

DRAFTING SETTLEMENT AGREEMENTS

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DRAFTING SETTLEMENT AGREEMENTS

A. INTRODUCTION

These materials provide background for the discussion of issues related to the drafting of mediated settlement agreements by the mediator. (This topic is readily expanded to include other mediation documents, but the settlement agreement is much the most important document – and the one most likely to raise unauthorized practice of law issues where the mediator is not an attorney.) While the drafting of documents related a mediated settlement agreement is a much discussed topic among mediators, there turns out to be little solid law on this important topic.

Your authors have uncovered few reported judicial decisions that expressly address settlement agreements drafted by mediators. We reproduce edited versions of the two most useful decisions: *Wilson v. Wilson* (divorce) and *Chang's Imports v. Srader* (business). Part D of these materials consists of the position taken by the ABA Section on Dispute Resolution, and an assortment of commentaries from throughout the country about state law and practice.

These materials close with an article organized by Suzanne Duval, a noted Dallas mediator, that was previously published in *Alternative Resolution*, the journal of the Alternative Dispute Resolution Section of the State Bar of Texas. See 18 *Alt. Resol.* 16 (Summer 2009). Several noted Texas mediators responded to a hypothetical problem that asked whether mediators may, and if so whether they should, draft settlement documents. The commentators also addressed the closely related issue of when drafting settlement documents arguably constitutes the unauthorized practice of law.

B. WILSON V. WILSON, 653 S.E.2D 702 (GA. 2007)

SEARS, Chief Justice.

Jonathan Wilson, appeals from a final judgment of the trial court that incorporated a mediated settlement agreement reached by Mr. Wilson and Twyla Wilson. On appeal, Mr. Wilson contends that the trial court erred in ruling that the agreement was enforceable. We conclude that the trial court did not err in enforcing the settlement agreement.

Ms. Wilson filed this divorce action against Mr. Wilson. As part of its ADR program, the Coweta Judicial Circuit had adopted a standing order requiring all contested divorce cases to participate in mediation. The parties filed information with the mediation program coordinator. Upon request of counsel the case was placed on inactive status – because further

discovery was planned – until the attorneys notified the mediation center of a date and time to schedule mediation.

Subsequently, without informing the mediation center of their action, the parties met with a mediator of their choosing, and agreed to do so without their attorneys, neither of whom were available on that date. Moreover, the mediator the parties chose was not on the mediation center's referral list. The mediator had the parties sign an "Agreement to Mediate," which provided that, if the parties reached an agreement during mediation, the mediator would prepare a "Memorandum of Understanding" and that "[e]ach party is advised to review this Memorandum of Understanding with his/her attorney before the agreement is placed in final form and signed."

As a result of the mediation, the parties signed a settlement agreement on December 22, 2006. In it, the parties acknowledged that they had reached the agreement without the presence of their attorneys at the mediation, that they "had adequate time to consult with their respective attorneys before freely and voluntarily executing this agreement," and that the agreement would be submitted to the court for incorporation into a final decree of divorce.

On December 27, 2006, Mr. Wilson's attorney sent a letter to Ms. Wilson's attorney, stating that Mr. Wilson had contacted her after the mediated settlement agreement was entered and that, although she (the attorney) had not seen the agreement, Mr. Wilson had decided that he could not comply with its terms. The letter stated that the agreement therefore was "set aside." On December 29, 2006, Ms. Wilson filed a motion to enforce the settlement agreement.

In response, Mr. Wilson contended the agreement was not enforceable. More specifically, he contended that the parties had engaged in a "court-referred" or "court-annexed" mediation governed by the Model Court Mediation Rules; that, under Rule 12(d)(2) of those rules, he had three calendar days in which to object to the mediated agreement since his attorney was not present at the mediation; and that he had properly objected by filing the objection with Ms. Wilson's attorney. He also contended that he was not competent to enter the agreement because he suffers from depression, was bothered by his medication, was exhausted, and lacked the mental and physical stamina to understand the obligations he was undertaking. In support of her motion to enforce, Ms. Wilson contended that the parties had not engaged in a court-referred mediation and that their mediation thus was not subject to rules adopted by the Coweta ADR Program.

The trial court ruled that the mediation was a private mediation in that it was not court-annexed or court-referred, and was not subject to the ADR Rules adopted by the Coweta Mediation Center, which would

entitle Mr. Wilson to reject the agreement if an objection was filed within three days of the execution of the agreement. The trial court also ruled that Mr. Wilson had the mental capacity to enter into the agreement. Accordingly, the trial court entered a final judgment of divorce that incorporated the mediated settlement agreement.

Mr. Wilson first contends that the trial court erred in ruling that the mediated agreement was not a “court-referred” or “court-annexed” mediation. We agree. Although the relevant mediation rules do not define what is a court-referred mediation, the superior courts of the Coweta Judicial Circuit have adopted a standing order providing that, in contested divorce cases, the “parties shall be referred to mediation,” and, in this case, the mediation center referred the case to mediation. Moreover, the parties' selection of a mediator who was not on the Coweta Judicial Circuit's approved list of mediators is consistent with Rule 4(a)(3) of the Model Court Mediation Rules, which permits the parties to a court-referred mediation to select their own mediator (instead of being assigned one approved by the local program) so long as he or she is registered with the Georgia Office of Dispute Resolution. The parties' mediator in this case was registered with the Office of Dispute Resolution. In addition, Rule 9.1 of the Uniform Rules for Dispute Resolution Programs adopted by this Court provides that “when the parties have been referred to an ADR process by the court, the court is responsible for the integrity of the process.” Finally, Rule 3.1 of those same rules provides that, once a case is referred to mediation by a court, a party “may petition the court to have the case removed from mediation.” Here, the parties did not petition the court to remove the case from mediation.

Considering the foregoing, it is clear that the parties' divorce case was referred to mediation by the trial court, and that the mediation was conducted by a mediator competent to conduct the mediation under the applicable rules. Moreover, because the trial court is charged with overseeing the integrity of a mediation once it is initiated, and because parties to a mediation are given a method by which they can opt out of a court-referred mediation and the parties in this case did not avail themselves of that option, we conclude that the parties' mediation was a “court-referred” mediation even though the parties, among other things, did not participate in certain of the processes of the local program and did not fulfill their responsibilities to communicate with the program director.

However, even though Mr. Wilson was entitled to the benefit of Rule 12(d)(2) of the Model Court Mediation Rules, we conclude that he did not comply with them. Under Rule 12(d)(2). Mr. Wilson had three calendar days in which to object to the mediation agreement. Rule 12(d)(2) provides that, if there is no

objection within three calendar days, “the program coordinator will file the agreement with the court.” Because the program coordinator is directed to file the agreement with the court if no timely objection is filed, it is clear that the objection, if one is filed, must be filed with the program coordinator. Mr. Wilson contends that he substantially complied with the rule by filing his objection with Ms. Wilson's attorney. We disagree. For the program coordinator to perform his or her job of communicating with the parties, the mediator, and the court regarding the progress of the mediation, any objections to a mediated agreement must be filed with the program coordinator.

Mr. Wilson also contends that the mediator exceeded his proper role as a mediator by drafting the settlement agreement in question. This contention, however, is without merit, because **a role of the mediator is to draft any agreement that the parties reached during mediation.** See Rule 12(d) of the Model Court Mediation Rules (if the parties reach an agreement during mediation, the mediator has the “responsibility to draw the agreement unless the parties determine otherwise.”).

Mr. Wilson testified at the hearing on the motion to enforce the settlement agreement that he suffered from depression and was depressed on the day of the mediation; that the mediator told him that he would be foolish to go to trial; that he was upset and cried during the mediation process; and that he does not remember signing the settlement agreement and was not aware that the settlement agreement was a legally binding document. Mr. Wilson's psychiatrist also testified, stating that Mr. Wilson suffered from bipolar disorder and took several medications to treat it.

The mediator did not testify as to substantive settlement discussions or any specific confidential communications but only testified about his status as a private mediator and about his general impression that both of the parties had the mental capacity to engage in the mediation and settlement. The mediator added that Mr. and Ms. Wilson were in the same room for only a short, initial discussion and that, during the nine hours of mediation, they were in separate rooms.

Some courts have held that, when a party to a mediated agreement contends in a court of law that the agreement is unenforceable, the party waives any privilege of confidentiality. This case law is consistent with Section 6(b)(2) of the Uniform Mediation Act (UMA) which provides that, when a party contends that a mediated settlement agreement is unenforceable, the mediator may testify regarding relevant mediation communications if a court determines that “the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, [and] there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.” Although neither this Court nor the Georgia

Commission on Dispute Resolution has adopted this exception to the confidentiality of a court-referred mediation, we conclude that fairness to the opposing party and the integrity of the mediation process dictate that we create such an exception when a party contends in court that he or she was not competent to enter a signed settlement agreement that resulted from the mediation. In this regard, a blanket rule prohibiting a mediator from being able to testify in such cases might well deprive the court of the evidence it needs to rule reliably on the plaintiff's contentions – and thus might either cause the court to impose an unjust outcome on the plaintiff or disable the court from enforcing the settlement. In this setting, refusing to compel testimony from the mediator might end up being tantamount to denying the motion to enforce the agreement – because a crucial source of evidence about the plaintiff's condition and capacities would be missing.

Following that course ... would do considerable harm not only to the court's mediation program but also to fundamental fairness. If parties believed that courts routinely would refuse to compel mediators to testify, and that the absence of evidence from mediators would enhance the viability of a contention that apparent consent to a settlement contract was not legally viable, cynical parties would be encouraged either to try to escape commitments they made during mediations or to use threats of such escapes to try to renegotiate, after the mediation, more favorable terms-terms that they never would have been able to secure without this artificial and unfair leverage. See *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110, 1137 (N.D.Cal.1999).

Although the trial court did not make specific findings on the factors set forth in Section 6(b)(2) of the UMA, the record is of sufficient detail for this Court to conduct the analysis. The only witness to all but about 15 minutes of Mr. Wilson's conduct during the mediation was the mediator, and thus there was no other witness available to offer evidence of Mr. Wilson's mental and emotional condition during the nine hours of mediation. Moreover, the mediator did not testify about specific confidential statements that Mr. Wilson made during the mediation, but only testified about his general impression of Mr. Wilson's mental and emotional condition, thus diminishing the potential harm to the values underlying the privilege of confidentiality in mediations. Finally, if the mediator here could not testify regarding his general impressions of Mr. Wilson's mental and emotional condition, it would be extraordinarily difficult for the trial court to reach a reasoned and just resolution of Mr. Wilson's contention that the agreement is unenforceable, thus undermining the efforts of the parties and the mediator in conducting the mediation and causing a potentially unjust result to Ms. Wilson. Although we conclude in this case that the trial court did not err in calling the

mediator to testify, we acknowledge the significance of the confidentiality of the mediation process and the strong policy considerations that support it, and we thus urge trial courts to exercise caution in calling mediators to testify. Moreover, before a trial court permits a mediator to testify, the better practice would be for a court to conduct a hearing in camera in order to address the need to call a mediator as a witness. We note also that the record does not show that the mediator in this case objected to testifying. See Rule 7(a) of the Model Court Mediation Rules (a mediator may not be required to testify concerning a mediation in a subsequent judicial proceeding).

Mr. Wilson contends that the trial court erred in enforcing the settlement agreement as he was unemployed at the time of the mediation agreement and did not have the means to pay for his child's college education or to pay \$1,000 per month in child support. However, we conclude that the trial court, after finding that Mr. Wilson had been paying \$1,000 per month in temporary support and had a net worth of approximately \$2 million, did not abuse its discretion in enforcing the agreement.

Georgia Commission on Dispute Resolution, MODEL COURT MEDIATION RULES

Note: The Commission is the policy-making body appointed by the Georgia Supreme Court to oversee the development of court-connected ADR programs in Georgia. The Commission, meets on a regular basis to consider issues related to the development of court-connected ADR in Georgia.

RULE 5. Mediator Qualifications for Service in the Program.

The qualifications for service as a mediator in the program shall be determined by the superior court judges of the circuit. Appropriate **use of non-lawyer mediators is encouraged**. Qualifications for service shall be approved by the Georgia Commission on Dispute Resolution and shall be filed with the Georgia Supreme Court. The program will maintain a roster of mediators chosen for service in the program. Program mediators will be evaluated by the program on an ongoing basis.

RULE 12. Completion of Mediation.

(d) Agreement. If an agreement is reached, it shall be reduced to writing. **It is the mediator's responsibility to draw the agreement unless all parties determine otherwise.**

(1) **If parties are represented by counsel present at the mediation, the agreement**

should be **reduced to writing by the mediator** and signed by the mediator, parties, and attorneys at the end of the mediation conference.

- (2) If any party is unrepresented or is represented by an attorney who is not present, the agreement should be **reduced to writing by the mediator** and signed by the mediator and parties at the end of the mediation conference. The parties will have an opportunity to have the agreement reviewed by an attorney. If there is no objection to the agreement within 3 calendar days following signing, the program coordinator will file the agreement with the court.

Note: Rule 5 not only contemplates the use of non-lawyer mediators, the Rule expressly states that “**use of non-lawyer mediators is encouraged.**” Rule 12(d) **requires** that an agreement be reduced to writing by the mediator. There is **no exception for non-lawyer mediators!!!** Accordingly, this activity cannot constitute the unauthorized practice of law in Georgia.

C. CHANG’S IMPORTS, INC. V. SRADER, 216 F.SUPP.2D 325 (S.D.N.Y. 2002)

KOELTL, District Judge.

The plaintiff, Chang's Imports, brought this action against the defendant Ronald Srader asserting a number of causes of action that purportedly either arose out of or relate to an agreement between these parties. This Agreement purported to settle a number of disputes ... which arose out of a prior relation and concerned the conditions under which the plaintiff would license and sell the “Margaret Jerrold” trademark to Srader, an appropriate payment schedule for the amounts owed between the parties, and a method for determining these amounts. The plaintiff also raised a number of causes of action against the defendant Joseph Rubin, **an attorney who helped mediate the parties' prior disputes and who drafted the Settlement Agreement.**

The defendant Rubin now moves for summary judgment dismissing the remaining two claims against him, which are for negligence in conducting the mediation and in drafting the Settlement Agreement. The plaintiff and Srader retained the defendant Rubin, who is an attorney, to act as a mediator to assist them in finding an amicable resolution to their differences. Rubin had previously provided legal representation to Clark Chang, the plaintiff's principal. [Rubin made a written disclosure of this conflict, and the parties signed a written waiver regarding this conflict.]

Rubin subsequently assisted the parties in coming to a resolution of their disputes, and then reduced the agreement to writing in the form of a draft Settlement Agreement. Rubin forwarded the draft to the plaintiff and Srader for comments, and suggested review by an independent attorney. The parties executed the final Settlement Agreement on March 31, 1999. The parties then retained separate accountants to review the relevant records, in accordance with the terms of the Agreement, but the accountants came to very different conclusions concerning the amounts owed between the parties. The plaintiff's accountant determined that Srader owed the plaintiff \$967,000; Srader's accountant, by contrast, determined that the plaintiff owed Srader over \$900,000.

Rather than submitting this dispute to a third accountant, the plaintiff brought suit against Srader and Rubin, seeking to invalidate the Settlement Agreement and obtain the amounts allegedly owed on the Notes. This Court subsequently granted a motion by Srader to compel arbitration of the dispute between the plaintiff and Srader pursuant to an arbitration clause in the Settlement Agreement.

The plaintiff's fourteenth cause of action is for negligence against Rubin for allegedly representing both the plaintiff and Srader during the mediation although Rubin was in a position of conflict of interest and should never have mediated and/or discussed the matter with both the Plaintiff and Srader, without Plaintiff having the benefit of counsel. The Complaint alleges, further, that Rubin was negligent in failing to advise the plaintiff to seek independent counsel, failing to inform the plaintiff that the Settlement Agreement purportedly extended beyond the scope of the license and sale of the Margaret Jerrold trademark, and failing to advise the plaintiff that the Settlement Agreement allowed Srader to contest monies allegedly owed to the plaintiff by Srader pursuant to the Notes. The plaintiff's fifteenth cause of action is also for negligence, specifically for failing to investigate critical facts relevant to the Notes and drafting the Settlement Agreement in a way that allowed Srader to contest the amounts owed under the Notes. Defendant Rubin moves for summary judgment on the ground that the plaintiff has not produced evidence of any actions that fell below the standard of care that Rubin owed the plaintiff during the mediation and drafting process.

One of the critical issues in this motion is the appropriate standard of care to be applied to Rubin's conduct during the mediation process. The plaintiff bases its claims for negligence almost entirely on the contention that Rubin was an attorney, who, as such, allegedly owed the plaintiff all of the duties of professional responsibility that arise when an attorney represents, or decides whether to represent, a client. The plaintiff's primary evidence is in the form of expert testimony concerning the relevant professional

standards of conduct that allegedly apply to attorneys in New York. The parties dispute whether the plaintiff's expert evidence is admissible. It is unnecessary to address this issue here, however, because this evidence is not probative of any actionable negligence ...

To establish a claim for negligence in the practice of law under New York law, a party must establish that (1) the attorney was negligent; (2) the negligence was the proximate cause of the loss sustained; and (3) the plaintiff sustained actual damages as a result of the attorney's negligence. Negligence or legal malpractice exists when an attorney fails to exercise that degree of skill commonly exercised by an ordinary member of the legal community.

However, Rubin was not acting as an attorney for either the plaintiff or Srader in negotiating and drafting the Settlement Agreement; he was acting as a neutral mediator. The plaintiff and Srader both signed the Waiver Letter, indicating that they understood that they were hiring Rubin only "to assist them in finding an amicable resolution to [their] differences relating to the trademark Margaret Jerrold and the business relating thereto," and that they were "both aware of the conflict of interest [that position would entail] and still desired [Rubin] to assist [them] in finding a common resolution of [their] difficulty and structuring a settlement." Waiver Letter.

The plaintiff cites *Layton v. Pendleton*, 864 S.W.2d 937 (Mo.App.1993), for the proposition that an attorney who acts as a scrivener in drafting an agreement that reduces to writing an understanding that has been reached between two parties can nevertheless be negligent for failing zealously to advocate for one of the parties' positions during the drafting process. In *Layton*, however, the attorney was found negligent based largely on the fact that the attorney did not "ever inform the parties that she was acting only as a scrivener," such that "it was reasonable for the plaintiff to expect that the attorney was acting on his behalf as a lawyer." *Id.* at 942. The court explained that "if a lawyer acts in a transaction as a scrivener, it is only reasonable that the parties be informed that the lawyer is acting as a scrivener and not as an attorney for either party." *Id.*

In this case, the Waiver Letter clearly set forth the parties' understanding of Rubin's role and the Waiver Letter refutes any contention that the plaintiff could have reasonably believed that Rubin was acting as the plaintiff's private attorney during the mediation process. Rubin was not acting as an attorney for either the plaintiff or Srader, and Rubin made this fact clear to the parties through the Waiver Letter. The Waiver Letter was also clear that Rubin was to "act for both" Srader and the plaintiff, and not just for the plaintiff. Hence, Rubin was not providing legal representation to two clients with adverse interests. *Compare* New York

Code of Professional Conduct DR 5-105 (setting out the rule and exceptions in connection with conflicts of interest in legal representation and conditions for simultaneous legal representation).

There is, moreover, no question that an attorney can act as a neutral mediator. Ethical Consideration 5-20 states that: "a lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. The lawyer may serve in either capacity after disclosing such present or former relationships. A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved."

Although the plaintiff bases part of its negligence claim on the contention that Rubin did not adequately disclose all of his former relationships to the plaintiff, the Waiver Letter clearly disclosed the fact that Rubin would be acting as a mediator and the parties explicitly waived any conflict issue by signing the Waiver Letter. Rubin had not previously represented Srader, although he had represented the plaintiff. This latter fact cannot form the basis for negligence claim by the plaintiff, however, because the plaintiff was aware that Rubin had represented him, and there is no claim that this fact was not disclosed to Srader.

There is almost no law on what the appropriate standard of care is, if any, for a mediator who helps negotiate a settlement between parties. However, a mediator cannot be held to a higher degree of skill and care than that commonly exercised by ordinary members of the relevant mediation community. There can be no claim that Rubin failed to satisfy this duty because Rubin did assist in bringing these parties together and did successfully draft an agreement that was executed by both parties and that settled their dispute.

The plaintiff argues that Rubin was nevertheless negligent in his capacity as a mediator because he failed to advise Rubin that he should obtain his own counsel during the mediation. Putting aside the fact that there is no authority for the proposition that a reasonable mediator must render such advice at the risk of personal liability, there is also no factual basis for the contention that Rubin failed to give such advice. The Waiver Letter clearly indicates that Rubin had "advised the plaintiff and Srader that they should be represented by different attorneys."

The plaintiff tries to circumvent the language of the Waiver Letter by citing isolated portions of Rubin's deposition in which Rubin testified that he told the plaintiff, after having drafted the Settlement Agreement, that "if you have an attorney review it with the attorney." However, the language of the Waiver Letter clearly advised the plaintiff that he should be represented by counsel, and Rubin also testified much more explicitly that:

I'm doing my best to mediate this thing, but I'm not acting as your lawyer. So go get a lawyer if you want. And I was emphatic with him. And I also did the same for Srader. I made those phone calls. And that was the conversation I had. But I also asked him if he had any comments on the agreement. But I said, get back to me. And I think they did get back to me later with some changes.

Rubin Dep. at 168. The plaintiff has not cited any evidence that contradicts Rubin's testimony, and, in any event, the Waiver Letter provided the plaintiff with adequate advice regarding the importance of seeking independent counsel during the mediation.

The plaintiff argues that Rubin was also negligent as a mediator for failing to advise him that the Settlement Agreement would allegedly allow Srader to contest monies previously known to be owed to the plaintiff under the Notes; failing to investigate critical facts relevant to the amounts owed under the Notes and the obligations thereunder; and failing to draft the Settlement Agreement so as to foreclose such a dispute. These arguments misconstrue the scope of the Settlement Agreement, the scope of the dispute that the Agreement purported to settle, and Rubin's role as a mediator.

The Settlement Agreement set up a neutral mechanism to handle any such outstanding disputes, whereby the parties could have their independent accountants determine the appropriate amounts owed, and could have any discrepancies settled by using a third and independent accountant. The Settlement Agreement thereby reasonably settled the only disputes that had arisen between the parties at the time. Once having found an amicable resolution to the outstanding disputes between the parties, Rubin had no duty as a mediator to investigate facts relating to matters that were collateral to his mediation tasks.

The plaintiff complains that Rubin should have specifically mentioned the Notes and fixed the amounts owed on them, but the Settlement Agreement did explicitly acknowledge the existence of the Loan, and the plaintiff and Srader were unable to agree on the amounts owed on the Loan. Instead, the parties agreed to a neutral mechanism for determining the amount of the Loan, and there is no basis for the claim that Rubin even could have obtained an agreement to a fixed sum.

In any event, to the extent that Srader has attempted to raise new counterclaims against the plaintiff under the Settlement Agreement, Srader's claims are based not on any provision in the Settlement Agreement but rather on obligations allegedly arising out of the parties' previous business arrangements, including the 1987 Agreement. Whether Srader can in fact raise such claims as offsets to the Loan, and whether the claims are valid, are questions that are

currently being arbitrated. There is, however, no basis for the claim that the Settlement Agreement played any role in allowing Srader to dispute the amounts allegedly owed between the parties on any grounds that were not already available to Srader. The bare use of the neutral mechanism for determining the amounts owed to the plaintiff could not, with any reasonable foreseeability, be the cause of legally cognizable injury to the plaintiff. Hence, the Settlement Agreement is not the proximate cause of any damages to the plaintiff. Indeed, the Settlement Agreement provided a neutral dispute resolution mechanism, which should provide the plaintiff with an adequate mechanism for vindicating any legitimate claims he has raised against Srader in this action.

In sum, the plaintiff has not identified any conduct on the part of Rubin that fell below any applicable standards of care and that could give rise to a claim for negligence. The plaintiff's fourteenth and fifteenth causes of action are therefore dismissed.

D. POSITIONS TAKEN BY ABA & INDIVIDUAL STATES

- 1. ABA Dispute Resolution Section, Resolution on Mediation and the Unauthorized Practice of Law (adopted February 2, 2002), 13 World Arb. & Mediation Rep. 135 (May 2002).**

Drafting Settlement Agreements

When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

- 2. Warren Knight, Richard Chernick, Susan Haldeman & William Bettinelli, California Practice Guide: Alternative Dispute Resolution Ch. 3A., Domestic Relations Mediation (2008).**

C. "Classic" Mediation In Domestic Relations Cases

Drafting settlement agreement: If settlement is reached through mediation, some mediators actually

draft the settlement agreement. Other mediators simply prepare a "memorandum of understanding" on key terms for the parties to sign. The mediator then turns this over to the spouses' independent counsel to draft a formal settlement agreement. (Of course, this does not avoid the unauthorized practice issue; the "key terms" usually have significant tax and legal implications.)

3. Suzanne J. Schmitz, A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation, 36 Loy. U. Chi. L.J. 783, 798-799 (2005).

The practice of mediators drafting settlement agreements raises several potential problems. First, there is the potential for an unauthorized practice of law issue if the mediator is not an attorney. If the mediator is an attorney, the attorney-mediator may not represent conflicting parties by drafting an agreement for adverse parties. Second, the mediator may be called to testify in a later proceeding to verify that the parties reached an agreement, or to help interpret its terms. If faced with a dispute over the agreement, a court may be tempted to call the only disinterested witness, the mediator. In general, mediators strongly believe that they should not be called to testify in such disputes. The mediator community believes that testifying may compromise their impartiality, or the perception thereof. Further, mediators fear that future parties may resist fully disclosing their interests and concerns in mediation, fearful that the mediator may testify against them at a later date.

The better practice is for parties' counsel, during the mediation, to draft a memorandum of the agreement, capturing the key points of agreement. If a dispute as to wording arises, the mediator can mediate the dispute, but may not draft the language. The mediator should not sign the memorandum. Later, the parties' counsel can complete any additional documentation as needed.

4. John R. Van Winkle, 4B Indiana Prac., Rules On ADR Ann. 2:7 Comment (2009).

Mediation is not the practice of law. Mediation is a process in which an impartial individual assists the parties in reaching a voluntary settlement. Such assistance does not constitute the practice of law. The parties to the mediation are not represented by the mediator.

Mediators' discussion of legal issues. In disputes where the parties' legal rights or obligations are at issue, the mediator's discussions with the parties may involve legal issues. Such discussions do not create an attorney-client relationship, and do not constitute legal advice, whether or not the mediator is an attorney.

Drafting settlement agreements. Indiana has adopted the Section on Dispute Resolution approach quoted at the beginning of this section.

5. Linda D. Elrod & James P. Buechele, 2 Kansas Law & Prac., Family Law § 16:31 (2009).

Drafting settlement agreements. Kansas has adopted the Section on Dispute Resolution approach quoted at the beginning of this section.

6. Maine. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar, Opinion 137 (1993)

Maine Professional Ethics Rule 3.4(h)(4) explicitly authorizes a mediator to draft a settlement agreement on behalf of unrepresented parties.

The lawyer may draft a settlement agreement or instrument reflecting the parties' resolution of the matter but must advise and encourage any party represented by independent counsel to consult with that counsel, and any unrepresented party to seek independent legal advice, before executing it.

Subject to the additional requirement that the parties to mediation be advised and encouraged to consult with counsel, a lawyer-mediator is expressly permitted to draft a settlement agreement or instrument reflecting the parties' resolution of the matter.

The Opinion went on to conclude that a lawyer-mediator may also "draft the divorce judgment and other ancillary documents such as promissory notes and deeds so long as the mediator remains neutral, reflects the parties' resolution of the matter in the documents, and encourages parties to consult with independent legal counsel to review draft documents."

7. Paul Finn, 47 Massachusetts Practice., Mediation and Arbitration § 6.2 (2008 ed.)

§ 6.2. Ethical considerations – Conflict of interest

Lawyers are generally prohibited from representing clients with conflicting interests. The Massachusetts Bar Association has, however, issued an Ethical Opinion which states that a lawyer acting as a mediator is not representing either party, but is acting as an intermediary. The attorney may act as mediator, provided certain precautionary steps are taken. The attorney should assure that the parties are fully informed of and consent to the limitation of his or her role as mediator. The mediator should also advise the participants if they are not represented by counsel that their communications with the attorney-mediator are not protected by privilege unless and until the mediator's privilege is triggered.

In order to maintain neutrality, mediators should refrain from giving legal advice and drafting settlement agreements. The mediator should only help the parties identify and analyze the issues. The final product of the mediation, the settlement agreement, should be drafted by the parties or their representatives. If the attorney-mediator gives legal advice or drafts an agreement for unrepresented parties, he or she effectively is engaging in dual representation of parties with potentially conflicting interests. Such representation gives rise to ethical concerns.

The attorney-mediator should avoid the ethical pitfalls associated with the drafting of settlement agreements. If, however, the parties agree, preferably in writing, that they wish the attorney-mediator to prepare the settlement agreement as part of the mediation process, the attorney-mediator must take certain steps to protect the ethical integrity of the process.

Before drafting a settlement agreement, the attorney-mediator must advise the parties of the advantages of having independent legal counsel review the agreement, and he or she must obtain the informed consent of the parties to such joint representation. Because the drafting of a settlement agreement involves the attorney in more of a traditional dual representation role, the attorney-mediator and the parties must agree that he or she can adequately represent the interests of each party. If the attorney-mediator drafts an agreement for the parties, he should advise them that the attorney-client privilege will apply to communications between the attorney-mediator and each party, but that "there will be no confidentiality for communications between each of them and the attorney vis-à-vis the other party."

8. State Bar of Michigan Standing Comm. on Prof'l and Jud'l Ethics, Op. RI-278 (1996).

"A lawyer acting as a mediator in a domestic dispute resolution process may draft documents which purport to represent the understanding reached between the parties." The lawyer mediator must advise pro se parties to obtain independent legal advice about the draft agreement, and "should ... discourage [party] from signing any agreement which has not been so reviewed." The lawyer-mediator may also prepare pleadings required to implement the parties' agreement, but this action is the practice of law and not mediation.

9. New York State Bar Ass'n Comm. on Prof'l Ethics, Opinion 736 (2001).

An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested

issues remain, and the attorney-mediator satisfies the "disinterested lawyer" test of DR 5-105(C). Under the disinterested lawyer test of DR 5-105(C), the lawyer may not represent both spouses unless the lawyer objectively concludes that, in the particular case, the parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses' objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents.

We remain convinced, however, that in the generality of cases, even if the spouses agree on the broad outlines of a settlement at the conclusion of the mediation, a disinterested lawyer will not be able to conclude that he or she can competently represent the interests of each spouse. Although there is general agreement on broad settlement terms, many particulars may remain to be worked out in the course of drafting a settlement agreement. Even with respect to the terms on which there appears to be agreement, one or both spouses may benefit from a disinterested lawyer's advice as to whether the agreement meets with the spouse's legitimate objectives and what other procedural alternatives may be available to achieve more favorable terms.

10. Oregon State Bar Ass'n Opinion 1991-101 (1991).

A lawyer mediator may draft a settlement agreement under DR5-105 if he or she advises and encourages the parties to seek independent legal advice, but the mediator may not represent one or both parties in placing the agreement in the records of the court).

11. Utah State Bar Board of Bar Commissioners: Opinion No. 05-03 (2005).

May a lawyer who serves as a domestic relations mediator, following a successful mediation, draft the settlement agreement and necessary court pleadings to obtain a divorce for the parties? When a lawyer-mediator, after a successful mediation, drafts the settlement agreement, complaint, and other pleadings to implement the settlement and obtain a divorce for the parties, the lawyer-mediator is engaged in the practice of law and attempting to represent opposing parties in litigation. A lawyer may not represent both parties following a mediation to obtain a divorce for the parties.

We recognize the Utah Legislature and the American Bar Association Section on Dispute Resolution have concluded that "mediation is not the practice of law." However, when the mediator performs tasks that are the practice of law or are even law-related, such as the preparation of pleadings for use in litigation, the mediator is subject to the Utah

Rules of Professional Conduct. We are unpersuaded that, once a mediation results in a settlement of existing property, custody and other disputes, the parties are not “adverse.” We believe it unlikely that two lay, adverse litigating parties can both be aware of their legal rights and all the other practical problems inherent in divorce proceedings, without an experienced lawyer advising them. Consequently, it is possible, and perhaps even likely, that the settlement reached in mediation, where parties do not have counsel, may be based upon the ignorance of unrepresented parties or upon ill-advised concessions.

Under Rule 1.7(a), this conflict cannot be waived by the opposing parties, even with the fullest kind of disclosure and consent. Rule 1.7(a) permits the lawyer to request consent only if the lawyer reasonably believes that the proposed simultaneous representation of both parties will not adversely affect the lawyer’s relationship with either client. This test of Rule 1.7(a) is judged by the objective standard of a disinterested lawyer. We conclude that this standard cannot be met. Informed consent would require explaining to each of the clients that the lawyer would be obligated to explain to each their respective rights, what they may have given up to arrive at a deal, previously unresolved disputes may result during the drafting of a final agreement, the risk that the settlement could be undone, and the requirement that the mediator-lawyer have no further involvement for either party if that were to occur. A disinterested lawyer could not possibly conclude that a lawyer could fairly and zealously represent both clients and not impair the lawyer’s relationship with either client under these circumstances.

E. DRAFTING MEDIATION-RELATED DOCUMENTS

Suzanne M. Duvall

Suzanne Duvall writes a regular Ethical Puzzler for *Alternative Resolutions*, the quarterly journal of Alternative Dispute Resolution section of the State Bar of Texas, which provides different views about hypothetical problems that mediators may face. Suzanne poses a problem, and then obtains responses from leading mediators around the state. This Ethical Puzzler appeared in the Summer, 2008 issue of *Alternative Resolutions*. The commentators are Jeffrey Coen (Dallas), Richard Grainger (Tyler), Kay & Frank Elliott (Fort Worth), and Ronald Hornberger (San Antonio). While the initial emphasis is on the unauthorized practice of law, the focus quickly shifts to the drafting of mediation-related documents – notably, settlement agreements.

Unauthorized Practice of Law or “What, Me Worry? I’m a Mediator?!”

The Practice of Law in Texas is restricted to members of the State Bar of Texas, with only limited exceptions as authorized by the Texas Supreme Court. The “practice of law” is defined in the State Bar Act as “the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.” Texas Government Code, § 81.101 (a).

This statutory definition is, by its own terms, “not exclusive of the power and authority ... to determine whether other services and acts not enumerated may constitute the practice of law.” Indeed, it has been held that “independent of any statutory provisions as to what may constitute the practice of law, the court has the duty to determine in each case what constitutes the practice of law and to inhibit persons from engaging in the practice of law without having obtained a license to do so.” *Grievance Committee vs. Coryell* 190 S.W.2d 130 (Tex.App.1945). A complaint may be filed and an action instituted not only by the state Unauthorized Practice of Law (“UPL”) Committee, but also by local grievance committees, local bar associations, a group of attorneys, or even an individual attorney. In 1993 the Legislature made the unauthorized practice of law a Class A misdemeanor, and for multiple convictions, a third degree felony. 13 Texas Penal Code § 38.123.

“All very interesting” you might say, “but what does this have to do with me? “I’m a mediator and everyone knows mediation is not the practice of law. Everyone knows that, according to both the Rules of Ethics for Mediators promulgated by the Supreme Court of Texas and the Ethical Guidelines of the ADR Section of the State Bar of Texas, mediators may not give legal advice – or any other professional advice.” But what if a mediator does provide legal advice? And how will a mediator know whether she has crossed the line from providing information to actually giving legal advice? And, what about drafting settlement agreements or other important mediation documents? To draft or not to draft, that is the (Ethical Puzzler) question.

What, if any, are the risks of drafting mediation-related documents? Are the risks, both ethical and other, different for mediators who are or are not attorneys? Please explain.

Jeffrey Coen, (Dallas): I think you can explore the question of whether mediation is the practice of law on several levels. A quick Google search of

“mediation and unauthorized practice of law” yields over 37,000 hits. That alone demonstrates there is no real consensus.

Based on the very strong public policy of promoting ADR – so strong that, according to recent case law, it transcends even the constitutionally recognized “best interest of the child” in Texas – we have created a legal fiction to protect mediators from becoming purveyors of legal services to parties who mediate. A legal fiction is employed where you want to reach a certain conclusion and it cannot be logically or rationally concluded from the existing jurisprudence. That mediation is not the practice of law, at least in Texas, is simply acknowledged *a priori*.

In support of this legal fiction, it would cause too much confusion and consternation to decide otherwise. There must be a bright line test regarding the practice of law in order for mediation to work, at least the evaluative model. You can throw in the justifications of having mediation participants (not “clients”) represented by independent counsel in the process, having a mediation contract that disclaims giving any type of “legal advice,” or even the rationale that facilitating third parties in reaching mutual understanding is not legal in nature. But, in truth, none of these justifications have saved the non-lawyer from injunctions and prosecution by the UPL committees in other areas of law.

Legal fictions are generally helpful and promote a public benefit. Otherwise why use them? As a mediator in the family law area – the area most fraught with malpractice and grievance complaints – I am delighted to have it so. At every turn, I emphasize to the participants that I am not offering legal advice. Inevitably at some point in the mediation, because of my legal and judicial experience, I am asked for or even volunteer my opinion on the legal effect of options being considered.

Family law mediations are unique because there is not one linear goal such as agreeing on an amount to be paid or a contract to be adhered to. It is impossible to draft a mediated settlement agreement (MSA) without employing the very definition of “practicing law” as stated in the question. No offense to the non-attorney family law mediator, but the slightest nuance in the description of property in a MSA can change separate property to community property; have unintended tax ramifications; or cause liability for debts that were not contemplated by the parties. In child centered issues, drafting the MSA requires the ability to understand the difference between Family Code guideline possession, guideline child support, and the various “code presumptions.” All of these matters would be considered practicing law outside the mediation context. A generalized memorandum of understanding without legal definitions is virtually useless in Family Law situations where a 55 page order must be drafted

to divorce the parties and provide for the children. But for the legal fiction created for ADR, it is impossible for me to comprehend how drafting a MSA in a family law matter cannot involve the practice of law to some degree. We can spend as much time negotiating the language of a MSA as we do agreeing to the issues. Often I find myself mediating the language of the MSA with the attorneys during what I call the “hiccup state.” In these situations I feel I’m using my skills as an attorney as well as a mediator to assist in dispute resolution.

Perhaps I am relying too heavily on my perception of the legal fiction that mediation is not the practice of law. Like the blind hog, maybe I’m gleefully crossing the ethical line trying to find the occasional acorn. But my perception is my reality. And a generalized legal fiction is easy to understand – even for me.

Richard Grainger, (Tyler): I have read your “ethical puzzler.” I am of the opinion that when the mediator prepares the settlement agreement he is in fact practicing law, and if said mediator is not an attorney there could be a violation of the Rules of Ethics for Mediators as promulgated by the Supreme Court and the Ethical Guidelines of the ADR Section by giving legal or other professional advice. I do draft settlement documents even though I am a lawyer, but I wonder if those who are not attorneys that draft settlement documents could be engaged in the unauthorized practice of law.

Kay and Frank Elliott, (Fort Worth): We believe that a mediator who drafts a settlement agreement is practicing law, defined as “rendering of any service requiring the use of legal skill or knowledge, such as preparing a ... contract or other instrument, the legal effect of which under the facts and conclusions must be carefully determined.” By definition in the ADR Act, a mediated settlement agreement is treated the same as any other contract, and is, in fact, a contract. An attorney mediator drafting the contract has problems because he or she is now representing two parties in the law suit and, unless he or she obtains written permission from both parties, might be faced with a conflict of interest. A non-attorney mediator drafting the contract is in violation of the unauthorized practice of law provisions stated in the Puzzler. Either or both may be guilty of imposing their will upon the parties, a clear abuse of the mediator’s duties. There are probably ways to alleviate the problems, but that should be considered in a later puzzler.

Ronald Hornberger, (San Antonio): You pose the question: “And what about drafting settlement agreement forms and other mediation documents?” In responding, one must begin by recognizing that some mediators are attorneys while others are not attorneys. Further, we must recognize that sometimes parties to mediation are represented by counsel at the mediation

and sometimes parties are not represented by counsel. Thus, we have several possible scenarios. In one scenario, the mediator is not an attorney and at least one of the parties is not represented by counsel. In another scenario, the mediator is an attorney and at least one of the parties is not represented at the mediation by counsel. Lastly, both parties are represented by counsel at the mediation. Depending on whether or not the mediator is an attorney, and whether or not one or more of the parties at the mediation is not represented by counsel, the Ethical Puzzler can be more complicated.

If the mediator is not an attorney, then the mediator must be very careful about giving “legal advice” in any form whatsoever, whether verbally or through attempting to “assist the parties” in the drafting of a settlement agreement or other mediation documents. I will focus only on the mediation settlement agreement. Because the *Coryell* court said that “the court has the duty to determine *in each case* what constitutes the practice of law” we are left with something less than an objective standard of review of the specific circumstances and much more of a subjective review. This “beauty is in the eye of the beholder” type of standard is problematic and dangerous, for the non-attorney mediator. Thus, for the non-attorney mediator, it is most important that he or she pay very close attention to whether or not the “giving legal advice” line has been crossed. Why? Because an attorney may give legal advice, but a non-attorney may not do so.

Next we move to the question of whether or not both parties are represented by counsel. If one party is not represented by counsel, that party may be looking to the mediator for legal assistance. Of course, this must be discouraged and the mediator must clearly explain to the parties at the outset, preferably in writing, that he does not represent either party and will not provide legal advice to anyone associated with the mediation.

With reference to drafting or not drafting the agreement memorandum resulting from a “successful” mediation, whether or not the mediator should become involved in that process at all starts with the question of whether or not all parties are represented by counsel. If they are not, then the danger is enhanced that the unrepresented party at the mediation will, whether this is verbalized or not, be depending on the mediator to offer legal advice with respect to the form and substance of the written agreement. In other words: “Well, the mediator did the document and I assumed that the mediator was doing it all proper and legal.” This is very dangerous, obviously. Where all of the parties are represented by counsel, the document itself can state that all parties are represented by counsel, and that any role the mediator may have had in the drafting of the document has been accepted by counsel in their

executed agreement. The document should state that each party has been represented by independent counsel throughout the process that produced the final agreement.

Even when the mediator is not an attorney, and at least one party is not represented by counsel at the mediation, any document the preparation of which involved the assistance of the mediator acting as scrivener can within its four corners represent clearly that the mediator is not giving legal advice to either party, is not representing either party, and is serving solely as scrivener with respect to any participation in the drafting of the mediation agreement. Obviously, where one of the parties is not represented by counsel, this approach still is more dangerous from the standpoint of subsequent assertions that the mediator was (1) giving legal advice, or (2) representing one of the parties.

In summary, perhaps discretion is the better part of valor where the mediator is not an attorney and the mediator should approach the documents completely with a hands-off attitude. That is, the non-attorney mediator should play no part whatsoever, not even as scrivener, in the preparation of the mediation agreement. The reason for this, obviously, is to avoid not just the “Well, the mediator was representing me at that point” problem, but, and more importantly for the non-attorney mediator, the problem of unauthorized practice of law. The non-attorney mediator’s position from beginning to end should simply be: “I am not a lawyer; I do not represent any of the parties; I am not giving legal advice to any of the parties; and all the parties recognize and agree this is true.”

“To draft or not to draft” is less of a problem for the attorney mediator where all parties to the mediation are represented at the mediation by counsel. The opportunity to avoid the issue and the problem is greater and more easily satisfied under those circumstances. First, as an attorney, a mediator actually can practice law, so the “unauthorized practice of law” problem is avoided. Further, with all parties to the mediation represented at the mediation by independent counsel, is it easier for the attorney mediator to make clear, in a binding fashion, that he or she is not representing any of the parties to the mediation, and that each of those parties is represented independently by separate counsel.

So, for the attorney mediator the question remains: “To draft or not to draft”? The simple solution, of course, is for the mediator to say to the parties, “The services of my secretary are available to you to prepare a typewritten document and to make copies.” Then, the mediator steps aside and lets the attorneys for the parties do the work of preparing the document, using the good offices of the mediator’s secretary for that purpose.

What about the mediation where all parties are represented by counsel, the mediator is an attorney, a mediated settlement is reached, but no document is prepared? Presumably, all parties and their counsel have agreed and understand that under no circumstances will the mediator ever be called as a witness for any purpose. However, after happily leaving the mediation, the parties are unable to agree about exactly what was the deal when they left the mediation. While that might seem an unfortunate circumstance, to me at least, it means that the parties probably did not reach a complete and final agreement. In this situation, the parties and counsel should return to mediation to solidify their agreement and, prior to leaving the mediation, reduce their agreement to writing and sign it.

This response has been written in the form of rambling thoughts rather than as a critical analysis. The reason is that so much of this area of the law is so unsettled that all we as mediators can do is talk to each other to share our thoughts on how to stay out of trouble. Thanks for listening. And, it's worth what you paid for it: zero!

Suzanne Duvall. Being risk adverse, I agree with Ronald Hornberger that “discretion is the better part of valor” when it comes to the drafting of documents incident to mediation, *especially* mediated Settlement Agreements. Even though I am an attorney, I believe that doing so breaches the ethical admonition against giving legal or other professional advice. But that’s just me. Perhaps, as Kay and Frank Elliott point out, “there are probably better ways to alleviate the problems, but that should be considered in a later Puzzler.”