

Michael J. Dwyer  
Circuit Judge

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Milwaukee County Courthouse  
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December 19, 2016

Clerk of the Supreme Court  
Attn: Deputy Clerk-Rules  
P.O. Box 1688  
110 East Main Street, Suite 215  
Madison, WI 53701-1688

RE: Responses to Public Comment to Petition 16-04 (Limited Scope Representation)

The Director of State Courts who filed the petition on behalf of the Policy and Planning Committee (PPAC) of the Supreme Court asked me as the chair of the PPAC Subcommittee that drafted the Petition to respond to the comments. We are grateful to the organizations and individuals for their thoughtful submissions, the overwhelming majority of which strongly supported adoption of the proposed Rule. We are especially grateful for the broad based support expressed by the State Bar of Wisconsin. In addition, we note that the Wisconsin Association of Family Court Commissioners endorsed the Petition on May 21, 2016, but did not submit a written comment.

Those who commented are from around the state. Although they expressed their support from different perspectives, taken in their entirety they confirmed the underlying predicates of the proposed Rule, in particular:

- That today most divorcing parties navigate the divorce process without benefit of counsel;
- That this trend creates a variety of problems for the parties and the courts, particularly when pro se parties attempt to draft divorce documents;
- That the proposed Rule would provide significant benefits to the parties, the courts, the public, and the legal profession;
- That the drafting divorce documents is a logical extension of the underlying mediation;
- That mediators will be able to maintain neutrality throughout the drafting process; and

- That the parties will be able to understand the neutral role of mediator in the drafting process.

There were three persons who submitted comments that warrant more particular response:

Judge Michael R. Fitzpatrick (Rock County Circuit Court Judge):

Judge Fitzpatrick opposes the proposed Rule on the basis that the litigants will not be able to understand the neutral role of the lawyer mediator and that some practitioners could be tempted to misrepresent that role. We thank Judge Fitzpatrick for his continued involvement but do not believe that his concerns warrant rejection of the proposed Rule.

Judge Fitzpatrick first expressed these and related concerns at a time when the subcommittee was considering a proposal that would allow a neutral lawyer mediator to switch roles and assume an attorney-client relationship with one or both of the litigants at the drafting stage. The subcommittee took Judge Fitzpatrick's comments very seriously, abandoned the original proposal and, after considering the potential benefits and risks of a variety of different solutions, ultimately produced the proposed Rule. The subcommittee believes that a neutral attorney mediator will be able to draft divorce documents in a neutral capacity and that the litigants will not be confused about the attorney's continued neutrality as long as the rule gives clear guidance. We do not think that the concept of neutrality in drafting, if explained to the litigants with the disclosures required by the proposed Rule, is any more difficult to grasp than the concept of neutrality in the process that precedes drafting. Moreover, although we cannot eliminate the possibility that some lawyer mediators will misrepresent their role to the litigants for personal gain, we do not think that there are any reasons or incentives inherent in the proposal for any attorney to do so.

Attorney Allan R. Koritzinsky (Allan R. Koritzinsky, LLC):

We thank Mr. Koritzinsky for his support of the petition and respond to his particular suggestions as follows:

*Timing of disclosure:* Mr. Koritzinsky notes that "implicit in the proposed Rule change is that this disclosure [i.e., of the various matters set forth in sub. (c)(1)] would/might occur after the case is settled" and suggests that "it would be better practice for this disclosure to be made before the mediation is commenced, with this appropriate language included in the Mediation Agreement signed at the outset of the case." We agree that the proposed Rule does not specify when the disclosure needs to be made, although implicit in the concept of informed consent is timeliness. We also agree that early disclosure is better practice, and words to that effect could be inserted in the comments. However, it is possible to imagine situations in which the desirability or the scope of post-MOU drafting might not become apparent until mediation has begun and, hence, do not believe that anything stronger than a suggestion in the comments would be warranted.

*Use of words "select" or "complete":* Mr. Koritzinsky questions the need to use the words "select" or "complete" in subs. (c)(1), (2), and (3). These verbs were included to cover the possibility that the lawyer-mediator may choose to rely on at least some of the standard forms suggested by any given court; in such a case, the lawyer mediator would have to select the appropriate form(s) and then complete it or them. These actions are at least arguably not encompassed in the remainder of the verbs used to describe permitted drafting.

*Addition of "modified" to sub. (c)(4):* Mr. Koritzinsky suggests that the word "modified" should be added to sub. (c)(4). Although we have attempted to use "draft, select, complete, modify, or file" (or their cognates) consistently when describing permitted drafting in subs. (1) through (3), we chose to substitute the more generic "prepared" in sub. (c)(4) because the subject of that subsection is the filing of documents already drafted and the subcommittee felt that the word "prepare" was sufficient to encompass all forms of permitted drafting. If the verb "modified" were to be added, all the rest of the verbs would need to be added as well.

*Appearance in court by lawyer mediator:* Mr. Koritzinsky suggests that the proposed Rule be modified to permit the lawyer mediator to appear in court, reasoning that such an appearance does not move the lawyer mediator any closer to the line of advocacy than neutral drafting. The subcommittee discussed this possibility when drafting the proposal but unanimously concluded that, as the comment observes, "any appearance 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." The subcommittee stands by this assessment, if for no other reason than real-time interactions in court do not present the same opportunity for recognizing and counteracting risks to neutrality that the process of drafting affords. The line between acceptable and unacceptable risk may be difficult to draw at times, but the subcommittee strongly believes that appearance in court by the lawyer mediator is on the wrong side of it.

Attorney Michael D. Rust (Executive Director, Winnebago Conflict Resolution Center, Inc.):

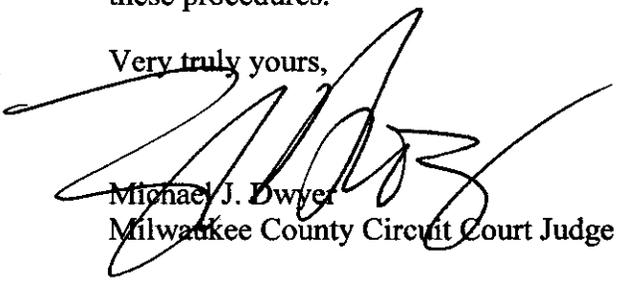
We thank Mr. Rust for his support of the petition and respond to certain of his particular comments and suggestions as follows:

*Whether non-lawyer mediators are "effectively free" to draft divorce documents:* Although Mr. Rust supports the Petition, he takes issue with one statement in supporting memorandum to the effect that lawyer-mediators are "effectively free" to draft divorce documents while lawyer mediators are not. We respectfully suggest that Mr. Rust has misconstrued the statement, which was intended to suggest nothing more than Mr. Rust acknowledges, i.e., that "there is a current dichotomy" in the way lawyer mediators and non-lawyer mediators are regulated and that the Petition "would remove the impediment for lawyer-mediators."

*Comprehensive mediator regulation:* Mr. Rust also urges the Court to "go further" than the Petition and adopt a more comprehensive oversight of mediation that would extend to subject matter outside the scope of ch. 767 as well as to non-lawyer mediators. By definition the Rules of Professional Conduct for Attorneys cannot regulate non-lawyer mediators; hence, the

subcommittee limited its proposals to those mediators who could be regulated by the Rules. It is likely that regulation of the conduct of non-lawyer mediators would require legislative study, action and funding. Further, the subcommittee unanimously agreed that the Petition should be limited to ch. 767 family matters based on the acute and apparent need for drafting assistance in these procedures.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Michael J. Dwyer', is written over the typed name and title.

Michael J. Dwyer  
Milwaukee County Circuit Court Judge

cc: Members of PPAC Subcommittee  
Ann Olson