MEMORANDUM

To: WSBA Committee on Professional Ethics
From: Alan Kirtley (#10760)
Katie Koch and Wiley Cason, UW Law Students
Date: October 25, 2018
Re: Draft Opinion to Replace Advisory Opinion 2223

Thank you for the opportunity to comment on the Draft Opinion to Replace Advisory Opinion (AO) 2223. This memorandum represents our best efforts in the time given for comments. For a more thorough exploration of the issue presented, we recommend an excellent law review comment by a former UW law student.[1]

The issue your Committee is considering is whether a lawyer[2]-mediator[3] may assist unrepresented parties in converting the terms of their mediation settlement agreement into the pleadings necessary to dissolve their marriage.

Advisory Opinion 2223 (2012) concluded that such drafting by a lawyer-mediator involves the representation of two legal clients in violation of RPC 1.7. The proposed revised AO 2223 would allow "a lawyer-mediator to draft pleadings following mediation if the mediator does so on the behalf of only one party if both parties are willing and able to provide informed consent."

For the reasons stated below we recommend to your Committee that a lawyer-mediator be permitted to draft pleadings following a divorce mediation on behalf of unrepresented mediation parties if both parties are willing and able to provide informed consent.

To that end, we propose an alternative revision of AO 2223 or an addition to RPC 2.4; offer a critique of the proposed revision; and highlight policy considerations inherent in the consideration of this issue.

Recommended Approach

A foundational principle of mediation is party self-determination.[4] In mediation, "each party makes free and informed choices as to process and outcome."[5] Likewise, legal clients, not their lawyers, determine the objectives of the representation,[6] whether to settle a matter,[7] and whether

[1] Caitlin Park Shin, *Drafting Agreements as an Attorney-Mediator: Revisiting Washington Bar Association Advisory Opinion 2223*, 89 Wash. L. Rev. 1035 (2014).
[2] GR 24(b)(4) permits a lawyer to serve in a neutral capacity as a mediator whether or not it constitutes the practice of law. Likewise, paragraph [3] of the RPC Preamble and Scope allows lawyers to function as third-party neutrals.
[3] In mediation the mediator "facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." RCW 7.07.010(1).
[4] Model Standard of Conduct for Mediators, Standard I(A).
[5] *Id.*
[6] RPC 1.2(a).

to continue with a lawyer in the face of some conflicts of interest.[8] Our proposal is grounded in the principle of self-determination that underlies both mediation and the practice of law. Mediation parties should be permitted to decide whether they want their lawyer-mediator to draft divorce pleadings, subject to protective circumstances and restrictions described below.

Jurisdictions have varied in their response to this issue. Some fourteen states[9] and an ABA Committee[10] have concluded that a lawyer-mediator may properly assist parties in converting their mediation settlement agreement into pleadings.

Other states, mirroring the approach in AO 2223, have concluded that lawyer-mediators may not draft pleadings.[11] Another group of states has adopted the approach of the proposed draft revision of AO 2223, allowing the lawyer-mediator to represent one of the parties in the drafting process with the informed consent of the other.[12]

The emergent view across jurisdictions is that lawyer-mediators should be permitted to draft pleadings with the informed consent of the mediation parties. These jurisdictions have concluded that when mediation parties reach settlement their interests are no longer "adverse."[13] As such, the lawyer-mediator's drafting on behalf of both parties does not violate legal ethics, because it does not involve the assertion of a claim by one client against another for presentation before a tribunal.[14]

For example, Tennessee (2011),[15] Maine (2012),[16] Oregon (2014),[17] and Utah (2017)[18] have added a provision to their versions of RPC 2.4 permitting lawyer-mediators to draft pleadings.[19] The reasoning for the Utah rule is contained in Comment [5a]:

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[7] *Id*.
[8] RPC 1.7(b).
[9] S*ee* Shin, fn. 1 at p. 1056; Robert Kirkman Collins, *The Scriveners Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters* 17 Cardozo J. Conflict Resol. 691 (2016).
[10] ABA Dispute Resol. Section's Committee on Mediator Ethics, Guideline Opinion 2010-1 (2010).
[11] IL. Adv. Op. 04-03 (2005) ("It is improper for a lawyer who mediated a divorce settlement to draft a proposed judgment of dissolution of marriage, marriage separation agreement and joint parenting agreement for unrepresented parties."); Texas Eth. Op. 583 (2008).
[12] Ohio Adv. Op. 2009-04 (2009).
[13] WA RPC 1.7(a) and Comment 6.
[14] WA RPC 1.7(b)(3).
[15] Tennessee RPC, Rule 2.4(e) (2011).
[16] Maine RPC, Rule 2.4 (e)(2): 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" (emphasis added).
[17] Oregon Rule 2.4(b) Lawyer Serving as Mediator:

> (b) A lawyer serving as a mediator:
> (1) may prepare documents that memorialize and implement the agreement reached in mediation;

> 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.[20]

The same stance is found in the conclusion of New York ethics opinion 736:

> 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).[21]

That opinion reasoned that if:

> 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. . . [the state should] permit spouses to avoid the expense incident to separate representation and permit them to consummate a truly consensual parting.[22]

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

(3) with the consent of all parties, may record or may file the documents in court.

[18] Utah RPC Rule 2.4. Lawyer Serving as Third-Party Neutral:

(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 informed consent of all parties confirmed in writing, 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.

[19] Both the Oregon and Utah rules allow for the lawyer-mediator to file the pleadings on behalf of the parties. Neither rule is limited to unrepresented parties.

[20] Utah RPC 2.4 (Effective Nov. 1, 2017); Utah RPC 2.4 (c), Comment 5a.

[21] NY Eth. Op.736 (2001).

[22] *Id*.

Among the other states allowing lawyer-mediators to draft pleadings following a successful mediation are Indiana,[23] Massachusetts,[24] Colorado,[25] Michigan,[26] and Kansas.[27]

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[23] Ind. Rules for Alternative Dispute Resolution, Rule 2.7(F) Mediator's Preparation and Filing of Documents in Domestic Relations Cases:

"At the request and with the permission of all parties in a domestic relations case, a Mediator may prepare or assist in the preparation of documents as set forth in this paragraph (F).

The Mediator shall inform an unrepresented party that he or she may have an attorney of his or her choosing (1) be present at the mediation and/or (2) review any documents prepared during the mediation. The Mediator shall also review each document drafted during mediation with any unrepresented parties. During the review the Mediator shall explain to unrepresented parties that they should not view or rely on language in documents prepared by the Mediator as legal advice. When the document(s) are finalized to the parties' and any counsel's satisfaction, and at the request and with the permission of all parties and any counsel, the Mediator may also tender to the court the documents listed below when the mediator's report is filed.

The Mediator may prepare or assist in the preparation of only the following documents:

> (1) A written mediated agreement reflecting the parties' actual agreement, with or without the caption in the case and "so ordered" language for the judge presiding over the parties' case;
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> (2) An order approving a mediated agreement, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;
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> (3) A summary decree of dissolution, with the caption in the case, so long as the decree is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the summary decree reflects the terms of the mediated agreement;
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> (4) A verified waiver of final hearing, with the caption in the case, so long as the waiver is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;
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> (5) A child support calculation, including a child support worksheet and any other required worksheets pursuant to the Indiana Child Support Guidelines or Parenting Time Guidelines, so long as the parties are in agreement on all the entries included in the calculations;
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> (6) An income withholding order, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the order reflects the terms of the mediated agreement.

[24] Ethics Op. 85-3 (1985), a lawyer-mediator may represent both parties with their informed consent in drafting their separation agreement. *See also* Mass. Sup. Ct. Uniform R. on Dispute Resol. Rule 9(g) Written agreement: "If a settlement is reached, the agreement shall be prepared in writing and signed by the parties, who shall forward for docketing a notice of the disposition of the case to the clerk of the court in which the case is pending. The neutral may participate in the preparation of the written agreement. At the parties' request, the court may allow an oral agreement instead of a written one."

[25] Colorado Dispute Resol. Act, Sec. 13-22-308 Settlement of disputes:

> (1) If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. If reduced to writing and signed by the parties, the agreement may

The states that, like Washington,[28] have concluded that a lawyer-mediator may not draft pleadings do not represent the majority or the trend of opinions on the issue.

Protective Conditions and Restrictions

The RPCs and ethics rules in jurisdictions that allow lawyer-mediators to draft pleadings contain critical protective conditions and restrictions. We offer some or all the following for inclusion in a new RPC or ethics opinion for Washington, or as best practices for the lawyer-mediator to follow:

1) A lawyer-mediator should not be permitted to draft pleadings if there are unresolved issues. Any unresolved issues present a conflict of interest for the lawyer-mediator. For that reason, any new RPC or ethics opinion should require that the unrepresented parties have reached full resolution of all issues before the drafting begins.[29]

2) There may be circumstances where the lawyer-mediator does not believe it is appropriate to draft a pleading, even if the mediation parties want the lawyer-mediator to do so. Any new RPC or ethics opinion should allow lawyer-mediators to use their professional judgement as to whether they will draft the pleading. The lawyer-mediator should only do so if the lawyer-mediator reasonably believes that she or he will be able to provide competent, impartial, and diligent representation to each affected client. We add "impartial"[30] because that is the appropriate stance for the lawyer-mediator, who is obligated to be impartial during the

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be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

[26] Michigan Ethics Op. RI-278 (1996), allowing lawyer-mediator to draft settlement agreement, (but silent on the unpresented issue of drafting pleadings): "Upon tentative resolution of the dispute, it is not inappropriate for a mediator to suggest that the parties memorialize their understandings in a written document. The lawyer, in the role of neutral mediator, is not *per se* prohibited from preparing the document. MRPC 1.7 and 2.2, which relate to the lawyer's role with clients, are not implicated." In accord, Arizona Op. 96-01 (1996), which states that the lawyer mediator should assure that unrepresented parties have an opportunity to obtain independent legal counsel for purposes of evaluating any tentative agreement that they might reach through the mediation process. In accord, ABA Standard VI D, "[w]hile a mediator cannot insist that each participant has separate counsel, they should be discouraged from signing any agreement which has not been so reviewed."

[27] Kansas Court Rules Relating to Mediation, Rule 901(b)(3): "The attorney-mediator advises and encourages the parties to seek independent legal advice before the parties execute any settlement agreement drafted by the attorney-mediator."

[28] WSBA Advisory Opinion 2223.

[29] If during drafting the lawyer-mediator faces an uncertainty about a provision of the parties' agreement, she should not assume the parties' wishes. Instead the lawyer-mediator should resolve the issue by consultation with and through agreement of the parties.

[30] "A lawyer is required to be impartial between commonly represented clients." WA RPC 1.7, Comment 29. Standards of Conduct for Mediators require mediators to conduct mediations in an impartial ['freedom from favoritism, bias or prejudice'] manner." Standard II.

mediation.[31] Continued impartiality during the drafting process will meet the expectations of the parties.

3) Many parties mediate before filing suit. In those cases, there are no claims pending in a tribunal when the mediation settlement is converted into pleadings. When there is a pending case, the Committee has expressed conflict concerns about a lawyer-mediator drafting pleadings on behalf of both parties because of the possibility of the assertion of a claim by one client against another. In the RPCs and ethics opinions discussed above, those jurisdictions have concluded that the divorcing parties who have resolved their dispute through mediation are no longer "adverse" under RPC 1.7. Their settlement resolves and eliminates claims by one party against the other. Nonetheless, as is done in King County, the Committee's concerns could be dealt with by requiring the parties to sign a Certificate of Settlement Without Dismissal[32] along with the other pleadings necessary to finalize their divorce. The Certificate informs the court that the parties have reached a settlement, fully resolving all their claims.[33] Importantly, the model Certificate includes a provision that states, "No court action shall be permitted except for enforcement of the settlement agreement."[34]

4) The mediation parties must be made to realize that the lawyer-mediator's representation is limited to drafting pleadings.[35] The lawyer-mediator should not be permitted to represent either party to contest or enforce their settlement agreement.

5) Before any pleadings are signed by the parties, the lawyer-mediator should advise each client in writing of their right to have independent counsel draft their divorce pleadings and/or have independent counsel review pleadings prepared by the lawyer-mediator; and

6) The lawyer-mediator should be burdened with evidencing that each of the mediation parties gave their informed consent confirmed in writing.[36]

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[31] Model Standard of Conduct for Mediators, Standard II.
[32] E.g., King County Superior Court, Local Rule 41(e)(3).
[33] *Id*.
[34] *Id*.
[35] WA RPC 1.2(c), Comment 6 would allow a lawyer-mediator to limit representation to drafting pleadings based on the parties' mediation settlement agreement, and would prohibit representation in a subsequent court action.
[36] We initially drafted a provision to recommend to the Committee. We have since concluded that both the Oregon and Utah RPCs are more straightforward and sufficiently comprehensive. Our draft rule follows:
"Notwithstanding the existence of a concurrent conflict of interest, a lawyer-mediator serving unrepresented parties may draft pleadings on behalf of both parties if:

1. the unrepresented parties have reach full resolution of all issues related to the dissolution of their marriage;
2. the lawyer reasonably believes that the lawyer will be able to provide competent, impartial and diligent representation to each affected client;
3. the lawyer limits the representation to drafting pleadings;

Opposition to Proposed and Current Advisory Opinion 2223

Proposed Advisory Opinion 2223: We urge the Committee to refrain from adopting the solution proposed in Draft Opinion 2223. In seeking to avoid the RPCs' prohibition on dual representation of adverse parties while still allowing for lawyer-mediator drafting of pleadings, the current proposal splits the proverbial baby. Allowing a lawyer-mediator to represent one party to a dissolution action in post-mediation pleadings drafting—with the informed consent of the other party—adheres to the plain language of the RPC 1.7(b)(3), but we believe that this solution raises more ethical issues for lawyer-mediators than it resolves.

Indeed, one state ethics committee's consideration of lawyer-mediator drafting warned of these unintended ethical dilemmas. The New Jersey Supreme Court Advisory Committee on Professional Ethics concluded that a lawyer-mediator's representation of one party in the drafting process subsequent to a divorce mediation would fail "to avoid even the appearance of impropriety":

> Because a lawyer is required to represent his client zealously (DR 7-101), a lawyer representing one party in a divorce proceeding subsequent to his acting in a mediation role would inevitably be faced with a conflict between the lawyer's duty to act zealously on behalf of one party and the lawyer's duty to respect the confidences of the other party, albeit confidences conveyed to the lawyer in his capacity as a mediator.[37]

The New Jersey committee foresaw practical problems that might arise from allowing one party in a divorce mediation to obtain the lawyer-mediator as counsel after the mediation concludes. For example, if an appeal arose from the original divorce agreement, would the lawyer-mediator, now acting as representative of one of the parties, be compelled to utilize confidential information or positional knowledge gained from the other party in the mediation in order to zealously represent her client? Ultimately, such a practice "would be, or at the very least appear to be, grossly unfair to the [other] participant" in the divorce proceeding and would severely compromise the attorney-mediator's claim to impartiality during the mediation process itself.[38]

Current Advisory Opinion 2223: We recommend the withdrawal of Advisory Opinion 2223 for all the well-argued reasons found in Caitlin Park Shin's Washington Law Review Comment.[39] The current Advisory Opinion cites only one relevant state ethics opinion[40] and does not consider the weight of authority in opposition to that opinion. At the least, the Committee should withdraw the Opinion until a more comprehensive review of other authority is undertaken.

> 4. the lawyer advises each client in writing of their right to have independent counsel draft the pleadings and to confer with independent counsel before signing any pleadings drafted by the lawyer-mediator; and
> 5. each affected client gives informed consent confirmed in writing."

[37] NJ Eth. Op. 521 (1983).
[38] *Id*.
[39] Shin, 89 Wash. L. Rev. 1035 (2014).
[40] Texas Eth. Op. 583 (2008).

Policy Reasons for Allowing Lawyer-Mediator Drafting

We urge the Committee to consider highly relevant social and economic conditions implicated by this issue. Washington faces a crisis in the delivery of civil legal services to its residents.[41] It is estimated that 75% of Washington households have unmet civil legal needs.[42] Parties seeking to dissolve a marriage are in greatest need of assistance. In approximately 70% of filed dissolution cases, one or both parties are pro se.[43]

To address this crisis, Washington State has created new categories of legal providers to assist persons of limited means who are seeking to dissolve their marriage. The professional category of Limited Licensed Legal Technicians was created by the Supreme Court "to expand the affordability of quality legal assistance which protects the public interest."[44] Courthouse facilitators are now available to provide assistance to unrepresented individuals.[45] And various bar and community groups have developed self-help divorce programs. These programs educate participants about the law, process, and forms involved in dissolving a marriage and provide assistance.

These efforts address the simple truth that large numbers of divorcing parties in Washington cannot afford lawyers or protracted litigation. Mediation with a lawyer-mediator becomes the only way for these parties to obtain professional assistance to resolve their issues.[46] To require unrepresented persons in these circumstances to hire two lawyers, or even one, to convert their agreement into pleadings creates a substantial and in some cases impossible financial barrier to dissolution. The effect of AO 2223 in its current and proposed form will result in many parties leaving the mediation with an agreement on all the issues but with no means to effectuate their divorce in court.

Our recommended approach allows lawyers and mediation parties to exercise self-determination. Lawyer-mediators will be able to exercise professional judgment as to whether drafting of pleadings is appropriate in given cases. Parties will be allowed to make an informed choice as to whether to leave mediation with or without lawyer-mediator drafted pleadings. The conditions and requirements we propose for lawyer-mediator drafting protects the integrity of conflict-of-interest rules, serves the interests of the mediation parties, and contributes to the public interest by providing increased access to justice.

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[41] Washington State Civil Legal Needs Study (2003)

[42] Ibid., p.22: "More than three-quarters of all low-income households in Washington state experience at least one civil (not criminal) legal problem each year. In the aggregate, low-income people experience more than one million important civil legal problems annually."

[43] WA Administrative Office for the Courts, An Analysis of Pro Se Litigants in Washington State 1995-2000, Table V, p.16.

[44] Admission to Practice Rule 28

[45] The assistance given by facilitators is permitted "[w]hether or not it constitutes the practice of law." GR 24 (b)(2).

[46] Undoubtedly many are also drawn to mediation as a less contentions manner to deal with their issues than litigation.

Thank you for taking the time to consider our views.