

LIMITED SCOPE REPRESENTATION – MEDIATION SUBCOMMITTEE
PLANNING AND POLICY ADVISORY COMMITTEE
WISCONSIN COURT SYSTEM

A proposal to amend the Rules of Professional Responsibility for Lawyers to permit a lawyer who serves as a mediator in a case arising under Chapter 767, Stats., to draft documents arising out of agreements reached in mediation.

The Planning and Policy Advisory Committee (PPAC) of the Wisconsin Court System has promoted the use of limited scope representation (LSR) as a means of improving access to legal assistance for litigants. The lack of legal assistance is most critical in the area of family law, where the vast majority of litigants currently navigate the divorce and child custody process, including mediation, without the assistance of lawyers.

In 2014, PPAC proposed and the Supreme Court approved rule changes designed to strengthen and expand limited scope representations by establishing procedures and providing guidance that can benefit clients, lawyers, and judges. At the time, the issue of authorizing lawyers who serve as mediators in family law cases to provide additional services to parties was deemed to require more study and the LSR-Mediation Subcommittee was created. After engaging in further study, the Subcommittee has developed the following proposal.

We are providing it to you for your thoughtful consideration.

Proposed Changes to Existing SCR 20:2.4:

Rule: Subsection (c) is created to read:

(c) (1) A lawyer serving as mediator in a case arising under Chapter 767 of the Wisconsin Statutes in which the parties have resolved one or more issues being mediated may draft, select, complete, or file documents confirming, memorializing or implementing such resolution, as long as the lawyer maintains his or her neutrality throughout the process and both parties give their informed consent, confirmed in writing signed by the parties to the mediation. “Informed consent” in this context requires, at a minimum, the disclosure of any interest or relationship likely to affect the lawyer’s impartiality or create an appearance of impartiality or bias and that the lawyer explain:

- a. The limits of the lawyer’s role.
- b. That the lawyer does not represent either party to the mediation.
- c. That the lawyer cannot give legal advice or advocate on behalf of either party to the mediation, and:
- d. The desirability of seeking independent legal advice before executing any documents prepared by the lawyer-mediator.

(2) A lawyer serving as mediator who has drafted, selected, completed, or filed documents pursuant to subsection (c)(1) may continue to mediate other issues that the mediator or the

parties identify and, upon resolution and subject to the conditions of subsection (c)(1), modify such existing documents or prepare others confirming, memorializing, or implementing such resolution.

(3) The drafting, selection, completion and filing of documents pursuant to subsections (c)(1) and (2) does not create an client-lawyer relationship between the lawyer and either party.

(4) Notwithstanding subparagraph (c)(3), in drafting, selecting, or completing the documents referred to in subsections (c)(1) and (2), a lawyer serving as mediator shall exercise the same degree of competence and shall act with the same degree of diligence as SCR 20:1.1 and 20:1.3 would require if the lawyer were representing the parties to the mediation.

(5) A lawyer serving as mediator who has prepared documents pursuant to subsections (c)(1) and (2) may, with the informed consent of all parties to the mediation, file such documents with the court. However, a lawyer who has served as a mediator may not appear in court on behalf of either or both of the parties in mediation.

(6) Any document prepared pursuant to this subsection that is filed with the court shall clearly indicate on it that it was “prepared with the assistance of a lawyer acting as mediator.”

Comments: A Wisconsin Comment is created to read:

Mediation is a process designed to resolve disputes between two or more parties through agreement facilitated by a neutral person. Although many lawyers routinely act as mediators, there has been some concern about the applicability of the SCRs to lawyers acting as mediators. However, the selection, drafting, completion, or filing of legal documents or agreements to memorialize or implement a mediated settlement does constitute the practice of law and is regulated by Chapter 23, SCR. *See* SCR 23.01. The purpose of subsection (c) is to clarify that a lawyer serving as mediator in a Chapter 767 proceeding may, while acting in that capacity, memorialize the outcome of the mediation, if it can be done without compromising his or her neutrality and that, by doing so, the lawyer does not assume a client-lawyer relationship with either party. The lawyer serving as mediator may not at any stage of the process attempt to advance the interests of one party at the expense of any other party.

Although a lawyer acting as mediator should strive to anticipate the issues and resolve issues prior to documenting the outcome of the mediation, the process of documenting itself may illuminate or create previously unforeseen issues. For this reason, the mediator should make it clear to the parties that the process of documentation is part of the mediation and the mediator must maintain neutrality throughout that process.

Likewise, even after documents confirming, memorializing, or implementing the resolution of issues have been finalized, other previously-identified or unresolved issues may arise. Subsection (c)(2) makes it clear that the mediator may, as an extension of the original mediation, continue in a neutral capacity to assist the parties in resolving and memorializing those issues. While this rule does not require the mediator to resolve or memorialize all issues, the prudent mediator may want to consider identifying any issues the parties have intentionally left unresolved.

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Documents drafted, selected, or completed by a mediator can have consequences an unrepresented party might not perceive. Although an attorney acting as neutral mediator may attempt to explain them to the parties in mediation, he or she does not stand in a client-lawyer relationship with either party and may not give legal advice to either or both parties while acting in that capacity. Moreover, because the line between discussing consequences and dispensing advice is not always clear, a lawyer acting as mediator who chooses to explain those consequences should take care to avoid offering or appearing to offer legal advice. For these reasons, and to emphasize to the parties that the lawyer acting as mediator does not represent the parties, subsection (c)(1)(d) requires an attorney who has mediated a dispute between unrepresented parties to recommend that each seek independent legal advice before executing the documents that attorney has drafted, selected, or completed.

Notwithstanding that no client-lawyer relationship is created when a lawyer-mediator drafts documents pursuant to this rule, (c)(4) imposes duties of competence and diligence in connection with the drafting of such documents. A lawyer who fails to fulfill such duties violates SCR 20:2.4(c)(4).

Filing documents prepared pursuant to this subsection in court can often be accomplished most efficiently by a lawyer familiar with the documents and, as long as done with the consent of the parties to the mediation, may be accomplished by the mediator without impairing his or her neutrality. However, any appearance by a lawyer in court on behalf of one or more parties is so closely associated with advocacy that it could compromise the appearance of neutrality and/or provide an occasion to depart from it. For this reason, although a lawyer who has served as a mediator may file documents with the court, such a lawyer may not appear in court on behalf of one or both parties. A lawyer who has served as a third party neutral, such as a mediator in a matter, may not thereafter represent any party at any stage of the matter – see SCR 20:1.12.

Because the lawyer mediator does not have a client-lawyer relationship with any of the parties, SCR 20:1.2(cm) does not apply. Subsection (6) makes it clear that the lawyer mediator must make an equivalent disclosure. Filing of documents by a lawyer-mediator pursuant to this rule does not constitute an appearance in the matter.