

MEMORANDUM

To: Planning and Policy Advisory Committee
From: Limited Scope Representation-Mediation Subcommittee
Date: December 8, 2015
Re: Request for Permission to Proceed with Proposed Rule Petition

The Limited Scope Representation - Mediation Subcommittee (LSR-M) was created by PPAC on August 27, 2013 as a continuation of the Limited Scope Representation Subcommittee that developed the limited scope representation Rule Petition that was adopted by the Supreme Court on June 27, 2014. LSR-M was formed to further study the issue of whether the rules that limit the ability of mediators to draft documents should be changed as a means of increasing litigants' access to legal assistance. Please note that Supreme Court Rules Petition 15-3 proposes that Wisconsin adopt a new SCR 20:5.8, "Law Related Services" which, if adopted, will impact the attached rule.

On March 9, 2015 LSR-M reported to PPAC that it had agreed on the following premises:

1. Mediation is a law related service, but it is not the practice of law
2. When a lawyer acts as a mediator he or she acts in a neutral capacity without representing any of the parties to the mediation.
3. Under current rules a mediator is authorized to draft a memorandum of understanding (MOU) that reflects the agreement reached in mediation.
4. This MOU is almost never sufficient to complete a family court case because it does not cover all of the issues in a marital settlement agreement, nor the Findings of Fact and Conclusions of Law required by the court at the final hearing.

LSR-M indicated that developing such a rule would require the solution to two current problems – the prohibition of mediators subsequently providing legal services to parties to mediations; and resolving the conflict of interest issues between parties to a Family Court case.

Since then, LSR-M has developed a rule proposal which is attached.

The draft rule is limited to cases arising under Chapter 767, Stats. because the family law arena is the area where the problem presents itself most frequently and where the absence of legal input into dispute resolution is most acute (estimated 70% self-represented). Mediation and limited scope representation are needed to assist the public and the courts. This rule allows lawyer mediators to prepare documents in addition to providing education and guidance to couples in divorce and other family law matters. It allows a lawyer-mediator to select and complete the documents needed to confirm, memorialize and implement agreements reached in mediation. The basic conditions for doing so are:

1. The lawyer must maintain her or his neutrality throughout the process.
2. The parties must give informed consent, confirmed in writing, which consent shall require the lawyer to explain the following:

- a. The limits of the lawyer's role and any information relevant to actual or potential conflicts of interest of the lawyer.
- b. That the lawyer-mediator does not represent either party to the mediation.
- c. That the lawyer-mediator cannot give legal advice or advocate on behalf of either party.
- d. The desirability of seeking independent legal advice before the execution of any documents.

The draft rule specifically provides that the lawyer-mediator who drafts documents as set forth does not establish an attorney client relationship with either of the parties to the mediation, but, notwithstanding the lack of an attorney-client relationship, requires that the lawyer exercise the same diligence and competence that a lawyer owes to a client. The rule also permits the drafting lawyer-mediator to file documents with the court, but prohibits the lawyer from appearing in court on behalf of the parties.

The members of the Subcommittee unanimously agreed that the rules should be changed to permit such drafting. The only point upon which there was not unanimous consent was whether the lawyer mediator should remain in a neutral role in providing the legal service of drafting documents after the parties have reached agreement or abandon neutrality and create a lawyer client relationship with both parties. The Subcommittee opted to maintain the drafting lawyer's neutrality for three primary reasons: (1) doing so preserves the well-established principle that a lawyer cannot jointly represent parties in a Family Court action where parties are legally considered to be inherently opposed; and (2) SCR 20:1.12 prohibits a previously neutral lawyer-mediator from representing parties to a mediation; and (3) parties are more likely to understand that the lawyer-mediator remains in the neutral role to which the parties have already agreed than to understand a role change that includes the concept of joint representation of parties who were previously in a neutral process.

Because the ethical duties of diligence and competence are owed only to clients pursuant to SCR 20:1.1 and SCR 20:1.3, the rule provides that lawyers electing to make use of the rule are subject to those ethical rules. These proposals will be reevaluated in the light of the proposed new SCR 20:5.8.

We are aware that, as drafted, the rule is not technically a form of limited scope representation, and are sensitive to staying within our charge from PPAC. We believe that the draft rule better serves the goals of the expansion of LSR.

We have shared the draft with the Wisconsin Lawyers Mutual Insurance Company, which enthusiastically endorses the draft and the Office of Lawyer Regulation, whose Administrative Board will consider the draft on December 3, 2015. We request that PPAC authorize LSR-M to circulate the rule proposal widely and gather comments and, after taking such comments into consideration, to prepare a revised Rule Petition for approval by PPAC.