

MEMORANDUM

FROM: Attorney Allan R. Koritzinsky¹
TO: Clerk of Supreme Court [Also sent via email to: clerk@wicourts.gov]²
RE: Comments re Rule Petition 16-04
DATE: December 6, 16

Very recently, I was made aware of the proposed Rule Petition 16-04³, which I reviewed and enthusiastically support.

I do have some comments which I would like to share, and would also appreciate the opportunity to appear in person at the public hearing on January 12, 2017, beginning at 9:30 am.

My comments are as follows:

1. Rule: Subsection (c) (1):

- a. I question the need to use the words “select” or “complete” in the listing of tasks that may be undertaken by the “lawyer serving as mediator.” I am not even certain what they mean in the context of the proposed Rule. These words may do no harm, but I do not know what they add. I believe the words “draft “ and “modify” cover the tasks.
- b. The informed consent provisions are important, and I strongly endorse them. However, implicit in the proposed Rule change is that this disclosure would/might occur after the case is settled. In my opinion, it would be better practice for this disclosure to be made before the mediation is commenced, with this appropriate language included in the Mediation Agreement signed at the outset of the case.

2. Rule: Subsection (c) (2): Again, I would consider deleting the words “selection” and “completion” in the listing of tasks.

¹ Allan R. Koritzinsky retired as a partner with Foley & Lardner LLP in 2009 and is currently employed by Allan R. Koritzinsky, LLC, where he does family law, mediation and arbitration. While at Foley, he was Chair of the Family Law Team. Mr. Koritzinsky was named a Wisconsin Super Lawyer and listed in *The Best Lawyers in America*® for over 25 years. He was the 2011 recipient of the State Bar of Wisconsin Senior Lawyers Division Leonard L. Loeb Award. He was a Lecturer at the UW Law School, teaching Evidence, Civil Procedure, Alternative Dispute Resolution and Real Estate. He co-authored Game Theory and the Transformation of Family Law, Tax Strategies in Divorce and Family Law Casenotes & Quotes. Mr. Koritzinsky was a Fellow of the American Academy of Matrimonial Lawyers, a Diplomat in the American College of Family Trial Lawyers, a member of the national AAML Board of Governors, a former National Chair of the AAML Arbitration Committee, President of the Academy’s Wisconsin Chapter and Chair of the Dane County Bar Case Mediation Program.

² Pursuant to Supreme Court Rules, I will also mail a hard copy (original and nine copies of this Memo) to the Clerk of the Supreme Court, P.O. Box 1688, Madison, WI 53701.

³ The pending Petition proposes changes to existing SCR 20:2.4.

3. **Rule: Subsection (c) (3):** Again, I would consider deleting the words “selection” and “completion” in the listing of tasks.
4. **Rule: Subsection (c) (4):**
 - a. Here, I would consider adding the word “modified” to the listing of tasks.
 - b. I also recommend that the final sentence be exactly the opposite and state as follows: “A lawyer who has served as a mediator **may** appear in court, not as counsel for either party, but to assist the parties and the court in facilitating the Final Hearing, if neither of the parties is represented by counsel.” (Emphasis supplied just to highlight my recommend change.)⁴ [Additional comments regarding this recommendation follow below.]
5. **Rule: Subsection (c) (5):**
 - a. Here, I would also consider adding the word “modified” to the listing of tasks.
 - b. No other comments.

With regard to my recommendation regarding the mediator appearing in court at the Final Hearing:

1. The Final Hearing process and procedures are not always user-friendly to the lay public. Having the lawyer-mediator in court will certainly facilitate the hearing, appreciated by the parties and welcomed by the Court.
2. There is no clear bright line between “neutrality” and “advocacy.” **If** the Supreme Court adopts the proposed Rule⁵, this new role of the lawyer is clearly defined. In fact and more specifically:
 - a. Allowing the lawyer-mediator to draft the Marital Settlement Agreement (“MSA”) **moves the line** closer to advocacy. The best example: when he or she is selecting or not selecting certain provisions to include in the MSA. That said, I believe this document drafting can be done, while still acting as a neutral.
 - b. In my opinion, allowing lawyer-mediator to appear in court does bring him or her **any closer** to being an advocate for either one or both of the parties.
 - c. I believe it is an easier call for the Supreme Court to decide whether the lawyer-mediator can appear in court, compared allowing the lawyer-mediator to draft the MSA.

⁴ I appreciate that this recommendation may controversial.

⁵ In my opinion, THIS is the controversial decision pending before the Supreme Court-not whether that same lawyer can appear in court to facilitate the settlement and the divorce.

- d. Simply stated, **if** the Supreme Court allows lawyers to draft the MSA, they should also allow him/her to appear at the Final Hearing:
 - i. If the parties request
 - ii. if neither of the parties has counsel appearing in Court, and
 - iii. if the proper disclosures are included in the MSA and put on the record.⁶
3. I reviewed the excellent 13-page Memorandum. Footnote 2 describes the “remarkable” SRL (Self-represented Litigants) surge, which has occurred over the past 30 years. I have been in private practice since 1970, and I have been an eyewitness to this phenomenon, watching lawyers lose more and more market share, especially in the family law arena. In no small way, this proposed Rule change gets the lawyer-mediator off the sideline and back in the “game,” especially if the lawyer-mediator can also be present at the Final Hearing, as a guide to the parties and as an aid to the Court. This is an important public service and a perfect role for the attorney-mediator.

I hope you find these comments helpful. I would be happy to respond to questions at the Public Hearing.

Thank you for providing me (and others) an opportunity to be heard on this important proposed Rule change, which I strongly endorse.

Respectfully submitted:

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⁶ Having an attorney at the Final Hearing is no different from having that same couple (instead of getting divorced) planning a hike in the jungle in a foreign country. They have maps. They have prepared for the trip. But, they decide to hire a Guide. Why? They want guidance on the trip, in a place where they’ve never been, etc. The lawyer-mediator is nothing more than a guide, helping the parties to the mediation navigate through the various procedures at the Final Hearing.