STATE OF WISCONSIN
SUPREME COURT

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

MEMORANDUM IN SUPPORT OF 16-04

Attorney Michael D. Rust hereby submits this memorandum in support of Petition 16-04 to amend the Rules of Professional Conduct for Attorneys to allow Lawyer-Mediators to Draft Settlement Documents in Family Cases.

SYNOPSIS

I am currently the Immediate Past-President of the Wisconsin Association of Mediators, Immediate Past-Chair of the Dispute Resolution of the State Bar of Wisconsin, a current member of the Joint Legislative Study Committee for Access to Civil Legal Services, and the Executive Director of the Winnebago Conflict Resolution Center, Inc. Because of this involvement, I am very aware of the problems facing mediators and divorcing parties in Wisconsin cases. I write this memorandum to the Court in my personal capacity and not in conjunction with any of my professional activities stated above.

I write to support the outcome of the Petition and to urge this Court to go further. I hope that my reasoning for this plea will be made clear hereby.

BACKGROUND

My current practice is completely devoted to mediation. I previously practiced litigation, but have focused my practice entirely on dispute resolution for more than seven years. I have served as a mediator in more than a thousand cases, with a wide range of subject matters. In my role as Executive Director of the

Winnebago Conflict Resolution Center, I oversee a roster of fifty volunteer mediators who mediate approximately five hundred cases per year. These volunteers come to us from varied backgrounds; some are also attorneys. When I, or my mediators at the WCRC, mediate a property division case in a divorce action, we draft a memorandum for the court – which the court reviews and can approve and enforce. We do not assist in drafting Marital Settlement Agreement (MSA) forms, nor will the outcome of the Petition change what we do. I say this only to highlight that this Memorandum is not self-serving.

As someone who regularly speaks on the ethics of mediation and has trained several hundred mediators, I recognize the importance of neutrality and the sometimes competing importance of finality in resolution. I also hear many horror stories from parties and fellow attorneys as to potentially unethical behavior by mediators. It is with this backdrop that I write this memorandum.

It is my sincere hope that this Court grants Petition 16-04. I also believe that it is essential that this Court, in cooperation with all mediators in this state, look further to the oversight of all mediators in Wisconsin. As such, I ask this Court to approve of Petition 16-04 and go further, as outlined below.

APPROVAL OF THE PETITION

Petition 16-04 seeks to create an opportunity for attorney-mediators to assist in compiling MSAs. State Bar of Wisconsin Ethics Counsel Tim Pierce wrote on this subject on May 19, 2010 in Volume 2, Issue 10 of the InsideTrack newsletter of the State Bar of Wisconsin.[1] It was Attorney Pierce's determination that attorney-mediators cannot draft documents for a divorcing couple after mediation. Although this article is not a formal ethics opinion, it has been widely viewed as an expression of the current rule. The Petition seeks to address the issues noted by Attorney Pierce in that article.

[1] Pierce, T., "Can a lawyer-mediator draft documents for a divorcing couple after mediation?" InsideTrack 2010:2:10 (State Bar of Wisconsin, May 19, 2010).

I think Attorney Pierce's conclusion and the out of state that he cites in his article rely solely upon legal ethics grounds and therefore miss a fundamental tenant of mediation. Namely, the requirement that the mediator act in an impartial manner. If the mediator cannot act in an impartial manner the "mediator shall withdraw."[2] When the mediator acts in an impartial manner, the resolution and drafting are a natural and logical outcome of the mediation process. To state that a mediator is impartial only until they begin drafting and compiling a document creates a logical fallacy.[3] Absurdly, it would follow that currently (prior to this Petition's enactment) an attorney could perform egregious acts, become disbarred, and then begin to offer the service of mediation followed by the drafting of an MSA whereas he could not do so now.[4]

Assessing one's ability to remain neutral is a core competency of a mediator, whether that person is an attorney or not. If a mediator cannot remain neutral in the drafting, she should carefully consider whether she can remain neutral in the preceding discussions. There is nothing inherently different about the act of memorializing an agreement that precludes the possibility of a mediator remaining neutral as in the earlier stages of the mediation.

To deny this petition, this Court leaves open the current situation whereby parties who wish to avail themselves of mediation must expend resources on an attorney-mediator, then take their resolution (and their money) to someone else to

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[2] Standard II(C). *Model Standards of Conduct for Mediators*. American Arbitration Association, American Bar Association, and Association for Conflict Resolution (2005). (*Note* that the *Model Standards of Conduct for Mediators* (MSOCM) are not required to be followed by mediators in Wisconsin. The Dispute Resolution Section of the State Bar of Wisconsin has endorsed their use by mediators in this State. ABA Comment 2 to the model rule utilized to create SCR 20:2.4 states that "mediators may be subject to various codes of ethics, such as… [MSOCM]" but this is not a definitive statement. The Wisconsin Association of Mediators has utilized the MSOCM to draft its *Ethical Guidelines for the Practice of Mediation* which reference the MSOCM Standards throughout.)

[3] As alluded to above, Attorney Pierce's article approaches this question in the intentionally limited frame of an attorney attempting to take on two clients simultaneously who have an unwaivable conflict of interest. This Petition removes this impediment and I support this Petition.

[4] Equally as ridiculous is the prospect that an attorney could become disbarred for repeatedly performing this action, but would then be perfectly in the right to continue performing this action.

draft the MSA. This is an unreasonable burden and results in far too many divorcing couples attempting the system *pro se* while not understanding how to progress through the legal system effectively.

Because I recognize the necessity for neutrality in mediation and the logical extension of that mediation neutrality into the drafting of MSAs and other like documents by attorneys, I support Petition 16-04.

EFFECT ON NON-ATTORNEY[5] MEDIATORS

Perhaps the reason that I felt most compelled to write this Memorandum to the Court is that I am uncomfortable with a statement made in the Petitioner's introductory paragraph. Namely,

> 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.[6]

I believe this is a potentially dangerous statement of the background for this Court. If this Court were to accept the "level the playing field" rationale suggested in the Petitioner's introduction, this Court will be allowing the exception to create the rule. Thankfully, I do not believe this is an accurate statement by the Petitioner.

As the Court is undoubtedly aware, there is no oversight of mediators in Wisconsin, beyond that of mediators who are also attorneys by this Court and the Office of Lawyer Regulation. Any man, women, or (presumably) child, can hang out the proverbial shingle and begin offering mediation services in this state. To state that mediators whom are not attorneys are "effectively free" is a

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[5] While this is a colloquially excepted term, I have spoken on the dangers of using this term and endeavor not to use it in this Memorandum. (We should not refer to people by what they are not – we would never refer to someone as a "non-male-mediator" or a "non-white-mediator" – this term has similar negative connotations to those it seeks to describe).

[6] Petitioner's Memorandum in Support of 16-____ at 3, p. 2.

mischaracterization of the facts. I doubt the Petitioner would agree that the *status quo* allows for an untrained child to draft MSAs for filing with the courts.

Supreme Court Rule 23.02(2)(i) allows for the drafting of certain legal documents "where the document may contain various blanks and provisions to be filled in" where the completion "requires only common or transaction specific knowledge regarding the required information and general knowledge of the legal consequences." It is simply not accurate to claim that all mediators who are not attorneys meet these requirements to be "effectively free to draft documents" as the Petitioner claims.

However, the Petitioner is correct that there is a current dichotomy as recognized by the disbarred attorney analogy above. The Petition would remove the impediment for attorney-mediators.

In the email dated November 29, 2016 to the Director of State Courts, the Executive Secretary of this Court asked if this petition would "have the unintended consequence of favoring lawyer mediators over non-lawyer mediators?".[7] I applaud the Court for seeing this possibility, because I agree that it should not favor one group over the other. The Petition does not affect the ability of mediators who are not attorneys – they must still meet the SCR 23.02(2)(i) test to not run afoul of the unauthorized practice of law rules.

FUTURE CONSIDERATION

[7] Bussan, L. E-mail to Olson, A. Subject: "Rule Petition 16-04 – Limited Scope Representation" (November 29, 2016 2:39PM).

As noted above, I whole-heartedly believe that mediators can remain neutral throughout the process of mediation and drafting. I am also nervous that without oversight, some mediators will not do so.

An attorney colleague recently said to me, "there are many people offering mediation services; there are not many mediators." As the recipient of the aforementioned horror stories, I agree. Without a requirement that mediators be trained, receive follow-up training, and some form of oversight – there is nothing that requires a mediator to follow the Model Standards of Conduct for Mediators or any other ethical guides that require impartiality and neutrality.

I was lucky enough to have had three mentors in my mediation practice. Justice Janine Geske (retired), Professor Andrea Schneider, and Moira Kelly. I was able to learn from the proverbial "retired judge mediator", the "attorney mediator", and the "non-attorney mediator". Without a doubt, I learned valuable things from all three. As someone who was mentored by, has trained, and works on a daily basis with mediators who are not attorneys, I must articulate that there is a wealth of mediation ability in both the attorney population and the entire rest of population. We should encourage mediators of every ilk to assist in the problems facing the court system due to the glut of unrepresented litigants.

Further, I fear that without a dedicated oversight entity this Court will be asked to repeatedly weigh-in on issues with respect to mediation under our current pseudo-regulatory system. This Petition applies to only drafting of documents for cases arising out of ch. 767. What about the drafting of a deed at the conclusion of a mediation?[8] Bill of sale for goods? Wills? Must each of these come to this

[8] It is generally understood that the drafting of documents for real estate transactions were the driving force behind the exception to UPL found in SCR 23.02(2)(i), but the matter of drafting of deeds is not clear from state to state. *See* N.C. Gen. Stat. §§ 84-4 and 84-5 which states that the preparation of deeds is the practice of law; *cf. Nebraska, ex rel. Wright,* v. *Barlow,* 131 Neb. 294, 296 (268 NW 95, 96) (1936):

Court for a further parsing of or exception to SCR 20:2.4? Each of these documents can be found as a form document that could arguably meet the UPL exception cited as the cause of the instant concern. A mediation oversight body could address the requirement that the drafter have "general knowledge of the legal consequences".[9]

The Petitioners thoughtfully cite the work of Robert Kirkman Collins in the Cardozo Journal of Conflict Resolution,[10] but I would draw the Court's attention further into that article. Specifically, Professor Collins suggests that a drafting certification program for all mediators could be implemented.[11]

Simply put, I am a proponent of the oversight of mediators. Oversight can increase the public confidence in mediation, enhance the professional standing of mediators, and create a minimum level of quality for all mediators.[12] There is evidence that a majority of people acknowledge that there should be some kind of minimum mediator qualifications and skills training.[13] Professor Collins seems to suggest a middle ground between the licensure or certification of mediators and the current wild-west of anyone being allowed to serve as a mediator.[14]

> We do not desire to be understood as saying that the mere act of drawing a promissory note, chattel mortgage, real-estate mortgage, deed or other similar instruments would constitute the practice of law, where the person so drawing them acts merely as an amanuensis and does not advise or counsel as to the legal effect and validity of such instruments.

[9] SCR 23.02(2)(i). Further, it is an obvious mistake to presume that an attorney has "general knowledge of the legal consequences" in every circumstance. While SCR 23.02(2)(i) may apply generally to mediators who are not attorneys, it would be prudent for attorney-mediators to have the same level of competency. This is not addressed by this Petition.

[10] Collins, R.K. *The Scrivener's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, 17 Cardozo J. Conflict Resol. 691 (2016).

[11] *Id*. at 712.

[12] *See* Hoffman, D.A. *Certifying ADR Providers*, 40 B. B.J. 9, 9 (Mar./ Apr. 1996) and Carey, T.V. *Credentialing for Mediators--To Be or Not to Be?* 30 U.S.F. L. Rev. 635, 636 (1996).

[13] Wagner, K.J. *A New Era for the ADR Review Board – Facing Issues Through Strategic Planning*. 20 Hamline J. Pub. L. & Pol'y 355, 370 (1999).

[14] Collins, *supra* note 7 at 713.

The current Petition cannot result in the oversight of mediators, but I strongly urge the Court to address this issue.

CONCLUSION

The time has come for this Court and mediators throughout Wisconsin to seriously consider a proper oversight authority for mediators, both those who also happen to be attorneys and all those who are not.

Respectfully, I must state that I am in favor of Petition 16-04, but solemnly concerned with its enactment without oversight of the practice of mediation.

Dated December 9, 2016.

Respectfully Submitted,

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