STATE OF WISCONSIN
SUPREME COURT

In re: amendment of Supreme Court
Rule Chapter 20 relating to
Limited Scope Representation

MEMORANDUM IN SUPPORT OF 16-_____

The Director of State Courts, on the recommendation of the Planning and Policy Advisory Committee (PPAC), hereby petitions the court to amend Rules of Professional Conduct for Attorneys to allow Lawyer-Mediators to Draft Settlement Documents in Family Cases. The full text of the proposed amendment is set forth in the Petition.

SYNOPSIS

Couples seeking to divorce are increasingly choosing to navigate the judicial process without benefit of legal counsel. Though this is also occurring with couples seeking to address post-judgment relief or unmarried couples with paternity issues, for brevity, the focus in this memorandum will be divorce. Some participate in court-ordered custody/placement mediation and continue in the court process if agreement is not reached on all issues. They then represent themselves in court, a process that requires the preparation and submission of a variety of legal documents. The results of the process are widely regarded as problematic.

Anecdotally, the documents submitted by these self-represented litigants are sometimes drafted by or with the assistance of non-lawyer mediators, whose activities are not regulated and are beyond the jurisdiction of Office of Lawyer Regulation (OLR). However, although most authorities agree that a lawyer serving as mediator may draft a memorandum of understanding (MOU) reflecting the results of the mediation without violating the Rules of Professional Responsibility for Lawyers (the "Rules"), the general consensus is that lawyer-mediators may not draft any of the specific legal documents that are necessary to obtain judicial relief. The

result is an anomaly: mediators who are not lawyers (and, by definition, do not have the legal expertise of lawyers) are effectively free to draft documents that will be submitted to a court and govern the legal rights of the divorcing couple, while lawyer-mediators, who are subject to OLR oversight, are prohibited from doing so.[1]

This petition seeks to amend the existing Rule governing lawyers acting as neutrals to allow a lawyer who is serving as a mediator in a case arising under Chapter 767 of the Wisconsin Statutes to draft, select, complete, modify, or file documents that confirm, memorialize, or implement the results of the mediation. The underlying premise of the rule is that such drafting is simply an extension of the process of mediation as long as the lawyer maintains a position of absolute neutrality throughout the process and the participants give their informed consent. The Rule sets forth various requirements designed to ensure that such consent is truly informed and that neutrality is preserved. Although the proposed amendment provides that the lawyer-mediator does not assume an attorney-client relationship with either participant, it does impose duties of competence and diligence in the performance of the permitted tasks.

The proposal, which is an outgrowth of the work of a PPAC subcommittee on limited scope representation, has been unanimously endorsed by the Ethics Committee and the Family Law Section of the State Bar of Wisconsin, OLR, the Wisconsin Lawyers Mutual Insurance Company and the Association of Family Court Commissioners. It has been widely vetted with a large number of other constituencies and appears to enjoy their broad support.

BACKGROUND

As noted above, this rule petition is an outgrowth of an initiative to explore and support the concept of limited scope representation, or "LSR." LSR contemplates the creation of an attorney-client relationship in which it is agreed that the scope of the legal services will be limited to specific tasks that the person asks the lawyer to perform. LSR may also be conceptualized as the unbundling of legal services.

In 2010 PPAC created a subcommittee to focus on LSR. On July 16, 2013 the director of State Courts filed petition 13-10 on behalf of PPAC to amend and create rules and statutes to support

and expand LSR. That petition encouraged the use of LSR, proposing rules addressing, among other things, limited appearances in court, ghostwriting, the ability to rely on representations made by clients, communication with clients who are represented by an unbundling lawyer, among other things. The proposed rules were not limited to family cases. Petition 13-10 was adopted by the Supreme Court on June 27, 2014.

In the course of its work, the original LSR subcommittee identified a need to address the role of lawyer-mediators in divorce proceedings and, particularly, the limits on the ability of such lawyer-mediators to draft documents that the participants in the mediation could then use to effectuate the divorce.

THE PROBLEM

Historically, the inability of lawyer-mediators to draft divorce documents was not an issue. Court processes in general and divorce proceedings in particular were originally designed by lawyers and intended to be navigated by lawyers on behalf of clients. Today, however, the underlying premise of such a system no longer applies. An estimated 70% of family court litigants navigate the family court system without the assistance of a lawyer.[2] This is not a trend, but a reality--the majority of people involved in family court cases do not hire lawyers.[3]

It is also noteworthy that in family law, as in civil law generally, the trend is toward resolution through the use of alternative dispute resolution. Mediation of custody and placement issues has been mandatory in Wisconsin since 1987. As a result, the overwhelming majority of **family court** cases – in excess of 95% - are resolved, by written settlement agreements, rather than trials.[4] At the same time, the frequency of divorce (and, with it, judicial proceedings) has not abated. Approximately 50% of all marriages end in divorce according to commonly quoted statistics.[5]

In family cases involving children, achieving a voluntary settlement is especially valuable to the parties. The presence of children guarantees that the parties will have a continuing relationship. The financial, emotional and relational costs that are incurred as a result of a trial are significant. While a small number of family cases require litigation and court decisions,

unnecessarily contested matters with self-represented parties can be harmful to families and overburden the court system.

Although the resolution of divorce and other family issues through mediation is a desirable trend, it can result in problems when neither of the parties has hired a lawyer. In a family case, it is not sufficient that parties reach agreement. They must prepare Financial Disclosure Statements. Their agreement must be reduced to a document acceptable to the court, in the form of a Marital Settlement Agreement. Parties must also prepare Findings of Fact, Conclusions of Law and a Judgment which confirms that the legal requirements for a divorce have been met and incorporates the settlement agreement of the parties. The preparation of these documents is the primary focus of the Rule. In addition, the parties often need ancillary implementation documents prepared, such as title transfer documents, beneficiary designations, instructions to child support agencies, and qualified domestic relations orders.

Although most lawyer-mediators would be competent to prepare such documents, various rules prevented them from doing so. For example, SCR 23.01(2) ("Definition of Practice of Law"), specifies that the selection, drafting or completion of legal documents or agreements which affect the legal rights of a party constitutes the practice of law. At the same time, SCR 20:12.1 ("Former judge, arbitrator, mediator or other 3rd party neutral") prohibits a mediator from representing a person who was a party to a mediation conducted by the lawyer. If the drafting is deemed the practice of law, drafting by a mediator might create an attorney-client relationship in violation of the rule. In addition, SCR 20:1.7(b)(3) ("Conflicts of interest current clients") prohibits a lawyer from representing both parties in a family court action because doing so involves the assertion of claims by one client against another "in the same litigation."[6] These issues have prevented conscientious lawyer-mediators from going beyond the preparation of the MOU.

The result of this is that many litigants are deprived of the best source of legal expertise (short of independent legal representation) and family courts are increasingly faced with parties who come before them unequipped to effectively complete the divorce process they have begun. This includes parties who may have a mediation memorandum which is not legally sufficient or

lack any of the additional legal documents needed. This results in delays and issues for the parties and the courts and also creates a real risk of ineffective judgments and post-judgment conflict.

FORMATION OF THE NEW SUBCOMMITTEE

The original subcommittee believed that lawyer-mediators were qualified to draft legal documents on behalf of both parties and that both parties and the courts would benefit by the provision of these services. It recommended that changes be made to the rules governing the drafting of settlement documents by lawyer-mediators and presented a proposal modelled on a rule adopted in Utah that would allow it to be done in a form of joint representation. Based upon an objection to the proposal by the Ethics Committee of the State Bar of Wisconsin, PPAC declined to approve the proposal and, instead, on August 27, 2013 created a new subcommittee to engage in further study of this issue.

This new subcommittee consisted of ethics experts and a broad cross section of family law practitioners and court officials.[7] It is the work of this new subcommittee that resulted in the current proposal.

THE NEW SUBCOMMITTEE'S ANALYSIS

The new subcommittee first met on August 14, 2014 and rapidly reached consensus on certain premises. There was general agreement that the problem created for the courts by unrepresented parties to divorce proceedings is real and widespread. The subcommittee decided to limit its consideration to the regulation of lawyers, inasmuch as the regulation of non-lawyer mediators would require either revisiting the definition of the practice of law or promulgating a statute governing mediation generally, neither of which were believed to be within the scope of the subcommittee's charge. It also agreed that, while many of the ethical principles under discussion could apply to mediation in other contexts, any proposal should be limited to cases arising under Ch. 767 because this is the field of law with the growing numbers of pro se parties and where the need is greatest for legal involvement. It agreed with the general consensus that a lawyer-mediator may currently only draft a non-legal document that memorializes the agreement

of the parties, commonly called a memorandum of understanding.[8] And it agreed that current ethical rules presented substantial limits on the ability of lawyer-mediators to go further than the MOU and prepare all the documentation necessary to effectuate a mediated final divorce.[9]

Within these parameters, the task of the subcommittee was to determine whether a lawyer-mediator could draft these additional documents while remaining true to the larger value those rules seek to protect, and, if so, what were the necessary changes and conditions for so doing.

During the ensuing months, members of the subcommittee researched and discussed rules enacted by various states, including Utah, Virginia, Tennessee, Oregon, Maine, Massachusetts, Indiana and New York. Some of its members consulted extensively with nationally known experts in the field of divorce mediation and with practitioners in each of these states. The subcommittee found that the approaches taken by many states were of limited utility because they often involved the interplay of their respective codes of ethics for lawyers with other rules or statutes generally regulating the practice of mediation. Similarly, although an Ethical Guidance issued by the ABA section of Dispute Resolution Committee on Mediator, SODR 2010-1, concluded that a lawyer mediator with the experience and training to competently provide additional drafting services was permitted to do more than act as scrivener for parties, its conclusion was dependent on compliance with the Model Standards Governing Party Self-Determination and Mediator Impartiality – standards which have not yet been incorporated into Wisconsin law. From these authorities, the committee came to the same conclusion drawn by Professor Robert Kirkman Collins of the Cardozo School of Law:

> "Currently there is widespread disagreement among the various jurisdictions as to the proper scope of document drafting authority for an attorney practicing divorce mediation." The rules that do exist in each jurisdiction regarding the proper professional parameters of an attorney practicing divorce mediation must, unfortunately, be ferreted out from a variety of state ethics opinions, disciplinary proceedings, Practice Guidelines, and state Court Rules. The answers that do emerge from a review of the fifty states, however, is less a contrasting study in black and white and more of a spectrum approaching "Fifty Shades of Grey"—an array of rules ranging from "yes" to "no". . .with a bewildering variety of approaches in between." *The Scrivener's Dilemma*, supra n. 3 at 694-695 (footnotes omitted).

While no clear path emerged from the subcommittee's review of these other jurisdictions, three overall approaches seemed theoretically possible: first, after helping the parties to reach a mediated solution, the lawyer-mediator could shift roles from neutral to that of advocate for one of the parties; second, the lawyer-mediator could shift roles from that of neutral to that of joint representative (a role which might encompass acting as an "intermediary" as previously defined by former SCR 20:2.2 and former Section 2.2 of the ABA Model Rules); and, third, the lawyer-mediator could draft in the same neutral role as originally undertaken, without representing either party.

The first option was rejected as patently unsatisfactory. Not only is the subsequent representation of a party in mediation by a mediator expressly prohibited by SCR 20:1.12, but all members of the subcommittee believed that such a change of roles would inevitably confuse the parties and could even call into question the original neutrality of the mediator.

The second option was rejected on similar grounds. Although the joint nature of the representation might diminish the appearance of initial partiality, the change of roles would still be confusing, particularly to the parties who have participated in mediation from the outset with an understanding of the lawyer-mediator as a neutral. Even more importantly, the ethical preconditions for joint representation in a matter potentially fraught with adverse interests present daunting and probably insurmountable problems.[10]

Ultimately, the third approach – maintaining neutrality throughout the mediation and subsequent drafting – seemed to best serve the interests of the parties and the courts while remaining true to the Rules' most fundamental principles. The subcommittee believes that allowing lawyer-mediators to provide the legal service of drafting settlement documents while remaining in a neutral capacity is an effective way to support parties' chosen means of dispute resolution that overcomes the obstacles raised in prior literature and the consulted constituents in the process. Moreover, the approach, while perhaps not as effective as providing separate legal representation to each party, would nonetheless greatly improve access to legal services and the courts.[11] This solution benefits all involved, including the public, courts and lawyers.

THE PROPOSED RULE

Existing SCR 20:2.4 ("Lawyer serving as 3rd-party neutral") already addresses some aspects of mediation by lawyers; in general terms, existing subsection (a) permits the practice of mediation by lawyers and existing subsection (b) requires the lawyer to explain his or her role to the participants.

The proposal would add a new subsection (c) permitting a lawyer acting as a mediator in family cases to draft settlement documents while continuing to act in the neutral role of mediator. Such documents presuppose, and are ancillary to, the primary resolution of the dispute: lawyer-mediators would be allowed to "draft, select, complete, modify, or file" the documents needed to "confirm, memorialize, and implement" the resolution already reached through the process of mediation. The essential condition is neutrality: the lawyer must maintain his or her neutrality throughout the process. Moreover, such drafting, etc. is only permitted if both participants give their informed, written consent, and the minimum requirements for such consent are specified. The remaining subsections set forth certain limits on the lawyer's actions, as well as require the lawyer-mediator to exercise diligence and competence in such drafting. Substantial comments are provided to explain the text of the rule.

More particularly:

Subsection (c)(1): This subsection defines the scope of drafting a lawyer-mediator may undertake and sets forth the basic preconditions for providing such services. The basic premise is that the documents will confirm, memorialize, or implement a resolution already achieved through mediation. Just as the lawyer-mediator maintained neutrality in reaching this resolution, so too must he or she maintain neutrality in drafting such documents. Moreover, to undertake such a task, the lawyer-mediator must first obtain the parties' informed consent, the most important component of which is a clear understanding by the parties of the limits of the lawyer's role. The rule specifically requires that the lawyer explain to the parties that the lawyer does not represent either or both of the parties and cannot give legal advice or advocate on behalf of either party. This limitation is further emphasized by the requirement that the lawyer-

mediator advise the parties to seek independent legal advice before signing any documents drafted pursuant to the rule.

Subsection (c)(2): Existing SCR 20:2.4 is conditioned on the lawyer's not assuming an attorney-client relationship with the participants. This subsection clarifies that such a relationship is not created by the act of neutral drafting.

Subsection (c)(3): By their terms, the duties of competence and diligence imposed on lawyers by existing SCR 20:1.1 and SCR 20:1.3 are owed only to clients. The subcommittee believed that, both in order to provide clarity for lawyers and for the protection of the public, these duties should be extended to neutral drafting. This subsection does that.

Subsection (c)(4): The subcommittee believed that the lawyer-mediator should be allowed to file the documents with the court because parties need guidance on how that should be done. However, the subcommittee also concluded that permitting an appearance by the lawyer was likely to confuse the parties about the lawyer-mediator's limited role and could present opportunities for the lawyer to depart from neutrality or the appearance of neutrality. This subsection draws that distinction.

Subsection (c)(5): Existing SCR 20:1.2(2)(cm) ("Scope of representation and allocation of authority between lawyer and client") requires that lawyers who draft on behalf of clients in an unbundled relationship must disclose their involvement. The subcommittee believes such disclosure is also desirable for neutral drafted divorce documents. Since SCR 20:1.2 presupposes a client-lawyer relationship, a separate provision to that effect is required here.

CONCLUSION

The proposed amendment recognizes and responds to the evolution of family law. It would provide family law litigants with access to the help of lawyer-mediators practicing within the code of ethics, who, after assisting the parties to reach agreement freely, knowingly and fairly, could assist them in efficiently and properly completing the family court process. It would also rectify the anomalous inability of lawyer-mediators to help the litigants effectuate the resolution of the dispute that was resolved in mediation while their non-lawyer counterparts do

so. The Planning and Policy Advisory Committee believes the amendment would be a positive step forward for the public, the courts and the legal profession, and urges its adoption.

Dated _____, 2016.

Respectfully Submitted,

The Director of State Courts on Behalf of
The Planning and Policy Advisory Committee

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[1] The definition of the practice of law contains an exception for

> (i) Selection or completion of a legal document, including a legal document created pursuant to statute, administrative rule, or Supreme Court Order, where the document may contain various blanks and provisions to be filled in or completed and selection or completion of the legal document requires only **common or transaction specific knowledge regarding the required information and general knowledge of the legal consequences**. SCR 23.02(2)(i) (emphasis added).

No further definition of "transaction specific knowledge" or "general knowledge of the legal consequences" appears in the Rules. Although determining whether the drafting of divorce documents by non-lawyer mediators constitutes the unauthorized practice of law was not within the scope of either subcommittee's task, a significant number of its members expressed doubt that this exception was intended to extend to the sorts of complex matters frequently addressed in divorce cases, for example, the joint ownership of real estate or retirement benefits or an award of limited maintenance.

[2] The growth in the number of self-represented litigants over the last 30 years in civil litigation has been remarkable. There is no reliable aggregate data on the actual size of the SRL population

in the American courts; however, local data combined with empirical observations have been available. Family law was the first area of unlimited civil law to be seriously challenged by the growth in the numbers of SRLs, and has been a harbinger for the future. In Arizona, for example, the rate of family law cases in which at least one party was without counsel doubled in five years, from 24 percent in 1980 to 47 percent in 1985. By 1990, this rate had grown to 88 percent. By the mid-1990s, in Washington state the rate of family law cases in which at least one party was unrepresented had reached 77 percent, in Massachusetts it was 80 percent, and in Oregon it was 89 percent. In California, during the 1980s, the percentage of family law cases in which at least one party was unrepresented grew from 30 percent to 67 percent and continued to grow throughout the 1990s.

From the California Task Force on Self Represented Litigants - Implementation Task Force Final Report, October 2014 at p. 2-3 (footnotes omitted).

[3] The reasons why divorcing spouses have stopped hiring lawyers are many and complex. The cost of legal representation is a significant factor, but not the only one. The concept of fault is gone from family law, and with it much of the need for a zealous litigator to represent each spouse. Society's attitude toward family law also has changed significantly, further reducing the frequency with which the resolution of family disputes are approached as an adversarial legal contest. Closely related is the growing number of self-represented parties who elect to use non-traditional processes such as mediation, collaborative practice and limited scope representation to resolve their disputes. The availability of these alternatives tends to create a perception that individual representation is no longer necessary.

[4] Robert Kirkman Collins, *The Scrivener's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, 17 Cardozo J. Conflict Resol. 691, 703 (2016) ("*The Scrivener's Dilemma*").

[5] Id.

[6] These issues and others are discussed by Tim Pierce, one of the subcommittee members, in an article appearing in the Wisconsin Lawyer, *Can a Lawyer-Mediator Draft Documents for a Divorcing Couple After Mediation?*, InsideTrack (State Bar of Wis., Madison, Wis.), May 19, 2010. Pierce concludes that drafting of anything beyond the memorandum of understanding is currently prohibited by the Wisconsin Rules of Professional Conduct for Lawyers.

[7] The committee was chaired by Michael Dwyer, Milwaukee County Circuit Judge, who was a member the prior LSR committee. Others who served on the new Subcommittee included (in alphabetical order):

Michael Apfeld – An appellate lawyer, chair of the ethics committee at the law firm of Godfrey & Kahn and a member of the State Bar Ethics committee

Erin Balsiger – An attorney with experience in family law and ADR who currently operated the court service office in LaCrosse when the committee was formed

Steven Bach – An experienced family lawyer and mediator from the Madison firm of Cullen, Weston, Pines & Bach

Barry Boline – An experienced family lawyer and family and judicial court commission from Ozaukee County

Jeff Brown – Pro bono coordinator for the Wisconsin State Bar and staff to the Access to Justice Commission

Dean Dietrich – A labor and employment lawyer, chair of the ethics committee of the Wausau law firm of Ruder Ware and long-time member of the of the State Bar Ethics Committee

Beth Hanan – U.S. Bankruptcy Judge, Eastern District of Wisconsin, formerly an appellate lawyer with the firm of Gass Weber Mullins, past president of the Milwaukee Bar Association and member of the LSR Subcommittee

Susan Hansen – An experienced family lawyer and mediator from the firm of Hansen and Hildebrand in Milwaukee

Theresa Owens – District Court Administrator of District 5 and former staff to the LSR Subcommittee

Timothy Pierce – A Madison lawyer and ethics counsel for the State Bar of Wisconsin

Mary Wagner – Kenosha County Circuit Judge, and past member of PPAC

Thomas Walsh – Brown County Circuit Court Judge

In addition, with the help of Professor Andrea Schneider from Marquette Law School, the subcommittee was able to recruit the help of Monica Chase and Brynn Bemis, third year law students, to assist the Committee with research.

[8] Wis. Stat. s. 767.405 (12)(a) mandates that custody and placement disputes should be referred for mediation with certain limited exceptions. (767.405(5)(a)). While the statute does not explicitly say that the mediator is to draft the agreement, it does mandate that it be reduced to writing and the mediator must certify that the agreement accurately reflects the agreement of the parties. It is accepted practice in Wisconsin that the mediator drafts the MOU.

[9] The problem is not unique to Wisconsin. In "Self Represented Parties in Mediation: Fifty Years Later It Remains the Elephant in the Room" Volume 51, Family Court Review No 1. January 2013, 87-103 the authors describe the uncertainty that prevails throughout the country regarding the issue of what a mediator can draft.

[10] See SCR 20:1.7(b)(3) and cmts. 14, 17 (simultaneous representation of two parties involving the assertion of a claim by one client against the other in the same litigation is non-consentable).

In theory, a comprehensive mediated MOU could eliminate the inherent adversity of parties to a divorce proceeding, but the members of the subcommittee and other constituencies expressed serious doubt whether any MOU could actually foresee and resolve all potential disputes to a degree sufficient to satisfy this Rule. Even were the conflict consentable, the preconditions are many and difficult to satisfy. See, e.g., [cite to old 2.2 and comments; current Tennessee 2.2 and comments.]

[11] For this reason, the proposed solution is not, strictly speaking, "Limited Scope Representation," since the lawyer-mediator does not undertake an attorney-client relationship with either party.