Navigating Informed Consent To The Road That Ought To Be More Traveled

By Vicki Shemin

While the practices of collaborative law and mediation are innovative shifts from the traditional adversarial legal model in the area of conflict resolution, lawyers must still adhere to the ethical rules of the legal field and obtain informed consent from clients involved in the processes. To borrow (and turn) a phrase from Professor Christopher Fairman, "Collaborative law and mediation's glass ceiling is legal ethics."

Although practitioners may have a broad-spectrum understanding of what constitutes informed consent, paying attention to the nuances of its practical application has far-reaching implications. In one sense, informed consent may refer to a client's agreement to a professional's proposed option after the professional has identified the alternatives, laid out the material strengths and weaknesses of other options, and obtained the client's consent to proceed with the professional's recommendation. However, informed consent may also refer to a client's choice among various alternatives laid out by the practitioner. Ultimately, in either case, the client gives consent — but the emphasis shifts depending on whether the client chooses among the panoply of alternatives presented as opposed to opting in to or out of the professional's proposed recommendation. Informed consent is particularly important in mediation and collaborative law because of the high level of client autonomy that is exercised in each process (collectively, "DR processes," and purposely not identified as "ADR processes," as they should be considered mainstream options as opposed to alternative dispute resolution options). In these DR processes, which by their nature and definition are limited-scope representations, parties are negotiating directly with each other and partnering to generate solutions as they address their independent and collective interests. While these types of negotiations are empowering for the parties, commencing a DR process without paying attention to the fundamental ethical considerations of informed consent is tantamount to malpractice at worst and unprofessional conduct on a variety of levels.

In our day-to-day work as busy practitioners, it is easy for us to be lulled into a false sense of security about fulfilling our ethical responsibility to our clients (or potential clients) in connection with advising them regarding informed consent. In truth, many of us may consider this to be part of the "housekeeping," "elevator speech," "spiel" or similar part of the intake process that does not recognize the due weight that should attend this gravely important part of our client-service delivery. Just as we would not want our internists to forgo detailing the potential side effects of a newly prescribed medication, so too do we as mediators and collaborative law professionals bear an equal responsibility to ensure that our (potential) clients have full informed consent prior to entering into a DR process.

Try this thought experiment. Read anew the embedded informed consent document you hand your client, and then imagine you are in a medical setting where you likely often

feel bewildered and overwhelmed; now, imagine the client coming into the legal arena — likely similarly feeling bewildered and overwhelmed — and try reading through your agreement to mediate (ATM) or collaborative law process agreement (CLPA) as a lay person would. In truth, it is probably not easily digestible to the average client. Perhaps we would serve our clients well if we initiated a discussion with them that echoes the judge's colloquy on the day of the divorce hearing: "Have you read this agreement line-by-line? Do you understand it? Have you had an opportunity to consult with counsel about the agreement if you wish? Are there any questions that I can answer for you? Do you think your spouse has read it? Do you think your spouse understands it? Do you think your spouse has had an opportunity to consult with counsel, if he or she so wishes? Are you prepared to abide by the parameters detailed for you and your spouse as set forth in the agreement? Do you understand the mediator's/collaborative law practitioner's obligations as outlined in the agreement? Do you understand the so-called 'disqualification agreement' in the CLPA and how that might prejudice your legal position in this action? Bearing all of that in mind, are you still prepared to go forward?"

As a "belt-and-suspenders approach," we as practitioners may want to consider whether, as part of our informed consent protocol, we, in fact, have an affirmative duty to screen our cases. To this end, John Lande and Gregg Herman's promulgation of "Factors Affecting Appropriateness of Mediation, Collaborative Law and Cooperative Law Procedures" is highly instructive and invaluable for conflict resolution modes that span the spectrum from unassisted negotiation to mediation to collaborative law to cooperative law to traditional litigation.

As to the basics that professionals should cover, here is a representative sampling of the rules, standards and factors that govern how lawyers (in particular) should screen for the appropriateness of cases for the mediation or collaborative law process and ensure that informed consent is obtained before entering into a formal DR process with a client.

Some Rules Of The Road (Along With Standards And Factors)

The International Academy of Collaborative Professionals (IACP) has Minimum Standards for Collaborative Professionals and for the Collaborative Process. These professional standards are distinctly different from the Rules of Professional Conduct for attorneys, as they are non-binding: Violation of the IACP standards does not subject the practitioner to disciplinary action, although the collaborative professional might be ousted from IACP.

- Minimum Ethical Standard for Collaborative Professionals 2.2 (and Comments): The "Collaborative Lawyer must inform the prospective client(s) of the full range of process options available for addressing any legal matter(s), and provide information reasonably necessary to enable the client to make an informed process choice."
- Minimum Standards for Introductory Collaborative Practice Trainings and Introductory Interdisciplinary Collaborative Practice Trainings 2 (c)(4): "Ethical

considerations including the need to discuss carefully the available process options with the client, informed consent, integrity, professionalism, diligence, competence, advocacy, and confidentiality."

Unlike the IACP standards, the American Bar Association's Model Rules of Professional Conduct subject attorneys under its auspices to disciplinary action. Lawyers are required to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." (Model Rules of Professional Conduct R. 1.4(a) (2).) In the DR context, the goal would be for the lawyer to ensure that clients understand their procedural options and anticipate what may happen during the process of these limited-scope representations. In considering all forms of dispute resolution, lawyers should help clients realistically weigh the advantages and disadvantages of the alternatives, taking into account the facts, circumstances, risks and benefits as part of client intake, orientation, interviewing and counseling.

Above and beyond these standards, there are many factors that practitioners should consider in assessing the appropriateness of a case for mediation or collaborative law, and whether or not a party's ability to provide informed consent may be impaired. These factors include, but are not limited to:

- Personal motivation/suitability of the lawyers and/or the parties (a willingness and ability to participate);
- Trustworthiness (a belief that the other party will not be forthcoming with information will hinder the transparent nature of the process);
- Domestic violence/state of mental health/substance abuse (these factors may cause intimidation or fear that impairs a party's comfort level in dealing so closely with the other spouse); and
- Risk of disqualification (if there is a high risk that the parties cannot resolve the matter outside of court, it may not make sense to begin the collaborative law process that will likely disqualify the attorney).

Informed Consent In DR Agreements

Oftentimes, ATMs include similar provisions to those found in a CLPA, such as informed consent for information sharing, interest-based negotiations and respectful communications. Both agreements are structured to incentivize settlement, not to pressure clients into making decisions against their best interests. Clients must provide informed consent to three core aspects of the collaborative law process that are particularly important because they illustrate how the attorney-client relationship differs in collaborative law as compared to litigation: (1) limited-scope representation; (2) confidentiality; and (3) honest and full disclosure without court intervention.

Limited Scope Of Representation

Lawyers have a duty to screen potential cases for appropriateness and obtain clients' informed consent to use collaborative law. This rule authorizes lawyers and clients to agree on a limited scope of representation "if the limitation is reasonable under the circumstances and the client gives informed consent." (Model Rules of Professional Conduct R 1.2 (c).) Similarly, the Restatement of the Law Governing Lawyers provides that agreements limiting the scope of representation are approved if "the client is adequately informed and consents, and [...] the terms of the limitation are reasonable in the circumstances." (Restatement (Third) of The Law Governing Lawyers § 19 (2000).) Summarizing the disqualification provision without explaining the implications does not satisfy the ethical requirement. It is crucial to assess the need for professional services and risks of litigation at the outset because termination of a collaborative law process would require the disqualification of all professionals from participation in any subsequent litigation.

Like collaborative law, mediation is a voluntary process, but there is a different disqualification provision for a mediator. In many ATMs, the document emphasizes that mediation is a voluntary process but adds this important twist:

> Either party may terminate the mediation for any reason by written notification to the mediator and to the other Party. The mediator may terminate his/her participation in the mediation if: (1) the parties fail to pay for the mediator's services, (2) continuation of the mediation would involve a violation of applicable ethical rules, or, (3) other reasonable cause. In the event of such termination, the mediator shall maintain the confidentiality of all information to which the obligation of confidentiality applies under this Agreement.

Consider the ethical conundrum that might arise if an untenable/confidential secret is disclosed by one party to the mediator versus the quandary of a collaborative law attorney who may be duty bound to withhold sharing of the secret.

Confidentiality

Confidentiality is approached differently in mediation than in the collaborative law (CL) setting. "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." (Model Rules of Prof'l Conduct R 1.6(a).) However, CL meetings and mediation involve the parties negotiating with each other in the presence of a third party, which could include opposing counsel, opposing parties, financial planners, coaches, mental health counselors and (of course) mediator(s). Therefore, clients expressly need to waive the attorney-client privilege of confidentiality.

Unquestionably, there are vocal critics of CL who have illuminated the problem of the quite possibly unattainable twin goals of the CL commitment to share material and relevant information, coupled with the lawyer's constrained ethical duty to maintain client secrets as privileged and confidential. Perhaps informed consent is a bridge

towards helping to resolve the otherwise seemingly unresolvable. Although parallels to what unfolds in mediation are often pointed to as an example of resolving the inherent conflict, the essential difference is that in CL, parties are being asked out of the gate to enter into binding contracts with an advance express agreement to disclose certain information. Although it has not, unfortunately, become common practice, this author strongly advocates for having the CLPA remain unsigned until there have been two to three meetings so that the parties can assess whether the process and its constraints are workable for each of them — including the all-important duty to disclose. This, too, should be part of informed consent so that clients do not feel compelled to sign binding contracts from the get-go.

Some states have adopted portions of the Uniform Collaborative Law Act (UCLA) and have retained its provisions on privilege of collaborative law discussions. Other states have otherwise adopted the UCLA, but have reserved the portions of their code corresponding to the UCLA's provisions on privilege. In effect, then, a state may opt in to or out of (in whole or in part) what is and is not deemed a privileged communication. Here in Massachusetts, the Legislature has not enacted a collaborative law statute so, arguably, collaborative law discussions are governed by contract law. A contract cannot alter the rules of evidence; thus, unless and until the Legislature amends the rules of evidence to provide for privilege, four-way meetings are not privileged in Massachusetts. Notwithstanding, as stated in some model collaborative law process agreements: "The entire collaborative law process is confidential and shall be treated as a compromise negotiation for the purposes of the rules of evidence and other relevant provisions of state and federal law."

The scope of confidentiality is decidedly different in mediation. In Massachusetts, the mediation process is confidential and privileged if certain conditions are met. Except when disclosure is required by law or court rule, the parties and the mediator agree not to disclose communications made by the parties or their counsel in connection with the mediation. Exceptions to confidentiality, as described in an ATM, may include disclosing information to one's attorney, therapist or financial advisor; disclosing information concerning child/elder abuse/neglect; and risk of serious harm to an individual or unlawful activity to the appropriate authority. Confidentiality and privilege also do not apply to evidence relating to the liability of the mediator in a subsequent suit against the mediator or disciplinary proceedings against the mediator. Parties may also agree that they will not seek to obtain testimony of the party or the mediator regarding the mediation or disclosure of the mediator's file.

Honest And Full Disclosure Without Court Intervention

As part of informed consent, it is also of particular importance for prospective clients to be aware that there is no court intervention in CL or mediation and no formal discovery procedures. Therefore, this voluntary process requires trust in the inherent principles of CL and mediation (which should be memorialized in writing in the CLPA and ATM)

because parties who sign on the proverbial dotted line submit themselves to abiding by the pledge to provide all relevant financial and other pre-trial information, and there is no ability to use the authority of the court to compel a party to "do the right thing" or order a party to refrain from transferring or dissipating marital assets. Aspirationally, parties agree not to withhold or misrepresent material and relevant information, not to secretly dispose of marital property, and not to fail to disclose the existence or true nature of assets and obligations. Informed consent on this issue is singularly significant because it may concern issues of privacy and safety. Practitioners should gauge the comfort level of their prospective clients in the DR process, characterized by transparency and trust, because there is no accountability measure imposed by the court.

Conclusion

The ever-evolving nature of the professional roles of lawyers as collaborative law practitioners and mediators continuously raises the bar of whether there is a need to re-evaluate the ethical rules and standards reflected in collaborative law and mediation, two mainstay pillars of DR. While the scope of this article emphasizes the duty of lawyers in certain sections, the central place and importance of financial, mental health and other collaborative law practitioners in the collaborative law field is noted and heralded. Undisputedly, the issue of informed consent is of paramount importance to protect not only prospective clients' interests, but also those of practitioners who, if they do not comply with ethical obligations, may be liable for professional discipline. To avoid potential malpractice issues and to better fulfill our informed consent responsibilities to prospective clients, professionals should provide comprehensive and balanced descriptions of conflict resolution processes — not limited to only those DR processes in which the client may express interest, but to examine other processes that clients might consider, such as mediation, collaborative law, cooperative negotiation, arbitration, med-arb, arb-med, neutral expert evaluations, settlement special masters, conciliation, court-annexed DR processes and, of course, litigation.

In summary, bearing in mind the applicable rules, standards and factors that comprise the ethical signposts of mediation and collaborative law — combined with a review of how each of us currently handles informed consent in our respective practices — may lead us to consider spending a lot more time idling on this very important path before having our prospective clients sign on the dotted line and letting them pass "go." It surely beats the alternative of ruefully reflecting back in the rear-view mirror.

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