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April 5, 2006

Ms. Marilyn M. Branch,
Appellate Court Administrator
Supreme Court of Utah
P.O. Box 140210
Salt Lake City, Utah 84114-0210

RE: Lawyers/Mediator Issue

Dear Matty:

Enclosed is the letter to the Chief Justice. Before submitting it to her, I would ask that you gather up the various documents referred to as enclosures. You will likely need to create a red-lined version of Rule 2.4 and Rule 1.12.

Yours truly,

Robert A. Burton

RAB/ls
Enclosure

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April 5, 2006

Chief Justice Christine M. Durham
Utah Supreme Court
P.O. Box 140210
Salt Lake City, Utah 84114-0210

RE: Lawyer/Mediator Issue

Dear Justice Durham:

At your request, on October 11, 2005 Matty Branch requested that the Advisory Committee on the Rules of Professional Conduct consider whether the applicable Rules of Professional Conduct should be amended to permit lawyer mediators to draft the settlement agreement and necessary court pleadings to obtain a divorce for parties following a successful mediation.

The issue was discussed extensively in meetings of the committee held on November 21, 2005, January 23, 2006, February 13, 2006, and March 20, 2006. Copies of the minutes of those various meetings are enclosed.

At the March 20, 2006 meeting, the committee voted to recommend an amendment to Rule 2.4. A red-lined version of the proposed amended rule is enclosed herewith. The committee also voted in favor of making a minor revision to Rule 1.12. A red-lined version of that rule is also enclosed. The proposed rule changes would not necessarily be limited to divorce actions only. (See minutes of March 20, 2006 meeting).

In addition to the minutes and the red-lined rules, I have also enclosed a copy of the Utah State Bar Ethics Advisory Opinion No. 05-03 dated May 6, 2005. Although this opinion was decided under Utah's previous Rules of Professional Conduct and was subsequently reissued in a shorter version by the Board of Bar Commissioners, the opinion, nonetheless, gives valuable background with respect to this matter.

I would be happy to provide any additional information the Court may require at this juncture. However, at this point, the Court may prefer to send the proposed rules out for comment, let the committee consider comments that are made, and then allow

the committee to make a final recommendation to the Court after carefully considering the additional comments that undoubtedly will be received.

Yours truly,

SUPREME COURT'S ADVISORY COMMITTEE
ON THE RULES OF PROFESSIONAL CONDUCT

By: _____
Robert A. Burton, Chair

RAB/ls
Enclosures
cc: Matty Branch

IN THE SUPREME COURT OF THE STATE OF UTAH
-ooOoo-

In re: Utah State Bar's Petition to Adopt House Counsel Admission Rule

No. 20051068-SC

ORDER

IT IS HEREBY ORDERED that the Utah State Bar's petition to adopt a house counsel admission rule is granted. The attached Rule 20 of the Utah State Bar Rules Governing Admission is approved and promulgated effective as of November 1, 2006.

For the Court:

May 10, 2006
Date

Christine M. Durham
Chief Justice

Rule 20. Qualifications for admission of house counsel applicants.

Rule 20-1. Scope of practice. An attorney admitted to the Bar as House Counsel shall limit his or her practice of law including legal representation only to the business of his or her employer. House Counsel shall not:

(a) Appear before a court of record or not of record as an attorney or counselor in the State of Utah except as otherwise authorized by law or rule; or

(b) Offer legal services or advice to the public or hold himself or herself out as being so engaged or authorized, except as permitted under Rule 5.5 of the Utah Rules of Professional Conduct. An attorney granted a House Counsel license is not prevented from appearing in any matter pro se or from fulfilling the duties of a member of the active or reserve components of the armed forces or the National Guard.

Rule 20-2. Requirements of house counsel applicants. To be recommended for admission to the Bar as House Counsel, a person must establish by clear and convincing evidence that he or she meets each of the following requirements:

(a) Filed with the Admissions Office a Complete Application for admission to the Bar and paid the prescribed application fee;

(b) Be at least twenty-one years old;

(c) Graduated with a first professional degree in law (Juris Doctorate or Bachelor of Laws) from an ~~Approved Law School~~ accredited;

(d) Be licensed to practice law and in active status in a sister state or United States territory or the District of Columbia;

(e) Either (1) be a bona fide resident of the State of Utah or (2) maintain an office as the employer's House Counsel within the State of Utah;

(f) Be employed and practice law exclusively as House Counsel for a corporation, its subsidiaries or affiliates, an association, a business, or other legal entity whose lawful business consists of activities other than the practice of law or the provision of legal services;

(g) Provide an affidavit signed by both the Applicant and the employer that the Applicant is employed exclusively as House Counsel and that Applicant has disclosed

to the employer the limitations on House Counsel's license of practicing under this rule;

(h) Be of good moral character and have satisfied the requirements of Rule 8;

(i) Present satisfactory proof of both admission to the practice of law and that he or she is a member in good standing in all jurisdictions where currently admitted;

(j) File with the application a certificate from the entity having authority over professional discipline for each jurisdiction where the Applicant is licensed to practice which certifies that the Applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter; and

(k) Complied with the oath and enrollment provisions of Rule 16 and paid the licensing fees required for active status.

Rule 20-3. Application. An Applicant requesting a license to serve as House Counsel must file a Complete Application for admission.

(a) An application under this rule may be filed at any time.

(b) The processing time of a House Counsel application is approximately 90 to 180 days.

(c) Applicants must meet all House Counsel admission requirements in accordance with Rule 20-2.

(d) Upon approval by the Board of an application, the Applicant will be admitted in accordance with Rule 16-2.

Rule 20-4. Unauthorized practice of law.

(a) It is the unauthorized practice of law for an attorney not licensed in Utah to practice law in the state except as otherwise provided by law.

(b) An attorney who complies with the requirements of Rule 20-2(a) may provide services to an employer in Utah while the application is pending as long as the application is filed within six months of the out-of-state attorney establishing an office or residence in Utah.

(ac) No attorney who is not a member of the Bar and is acting as an attorney in Utah for an employer shall be denied a House Counsel license solely because of the attorney's prior failure to seek admission to the Bar, provided that an application pursuant to this rule is filed within one year of the Court's adoption of this rule.

(bd) After the one-year enrollment period referred to in Rule 20-4(ac), an attorney who provides legal advice to his or her employer but is not an active member of the Bar or licensed as a House Counsel pursuant to this rule may be referred for investigation for

the unauthorized practice of law.

Rule 20-5. Continuing legal education requirement. House Counsel shall:

(a) File with the Board of Mandatory Continuing Legal Education ("MCLE Board"), by January 31 of each year, a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed; and

(b) Pay the designated filing fee at the time of filing the Certificate of Compliance. A House Counsel admitted under this rule who fails to comply with the CLE filing requirement by the January 31 deadline shall be assessed a late fee. Any House Counsel who fails to file within thirty (30) calendar days of the January 31 deadline may be subject to suspension and a reinstatement fee.

Rule 20-6. Applicable regulations. House Counsel is subject to and must comply with the Utah Rules of Professional Conduct, the Rules Governing Admission to the Utah State Bar, the Rules for Integration and Management of the Utah State Bar, the Rules of Lawyer Discipline and Disability, and all other rules and regulations governing the conduct and discipline of members of the Bar.

Rule. 20-7. Discipline. House Counsel is subject to professional discipline in the same manner and to the same extent as a member of the Bar. Every person licensed under this rule is subject to control by the courts of the State of Utah and to censure, suspension, removal, or revocation of his or her license to practice as House Counsel in Utah regardless of where the conduct occurs.

Rule 20-8. Notification of change in standing.

(a) House Counsel shall execute and file with the Licensing Office a written notice of any change in that person's membership status, good standing or authorization to practice law in ~~all~~ any jurisdictions where licensed.

(b) House Counsel shall execute and file with the Office of Professional Conduct a written notice of the commencement of all formal disciplinary proceedings and of all final disciplinary actions taken in any other jurisdiction.

Rule 20-9. No Solicitation.

~~(a)~~ House Counsel is not authorized by anything in this rule to hold out to the public or otherwise solicit, advertise, or represent that he or she is available to assist in

representing the public in legal matters in Utah.

~~(b) All business cards, letterhead and directory listings, whether in print or electronic form, used in Utah by House Counsel shall clearly identify House Counsel's employer and that House Counsel is admitted to practice in Utah only as House Counsel or the equivalent.~~

Rule 20-10. Cessation of activity as house counsel. A House Counsel license terminates and the House Counsel shall immediately cease performing all services under this rule and shall cease holding himself or herself out as House Counsel upon:

(a) Termination of employment with the qualified employer as provided in Rule 20-2(f);

(b) Termination ~~from~~ of residence, or the maintenance of his or her office in the State of Utah as provided in Rule 20-2(e);

(c) Failure to maintain active status in a sister state or United States territory or the District of Columbia, or to satisfy the Bar's annual licensing requirements, including compliance with mandatory continuing legal education requirements as provided for in this rule;

(d) Completion of any disciplinary proceeding in Utah or any other jurisdiction, which warrants suspension or termination of the House Counsel license; or

(e) An attorney who seeks admission to practice in this state as House Counsel and who previously had a Utah House Counsel license that was terminated due to a disciplinary proceeding pursuant to Rule 20-10(d) or whose license was terminated for a period longer than six months pursuant to Rule 20-10(a), (b) and/or (c) must file a new application under this rule.

Rule 20-11. Reinstatement after temporary lapse in license. An attorney whose House Counsel license is terminated pursuant to Rule 20-10(a), (b) and/or (c) shall be reinstated to practice law as a House Counsel if within six months from the termination the attorney is able to demonstrate to the Admissions Office that he or she has:

(a) Employment with a qualified employer and has provided the required verification of employment pursuant to Rule 20-2(g) of this rule;

(b) Established a residence or maintains an office for the practice of law as House Counsel for the employer within the State of Utah; and/or

(c) Active status in a sister state or United States territory or the District of Columbia and has complied with the Bar's annual licensing requirements for House Counsel.

Rule 20-12. Notice of change of employment. House Counsel shall notify, in writing, the Licensing Office of the termination of the employment pursuant to which the House Counsel license was issued.

Rule 20-13. Full admission to the Utah State Bar. A House Counsel license will be terminated automatically once the attorney has been otherwise admitted to the practice of law in Utah as an active member of the Bar. Any person who has been issued a House Counsel license may qualify for full membership by establishing by clear and convincing evidence that he or she meets the following requirements:

(a) Filed a complete written request for a change of status with the Admissions Office in accordance with the filing deadlines set forth in Rule 7-2. The request for a change of status must include:

(a)(1) A Reapplication for Admission form updating the information provided in the original application, including payment of the prescribed application fee. If the original application for admission is more than two (2) years old, a new Complete Application for admission must be filed;

(a)(2) A criminal background check dated no more than 180 days prior to the filing of the change of status request;

(a)(3) Satisfactory proof of both admission to the practice of law and that House Counsel is a member in good standing in all jurisdictions where admitted; and

(a)(4) A certificate from the entity having authority over professional discipline for each jurisdiction where House Counsel is licensed to practice which certifies that House Counsel is not currently subject to lawyer discipline or the subject of a pending disciplinary matter.

(b) Be of good moral character and have satisfied the requirements of Rule 8;

(c) Successfully passed the Bar Examination as prescribed in Rule 10;

(d) Successfully passed the MPRE as prescribed in Rule 13; and

(e) Complied with the provisions of Rule 16 concerning licensing and enrollment fees.

Rules - Comments

Comments: Rules of Professional Conduct

Re: USBRPC 01.12 and USBRPC 02.04

As the Court is aware, on behalf of the Utah State Bar's Office of Professional Conduct ("OPC"), I sit on the Court's Advisory Committee on the Rules of Professional Conduct ("RPC"). The Advisory Committee proposed amendments to USBRPC 01.12 and USBRPC 02.04. I participated in the discussion and vote on these proposed amendments as part of the Committee. I opposed the proposed amendments, but on a vote of ten in favor and five against, the proposed amendment passed and the proposed rule changes were submitted to the Court. Notwithstanding the above and with all due respect to the work of the Committee, because the OPC feels so strongly about the reasons for opposing the proposed rule changes, I felt it was necessary to outline to the Court the OPC's reasons of opposition as part of the public comment to the proposed changes.

It should be noted that the proponents of the change appear to approach the issues presented from a practitioner's perspective. The OPC's perspective is that of a gatekeeper. The OPC recognizes that these perspectives do not always fit hand in glove.

The proposed changes to RPC 1.12 and RPC 2.4 would allow a lawyer-mediator, after a "successfully" mediated resolution, and with the consent of both parties, to represent them as their respective lawyer for the limited purpose of filing the court documents necessary to have the Court accept the stipulated resolution. Without this change, pursuant to the conflict of interest rule, RPC 1.7, and specifically subsection (b)(3), even with the consent of all parties, a lawyer currently could not do this.

Proponents of the changes have essentially given two reasons for adopting them. The first reason is that limited representation of both parties does not eviscerate the attorney/client responsibilities between the lawyer and each party because the parties are no longer adverse: since mediation was successful, all the contested issues have been resolved. The second reason is that since the parties are no longer adverse, as a matter of economics and efficiency, it makes perfect sense to have the lawyer-mediator complete the transaction.

It is the OPC's viewpoint based on client protection that if a mediator becomes a lawyer for both parties for the purpose of presenting the mediated resolution to a Court, the lawyer's responsibilities as a lawyer to each party are eviscerated or undercut. The OPC has this view notwithstanding that the representation is limited; notwithstanding that the parties are advised to seek independent legal advice; notwithstanding that the consent (written or otherwise) of all parties is obtained; and notwithstanding that the parties have reached a proposed settlement.

Regarding the limited nature of the representation, the OPC acknowledges that a lawyer may limit her representation to a client. See RPC 1.2(c), RPC 4.2(b) and RPC 4.3 (b). However, nothing in the RPC supports the premise that when an attorney limits her representation, that she also limits her duty of competence (RPC 1.1); that she limits her duty of communication (RPC 1.4); or that she limits her duty with respect to conflicts (RPC 1.7). In other words, a lawyer in a limited representation situation maintains a duty of loyalty to a client as reflected by these rules.

Specifically, the duty of loyalty is implicated because when a lawyer leaves the mediator role and becomes the lawyer for each party, the parties' expectations change. In this respect, each party as part of the mediation will be told that the lawyer-mediator is not their legal advocate. So the parties cannot expect the

lawyer-mediator to advise them on the legal strength of their respective position or expect the lawyer-mediator to tell each party what the other party might have said on the weakness of his position. But if the lawyer-mediator becomes the lawyer for each party, each party will expect competent representation (i.e., legal advice on the solidity of their position concerning the deal pursuant to RPC 1.1); each party will expect complete communication (i.e., full information including information possibly given to the lawyer-mediator in confidence from the other client concerning the factual weakness of their case pursuant to RPC 1.4 and RPC 1.2); and each party will expect the lawyer to be free of conflicts that might affect the representation (i.e., that the lawyer will not be motivated by his personal interest of making sure that the mediated settlement is completed notwithstanding any inequities in the deal in contravention to RPC 1.7).

The OPC disagrees with the argument that the parties are adequately protected if they are advised to seek independent legal advice. A lawyer advising a client to seek independent legal advice on issues that are the very subject of his legal representation is form over substance with respect to ethical safeguards. Specifically, a client even without this direction always has the right to seek a second opinion on the lawyer's legal work, however, this second opinion does not relieve the initial lawyer's responsibilities of competence, communication, and conflicts under the ethical rules. Furthermore, since the clients are anticipating that the lawyer is going to be their lawyer for the purpose of completing the deal, why should each client believe that they need to seek independent legal advice? This proposed safeguard becomes more of a "window dressing" requirement than a substantive protection for each client.

The OPC also disagrees with the idea that the parties' consent removes the ethical problems. The ethical rules do not and should not allow clients to consent away their right to competent legal counsel and their right to be fully informed so they can make adequate decisions. Furthermore, since full communication (i.e., informed consent) is at the base of the waiver of any conflict, it is the OPC's view that consent to a conflict such as the lawyer's personal interest in ensuring his mediated resolution has no interference, should also not be allowed.

Regarding the fact that the parties have reached an agreement, it is significant to note that the mediated settlement is a "proposed" settlement. Until the settlement is accepted by a tribunal, the parties are still asserting claims. The tribunal has the discretion to reject the settlement. The OPC is fairly certain that there has been at least one case where a tribunal has had to consider a challenge to a mediated agreement by a party, including the issue whether the mediator should testify regarding the "agreement."

It is interesting to note that this proposed change originally came up in the context of domestic cases. As I am sure the Court is aware, in an overwhelming number of domestic cases, notwithstanding the initial settlement of issues, the parties often have ongoing issues concerning the adequacy of the alimony, child support, visitation, and property division. This is especially true given that often one of the parties is at a financial disadvantage at the time of the initial settlement. Thus, certainly with respect to domestic matters, a matter does not necessarily "resolve" at the end of a "successful" mediation. Two very experienced domestic practitioners made this point in presentations to the Committee in opposition to the proposed rule change.

With respect to the reasons of economics and efficiency for allowing a lawyer-mediator to complete the deal, this idea in isolation may make good sense. However, in the Court's previous consideration of a petition to change the ethical rules to allow multi-disciplinary practice (which was proposed to the Court primarily on the basis of efficiency and economics), the Court concluded that a rejection is appropriate when the ethical rule(s) change will result in a breach of the core values of an attorney. In similar fashion, the OPC thinks the Court should reject the proposed lawyer-mediator change to RPC 2.4 and RPC 1.12 because this change would breach the core value of loyalty to the client.

It should be noted that it appears that it is the intention of the proponents of the change to somehow limit the role of the mediator-turned-lawyer to basically that of an "agent" for the narrow purpose of memorializing the agreement and filing documents with the tribunal. Assuming the role can be so limited, the parties are essentially pro se because lawyer-mediators do not have any other legal responsibilities normally associated with that of a lawyer. The OPC suggests that if the Court adopts this change with such a limited role in mind, the Court maybe should also consider amending its authorization to practice law rule (Chapter 13A, Rule 1) to allow non-lawyer mediators to do what is proposed for lawyer-mediators by the change to RPC 2.4. In this way, the parties should not expect any more from a lawyer-mediator who is

completing the deal than they would expect from a non-lawyer mediator who is completing the deal. This solution would also satisfy the economics and efficiency rationale for the proposed change.

The OPC made an inquiry of other jurisdictions regarding the issues presented by this proposed change. Of the twenty-one (21) jurisdictions that responded (Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington) only Oregon appears to specifically allow what is being proposed by the change. As a matter of fact, Utah's proposed change appears to be based on the language of the Oregon rule. Ten (10) of the jurisdictions have not asserted any position or interpretation regarding the subsequent representation of both parties by a lawyer-mediator (Colorado, Illinois, Minnesota, Montana, Nevada, New Hampshire, North Carolina, Rhode Island, Vermont and Washington); and nine (9) jurisdictions by either rule or interpretation would not allow a mediator-turned-lawyer to represent both parties for the purpose of completing the deal (Connecticut, District of Columbia, Florida, Georgia, Idaho, Indiana, Massachusetts, Missouri and Virginia). Pennsylvania would look to their conflict rule (1.7) to interpret whether they would allow it. Thus, Utah appears to be only one of two states that has explicitly proceeded down this path.

If the rule change is adopted, the OPC forecasts that the party with "buyer's remorse" concerning the mediated settlement will file a Bar complaint against the mediator-turned-lawyer claiming that the lawyer did not look out for his individual interests. Specifically, he will claim that if the lawyer had told him everything, he would not have gone through with the deal. When this happens, the "efficiency" created by allowing the lawyer-mediator to complete the transaction as lawyer to both parties shifts the burden to the OPC to police the area of alleged inadequate representation that will have been built into the system. The OPC recognizes that there may be a number of reputable lawyer-mediators capable of carrying out their duty of loyalty in this situation. However, because of the difficulties presented and the attractiveness of completing the deal, there are significant numbers who cannot and will not.

In conclusion, the OPC feels that the proposed changes to RPC 2.4 and RPC 1.12 undermine a number of other ethical rules, causing an erosion of the core value of a lawyer's loyalty to his client. Thus, it is the OPC's viewpoint that the rule change as proposed would not be in the overall best interests of the Bar, the Courts, or the public. Based on this, the OPC respectfully requests that the Court reject the proposed changes to RPC 2.4 and RPC 1.12.

Billy L. Walker
Senior Counsel
Office of Professional Conduct
Utah State Bar

Posted by Billy L. Walker July 5, 2006 01:53 PM

I was delighted to read that this amendment to Rule 2.4 has been proposed. I endorse its approval. I have considerable personal interest in this clarification to the Rules of Professional Conduct.
I am not certain who will be reading these comments, so please excuse me if this is old news. More than 3 years ago, Bill Downes (another mediator/lawyer) and I requested on opinion from the Utah Bar's Ethics Opinion Committee as to whether it was ethical for a lawyer/mediator, who successfully helped a divorcing couple reach a mutually acceptable agreement in mediation, to then do the legal paperwork for the divorce. The Ethics Committee considered the issue for nearly two years before issuing their opinion. A majority and a minority opinion were issued. In that opinion #05-03, the majority concluded that the practice should not occur. In essence, they were of the view that it would constitute a violation of Rule 1.7 governing conflicts of interest. The minority opinion thought the practiced should be permitted subject to appropriate disclaimers and waivers. At the time that opinion was issued, there was no Rule 2.4.
In response to that opinion, I did two things. I petitioned the Bar Commission for review of the opinion asking that the minority view be adopted. I also sent a "self reporting" letter to the Office of Professional Conduct informing them that I had in the past engaged in the practice now proscribed by the new opinion and that in my view, the practice was appropriate and accordingly, I intended to continue that practice. My purpose in reporting myself was not to throw down the gauntlet, but to hope that an acceptable solution

could be negotiated by all interested parties. It did not work out that way.
The Bar Commission accepted the majority opinion with some minor modification. The minority opinion was left out of the published version.
OPC filed an Notice of Informal Complaint against me. A screening panel hearing was held. I appeared and gave testimony. After holding the matter in abeyance for nearly a month, the screening panel dismissed the complaint without explanation. I can only hope that the screening panel agreed with the merit of my view but a more logical explanation might be due to the fact the between the time the screening panel hearing was scheduled and its actual hearing date, the Supreme Court adopted substantial revisions to the Rules of Professional Conduct, including the adoption the new rule, Rule 2.4 and amendments to Rule 1.7 and 2.12, all of which, at least in my view, would allow the complaint against me to be viewed in a different light from what was being asserted by OPC at the time they initiated the proceedings against me.
During the pendency of the screening panel process I experienced considerable embarrassment and concern since that was my only experience of that nature in 38 years of practice. While I was relieved to have the disciplinary proceeding behind me, I was aware that numerous bodies, the OPC, the Bar Commission, the ADR section of the Bar, the ADR ad hoc committee of the Judicial Council as well as the Supreme Court's Advisory Committee on the Rules of Professional Conduct, all thought that the matter merited specific attention and decision by the Supreme Court.
I am pleased that the recommendation now under consideration by the Court, would specifically approve this practice. I won't detail here the reasoning that I presented to the screening panel in support of my position. I only suggest that I probably have more personal history and experience with this practice than any other lawyer in Utah. If the Court is considering any formal hearing on this issue, I would ask that I be invited to participate and respond to questions and provide further information.
I do have two suggestions however. First, I would suggest that this proposed amendment also be referenced in subparagraphs 18 and 19 of Rule 1.7 in the newly amended material so as to further define and permit common representation with the conditions required by that Rule.
Second. While the legal profession may be comfortable with its governance of this service as it relates to lawyers roles, I would suggest that the Court require some minimum training and practice requirements for the mediation portion.
Throughout my own perseverance and advocacy of this practice, I have acknowledged the possibility of abuse if this practice is permitted. While that possibility exists, I feel it is outweighed by the public interest in having a professional person being able to participate in a divorce proceeding without having to align him/herself as an advocate for one person or the other. But since, the possibility of abuse does in fact exist, I feel it would be helpful to create some training and practice guidelines to minimize the abuses and make certain that the lawyers who undertake this practice will also have some skills in the mediation arena. One possible approach might be to require the lawyer to meet the certification requirements for the Federal Court or State Court ADR rosters.
Clearly there are other possible solutions but I think it important that lawyers who engage in this dual role, understand the neutrality requirement imposed on mediators and also understand basic purposes, skills and techniques of the mediation process.
Brian Florence

Posted by Brian Florence June 10, 2006 07:38 AM

The Council's ADR committee discussed Rule 2.4 and asked me to convey its inanimous recommendation that the word "written" be inserted prior to the word "consent" in the first line of (c)(3). This requirement that the consent of all parties be memorialized will reduce the liklihood of future claims of unauthorized mediator conduct.

Posted by Rick Schwermer June 1, 2006 11:18 AM

I strongly support USB RPC02-04, which permits attorney-neutrals to draft pleadings and other documents to memorialize agreements reached between parties to mediation. This enables the parties to retain control of their own cases, expressing their agreements in a direct fashion, while parties who have not been allowed to have their agreements documented by their mediators and who nonetheless do not use their own attorneys are left to their own devices, usually with unintended consequences.

Posted by Jerome Hamilton May 16, 2006 06:16 PM

I support the proposed changes to USB RPC02-04. In my limited experience with divorce mediation, once the issues are settled the parties do not want to hire an attorney and instead use the on-line court assistance program to complete their divorce. For those clients who insist on using that program instead of legal counsel, this amendment would allow a review of these documents to make sure they have correctly incorporated the modified agreement into the forms and ensure that all issues have been addressed. Overall, this amendment will improve the quality of these type of filings and likely more accurately and quickly move the matter through the courts. The changes will also serve to reduce the expense to the parties and avoid further interaction, delay and possible frustration in completing the divorce.

Posted by Kathleen Phinney May 15, 2006 02:10 PM

I think it improvident to amend Rule 2.4(c) to grant a blanket authorization in all cases. It is a rare case that writing a settlement agreement does not disclose other issues. For example, timing issues are often not appreciated until the document is being drafted.

Moreover, Rule 1.7 not only applies to situations where the clients are "directly adverse" to each other, but it also applies where there is a "significant risk that the representation of one or more the clients will . . . materially limit" the lawyer's ability to represent all clients. That is an independent reason why the lawyer should not accept a particular representation.

Of course, Rule 1.7 also requires "informed consent, confirmed in writing" when the lawyer decides to proceed because the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

Thus, I think the better approach is to make Rule 2.4(c) "subject to Rule 1.7" and to provide in the comments that "in many cases" the preparation of the agreement should not be "directly adverse" or create a "significant risk of a material limitation" etc., warning lawyers that either possibility could arise during the course of prepairing the agreement and require a rexamination of the situation at that time. In sum, rather than a blanket authorization, I think it wise to provide a case by case authorization consistent with Rule 1.7.

Sincerely yours,

Charles M. Bennett

Posted by Charles M. Bennett May 15, 2006 10:55 AM

From: "Terry" <tcathcart@bountifullawoffice.com>
To: "Tim Shea" <tims@email.utcourts.gov>
Date: 5/26/06 12:12PM
Subject: USB RPC 02-04

Tim,

I hope I have the correct rule number above, because I have real concerns about mediators drafting documents.

As I do primarily divorce mediation, my experience relates to that area.

I do not feel that a mediator can, or should, draft final documents, after mediating for pro se clients. Regardless of how impartial you try to be, there are many ways by using language that varies little that major impacts on the agreement itself may be had. Even though a mediator may have negotiated a settlement, putting that settlement on paper is different, and whether we like it or not, parties rely on mediators once they become more comfortable in the mediation process. I believe the only way to explain the differences in language in a document comes very close to, if not, giving legal advice.

I believe we may create a very large problem with this rule. I propose strong consideration of the possible ramifications of entering it.

Thanks for listening.

Terry

Rule 2.4. Lawyer Serving as Third-Party Neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall 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.

(c) A lawyer serving as a mediator in a mediation in which the parties have fully resolved all issues;

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

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

(c)(3) with the consent of all parties, may record or may file the documents in court, informing the court of the mediator's limited representation of the parties for the sole purpose of obtaining such legal approval as may be necessary.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject

to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

[5a] Rule 2.4(c) is intended to permit a lawyer-mediator for parties who have successfully resolved all issues between them to draft a legally binding agreement and, to the extent necessary or appropriate, record or file related papers or pleadings with an appropriate tribunal. In so doing, the lawyer will be jointly representing the parties in their common goal of effecting proper legal filings or obtaining judicial approval of their fully resolved issues. Because the parties in this situation have fully resolved their issues, they are not considered "adverse" under Rule 1.7(a)(1). ABA Model Rule 2.4 does not address the lawyer's drafting of documents to implement the parties' agreement.

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral.

(a) Except as stated in paragraph (d) and in Rule 2.4 (c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(c)(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee from that matter; and

(c)(2) written notice is promptly given to the parties and any appropriate tribunal.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare

the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part□time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule prohibits such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.