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Clerk of Supreme Court
Attn: Deputy Clerk-Rules
P.O. Box 1688
Madison, Wisconsin 53710-1688

Re: 16-04 Lawyer Mediators Drafting Settlement Documents

Dear Clerk:

I am writing this letter in opposition to proposed Rule 16-04 Lawyer-Mediators to Draft Settlement Documents in Family cases that is currently before the Supreme Court. Settlement documents drafted by mediators are one of my pet peeves. They are the source of considerable post-judgment confusion, unworkable and ambiguous clauses, and misapplications of the law. I also, believe that non-lawyer mediators should be regulated. I do not believe that a lawyer can consistently draft a mediated agreement in an ethical fashion and remain a true neutral.

I have practiced in Madison, Wisconsin for over 30 years. Approximately 95% of my practice focuses on divorce law. The ever growing percentage of pro se divorces presents a significant problem for the courts and (although they do not fully realize it at the time of the divorce) for the pro se litigants. I have been a mediator in many dozens of divorce cases. For reasons which I will explain below, I always insist that both parties have legal counsel present at the mediation.

It is a very frequent occurrence that someone comes into my office struggling with a divorce judgment which Is based upon a settlement agreement which was drafted either pro se or by a mediator. The problems often become apparent 1 or more years after the divorce was granted. Some examples, and there are many, many more:

1. Child custody or physical placement agreements were entered into when the children were under the age of 5. There is an expectation that once the children are school age, placement will change. That expectation runs contrary to case law. (E.g. Lofthus v. Lofthus, 2004 WI App 65) Had the parties had legal counsel, they would have been cautioned about this future problem. Non-lawyer mediators probably do not know the law and this pitfall. Lawyer mediators cannot counsel caution to the parent who has future expectations without sacrificing neutrality or giving legal advice.

2. The parties develop a scheme for selling jointly titled real estate at some point in the future. That scheme falls apart when the parties do not agree on a selling price, whether to hire a Realtor, making and paying for repairs to the home, or how to divide settlement proceeds. They almost never reserve to the court the authority to settle those disputes post judgment. Courts are properly not receptive to reopening property division provisions in a judgment years after the judgment is granted.

3. The parties agree to nonmodifiable maintenance for a long period of time. Had the payor had counsel, the pitfalls of such an agreement would have been explained. I have also had the opposite problem present itself in my office when a very low wage earner in a long marriage gave up any spousal support and is then in significant financial difficulty. Once maintenance is waived, it is permanently waived.

4. Provisions dealing with the division of retirement funds present many problems. Tax discount rates and the specifics for Qualified Domestic Relations Orders (including whether there are post judgment earnings until the asset is divided) are very common problems.

5. Holiday placement schedules which are vague and incomplete. This issue comes to mind now because it seems I always have several of these cases come to my office in December.

I believe it is impossible for a lawyer mediator to remain completely neutral and do a competent job. When one party is agreeing to something favorable to the other, and that agreement will clearly present future problems or is grossly unfair, how does the mediator intervene? If that mediator was an attorney for one side and did not counsel his or her client about the pitfalls of the agreement it would constitute ineffective assistance of counsel.

As with many things, it is easier to identify the problem than to craft a solution. However, Rule Petition 16-04 and non-lawyer mediators often create a whole new set of problems. They give the litigants a false sense that the matter has been properly handled. The non-lawyer mediators are practicing law, are often not fully competent, and as far as I can tell are often not neutral.

Respectfully yours,

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