

Alternative Dispute Resolution and Ethics

Is there a Duty to Discuss ADR with Clients?

So, a new client is sitting in your office and outlining the contours of an ongoing dispute with her business partner. The client is wellheeled and, at the moment at least, pretty ticked off about her partner's recent actions. She has raised her concerns with her partner, and he has denied or dismissed them.

Based on the client's account of events, you advise her that the facts give rise to several causes of action and you can file a multi-count Complaint. Certainly, you are likely to discuss that option with the client. But, do you have an ethical obligation to discuss any other options with your client, that is, to advise your client about the availability of alternative processes for resolving the dispute?

No Maryland Rule of Professional Conduct expressly answers that question. A former Comment to Rule 2.1 stated: "It *may* be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." In response to an effort to amend the Comment by changing the "may" to "shall," the Comment was changed to read:

"when a matter is likely to involve litigation and, in the opinion of the lawyer, one or more forms of ADR are reasonable alternatives to litigation, the lawyer should advise the client about those reasonable alternatives."

Now, the Comment instructs that the lawyer "should" advise the client about the existence of ADR when, in the opinion of the lawyer, ADR is a reasonable alternative to litigation, a curious development in response to an effort to strengthen the lawyer's obligation to advise clients about ADR.

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