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Should an Attorney be Required to Advise Client of ADR Options?

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Should an Attorney be Required to Advise a Client of ADR Options?*

MARSHALL J. BREGER**

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INTRODUCTION

In recent years alternative dispute resolution ("ADR") has moved from the margins of legal practice into the mainstream.\(^1\) It is no longer the exception for

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attorneys to employ or clients to request ADR services in almost every aspect of legal representation. This shift to the legal mainstream raises the question whether attorneys, as part of their general obligation to keep clients informed of their legal alternatives, should be required to advise their clients regarding ADR options. This paper will consider this question. In doing so, it will consider, at least inferentially, the character and purpose of ethics "rules." Consideration of the issue begins with four relevant Model Rules of Professional Conduct, which is the operative "model" text for state ethics rules.

1) Model Rule 1.2(a) provides 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" (emphasis added).

2) Model Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."
3) **Model Rule** 3.2 provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

4) Finally, **Model Rule** 2.1 provides that "[i]n representing a client, a lawyer shall exercise independent professional judgement 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."  

As the above texts make clear, the **Model Rules** do not provide explicit guidance regarding the mandatory quality of an ADR requirement. For many, however, the language of the **Model Rules** creates an implicit obligation to advise a client regarding ADR options. After all, the **Model Rules** require that an attorney "consult with the client" to "explain a matter," to expedite litigation and to "render candid advice" on relevant matters, all seemingly consonant with the duty to consult with a client regarding ADR options.  

In contrast, some have opposed mandatory ADR disclosure by arguing that it
results in unnecessary client expense.¹² “Such a rule would increase greatly malpractice liability and run up the meter on client expenses” suggests New Jersey lawyer, Michael L. Prigoff.¹³ Thus, he argues that in “small disputes” it is “counter productive to the goal of providing more satisfactory dispute resolution at an affordable price.”¹⁴ Such proposals, Prigoff concludes, are “overkill and unfair micro-management of the practice of law.”¹⁵

More broadly, others have expressed that rules for ethical responsibilities are generally inflexible and do not capture real world complexities.¹⁶ Unlike unenforceable standards, it is said that this inflexibility manifests itself when lawyers, in fear of punishment, are deterred from exercising their own consciences and instead seek the safety of the precise letter of the law.¹⁷ From this perspective, statutory rules deprive lawyers of recourse to their own consciences and thus lead to action that may be incompatible with the promotion of ethical judgment.¹⁸ In the context of ADR, this means that promoting consultation would best be accomplished by structuring a standard that allows an attorney a certain amount of discretion in deciding the appropriateness of consultation.

The underlying assumption here is that the power of a rule rests primarily in its ability to sever an actor from the exercise of personal judgment. This assumption overlooks the fact that an undeniable effect of a rule is to establish norms that shape our surroundings and mold our consciences.¹⁹ Thus, the power of a rule is not necessarily its ability to detach attorneys from their consciences and immerse them in abstract law. In fact, the power of a rule may lie in its ability to inform conscience through the public validation of desirable norms.²⁰ Thus, establishing

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¹³. Id.
¹⁴. Id.
¹⁵. Id.
¹⁶. See William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1083-1145 (1988) (arguing that when the legal community insists upon conventional rules of ethics, lawyers are forced to follow rigid rules “that dictate a particular response in the presence of a small number of factors. The decision-maker has no discretion to consider factors she encounters that are not specified or to evaluate specified factors in any way other than that given in the rule.”). See id. at 1086.
¹⁸. See Strassberg, supra note 17, at 903.
¹⁹. See Sunstein, Free Markets and Social Justice, 57-59 (1997) (In part, arguing that there exists an “expressive function of law” which has the effect of “expressing social values and in encouraging social norms to move in particular directions.”).
²⁰. See Richard H. Pildes, The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium, 89 Mich. L. Rev. 936, 936-78 (1991). Pildes argues that “implicit in all public policy programs and institutions are norms that inform their design and aim. By expressing and embodying such norms, policy outcomes necessarily consecrate certain values and exclude others. The public validation of certain norms
a mandatory ADR consultation rule is only in part an attempt to dispense with the role of attorney discretion. It is also an attempt to establish norms and values that will subtly but surely provide the context for the use of that discretion.

I. WHAT IS ADR FOR THESE PURPOSES?

One of the problems with creating a specific ADR obligation is the difficulty in articulating a precise definition of the term "ADR." As long as ADR existed as an experimental or supplemental tool to litigation, strict classification of which activity did and did not fall within its ambit was unnecessary, and even counterproductive, to the concept's development.

An explicit requirement of ADR consultation will inevitably require a "canonization" of ADR techniques. While this may be a balm to many ADR enthusiasts, it will, as a consequence, leave many experimental procedures outside of the canon. Are we ready for the reduction of the flexibility and experimentation that inevitably accompanies the classification of what is and is not an officially recognized ADR practice? The question of canonization must be answered before one can support any consultative duty.

Efforts have been made to overextend the concept of ADR to encompass an attorney obligation to attempt to settle litigation whenever possible. As one court has suggested, "lawyers not only owe allegiance to their clients, but have a duty to spare the courts from unnecessary litigation" and should serve as

contributes to a broader political culture characterized by those particular understandings and commitments." Id. at 941. Pildes goes on to argue that this "broader political culture" serves as the context for individual and collective decision making. Id.

21. In another context I have written that parties using ADR could "shape procedures to meet their needs on a case by case basis." Administrative Dispute Resolution Act: Hearings on H.R. 2497 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 101st Cong. 66 (1990) (statement of Marshall J. Breger). See also Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Resolution Professionals, 44 UCLA L. Rev. 1871, 1890 (1997) (suggesting that if ADR is to work, mediators and parties will just have "to be more open, candid, creative, and solution-seeking").

22. As is by now well known, there are at least four basic types of ADR methods. (1) Arbitration is the most commonly used and is established by a contract between the parties. (2) Mediation involves the use of a neutral third party who helps the parties reach an agreement. Parties involved in this type of proceeding are not limited by contract terms nor are they bound by the mediator's decision. (3) Mini-trials are faux proceedings conducted with the supervision of a "settlement" judge. The benefit of a mini-trial is that it allows both parties to gain a clear perspective of each side's strengths and weaknesses. (4) "Rent a judge" is an ADR method in which the parties agree to abide by the results rendered by a referee, typically a retired judge. Within this broad framework, there is substantial experimentation, including such mechanisms as "med-arb," "last best chance arbitration" and "proactive mediation." See generally ABRAHAM P. ORDOVER, ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION AND THE ART OF DISPUTE RESOLUTION 14 (1993).

23. See, e.g., Steven H. Goldberg, "Wait a minute. This is where I came in." A Trial Lawyer's Search for Alternative Dispute Resolution, 1997 B.Y.U. L. Rev. 653, 665 (1997) (arguing that "court annexation of ADR is bad for the ADR movement" because "ADR will lose its unique character, and with it, its value to a society already too adversarial for its own good").

24. MODEL RULES Rule 3.2.
gatekeepers to the legal process by diverting claims into mediative channels rather than translating them into adversary claims.\textsuperscript{25} This independent duty to settle has been used to deny statutory attorney fees in litigation where the defendant was prepared to settle before a suit was filed, thus making "the filing of suit . . . unnecessary to the ultimate result obtained."\textsuperscript{26} Failure to discuss settlement with a client is a violation of many ethics codes\textsuperscript{27} and has been used to support malpractice claims as well.\textsuperscript{28}

One might well tease out a duty to attempt appropriate ADR solutions from the duty to attempt settlement. Thus, any operative definition of ADR for consultation purposes must consider the extent to which ADR is analytically separate from settlement negotiations and whether that distinction has any meaning in considering an ADR consultation requirement. Indeed, many ADR casebooks include chapters on settlement negotiation techniques.\textsuperscript{29} Certainly there will be the temptation for many attorneys to sweep settlement within the ambit of ADR and claim to have met any consultation obligation through consultation with their client over settlement offers.

Having said this, I believe it important to hive off the settlement process from the ADR process and to view them as two separate processes. Settlement is drawn from an adversary paradigm; you have to begin formal litigation before you can settle. The ADR process, in theory, requires one to shuck the adversary paradigm to be successful. Thus, the duty to make a good faith effort to settle should not serve as the underpinning of any ADR consultation duty.

\section*{II. Does such a Rule of Consultation Already Exist?\textsuperscript{30}}

Read literally, neither \textit{Model Rule} 1.2 or 1.4(b) even mentions ADR. \textit{Model Rule} 1.2 requires that attorneys consult as to "means" and \textit{Model Rule} 1.4(b) provides only that "a lawyer shall explain a matter to the extent reasonably

\begin{itemize}
  \item \textsuperscript{27} \textit{See, e.g.,} KAN. ETHICS CODE (1999).
  \item \textsuperscript{28} \textit{See, e.g.,} Garris v. Severson, 252 Cal. Rptr. 204 (Cal. Ct. App. 1988) (order not published). This opinion is binding upon the parties, but may not be used in California courts as precedent. VanAukens-Hight and Enslen, \textit{supra} note 10, at 1039 n.12. It has been suggested that this case may be the "camel's nose under the tent flap," indicating "that an attorney's duty to explore settlement options encompasses a duty to inform the client of various means of settlement, including ADR." \textit{Id.} at n.7.
  \item \textsuperscript{29} \textit{See, e.g.,} WENDY TRACHTE-HUBER \& STEPHEN K. HUBER, ALTERNATIVE DISPUTE RESOLUTION: STRATEGIES FOR LAW AND BUSINESS 1045-1103 (1996); JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYER 192-292 (2d ed. 1996).
  \item \textsuperscript{30} Professor Frank E.A. Sander, one of the earliest pioneers of ADR, would answer yes to this question. \textit{See generally} Sander, \textit{supra} note 11, at 50. It may be argued that the fiduciary duties owed by an agent-attorney to his principal-client encompass the duty to "identify and protect the client's interests." Such a duty may include alternatives to litigation. For an informative article discussing the principles of agency involved in attorney relationships, including duties owed to the client, the court, the self-regulating profession and third parties, see Deborah A. DeMott, \textit{The Lawyer as Agent}, 67 FORDHAM L. REV. 301, 301-11 (1998)."
necessary to permit the client to make informed decisions regarding the representation.”

Reading “reasonably necessary” broadly, this rule may be construed as containing an inherent obligation for an attorney to provide an explanation of ADR processes sufficient to enable a client to make an “informed decision” as to whether to pursue ADR. Some commentators have suggested that a reasonable reading of state rules based on Model Rule 1.4 reveals such an implicit duty.

Besides reading Model Rule 1.4(b) broadly, an ADR obligation can often be inferred by referring to legal sources outside of the rules of professional conduct. For example, under the Louisiana Rules of Professional Conduct, Disciplinary Rule 1.4 reads that attorneys have a duty to “keep clients reasonably informed about the status of a matter.” As in the case of the Model Rules, enforcement of this rule relies upon the meaning of “reasonably informed.” It has been argued that in light of the Louisiana Mediation Act, enacted to encourage the use of ADR, the “reasonably informed” language of rule 1.4 should be read as including an obligation for attorneys to discuss ADR options with their clients.

Model Rule 2.1 provides a different approach than rules 1.2 or 1.4(b). It requires that an attorney should render “candid advice,” directing an attorney not only to consider legal, but also “moral, economic, social and political factors” that may impact the outcome of a client’s dispute. If such “candid advice” includes a discussion regarding ADR options, then attorneys will have an affirmative obligation to discuss ADR options for a wide variety of reasons beyond the technically “legal.”

31. MODEL RULES Rule 1.4(b). See, e.g., MASS. ANN. LAWS S. JUD. CT. R. ch. 3 (“There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation.”); N.H. RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (“A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding representation.”).

32. In some states like Florida “the issue has not yet been decided.” Robert Jarvis, Arbitration Ethics sec. D(2) in THE FLORIDA BAR, ALTERNATE DISPUTE RESOLUTION IN FLORIDA. Nonetheless, this leading commentator suggests that “prudence dictates that Florida advocates tell their clients about arbitration as well as other extra-judicial dispute systems.” Id.

33. LA. RULES OF PROFESSIONAL CONDUCT D.R. 1.4(a).

34. LA. RS. 9:4101 — 4112.


36. MODEL RULES Rule 2.1.

37. See COLO. RULES OF PROFESSIONAL CONDUCT Rule 2.1. (“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.”). See also Steve C. Briggs, ADR in Colorado: Past and Present, COLO. LAW. 103 (June 26, 1997) (discussing the development of ADR in Colorado); Edward A. Dauer & Cynthia McNeill, New Rules on ADR: Professional Ethics, Shotguns and Fish, COLO. LAW. (Sept. 1992).

38. See HAW. RULES OF PROFESSIONAL CONDUCT Rule 2.1. (“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.”).

39. See GA. R. C.P.R. EC 7-5.
consider alternative dispute resolution, in addition to these other considerations.40

As clients are clearly the best interpreters of their "non-legal" interests, the proportion of disputes for which ADR consultation should be required has become exceedingly large. Thus, this analysis suggests that allowing an attorney to make the ADR decision for the client takes away the control over aspects of the case that should rightfully be in the client’s hands.41

Even if one does not accept that a duty of consultation can be derived from a reading of Model Rules 1.4(b) or 2.4, it is possible to cobble together support from other textual sources for an existing rule of consultation. One may, as an example, treat an offer to pursue ADR as any other settlement offer and base the purported consultation requirement on Model Rule 1.4(b).42 Such an offer must be communicated to the client.43 Thus, a Kansas Bar Opinion states that "[i]f an ADR technique is proposed by opposing counsel or the court, the lawyer must advise the lawyer’s client of the benefits and disadvantages of the ADR techniques proposed, and give the lawyer’s professional advice to the client regarding use of the ADR in the particular case.’’44 The State Bars of Michigan45 and Pennsylvania46 adhere to a similar position.47

40. See GILLERS & SIMON, supra note 7, at 188. See also VA. RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. 2 (Proposed Official Draft, 1999); GA. R. U.S.D.C.T.M.D. STANDARDS OF CONDUCT § B(10)(c) (“In every case, a lawyer should consider, and discuss with his client, whether the client’s interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.”).

41. Mark Spiegel suggests that the “subject-matter/procedure line” helps to delineate this responsibility and autonomy, admittedly not clear, by establishing “affirmative obligations” in certain instances, for example, when a conflict of interest arises. Spiegel, supra note 5, at 64. “Absent such circumstances, the burden of initiating consultation between attorney and client falls upon the client. In most instances, therefore, the lawyer may act upon his own judgment unless the client instructs otherwise.” Id. at 64-65.

42. See, e.g., Menkel-Meadow, supra note 21, at 1886 (raising this recently developing issue).

43. See, e.g., Rizzo v. Haines, 555 A.2d 58 (Pa. 1989) (failure to communicate a settlement offer to a client is malpractice). Recently the Maryland Court of Appeals established liability in a case where an attorney negligently advised a client to accept an “inadequate” offer of settlement. See Steve France, Giving Up the Fight: Maryland Joins about a Dozen States Holding Lawyers Liable for Bad Settlement Recommendations, A.B.A. J. 28 (Feb. 1999).


45. State Bar of Mich., Standing Comm. on Professional and Judicial Ethics, Op. RI-255 (1996) (referring to Model Rules 1.2(a), 1.4 and 2.1). “By offering to settle the dispute through means other than the public forum of trial, the proposal is akin to an offer of settlement which must be conveyed to the client.” Id. See generally Thomas D. Dyze, ADR’s Impact on the Resolution of Cases in the Michigan Federal Courts, 74 MICH. B.J. 654 (July 1995).

46. Pa. Bar Ass’n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 90-125 (1991) (referring to Model Rules 1.2(a), 1.4, 1.7 and 3.2). “If the lawyer fails to convey the mediation proposed to the client, he may not charge the client the expense of trial preparation if these expenses are incurred as a result of the lawyer’s failure to communicate the offer.” Id. See also Arthur Garwin, Show Me the Offer: When Opposing Counsel Suggests Mediation, Your Client Needs to Know, 83 A.B.A. J. 84 (June 1997) (discussing same).

47. As does Washington, D.C., where the Rules of Professional Conduct Rule 1.4(c) provide that “[a] lawyer who receives an offer of settlement in a civil case . . . shall inform the client promptly of the substance of the
Following this view, the State Bar of Virginia proposed a revised version of the Virginia Rules of Professional Conduct. Proposed Rule 1.4(c) provides, that “[a] lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.”

Driving home this specific point, Comment 1(a) to proposed Rule 1.4 explicitly provides that “[t]his continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client’s goals than the initial process chosen.”

Further, Model Rule 3.2 underscores the attorney’s duty to expedite the resolution of disputes. While arbitration can often be costly and time consuming, other forms of alternate dispute resolution, such as mediation, almost certainly save time, if not money. For the client to guide the attorney on these efficiency issues, he must be knowledgeable regarding ADR options.

III. Even if the Client has the Right to be Advised of ADR, Does He Make the Choice or Does the Attorney?

The professional codes governing attorneys attempt to define the line between the client and attorney decision-making authority in terms of “ends” and “means.” The client is to choose the ends of representation and the attorney is to choose the means to pursue that end. There is no doubt that the ends/means line is in many respects unclear.

communication.” D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.4(c). See also Ohio S. Ct. App. V (Statement on Professionalism, A Lawyer’s Creed, and A Lawyer’s Aspirational Ideals) (“I shall counsel you with respect to alternative methods to resolve disputes.”).

48. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.4 (Proposed Official Draft, 1999). Additionally, Comment 1 to proposed Rule 1.4 provides that “[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” Comment 2 to proposed Rule 1.4 provides that “[a]dequacy of communication depends in part on the kind of advice or assistance involved . . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.” See id. [hereinafter VA. RULES Rule 1.4 (Proposed)].

49. VA. RULES Rule 1.4 cmt. 1a. The Kansas Bar goes even further, requiring that an attorney raise ADR options with the client if he deems it professionally appropriate, “whether or not the issue is raised by opposing counsel.” Kan. Bar Ass’n, Professional Ethics — Advisory Comm., Informal Op. 94-01 (April 15, 1994) (referring to Model Rules 1.1, 1.2 and 1.4). “When the lawyer?s professional judgement indicates ADR is a viable option, the lawyer should discuss that option with the client, whether or not the issue is raised by opposing counsel or court.” Id.

50. Robert F. Cochran, Jr., Legal Representation and the Next Steps toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation, 47 WASH. & LEE L. REV. 819, 826-28 (1990). Cochran points out that the difficulty of identifying a decision as either an ends or means decision is best illustrated by cases in which one court has identified a decision as an ends decision for the attorney while another court has identified the same decision as a means decision for the client. Id. at 827 (citing to Duffy v. Griffis Co., 206 Cal. App. 2d 780 (1962); Harness v. Pacific Curtinwall
This ends/means problem is apparent in Model Rule 1.2. It has been suggested that this rule gives the client the right to information about ADR, but does not give the client the right to decide whether to pursue it. Thus, Robert Cochran intimates that "the courts will label the decision to pursue ADR a "means" decision, rather than an "objectives" decision." Cochran’s statement implies that the rule simply requires an attorney to consult with the client concerning ADR.

This view is buttressed by the concept of "craft" values and "craft" standards. On this view, it is the attorney’s expertise that is the basis for professional autonomy. While the client certainly has control of the ends of a litigation, the means must be left to the attorney’s professional judgment. Such a "craft" standard, Mark Spiegel suggests, "lies in the integrity of one's work and one’s reputation." For example, a strategic decision whether to raise ADR prior to trial or during discovery or at all would be left to the attorney in his professional judgment.


One example is that in 1992, the Illinois Attorney Registration and Disciplinary Commission (ARDC) received 802 charges of incompetence with Rules 1.2 and 1.4. The vast majority raised issues of new communication (Rule 1.4). There is no breakdown as to whether any of these claims pertain to ADR. See Stuart Widman, ADR and Lawyer’s Ethics, 82 Ill. B.J. 150, 151 (1994)


See Cochran, supra note 6, at 9.

See Camille A. Gear, Note: The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship, 107 Yale L.J. 2473, 2473 nn.1-3 (1998). See also Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 Wm. & Mary L. Rev. 1303 (1995) (examining “the tension between client orientation and professionalism” and concluding that ethics rules carve room for lawyers to exercise discretion, however, “the rules, legal training and custom fail to emphasize adequately the lawyer’s duty to act objectively”); Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession 295 (1993) (describing the craft of law as “demanding a cultivated subtlety of judgment whose possession constitutes a valuable trait of character, as distinct from mere technical skill, and which therefore justifies the special sort of pride that the possession of such a trait affords”).


Spiegel, supra note 5, at 128. Arguably this leaves a large amount of discretion to an attorney, with ample room for abuse. Id. For example, an attorney may favor litigation over mediation. However, an attorney will likely have a greater craft interest where the decision-making involves his “performance.” Id. at 129. But see Marcy Strauss, Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy, 65 N.C. L. Rev. 315, 315-16, 324 (1987) (arguing that the traditional allocation, the “means-ends distinction” is a “false dichotomy” which should be re-allocated to shift more authority to the client).
In sharp contrast to this approach is the principle of client autonomy.\textsuperscript{57} Ironically, although an attorney is in the position of “protect[ing] the client’s autonomy from interference by the state and other individuals,” he himself may specifically interfere and limit his client’s decision-making abilities and autonomy by not providing his client with available options.\textsuperscript{58} To maintain that autonomy, or “right of self-determination,” the client should be permitted to retain control, not only because of his “interest in autonomy,” but because he “is likely to improve the quality of legal representation” that he will receive.\textsuperscript{59} This requires that a client be an informed client.\textsuperscript{60}

The Comment to Model Rule 1.2, however, states that the attorney should defer to the client when it comes to questions involving the expenses to be incurred and the adverse impact on third parties caused by litigation.\textsuperscript{61} Certainly, the determination of whether to select ADR will, in part, reflect issues of client economics and may, in many instances, radically affect third party relationships. Given these factors it is hard to imagine the decision to opt for ADR as the attorney’s alone.

It must be admitted that the courts have been unclear regarding the extent to which “process choices”?\textsuperscript{62} such as the ADR decision are “substantive” decisions or simply reflect a choice of a “private forum” for private justice. The recent judicial “revolution” federalizing arbitration law treated the choice between arbitration and litigation as essentially procedural and certainly not one which

\textsuperscript{57} Model Rule 1.2(a) provides 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. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.” MODEL RULES Rule 1.2. See also Monroe H. Freedman, Professionalism in the American Adversary System, 41 EMORY L.J. 467, 471 (Spring 1992) (discussing autonomy as part of the “core of basic rights that recognize and protect the dignity of the individual in a free society”).

\textsuperscript{58} Cochran, supra note 50, at 830.

\textsuperscript{59} See Cochran, supra note 50, at 822-23. Along these lines, the Hawaii State Bar provides a wealth of information regarding ADR generally, with which a client may arm himself, including a list of questions to ask his attorney regarding ADR. See Questions to Ask Your Lawyer About ADR (visited Sept. 28, 1999) <http://hsba.org/ADR/questions.htm>.

\textsuperscript{60} See Cochran, supra note 50, at 822-23. Authors Schaffer and Cochran propose four models of distribution of authority in the attorney-client relationship. See THOMAS L. SCHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 3, 4 (1994). The first model is that of attorney as “Godfather.” Id. at 5. Under this model, the client relinquishes all control to the attorney, reflecting elements of paternalism and partisan representation. Id. at 5-14. The second model is the attorney as “hired gun.” Id. at 15. Under this model the attorney provides “client-centered” counseling, which allows for client autonomy, and the client is thus empowered. Id. at 15-17. The third model is the attorney as “guru” or what has been traditionally called a “gentleman-lawyer.” Id. at 30-32. Under this model the attorney takes on the task of actually telling the client what he ought to do. In doing so, he takes into account the morality of decision making, thereby ensuring responsibility, and justice in turn. Id. at 31. The fourth and final model is the attorney as friend. Id. at 40. Under this model the attorney takes on the role of a “true advocate,” in other words, looking out for more than a financial gain, and seeking to resolve disputes while preserving relationships. Id. at 42. The attorney also seeks to involve the client in wrestling with issues, raising moral issues, while refraining from imposing his own moral values on his client. Id. at 43.

\textsuperscript{61} MODEL RULES Rule 1.2 cmt. 1.

\textsuperscript{62} I borrow the term “process choices” from Carrie Menkel-Meadow. See Menkel-Meadow, supra note 21, at 1919 n.227.
"cut off" substantive rights. Thus, courts have determined that pre-dispute arbitration agreements can be used as a surrogate to the court system to vindicate statutory rights such as those under the Sherman Act, the Age Discrimination in Employment Act of 1967 (ADEA) or Title 7 of the Civil Rights Act. The general position of these cases is that: "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral setting not a judicial forum."

On this view of arbitration as little more than a procedural choice between forums, the need for client disclosure may be somewhat reduced. Nonetheless, in the last few years, courts have begun to recognize that there is a difference between courts and arbitration procedures and that while some arbitrations may capture the due process protection of a court proceeding, the two are in no way equivalent. Thus, they have begun to require elements of due process and a significant indicia of consent before affirming mandatory arbitral forums. This approach accepts implicitly at least, that the decision to arbitrate has substantive connotations.

IV. WHAT EXACTLY DOES THE ATTORNEY’S DUTY TO ADVISE CLIENTS OF ADR OPTIONS ENCOMPASS?

The duty to consult with a client concerning ADR options may be understood in two ways: a "hard" sense, in which an attorney is required to analyze the case at hand and recommend an option to his client, or, a "weak" sense, in which he must simply inform his client that ADR is an option that the client may wish to explore.

Under the "hard" sense, analyzing and explaining all of the ADR options

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65. See also Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e (1967).
67. Id.
68. See id. at 626.
70. See, e.g., CA. R. SAN DIEGO SUPER. CT. Div. 5, Rule 2.2 (1999) (“[A]ttorneys representing family law litigants are encouraged to advise their clients of the availability of mediation as an alternative means of dispute resolution.”); DEL. SUP. Ct. R. 71(B) (1998) (Del. State Bar Ass’n Statement of Principles of Lawyer Conduct) (“Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution.”); Minn. Gen. R. Prac. 114.03 (1998) (The court will provide information about available ADR options and “[a]ttorneys shall provide clients with the ADR information.”); S. Ct. Rule 17.02(b) R.S. MO (1999) (“[C]ounsel shall advise their clients of the availability of alternative dispute resolution programs.”); GA. R. C.P.R. EC 7-5 (1998) (“A lawyer has a duty to advise the client as to various forms of dispute resolution.”); TX R. LAW. CREED 2(11) (1999) (“I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.”).
available to a client may require a level of attention to the details of a case that may often not occur until the parties are closer to trial. Thus, attorneys will be expected to “analyze” the “cash value” of a lawsuit far earlier than they might otherwise have done under existing customary practice. This “front-end” analysis may cost clients more. Whether the cash value of the settlement or verdict will be worth the extra expense is an open question.

As one example, a Michigan Bar Opinion provides that an attorney must disclose “all information pertinent to a mediation decision,” including “the cost, whether the decision-maker is a single individual or panel of individuals, the format of the presentation to the forum, whether the decision is binding, the length of time before a decision is rendered, and the general objective of the forum.”

This view is undergirded by Model Rule 1.4(b) which requires that “a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” The rule further states that “the client shall have sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be pursued.” Issues such as how much information, how long an attorney must take in explaining alternatives and whether the costs of such an explanation are sufficient to comply with this rule will add to the cost of legal advice. A resolution of these issues will depend on what is encompassed by the general requirement to communicate with one’s clients.

71. Comment 2 to Proposed Rule 1.4 of the Virginia Code of Professional Conduct provides that the “guiding principle” in this determination “is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.” See Va. Rules Rule 1.4 (Proposed), supra note 48.

72. Note also, that the Federal Rules of Civil Procedure were designed to reveal earlier in the discovery process the strengths and weaknesses of a case, thus facilitating “realistic negotiations” and settlement. See Judith A. McKenna & Elizabeth C. Wiggins, Empirical Research on Civil Discovery, 39 B.C. L. Rev. 785, 785-86 (1998). It is at least arguable that ADR may be an option that provides a way to avoid the often exorbitantly large expenses associated with discovery in the Federal Courts. Statistically, discovery has become “the bulk of the civil litigator’s work.” Id. at 787. However, “[c]ases involving extensive discovery are in fact relatively rare.” Id. at 791. Statistics suggest that whether and how much discovery is undertaken is tied to “case complexity.” See id. One study found that “cases with more discovery were actually less likely to settle.” Id. at 796. Compare Alan Van Etten & Ellen Godbey Carson, Why the Hawaii State Bar Supports ADR, (visited Sept. 28, 1999) <http://hsba.org/ADR/supports.html> (discussing huge savings experienced by the Federal Deposit Insurance Corporation (twenty four million dollars in three years), the Resolution Trust Corporation ($115.5 million in four years), the U.S. Air Force (four million dollars on a hundred Equal Employment Opportunity complaints) and the U.S. Mint (three million dollars on 220 Equal Employment Opportunity complaints). General Mills “refuses to do business with companies that won’t use ADR, and reports millions saved in legal fees and saved management time.” Id.


74. MODEL RULES Rule 1.4(b).

75. Id.

76. See Warnbrod, supra note 10, at 811.

77. See J. Nick Badgerow, Can We Talk?: The Lawyer’s Ethical, Professional and Proper Duty to
In contrast to the more detailed Model Rule 1.4(b), a Missouri Supreme Court Rule 17.02(b) merely provides that lawyers "shall advise their clients of the availability of alternative dispute resolution programs." This "weak" consultation is, of course, far less burdensome because it does not require an individual analysis of the case file, but merely a generic explanation of the ADR concept. Certainly, the transaction costs in such a "weak" consultation requirement would be less, but the utility to the client may be commensurably less as well.

However, unless there is some specificity regarding the modality of disclosure, the consent process is likely to become both boilerplate and rote in short order. This certainly has been the experience in informed consent studies in the medical and human experimentation arenas. An abstract duty of disclosure will likely result in disclosure about ADR generally, and not a specific and concrete work-up of the strengths and weaknesses of using ADR in the specific case at hand. While such a work-up would suggest a serious or "heavy" consultation requirement, and would contribute to greater "front-end" attorney time and costs, it would ensure that the client himself has personally thought through the ADR option.

Thus, Nolan-Haley and others argue for relying on a test of effective client decision making rather than on mechanical fact of informed consent. Nolan-Haley's "strong" or "robust" informed consent requirement goes further than the "strong" disclosure requirement discussed above. For one, she is less interested in controlling the delivery of the information, and in the process, gives greater control to the client in making an informed choice. Indeed, as one study of human experimentation points out, "a subject's signature on a consent form is no assurance that the subject has given informed consent." BRADFORD H. GRAY, HUMAN SUBJECTS IN MEDICAL EXPERIMENTATION 236 (1975). Discussing research nurses securing consent forms for a medical research project Gray states "Although they took responsibility for getting a signature on the consent form, it was not clear how much responsibility they felt for informing subjects." Id. at 215.

78. S.Ct. Rule 17.02(b) R.S. MO (1999).
79. See Dorothy Derrickson, Informed Consent to Human Subject Research: Improving the Process of Obtaining Informed Consent for Mentally Ill Persons, 25 FORDHAM URB. L.J. 143, 144 (1997). The author discusses various methods of obtaining informed consent and the relative effectiveness of each method. See id. at 143. For example, the "long form method" of providing a "long list of medical terms" is not effective because it "fails to ensure that the potential subject comprehends [his] role and the protocol of the study." Id. at 156. She recommends revising the existing federal regulations to include an "oral conversation" that will "preserve the subject's autonomy" and include "meaningful consent." Id. at 157. She states that research has shown that "obtaining informed consent through a conversation from a potential subject with impaired cognitive abilities produces the highest rate of comprehension" because it provides the physician with opportunities to both clarify, using clearer terms or those a lay person understands, and repetition. Id. at 158.

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81. Id. at 816.
in the amount of information and the specificity of attorney recommendations, if
any, and is more interested in the parties "minimum level of understanding of the
outcome to which they agree."\textsuperscript{82} Her focus is "the informational needs of
individual disputants."\textsuperscript{83} In that regard, she promotes a "sliding scale model of
informed consent disclosures in which a mediator has additional informed
consent responsibilities whether parties participate in voluntary mediation and
. . . whether they are represented by counsel."\textsuperscript{84} To buttress this point, Nolan-
Haley notes that many ethical codes, standards and court rules require that a
mediator assure himself that any consent is truly informed.\textsuperscript{85} While one can have
sympathy for the robust view of consent Nolan-Haley proposes, it is hard to
imagine the kind of "educating decision making" she proposes "in all the
disparate circumstances under which . . . [ADR] . . . occurs."\textsuperscript{86}

\textbf{V. How will Attorneys Show that They Have Met the ADR Consultation Obligation?}

The problem of proving compliance is really a second-order issue that
becomes important only if attorneys fear civil liability or a bar association
complaint for failure to comply with an obligation.\textsuperscript{87} In such instances, a
boilerplate "form," similar to informed consent forms in medical practice, may
be used, whereby the client would attest that he was informed about his ADR
options and consulted by an attorney about its relevance to his case.

For example, attorney Tom Arnold provides clients with a copy of a paper he
authored entitled "A Vocabulary of ADR Procedures," which he describes as
"reveal[ing] the processes" and assisting in the "mak[ing] of a paper trail of full
disclosure which would be beneficial in the event of a malpractice suit."\textsuperscript{88}
Further, such a paper enables "complementary oral disclosure to be made in half
an hour of conversation instead of a half a week of conversation."\textsuperscript{89} Professor
Sander suggests that "attorneys could be required to hand out a brochure that
describes the most common alternatives and to discuss these options with their
clients and opponents."\textsuperscript{90} The attorney could then, as part of his pre-trial
submission, certify that he had complied with this obligation.\textsuperscript{91}

\textsuperscript{82.} \textit{Id.} at 827.
\textsuperscript{83.} \textit{Id.} at 824.
\textsuperscript{84.} \textit{Id.} at 827.
\textsuperscript{85.} \textit{Id.} at 824 n.234.
\textsuperscript{86.} \textit{Id.} at 824.
\textsuperscript{87.} \textit{See, e.g.,} Chalom v. Benesh, 560 A.2d 746, 746 (N.J. Super. 1989) (attorney's failure to note in the
complaint seeking fees owed that she had notified her client of the option to arbitrate fee disputes as provided by
statute resulted in vacation of a default judgment against the owing client).
\textsuperscript{89.} \textit{Id.}
\textsuperscript{90.} Sander, \textit{supra} note 11, at 50.
\textsuperscript{91.} \textit{Id.}
Empirical studies of informed consent\(^9\) in the medical profession, however, have "cast doubt on the practicality and performance of informed consent."\(^9\) The studies have "consistently" revealed that: 1) "doctors do not tell patients what tests they are performing or why;" 2) "doctors can frame the information they provide patients and quite successfully generate the physician-desired consent or refusal of the treatment;" and 3) "only about half of patients recall being informed of serious risks of interventions, such as the risk of death."\(^9\) It is at least questionable whether this approach would serve to adequately inform a client regarding a proposed legal strategy.

Use of the signed consent form case creates, if not a safe harbor, then a practical presumption of consent.\(^9\) Indeed, some commentators view informed consent forms in more problematic populations — such as human experimentation protocols — as functionally insulating the practitioner from liability rather than increasing patient communication or patient understanding.\(^9\) Similar observations may be relevant in the context of legal practice.

Similarly, the Western District Court of Texas requires that "[u]pon order of the Court entered early in the case, the parties shah submit a report addressing the status of settlement negotiations . . . and evaluating whether alternative dispute resolution is appropriate in the case. Counsel shall certify in the report that their clients have been informed of the ADR procedures available in this district."\(^9\)

92. See, e.g., Evan G. DeRenzo, Ph.D., et al., Assessment of Capacity to Give Consent to Research Participation: State-of-the-Art and Beyond, 1 J. HEALTH CARE L. & POL’Y 66, 71 (1998) (discussing one study in which the “five requirements of the doctrine of informed consent” were distilled into the following: disclosure of information, patient’s understanding thereof, patient’s competency to understand, patient’s voluntariness in making the decision and the decision itself, including the role of information disclosure therein).


94. \(\text{Id. at 13-14.}\)

95. One alternative would be to require physicians to “ascertain and ensure the patient’s understanding” rather than simply have physician disclosures and patient signatures. See Peter H. Schuck, Rethinking Informed Consent, 103 YALE L.J. 899, 946 (1994). Individual states vary in their requirements for informed consent, but will provide a presumption many times where, for example, explanatory language was easy to understand, sufficiently detailed and risks and alternatives were disclosed and explained. \(\text{Id. at 946 n.189.}\)

96. See ARNOLD ROSOFF, INFORMED CONSENT 281 (1981). Indeed Rosoff has suggested that the main purpose served by a written consent form is that it provides the most direct, effective proof of a valid “consent.”


Counsel and client shall certify that both have:

1. Read the brochure entitled Dispute Resolution Procedures in the Northern District of California;

2. Discussed the available dispute resolution options provided by the court and private entities; and

3. Considered whether their case might benefit from any of the available dispute resolution options.
The Association of the Bar of the City of New York subcommittees on arbitration and ADR have submitted to the New York Supreme Court, the state trial court, a proposed draft "Notice of Dispute Resolution Alternatives," based in part on the California District Court rule and other relevant provisions. The proposed notice "introduces litigants to mediation, nonbinding arbitration and neutral evaluation, and explains mediation at length," and also includes information on the selection of a mediator. The proposed notice also includes a certification section which both the attorney and client must sign for purposes of acknowledgment.

98. The Association adopted the following policy statement in 1995: "Every lawyer should be knowledgeable about alternative dispute resolution processes, and should advise the lawyer's clients of the availability of any appropriate alternatives to litigation so such clients can make an informed choice concerning resolution of present and prospective disputes." Letter from Michael A. Cooper, President, The Ass'n of the Bar of the City of New York, to Stephen G. Crane, Justice, New York Supreme Court (July 14, 1998) (on file with The Ass'n of the Bar of the City of New York).

99. See Ready or Not: City Bar Drafts Uniform ADR Notice, 16:7 ALTERNATIVES TO THE HIGH COSTS OF LITIGATION 93, 103, 108 (July/Aug. 1998) [hereinafter City Bar].

100. Telephone interview with Stephen A. Hochman, Co-chair, Joint Subcomm. of the ADR and Arbitration Comm. of The Ass'n of the Bar of the City of New York (Nov. 1998) (explaining that the Joint Subcomm. also examined Colo. Ethics Rule 2.1, as well as Kan. City Supreme Court Rule 17.04). Telephone interview with Kenneth L. Andrichik, Co-chair, Joint Subcomm. of the ADR and Arbitration Comm. of The Ass'n of the Bar of the City of New York (Jan. 5, 1999) (adding that the Joint Subcomm. also considered Minn. General Rule of Practice 114.03, similar to Colo. Ethics Rule 2.1. As of early January 1999, the recommendations had not yet been approved by the court.).

101. See City Bar, supra note 99, at 108.

102. See id. ADR Certification and Attorney Questionnaire.

"ADR CERTIFICATION AND ATTORNEY QUESTIONNAIRE
Re: [identify lawsuit]

Pursuant to Court Rule XX, each attorney and party to the above lawsuit is required to complete this certification, and each attorney is required to complete this questionnaire and submit it to the Court within ___ days after the defendant has served an answer or made a motion in response to the complaint.

Certification. The undersigned attorney for _________ ("Client") has provided Client with a copy of the ADR Notice required by Court Rule XX, and the undersigned Client acknowledges having received a copy of such ADR notice.

Attorney Questionnaire. In the event your case is not ordered into mediation by the Court under its Alternative Dispute Resolution Program, are you and your client willing to elect to enter into mediation or any other ADR procedure at this time? ___ Yes ___ No

If Yes and you prefer an ADR procedure other than mediation, please indicate your choice here. If No, you may but are not obligated to explain below why you and your client are unwilling to commence an ADR procedure at this time (attach additional sheet, if necessary):

Note: If you believe you need some discovery before you and your client can commence an ADR procedure, you can either raise those concerns with the judge or with the mediator or other neutral. Please be aware that a mediator or other neutral, as part of the ADR process, may assist you in obtaining the needed information more quickly and efficiently than by means of traditional discovery.

Dated: ____________________________

Signature of Attorney

Signature of Client"
The Utah voluntary court-annexed ADR program requires parties and their counsel to watch a short video entitled "ADR: A Different Choice." Parties who choose not to pursue arbitration sign a form that they have seen the video, discussed ADR with counsel, and reject the ADR option.

Yet another alternative may be to incorporate notice into the earliest communications with the client, perhaps through the initial fee agreement. The "fee agreement presents the attorney with a terrific opportunity" to address not only fee issues, but also to define the particular scope of representation or relationship. ADR could easily be worked into the agreement and discussion thereof, and at the same time, serve as a memorialization of notice provided.

Some attorneys who fear malpractice claims based on an ADR rule argue that such a rule imposes unnecessary, additional burdens on the attorney. They feel that ADR increases costs to their clients because of the fees incurred in preparing for, attending, and conducting arbitration and mediation. Further, an attorney must also allocate time for a reasonable explanation to be given to the client. Such cost considerations may be particularly significant for corporate clients who incur significant expense in pre-ADR discovery. But, if an attorney is under a


103. See Nolan-Haley, supra note 80, at 840 n.141.
104. See id.
105. See Sander, supra note 11, at 50 (proposing that "the lawyer write a letter signed by the client, much as is now done with contingent fee agreements").
107. See also Zacharias, supra note 54, at 1368 (discussing that at the beginning of a relationship certain "requirements call for verifiable action;" thus, compliance can be ensured by "reviewing the lawyer’s memorialization of the conversations or questioning the client," especially where the law requires conveyance of information in writing).
108. One survey conducted in Minnesota uncovered that another obstacle to ADR use was attorney perceptions and behavior. Minnesota’s experiment with ADR resulted in a mandatory ADR consideration rule, which required attorneys to consider ADR in every civil case, discuss ADR with their client(s) and opposing counsel, and advise the court regarding their conclusions about ADR. See Barbara McAdoo & Nancy Welsh, Does ADR Really Have a Place on the Lawyer’s Philosophical Map?, 18 HAMLIN J. PUB. L. & POL’Y 376, 376 (1997). Despite Rule 114’s decade long history and use in the court system, ninety percent of attorneys responding to a survey stated that they would, at a minimum, only "sometimes" use ADR. Id. at 384. The result of the survey indicated that a significant number of attorneys use ADR because they feel coerced into it. See id. at 385. The underlying fear in these results is that "if the lawyers philosophical map fails to embrace a client-centered dispute resolution process, neither lawyers nor their clients will ever benefit fully from ADR." Id. at 392-93. Gary Friedman, a mediator and trainer, states that the "attitude problem" is this: "Attorneys accustomed to seizing power in law and practice must learn to give it away to the parties in mediation. That's counterintuitive for lots of lawyers whose habits are such that they feel the essence of being a good lawyer is controlling their client." Richard C. Reuben, The Lawyer Turns Peacemaker, 82 A.B.A. J. 54, 57 (Aug. 1996).
109. See Hon. H. Jeffrey Coker, ADR in Coconino County, 33 ARIZ. ATT’Y 30, 30 (1996). Despite this opinion, most attorneys in Coconino County, Arizona, responded overwhelmingly to ADR use by becoming arbitrators and mediators, and by voluntarily advocating ADR programs to their clients.
110. See John Maul, ADR in the Federal Courts: Would Uniformity be Better?, 34 DUQ. L. REV. 245, 261 (1996). It is relevant to consider the economic impact of mandatory ADR. It has been suggested that "there is
duty to effectively serve his client, is he not also under a duty to help his client choose the best form of ADR to pursue his client's objectives? Absent such a form, attorneys would have to show compliance by reference to their case notes or by the messier Kabuki dance of "he said, she said." Given such an alternative, some type of "consent" form appears preferable. Indeed, the consent form is likely to be used to confirm the discussion referenced in the case files.

VI. CASE MANAGEMENT AND THE CLIENT: CONSIDERATION AND CONSULTATION OF ADR AS AN ALTERNATIVE: CAN THE ATTORNEY GO IT ALONE?

In an effort to encourage increased use of ADR alternatives, many states require that ADR be considered at or before the pre-trial or status conference often called by judges prior to trial. For example, a Tennessee statute provides that at the initial case management conference "the possibility of settlement or the use of extrajudicial procedures, including alternative dispute resolution to resolve the dispute" is a topic that may be considered. Similarly, Illinois Supreme Court Rules call for a case management conference in no event more than 182 days following the filing of the complaint. The Rules provide that "the advisability of alternative dispute resolution" shall be considered by counsel at the case management conference.

It must be recognized that an ADR case management duty need not necessarily encompass a consultation requirement. The case management duty could, in

little strong data supporting the theory that ADR saves significant time and money for participants or the system." Lucy V. Katz, Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?, 1993 J. Disp. Resol. 1, 46 (1993). Katz argues that most existing studies lack adequate control groups and measure single programs, thereby failing to provide a source of comparable data. See id. In fact, most studies reporting high satisfaction rates with ADR methods involve satisfaction with fairness and the need to be heard rather than costs and speed. See id. at 48-49.

111. See, e.g., Robert B. Fitzpatrick, Shouldn't We Make Full Disclosure to Our Clients of ADR Options?, 55 ALI-ASA 755, 762 (1998) (noting that under the proposed text of the Rules of Professional Conduct being considered in Virginia that "attorneys who do not discuss ADR with their clients may expose themselves to discipline . . . . The proposed rules in Virginia require attorneys to advise their clients of the advantages and disadvantages of all options for pursuing the clients' objectives, including ADR."). See Virginia State Bar, supra note 8.

112. See CT R. SUPER. CT. CIV. § 14-13 (1998) (providing that parties and counsel shall attend and consider "alternative dispute resolution options to trial" at a pre-trial conference); KY R. JEFFERSON CIR. CT. Rule 708(A)(a) (1999) ("During any status conference, the Court will address and the parties shall be prepared to discuss . . . alternative dispute resolution."). See infra App. II (listing representative procedural rules in State and Federal courts).

113. TN. CIV. PRO. RULE 16.03(7) (1998). A Rhode Island statute provides a more oblique recommendation, but one that arguably includes the consideration of ADR alternatives, providing that "[i]n any action the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: . . . such other matters as may aid the disposition of the action." RI. R. R.C.P Rule 16(5) (1999).


115. See Fitzpatrick, supra note 111, at 772 ("court-administered arbitration is neither voluntary nor binding which may cause a tendency not to take the procedure seriously").
theory, be met by the attorney discussing ADR with opposing counsel and the court, to the exclusion of the client.\(^{116}\) If the goal of ADR is to maximize client autonomy (instead of litigation efficiency), however, an ADR case management conference requirement does not substitute for an ADR client consultation rule.

The client should be entitled to retain autonomy and control the decision whether to pursue ADR because of the "importance of the decision to the client."\(^{117}\) The client will ultimately bear the risk and suffer the consequences of whatever choice he makes.\(^{118}\) If the ADR option is presented, the client may select ADR in light of what the client judges to be his best interest. With an explanation of available options provided by the attorney, the ultimate decision should rest with the client.

VII. WILL FAILURE TO FOLLOW THE RULE REQUIRING ADR CONSULTATION RESULT IN BAR DISCIPLINE OR MALPRACTICE LIABILITY?

Violations of the Model Rules of Professional Conduct may result in disciplinary proceedings; however, the Model Rules are not intended to provide a basis for civil liability.\(^{119}\) While I have no statistics regarding the level of enforcement of Model Rule 1.2, if the ADR consultation is part of the prescriptive portion of the Model Rule, one would expect bar discipline at least in egregious cases. This would, of course, require that there be a mandatory and not a precatory requirement to address ADR options with a client.

Virginia State Bar Counsel James McCauley suggests that a violation of the proposed Virginia Rules of Professional Conduct is appropriately followed by disciplinary action, "[i]f a lawyer fails completely and utterly to inform of ADR in circumstances where it would be a viable option and reasonable practitioners in the same area would have recommended ADR."\(^{120}\) He explains that "[t]he purpose of the comments is to be more than aspirational . . . ."\(^{121}\)

The real risk for an attorney who fails to advise clients about ADR options is the possibility of a malpractice claim. And this is the case notwithstanding that the theory of malpractice liability for derogation of ethical rules should yield a different result. Thus, the introductory "Scope" section to the Model Rules states that a "[v]iolation of a rule should not give rise to a cause of action nor should it

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116. This assumption has not, to my knowledge, been tested.
117. See Cochran, supra note 6, at 10.
118. See id. Choice of litigation or ADR will have different risks and benefits. For example, "ADR options, if successful, are likely to resolve the case earlier, quicker and with less expense and greater privacy" than litigation, but a client risks being "overpowered" in a mediation which takes place without "some of the procedural protections that are present in court." Id.
119. See supra text relating to notes 4-8.
121. Id. at 13.
create any presumption that a legal duty has been breached.”  

And indeed the earlier Model Code of Professional Responsibility went further underscoring in its “scope” section that “[t]he Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, not does it undertake to define standards for civil liability of lawyers for professional conduct.”

While most states accept this limitation, some do allow the introduction of the Model Rules as evidence of the common law duty of care. Indeed Section 74 of the Draft Restatement of the Law Governing Lawyers states:

(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:
(a) does not give rise to an implied cause of action for lack of care;
(b) does not preclude other proof concerning the duty of care in Subsection (1); and
(c) may be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant’s claim.

Proponents of this viewpoint argue that permitting a violation of the Model Rules to be used in a civil liability context would allow for the development of a framework in which to place attorney behavior when considering whether certain behavior is actionable or not. Over time developing caselaw will likely create a list of permissible and impermissible behaviors and give the Model Rules greater weight for purposes of enforcement.

122. MODEL RULES scope (1983). See, e.g., Baxt v. Liloia, 1998 WL 397181 (N.J. July 17, 1998) (declining to use the Rules of Professional Conduct to establish a basis for civil liability); Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239 (March 1991) (discussing the need for the legal profession to “reestablish an independent identity for [the] profession” to counterbalance the changes in regulation that have come about due to external pressure).

123. MODEL CODE scope (1979).

124. American Law Institute, Restatement of the Law Governing Lawyers § 74 (Tentative Draft No. 8, March 21, 1997). But see Carrie Menkel-Meadow, The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice, 10 GEO. J.LEGAL ETHICS 631, 632 (1997) (criticizing this Restatement as “suffer[ing] from the temporal flaws” of other such Restatements in that “it looks backward, not forward, and thus will provide little guidance, at least on some important issues”).


126. One author posits that “[w]hile particular customs may seem to insulate the legal profession in a particular community against liability, a jury is always free to decide that there was a breach if those customs are inconsistent with broader patterns of attorney diligence.” Benjamin C. Zipursky, Legal Malpractice and the Structure of Negligence Law, 67 FORDHAM L. REV. 649, 679 (1998) (arguing that traditional negligence models “cannot adequately interpret the key concepts of duty and breach in the law of attorney malpractice” and that the traditional model should be replaced with a “relational model”). See also D. Alan Rudlin, Ethics: A Duty to Inform Clients about ADR?, 11 VA. L.WKLY. 342 (Sept. 16, 1996) (“Alternative dispute resolution has unquestionably evolved into much more than an “alternative” to litigation. Embraced and implemented by the courts, by corporate counsel and increasingly by law firms, ADR has become a well established, integral part of the practice of law.”).
The real risk for an attorney who fails to advise clients about ADR options is the possibility of a malpractice claim. Legal scholars have listed several reasons why courts may specifically impose liability on an attorney for failure to advise a client about ADR. The medical malpractice concept of informed consent could potentially "create a precedent for a cause of action against attorneys." Just as a doctor is liable for his failure to explain alternative, available treatments, so, theoretically, could an attorney be liable for his failure to explain alternative, available resolutions. In fact, attorneys may even be held to higher standards of communication, because a doctor's primary skills are focused on treating disease, whereas an attorney's primary function is to communicate alternatives, risks and benefits of proposed alternatives.

A direct corollary to this line of reasoning is found in Model Rule 1.4, which requires that an attorney provide a client with all of the information reasonably necessary to make an informed decision. Taken to its logical conclusion, both the doctor and attorney are faced with a similarly delicate situation, as both must fulfill a duty to inform, and yet allow the respective patient or client to ultimately make a decision as to which course of action to pursue. Control rests in the hands of the patient or client who must bear the ultimate consequence of the surgery or litigation.

We must further recognize that an attorney has a financial interest in his client's choices and this may raise conflict of interest concerns. Simply stated, an

127. In a recent case before the New Jersey Supreme Court, Baxt v. Liloia, 155 N.J. 190, 714 A.2d 271 (1998), the court refused to use the New Jersey Rules of Professional Conduct to establish a basis for civil liability and noted that research produced no other such cases establishing liability "premised solely on a breach of the relevant provisions." However, such rules are relevant for purposes of providing evidence of an attorney's violation of a duty of care. Id. at *5. See also Daniel R. Coquillette, Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct, Q247 ALI-ABA 311, 334-35 (1996) (suggesting that under such "ambiguous guidance" as provided through the "inherent fragmentation of the existing state rules" and "bad draftsmanship" apparent in the many variations, to discipline an attorney thereunder could possibly violate Due Process).

128. See Cochran, supra note 6, at 9-12. See also Warnbrod, supra note 10, at 813-17.

129. Cochran, supra note 6, at 10. See generally VanAuk-Haught & Hensel, supra note 10, at 1039-40; Warnbrod, supra note 10, at 814. Professor Sander also makes this analogy. See Sander, supra note 11, at 50.

130. See Cochran, supra note 6, at 10. See generally VanAuk-Haught & Hensel, supra note 10, at 1039-40; Warnbrod, supra note 10, at 814. See Sander, supra note 11, at 50.


132. Alaska recently amended Rule 1.4 of the Alaska Rules of Professional Conduct, adding a paragraph (c) that requires an attorney to provide notice to his clients in the following instances: 1) his malpractice insurance is below $100,000 per claimant; 2) his malpractice insurance falls below this amount at any time; or, 3) his malpractice insurance is terminated. Alaska Requires Lawyers to Inform Clients About Malpractice Insurance, 67:27 U.S. L. Wk. 2422, 2422 (Jan. 1999). South Dakota is considering a similar amendment, and is also considering an amendment to Rule 7.2 which would require an attorney to disclose in advertising whether the attorney held malpractice insurance of at least $100,000. Id. at 2423.

133. See Cochran, supra note 6, at 11; Gear, supra note 54, at 2476-77 (noting and rejecting the trend of ethics scholars to argue for subordination of client autonomy and further arguing that this "ideology of domination ... encourages attorneys to deprive clients of the right to engage in autonomous moral judgment and therefore denies clients true autonomy). See also Freedman, supra note 57, at 470.
attorney may have a financial stake in how a client chooses to resolve his legal dispute. 134 We all know the apocryphal tale of the litigators who view new complex cases as opportunities for running hours and keeping litigation sections busy. 135 On this view, if the client selects arbitration or mediation over litigation (which in many instances may be more lucrative for the attorney or law firm), the attorney might stand to earn less. 136 This dilemma supports a heightened responsibility of full disclosure by the attorney, thereby enabling the client to select how he would like to proceed or to choose to leave the decision to the attorney’s professional judgment.

On occasion it may be in the best interest of the client for his attorney to refer the case to a colleague who has more experience in ADR methods, 137 thus “losing” a case he was otherwise qualified to handle. Other attorney “interests” may create conflicts as well. An attorney may want to further his reputation as a litigator or perhaps display his litigation skills to attract new clients. 138 These attorney interests and the potential conflicts that they may create suggest that it is the client, rather than the attorney, who should decide whether to litigate or pursue ADR.

It should be pointed out that the question may no longer turn on the existence of express “ethical” language mandating ADR disclosure. The increased application of ADR as a method of dispute resolution may place an attorney at risk if he is not familiar with ADR methods, 139 following a standard which requires him to exercise “the degree of skill, knowledge and judgment ordinarily possessed by members of the legal profession.” 140 As more state professional codes require ADR disclosure implicitly or otherwise, an attorney’s failure to instruct a client regarding ADR options could therefore result in liability.

Although, arguably the failure to present ADR options may result in injury or loss, the actual proof of such injury or loss may be very challenging. 141 For example, in an informed consent case, a plaintiff must show that if he had been offered the alternative option that he would have chosen that option. 142 But in a malpractice claim over an attorney’s failure to discuss ADR alternatives, the plaintiff would have to show that he would have chosen that option, that opposing

134. See VanAuken-Haight & Enslen, supra note 10, at 1038.
135. Nancy H. Rogers & Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13:3 OHIO ST. J. ON DISP. RESOL. 831, 846 n.2 (1998) (stating that other commentators suggest that this contributes to the “reluctance” to refer matters to mediation). See generally Cornell/PERC, supra note 1.
136. See id. See also Widman, supra note 51, at 150 (“Many lawyers see . . . [ADR] . . . as a threat to their income and an unwelcome abandonment of tradition.”).
137. See VanAuken-Haight & Enslen, supra note 10, at 1038.
138. See id.
139. Id. See also Warmbrod, supra note 10, at 810 (discussing the reasonable attorney standard of care).
140. MODEL RULES Rule 1.1. See also Cochran, supra note 6, at 11.
141. See Cochran, supra note 6, at 12-13.
142. Id. at 12.
counsel would have accepted the option proposed, and that the choice would have proven successful.\textsuperscript{143}

The increased use of ADR raises not only issues relative to professional standards, but also client expectations. Whether or not the \textit{Model Rules} are made more explicit, clients will demand or expect to be advised of ADR alternatives and methods. If an attorney is ill-equipped to do so or is unfamiliar with ADR methods, he risks exposure to malpractice liability, not to mention the diminished confidence of clients in his perceived capabilities.

VIII. \textbf{DOES LACK OF FAMILIARITY WITH ADR TECHNIQUES AMONG ATTORNEYS UNDERCUT THE UTILITY OF MANDATORY ADR CONSULTATION?}

As one legal scholar has pointed out, to the extent that a lawyer's duty to provide competent representation has come to include knowledge and skills regarding ADR, the job description of "lawyer" has "acquired new dimensions."\textsuperscript{144}

As a result, if the bar chooses an ADR consultation requirement, attorneys must be given the opportunity to educate themselves on methodologies of ADR before a disclosure rule may equitably be enforced.\textsuperscript{145} While I have seen no empirical evidence regarding how much knowledge attorneys have about ADR, there is no reason to believe that attorneys cannot acquire the necessary knowledge through CLE programs or other programs.

Implementing such a rule, however, requires that attorneys receive appropriate introduction to ADR methods. Such training may take place on three levels. First, as ADR gains broader acceptance, law schools are beginning to enlarge their ADR offerings and, in some instances, to integrate ADR into the "core" curriculum.\textsuperscript{146} Second, state bar associations may require new attorneys to attend

\textsuperscript{143.} Id.

\textsuperscript{144.} Edwin H. Greenebaum, \textit{Lawyers' Agenda for Understanding Alternative Dispute Resolution}, 68 \textit{IND. L.J.}, 771, 788 (1993). \textit{See also} Rudlin, \textit{supra} note 126, at 7 ("It is in the best interest of all practitioners to have a working knowledge of mediation and how it can serve their clients."); \textit{ROBIN M. KENNEDY ET AL., OHIO JUR. 3D ALTERNATIVE DISPUTE RESOLUTION} § 122 (1997) ("It is . . . good practice to fully disclose all the elements of ADR to each client.").

\textsuperscript{145.} For example, the Virginia State Bar submitted its petition to the Supreme Court of Virginia to adopt the new Virginia Rules of Professional Conduct this past September, recommending an implementation date of January 1, 2000, because "[i]t would allow ample time for the rules to be published throughout Virginia and explained in CLE programs." \textit{See Virginia State Bar, supra} note 8. Indiana's state bar has moved one step beyond educating attorneys to educating the public. Entitled "Dateline ADR," the Indiana State Bar Association's ADR Section's education committee and WTCY-Channel 16, the City-County Government Access channel in Indianapolis, teamed up to produce numerous television programs which have been designed to educate the public about ADR. \textit{See Judith Stimson, A Television Series in the Making: Dateline ADR, 40 RES GESTAE 22 (1997).} In the District of Columbia, ADR programs have been advertised over the radio and on billboards as well as in telephone books and on flyers distributed to the public, containing descriptions of the programs, as well as the advantages and disadvantages of the pilot program. \textit{See Antionette M. Guidry, Alternative Dispute Resolution: Broadening the Use Through Louisiana Courts, 19 S.U. L. REV. 403 (1992).}

\textsuperscript{146.} Indeed, there is a nascent revolution in law schools that brings ADR into the learning process as an
an ADR course prior to admission to the bar or as part of a continuing legal education requirement. Finally, and perhaps the most risky, would be to allow attorneys to self-educate on ADR methods.

How much ADR training is necessary will depend on how much ADR advice the obligation requires an attorney to provide. Merely advising a client as to the existence of ADR options requires far less skill than actually analyzing the case to determine whether pursuing ADR will provide any benefits.

The various meanings of any proposed consultation obligation require that consideration be given to Model Rule 1.1, which addresses the technical level of skill required for an attorney to provide ADR advice. Model Rule 1.1 provides that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

The rule requires that an attorney provide competent representation and in so doing, the Comment to the rule states that “in determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . . . the lawyer’s training and experience in the field in question” and further states that “expertise in a particular field of law may be required in some instances.”

If ADR is described as an independent “field of law,” we must consider whether a general practitioner will have the necessary knowledge of ADR methods to comply with this rule if he is required to provide ADR advice. Further, if such a specific set of skills exists, it would suggest that the consultation obligation not only include discussion of ADR options but also include a discussion of whether, depending on the attorney’s skill level, the attorney should undertake the ADR himself or bring in an ADR specialist.

IX. DIFFERENT FORMS OF THE CONSULTATION OBLIGATION

The “consultation obligation” has been anchored in a number of different norm-creating articulations — each with a different level of authoritativeness and binding quality. Among them have been lawyers’ creeds and court rules, as well as bar association and statutory rules of professional conduct.

A. LAWYERS’ CREEDS

A number of states have added aspirational creeds to their “black-letter” regulatory codes of professional behavior. The Texas Lawyer’s Creed is an equal option for lawyers in dispute settlement. See generally Robert B. Moberly, Dispute Resolution in the Law School Curriculum: Opportunities and Challenges, 50 FLA. L. REV. 583 (Sept. 1998).

147. MODEL RULES Rule 1.1.
148. MODEL RULES Rule 1.1 cmt. 1.
149. This point should not be ignored. A litigator does not become an ADR specialist by calling himself one, as the restyling of big firm litigation departments as dispute resolution departments might suggest, and the obligation to “pass off” a client to an ADR specialist might not sit well in a small firm context. The “knowledge gap” is likely to be greater the further along the ADR continuum one moves from arbitration to mediation.
example of an aspirational statement of lawyer responsibilities and goals. The Lawyer’s Creed provides: “I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.”

The problem with an aspirational statement is that it is just that — aspirational. While lawyers’ creeds certainly recommend the most commendable behavior, they purposefully lack enforcement mechanisms, so it is hard to gauge whether such codes are even followed. One commentator, James Moliterno, argues that the emergence of the civility or professionalism creeds is in response to the Model Rules’ lowest common denominator approach to establishing minimum standards of conduct. Such creeds recapture the aspirational standards of conduct absent in the current Model Rules regulating attorney conduct. Moliterno argues that such creeds should not be enforceable. Indeed, the creeds were purposely drafted to be non-binding. In practice, “civility codes can cause confusion among the judiciary and the practicing bar,” because it is not always clear when mandatory rules of professional conduct, as opposed to “aspirational” statements of ideal conduct, are being applied.


151. Id. See also Dwight Jefferson, Courtroom Ethics and Antics Integrity in Advocacy, 36 HOULAW 39, 42 (November/December 1998) (describing how the Houston Bar Ass’n promulgates professional standards which in part state that when appropriate, attorneys should counsel their clients “with respect to mediation, arbitration, and other alternative methods of resolving disputes.”) The Hawaii State Bar Association adopted the Guidelines of Professional Courtesy and Civility, which provide that:

A lawyer should raise and explore the issue of settlement and alternative dispute resolution in every case as soon as the case can be evaluated and, if feasible, mediation should be encouraged. Specifically, a lawyer who manifests professional courtesy and civility: a. Advises the client at the outset of the availability of alternative dispute resolution.

d. Considers whether the client’s interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other form of alternative dispute resolution.


152. But see A. Darby Dickerson, The Law and Ethics of Civil Dispositions, 57 MD. L. REV. 273, 379 n.12 (1998) (citing several sources that suggest that courts may indeed enforce “civility codes”).

153. See id. at 304-05.


155. See id. at 797-99.

156. See id. at 796.

157. See Dickerson, supra note 152, at 304. See also MARLA B. RUBIN, COMPARATIVE ETHICS: THE BACK OF THE BASEBALL TICKET IN NEW YORK PRACTICE SKILLS COURSE HANDBOOK SERIES 5-7 (1998) (stating that “[f]ederal local court rules about standards of attorney conduct are as varied as judges’ personalities”). Thus, that there may be more than one applicable set of rules is common throughout the United States. For example,
B. COURT RULES

Many court rules, such as those of Maryland,158 require ADR to be an issue placed "on the table" at a case management conference. For example, the parties may be required at such a conference to consider "available and appropriate forms of alternative dispute resolution."159

The problem in the case management approach is that it both anchors ADR too late in time strategically and places it in the wrong value calculus. If ADR is a requirement to be raised at a case management conference, it will not be discussed by attorney and client until litigation is well along. It will become a tool to use when settlement fails rather than as independent track to undertake notwithstanding litigation options. Further, placing ADR in a case management context makes it an efficiency value. Also, as previously suggested, the case management discussion is often between attorneys only and may take place without client input.

C. RULES OF PROFESSIONAL CONDUCT

Most ADR consultation requirements are situated in state Rules of Professional Conduct. As already discussed, some commentators believe that the state codes already include an ADR consultation obligation by inference. Others do not.

1. The Status Quo

The benefit of the status quo is the wide ranging flexibility that it provides. ADR proponents can stir the pot and encourage ADR without any concern that they are creating new obligations on the legal profession.

The problem, however, is that the status quo is not a blank slate — it just may appear to be. If the existing Model Rules implicitly require ADR consultation then the status quo encourages flexibility only by ignoring clear professional responsibilities. The fact that the obligation is implicit in no way reduces the obligation. It means only that the obligation is not facially clear from the

the Colorado Supreme Court Rules are applicable to proceedings in court, whereas the District of Columbia Rules of Professional Conduct apply "whether or not the act or omission occurred in the course of an attorney-client relationship." Id. at 6. Even more treacherous are jurisdictions that have more than one district court, as in the case of Alabama, whose district courts appear to apply the Model Rules and the Alabama Rules of Professional Conduct. Id. at 7.

158. See Md. R. Civ. P. 2-504.1(c)(1).
159. See Md. R. Civ. P. 2-504.1(c)(1). Not all court rules refer specifically to ADR. For example, New Mexico Rule of Civil Procedure 1-016(C)(7) provides that participants "may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." See infra App. II.
language of the text but must be "inferred" from it. The implicitness does not reduce the weight of the obligation. The issue then becomes whether a purely aspirational or a mandatory explicit requirement would be most appropriate.

2. A Precatory Requirement\textsuperscript{160}

The value of a precatory requirement lies in the belief that it will, by its existence, encourage the use of ADR where appropriate, yet will not include any of the externalities associated with regulatory mandates. We cannot statistically judge whether this is the case. The aspirational approach also shifts between statements that attorneys ought to consult on ADR to statements that attorneys in the appropriate circumstances shall consult on ADR. I count this as precatory as the issue of appropriate circumstances is, as a practical matter, subjective. Even if one argues that the question of appropriateness is objective, the proof problems are sufficiently formidable to likely consign the matter to the judgment of the attorney.

One example of a precatory obligation is Hawaii, which chose to adopt a modified version of \textit{Model Rule} 2.1, providing: "In a matter involving \ldots litigation, 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."\textsuperscript{161}

The arguments for an aspirational obligation include, first, that an aspirational obligation while unenforceable, would still provide guidance for aspired-to conduct, and second, that it is simply too early to raise the notion of mandatory enforcement as we are still in a period of "acclimation" to the ADR concept. The fact is that the proponents of ADR do not view it as superogatory conduct on the part of an attorney or in any way supplementary to appropriate legal practice. On the contrary, it would seem likely that members of the ABA Ethics 2000 Commission would view the discussion of ADR alternatives as part of appropriate legal practice. That being the case, as a matter of principle, it should be viewed as a mandatory, not an aspirational obligation.

True, the addition of precatory language to an ethical code may be accomplished without much resistance and may have a certain heuristic value. However, the bar and bench have been pushing ADR for almost two decades now. The question is whether these two decades of socialization have brought ADR beyond the "aspirational" stage. If so, mandatory language is in order.

\textsuperscript{160} Ethical rules in Arkansas, California, Colorado, Delaware, Hawaii, Massachusetts, New Jersey and New Mexico have a precatory duty to advise or inform a client as to ADR options. \textit{See infra} App. I. Kansas, Michigan and Pennsylvania have developed an "implied ethical duty." \textit{See id.}

3. A Mandatory Obligation: Explicit or Implicit?\textsuperscript{162}

While creative ambiguity may have its place in human relationships, it is rarely successful when expectations of conduct are written down and enforced. Thus, if we have decided that there should be ADR consultation between lawyer and client, there can be only one reason not to make that duty explicit. And that reason is that the externalities are so great that they will otherwise impair the attorney-client relationship. Among those externalities we may include the cost of lawyering time, paper work, transaction costs, and the negative risks of unwarranted malpractice actions or bar sanctions for failure to consult.

It must be remembered that an implicit rule is a far different animal than the aspirational standards found in the old \textit{Canons of Professional Ethics}\textsuperscript{163} or the present day state bar “creeds.”\textsuperscript{164} The theory behind aspirational standards was that they reflected goals to which the profession should ideally aspire.\textsuperscript{165} Enforcement of these standards mainly relied upon one’s own internal sense of duty rather than the use of an external disciplinary force.\textsuperscript{166} Like an aspirational standard, the enforceability of an implicit rule may be limited in its use of external disciplinary force. But while an aspirational standard limits its degree of obligation by its very design and purpose, the obligation of an implicit rule is limited only by our inability to decipher its actual presence.\textsuperscript{167} If it can be determined that an explicit rule contains an implicit shadow,\textsuperscript{168} one is equally obligated to obey both the explicit text and the implicit shadow.\textsuperscript{169}

\textsuperscript{162} California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, Ohio and Texas have elected mandatory duty language. \textit{See infra} App. I.

\textsuperscript{163} \textit{See, e.g.}, \textit{CANONS OF PROFESSIONAL ETHICS} (1908) and \textit{MODEL CODE} (1980).

\textsuperscript{164} \textit{See infra} note 31.

\textsuperscript{165} Prior to the \textit{Model Rules}, the \textit{Model Code} provided the ethical framework for the legal field. \textit{ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY} 3 (1979). Like the \textit{Canons of Professional Ethics} that served as its basis, the \textit{Model Code} was largely comprised of “ethical considerations” that were “aspirational in character” and representative of “the objectives toward which every member of the profession should strive.” \textit{Id}. The \textit{Code} further stated that the rules were not “mandatory in character” since their violation would be met with no disciplinary measure. \textit{Id}.

\textsuperscript{166} John Austin described “laws” which rely on moral authority as a sole mechanism of enforcement as “imperfect law.” John Austin, \textit{Legal Positivism’s Challenge to Natural Law Theory: A Positivist Conception of Law}, in PHIL. OF LAW 32-42 (1995). This argument rests on the thesis that the essence of a law is the presence of a command. \textit{Id}. Austin describes laws that have no purpose of enforcing compliance as mere “desires” that lack a sense of command. \textit{Id}. While expressed “desires” and “commands” may share certain common elements, Austin holds that only “commands” should be recognized as law in the complete sense. For a more favorable interpretation of aspirational laws, see generally LON L. FULLER, \textit{THE MORALITY OF LAW} (Rev. ed., 1969). For insight into the substantial influence of this book on the use of aspirational laws in the writing of the \textit{Model Code of Professional Responsibility}, see David Luban, \textit{Rediscovering Fuller’s Legal Ethics}, 11 GEO. J. LEGAL ETHICS 801, 806 (1998).

\textsuperscript{167} For a discussion of the complex hermeneutic and jurisprudence issues involved in deciphering the meaning and scope of legal rules, \textit{see} Joseph Raz, \textit{Dworkin a New Link in the Chain}, 74 CAL. L. REV. 1103 (1986).

\textsuperscript{168} And indeed, it would be difficult to assert that any explicit assertion is without some implicit meaning. “It is a universal feature of human communication that what is said or communicated is more than what is explicitly stated and includes what is implied.” \textit{See id}. at 1106.

\textsuperscript{169} One must obey since both are equally part of what is communicated. \textit{See id}.
Once we have agreed upon the need for an enforceable rule rather than an aspirational standard, is there a reason to prefer implicit phrasing over explicit phrasing? The question boils down to whether objective standards exist in ways that allow us to decipher the meaning and scope of language. If such standards do exist, then clearly, for purposes of understandable definiteness, we ought to pursue the most explicit expression of our goals. If, however, we are without such standards, it might be preferable to have implicit laws that are structured in a way that fosters a degree of indeterminacy. While concrete, explicit, hard-line rules might offer easily ascertained answers, these fixed answers may be blind to circumstances unimaginable at their creation. Implicit laws, however, necessarily contain a degree of vagueness that ideally provides space for third party decision-makers to tailor the law to the variances and realities of the moment.

Despite the fact that an implicit law may result in a more realistic application of justice, it may also serve to befuddle the everyday citizen who attempts to ascertain and obey the law. Is the law to be found in its explicit text, or is the law what we predict to be the possible implicit meanings that may be derived by a third party in the future? While indefiniteness might help us to address the concerns of the moment by interjecting the wisdom of a third party, it also prevents us from being completely aware of our legal obligations since the wisdom of the third party is often an unpredictable variable. To some, the trade-off of using indeterminate language is dangerous and contrary to traditional principles of fairness.

Despite the risks, many believe that an ADR consultation rule is worth explicit wording. They want to move ADR from a good idea that might be useful in some circumstances to a normative requirement of legal practice. The question then becomes whether the profession wants to go so far in our civil justice system as to make ADR the default mode for litigation? Will we have to "force" recalcitrant, old-fashioned attorneys to incorporate ADR into their practices?

It is understandable that the profession will be wary of yet one more regulatory mandate. Nonetheless, as this Paper suggests, such regulation may be necessary. The challenge is how to formulate a mandatory rule with the least bureaucratic externalities placed on the profession and the least intrusion into the necessary trust between attorneys and clients.

CONCLUSION

As this Paper suggests, leaving the Model Rules "as is" merely perpetuates confusion. It allows the obligation to exist in unarticulated form. No matter how adroit the tacking and filling, this approach would quickly veer into "fair notice"

170. It should at least be noted that ADR is more appropriate in some instances than others.
problems and violate due process as understood by contemporary administrative law jurisprudence.\footnote{See, e.g., General Electric Co. v. EPA, 53 F.3d 1324, 1334 (D.C. Cir. 1995); Cates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986).}

Similarly, while the case-management solution captured in many court rules may force ADR onto the attorney-client agenda, it will not solve the analytical question of who makes the choice. Further, as suggested above, it may cause ADR to be discussed only after a dispute has "ripened" into litigation.

As a practical matter, in approaching this issue, the ABA Standing Committee on Ethics and Professional Responsibility must choose between a precatory rule urging client consultation on ADR or a mandatory rule concerning client consultation on ADR. I have discussed a precatory rule above and will discuss the mandatory option below.

A. A MANDATORY RULE

To a great extent, the entire discussion whether ADR consultation should be mandatory is a judgement as to the mainstreaming of ADR in the practice of law. Under existing ethical rules, a lawyer is required to explain substantive options to their clients. It is only if one posits that ADR is outside the normal scope of legal practice that one will support an aspirational ADR consultation rule.

This is especially true in the matter of the "work" of lawyers which, in America at least, encompasses a relatively unbounded list of possible tasks and projects.

But we should not make the mandate triggered solely on an attorney's subjective belief as provided in a Kansas Bar opinion, which states that "[w]hen a lawyer's professional judgment indicates ADR is a viable option, the lawyer should discuss that option with the client . . . ."\footnote{Kan. Bar Ass'n, Professional Ethics — Advisory Comm., Informal Op. 94-01 (1994).} Instead, I would argue for language analogous to that employed in the Rules of the Supreme Judicial Court of Massachusetts which provide that "[t]here will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation."\footnote{MASS. ANN. LAWS S. JUb. CT. Rule 5(5) (emphasis added).}

If one takes this approach, it would not be necessary to consider limiting the ADR consultation requirement to matters where litigation is contemplated\footnote{See infra App. II.} or to suggestions of ADR by opposing counsel as in Michigan.\footnote{State Bar of Mich., Standing Comm. on Professional and Judicial Ethics, Op. RI-262 (1996) (referring to Model Rules 1.2(a), 1.4(a)-(b) and 2.1). The Michigan Rule differs from the ABA draft in that the duty it articulates goes beyond providing information about ADR to require a recommendation of ADR where is a reasonable option. In my view, the duty is more appropriately to provide information as to available options rather than to recommend particular options.} The ADR option...
can be relevant to cases before they go to litigation or even in transactional matters that most likely will not go to litigation. Similarly, ADR options do not become reasonable or appropriate merely because they are introduced by an adversary. The responsibility of a lawyer to fully inform clients of options should not be conditioned by the proposal of adversaries.

B. DRAFTING RECOMMENDATION

One of the least satisfying features of the existing efforts to codify "ethics" is the lack of analytic clarity regarding what specific rules mean. In contrast to the approach of general tenets used in the old ethical considerations, the existing codification process is designed as a vehicle for professional regulation — whether self or otherwise. One example of the confusion that arises from this newer regulatory approach is the uncertainty as to where to locate an ADR consultation requirement.

As noted, states have based some ADR consultation requirements as duties under their equivalents of Model Rules 2.1 or 1.4(b). Yet many times states throw all the texts together in a "hodge-podge" of precedent. For example, when the ABA Dispute Resolution Committee based an ADR consultation argument on Model Rule 2.1, and then learned that Model Rule 2.1 was off the table, the committee quickly changed gears and made the argument that ADR consultation belonged in Model Rule 1.4(b).

A problem associated with attempting to codifying an ADR obligation in Model Rules 2.1 and 1.4(b) is that Model Rule 2.1 refers only to a lawyer's duty to inform his client of "moral, economic, social and political factors." As such, the rule pertains to a lawyer's duty to render advice about things that are extra-legal. ADR should not be placed in the context of Model Rule 2.1 because the very premise that supports the implementation of the rule is that ADR has become fully integrated in the legal system. The textual support is inconsistent with the factual finding that justifies the requirement.

It is understandable why many are eager to put an ADR requirement somewhere within the Model Rules; however, it should be remembered that placing an ADR option in Model Rule 2.1 would understate the legal significance of ADR by equating it with amorphous extra-legal considerations and would furthermore be logically inconsistent with any duties enumerated in Model Rule 1.4(b). For reasons of analytical necessity, if an ADR requirement is to be enacted, it is most appropriately placed only in the context of Model Rule 1.4(b).

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176. One author suggests that in drafting a modern business contract, the competency of an attorney might be questioned if he fails to include a dispute resolution clause. See Warmbrod, supra note 10, at 810.

177. See supra notes 38-40 for states that use Model Rule 2.1 as a basis for an ADR consultation requirement. See infra notes 45-47 for states that use Model Rule 1.4 as part of the basis for an ADR consultation requirement.

178. See supra note 45.

In considering revisions to the *Model Rules*, whether to *Model Rule* 2.1 or *Model Rule* 1.4, the ABA ought to adopt a formulation like that found in the ABA Section of Dispute Resolution Proposed Draft One which provides: "[a] lawyer has a duty to inform his client about the availability and applicability of alternative dispute resolution procedures that are reasonably appropriate under the circumstances."  

This ABA Proposed Draft contains components reflected in the many different state versions of rules and opinions governing the "duty" of an attorney to advise clients regarding alternatives to litigation. First, the language establishes clearly that the attorney is under a duty. Second, pursuant to such duty an attorney must provide not only notice of the availability of ADR, but also the applicability thereof to the client's action. Finally, the language "reasonably appropriate under the circumstances" is an objective standard that may more easily be evaluated by reviewing bodies to determine compliance therewith.

The Proposed Draft tracks language used by the Michigan State Bar which held that: "[a] lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client's interests . . . ." Here, of course, the non-consulting attorney has wiggle room. But a disciplinary committee or a court can objectively review the issues of reasonableness or appropriateness.

An alternative to an explicit provision in the *Model Rules* is to reference discussion of the ADR duty in a "comment" to the *Model Rules of Professional Conduct*. However, it is important to note that the "[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the [Model] Rules." In that regard they may be viewed as similar to interpretive regulations or statements of policy in the federal regulatory process. Such "guidance" as we know, lacks the force of law, but states the

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182. This follows California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, Ohio and Texas, which impose a mandatory duty. See infra App. I.

183. The Kansas Bar Opinion implies that an attorney should discuss the option with his client, implying that the applicability of ADR to the particular context should be discussed.


186. See id.
agency's position on the law and informs us as to the kinds of situations the agency would consider inappropriate.187

If one were to use the Comment approach, I would add a proposed Comment, to Model Rule 1.4, as follows:

A lawyer should take into consideration, in relevant and appropriate circumstances, alternatives to litigation that may further the client's interests and provide the client with this information in order to assist the client in making an informed decision as to what avenue should be pursued to achieve the legal objective sought. In some circumstances, providing notice of the availability of alternatives to litigation may be sufficient and, in other cases, the applicability of alternatives may need to be discussed in greater detail.

The ABA need not worry about being too precipitous in promulgating a mandatory ADR requirement as there is a sense in which the debate over ADR disclosure may soon be overcome by events. Just as the owl of Minerva flies only at twilight, so will the ABA be facing the issue of ADR disclosure at a time when the practice realities have significantly changed. We are already in the dispute resolution age, not the litigation age. Thus the Alternative Dispute Resolution Act of 1998 requires every Federal District Court to institute an ADR scheme.

Once these federal district court programs are operating, every attorney who envisions some federal practice will have to educate himself, and equally important, organize his practice to incorporate ADR options into the fabric of his communications with his clients. Thus, many of the transactional costs adverted to in this Paper188 will be reduced.

As one commentator has suggested, "not only is ADR here but it is becoming a standard way of resolving legal disputes."189 The rules of ethics ought to recognize this change.

187. See supra text relating to notes 162-63.
188. See supra text relating to notes 12-20.
189. See McClanahan, supra note 120, at 5 (quoting Virginia State Bar Ethics Counsel James M. McCauley regarding the proposed Virginia Rules of Professional Conduct).
APPENDIX I

FIFTY STATE SURVEY: IS THERE A DUTY TO ADVISE CLIENTS OF ALTERNATIVE DISPUTE RESOLUTION OPTIONS?*

THE FOLLOWING STATES HAVE A PRECATORY DUTY: Arkansas, California, Colorado, Delaware, Hawaii, Louisiana, Massachusetts, New Jersey, New Mexico, Virginia

STATUTES OR COURT RULES:

Arkansas: Attorneys are “encouraged” to advise their clients regarding ADR options and to “assist” them in selecting the most appropriate procedure. Ark. Code Ann. § 16-7-204 (Michie 1997).

California: “[A]ttorneys representing family law litigants are encouraged to advise their clients of the availability of mediation as an alternative means of dispute resolution.” San Diego County Super. Fam. Ct. L.R.

Louisiana: The Louisiana Mediation Act encourages attorneys to discuss mediation options with their clients. La. R.S. 9:4101-4112.

Massachusetts: “There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation.” Mass. Ann. Laws S. Jud. Ct. R. ch. 3.


PROFESSIONAL RESPONSIBILITY OR ETHICS CODES:

Colorado: “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.” Colo. R.P.C. 2.1.

Delaware: “Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution.” Del. R. S. Ct. 71(B) (Delaware State Bar Association Statement of Principles of Lawyer Conduct).

Hawaii: “In a matter involving or expected to involve litigation, 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.” Haw. R. S. Ct. R.P.C. 2.1.

“A lawyer should raise and explore the issue of settlement and alternative dispute resolution in every case as soon as the case can be evaluated and, if feasible, mediation should be encouraged.

Specifically, a lawyer who manifests professional courtesy and civility:

a. Advises the client at the outset of the availability of alternative dispute resolution.

d. Considers whether the client’s interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other form of alternative dispute resolution.” Hawaii State Bar Guidelines of Professional Courtesy and Civility § 11.

**New Mexico:** “In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes.” N.M. R. Ct. (A Lawyer’s Creed of Professionalism of the State Bar of New Mexico).

**Virginia:** “Purely technical legal advice . . . can sometimes be inadequate. It could also ignore, to the client’s disadvantage, the relational or emotional factors driving a dispute. In such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances.” Proposed Va. R.P.C. R. 2.1 cmt. 2.

**The following states have a mandatory duty:** California, Connecticut, Georgia, Minnesota, Missouri, New Hampshire, Ohio, Texas, Virginia

**Statutes or Court Rules:**

**California:** “Prior to the pre-trial status conference, counsel shall confer with the client and discuss the mediation program, and shall ask the client for authorization to participate in the mediation program.” Bankr. S.D. Ca. L.R. 7016-4.

**Connecticut:** Where a pre-trial conference is deemed necessary, both the parties and the attorneys shall attend and shall consider “alternative dispute resolution options to trial.” Conn. Super. Ct. R. Civ. P. § 14-13.

**Minnesota:** The court will provide parties and attorneys with information about ADR options available. “Attorneys shall provide clients with the ADR information.” Minn. Gen. R. Prac. 114.03.

**Ohio:** “Before the initial pre-trial conference in a case, counsel shall discuss the appropriateness of ADR in the litigation with their clients and with opposing counsel.” Ohio Gen. R. 16.03 (Stark County).
“I shall counsel you with respect to alternative methods to resolve disputes.” Ohio S. Ct. App. V (Statement on Professionalism, A Lawyer’s Creed, and A Lawyer’s Aspirational Ideals). “As to clients, I shall aspire ... [t]o fully informed decision-making. I should: (1) Counsel clients about all forms of dispute resolution.” Ohio S. Ct. App. V.

Texas: “Before the initial conference in a case, counsel shall discuss the appropriateness of ADR in the litigation with their clients and with opposing counsel.” S.D. Tex. L.R. 20(A)(1).

“Upon order of the Court entered early in the case, the parties shall submit a report addressing the status of settlement negotiations ... and evaluating whether alternative dispute resolution is appropriate in the case. Counsel shall certify in the report that their clients have been informed of the ADR procedures available in this district.” W.D. Tex. L.R. CV-88(a).


Texas: “I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.” Tex. Ct. R. II (The Texas Lawyer’s Creed — A Mandate for Professionalism).

Virginia: “A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.” Proposed Va. R.P.C. R. 1.4(c).

“This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client’s goals than the initial process chosen.” Proposed Va. R.P.C. R. 1.4 cmt. 1a.

THE FOLLOWING STATES HAVE AN IMPLIED ETHICAL DUTY: Kansas, Michigan, Pennsylvania

Kansas: “When a lawyer’s professional judgment indicates ADR is a viable option, the lawyer should discuss that option with the client, whether or not the issue is raised by opposing counsel or the court.” Pursuant to the Model Rules of Professional Conduct as adopted by Kansas, if opposing counsel or the court suggests ADR, “the lawyer must advise the [his] client of the benefits and disadvantages of the ADR techniques proposed.” Kansas Bar Association, Professional Ethics-Advisory Committee, Informal Op. 94-01(1994).

Michigan: “[I]f counsel for the opposing party offers to resolve the pending dispute through alternative dispute resolution forums, a lawyer is required to

“A lawyer has an obligation to recommend alternatives to litigation when an alternative is a reasonable course of action to further the client’s interests, or if the lawyer has any reason to think that the client would find the alternative desirable.” State Bar of Michigan, Standing Committee on Professional and Judicial Ethics, Op. RI-255 (1996) (1996 WL 381527).

Pennsylvania: Where the opposing attorney offered to “submit the dispute to a third party neutral to mediate the case,” and the plaintiff’s attorney “rejected the offer without discussing the defense request with his client,” the attorney failed his professional responsibility to keep his client informed, unless the client had previously indicated that such a proposal was not “acceptable.” The opinion further suggests that where additional discovery expenses were incurred, that “[t]he attorney probably should not charge . . . the client if the attorney’s refusal to convey the request for mediation to the client may have been the cause of his or her incurring the expenses of trial preparation.” Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Op. 90-125 (1991) (1991 WL 787516).
APPENDIX II

FIFTY STATE REPRESENTATIVE SURVEY: RULES OF CIVIL PROCEDURE*

STATE COURT RULES:

Alabama: “Mediation [non-binding] is mandatory for all parties” in certain instances, e.g., where all parties agree, upon motion by a party or upon motion of the court sua sponte. Ala. Code tit. 6, ch. 6 § 6-6-20 (Michie 1997).

Alaska: A court may direct attorneys for the parties to appear before it to “facilitat[e] the settlement of the case, including the use of alternative dispute resolution measures.” Alaska R. Civ. P. 16(a)(5).

Arizona: A party may request or a judge may by motion, schedule a pretrial conference, at which ADR may be considered. Ariz. R. Civ. P. Rule 16. Civil rights public accommodation and services statute encourages use of alternative dispute resolution to resolve disputes arising under the provision. Ariz. Rev. Stat. § 41-1492.09 (Michie 1997).

Arkansas: “It is the duty of all trial and appellate courts of this state ... to encourage the settlement of cases and controversies pending before them by advising the reference thereof to an appropriate dispute resolution process agreeable to the parties ....” Ark. Code Ann. § 16-7-202(a) (1997).

“...It is the duty of all the elements of government expressed or implied ... and they are hereby authorized, to use dispute resolution processes in resolving any and all disputes, cases, or controversies in which they may be directly or indirectly involved ....” Ark. Code Ann. § 16-7-203 (1997).


Georgia: “The Georgia Supreme Court encourages every court in Georgia to consider the use of ADR processes to provide a system of justice which is more efficient and less costly in human and monetary terms. The Georgia Supreme Court strongly urges that courts with established mediation programs cooperate with courts seeking to establish new programs.” Ga. Ct. R., ADR IV. Courts that have adopted a court annexed or court referral ADR program, “shall make information about ADR options available to all litigants.” Ga. Ct. R., App. A., Rule 1.1.
Illinois: At the case management conference counsel shall consider “the advisability of alternative dispute resolution.” Ill. S. Ct. R. 218(a)(7). Certain actions are subject to mandatory arbitration. Ill. S. Ct. R. 86.

Iowa: Among the topics that may be considered at a pre-trial conference is “[t]he possibility of settlement and imposition of a settlement deadline or the use of extrajudicial procedures to resolve the dispute.” Iowa R. Civ. P. 136(c)(7).

Kentucky: “During any status conference, the Court will address and the parties shall be prepared to discuss (a) alternative dispute resolution . . . .” Ky. R. Ct. 708(A)(a) (Jefferson Cir.).

Louisiana: The Louisiana Mediation Act encourages attorneys to discuss mediation options with their clients. La. R.S. 9:4101-4112.

Maryland: Should the court order a scheduling conference, the parties may be required at such conference to consider “available and appropriate forms of alternative dispute resolution.” Md. R. Civ. P. 2-504.1(c)(1).


Michigan: At a pre-trial conference, “the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including [] whether mediation or some other form of alternative dispute resolution would be appropriate for the case.” Mich. R. Civ. P. 2.401(C)(1)(h).

Minnesota: “All civil cases are subject to Alternative Dispute Resolution (ADR) processes,” except provisions made in the rules. Minn. Gen. R. Prac. 114.01. “After the filing of an action, the parties shall promptly confer regarding case management issues, including the selection and timing of the ADR process.” Minn. Gen. R. Prac. 114.01.

Missouri: If counsel determine after conferring with their clients and other attorneys “that referral to alternative dispute resolution has no reasonable chance of being productive, they may opt out by so advising the court, in writing, within thirty days” of referral to alternative dispute resolution. Mo. S. Ct. R. 17.03.


Nebraska: The Dispute Resolution Act provides for mediation and other forms of dispute resolution through referral to “nonprofit dispute resolution centers”
which "can make a substantial contribution to the operation and maintenance of the courts of this state by preserving the court's scarce resources for those disputes which cannot be resolved by means other than litigation." Neb. R. Civ. P. § 25-2902(8).

**Nevada:** "Pretrial conferences shall include settlement negotiations." Nev. Ct. R. 9(B).

**New Mexico:** At the pre-trial conference, participants "may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute." N.M. Ct. R. Civ. P. 1-016(C)(7).

**New York:** In the Commercial Division, Supreme Civil Court for New York County, all parties to commercial actions "shall be obligated[] to attempt in good faith to achieve early resolution of their dispute by use of appropriate forms of nonbinding Alternative Dispute Resolution (ADR)." N.Y Ct. R. App. G.

**North Dakota:** "At any conference under this rule consideration may be given . . . to: (9) Settlement and the use of special procedures to assist in resolving the dispute . . . (16) Such other matters as may facilitate the just, speedy, and inexpensive disposition of the action." N.D. R. Civ. P. 16(b)(9), -(16).

**Oregon:** "All civil disputants shall be provided with written information describing the mediation process, as provided by the Dispute Resolution Commission." Or. Rev. Stat. § 36-185 (1997).

**Rhode Island:** "In any action the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: . . . [s]uch other matters as may aid in the disposition of the action." R.I. Super. Ct. R. Civ. P. 16(5).

**South Carolina:** "[T]he court may in its discretion . . . direct the attorneys for the parties to appear before it for a hearing to consider: . . . [s]uch other matters as may aid the disposition of the action." S.C. R. Civ. P. 16(a)(8).

**South Dakota:** "Prior to the trial of any action, the court . . . shall, after consulting with the attorneys for the parties . . . enter a scheduling order that limits . . . [t]he date or dates for conference before trial, final pre-trial conference and trial [or] [a]ny other matters appropriate to the circumstances of the case." S.D. R. Civ. P. § 15-6-16.

**Utah:** At pretrial management conferences consideration may be had of "matters as may aid in the orderly disposition of the case." Utah R. Civ. P. 16(a)(6), (b)(11).

**Tennessee:** Among the topics that may be considered at pre-trial conferences is "the possibility of settlement or the use of extrajudicial procedures, including alternative dispute resolution to resolve the dispute." Tenn. R. Civ. P. 16.03(7).

**Vermont:** "In any action, the court may . . . direct the attorneys for the parties to appear before it for a conference to consider . . . [s]uch other matters as may aid in the disposition of the action." Vt. R. Civ. P. 16(6).
Virginia: "The court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider... such other matters as may aid the disposition of the action." Va. S. Ct. R. 4:13(8).

Wyoming: At the pre-trial conference, among the subjects that may be considered is the use of alternative dispute resolution procedures. Wy. R. Civ. P. 16(c)(9).

FEDERAL DISTRICT LOCAL COURT RULES:

Alabama: Alternative Dispute Resolution Plan "aims to encourage the use of ADR in part by granting the parties discretion to decide to employ any number of ADR processes available through private means." M.D. Ala. L.R. 16.1(c).

A judge may refer the parties as part of the scheduling order to engage in one of the forms of ADR, as provided for in the Civil Justice Expense and Delay Reduction Plan. The "court encourages litigants to resolve their disputes prior to trial through a program of voluntary mediation." Bankr. N.D. Ala. L.R. 9019-2; see also M.D. Ala. L.R. 16.2.

California: Section VIII(B) of the Case Management Pilot Program provides that within one hundred days of the filing of the complaint, trial counsel "shall meet and confer" regarding "alternative dispute resolution procedures." N.D. Ca. G.O. 34. "Counsel and client shall certify that both have:

1. Read the brochure entitled Dispute Resolution Procedures in the Northern District of California;
2. Discussed the available dispute resolution options provided by the court and private entities; and
3. Considered whether their case might benefit from any of the available dispute resolution options.? N.D. Ca. L.R. 16-12(a).

Colorado: Section II of the Civil Justice Reform Act Expense and Delay Reduction Plan provides that the attorneys "shall" attend the conference "prepared to address all matters related to discovery, motions, settlement conferences, and all other aspects of the litigation." D. Colo. L.R. 29.1. Further, "[t]he judicial officer presiding will discuss alternative dispute resolution possibilities." Id.


Delaware: "Matters to be considered at the Rule 16(b) conference will include: ...(4) whether the matter could be resolved by voluntary mediation or binding arbitration." D. Del. R. 16.2(b)(4).

District of Columbia: At the meeting required in accordance with Rule 26 of the Federal Rules of Civil Procedure the parties "shall discuss... [w]hether the case could benefit from the Court's alternative dispute resolution (ADR) procedures." D.D.C. Civ. R. 206(c)(5).
Florida: Attorneys for the parties "shall" be required to meet and "[d]iscuss the possibilities for prompt settlement or resolution of the matter, and whether mediation or the use of an other alternative dispute resolution process might be helpful in that regard." N.D. Fla. L.R. § 6(F) (Civil Justice Expense and Delay Reduction Plan).

Hawaii: All parties "shall attend in person or by counsel" the pre-trial scheduling conference, "and shall be prepared to discuss . . . [a]ppropriateness of special procedures such as . . . reference . . . to the Judicial Panel on Multidistrict Litigation alternative dispute procedures." D. Haw. L.R. 253-3(a)(9).

Idaho: Prior to the scheduling conference "attorneys will be required to communicate between themselves with respect to [the c]onsideration of Alternative Dispute Resolution." D. Idaho L.R. 16.1(a)(8).

Indiana: "Counsel for the parties should appear at an initial pretrial conference prepared to express themselves effectively with respect to . . . [w]hether there is a probability of disposing of the case through . . . mediation or alternative dispute resolution methods." N.D. Ind. L.R. 16.1(d)(11).

Kansas: At the final pretrial conference, the feasibility of mediation, arbitration or other alternative methods of dispute resolution shall be considered. D. Kan. Ct. R. 16.1(b)(10).

Louisiana: Counsel shall attend the scheduling conference, at which they are to come "fully prepared" to "discuss other alternatives available to assist the litigants in resolving their dispute, including . . . mediation or arbitration." W.D. La. R. § 11(b)(4) (Civil Justice Expense and Delay Reduction Plan).

Maine: On the "standard track" for purposes of case management, counsel are to "confer and discuss" prior to the scheduling conference, regarding "the various alternative dispute resolution options." The agenda for the scheduling conference includes "ADR options." Further, "[d]uring the conference the judicial officer shall be aggressive in exploring the advisability and utility of ADR." D. Me. L.R. 16.3(B)(3) et seq.

Mississippi: Counsel are to meet and discuss "ADR recommendations" prior to the case management conference. D. Miss. R. § 3(I)(A) (Expense and Delay Reduction Plan).


New Hampshire: "ADR will be discussed at the preliminary pretrial conference." D. N.H. L.R. 53.1(a).

New Jersey: "At or after the initial conference, the Magistrate Judge shall, after consultation with counsel, enter a scheduling order which may include, but not
need be limited to the following: . . . any designation of the case for arbitration.”

New York: As part of the Civil Justice Expense and Delay Reduction Plan for the U.S. District Courts for the Eastern and Southern Districts of New York, the court and counsel “shall address . . . the feasibility of settlement or alternative dispute resolution” at the case management conference. S. & E.D.N.Y. R., App. H(5)(f).

North Carolina: The ""Initial Attorneys Conference' (""IAC") is the first required conference in which counsel for all parties shall confer. During this conference counsel shall discuss and agree upon, if possible, the following matters: . . . whether the case is suitable for reference to ADR." W.D. N.C. R. I(B)(3) (Civil Justice Reform Act Plan).

Ohio: Under the Differentiated Case Management system, among the issues that shall be determined at a case management conference is “whether the case is suitable for reference to an ADR program.” N.D. Ohio L.R. 16.1.

Oklahoma: Prior to the case management conference, counsel “shall confer and discuss . . . [w]hether a settlement conference or other alternative dispute resolution mechanism should be employed.” N.D. Okla. L.R. 16.1(C)(13).

Pennsylvania: At the second pre-trial conference, the parties shall submit a plan for the preparation for trial, and shall include deadlines for events such as “any proposed use of alternative dispute resolution procedures.” E.D. Pa. L.R. § 3:02 et seq. (Civil Justice Expense and Delay Reduction Plan).

Texas: “Prior to the Management Conference, attorneys for each party shall make the required disclosures . . . and shall have conferred with the other attorneys in the action concerning . . . alternative dispute resolution.” E.D. Tex. L.R. CV-16(a)(2), -(c).

Washington: At the scheduling conference, “counsel shall . . . state whether there is a significant possibility that early and inexpensive resolution of the case would be fostered by any alternative dispute resolution ("ADR") procedure.” W.D. Wash. R. 16(a).

West Virginia: Prior to the scheduling conference the parties “shall” meet to “consider alternative dispute resolution processes.” S.D. W. Va. R. 2.01(b)(4).

Wisconsin: At the Federal Rule of Civil Procedure Rule 16 conference “the judicial officer shall determine whether a case is an appropriate one in which to invoke . . . the referral of the case for . . . alternative dispute resolution.” E.D. Wis. Ct. R. 7.
APPENDIX III

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