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December 6, 2016

Via Email and Regular Mail

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DEC 06 2016
CLERK OF SUPREME COURT
OF WISCONSIN

Clerk of the Supreme Court
Attn: Deputy Clerk - Rules
P.O. Box 1688
Madison, WI 53701-1688
clerk@wicourts.gov

**Re: Rule Petition 16-04, In re amendment of Supreme Court Rule Chapter 20
relating to Limited Scope Representation**

Dear Members of the Wisconsin Supreme Court:

On January 12, 2017, the Court will conduct a public hearing regarding Rule Petition 16-04. That Petition was prepared by the Planning and Policy Advisory Committee (PPAC). It concerns proposed amendments to SCR 20:2.4 to create a new subsection to allow lawyer-mediators to draft settlement documents in family law cases.

I respectfully suggest that the Court NOT adopt Rule Petition 16-04 for the reasons noted in the attached, short letter of March 30, 2016.

My involvement regarding this proposed change to the Supreme Court Rules, Chapter 20, began several years ago. I served two terms as a member of the State Bar Committee on Professional Ethics. When this proposed change to the Supreme Court Rules was first floated, our Committee on Professional Ethics was asked to weigh in on the issue. Both in writing and at several lengthy meetings, the members of the Committee agreed that a previous version of this change to Chapter 20 would be unworkable and not in the interests of the public or the profession.

After some time, PPAC again took up this issue and proposed new language to allow a lawyer-mediator to draft settlement documents in family law cases only. My friend, Judge Michael Dwyer of the Milwaukee County Circuit Court, was on that PPAC sub-committee. He asked me early in 2016 to again express my opinion on the matter. Attached is my letter to Judge Dwyer in which I expressed my admiration for

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the members of the Committee and their work. However, I also expressed my opinion that this is a bad idea. My reasons are, I believe, adequately stated in the attached letter.

Thank you for your attention to this matter. If you or your staff should have any questions of me in this regard, please do not hesitate to contact me.

Yours very truly,

Michael R. Fitzpatrick
Circuit Judge

/amw
Attachment

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March 30, 2016

By Email Only

Judge Michael Dwyer
Milwaukee County Circuit Court
10201 W. Watertown Plank Rd.
Milwaukee, WI 53226-3532

Re: Proposed Changes to SCR 20:2.4

Dear Mike:

Thank you for sending to me the materials related to proposed changes to Supreme Court Rule 20:2.4.

First, please accept my apologies for not responding sooner. I have had a number of cases go to trial recently which I expected would settle. Therefore, I have been spending more time on the Bench lately than I had anticipated. Also, and as I had mentioned to you, I wanted to speak to Attorney Dean Dietrich, Attorney Michael Apfeld, and Teresa Owens regarding this matter since they have been on your sub-committee. My discussions with them have been very helpful.

Second, I am appreciative of the fact that you have sought out my input regarding this issue. I very much doubt that anyone is anxiously waiting to hear what I think of this proposal. Nonetheless, since you were so kind to ask, I thought it best to seriously consider the matter and respond as soon as my schedule allowed.

Third, nothing in this letter should be considered in any way a criticism of your sub-committee, its work, or its members. I have great respect for each of you and have every confidence that the work of the sub-committee was done in a diligent and professional fashion.

Fourth, after reviewing the materials you sent, it is my opinion that, if the goal is to change the Supreme Court Rules to allow mediation in family law cases to be handled in this manner, then your sub-committee has done an excellent job drafting the proposed addition to SCR 20:2.4.

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Fifth (and here's the rub), regardless of the amount of thought which has gone into this and the excellent work in drafting the addition to the Rule, it is my opinion that this is a bad idea. I will note my concerns about this only in general fashion since it will be up to the Wisconsin Supreme Court - and not me - to determine whether this addition to Chapter 20 of the Supreme Court Rules will be good for the citizens of the State of Wisconsin.

My most pressing concern is that, while we as lawyers will understand the fine distinctions between an attorney acting as a mediator and that this mediator shall not dispense legal advice, those fine distinctions will be lost on the vast majority of persons who may attempt to use an attorney/mediator in this way. At a very basic level, what this proposed change to SCR 20:2.4 would do is inconsistent with the public's understanding of the professional duties of an attorney. Creating this new type of relationship between someone with a law license and the public - which is neither fish nor fowl - will inevitably lead to misunderstandings and confusion among the public as to the services which will be delivered, the duties of this person, and whether he or she will be protecting the interests of the Wisconsin citizens who retain this attorney/mediator. I understand that this proposed addition to SCR 20:2.4 requires written disclosure of certain aspects of the relationship. However, this new type of service may be understood by us because we have spent years in training as lawyers to understand those fine gradations. The general public will not understand it and will be confused as to exactly what services will be rendered (and which are not).

In a similar vein, and while I find it sad to say this, it is my firm belief that some members of the Wisconsin Bar who find themselves with too few clients will misrepresent this relationship to the parties during the process. Regardless of the fact that certain statements should be in writing, I believe this opens up another avenue for less than scrupulous attorneys to quietly take advantage of persons by telling the parties that the attorney/mediator will be acting as their attorney and they only have to spend money on him/her to have their divorce done. Please accept my apologies if this sounds cynical. But, I do not think it is in the interests of the citizens of Wisconsin for there to be an obvious avenue created for certain attorneys to attempt to take advantage of members of the public.

Having said all that, I will reiterate that I am not going to be one of the persons making this decision and this will be left to the Justices on the Wisconsin Supreme Court.

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Thank you very much for this opportunity to express my views about this proposed change to Supreme Court Rule 20:2.4, and I hope all is well with you and your family.

Yours very truly,

/s/

Michael R. Fitzpatrick
Circuit Judge

/amw