Agenda
Committee on Resources for Self-represented Parties

October 11, 2013
12:00 to 2:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	Judge John Baxter
Pro bono family law calendar		Virginia Sudbury
Attorneys for guardianship respondents	Tab 2	Tim Shea
E-filing through OCAP		Jessica Van Buren
Self Help Center report		Mary Jane Ciccarello
Pre-filing document review	Tab 3	Tim Shea
2014 Schedule		See below

Committee Web Page: http://www.utcourts.gov/committees/ProSe/

Meeting Schedule: Matheson Courthouse, Judicial Council Room,12:00 to 1:30 unless otherwise stated.

December 13, 2013
February 14, 2014
April 11, 2014
June 13, 2014
August 8, 2014
October 10, 2014
December 12, 2014

Tab 1

Minutes of the Committee on Resources for Self-represented Parties

June 14, 2013

Draft. Subject to approval

Members Present

Judge John Baxter, Chair, Lisa Collins, Mary Jane Ciccarello, Carol Frank, Russ Minas, Stewart Ralphs, Jessica Van Buren

Members Excused

Fred Anderson, Emily Chiang, David Dominguez, Judge Michael DiReda, Robert Jeffs, Judge Scott Johansen, Jose Lazaro, Shauna O'Neil, Barbara Procarione, Virginia Sudbury, Judge Douglas Thomas,

Staff

Wogai Mohmand, Jason Ralston, Tim Shea

Guests

Judge Royal Hansen, Robert Rice

(1) Approval of minutes.

The minutes of February 8, 2013 were approved as prepared.

(2) Pro Bono and Modest Means Programs

Judge Hansen and Mr. Rice described the pro bono program of the Utah State Bar. Judge Hansen described an adoption case in which lawyers made available through the program were able to help the parties resolve the case. Without this program the parties would not have had lawyers, and he compared that to juvenile court where the parties would have automatically had appointed counsel.

Mr. Rice described the pro bono commission and the "Lend a Learned Hand" video that recruits lawyers to volunteer for the program. He expressed appreciation for all of the support the Bar has received from the Judicial Council and the local courts.

Mr. Rice said there are eight district committees, one for each of the judicial districts, made up of lawyers and judges. He said that the district committees help organize the program around local needs. The Bar staff works to find a volunteer lawyer after the client has qualified for one. Currently the Bar is relying on Utah Legal Services to income-qualify the client and to be sure that a pro bono lawyer is what the client needs. ULS is the only provider at the moment, and the commission would like to add other nonprofit entities to perform that service.

Mr. Rice said that about 700 lawyers have volunteered during this first year of operation and the program has placed about 150 clients.

Judge Hansen said that the commission is working on the procedures for referrals from judges. The plan at the moment is to refer the client to the self help center. Ms. Van Buren said that the self help center will

interview the client to try to match the person with appropriate services and that it will be a great help to be able to include pro bono representation among those services. Ms. Ciccarello said judges could start referring clients right away because the center is already helping these clients. The pro bono program is simply an additional resource for the center to offer.

Ms. Ciccarello expressed concern that Utah Legal Services has to screen out too many people who would otherwise qualify for pro bono counsel because their charter requires them to do so. She said the self help center responds to everyone who contacts them. She said the center will not income-qualify a client, but that the center often has information indicating whether the client will qualify for the pro bono program. The center will also evaluate whether a pro bono lawyer will be able to help the client.

Mr. Rice said that the program is not yet capable of managing requests directly from the public. Mr. Ralphs said that his and other entities act as conduits to the program.

Judge Hansen said that awareness of the program among the judges is mixed. Mr. Hansen said that they should be in a position to market the program more broadly to the judges within a few months.

(3) On-line Court Assistance Program

Mr. Ralston described the features of the new OCAP application and answered the committee's questions.

Tab 2

Guardianship and Conservatorship Signature Program

(1) Objectives

(A) Provide judges with a roster of attorneys to appoint, in compliance with Section 75-5-303 and Section 75-5-407, to represent adult respondents in guardianship and conservatorship proceedings.

(B) Provide a roster of attorneys willing to represent adult respondents in guardianship and conservatorship proceedings for no fee, but to be paid, as circumstances warrant, under Section 75-5-303.

(C) Eliminate the expectation that the petitioner will recruit an attorney to represent the respondent. Eliminate the practice of an attorney representing the respondent after having given advice or having prepared pleadings for the petitioner.

(2) Administration

(A) The Access to Justice Coordinator will maintain the roster of volunteer attorneys, which will be shared with the Administrative Office of the Courts when there is a change in the roster.

(B) The Executive Committee of the Elder Law Section, the Executive Committee of the Estate Planning Section, the Disability Law Center and Utah Legal Services will form a Board of Directors.

(C) The Board will:

i. recruit attorneys to participate in the signature program;

ii. develop a curriculum for basic and continuing education in guardianship and conservatorship law and procedures;

iii. mentor volunteer attorneys as requested by an attorney;

iv. develop a law student and law graduate legal assistance component under Rule 14-807;

v. assist in placing clients.

(3) Judge's and clerk's role

(A) If the respondent to a petition filed under Section 75-5-301 does not have counsel of his or her own choice, the judge will refer the respondent to the signature program. If an adult respondent to a petition filed under Section 75-5-401 does not have counsel of his or her own choice, the judge may refer the respondent to the signature program.

(B) If the judge refers a respondent to the signature program, the clerk will notify the volunteer attorneys for the district of the need to place the client. The client will be placed with the first attorney to accept the placement. If the clerk is not successful in placing the client, s/he will contact the Board or the Pro Bono Commission for the district to assist in placing the client.

(C) If the petitioner in a petition filed under Section 75-5-301 or Section 75-5-401 is not represented by counsel, the judge may refer the petitioner to the Self Help Center for assistance, including possible inclusion in the pro bono program, the modest means program.

(D) If possible, the judge will refer the respondent to the signature program in time for the respondent to be represented at the initial hearing.

(E) If necessary, the judge may appoint a temporary guardian if the conditions of Section 75-5-310 are met.

(4) Volunteering

(A) To volunteer for the signature program, an attorney must:

vi. be admitted to practice law in Utah and be a member of the Utah State Bar in good standing;

vii. volunteer through the pro bono survey;

viii. maintain malpractice insurance;

ix. accept the fee limits described in Section (6);

x. complete the basic curriculum in guardianship and conservatorship law and procedures;

xi. biannually complete at least 4 hours of MCLE in guardianship and conservatorship law and procedures;

xii. comply with the Rules of Professional Conduct, noting especially:

1. Rule 1.1. Competence;
2. Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Attorney;
3. Rule 1.3. Diligence;
4. Rule 1.4. Communication;
5. Rule 1.14. Client with Diminished Capacity;
6. Rule 3.1. Meritorious Claims and Contentions; and
7. Rule 3.3. Candor Toward the Tribunal; and

xiii. comply with Rule 14-301, Standards of Professionalism and Civility.

(B) If a volunteer attorney does not have an e-filing account, the attorney may apply for a free account by submitting to the Access to Justice Coordinator an agreement and application for an e-filing account. The attorney will use the account only for clients represented as a result of placements under the signature program.

(5) Attorney's responsibilities

(A) An attorney who has agreed to represent the respondent will:

i. provide the client with an informed understanding of the client's legal rights and obligations and explain their practical implications;

ii. zealously assert the client's position under the statutes and rules;

iii. seek a result advantageous to the client consistent with requirements of honest dealing with others;

iv. examine the client's legal affairs and report them to the client; and

v. continue to represent the client until the conditions of Utah Code Section 75-5-303(3) or Section 75-5-407(3) have been met.

(B) The attorney will also:

i. contact the client;

ii. file for the judge's signature an order appointing the attorney;

iii. file a notice of appearance;

iv. help the client complete the income qualification form;

v. investigate the nature and extent of the client's alleged incapacity;

vi. investigate the nature and extent of the client's estate;

vii. investigate alternatives to guardianship;

viii. investigate whether all interested persons have been properly served with the appropriate notice of hearing and petition;

ix. investigate the priority of the proposed guardian;

x. assist the client in nominating a guardian or conservator if desired;

xi. investigate the proper limited authority of a guardian or conservator;

xii. present the client's proposals and contest proposals with which the client does not agree;

xiii. participate in mediation with or on behalf of the client;

xiv. ensure the adequacy of the findings of fact; and

xv. try the case if needed.

(6) Income qualification and attorney fees

Income* as a Percent of Federal Poverty Guidelines	Presumed* Maximum Hourly Fee*
Up to 125%	$0
More than 125% to 200%	$50
More than 200% to 300%	$75
More than 300%	Determined by the court at the end of the proceedings.

* There are no restrictions on income or assets to qualify for the program. In the normal course, the attorney's maximum hourly fee will be determined by the respondent's income alone. However, the judge may consider the respondent's assets when determining the hourly fee, even if the respondent's income is less than 300% of the federal poverty guidelines. The respondent's assets will need to be considered as a source for establishing and paying the fee when the respondent has substantial assets but low income and for other good cause.

Resolution of income qualification can be deferred until the end of the proceedings and the attorney and client have evaluated the client's estate and completed the income qualification form.

(7) Assessment of costs and attorney fees

(a) Guardianship (with or without conservatorship)

(A) The parties will pay their respective costs and attorney fees unless:

i. the court determines that the petition is without merit, in which case the petitioner will pay the respondent's costs and attorney fees;

ii. the court appoints the petitioner or the petitioner's nominee (and the petitioner is authorized by Section 75-5-311 to nominate a guardian), in which case the protected person will pay the petitioner's costs and attorney fees.

(B) The court may award costs under URCP 54. An attorney may present to the court a memorandum for costs under URCP 54 and an affidavit for attorney fees under URCP 73.

(C) The total award for costs and attorney fees paid by the protected person may not exceed 20% of the protected person's estate, including the

anticipated income in the year in which the guardian is appointed. The judge may limit payments based on the protected person's ability to pay.

(D) The court may suspend the application of this section to prevent manifest injustice.

(b) Conservatorship only

(A) The parties will pay their respective costs and attorney fees unless the court appoints the petitioner or the petitioner's nominee (and the petitioner is authorized by Section 75-5-410 to nominate a conservator), in which case the protected person will pay the petitioner's costs and attorney fees.

(B) The court may award costs under URCP 54. An attorney may present to the court a memorandum for costs under URCP 54 and an affidavit for attorney fees under URCP 73.

(C) The total award for costs and attorney fees paid by the protected person may not exceed 20% of the protected person's estate, including the anticipated income in the year in which the conservator is appointed. The judge may limit payments based on the protected person's ability to pay.

(D) The court may suspend the application of this section to prevent manifest injustice.

(8) Forms

- Request for appointed counsel
- Income qualification form
- Order appointing counsel (Add HIPAA language.)
- Letter to client
- Client contract
- Notice of appearance
- Notice of withdrawal
- Memorandum of costs
- Affidavit of attorney fees
- Objection to costs and fees
- Order on costs and fees
- Agreement and application for an e-filing account
- ???

(9) Things to do

- Draft forms.
- Develop basic training module.
- Work with MCLE Board to keep records of minimum education component.

- Work with clerks to establish procedures to identify qualifying cases and take appropriate steps as soon as possible after the petition is filed.
- Find out whether CORIS can help with the notice to lawyers.
- Develop uniform script of clerk's email to attorneys.
- Develop uniform script of CORIS entry of referral and placement. Develop CORIS query to report referrals and placements.
- Include on the court's webpage.
- Include in judges' benchbooks and clerks' manuals.

Tab 3

Rules governing limited representation

RPC 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

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(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. Agreements Limiting Scope of Representation

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Comments

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Rule 14-802

…

(c) Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

(c)(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(c)(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person's facts or circumstances.

(c)(3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.

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Rule 75. Limited appearance.

(a) An attorney acting pursuant to an agreement with a party for limited representation that complies with the Utah Rules of Professional Conduct may enter an appearance limited to one or more of the following purposes:

(a)(1) filing a pleading or other paper;

(a)(2) acting as counsel for a specific motion;

(a)(3) acting as counsel for a specific discovery procedure;

(a)(4) acting as counsel for a specific hearing, including a trial, pretrial conference, or an alternative dispute resolution proceeding; or

(a)(5) any other purpose with leave of the court.

(b) Before commencement of the limited appearance the attorney shall file a Notice of Limited Appearance signed by the attorney and the party. The Notice shall specifically describe the purpose and scope of the appearance and state that the party remains responsible for all matters not specifically described in the Notice. The clerk shall enter on the docket the attorney's name and a brief statement of the limited appearance. The Notice of Limited Appearance and all actions taken pursuant to it are subject to Rule 11.

(c) Any party may move to clarify the description of the purpose and scope of the limited appearance.

(d) A party on whose behalf an attorney enters a limited appearance remains responsible for all matters not specifically described in the Notice.

Ethics Advisory Opinion 02-10

December 18, 2002

http://webster.utahbar.org/committees/eaoc/2002/01/0210_may_a_lawyer_review_plead.html

¶ 1 Issue: May a lawyer review pleadings prepared by a non-lawyer mediator for simple, uncontested divorces and advise the mediator on how to modify the pleadings for filing in court?

¶ 2 Conclusion: (1) As lawyer for the mediator, a lawyer may advise the mediator on the issues likely to arise in the course of the mediation, but may not advise the mediator how to prepare the divorce agreement and court pleadings for particular parties who are clients of the mediator. This would constitute assisting in the unauthorized practice of law and would violate Utah Rules of Professional Conduct 5.5. (2) An attorney may provide representation to a party engaged in a divorce mediation that is limited to advising the party and assisting with pleadings, but may not so limit the representation without first fully informing the party of the proposed limitation and obtaining the party's informed consent.

¶ 3 Background: A divorce mediator has requested that a lawyer perform a limited service: review pleadings prepared by the mediator and amend them as needed. Prior to the attorney's involvement, the mediator would meet with the divorcing parties and assist them in reaching a settlement of all issues in their divorce. Then, the mediator would draft the parties' agreement, which would be filed with the court or incorporated into the judgment of the court. Finally, the mediator would draft the various additional court documents (e.g., complaint, findings of fact and conclusions of law, judgment) needed for the parties' divorce. The mediator would inform the divorcing parties that the pleadings were not prepared by an attorney, but had been reviewed by an attorney for "sufficiency." The divorcing parties would pay the attorney a small fee for this service.

¶ 4 Analysis: The request raises the following issues:

* Whether the lawyer is representing the mediator or the divorcing parties.

* Whether this plan involves the lawyer's assisting in the unauthorized practice of law in violation of Utah Rules of Professional Conduct 5.5.

* Whether this plan constitutes an appropriate limitation on the lawyer's representation for the client under Utah Rules of Professional Conduct 1.2 and 1.1.

A. Whether the lawyer is representing the mediator or the divorcing parties.

¶ 5 The original request appears to presume that the lawyer is advising the mediator. However, the advice sought from the Committee focuses on the agreement and pleadings for a divorce between two particular parties. Here, we consider the ethical constraints on both possible relationships.

B. Whether the lawyer, in advising the mediator, is assisting in the authorized practice of law.

¶ 6 Rule 5.5 provides that a lawyer shall not "assist any person in . . . the unauthorized practice of law." However, the Comments to Rule 5.5 state that the rule "does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law." Accordingly, it should be permissible for a lawyer to form an attorney-client relationship and provide a mediator with professional advice that the mediator needs for this occupation. In order to understand the limits of what is appropriate legal advice to give a mediator, we first examine what constitutes the practice of mediation under Utah law and current codes of conduct for mediators.

¶ 7 Utah statute provides for the certification of "alternative dispute resolution providers,"1 including persons providing services as mediators.2 "Alternative dispute resolution" is defined as "the provision of an alternative system for settling conflicts between two or more parties, which operates both independent of or as an adjunct to the judicial-litigation system, through the intervention of a qualified neutral person or persons who are trained to intercede in and coordinate the interaction of the disputants in a settlement process."3 A "dispute resolution provider" is "a person, other than a judge acting in his official capacity, who holds himself out to the public as a qualified neutral person trained to function in the conflict-solving process using the techniques and procedures of negotiation, conciliation, mediation."4

¶ 8 Utah statute also provides for the Judicial Council to establish alternative dispute resolution programs to be administered by the Administrative Office of the Courts.5 The Judicial Council is authorized to establish rules concerning ADR procedures, including establishing the qualifications of ADR providers for each form of ADR.6 This statute further provides that an ADR provider "conducting procedures under the rules of the Judicial Council and the provisions of this act" shall be immune from all liability except for wrongful disclosure of confidential information.7 These court-annexed ADR programs may also include mediation, defined as "a private forum in which one or more impartial persons facilitate communication between parties to a civil action to promote a mutually acceptable resolution or settlement."8

¶ 9 These laws establishing and defining mediation focus on the mediator's possessing and utilizing certain communication skills in order to help parties resolve a dispute, rather than having legal knowledge or the ability to prepare court pleadings.

¶ 10 This focus is consistent with the model Standards of Conduct for Mediators adopted in 1994 by the American Bar Association Section on Dispute Resolution, the Society of Professionals in Dispute Resolution (SPIDR), and the American Arbitration Association. These standards provide that "[m]ediation is based on the principle of self-determination by the parties" and includes the comment: "A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the

importance of consulting other professionals, where appropriate, to help them make informed decisions."9Thus, standards for mediators recognize that legal advice may be necessary for some parties to make informed decisions. The standards further recognize that it is not the mediator's role to provide that legal advice:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice.10

¶ 11 Accordingly, in "providing professional advice and instruction to nonlawyers whose employment requires knowledge of law,"11 it would be appropriate for a lawyer to advise a mediator about the issues that typically arise in a divorce—custody, visitation, child support, alimony, and property division. In this way, the mediator can assist the parties to discuss all of the relevant issues. Similarly, the lawyer might properly explain various options for parties to consider in resolving their dispute and might suggest which options are likely to be adopted by a court of law. In this way the mediator can assist the parties to consider relevant and feasible options.

¶ 12 Moreover, a lawyer may publish a "How to" manual regarding divorce, including draft forms to use.12 Thus, the attorney could give such a manual and draft forms to the mediator for distribution to clients who could complete and file these forms pro se. Similarly, the lawyer could approve the draft forms the mediator has prepared for distribution to divorcing parties to use pro se. Finally, a lawyer could advise the mediator as a consultant about the mediator's legal obligations in difficult cases. For example, if a party told the mediator of suspected child abuse by the other parent, the mediator could seek and obtain advice from an attorney about the mediator's obligation to report suspected child abuse.

¶ 13 However, in a mediated divorce setting, a lawyer's more typical role would be to provide legal advice to one of the parties in order to insure that the party is making informed decisions. Typically, this advice is provided in the context of full representation of the client who is participating in the mediation. However, the lawyer's services to that client can be more limited. (See part C below, regarding "unbundled services.") Note that a lawyer is permitted to represent only one of the parties to the divorce in order to avoid impermissible, and non-consentable conflict, as we explained in Opinion 116.13

¶ 14 The Comment to Rule 5.5 states: "[A] lawyer may counsel nonlawyers who wish to proceed pro se." Accordingly, the lawyer might properly advise a divorcing party about her rights in a divorce case and about the pleadings she will need to file and the procedures she will need to pursue.

¶ 15 However, complications arise when the lawyer is providing that advice to the mediator (rather than directly to a party) and the mediator is assisting that party to complete the necessary pleadings.

¶ 16 The Utah Supreme Court considered the propriety of non-lawyers assisting parties to prepare court pleadings most recently in the case of Utah State Bar v. Petersen,14 where a paralegal “prepared wills, divorce papers, and pleadings . . . on behalf of clients for a fee” without this work being supervised by an attorney.15 The Supreme Court affirmed the judgment that Petersen had engaged in the unauthorized practice of law,16 defining the “practice of law” as “the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent . . . performing services in the courts of justices . . . counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities.”17

¶ 17 In a similar case, the Florida Supreme Court held that a paralegal would run afoul of the unauthorized practice of law by assisting divorcing parties to draft their pleadings in a divorce case; but the paralegal would be permitted to sell printed divorce forms to the parties.18

¶ 18 In a recent bankruptcy case a nonlawyer “bankruptcy petition preparer” (BPP) went beyond “the typing services a BPP may legitimately perform” by having pleadings she prepared reviewed by a lawyer and by having the lawyer available to “chat” with petitioners regarding their “general” questions.19 The Idaho Bankruptcy Court found that this arrangement constituted a deceptive and unfair practice where the reviewing lawyer did not actually represent the bankruptcy petitioners and this BPP advertised the availability of a lawyer for review and general information as a benefit to her clients.20 The Bankruptcy Court further found that this BPP engaged in the unauthorized practice of law by providing “legal advice to prospective debtors by giving them a pamphlet or other publication.” since “the very act of directing a prospective debtor to review a particular section or a legal book in and of itself constitutes legal advice.”21

¶ 19 In light of Utah case law and persuasive authority from other jurisdictions, we conclude that an attorney may not advise a nonlawyer mediator about the preparation of pleadings or agreements in particular cases without violating the rule that prohibits the lawyer from assisting the unauthorized practice of law, Rule 5.5.

¶ 20 While we have no authority to define “unauthorized practice of law” under state statute, we are able to state that an attorney would assist the unauthorized practice of law and thus violate Rule 5.5 by advising a non-lawyer how to conform legal pleadings to proper form without having an attorney-client, advice-giving relationship with the party in interest. Accordingly, the proposed plan of having the mediator draft the court pleadings and the agreement and having the attorney review these documents “for sufficiency” would be a violation of the Utah Rules of Professional Conduct.

C. What are the limitations on the lawyer’s representation of a party engaged in a divorce mediation?

¶ 21 If the lawyer has been retained by the mediator to provide advice as discussed in Part B, then she may not, in most cases, concurrently represent either of the divorcing parties.22 If, on the other hand, the lawyer has not been retained by the mediator, she may represent one or the other of the parties (but, under Opinion 116, not both), and mediators often do recommend that divorcing parties obtain legal advice from lawyers. However, the parties may seek to limit their expenses by engaging a lawyer for only limited representation. We now take up the issue of how an attorney may properly limit the scope of her representation in this situation.

¶ 22 Rule 1.2(b) provides that "a lawyer may limit the objectives of the representation if the client consents after consultation." However, the Comments to Rule 1.2 indicate that "the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [competence]."

¶ 23 This Committee has had occasion to address the propriety of limiting the scope of legal representation under the prior Code of Professional Responsibility as well as under the current Rules of Professional Conduct, and we take this opportunity to review those determinations:

* **Opinion 47**: An attorney may "provide limited legal advice, consultation, and assistance to inmates regarding the preparation of the initial pleadings in civil matters" provided the inmates are fully informed of the limited services.23

* **Opinion 53**: An attorney may interview, advise, and provide a manual and forms for clients seeking to file pro se divorces.24

*** Opinion 74**: An attorney may advise a party proceeding pro se and assist him to prepare pleadings. ("However, extensive undisclosed participation . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper" as conduct involving misrepresentation.)25

* Opinion 95-01: Publishing a "How to" manual does not constitute the practice of law where there is no "personal advice given on a specific problem."26

* Opinion 96-12: An attorney may charge for legal advice given to callers using a "1-900" number, but cannot disclaim the creation of an attorney-client relationship.27

* Opinion 97-09: A lawyer providing certain estate-planning legal services in conjunction with a non-lawyer estate-planner "must perform an independent role as legal advisor to the client, assuring that the estate plan and associated documents are legally appropriate to accomplishing the client's objectives."28

* Opinion 98-14: A lawyer representing a client in a divorce is not automatically counsel for that client in a protective-order proceeding because the client may elect to proceed pro se in this separate action.29

* Opinion 01-03: An insurance defense lawyer with a flat-fee arrangement may not improperly curtail services to the client, which include "competent representation . . . to exercise independent professional judgment and render candid advice."30

Certain principles from these precedents emerge as fundamental when a lawyer attempts to limit the scope of representation.

¶ 24 First, the lawyer may "limit the objectives of the representation [only] if the client consents after consultation."31 Such consultation should comport with Rule 2.1, which requires an exercise of "independent professional judgment" and "candid advice," as well as with Rule 1.4 which requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

¶ 25 Accordingly, an attorney may limit the legal services provided to a divorcing client only after fully advising the client as the to range of services possible (e.g., from full representation to advice followed by the client proceeding pro se)32 and after advising the client as to the pros and cons of proceeding in any particular manner.33

¶ 26 There are nevertheless certain limitations that cannot be imposed. The lawyer cannot disclaim the attorney-client relationship,34nor limit the obligation to be "competent," which includes "thoroughness" and "preparation reasonably necessary" for the representation.35

¶ 27 In a similar case, we analyzed the proposal of a professional estate planner who sought to involve a lawyer on a limited basis to assist in drafting estate plans for his clients.36The issue we addressed in that opinion was whether the lawyer could thus "provide competent representation under Rules 1.1 and 1.2(b)." We concluded that too circumscribed a role is not permissible. We opined that the estate planning lawyer cannot "provide competent representation . . . if he declines to counsel the client as to the appropriate means of executing the estate-planning documents or as to the appropriate means of transferring assets into the estate-planning vehicles to accomplish the client's objectives." In the estate planning situation, we determined that "a lawyer has an obligation not only to advise a client of legal rights and responsibilities, but also to advise the client regarding the advisability of the action contemplated." We stated: "A lawyer is under a duty to inform clients of the relevant facts, law and issues necessary for the client to make intelligent decisions regarding the objectives of the representation."37

¶ 28 We are unable to find a principle that justifies a different decision here. An estate- planning lawyer cannot be a mere scrivener, but "must perform an independent role as legal advisor to the client."38Likewise, a divorce attorney cannot be a mere drafter, preparing court pleadings, proposed orders and judgments and avoiding the exercise of any "independent professional judgment" and communication of any "candid advice"39to the client.

¶ 29 Indeed, the Rules of Professional Conduct identify various functions the lawyer assumes as "representative of clients," including advisor, advocate, intermediary, and evaluator,40but the Rules do not identify the role of "drafter" or "scrivener." As an advisor, "a lawyer provides a client with an informed understanding of the client's legal

rights and obligations and explains their practical implication."41While an attorney may limit the scope of representation to advising the client or to advising and assisting in drafting pleadings, there is no authority for eliminating the advice-giving role in an attorney-client relationship.

¶ 30 Commentators have addressed the challenges faced in such "unbundled" legal services.42Various courts have addressed the propriety of attorneys assisting only with "ghostwritten" pleadings, as is proposed here. In some cases, courts have considered ghostwritten pleadings to be a fraud on the court.43Some courts have explicitly required a pro se litigant to indicate whether she had legal assistance in preparing her pleadings;44other courts have required an attorney to appear in person and represent clients in future hearings if they attempt to appear only through ghostwritten pleadings.45A few states have addressed the limited service of ghostwritten pleadings through court rule. Colorado provides that an attorney may "undertake to provide limited representation . . . to a pro se party" by including his name on the party's pleadings and warranting that the attorney's assistance relies upon the pro se party's representation of the facts.46

¶ 31 Various state bars have addressed the limitation on legal services where the lawyer provides only legal analysis and drafting services.47We can find no judicial or ethics opinion that approves drafting services alone; the drafting services are always an adjunct to analysis and advice provided by the lawyer. Finally, best practices in "unbundled" legal services are addressed in various books and articles,48and we can find none that suggest drafting services alone are adequate or appropriate.

¶ 32 Indeed, all pleadings in Utah divorce cases must be signed by the attorney or the pro se party, "certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the claims, defenses and other legal contentions therein are warranted by existing law [and] . . . the allegations and other factual contentions have evidentiary support."49It is difficult to understand how a lawyer could appropriately assist an individual to file pro se divorce pleadings without advising the party when his claims appear to lack any legal support and without advising the party regarding the evidentiary support the party will need to support certain contentions.

¶ 33 In the absence of any court rules that address the propriety of ghostwritten pleadings, this Committee concludes that, at a minimum, a lawyer may not limit her services to conforming a party's pleadings to proper form without providing analysis and advice to the party seeking such advice.

D. Conclusion

¶ 34 It is permissible for a lawyer to advise a divorce mediator on the issues likely to arise in the course of a mediation, but the lawyer may not advise the mediator how to prepare divorce agreements and court pleadings for particular parties who are clients of the mediator. It is also permissible for a lawyer to review the contents of the divorce

agreement for one of the parties and advise that party about the options and the advisability of the draft agreement. A lawyer might appropriately limit her services to such a review. A second attorney might advise the other party in this same way. Thereafter, either of these two attorneys might review the pleadings prepared by these parties as to sufficiency. And these parties might then proceed to file pro se.

¶ 35 However, the most crucial element of legal services here is informing a party about the relevant legal standards so that the party's decisions are informed. Accordingly, it is inappropriate for an attorney to limit her services to assisting a divorcing party to prepare divorce pleadings while failing or refusing to advise the divorcing party about the relevant law.

Footnotes

1.Utah Code Ann. §§ 58-39a-1 et seq. (2002), "Alternative Dispute Resolution Provider Act." An ADR Providers Certification Board, comprising two judges, one lawyer and four members of the general public with a demonstrated interest in ADR, is to grant certification to persons who "complete a program of education or training, or both, in ADR or have demonstrated sufficient experience in ADR." Id. §§ 58-39a-3 and -5

2.Id. § 58-39a-2.

3.Id. § 58-39a-2(1)(a).

4.Id. § 58-39a-2(4).

5.Utah Code Ann. §§ 78-31b-1 et seq. (2002), "The Alternative Dispute Resolution Act."

6.Id. § 78-31b-5(3)(h). This statute explicitly provides that ADR providers may, but need not, be certified under the ADR Provider Certification Act.

7.Id. § 78-31b-4(4).

8.Id. § 78-31b-2(8).

9.Standards of Conduct for Mediators, Standard I and cmt.

10.Id., Standard V cmt.

11.Utah Rules of Professional Conduct 5.5, cmt.

12.Utah Ethics Advisory Op. 95-01, 1995 WL 49472 (Utah St. Bar). Publication of such forms is not the practice of law where no personal advice is given. (The Committee's opinions are also available at www.utahbar.org/options/index.html).

13.Utah Ethics Advisory Op. 116, 1992 WL 685249 (Utah St. Bar).

14.Utah State Bar v. Petersen, 937 P.2d 1263 (Utah 1997)

15.Id. at 1263.

16.Petersen was found to have violated Utah Code Ann. § 78-51-25.

17.Petersen, 937 P.2d at 1268.

18.Florida Bar v. Brumbaugh, 335 So. 2d 1186 (Fla. 1978).

19. In re: Doser, 281 B.R. 292, 294 (Bkrtcy. D. Idaho 2002).

20.Id. at 304-06.

21.Id. at 306-09.

22.Such a concurrent representation would likely create a conflict of interest under Rules of Professional Conduct 1.7. Whether this conflict could be waived by the consent of the mediator and the divorcing party would depend on the facts and circumstances.

23.Utah Ethics Advisory Op. 47 (Utah St. Bar, July 1978).

24.Utah Ethics Advisory Op. 53 (Utah St. Bar, April 1979).

25.Utah Ethics Advisory Op. 74 (Utah St. Bar, Feb. 1981).

26.Utah Ethics Advisory Op. 95-01, 1995 WL 49472 (Utah St. Bar).

27.Utah Ethics Advisory Op. 96-12, 1997 WL 45137 (Utah St. Bar).

28.Utah Ethics Advisory Op. 97-09, 1997 WL 433814 (Utah St. Bar).

29.Utah Ethics Advisory Op. 98-14, 1998 WL 863905 (Utah St. Bar).

30.Utah Ethics Advisory Op. 01-03, 2001 WL 314288 (Utah St. Bar).

31.Utah Rules of Professional Conduct 1.2 (c)(emphasis added). See also Utah Ethics Advisory Op. 47.

32.See Utah Ethics Advisory Op. 98-14.

33.See Utah Ethics Advisory Op. 47.

34.Utah Ethics Advisory Op. 96-12.

35.Utah Ethics Advisory Op. 02-03.

36.Utah Ethics Advisory Op. 97-09.

37.Id.

38.Id.

39.Utah Rules of Professional Conduct 2.1.

40.Preamble, Utah Rules of Professional Conduct.

41.Id.

42.See Forrest S. Mosten, Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte, (ABA Law Practice Management Section, 2000)(hereinafter, “Mosten”).

43.Johnson v. Freemont 868 F. Supp. 1226 (D. Colo. 1984). Our Opinion 74 considers an attorney providing “extensive undisclosed” assistance to be unethical as assisting in a misrepresentation.

44.Wesley v. Dan Stein Buick, 987 F. Supp. 884 (D. Kans. 1997).

45.See Kimberly Pochnau, Unbundling Civil Legal Services, A Critical Reader (ABA 1998).

46.Colo. R. Civ. P 11(b).

47.Alaska Bar Association Ethics Opinion No. 93-1 (permissible to interview client and draft pleadings without appearing in court); ABA Informal Ethics Opinion 1414 (1978)(permissible to advise and prepare pleadings; but extensive undisclosed participation would constitute misrepresentation); Arizona Opinion 91-03 (attorney may advise on domestic relations matters and prepare pleadings); Colorado Bar Association Ethics Committee Formal Opinion No. 101 (1998)(attorney may limit representation provided she makes sufficient inquiry into and analysis of factual and legal elements to provide competent representation); New York Opinion 613 (1990)(attorney may advise and prepare pleadings for a pro se litigant without entering an appearance).

48.See, e.g., Mosten, supra note 42; Mary Helen McNeal, Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients, 32 Wake Forest L. Rev. 295 (1997)

49.Utah R. Civ. P. 11.

Ethics Advisory Opinion 74

February 13, 1981

Summary: An attorney may give advice to a litigant who is proceeding prose and may prepare or assist in the preparation of pleadings. But when the attorney gives any additional advice or assistance, he has an obligation to notify the court and opposing counsel of his representation.

Comments: See also, Utah Opinions 47 and 53.

Facts: The following fact situation has been presented to the Ethics Committee: A person comes to an attorney's office and brings with him a copy of a complaint which has been served upon him. The attorney then advises this person that before a formal appearance can be entered in his behalf, it is necessary that a substantial retainer be paid. The individual then indicates that he is not in a financial position to pay such a retainer and wants to proceed with his case pro se. However, he wants to have an answer filed to protect his position.

The questions presented in this situation are two fold:

1. The propriety of an attorney preparing a responsive pleading showing the party to be appearing pro se, giving this pleading to the party and letting him do with it what he chooses, and;

2. Is the attorney obligated to advise a court and opposing counsel of his assistance in the preparation of these pleadings and of any legal advice which he has given. Opinion: The answer to both questions is determined by the extent of the legal advice the attorney gives to the litigant. There is nothing improper in an attorney giving initial advice to a litigant who is proceeding pro se nor is it improper for an attorney to prepare or assist in the preparation of pleadings. However, when the attorney gives any additional assistance and the litigant continues to inform the court that he is proceeding pro se, he has engaged in misrepresentation by professing to be without representation. The attorney who engages in this conduct is involved in the litigant's misrepresentation contrary to DR 1- 102(A)(4) of the Revised Rules of Professional Conduct of the Utah State Bar which provides:

> "A lawyer shall not: . . .
>
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation." A determination of whether or not the attorney's conduct is improper will depend upon the particular facts involved in each situation. The extent of an attorney's participation on behalf of the litigant who appears to the court and other counsel as being without professional representation is the determining factor. Minimal participation by the attorney is not improper. However, extensive undisclosed participation by an attorney that permits the litigant falsely to appear as being without substantial professional assistance is improper for the reasons noted above.