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When "Yes" May Actually Mean "No": Rethinking Informed Consent to ADR Processes

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Ethical Compass
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By Professor Elayne E. Greenberg

Introduction

It is time for us to rethink how to achieve meaningful party consent to ADR processes such as mediation and arbitration. I, along with my colleagues Professors Jeff Sovern, Paul F. Kirgis and Yuxiang Liu, recently contributed to the growing body of research finding that a party's consent to use an ADR process rather than utilizing a court to resolve the dispute is too often neither informed nor consensual.[1] In our empirical study "'Whimsy Little Contracts' With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements," we found a paucity of consumer awareness and understanding of arbitration clauses in pre-dispute consumer contracts.[2] Although our research was about the degree of a party's informed consent to arbitration agreements in consumer contracts, I believe the findings have broader applicability to our understanding of a party's informed consent beyond consumer contracts and to ADR processes in general. This research challenges the long-held assumptions and ongoing practices of many ADR professionals, including myself, who believe that a party's decision to participate in dispute resolution should be a voluntary and informed decision. In this column, I will extrapolate the lessons learned from this research and question how we might make informed consent a more meaningful concept when using and conducting such ADR processes.

In Part One, I begin our discussion by introducing the different meanings and interpretations of informed consent in the ADR processes of arbitration and mediation. Then in Part Two, I illustrate the lack of meaningful party informed consent in ADR processes, by highlighting our research findings that show how consumers have little awareness of or understanding about their arbitration agreements in their consumer contracts. In Part Three, I offer the multiple causes for this lack of awareness and understanding. I conclude in Part Four with some suggestions about how we might address this nuanced and contextual problem.

Part One: What Does Informed Consent Mean in the ADR Context?

Lawyers and neutrals agree that a client's *informed consent* is a pre-requisite for a client to opt-in to ADR processes.[3] Regardless of whether parties choose to participate in arbitration, mediation or a hybrid process, parties should have quality, comprehensive and comprehensible information to fully understand their dispute resolution options and meaningfully decide which dispute resolution option, if any, to use in lieu of traditional court processes. Moreover, to ensure that parties truly give their informed consent, many lawyers and neutrals, as part of their ethical obligation, regularly provide parties with both a written and verbal explanation of the process prior to the beginning of an arbitration or mediation. Advancing their ethical mandate even further, many lawyers and neutrals also provide parties with a written and verbal explanation of the ADR process multiple times and in many forms, including promotional material, engagement letters, consent forms, media presentations and confidentiality agreements, all to ensure that parties to an ADR process are giving their informed consent to use an ADR process and forgo their right to resolve their dispute in court.

Although there is general agreement among legal and ADR professionals that informed consent should be a predicate to participation in ADR, there is little consensus about how to make the determination of informed consent and whose responsibility it is to do so.

By way of illustration, the Supreme Court's current predilection towards arbitration and the enforcement of pre-dispute arbitration agreements indicates that the concept of "informed consent" is being interpreted broadly.[4] As interpreted by the Court, the mere existence of a contract to arbitrate is sufficient evidence of party consent. Absent from the Court's inquiry is the extent to which the contracting parties were adequately informed to give meaningful consent. Similarly, the arbitrator's ethics codes do not explicitly address an arbitrator's ethical obligation to ensure party informed consent. For example, the Jams' Arbitrators Ethical Guidelines Introduction B provides:

> Arbitration—either entered into voluntarily after a dispute has occurred, or as agreed to in a pre-dispute clause—is generally binding. By entering into the Arbitration process, the Parties have agreed to accept an Arbitrator's decision as final.…[5]
> Thus, again the contract to arbitrate is deemed to be adequate informed consent.

Again, the ethics code deems the contract to be evidence of a party's informed consent to arbitrate.

Shifting to the mediation context, we see that informed consent is interpreted to be a central part of a mediator's broader ethical obligation to honor a party's right to self-determination.[6] Specifically, Standard IA Self-Determination provides in relevant part that:

> A mediator shall conduct a mediation on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to *process* (emphasis added) and outcome.[7]

However, the mediator's ethical obligation to ensure a party's informed consent is limited.

> A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.[8]

Thus, we see that depending on the context, informed consent appears to have different meanings. Moreover, it remains unclear who should be the insurer of party informed consent: the party himself, his lawyer or the ADR neutral.

Part Two: What "'Whimsy Little Contracts' With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements" Tells Us About Consumers' Informed Consent to Arbitration in Consumer Contracts

Our online survey of 668 consumers showed that most consumers are unaware of and do not understand the import of the arbitration clauses in their consumer contracts.[9] Let me provide you with a thumbnail sketch of our survey and the research results. As part of the study, we showed survey participants a representative consumer contract that had an arbitration clause. The survey participants were representative of the general American population with respect to age, income, education and ethnicity. We intentionally selected a sample contract in our survey that was more readable than typical credit card contracts with an arbitration clause. Moreover, the arbitration clause in our contract was printed in bold and referenced in three of the seven pages of the sample contract. Finally, the provisions in the arbitration clause that informed consumers that they were waiving their rights to sue in court, participate in a class action, have a jury trial and appeal the arbitrator's decision were in italics and ALL CAPS.

The magnitude of the survey participants' misinformation and lack of awareness about the arbitration clause shatters any remaining illusions that parties are giving meaningful informed consent to ADR processes. For example, ninety-one per cent did not realize that the contract both had an arbitration clause and that it would prevent them from going to court. Of the 303 respondents who claimed to never have entered into an arbitration contract, eight-seven per cent did in fact enter into at least one consumer contract that included an arbitration clause.

We also tested the salience of the arbitration clause by asking the survey respondents to recall five of the words or phrases they had read in the sample contract. Tellingly, only 23 of the survey respondents explicitly mentioned arbitration or a phrase relating to arbitration. Respondents' failure to recall the arbitration clause in the contract suggests that arbitration specifically, or dispute resolution generally, was not a primary consideration for survey participants when reviewing consumer contracts.

These survey results have compelled me to question what is preventing ADR consumers from being aware of the presence of the arbitration clause and understanding what they are agreeing to. From our study, providing written explanation and having key phrases in bold and ALL CAPS are not enough to provide informed consent.

Part Three: What Is Preventing Consumers of ADR Services from Giving Meaningful Informed Consent?

We can posit many reasons, none absolute, but each shedding some light that explains why, in part, parties might not be fully informed about their dispute resolution choice despite our best efforts.

Some may insist that all consumers of dispute resolution service are not alike, and that there is a difference between sophisticated and unsophisticated consumers of dispute resolution services. Thus, the less sophisticated, such as the typical consumer entering into a consumer contract or the employee entering into an employee contract, require different types of information in a different context before they can truly give meaningful informed consent than the more sophisticated consumer of dispute resolution services such as business people. Others may counter that it doesn't matter if an individual is a sophisticated or unsophisticated consumer of dispute resolution services. Informed consent should never be taken for granted.

Offering a different perspective, in her thought-provoking book "Boilerplate," Mary Jane Radin suggests multiple reasons to explain why a party may not read and understand Agreements to Participate in dispute resolution, if these agreements are viewed as one more piece of "boilerplate" that is not worth reading.[10] First, some may feel it would be a waste of time to even read the terms because they are unlikely to understand them.[11] Second, a party may need the services now, and believe there are no viable alternatives.[12] Third, a party may be unaware that there may be any implications of participating in a dispute

resolution process and feel no need to read the Agreement to Participate.[13] Fourth, a party may trust the provider would not harm him, and believe there is no need to read the terms.[14] Fifth, a party may think that if the agreement does actually contain onerous terms, then that agreement wouldn't be enforceable. Sixth, a party may regard the person providing the contract as having greater power, so the party really has no choice but to agree.[15] Seventh, many parties don't believe that a dispute will actually occur in the future and that a time will come when they will have to exercise their legal rights.[16]

Our survey participants' illustrative comments ratify the many reasons Radin offers about why people may ignore such "boilerplate" as arbitration clauses in consumer contracts.

"I don't see how they could preclude us from filing a class action suit through a whimsy little contract."[17]

"No way they can tell me that they can screw up and then I have no recourse."[18]

"Based on my memory of what I think I've read has happened. And an old cliché, 'You can't sign away your rights.'"[19]

Still, another viable explanation of why consumers of ADR services may ignore or choose not to focus on information that will help them give their informed consent is their unwavering belief that court will always remain their default option. After all, our media replays and reinforces ongoing images of people securing justice in court. Conspicuously absent from the media are images of people also securing justice in arbitration, mediation or hybrid processes.

Part Four: How Then Might We Provide Meaningful Informed Consent?

As we re-visit this threshold issue of meaningful informed consent for consumers of dispute resolution, we realize that there is no quick fix. Rather, the problem has many causes. This more nuanced understanding of the problem suggests that different types of interventions are needed depending on the circumstances, including the sophistication of the parties, the context of the dispute and the type of ADR process employed.

For example, there are those ADR activists who are trying to create a more perfect world and influence the media to present a fuller media portrayal of the multiple ways beyond court that people in conflict may resolve their disputes. Possibly, if mediation and arbitration become more mainstream concepts in the public's eye, that will be an important step to ensuring more meaningful informed consent.

Another suggestion is that there be different standards of informed consent for different ADR processes and different types of ADR consumers. Possibly the standard for appropriate informed consent should differ if the parties are just deferring their access to court as in mediation, or if they are permanently relinquishing their access to court as in arbitration. After all, if you are going to relinquish your Constitutional rights to court access, jury trial and class actions, you must have enough information to understand the ramifications of that choice. Similarly, unrepresented or less sophisticated consumers of ADR services should be provided with a different decision-making process to ensure they are making meaningful informed decisions about ADR.

A third idea is to continue thinking about what we as committed ADR professionals might do differently in our practice and our teachings. Helping parties achieve meaningful informed consent is a practical challenge that doesn't have one immediate solution. I believe our collective thoughts, reflections and sharing will help advance our assumptions and practices.

Endnotes

1. Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, Social Science Research Network* (October 29, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516432.
2. *Id.*
3. *See, e.g.*, NY Rules of Prof'l Conduct R. 1.0 cmt. 6-7 (2009 as amended through January 1, 2014); Model Standards of Conduct for Mediators Standard I (2005).
4. *See, e.g.*, Prima Paint Co. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Southland Co. v. Keating, 465 U.S. 1 (1984); Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011); American Express Co. v. Italian Colors, 133 S. Ct. 2304 (2013).
5. Arbitrators Ethics Guidelines Intro. (2010).
6. Model Standards of Conduct for Mediators Standard I (2005).
7. *Id.*
8. *Id.* at Standard I(A)(2).
9. *See supra* note 1.
10. Mary Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013).
11. *Id.* at 12.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *See supra* note 1 at 57.
18. *Id.*
19. *Id.*

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