Supreme Court of Wisconsin

DIRECTOR OF STATE COURTS
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Patience D. Roggensack
Chief Justice

16 East State Capitol
Telephone 608-266-6828
Fax 608-267-0980

J. Denis Moran
Director of State Courts

December 6, 2016

Clerk of Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688

RE: Petition #16-04

Dear Ms. Fremgen:

At the November 7, 2016 open administrative rules conference, the Supreme Court requested that the petitioner provide additional information regarding Petition #16-04. As the petitioner on behalf of the Planning and Policy Advisory Committee (PPAC), I submit the following responses to the questions posed by the Court.

1. What percentage of mediators in Wisconsin are lawyers?

A variety of factors, discussed below, makes it difficult to answer the question as phrased (that is, without limitation of subject matter being mediated) with any degree of reliability. However, what evidence there is suggests that, in the particular type of mediation to which Rule Petition 16-04 is directed – family law mediators governed by ch. 767 who charge a fee for their services – the majority of mediators are lawyers.

The field of mediation is sufficiently broad and unregulated that it would be difficult to estimate the overall number of practitioners, much less the proportion who are attorneys. While there are statutory definitions of mediation, see, e.g., s. 802.12(1)(e), there are few requirements for acting as mediator. (One exception is in the area of mandatory mediation of custody and placement disputes, for which there are minimum training requirements. See s. 767.405(4).) We are aware of no area of mediation for which a professional license is required and, hence, no regulatory body to keep track of the number of practitioners. Certainly, many people have received mediation training (the Winnebago Conflict Resolution Center, Inc., for example, has trained about 1,000 people in the past 20 years), but many of those receiving training use mediation skills in their occupations without formally mediating. Some mediators charge for mediating, and others are unpaid volunteers. At the same time, there are numerous Wisconsin statutory mediation programs in place that relate to a wide variety of disputes, including employment law, medical malpractice claims, farmers and motor vehicle dealers. The Federal Government requires mediation in Equal Employment Opportunity cases, and there is a mediation program in the U. S. Bankruptcy

court. Some counties have small claims mediation programs staffed by volunteers, paid mediators or through a mediation organization. There are also many other fields in which some form of mediation occurs; some of these include foreclosure mediation, peer and special education mediation in schools, workplace mediation, and community mediation.

There are, however, some data from which one might infer the percentage of family law mediators who are lawyers as compared to those who have other training. The Milwaukee Family Court Mediation Program has a roster of 37 mediators who mediate cases in the custody and placement mediation program mandated by s.767.405. Of these, eight are not lawyers. Membership levels in two statewide organizations may provide further insight. The Wisconsin Association of Mediators (WAM) has a total membership of 132, but this number does not distinguish between lawyers and mediators with other backgrounds. The State Bar of Wisconsin's Dispute Resolution Section (DRS) supports the work of 700 lawyer-mediators across the state.

In short, it appears probable that a majority of the family law mediation work currently being done in Wisconsin is being performed by lawyers, although authoritative figures are not available.

2. Is SCR 23.02(2)(d)-(providing that a license to practice law is not required for a person serving in a neutral capacity as mediator) sufficient to encompass drafting of settlement documents if this petition is approved?

As the question suggests, mediating itself does not require a law license. Unfortunately, although the rule presumes that mediation, like the other functions listed in the exception, constitutes "[s]erving in a neutral capacity," it neither defines mediation nor sets its boundaries. Whether subsection (2)(d) encompasses drafting settlement documents (including, in this instance, collateral documents that will be filed in court) would seem to depend, at least in the first instance, on whether the non-lawyer mediator preserves conditions of neutrality.

Drafting a memorandum of understanding (MOU) has generally been regarded as falling within the ordinary purview of a mediator. This appears to be a matter of consensus and is confirmed, albeit indirectly, by the language of s.767.405(12), which provides in part that any agreement reached in mediation "shall be prepared in writing, reviewed by the attorney, if any, for each party…." By implication the MOU is prepared by the mediator – for whom, as noted, no law license is required – and that is the universally accepted practice in family law mediation and, perhaps, mediation in general.

Things are less certain when the mediator goes beyond preparation of the MOU. Traditionally, the role of the mediator has ended with the completion of such a document. Moreover, the definition of the practice of law includes, among other things, the "[s]election, drafting, or completion for another entity or person of legal documents or agreements which affect the legal rights of the other entity or person(s)." SCR 23.01(2). At the same time, however, SCR 23.02(2)(i) provides that a license to practice law is not required to complete an approved legal form by filling in the blanks where completion "requires only common or transaction-specific knowledge regarding the required information and general knowledge of the legal consequences." Whether and to what extent these provisions affect the exception

for mediators found in 23.02(2)(d) has not been developed in any authority of which we are aware.

Relying on ethics opinions from Ohio and Utah, Tim Pierce, the State Bar of Wisconsin Ethics Counsel, and a member of the PPAC subcommittee that developed the petition, opined in May of 2010 that the drafting of "pleadings or other documents, such as marital settlement agreements, that are intended to be filed with the court…" is the practice of law. (See http://www.wisbar.org/NewsPublications/RotundaReport/Pages/Article.aspx?ArticleID=7759).

We believe that drafting of those sorts of documents clearly falls within the general definition of the practice of law found in SCR 23.01 and at least presumptively falls outside the exceptions for mediators provided in SCR 23.02(2)(d) or for filling out forms provided in SCR 23.02(2)(i). Such drafting is not within the traditional role of mediators as we understand it. In many if not most instances, the knowledge required for family law issues such as valuation and allocation of retirement benefits, spousal maintenance calculations and tax effects of financial decisions are beyond "general knowledge of legal consequences" even if blanks for such matters are found in approved legal forms. Although we cannot eliminate the possibility that there are family cases of sufficient simplicity that checking boxes, filling in blanks, or providing attachments to mandatory court forms would be permissible by non-lawyers, we doubt whether a mediator lacking a law license would have sufficient knowledge to even determine whether the conditions for neutrality are being preserved. At best, the question of whether filling out court forms is a permissible extension of the non-lawyer mediator's role to fall within the exception may have to be determined on a case-by-case basis.

Whatever the answer to this question for non-lawyer mediators, the proposed petition would not change the definition of the practice of law or the application of that definition to the activities of non-lawyer mediators. It would, however, set forth a clear roadmap for lawyer mediators to preserve neutrality throughout the drafting process.

3. If this petition is granted, will it have the unintended consequence of favoring lawyer mediators over non-lawyer mediators?

The petition is intended to remove a disadvantage under which lawyer mediators currently labor. Self-represented parties who navigate the family court process need assistance in drafting legal documents necessary to finalize and implement their divorce. The professionals whose training equips them to draft such documents are lawyers. Indeed, that parties will benefit by having licensed lawyers "select[], draft[], or complet[e] . . . legal documents" is implicit in the definition and regulation of the practice of law. However, current rules prohibit lawyers acting as mediators from using their legal drafting skills to benefit the parties in mediation, even though mediators who are not lawyers are at least arguably permitted to do so by SCR 23.02(2)(d) and are reported to do so in fact.

If anyone is "favored" by allowing lawyer-mediators to use their legal training and experience in drafting divorce documents, it is the mediation consumer. Divorcing couples will now be able to obtain the needed drafting service from persons both qualified to perform it and subject to judicial oversight, i.e. lawyer-mediators. The degree to which this would

provide lawyer mediators an advantage over non-lawyer mediators will depend entirely on the value the consumer ascribes to such training, experience and oversight.

4. To what extent is mediation required in Wisconsin courts?

By statute, the only mediation that is required in all cases is that set forth in s.767.405 for family law cases, and then only in those cases in which legal custody or physical placement is contested. Since the statute has statewide application, we presume that mediation is mandatory in all counties where such issues arise.

Beyond the requirements of s. 767.405, the mediation of statewide applicability of which we are aware is that provided for in s. 802.12. As noted above, that statute empowers (but does not require) a circuit court to order the parties to mediation in civil cases regardless of subject matter. The extent to which courts actually enter such orders is difficult to determine. In Milwaukee County, the standard scheduling order includes an order that mediation occur before a trial will be scheduled in a civil case. However, civil cases differ from family cases in that many more civil litigants are represented by lawyers. Some counties, by local rule or practice, have referral or volunteer mediation programs in small claims cases, with a distinction that outcomes do not require and extensive legal drafting for agreements, judgments, or implementation. Reliable generalizations are difficult to make.

Thus, while court-ordered mediation is probably widespread, the only required mediation across the state is in s. 767.405 as referenced above.

Please contact Ann Olson at ann.olson@wicourts.gov if any further information is needed.

Sincerely,

J. Denis Moran
Director of State Courts

JDM/AO/lai
cc: Ann Olson