maybe we are comfortable with the status quo, despite the gaps. But if non-adversarial advocacy is not distinguished in the Model Code it signals that non-adversarial advocacy is not proper. The exclusion suggests that a lawyer is doing something wrong when her understanding of her role is not reflected in the law governing her behaviour. Moreover, without a universal definition of non-adversarial advocacy, it is challenging for us to make collective decisions about whether the law governing lawyers' behaviour needs to be more responsive to lawyers working in non-adversarial dispute resolution processes.

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