Advising Clients about CDR Options and Litigation –
What Is a Lawyer's Responsibility?

A lawyer's obligation to advise clients about alternatives to litigation arises in several ways. This article explores the timing and requirements for providing this advice so that clients make an informed decision about Complementary Dispute Resolution ("CDR") options, and also considers what advice lawyers should give clients about the option to litigate a family dispute.

The Court Mandate to Advise of CDR Alternatives

The New Jersey courts have mandated the filing of an Affidavit (or Certification) of Notification of Complementary Dispute Resolution Alternatives with the first pleading in every case.[i] This affidavit must be signed by both attorney and client, stating that the party has been informed of the availability of CDR alternatives, including, but not limited to, mediation, arbitration, and collaborative law (NJ Family Collaborative Law Act, N.J.S.A.2A:23D-1 through 18), specifically in the form prescribed by the court in Appendix XXVII-A or XXVII-B of the court rules.[ii] The affidavit must also state that the party received descriptive materials about these alternatives in the proscribed document entitled "Divorce-Dispute Resolution Alternatives to Conventional Litigation" ("the Materials"), which is the only form approved by the New Jersey Supreme Court for this purpose.[iii]

The information provided in the Materials is minimal, with only a paragraph or two about mediation and arbitration. Until the Supreme Court revises them, the Materials make no mention of collaborative family law, so there is no guidance to lawyers as to what they must tell clients about this option.[iv]

The preliminary statement in the Materials evidences the goal to present clients with meaningful information about available options aimed at avoiding the cost, delay, public forum and contentiousness of litigation. Thus, it stands to reason that this information should be

provided early -- prior to selecting litigation as an option. Otherwise, the advisement is perfunctory, ineffective, and presumes that litigation is the most appropriate option.[v] The court rules require only that, *by the time of filing a complaint or an answer*, parties are advised of these alternatives. The time of filing may be immediate or it may be many weeks or months after an attorney has been retained, when the litigation option has been selected, and the paperwork prepared to file the complaint. Thus, the information provided in the Materials on alternatives to litigation is not only insufficient to give clients a real understanding of the options, the requirement to provide this information comes into play at a point when it has little or no significance and litigation is already underway.

To a limited degree, the Court rules require more than merely handing a document to a client. The Certification by Attorney and Client required by Rule 5:402(h) also requires both attorney and client to certify that they have "discussed...the complementary dispute alternatives to litigation contained in" the Materials. Based on a literal reading of the rules, that discussion may be nothing more than asking whether the client has read and understands the Materials. Presently, that pertains only to mediation and arbitration. As to collaborative family law, the certification is silent. The Rules of General Application also require more than merely providing a form to clients. In addition to recognizing CDR as a "an integral part of the judicial process," the rules specify that "attorneys have a responsibility to become familiar with" those options "and inform their clients of them."[vi] Again, however, there is no specific guidance on when or in what detail attorneys should meet this responsibility.

Use of CDR Alternatives in Conjunction with Litigation

For many litigants, some CDR options remain available to them after filing a complaint. Both mediation and arbitration can co-occur with litigation. Parties in contested family matters

may be required to participate in mediation on custody issues, presumably early on in the case, and later on economic issues after appearing before the Early Settlement Panel (ESP).[vii] These court-sponsored mediation programs are post-filing and are not optional.

As of September 2016, litigants in family law cases can now elect to have their case assigned to an arbitration track. This option, unlike the court-sponsored mediation programs, is voluntary. Thus, the provision of information about arbitration at the point of filing a complaint or an answer may still have value to the client who may later elect to take the case to arbitration for a more expedient result.

Collaborative family law, however, must be completely separate from any contested court process. Litigated cases, by definition, cannot be handled in a complementary or parallel way with collaborative family law. Collaborative family law is defined as "a procedure intended to resolve the family law dispute without intervention by a tribunal."[viii] The collaborative process is entirely "voluntary and may not be compelled."[ix] Parties and lawyers in a collaborative case enter into a Participation Agreement, which must specify that if the case is filed as a litigated matter, the lawyers must withdraw from further representation and the collaborative process terminates.[x] Likewise, if a case is in litigation and the parties decide they wish to proceed in a collaborative process, the complaint and any counterclaim must be withdrawn.

Informed Decision-Making

The requirement of informed consent is essential to the practice of law, and is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[xi] Lawyers must "explain a matter to the extent

reasonably necessary to permit the client to make informed decisions regarding the representation.[xii]

Collaborative practice more specifically requires parties submitting disputes to a collaborative process do so based on informed consent. This is because the process imposes a significant limit on the scope of representation that the lawyer can accept: the lawyer is precluded from representing the client in contested litigation. The New Jersey Advisory Board on Attorney Ethics ruled that, in collaborative cases 1) lawyers must advise clients of the risks associated with collaborative practice (i.e., lack of formal discovery, potential for increased costs if the process fails and the parties go forward with litigation and new lawyers), and 2) clients must give informed consent.[xiii]

When considering engaging in a collaborative process, lawyers have a duty to assess whether the limited scope of representation is in the client's interests. This requires "a determination that must be made in the first instance by the lawyer, exercising sound professional judgment in assessing the needs of the client." If based on that assessment, the lawyer concludes that the collaborative process will serve the client's interests "then this limitation would be reasonable and thus consistent with RPC 1.2(c)." [xiv]

Informed consent is also required for arbitration and arguably for other forms of CDR as well. The 2016 court rule amendments require parties in a litigated case who elect arbitration or other alternate dispute resolution to complete and sign a questionnaire confirming they have been advised of the risks of the process they are choosing.[xv] This questionnaire relates not only to arbitration, but, by its terms, potentially to other alternate dispute resolution for litigated cases electing a CDR option.[xvi]

Informed Consent in Contested Litigation

Case law governing the practice of family law is based on contentious cases that parties could not settle. But just because contested litigation has been the most publicized and traditional way to handle divorce does not mean the process does not carry with it its own risks. The risks are numerous and substantial when parties opt for contested litigation. There is risk in having a third party decide a family's future. There is risk in a client expecting the lawyer will make sure every issue, great and small, is presented in evidence to the court in a way that persuades the trier of fact to find in that client's favor. There is the risk of substantial delay due to an overburdened judicial system that can take years to not only schedule a trial, but to complete it and provide a final decision. There is the risk of losing time from work, school or caring for children in order to spend days in court. There is the risk of spending tens of thousands of dollars, decimating the family finances, and raiding accounts that were intended for children's educations and parents' retirement. There is risk in the collateral damage to family relationships as a result of contentious litigation. And there is the risk that the final decision will be unsatisfactory, despite all the other costs and sacrifices.

Lawyers should not presume that clients are aware of all these risks. If lawyers are required to assess a client's interests in opting for a collaborative process, or mediation, or arbitration, they should also have a responsibility, if not a duty, to assess a client's interests when choosing litigation. The rush to file a complaint may well be one of the most detrimental steps a lawyer can take. Many clients in family law matters are highly emotional, upset, confused, angry and frightened about their futures. Filing a complaint before making sure the client understands all of his or her options is a failure to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Informed consent further arguably includes advising clients about the advantages of the various options, not only about the risks and disadvantages. If clients are to weigh one process against another, they should know how each process will potentially benefit them, as well as the risks being taken.

Lawyers' Responsibility to Steer the Client in or out of Litigation vs CDR Options

Lawyers are expected to assess client needs and provide meaningful information so clients can choose the most appropriate dispute resolution option. This requires knowledge and experience on the part of the lawyer. Understanding the client involves an assessment of many factors, including: the emotional state of the client; the complexity of the issues; the likelihood of difficulty getting full disclosure (either from the other side or from your own client); the available finances to fund the process; the client's need for structure or flexibility; the need for privacy; and the client's level of knowledge/sophistication and need for advocacy and guidance.

This assessment is not something easily accomplished in an initial consultation. Still, some lawyers convince clients (or are convinced by clients) to immediately file a complaint, without a thorough assessment of what is in the client's interests. Lawyers can consider seeking assistance to assess a client's capacity and tolerance for litigation versus CDR alternatives. There are licensed mental health professionals with backgrounds in forensic work, who can meet with clients for this specific purpose, many of whom are trained in mediation and collaborative process. Their input can be enormously helpful in making this assessment.

Inherent conflicts of interest exist between lawyers and clients depending on the lawyer's level of comfort and expertise handling different processes. In the private practice of law, a lawyer's interest in taking the case may be "at odds with the client's interest in being served by another lawyer with different expertise."[xvii] The ways in which a lawyer describes the various

options affects how a client views them. Lawyers who know little about mediation, arbitration or collaborative law have a limited ability to discuss and adequately inform clients about the risks and benefits of each process. Lawyers, like most people, tend to make the best presentation of what they know and what they are comfortable doing. Lawyers who are uncomfortable with litigation may be more likely to steer clients towards CDR options. Lawyers who are uncomfortable with CDR options may more likely steer clients towards litigation. Lawyers who are highly effective as part of a team, may recommend working cooperatively or in a collaborative process. Others who are most effective in the more traditional "lawyer-in-charge" mode may promote litigation.

While these potential conflicts are "commonplace," it is nonetheless important for lawyers to be aware of their biases, comfort level, strengths and weaknesses, and be honest with clients about what they can and cannot do for them. There are volumes of written materials about mediation, arbitration and collaborative law, as well as training programs offered in New Jersey and elsewhere. Lawyers can and should make an effort to educate themselves in order to understand and, in turn, meaningfully discuss the options in order to assist clients in making informed choices about the course they follow in resolving their family disputes.

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[i] R.5:4-2(h).

[ii] Appendices XXVII-A and XXVII-B. R.5:4-2 pertains to "all family matters." The rules do not distinguish between dissolution and non-dissolution matters, so technically this affidavit is required in both case types.

[iii] "Divorce -- Dispute Resolution Alternatives to Conventional Litigation" can be found at www.judiciary.state.nj.us/notices/2006/n061204.pdf. This form does not include a reference to collaborative divorce, as the Supreme Court has not yet amended it to conform with the 2016 amendments to R. 5:4-2(h). Note also that this is entitled "Divorce," which could be argued to limit its applicability.

[iv] Pending revision of the Materials, the following language regarding collaborative law has been submitted to the AOC for consideration, and has been added by some attorneys to the Materials:

> "Collaborative law is a voluntary dispute resolution process in which parties to a family dispute resolve the issues in their case without bringing contested issues to litigation. Both parties must be represented by attorneys, who are retained for the limited scope of settling the case. The parties and their attorneys enter into an agreement (called a "Participation Agreement") by which

they agree to maintain confidentiality of communications and information exchanged in the collaborative process, to voluntarily disclose information that is material to the issues in their cases, and to settle their differences without bringing them to the court or other tribunal for determination. The parties may jointly retain other professionals as needed to participate in the collaborative process.

The parties make the final decisions, so the judge does not decide any of the issues. If the process is terminated before agreement is reached, and either party seeks to address issues through litigation, both parties' attorneys, as well as any other professionals participating in the process, must withdraw from further representation in the matter."

[v] Appendix XXVII-B of the Court Rules is a certification for the self-represented party to indicate he/she has read "Divorce -- Dispute Resolution Alternatives to Conventional Litigation" That document currently does not include any mention or description of collaborative law. Thus, the self-represented litigant is not informed of all the options as required by R.5:4-2(h). There is no indication elsewhere that the courts are in any other way providing this information.

[vi] R.1:40-1

[vii] R.1:40-5(a) requires "screening" of custody matters to determine whether issues are genuine and substantial and, if they are, the matter must be referred to mediation. R.1:40-5(b) requires mediation following Early Settlement Panel appearances that do not result in settlement.

[viii] N.J.S.A. 2A:23D-3(c)

[ix] N.J.S.A. 2A:23D-6.

[x] N.J.S.A. 2A:23D-7(b)(6); N.J.S.A. 2A:23D-7(e)

[xi] R.P.C. 1.0(e)

[xii] R.P.C. 1.4(c)

[xiii] NJ Advisory Committee on Professional Ethics at Opinion 699, December 12, 2005.

[xiv] Id.

[xv] Appendix XXIX-A

[xvi] It does not appear that all clients heading to custody mediation, MESP mediation or otherwise must all complete this questionnaire. Several of the questions relate to decisions by an arbitrator or umpire, which are not applicable in a mediation process, which is non-binding. Thus, other than arbitrations, it is not clear what types of CDR require completion of the questionnaire.

[xvii] N.J. Advisory Committee on Professional Ethics at Opinion 699, December 12, 2005