SUPREME COURT OF WISCONSIN

No. 16-04

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

FILED

FEB 21, 2017

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On October 14, 2016, the Director of State Courts filed a rule petition on behalf of the Planning and Policy Advisory Committee (PPAC) asking the court to amend SCR 20:2.4 to create a new sub. (c) to allow lawyer-mediators to draft settlement documents in family cases. On November 7, 2016, the court discussed the petition, identified some specific questions for the petitioner, and voted to schedule a public hearing.

On November 9, 2016, the court sent a letter soliciting input from interested persons. A number of responses were received. Nearly all who responded expressed support for the petition, including the State Bar of Wisconsin's Board of Governors, which voted unanimously to support the petition, the Wisconsin Family Court Commissioners Association, the Wisconsin Association of Mediators and Mediation, and the Milwaukee County Circuit Court Family Division. The following individuals also expressed support for the petition:

Attorney Lisa L. Derr, Attorney Steven P. Doyle, Professor Natalie C. Fleury, Attorney Cheryl A. Gemignani, Attorney Linda A. Ivanovic, Attorney Nanette Karls, Attorney Allan R. Koritzinsky (with some proposed some drafting changes), Professor Marsha M. Mansfield, Attorney Kimberly N. Ripp, Attorney Lauri Roman, Attorney Michael D. Rust, Professor Andrea Kupfer Schneider, Attorney Paul W. Stenzel, Attorney Kent A. Tess-Mattner, Attorney Antoinette Vacca, and Attorney Cassel Villarreal.

The Office of Lawyer Regulation, by its Director, Keith Sellen, stated it had no objection to the petition.

Two individuals opposed the petition: the Honorable Michael R. Fitzpatrick and Attorney Mark F. Borns. The petitioner also filed a written response to questions posed by the court.

The court conducted a public hearing on January 12, 2017. The Honorable Michael J. Dwyer appeared and presented the petition on behalf of PPAC, joined by Attorney Susan A. Hansen and Attorney Michael B. Apfeld. Several individuals spoke in support of the petition: Attorney Paul W. Stenzel, Stenzel Law Office, LLC; Attorney Michael D. Rust, Executive Director, Winnebago Conflict Resolution Center, Inc.; Attorney Lisa L. Derr, Derr & Villarreal, LLC; Attorney Francis W. Deisinger, President, State Bar of Wisconsin; Attorney Timothy J. Pierce, State Bar of Wisconsin; and Attorney Rebecca W. Oettinger, Driftless Mediation and Family Law.

At the ensuing open rules conference, the court discussed the petition and, following two unsuccessful motions by Justice Shirley S. Abrahamson to make certain changes to the language of the

petition, the court voted 6:1 (Abrahamson, J. opposing) to approve the petition, as drafted. Therefore,

IT IS ORDERED that:

SECTION 1. Supreme Court Rule 20:2.4(c) is created to read:

(c)(1) A lawyer serving as mediator in a case arising under ch. 767, stats., in which the parties have resolved one or more issues being mediated may draft, select, complete, modify, 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 a writing signed by the parties to the mediation. For purposes of this subsection, informed consent requires, at a minimum, the lawyer to disclose to each party any interest or relationship that is likely to affect the lawyer's impartiality in the case or to create an appearance of partiality or bias and that the lawyer explain all of the following to each of the parties:

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.

d. The desirability of seeking independent legal advice before executing any documents prepared by the lawyer-mediator.

(2) The drafting, selection, completion, modification, and filing of documents pursuant to par. (1) does not create a client-lawyer relationship between the lawyer and a party.

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

(4) A lawyer serving as mediator who has prepared documents pursuant to par. (1) 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.

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

SECTION 2. A Wisconsin Comment to SCR 20:2.4(c) is created to read:

WISCONSIN COMMENT

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, modification, or filing of legal documents or agreements to memorialize or implement a mediated settlement does constitute the practice of law and is regulated by SCR Chapter 23. 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 them 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-unidentified or unresolved issues may arise. 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.

Documents drafted, selected, completed or modified by a mediator can have consequences an unrepresented party might not perceive. Although an attorney acting as neutral mediator may attempt to explain those consequences 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 neutral 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, completed, or modified.

Notwithstanding that no client-lawyer relationship is created when a lawyer-mediator drafts documents pursuant to this rule, subsection (c)(3) 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 (5) 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.

IT IS FURTHER ORDERED that the Comment to SCR 20:2.4(c) is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that that the amendment adopted pursuant to this order shall be effective as of July 1, 2017, and shall apply to proceedings commenced after the effective date of this rule and, insofar as is just and practicable, to proceedings pending on the effective date.

IT IS FURTHER ORDERED that notice of this amendment of Supreme Court Rule 20:2.4 be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 21st day of February, 2017.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. *(concurring).* The Committee has worked long and hard on the proposal (an estimated seven years), changing it multiple times to satisfy the various persons and groups the Committee has lined up to support the rule. Good job! I suggest three "fine tunings."

¶2 First, I suggest that proposed SCR 20:2.4(c) or the Comments thereto be tweaked to describe more fully the documents the lawyer-mediator prepares.

¶3 The text of the Rule and the Comment printed with it focus on instruments documenting or implementing the outcome of mediation. Thus, proposed SCR 20:2.4(c) provides that a lawyer mediator may prepare "documents confirming, memorializing, or implementing such resolution [of one or more issues being mediated]."

¶4 In contrast, the petitioner's Memorandum in support of the Petition explains that the documents to be prepared by the lawyer-mediator are not limited to documents relating to the parties' resolution of issues at mediation. The Memorandum explains as follows that the lawyer-mediator is to draft numerous and varied documents to terminate the Chapter 767 dispute in court and put into effect the agreement and the court's judgment or order:

> 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.

¶5 This all-encompassing description of the numerous documents to be drafted by the lawyer-mediator should be front and center in the text of the Rule or at least in the Comment thereto.

¶6 My second "fine tuning" relates to Wis. Stat. § 767.405, entitled "Family court services." This statute creates a director of family services in each county to perform mediation and to prepare legal custody and physical placement studies. It further provides that agreements resolving issues of legal custody and placement through mediation under the statute be prepared in writing and submitted to the circuit court to be included in the court order as a stipulation. Moreover, "[t]he mediator shall certify that the written mediation agreement accurately reflects the agreement made between the parties."

¶7 An analogous rule in the state of Oregon (upon which the proposed Rule is based) explicitly declares that the rule governing a lawyer serving as mediator does not apply to mediation programs established by operation of law or court order.

¶8 I would follow Oregon's example and explicitly explain in the Rule or in the Comment that the Rule does not apply to agreements reached pursuant to Wis. Stat. § 767.405. It seems to me that this statement is not complicated; it clarifies the issue; and it is easy to include in the rule. I have attached the Oregon rule that I think is clearer in some respects than the proposed drafted Rule and helps explain the proposed Rule. (As an aside, the Oregon rule treats preparing documents and "filing" as separate incidents. The proposed Rule seems to treat filing a document the same as preparing the document; it is not.)

¶9 The justices did not necessarily disagree with my two "tune-ups." They merely concluded that the court should accept verbatim a draft seven years in the making and that if the issues I raised come to pass, the court could modify the Rule at that time.

¶10 My third "fine tuning" relates to an issue of the practice of law that Justice Daniel Kelly raised at the hearing and the open court rules conference. In considering his comments, I looked at Chapter 23 of the Supreme Court Rules entitled Regulation of Unauthorized Practice of Law (the Supreme Court Rules are printed in volume 6 of the Wisconsin Statutes). This Chapter should, in my opinion, be referenced in the Comments to the Rule. Several provisions in SCR Chapter 23 relate to lawyers and non-lawyers who mediate disputes and to

the selection or completion of legal documents. Rule Petition 16-04 is silent about non-lawyer mediators drafting documents.

¶11 I have registered by objection to that part of the order regarding the applicability of the order in my writing to Rule Petition 16-01. I repeat my comments here in Attachment B.

¶12 I offer the following language to be substituted as the applicability provision and a comment:

> IT IS ORDERED THAT the rule applies fully and without limitation to any action commenced after July 1, 2017. For any action commenced before July 1, 2017, but continuing thereafter, the rule applies to all events in the action except to the extent that the circuit court determines that application of the rule change would not be feasible or would work injustice.
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> COMMENT: The phrase "action commenced" is used herein to describe the commencement of a civil action as set forth in Wis. Stat. §§ 801.01 and 801.02 (2015-16). The phrase "events in the action" is used herein to refer to any matter in the action after commencement of the action. For a discussion of the word "action," including "special proceedings," used in Wis. Stat. § 801.01, the history of this terminology, and the commencement of civil actions, see Charles D. Clausen and David P. Lowe, The New Wisconsin Rules of Civil Procedure: Chapters 801-803, 59 Marq. L. Rev. 1. 2-9 (1976).

¶13 With these comments and suggestions for tweaks, I join the order adopting Rule Petition 16-04 and thank the Committee.

ATTACHMENT A

Oregon Rules of Professional Conduct R.2.4

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

(1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and

(2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

(1) may prepare documents that memorialize and implement the agreement reached in mediation;

(2) shall recommend that each party seek independent legal advice before executing the documents; and

(3) with the consent of all parties, may record or may file the documents in court.

(c) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Adopted 01/01/05

ATTACHMENT B

¶1 SHIRLEY S. ABRAHAMSON, J. *(concurring)*. I join most of the order repealing the "deadman's statutes." I write to discuss two provisions of the order: the effective date of the rule and the applicability of the rule after the effective date of the rule.

¶2 These two provisions have given the court pause in a number of orders, and the court is not consistent in its language relating to the applicability provision.

¶3 I write to clarify and memorialize the issues for the future. The Legislative Reference Bureau has had a great deal of experience with drafting effective date and applicability provisions in statutes, and I rely on chapter 6 of the Wisconsin Bill Drafting Manual 2017-2018, along with other materials, for my comments.

¶4 The effective date of a rule (like the effective date of a statute) is the date when the change becomes operative. The effective date of Rule 16-01, issued in January 2017, is July 1, 2017. This rule adopted by the court will appear in the Wisconsin Statutes as § 906.01. Sections 885.16 and 885.17 of the Statutes will be shown in the statutory history as repealed by the court.

¶5 Two reasons justify the delayed effective date of this rule. First and foremost, this rule (although it fails to so state) was issued pursuant to Wis. Stat. § 757.12, which provides that the effective dates for all rules adopted by the court shall be January 1 or July 1. See Wis. Stat. § 751.12(1).

Second, the delayed effective date gives the bench and bar time to learn of and adapt to the change.

¶6 The applicability provision of the rule (like the applicability provision of a statute) specifies the event or series of events in a temporal sequence that the change will govern after the effective date of the order. Although the rule becomes effective on July 1, 2017, its application after that date may be limited to certain events.

¶7 The order adopting the rule declares that the rule applies "to court proceedings commenced after the effective date of this rule and to any proceeding within a court proceeding then pending, except insofar as, in the opinion of the circuit court, application of the rule change would not be feasible or would work injustice, in which event the former rule applies."

¶8 The phrases "court proceedings" (used once) and "court proceeding" (used once) and the word "proceeding" (used once) are not defined in the rule. These phrases and words are apparently used in the Wisconsin Statutes more than one hundred times, and they do not always have the same meaning. The rule does not adopt any particular usage of the phrases or words.

¶9 Because the text of the applicability provision is not clear, I write separately.

¶10 Privy to the discussions of the applicability provision at open rules conferences and in e-mails by the justices and staff, I think I understand the court's intent in adopting the applicability provision. I conclude that the court can express its intent better and more clearly.

¶11 Accordingly, I offer the following language to be adopted as the applicability provision and a comment. I think this language is clearer than that adopted and expresses the intent of the court:

> The rule applies fully and without limitation to any action commenced after July 1, 2017. For any action commenced before July 1, 2017, but continuing thereafter, the rule applies to all events in the action except to the extent that the circuit court determines that application of the rule change would not be feasible or would work injustice.
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> COMMENT: The deadman's statute governs testimony in "any civil action or proceeding." See Wis. Stat. § 885.16. The words "civil action or proceeding" are not defined in § 885.16. The phrase "action commenced" is used herein to describe the commencement of a civil action as set forth in Wis. Stat. §§ 801.01 and 801.02 (2015-16). The phrase "events in the action" is used herein to refer to any matter in which a party or person may be examined pursuant to Wis. Stat. §§ 885.16 and 885.17 (2013-14). For a discussion of the word "action," including "special proceedings," used in Wis. Stat. § 801.01, the history of this terminology, and the commencement of civil actions, see Charles D. Clausen and David P. Lowe, The New Wisconsin Rules of Civil Procedure: Chapters 801-803, 59 Marq. L. Rev. 1. 2-9 (1976).

¶12 For the reasons set forth, I write separately.

¶13 I am authorized to state that Justice ANN WALSH BRADLEY joins this opinion.