

**Professional Rules and ADR: Control of Alternative Dispute Resolution  
Under the ABA Ethics 2000 Commission Proposal and  
Under Other Professional Responsibility Standards**

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**Introduction**

In the early 1900s, Boston, Massachusetts witnessed a nasty lawsuit between two brothers.<sup>1</sup> The papers filed in the case accused the older brother—trustee of the family estate—of a breach of trust. In many respects, the suit was typical: the accusations were harsh, the defendant took them personally, and the litigation increased the animosity between the parties.

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<sup>1</sup> For the facts of the Warren case described in the following paragraphs see John T. Noonan Jr., Distinguished Alumni Lecture—Other People's Morals: The Lawyer's Conscience, 48 **Tenn. L. Rev.** 227, 234-36 (1981) (citing *Warren v. Warren*, No. 14630, Mass., filed Dec. 13, 1909); **Thomas L. Shaffer & Robert F. Cochran Jr., Lawyers, Clients, and Moral Responsibility** (1994). The case involved a will drafted by Louis D. Brandeis while he was practicing law. John P. Frank, The Legal Ethics of Louis D. Brandeis, 17 **Stan. L. Rev.** 683, 694-98 (1965) (discussing the charge, facts, and ethical problems in the case).

There were a few unusual aspects of the suit. One was the prominence of the participants. The trustee-brother was Samuel Warren, former law partner of Louis Brandeis and co-author with Brandeis of the Harvard Law Review privacy article, possibly the most famous and influential law review article ever published.<sup>2</sup> The plaintiff-brother was Ned Warren, early gay activist and one of the founders of the Boston Museum of Art.<sup>3</sup> A second unusual aspect of the case was its tragic consequence. After being subjected to two days of harsh cross-examination, Sam Warren died; apparently he committed suicide. A third unusual aspect of the case is the note Ned wrote to Sam and delivered on the day that the suit was filed. This note reveals not only something about the relationship between Ned and Sam but also about the relationship between Ned and his lawyers. It reads, in part,

The phrases [in the complaint] are such as in a legal document I have felt obliged to sign, but are very far from representing my feelings toward you. . . . Let us try to agree; it would be much pleasanter.

Your affectionate brother, E.P. Warren.<sup>4</sup>

It is not surprising that the allegations of a breach of trust in the complaint had more influence on Sam than the brotherly note. The suit proceeded toward its tragic consequence.

The note suggests that Ned's lawyers had two characteristics that are common among lawyers: they were aggressive and paternalistic. These lawyers filed suit and made vicious

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<sup>2</sup> Samuel Warren & Louis D. Brandeis, The Right to Privacy, 4 **Harv. L. Rev.** 193 (1890).

<sup>3</sup> See generally **David Sox, Bachelors of Art: Edward Perry Warren and the Lewes House Brotherhood** (1991).

<sup>4</sup> Noonan, supra note 1, at 234-36.

allegations against Sam, in spite of the better instincts of their client. Ned likely agreed to the filing of the suit, but as he wrote in his note, the allegations “are very far from representing my feelings toward you.”<sup>5</sup>

Today, some lawyers would recognize this case as a good candidate for mediation— parties who have had, and are likely to continue to have, a long-term family and business relationship; parties who are likely to want to preserve family privacy; parties who are likely to have other family members who will want to preserve family peace and privacy; and, if Ned’s letter is to be believed, a plaintiff who as an “affectionate brother” believes it would be “much pleasanter” to “agree.”<sup>6</sup> Today, the right lawyers might have presented Ned with the option of pursuing mediation and this case might have been resolved peacefully. I wish that I could say that Ned’s lawyers’ methods were the methods of an earlier era, but, unfortunately, their type of practice is very much alive and well today. One of the most often heard complaints about lawyers is that they exacerbate conflict between people. Many lawyers today would follow in the footsteps of Ned’s lawyers.

I have suggested elsewhere that lawyers should present the option of pursuing alternative means of dispute resolution (“ADR”) to clients as a matter of good practice,<sup>7</sup> and that lawyers might be subject to malpractice liability if they fail to do so.<sup>8</sup> My argument here is that the rules

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<sup>5</sup> Noonan, supra note 1, at 234-36.

<sup>6</sup> Noonan, supra note 1, at 234-36.

<sup>7</sup> **Robert F. Cochran Jr. et al., The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling 189-202 (1999).**

<sup>8</sup> Robert F. Cochran Jr., Legal Representation and the Next Steps Toward Client Control:

of the legal profession should require lawyers to present such options to clients. Section I will consider the arguments for giving control of this decision to clients. Section II will offer analysis of current professional rules that address this issue. Section III will focus on the recent proposals

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Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue

Alternatives to Litigation, 48 **Wash. & Lee L. Rev.** 819 (1990). I argue that a right of client control of ADR should be adopted based on the medical informed consent analogy. Courts developed the right of medical patients to choose alternatives to surgery as a medical malpractice rule. Though there are strong parallels between the right of patients to choose alternatives to surgery and the proposed right of clients to choose ADR options, it is unlikely that an ADR rule will develop as a matter of malpractice law. It is likely that courts and juries would recognize the right of a client to choose ADR options (in light of the arguments made below), but it is unlikely that a client, in a particular case, would be able to establish that the lawyer's failure was a cause-in-fact of the client's loss. In the medical informed consent action, the patient must establish that had the doctor informed her of an alternative, she would have chosen the alternative and that the alternative would likely have yielded a better result. This presents difficulties in some informed consent cases, but patients often are able to meet this burden. In a comparable action for the failure of the lawyer to present ADR options to a client, the client would have to show not only that he would have chosen the alternative means of dispute resolution, but that the other side would have agreed to it, and that it would have yielded a more favorable result. For further discussion of the possibility of establishing cause-in-fact in a claim against attorney for failure to present the ADR option, see *id.* at 871-76. The difficulties that the client would have in meeting such a burden make it unlikely that the right to choose ADR options will develop as a matter of legal malpractice.

of the American Bar Association's ("ABA") Ethics 2000 Commission. Finally, in Section IV, I will propose two alternate rules that would give clients greater control over ADR choices: the client control model and the informed consent model.

## **I. Justifications for Client Control of ADR**

### **A. Preserving Client Dignity, Especially of Poorer or Inexperienced Clients**

Maintaining a significant level of control over one's life is an important aspect of human dignity. One of the primary roles of the lawyer is to increase the client's control of her own life when that control is threatened by individuals, the state, or other institutions. Nevertheless, one of the dangers of lawyering is that the lawyer will merely become another person who tells the client what to do. In this way, lawyers can be a threat to, instead of protectors of, client dignity.

The market does a pretty good job of protecting the dignity of the wealthy, educated client who has experience dealing with lawyers. If a lawyer is too controlling, the wealthy, educated client has the means and knowledge to seek representation elsewhere. Such clients do not need the professional responsibility rules to protect their right to autonomy within the lawyer-client relationship. They are likely to know about alternative means of dispute resolution, and, if they are interested, can demand that lawyers pursue them. One of the biggest areas of growth of ADR in recent years has been among corporations that have demanded that their lawyers seek alternatives to litigation.<sup>9</sup> It is the poorer, less-informed clients who need the rules of professional conduct to protect their rights to self-determination. As the following section explains, the determination of whether to pursue ADR is likely to have a significant impact on the client's life.

### **B. The Importance to the Client of the Means of Dispute Resolution**

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The choice of the means of dispute resolution is likely to have a significant impact on the client's time and money, the client's relationship with the opposing party, the ultimate result of the representation, and the client's privacy and personal satisfaction.

Mediation and arbitration can save the client both time and money.<sup>10</sup> Parties generally can arrange to have a dispute mediated or arbitrated at a much earlier date than they can have it litigated.<sup>11</sup> In addition, once mediation and arbitration begin, they may require a shorter amount of attorney and client time than litigation or attorney negotiation.<sup>12</sup> A savings in attorney time

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<sup>10</sup> E.g., Jessica Pearson, An Evaluation of Alternatives to Court Adjudication, 7 **Just. Sys. J.** 420, 435-37 (1982); **Karl D. Schultz, Fla. Dispute Resolution Ctr., Florida's Alternative Dispute Resolution Demonstration Project: An Empirical Assessment** viii (1990), cited in Robert B. Moberly, Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment, 21 **Fla. St. U. L. Rev.** 702, 703 (1994).

<sup>11</sup> Though the parties can arrange for mediation at an early date, if the parties fail to resolve a dispute through mediation, and then have to get a trial date, the mediation may delay the resolution of the dispute. The parties can avoid this problem if they set a trial date and mediate the dispute pending the trial. Parties can be certain that a dispute will be resolved at an early date if a case is arbitrated. **Leonard L. Riskin & James E. Westbrook, Dispute Resolution and Lawyers** 146-47 (1988). As with mediation, the parties can arrange to have a case arbitrated within a short period of time and, unlike mediation, the parties can be sure that arbitration will result in a resolution of the dispute. The client does not have the right to reject the decision of the arbitrator, but the client can be confident that the arbitrator will reach a decision.

<sup>12</sup> One study found that companies using mediation in business disputes most often achieved

generally means a savings in attorney fees. In cases in which mediation is successful and attorney negotiation would not have been successful, the savings in time and money can be substantial.<sup>13</sup> Of course, if mediation or non-binding arbitration fails to resolve a dispute, ADR is likely to increase the costs to the client—the client must pay for the costs of litigation as well as the costs of ADR. Whether a particular case is likely to be resolved through ADR generally will turn on its facts. Thus, the lawyer should explain this risk, as well as the potential benefits, of ADR to the client.

Another potential benefit of ADR is that the parties are likely to have a better relationship after ADR than after a trial.<sup>14</sup> This may be especially important in cases in which the parties

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settlement an average of ten months earlier than those companies who used mediation least often. Nancy H. Rogers & Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 **Ohio St. J. on Disp. Resol.** 831, 843 (1998).

<sup>13</sup> Studies have indicated that mediation is more successful at resolving disputes than attorney negotiation. E.g., Jessica Pearson & Nancy Thoennes, Divorce Mediation: Strengths and Weaknesses Over Time, in **Alternative Means of Family Dispute Resolution** 51, 57-58 (Howard Davidson et al. eds., 1982).

<sup>14</sup> **Riskin & Westbrook**, supra note 11, at 24. A study comparing child custody agreements reached through mediation with other child custody arrangements found that a substantially higher number of the parties who had mediated agreements were in compliance with the terms of those agreements. Pearson & Thoennes, supra note 13, at 59.

may have a future relationship, such as some family cases and some commercial cases.<sup>15</sup> The Warren case was both a family and a commercial dispute. Ned and Sam might have preferred a peaceful resolution of the dispute, both for the sake of family peace and for the sake of the smooth and efficient operation of the family business. Whereas litigation and attorney negotiation are likely to inhibit communication between the parties, mediators try to open lines of communication so that the parties can better understand one another.<sup>16</sup> The ultimate goal of many mediators is the reconciliation of the parties.<sup>17</sup> Indeed, parties are more likely to comply with and less likely to litigate over agreements that they reach through mediation.<sup>18</sup>

In many cases, mediation is likely to yield a better result for both parties than litigation or attorney negotiation. In mediation, the parties may develop a creative resolution of a dispute that benefits both parties and is different from any remedy a court could provide.<sup>19</sup> Attorneys, of course, may reach a creative resolution of a dispute in negotiation, but the parties are often more familiar with the subject matter of the dispute than are their attorneys and, thus, may be more

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<sup>15</sup> Jethro K. Lieberman & James F. Henry, Lessons From the Alternative Dispute Resolution Movement, 53 **U. Chi. L. Rev.** 424, 427 (1986).

<sup>16</sup> Id.

<sup>17</sup> See generally Andrew W. McThenia & Thomas L. Shaffer, For Reconciliation, 94 **Yale L.J.** 1660 (1985).

<sup>18</sup> **John S. Murray et al., Processes of Dispute Resolution: The Role of Lawyers** 248 (1989).

<sup>19</sup> Lieberman & Henry, supra note 15, at 429.

likely to develop a creative resolution.<sup>20</sup>

An additional advantage that accrues to the parties of alternative methods of dispute resolution is privacy. Mediation sessions and arbitration hearings generally are not open to the public.<sup>21</sup> Privacy can be especially important to parties to a family dispute, as in the Warren case.<sup>22</sup>

A final important justification for requiring lawyers to present ADR options to clients is that clients generally are more satisfied with ADR than with litigation and attorney negotiation.<sup>23</sup> Although the value of this satisfaction may be difficult to measure, it seems that ADR increases

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<sup>20</sup> In mediation, the parties are directly involved in the negotiation process and can minimize the effect that the lawyer's self-interest might have on the results. Id. at 430.

<sup>21</sup> Supra text accompanying notes 1-5.

<sup>22</sup> **Riskin & Westbrook**, supra note 11, at 148.

<sup>23</sup> E.g., Craig A. McEwen & Richard J. Maiman, Small Claims Mediation in Maine: An Empirical Assessment, 33 **Me. L. Rev.** 237, 256-57 (1981); Pearson, supra note 10, at 432; **Murray et al.**, supra note 18, at 248; Gary Phelan, Dispute Resolution the Mediation Way, **Conn. L. Trib.**, Aug. 18, 1997 (stating that a survey of general counsel, deputy counsel, and chief litigators from 528 of the largest 1000 corporations in the United States indicated that eighty-one percent felt mediation provides a “more satisfactory process” than litigation and sixty-six percent felt mediation provides “more satisfactory settlements”); Roselle L. Wissler, The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts, 33 **Willamette L. Rev.** 565, nn.15-16 (1997).

client feelings of self-worth as clients take more control of their lives. ADR empowers clients.

I am not suggesting that in every case all of these factors will point toward pursuing ADR; rather, I suggest that enough of these factors are likely to point toward pursuing ADR that the lawyer should inform the client of the ADR options and allow the client to decide whether to pursue them. There are risks and potential benefits to both litigation and ADR and the choice between them should be made by the client. The client is likely to bear most of the risks of the choice, and the client is likely to be the best judge of her own interests.

### **C. The Lawyer's Conflict of Interest**

The decision whether to pursue ADR should be made by clients, rather than attorneys, not only because of the risks and potential benefits to clients, but because lawyers are likely to have a conflict of interest as to this issue. If ADR requires less attorney time than traditional means of dispute resolution, lawyers who are paid on an hourly basis will lose money. If the parties choose to mediate without the presence of attorneys, the loss is likely to be especially great.

Attorneys who do not have experience with mediation and arbitration will have an additional conflict of interest as to whether to pursue these processes.<sup>24</sup> If a client chooses to pursue mediation or arbitration and the lawyer does not have experience with them, the lawyer may have to refer the case to another attorney. One study found that the strongest predictor for whether a lawyer will refer clients to mediation is whether the lawyer has experience in mediation.<sup>25</sup> The availability of ADR to a client should not turn on whether the lawyer has had

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<sup>24</sup> Leonard Riskin, Mediation and Lawyers, 43 **Ohio St. L.J.** 29, 49-50 (1982).

<sup>25</sup> Richard J. Klimoski et al., Non-Binding Dispute Resolution for Business Disputes? Corporate

experience with it.

## **II. Control of ADR Under Existing Professional Responsibility Standards**

Professional groups have proposed, and jurisdictions have adopted, a wide variety of standards that are likely to have an impact on who makes the decision whether to pursue ADR. Jurisdictions have at least four potential means of involving clients in the question whether to pursue ADR: client consultation, client notice, client control, and informed consent models. In this section, I consider those models that are currently in effect.

### **A. Consultation Models—Current ABA MR 1.2 and Virginia’s Rule 1.2**

The ABA Model Rules govern lawyers in the vast majority of states.<sup>26</sup> The Model Rules (“MRs” or “Rules”) were adopted in 1984, before use of ADR was common, yet the Rules give some guidance that can be helpful in determining who should control ADR decisions. MR 1.2(a) allocates lawyer and client decision-making responsibility. In part, it states that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.”<sup>27</sup> The decision whether to pursue ADR seems to be a means decision, and because alternative *means* of dispute resolution may be used to seek the client’s objectives, it is likely that the Model Rules require lawyers to consult with clients about them.

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Counsel Are of Two Minds (1998) (unpublished manuscript, on file with authors), cited in Rogers & McEwen, supra note 12, at 845.

<sup>26</sup> **Am. Bar Ass’n & Bureau of Nat’l Affairs, Lawyer’s Manual on Professional Conduct** § 1:3.

<sup>27</sup> **Model Rules of Prof’l Conduct** R. 1.2(a) (1999).

The comments to Virginia’s newly adopted version of the Model Rules make this reasoning explicit. Effective in 2000, Virginia added the italicized portion of the following to the ABA’s Official Comment to MR 1.2:

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.<sup>28</sup>

Other portions of the ABA’s Official Comment to MR 1.2 state that clients *should* control some means decisions:

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.<sup>29</sup>

It may be that under this Comment, the lawyer “should defer to the client” as to whether to pursue ADR. The decision whether to pursue ADR is not so technical that a client cannot understand it. Furthermore, whether the client engages in ADR is likely to have such a significant impact on the two factors mentioned by the Comment—“expenses incurred and concern for third parties”—that leaving this decision to the client is justified. As noted in the previous section, some methods of ADR are likely to save money and preserve the client's

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<sup>28</sup> **Va. Code Ann. R.** Pt. 6, § II, R. 1.2 cmt.[1] (Michie 2000) (emphasis added).

<sup>29</sup> **Model Rules of Prof’l Conduct** R. 1.2. cmt.[1].

relationship with the opposing party.<sup>30</sup> The importance that the Comment gives to these considerations, coupled with the non-technical nature of the decision whether to pursue ADR, suggests that under the Comment the lawyer *should* consult with the client about whether to pursue ADR. But the comment is couched in hortatory language (“should”), rather than mandatory language (“must”). A violation of hortatory language in the lawyer codes does not subject a lawyer to discipline.<sup>31</sup>

Some commentators have suggested that MR 1.4(b) imposes a duty on lawyers to present ADR options to clients.<sup>32</sup> It states: “A lawyer *shall* explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>33</sup> Much as I would like this section to require lawyers to present ADR options to clients, it does not identify the “informed decisions” that clients are entitled to make. MR 1.4(b) merely dictates the level of counseling assistance a lawyer must give clients about issues that the client is entitled to resolve under MR 1.2(a). Since MR 1.2 only requires the lawyer to “consult” with the client concerning means decisions, it does not appear that the Model Rules require the lawyer to allow the client to choose whether to pursue ADR.

The term “consult” suggests that the client is entitled to something less than control of

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<sup>30</sup> Supra Section I.B.

<sup>31</sup> **Model Rules of Prof'l Conduct**, Preamble, Scope & Terminology [13].

<sup>32</sup> See generally Edward A. Dauer & Cynthia McNeil, New Rules on ADR: Professional Ethics, Shotguns and Fish, 21 **Colo. Law.** 1877 (Sept. 1992).

<sup>33</sup> **Model Rules of Prof'l Conduct** R 1.4 (emphasis added).

ADR, but something more than mere notice of the means that the lawyer has chosen.<sup>34</sup> When I am hired as a consultant, I do not have control over decisions, but I am listened to carefully, and am likely to have substantial influence on decisions that are made. As to the ADR decision, the Model Rules' duty to consult probably requires that the lawyer, in the terms used by the Virginia Rule's Comment, "advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives"<sup>35</sup> and obtain and consider the client's opinion about the matter. Ultimate control of means appears to be in the hands of the lawyer under the Model Rules, but only after a serious evaluation of those means with the client. Of course, in the case of wealthy, informed clients, the practical effect of consultation is likely to be client control. If the lawyer does not comply with client wishes, the client is likely to go elsewhere. Consultation, however, is unlikely to give much power to the poor or weak client.<sup>36</sup>

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<sup>34</sup> The Terminology section of the Model Rules states: "'Consult' or 'Consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." **Model Rules of Prof'l Conduct**, Preamble, Scope & Terminology. The ABA Ethics 2000 Commission moves the Terminology section to a new rule, Proposed Rule 1.0 and deletes the definition of "Consult" or "Consultation." **ABA Ethics 2000 Comm'n, Final Rules Part Two**, Proposed Rule 1.0 (Dec. 1, 2000).

<sup>35</sup> **Va. Code Ann. R.** Pt. 6, § II, R. 1.2 cmt.[1] (Michie 2000).

<sup>36</sup> Supra Section I.A.

## B. Client Notification Models—The Colorado Rule

Several jurisdictions encourage, but do not require, lawyers to inform clients of ADR options.<sup>37</sup> For example, Rule 2.1 of the Colorado Rules of Professional Conduct states:

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<sup>37</sup> E.g., **Colo. Rev. Stat. Ct. R.** chs. 18-20 app. R. 2.1 (2000); **Haw. Rules of Prof'l Conduct R.** 2.1 (2000) (“[A] lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.”); **Ga. R. & Regs. for the Org. and Gov’t of the State Bar** R. 3-107, EC 7-5 (1999) (“A lawyer as advisor has a duty to advise the client as to various 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.”); **Ohio State Bar Ass’n Rptr.** xli (1997) (exhorting lawyers to advise clients of ADR options); **The Tex. Lawyer’s Creed—A Mandate for Professionalism** § II A(11) (1989) (“I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.”); **Ark. Code Ann.** § 16-7-101 (Michie 1999) (encouraging lawyers to advise clients of ADR options); **N.J. Sup. Ct. R.** 1:40-1 (West 2000) (encouraging attorneys to become familiar with dispute resolution programs and inform clients of their availability).

A few court rules, statutes, and ethics opinions require lawyers to initiate discussions of ADR options with clients. E.g., **Mass. Local R. (D. Mass)** R. 16.1(D)(3)(b) (1995) (requiring attorneys to certify that ADR options have been discussed with the client); **Mich. Bar Ass’n, Model Rules of Prof'l Conduct, Formal Op. RI-255** (1996) (requiring attorney to inform client if opposing counsel suggests ADR); **Pa. Bar Ass’n, Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 90-125** (1991) (stating that Rule 1.4 and Rule 1.2 read together

In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.<sup>38</sup>

Although the Colorado rule was obviously designed to encourage lawyers to discuss ADR options with clients, it has several weaknesses. First, the Colorado rule is hortatory (“a lawyer should. . .”). It does not require lawyers to present ADR options to clients. Second, the rule encourages lawyers only to “advise the client” of ADR. Presumably, a lawyer could meet the requirements of the rule merely by describing ADR methods and then informing the client that he has decided to file suit. Unlike a consultation model, the lawyer need not seek client input. Finally, the Colorado Rule may actually weaken the possibility that MR 1.2 (which remains a part of the Colorado professional rules) would be interpreted by a court or disciplinary body to require that lawyers “consult” with clients about ADR, as suggested in the previous section,.

### **C. Client Control: The Michigan Rule**

A few jurisdictions have adopted rules that require lawyers to allow clients to control the decision whether to pursue ADR. A Michigan bar opinion states:

A lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client’s interest, or if the lawyer has any reason to think that the client would find the alternative desirable.

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While not all options which are theoretically available need be discussed, any doubts about whether a possible option is reasonably likely to promote the clients [sic]

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obligate a lawyer to inform a client when the opposing counsel suggests mediation).

<sup>38</sup> **Colo. Rev. Stat. Ct. R.** chs. 18-20 app. R. 2.1 (2000).

interests, as well as any doubt about whether the client would desire the use of any particular option, should be resolved in favor of providing the information to the client and allowing the client to render a decision.<sup>39</sup>

In addition, the rule articulated in the Restatement (Third) of the Law Governing Lawyers may require lawyers to allow clients to control ADR decisions. I will discuss the Restatement as well as a proposed professional rule that would give clients control of the ADR decision in a later section.<sup>40</sup>

### **III. The ABA Ethics 2000 Commission**

In 1997, the American Bar Association appointed the Ethics 2000 Commission and gave it the express responsibility to update the Model Rules of Professional Responsibility.<sup>41</sup> The Model Rules had been adopted in 1983, when ADR was in its infancy.<sup>42</sup> Tremendous growth in the ADR field had occurred since the Model Rules were adopted, and it was my hope that the Ethics 2000 Commission would recognize the importance of ADR and the importance of client

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<sup>39</sup> Formal Op. RI-262; see also **Or. Rev. Stat.** § 36.185 (Supp. 1998) (requiring all parties in civil actions to file a confidential statement indicating their knowledge of ADR and their election whether or not to participate in an ADR proceeding).

<sup>40</sup> See infra Section IV.B.

<sup>41</sup> **ABA Ethics 2000 Comm'n, Proposed Introduction and Summary of Changes** (Dec. 1, 2000), available at [http://www.abanet.org/cpr/e2k-intro\\_and\\_summary\\_changes.html](http://www.abanet.org/cpr/e2k-intro_and_summary_changes.html).

<sup>42</sup> **Model Rules of Prof'l Conduct** (1999).

control over the decision whether to pursue it.<sup>43</sup> Unfortunately, the Commission’s proposed rules may undercut the possibility of client influence over the ADR decision.

The Commission’s initial “Proposed Rule,” issued as a “Public Discussion Draft” on April 24, 2000, would have removed the language from MR 1.2 that requires lawyers to consult with clients about means decisions—a step that would have had implications far beyond the issue of control of ADR.<sup>44</sup> Not surprisingly, this proposal was short-lived. As I suggested in testimony before the Commission, this proposal would have moved us in the wrong direction, toward lawyer paternalism and away from client autonomy.<sup>45</sup>

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<sup>43</sup> Robert F. Cochran Jr., ADR, the ABA, and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients, 41 **S. Tex. L. Rev.** 183 (1999).

<sup>44</sup> The Commission’s proposal was to delete the struck language and add the underlined language to Model Rule 1.2(a): “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and ~~shall consult with~~ may take such action on behalf of the client as ~~to the means by which they are to be pursued~~ is impliedly authorized to carry out the representation.” **ABA Ethics 2000 Comm’n, Proposed Rule 1.2—Public Discussion Draft** (Apr. 24, 2000), available at <http://www.abanet.org/cpr/rule12.html>.

<sup>45</sup> As I testified:

[The Ethics 2000 Commission’s] Proposed Rule 1.2 contains one of the most surprising proposed changes to the rules. Under Proposed Rule 1.2, clients continue to control the objectives of the representation, but they no longer have the right to be consulted about

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the means used to obtain those objectives. This moves in exactly the opposite direction from the general direction of the law toward client autonomy. [T]he Commission appears to move us . . . from consultation to pure lawyer control.

Comment 2 of the Reporter's Explanation of Changes states that the "Commission believes that the current formulation [of MR 1.2] is flawed because it . . . suggests too strongly that the lawyer never has to abide by a client decision with respect to means as distinct from objectives." The problem is that the Commission's proposed formulation continues to strongly suggest that "the lawyer never has to abide by a client decision with respect to means," *and* it withdraws the requirement that the lawyer consult with the client about means decisions. In my view, the Rule should expressly expand client control, not retract it. The Proposed Rule withdraws one of the few requirements that lawyers give clients any influence as to means decisions.

Comment 2 of the Reporter's Explanation of Changes to Rule 1.2 also states that "the Commission recommends that the lawyer's responsibilities to consult with the client about the means to be used . . . be determined by reference to the lawyer's duty under Rule 1.4 to keep the client reasonably informed about the representation." It seems to me that a "duty to inform" under the Proposed Rule 1.4 is a much weaker duty than a duty to "consult" under the current Model Rule 1.2(a). For example, a duty to keep the client informed would be met by notice that the lawyer has filed suit against the opposing party. A duty to consult with the client would at least require that the lawyer contact the client before filing suit and get the client's reaction to the proposed suit. Of course, my earlier

The Commission's "Final Proposed Rules," issued on December 1, 2000, provide for what may be a weakened client right to be consulted about means decisions. In a Comment, the Commission raises the possibility that a client might have a right to be informed about ADR. Three provisions of the Commission's proposed rules are relevant to ADR decision-making.

First, the Commission's Final Proposed Rule 1.2 adds the underlined language to the original Model Rule:

**Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer** 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>46</sup>

Note that the Commission has re-instituted the client's right to be consulted about means decisions, but it is now "required by Rule 1.4," rather than Rule 1.2.

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argument is that the client needs some muscle. My proposals would require the lawyer to not merely inform or consult with the client, but to allow the client to decide whether to sue and whether to pursue an alternative means of dispute resolution.

**ABA Ethics 2000 Comm'n, Comments on Proposed Rules 1.2, 1.4, and 2.1 and A Proposal that Model Rule 1.2 Require Lawyers to Allow Clients to Choose Whether to Pursue ADR** [hereinafter **ABA Ethics 2000 Comm'n, Comments**] (July 6, 2000) (statement of Robert F. Cochran Jr.), available at <http://www.abanet.org/cpr/cochran10.html>.

<sup>46</sup> **ABA Ethics 2000 Comm'n, Final Rules Part Two**, Rule 1.2(a) (Dec. 1, 2000), available at [http://www.abanet.org/cpr/e2k-final\\_rules2.html](http://www.abanet.org/cpr/e2k-final_rules2.html).

The relevant portion of the Commission’s Proposed Rule 1.4 reads as follows:

**Rule 1.4: Communication** A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished.<sup>47</sup>

Moving the client’s right to be consulted about means decisions from MR 1.2 to Proposed Rule 1.4 initially might appear to be merely a matter of moving boxes around, but on closer examination, the move may be significant. Under the proposed rules, the client’s right to be consulted about means decisions appears under Rule 1.4, labeled “communication,” rather than under Rule 1.2, which allocates authority between client and lawyer. Under the proposed rule, the right to be consulted looks much more like the right to be informed than the right to have influence.

In addition to the changes to Rules 1.2 and 1.4, a change to the Comments to Rule 2.1 in the Ethics 2000 Commission proposal includes a specific reference to the decision whether to pursue ADR. MR 2.1 is entitled “Advisor” and requires the lawyer to “render candid advice.”<sup>48</sup>

The Commission would add the underlined portion below to the Comment:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer ~~æ~~ offer advice if the client’s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it

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<sup>47</sup> Id., Rule 1.4(a). The proposed rule adds the word “reasonably” to the language that originally appeared in MR 1.2. I do not see this as a significant limitation on the client’s right to be consulted. I am confident that any court or bar committee would have implied this limitation to the original language of MR 1.2.

<sup>48</sup> **Model Rules of Prof’l Conduct** R. 2.1 (1999).

may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.<sup>49</sup>

I have three concerns with the Commission's proposed addition to this comment. My first concern is with the weakness of the Comment's language. The Commission's proposal says merely that MR 1.4 *may* require the lawyer to inform the client of ADR. That language fails to give the lawyer any guidance. The ambiguity (and ambivalence) of the Comment will certainly give any attorney charged with a disciplinary violation a strong argument that he should not be disciplined. Nevertheless, the rule does raise the possibility that MR 1.4 will require lawyers to notify clients of ADR, and it may be that careful lawyers will give such notice in order to avoid the possibility of discipline.

Second, the Comment states only that lawyers may be required to *inform* clients about ADR. Both MR 1.2 and the Commission's proposed Rule 1.4 require the lawyer to "consult" with the client about means decisions. As I argued previously, I think that the right to be consulted is more than the right merely to be notified.<sup>50</sup> A duty to consult would at least require the lawyer to hear and consider the opinion of the client on the ADR issue.

My final concern is with locating the provision in the Comment to Rule 2.1 (though given the weakness of the rule, it may be just as well. Lawyers who are wrestling with the question whether to discuss ADR options with clients are more likely to go to MR 1.2 or 1.4, which have to do with allocation of authority and communication, than to MR 2.1. The Commission's proposed addition to the comment is, by its very terms, a statement about what "may be

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<sup>49</sup> **ABA Ethics 2000 Comm'n, Final Rules Part Two**, supra note 46, R. 2.1 cmt.[5].

<sup>50</sup> Supra Section II.A.

necessary under Rule 1.4.” It would seem that the proper location of the Commission’s Comment would be under Rule 1.4 (though, as I argue below, I believe that a much stronger rule should be added as a part of Rule 1.2.).

#### **IV. Two Alternate Proposals: Informed Consent or Client Choice**

It is important that clients get not only information, but empowerment. Information about ADR is likely to enable the client who is already powerful to choose ADR, but it may not help the poor or uneducated client. I propose two alternate rules, either one of which would allow clients to make the ultimate decision whether to pursue litigation or ADR. Both rules have strong precedents. Whatever rule is adopted, it should be included in Rule 1.2(a), the rule that allocates authority between lawyer and client. MR 1.2(a) currently reads:

A lawyer shall abide by a client’s decisions concerning the objectives of representation . . . 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 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.<sup>51</sup>

##### **A. Alternative One: Informed Consent**

My first proposal is that the ABA add the following sentence at the end of MR 1.2(a): “A lawyer may litigate a matter if the client gives informed consent.”

Several provisions of the Model Rules and the Proposed Rules give the client the right to informed consent as to other matters. Under Proposed Rule 1.2, the lawyer must obtain the client’s informed consent to limit the scope of the representation; under MR 1.6, the lawyer must obtain informed consent to the disclosure of confidential information; and under MRs 1.7 to 1.12 the lawyer must obtain informed consent to several types of conflicts of interest. Surprisingly,

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<sup>51</sup> **Model Rules of Prof’l Conduct** R. 1.2(a) (1999).

nowhere in the Model Rules or the Proposed Rules is the lawyer required to get the client's informed consent to litigating a case. Litigation is at least as important as are these other matters that require the client's informed consent.

The Commission's Proposed Rule 1.0: Terminology includes the following provision:

(e) "Informed consent" denotes the agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.<sup>52</sup>

If the Rules were to require that the lawyer obtain the client's informed consent before litigating a matter, pursuant to this definition, the lawyer would have to obtain the client's "agreement to [litigate] after the lawyer has communicated [to the client] reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the [litigation]." Those alternatives would include means of ADR that are reasonably available in the jurisdiction.

There is an analogy between the rule that I am proposing here and the informed consent right of medical patients. Medical patients have the right to be informed about and to choose alternatives to a proposed medical procedure.<sup>53</sup> The recognition of the medical informed consent

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<sup>52</sup> **ABA Ethics 2000 Comm'n, Final Rules Part Two**, supra note 46, Rule 1.0(e).

<sup>53</sup> *Karp v. Cooley*, 349 F. Supp. 827, 838 (S.D. Tex. 1972) (explaining that a lack of informed consent does not amount to liability unless it is the proximate cause of the patient's injuries); *Dunham v. Wright*, 302 F. Supp. 1108, 1111 (M.D. Pa. 1969) (holding that informed consent may not be required in emergency cases); *Williams v. Menehan*, 379 P.2d 292, 294 (Kan. 1963) (stating that a doctor need only make a "reasonable disclosure" to obtain informed consent); *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960) (determining that patient did not give informed consent to radiation treatment because physician failed to warn her of the hazards

cause of action was a choice for patient autonomy and against doctor paternalism. Because the patient is the person who bears the greatest risks, the courts concluded that the patient should control the choice.

Legal clients have similar interests in being able to choose alternatives to litigation. In many respects litigation is to the client what surgery is to the patient. Both litigation and surgery are likely to carry great risks and offer great potential benefits for the client or patient. It is not that ADR is always better than litigation, any more than conservative medical care is always better than surgery. It is a question of who should decide. An attorney disciplinary rule requiring the lawyer to present the client with the option of pursuing ADR would be based on a concern for client dignity, as the duty of doctors to obtain informed consent is based on a concern for patient dignity; to the extent reasonably possible, individuals should control decisions that affect them.

### **B. Alternative Two: Client Choice**

As an alternative, the ABA might add the underlined portion of the following to Proposed Rule 1.2 (a):

A lawyer shall abide by a client's decision whether to pursue a means of alternative dispute resolution and whether to settle 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 to testify.<sup>54</sup>

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involved); *Mitchell v. Robinson*, 334 S.W.2d 11, 18-19 (Mo. 1960) (holding that a doctor owes his patient, who is in possession of his faculties, the duty to inform him of the possible serious collateral dangers of shock therapy).

<sup>54</sup> **ABA Ethics 2000 Comm'n, Comments**, supra note 45.

The existing rule identifies several means decisions that are reserved for the client. In my view, the decision whether to pursue alternative means of dispute resolution is of equal importance to these decisions. My proposal would give the client the right to choose to pursue ADR and would preclude the lawyer from adopting a form of ADR against the client's wishes.<sup>55</sup>

As noted previously, a few jurisdictions, through bar opinions and court rules, have given clients the right to control the ADR decision.<sup>56</sup> In addition, under the Restatement (Third) of the Law Governing Lawyers, it may be that a lawyer is required to allow clients to make this decision. Section 33(1) states:

As between client and lawyer . . . the following *and comparable decisions* are reserved to the client except when the client has validly authorized the lawyer to make the particular decision: whether and on what terms to settle a claim; how a criminal defendant should plead; whether a criminal defendant should waive jury trial; whether a criminal defendant should testify; and whether to appeal in a civil proceeding or criminal prosecution.<sup>57</sup>

The Restatement's Comment to 33(1) identifies the factors that determine whether a means decision is "comparable" to those decisions explicitly allocated to the client's control, and therefore also within the client's control. Those factors are:

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55 The California Supreme Court held that a lawyer may not opt for arbitration against the client's wishes. *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985). In a concurring opinion, Justice Bird stated, "An attorney should explain to the client the strategic considerations that determine whether a jury trial or some other form of dispute resolution should be utilized." *Id.* at 656 (Bird, Chief J., concurring).

56 Supra note 39 and accompanying text.

57 **Restatement (Third) of the Law Governing Lawyers** § 22(1) (1998) (emphasis added).

[H]ow important the decision is for the client . . . whether reserving decision to the client would necessitate interrupting trials or constant consultations; whether reasonable persons would disagree about how the decision should be made; and whether the lawyer's interests may conflict with the client's.<sup>58</sup>

Each of these factors suggests that the decision to pursue ADR should belong to the client.

(1) “*how important the decision is for the client*”: As suggested earlier in this article, the decision whether to pursue ADR is a very important decision for the client. ADR can save time and attorney's fees, reduce hostility between the parties, and protect the client's privacy.<sup>59</sup>

(2) “*whether reserving decision to the client would necessitate interrupting trials or constant consultations*”: Reserving this decision to the client would not interrupt a trial or require constant consultations. The decision whether to pursue ADR is generally made a substantial time before trial.

(3) “*whether reasonable persons would disagree about how the decision should be made*”: There are advantages and disadvantages to the ADR options. Reasonable people can differ over whether to pursue these options. The lawyer cannot know how the client would choose and should present this issue to the client.

(4) “*whether the lawyer's interests may conflict with the client's*”: As suggested previously, the lawyer and client are likely to have conflicts of interest over this issue.<sup>60</sup> Pursuing ADR may conflict with lawyers' interest in high attorneys fees and some lawyers' interest in maintaining a “hardball” image. Lawyers who do not practice in the ADR area may have to give up a case if a client chooses ADR.

Overall, it appears that under the Restatement, the client should be entitled to decide whether to pursue ADR options.

As between an informed consent rule and a client control rule, my preference, though not

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58 Id., cmt. e.

59 Supra Section I.A., B.

60 Supra Section I.C.

a strong one, is for a client control rule. Under either rule, the lawyer must present ADR options to the client, describe their advantages and disadvantages, and allow the client to make the ultimate decision. But I believe that the informed consent rule and the client control rule have significant differences in emphasis. The label “informed consent” suggests that the lawyer might merely seek the client’s consent to the lawyer’s decision. The “client control” model properly focuses on the client’s control.

### **Conclusion**

The ABA should amend the Model Rules to require lawyers to present the option of pursuing ADR to the client. Whether to pursue ADR is important to the client, the ability to make the decision is likely to be within the competence of the client, and the lawyer is likely to have a conflict of interest as to this issue. One of the attorney’s primary functions is to protect client autonomy from interference by the state and other individuals. Attorneys should enhance client autonomy; they should not be an additional source of interference with that autonomy.

What would the result of such a rule be? I do not think that it would put a great burden on lawyers. Standard forms for instructing clients about the various types of dispute resolution would evolve. Lawyers would give such forms to clients as a part of their standard package of client materials. Clients could look such materials over at their leisure. Some clients who are not informed of ADR options today would choose to pursue them. ADR would be more heavily used, there would be less litigation and less conflict within our society, and clients would have a greater sense of control over their lives.