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Lawyers Fail to Give Clients All Options Available for Resolving Conflict

The obligation of lawyers to advise clients about litigation alternatives to dispute resolution has been the subject of debate for well over a decade. In fact, in 2005, Gerald F. Phillips, Esq. wrote and article titled, "The Obligation of Attorneys to Inform Clients about ADR." In that article, he stated, "There appears to be a growing view that lawyers should discuss ADR with clients." At the time he wrote that article the American Bar Association's Model Rule on the subject was Rule 2.1, which provided as follows: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." At that time, the Rule was considered somewhat of a joke because by using the word "may," it failed to mandate anything. Nevertheless,Virginia imposed a mandatory obligation on attorneys to advise clients of the "advantages, disadvantages, and availability of dispute resolution processes." Unfortunately, other states enacted Rules which were as weak as the American Bar Association's Model Rule. Sadly, little has changed since that time and the American Bar Association's Model Rule is still exactly the same.

In 2005, Gerald F. Phillips wrote the following: "The client faces the greatest consequences of any decision regarding the means of resolving a legal dispute. Yet typically the client is not informed of alternatives to litigation unless the matter is court ordered, requested by an opposing disputant or required by a contractual provision.... Clients are most often in the best position to determine what is in their best interests. Clients know how important it may be to preserve the relationship with the other party. A court decision may destroy a relationship that may be very important to the client. The client, not the attorney should decide whether to use mediation. The attorney may, for legal, strategic or other reasons, want the matter to go to court while the client may desire that an effort be made to settle the

controversy though mediation. The client is often unable to make such a decision without the attorney explaining the processes. Some clients do not even know that mediation and arbitration are available. For the decision to be meaningful the client must have a full understanding of the various ADR options.... Many trial lawyers have come to consider themselves as 'resolvers of disputes,' not merely gladiators to do combat in the courts. And though ADR is now central to the practice of law, there will not be complete acceptance of ADR until clients, the public and all members of the professional fully understand the advantages and disadvantages of the various forms of ADR."

On December 14, 2009, John M. Delehanty, Esq. published an article titled "Do Attorneys Have An Ethical Obligation To Discuss ADR With Their Clients Under the Professional Conduct Rules & When Do They Have To Do It?" In that article, he stated, "There is no consensus about whether lawyers have an ethical obligation to discuss ADR with their clients.... The majority of state ethics codes suggest, but to do not require, that lawyers discuss ADR with clients.... Many states' ethics rules relating to legal fees and the client's right to control litigation decisions suggest that lawyers have an implicit ethical obligation to discuss ADR with their clients.... While state ethics rules do not explicitly requires lawyers to discuss ADR with their clients, many courts require parties and their counsel to confer, or at least to sign certifications affirming that they have conferred, about resolving litigation through ADR. Implicit obligations alone do not provide sufficient incentives for lawyers to include ADR in the range of options which they present to their clients. To make sure that lawyers do in fact inform their clients of the availability of ADR, the states should require lawyers to consult with their clients about ADR and obtain informed consent from the clients concerning the dispute resolution method they wish to pursue."

In 2011, I had the pleasure of hearing Tobias Desjardins, the Director & Founder of the International Center for Peaceful Shared Custody, speak. During his talk, he mentioned that families are frequently referred to him by judicial officers when a child becomes suicidal as a result of their parents protracted custody battle. He told us that by the time he sees these families, both parents have worked with several different attorneys and that they have consistently told him that the first time they learned about mediation or collaborative divorce was through him. This reality is not only indicative of unethical conduct by family law attorneys, but it is just plain tragic.

In 2012, I took part in a discussion of family law on the Los Angeles County Bar Association's Family Law Section Listserv. After one lawyer pointed out that "the code of ethics requires attorneys to advise their clients about mediation possibilities," a number of others chimed in with reason after reason for opposing the use of mediation in family law cases. Eventually I spoke up. "Why is it that mediation and collaborative divorce is very successful in other countries (such as the U.K.), and in some states in the U.S., but the family law litigation community here seems to have a completely different impression? Is it that people in Los Angeles somehow differ from people everywhere else?" Disappointingly-but not surprisingly-no one even acknowledged my question.

However, even if lawyers were required to discuss the various ADR options with their clients, how would they effectively do so if they don't fully understand those processes? For example, the Mediation Descriptions by the Maryland Program for Mediator Excellence specifically provides as follows: "'Evaluative Mediation' is not defined here because we believe it is a misnomer. Evaluation is a technique, not a mediation framework. If a process consists solely of an evaluation and attempts to get participants in line with the evaluation, then that process is not mediation, it is more likely a settlement conference." I have referred to "evaluative mediation" as an alternative form of litigation and others refer to it as "soft arbitration." Regardless of how it is described, it is not mediation. Unfortunately, however, the legal community in many states including California, emphasize the use of "evaluative mediation" and it is the preferred method of mediation. In fact, they don't even need to distinguish it because that is basically the only form of "mediation" used by the vast majority of the legal community. In fact, as recently as August 18, 2013, many in the mediation community werediscussing just this issue. They were expressing frustration over the fact that little has changed over the past several decades. The consensus was that public education was the answer. As I like to remind people, you can only give what you have and teach what you know. If the legal community won't embrace ADR, maybe an educated public can force the issue.