

DRAFT OPINION TO REPLACE ADVISORY OPINION 2223

Issue presented: A lawyer serves as a mediator in resolving issues in a dissolution action. The parties to the dissolution action are both unrepresented. If the parties come to a full resolution of all issues through the mediation, may the lawyer-mediator on behalf of both spouses prepare pleadings that reflect the parties' agreement?

Discussion:

RPC 2.4 addresses the obligations of a lawyer who is serving in a neutral role, including as a mediator. That rule requires a third-party neutral, such as a mediator, to "inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." RPC 2.4(b).

RPC 2.4 recognizes that a lawyer serving as a mediator is performing a very different function from a lawyer who is representing a client. A lawyer representing a client advises that client of what is in the client's best interest and drafts documents with the goal of furthering the client's interests. In contrast, a lawyer acting as a mediator is not advocating for either party to the mediation but instead attempts to bring the parties to an agreement.

If the parties come to an agreement at a mediation, it is appropriate for the mediator to draft a written confirmation of that agreement with as much or as little specificity as appears warranted under the circumstances. Drafting the confirmation of the parties' agreement does not mean the mediator is representing one or both parties to the mediation as the mediator is simply recording the terms of the parties' agreement. When doing so, the lawyer-mediator should be sure each party understands that the mediator is not acting as either party's lawyer. While not required by RPC 2.4, the best practice is to advise both parties that they may wish to have the agreement reviewed by counsel.

Drafting pleadings is not the same as recording the parties' oral agreement in written form. Rather, under GR 24(a)(2), drafting pleadings constitutes the practice of law.

However, filling in the blanks on a pleading form does not necessarily constitute the practice of law. For example, in *In re Estate of Knowles*, 135 Wn.App. 351, 364-365 (2006), the Court of Appeals found that a testator's son did not engage in the practice of law by filling in blanks in a pre-printed will form when the son merely filled in the form as the testator instructed. The Court found that "[g]enerally, a person begins to practice law by either directly or indirectly (selection of appropriate documents) giving advice" and completing forms did not qualify as the practice of law because the son did not select the will form or advise the testator. *Id.*, 135 Wn.App. at 365. See also *In re Disciplinary Proceeding Against Shepard*, 169 Wn.2d 697, 710-11, 239 P.3d 1066 (2010) (distinguishing *Knowles* from nonlawyer selling living trust documents

who presented clients with information about the benefits of a living trust and selected which documents the clients should use).

A mediator may complete a pleading form on behalf of both parties to the mediation if the mediator's role in doing so is similar to the son's role in *Estate of Knowles*, where the son was merely recording information on a preprinted form as his father directed. Because filing documents with the court does not constitute the practice of law, a mediator is permitted to file documents regardless of the contents.¹

On the other hand, if a lawyer-mediator drafted a pleading with customized provisions on behalf of both parties, the mediator would be representing both parties in the same litigation. The conflict of interest rules flatly prohibit a lawyer from representing adverse parties in the same action if the representation involves the assertion of a claim by one client against another client. Rule 1.7(b)(3). Even if the parties have agreed in the mediation to a resolution of the claims, the parties are still adverse.²

If the parties to a dissolution have reached agreement on the matters that were originally in controversy, some may argue that they are no longer asserting claims against one another so a lawyer could represent both in drafting pleadings dictated by the parties' agreement. But this argument is incompatible with the plain language of Rule 1.7(b)(3) and the first sentence of comment 21: "Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent." Cmt [21] to Rule 1.7.

If each party has separate counsel, each receives advice about drafting the pleading in a way that favors that party. The parties would not receive that advice if they are both represented by the same lawyer-mediator. For example, one spouse might not understand that she is entitled to an interest in her spouse's retirement plan and the parties could have come to an agreement based on that misunderstanding. A neutral mediator would have to draft the pleading to reflect the parties' agreement premised on the misunderstanding, but a lawyer representing only that spouse would explain that the agreement is not consistent with the spouse's legal rights.³

Nonetheless, a mediator-lawyer may draft pleadings following a mediation if the mediator does so on behalf of only one party if both parties are willing and able to provide informed consent.

¹ This does not mean a mediator can present the orders to a judge or commissioner, as that would require a notice of appearance on behalf of at least one party.

² Comment [17] to RPC 1.7 states that RPC 1.7(b)(3) "does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0A(m)), but "such representation may be precluded by" RPC 1.7(b)(1). This comment addresses a lawyer who is representing more than one client at a mediation. It does not address a lawyer who is serving as a mediator.

³ Some may argue that this would not occur because a lawyer who is aware that one party is laboring under a misunderstanding of that party's rights could not reasonably proceed with representation without clearing up the misunderstanding. However, the mediator would not necessarily be aware of the misunderstanding. Unlike a lawyer who is providing legal advice, a mediator would not necessarily ask sufficient questions to learn whether both parties fully understand their legal rights.

PROPOSED DRAFT OPINION
WSBA Committee on Professional Ethics

RPC 1.12(a) permits a lawyer to represent a person in a matter in which the lawyer previously served as a mediator if all parties to the proceeding give informed consent, confirmed in writing. Informed consent requires that the lawyer provide adequate information and explanation about the risks of agreeing to allow the mediator to draft the pleadings on behalf of one party and also explain available alternatives, such as having each party represented by separate counsel. It also requires that the client, under all the circumstances, is able to understand the information the lawyer has provided and explained, and that the client has the capacity to give consent. See RPC 1.0A(e) and cmts [6-7].

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