

## Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-10

Issued December 18, 2002

¶ 1 **Issue:** May a lawyer review pleadings prepared by a non-lawyer mediator for simple, uncontested divorces and advise the mediator on how to modify the pleadings for filing in court?

¶ 2 **Conclusion:** (1) As lawyer for the mediator, a lawyer may advise the mediator on the issues likely to arise in the course of the mediation, but may not advise the mediator how to prepare the divorce agreement and court pleadings for particular parties who are clients of the mediator. This would constitute assisting in the unauthorized practice of law and would violate Utah Rules of Professional Conduct 5.5. (2) An attorney may provide representation to a party engaged in a divorce mediation that is limited to advising the party and assisting with pleadings, but may not so limit the representation without first fully informing the party of the proposed limitation and obtaining the party's informed consent.

¶ 3 **Background:** A divorce mediator has requested that a lawyer perform a limited service: review pleadings prepared by the mediator and amend them as needed. Prior to the attorney's involvement, the mediator would meet with the divorcing parties and assist them in reaching a settlement of all issues in their divorce. Then, the mediator would draft the parties' agreement, which would be filed with the court or incorporated into the judgment of the court. Finally, the mediator would draft the various additional court documents (e.g., complaint, findings of fact and conclusions of law, judgment) needed for the parties' divorce. The mediator would inform the divorcing parties that the pleadings were not prepared by an attorney, but had been reviewed by an attorney for "sufficiency." The divorcing parties would pay the attorney a small fee for this service.

¶ 4 **Analysis:** The request raises the following issues:

Whether the lawyer is representing the mediator or the divorcing parties.

Whether this plan involves the lawyer's assisting in the

unauthorized practice of law in violation of Utah Rules of Professional Conduct 5.5.

Whether this plan constitutes an appropriate limitation on the lawyer's representation for the client under Utah Rules of Professional Conduct 1.2 and 1.1.

### A. Whether the lawyer is representing the mediator or the divorcing parties.

¶ 5 The original request appears to presume that the lawyer is advising the mediator. However, the advice sought from the Committee focuses on the agreement and pleadings for a divorce between two particular parties. Here, we consider the ethical constraints on both possible relationships.

### B. Whether the lawyer, in advising the mediator, is assisting in the authorized practice of law.

¶ 6 Rule 5.5 provides that a lawyer shall not "assist any person in . . . the unauthorized practice of law." However, the Comments to Rule 5.5 state that the rule "does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law." Accordingly, it should be permissible for a lawyer to form an attorney-client relationship and provide a mediator with professional advice that the mediator needs for this occupation. In order to understand the limits of what is appropriate legal advice to give a mediator, we first examine what constitutes the practice of mediation under Utah law and current codes of conduct for mediators.

¶ 7 Utah statute provides for the certification of "alternative dispute resolution providers, (fn1) including persons providing services as mediators. (fn2) "Alternative dispute resolution" is defined as "the provision of an alternative system for settling conflicts between two or more parties, which operates both independent of or as an adjunct to the judicial-litigation system, through the intervention of a qualified neutral person or persons who are trained to intercede in and coordinate the interaction of the disputants in a settlement process." (fn3) A "dispute resolution provider" is "a person, other than a judge acting in his official capacity, who holds himself out to the public as a qualified neutral person trained to function in the conflict-solving process using the techniques and procedures of negotiation, conciliation, mediation."<sup>4</sup>

¶ 8 Utah statute also provides for the Judicial Council to establish alternative dispute resolution programs to be administered by the Administrative Office of the Courts. (fn5) The Judicial Council is authorized to establish rules concerning ADR procedures, including establishing the

qualifications of ADR providers for each form of ADR. (fn6) This statute further provides that an ADR provider "conducting procedures under the rules of the Judicial Council and the provisions of this act" shall be immune from all liability except for wrongful disclosure of confidential information. (fn7) These court-annexed ADR programs may also include mediation, defined as "a private forum in which one or more impartial persons facilitate communication between parties to a civil action to promote a mutually acceptable resolution or settlement." (fn8)

¶ 9 These laws establishing and defining mediation focus on the mediator's possessing and utilizing certain communication skills in order to help parties resolve a dispute, rather than having legal knowledge or the ability to prepare court pleadings.

¶ 10 This focus is consistent with the model Standards of Conduct for Mediators adopted in 1994 by the American Bar Association Section on Dispute Resolution, the Society of Professionals in Dispute Resolution (SPIDR), and the American Arbitration Association. These standards provide that "[m]ediation is based on the principle of self-determination by the parties" and includes the comment: "A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions." (fn9) Thus, standards for mediators recognize that legal advice may be necessary for some parties to make informed decisions. The standards further recognize that it is not the mediator's role to provide that legal advice:

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should, therefore, refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice. (fn10)

¶ 11 Accordingly, in "providing professional advice and instruction to nonlawyers whose employment requires knowledge of law," (fn11) it would be appropriate for a lawyer to advise a mediator about the issues that typically arise in a divorce—custody, visitation, child support, alimony, and property division. In this way, the mediator can assist the parties to discuss all of the relevant issues. Similarly, the lawyer might properly explain various options for parties to consider in resolving their dispute and might suggest which options are likely to be adopted by a court of law. In this way the mediator can assist the parties

to consider relevant and feasible options.

¶ 12 Moreover, a lawyer may publish a "How to" manual regarding divorce, including draft forms to use. (fn12) Thus, the attorney could give such a manual and draft forms to the mediator for distribution to clients who could complete and file these forms *pro se*. Similarly, the lawyer could approve the draft forms the mediator has prepared for distribution to divorcing parties to use *pro se*. Finally, a lawyer could advise the mediator as a consultant about the mediator's legal obligations in difficult cases. For example, if a party told the mediator of suspected child abuse by the other parent, the mediator could seek and obtain advice from an attorney about the mediator's obligation to report suspected child abuse.

¶ 13 However, in a mediated divorce setting, a lawyer's more typical role would be to provide legal advice to one of the parties in order to insure that the party is making informed decisions. Typically, this advice is provided in the context of full representation of the client who is participating in the mediation. However, the lawyer's services to that client can be more limited. (See part C below, regarding "unbundled services.") Note that a lawyer is permitted to represent only one of the parties to the divorce in order to avoid impermissible, and non-consentable conflict, as we explained in Opinion 116. (fn13)

¶ 14 The Comment to Rule 5.5 states: "[A] lawyer may counsel nonlawyers who wish to proceed *pro se*." Accordingly, the lawyer might properly advise a divorcing party about her rights in a divorce case and about the pleadings she will need to file and the procedures she will need to pursue.

¶ 15 However, complications arise when the lawyer is providing that advice to the mediator (rather than directly to a party) and the mediator is assisting that party to complete the necessary pleadings.

¶ 16 The Utah Supreme Court considered the propriety of non-lawyers assisting parties to prepare court pleadings most recently in the case of *Utah State Bar v. Petersen*, (fn14) where a paralegal "prepared wills, divorce papers, and pleadings . . . on behalf of clients for a fee" without this work being supervised by an attorney. (fn15) The Supreme Court affirmed the judgment that Petersen had engaged in the unauthorized practice of law, (fn16) defining the "practice of law" as "the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent . . . performing services in the courts of justices . . . counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities." (fn17)

¶ 17 In a similar case, the Florida Supreme Court held that a paralegal would run afoul of the unauthorized practice of law by assisting divorcing parties to draft their pleadings in a divorce case; but the paralegal would be permitted to sell printed divorce forms to the parties. (fn18)

¶ 18 In a recent bankruptcy case a nonlawyer "bankruptcy petition preparer" (BPP) went beyond "the typing services a BPP may legitimately perform" by having pleadings she prepared reviewed by a lawyer and by having the lawyer available to "chat" with petitioners regarding their "general" questions. (fn19) The Idaho Bankruptcy Court found that this arrangement constituted a deceptive and unfair practice where the reviewing lawyer did not actually represent the bankruptcy petitioners and this BPP advertised the availability of a lawyer for review and general information as a benefit to her clients. (fn20) The Bankruptcy Court further found that this BPP engaged in the unauthorized practice of law by providing "legal advice to prospective debtors by giving them a pamphlet or other publication." since "the very act of directing a prospective debtor to review a particular section or a legal book in and of itself constitutes legal advice." (fn21)

¶ 19 In light of Utah case law and persuasive authority from other jurisdictions, we conclude that an attorney may not advise a nonlawyer mediator about the preparation of pleadings or agreements in particular cases without violating the rule that prohibits the lawyer from assisting the unauthorized practice of law, Rule 5.5.

¶ 20 While we have no authority to define "unauthorized practice of law" under state statute, we are able to state that an attorney would assist the unauthorized practice of law and thus violate Rule 5.5 by advising a non-lawyer how to conform legal pleadings to proper form without having an attorney-client, advice-giving relationship with the party in interest. Accordingly, the proposed plan of having the mediator draft the court pleadings and the agreement and having the attorney review these documents "for sufficiency" would be a violation of the Utah Rules of Professional Conduct.

### **C. What are the limitations on the lawyer's representation of a party engaged in a divorce mediation?**

¶ 21 If the lawyer has been retained by the mediator to provide advice as discussed in Part B, then she may not, in most cases, concurrently represent either of the divorcing parties. (fn22) If, on the other hand, the lawyer has not been retained by the mediator, she may represent one or the other of the parties (but, under Opinion 116, not both), and mediators often do recommend that divorcing parties obtain legal advice from lawyers. However, the parties may seek to limit their expenses by engaging a lawyer for only

limited representation. We now take up the issue of how an attorney may properly limit the scope of her representation in this situation.

¶ 22 Rule 1.2(b) provides that "a lawyer may limit the objectives of the representation if the client consents after consultation." However, the Comments to Rule 1.2 indicate that "the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [competence]."

¶ 23 This Committee has had occasion to address the propriety of limiting the scope of legal representation under the prior Code of Professional Responsibility as well as under the current Rules of Professional Conduct, and we take this opportunity to review those determinations:

Opinion 47: An attorney may "provide limited legal advice, consultation, and assistance to inmates regarding the preparation of the initial pleadings in civil matters" provided the inmates are fully informed of the limited services. (fn23)

Opinion 53: An attorney may interview, advise, and provide a manual and forms for clients seeking to file *pro se* divorces. (fn24)

Opinion 74: An attorney may advise a party proceeding *pro se* and assist him to prepare pleadings. ("However, extensive undisclosed participation . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper" as conduct involving misrepresentation.) (fn25)

Opinion 95-01: Publishing a "How to" manual does not constitute the practice of law where there is no "personal advice given on a specific problem." (fn26)

Opinion 96-12: An attorney may charge for legal advice given to callers using a "1-900" number, but cannot disclaim the creation of an attorney-client relationship. (fn27)

Opinion 97-09: A lawyer providing certain estate-planning legal services in conjunction with a non-lawyer estate-planner "must perform an independent role as legal advisor to the client, assuring that the estate plan and associated documents are legally appropriate to accomplishing the client's objectives." (fn28)

Opinion 98-14: A lawyer representing a client in a divorce is not automatically counsel for that client in a protective-order proceeding because the client may elect to proceed *pro se* in this separate action. (fn29)

Opinion 01-03: An insurance defense lawyer with a flat-fee arrangement may not improperly curtail services to the client, which include "competent representation . . . to

exercise independent professional judgment and render candid advice." (fn30)

Certain principles from these precedents emerge as fundamental when a lawyer attempts to limit the scope of representation.

¶ 24 First, the lawyer may "limit the objectives of the representation [only] if the client consents after consultation." (fn31) Such consultation should comport with Rule 2.1, which requires an exercise of "independent professional judgment" and "candid advice," as well as with Rule 1.4 which requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

¶ 25 Accordingly, an attorney may limit the legal services provided to a divorcing client only after fully advising the client as to the range of services possible (e.g., from full representation to advice followed by the client proceeding *pro se*) (fn32) and after advising the client as to the pros and cons of proceeding in any particular manner. (fn33)

¶ 26 There are nevertheless certain limitations that cannot be imposed. The lawyer cannot disclaim the attorney-client relationship, (fn34) nor limit the obligation to be "competent," which includes "thoroughness" and "preparation reasonably necessary" for the representation. (fn35)

¶ 27 In a similar case, we analyzed the proposal of a professional estate planner who sought to involve a lawyer on a limited basis to assist in drafting estate plans for his clients. (fn36) The issue we addressed in that opinion was whether the lawyer could thus "provide competent representation under Rules 1.1 and 1.2(b)." We concluded that too circumscribed a role is not permissible. We opined that the estate planning lawyer cannot "provide competent representation . . . if he declines to counsel the client as to the appropriate means of executing the estate-planning documents or as to the appropriate means of transferring assets into the estate-planning vehicles to accomplish the client's objectives." In the estate planning situation, we determined that "a lawyer has an obligation not only to advise a client of legal rights and responsibilities, but also to advise the client regarding the advisability of the action contemplated." We stated: "A lawyer is under a duty to inform clients of the relevant facts, law and issues necessary for the client to make intelligent decisions regarding the objectives of the representation." (fn37)

¶ 28 We are unable to find a principle that justifies a different decision here. An estate-planning lawyer cannot be a mere scrivener, but "must perform an independent role as legal advisor to the client." (fn38) Likewise, a divorce attorney cannot be a mere drafter, preparing court

pleadings, proposed orders and judgments and avoiding the exercise of any "independent professional judgment" and communication of any "candid advice" (fn39) to the client.

¶ 29 Indeed, the Rules of Professional Conduct identify various functions the lawyer assumes as "representative of clients," including advisor, advocate, intermediary, and evaluator, (fn40) but the Rules do not identify the role of "drafter" or "scrivener." As an advisor, "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implication." (fn41) While an attorney may limit the scope of representation to advising the client or to advising and assisting in drafting pleadings, there is no authority for eliminating the advice-giving role in an attorney-client relationship.

¶ 30 Commentators have addressed the challenges faced in such "unbundled" legal services. (fn42) Various courts have addressed the propriety of attorneys assisting only with "ghostwritten" pleadings, as is proposed here. In some cases, courts have considered ghostwritten pleadings to be a fraud on the court. (fn43) Some courts have explicitly required a *pro se* litigant to indicate whether she had legal assistance in preparing her pleadings; (fn44) other courts have required an attorney to appear in person and represent clients in future hearings if they attempt to appear only through ghostwritten pleadings. (fn45) A few states have addressed the limited service of ghostwritten pleadings through court rule. Colorado provides that an attorney may "undertake to provide limited representation . . . to a *pro se* party" by including his name on the party's pleadings and warranting that the attorney's assistance relies upon the *pro se* party's representation of the facts. (fn46)

¶ 31 Various state bars have addressed the limitation on legal services where the lawyer provides only legal analysis and drafting services. (fn47) We can find no judicial or ethics opinion that approves drafting services alone; the drafting services are always an adjunct to analysis and advice provided by the lawyer. Finally, best practices in "unbundled" legal services are addressed in various books and articles, (fn48) and we can find none that suggest drafting services alone are adequate or appropriate.

¶ 32 Indeed, all pleadings in Utah divorce cases must be signed by the attorney or the *pro se* party, "certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the claims, defenses and other legal contentions therein are warranted by existing law [and] . . . the allegations and other factual contentions have evidentiary support." (fn49) It is difficult to understand how a lawyer could appropriately assist an individual to file *pro se* divorce pleadings without advising the party when his claims appear to lack any legal support and without advising the

party regarding the evidentiary support the party will need to support certain contentions.

¶ 33 In the absence of any court rules that address the propriety of ghostwritten pleadings, this Committee concludes that, at a minimum, a lawyer may not limit her services to conforming a party's pleadings to proper form without providing analysis and advice to the party seeking such advice.

#### D. Conclusion

¶ 34 It is permissible for a lawyer to advise a divorce mediator on the issues likely to arise in the course of a mediation, but the lawyer may not advise the mediator how to prepare divorce agreements and court pleadings for particular parties who are clients of the mediator. It is also permissible for a lawyer to review the contents of the divorce agreement for *one* of the parties and advise that party about the options and the advisability of the draft agreement. A lawyer might appropriately limit her services to such a review. A second attorney might advise the other party in this same way. Thereafter, either of these two attorneys might review the pleadings prepared by these parties as to sufficiency. And these parties might then proceed to file *pro se*.

¶ 35 However, the most crucial element of legal services here is informing a party about the relevant legal standards so that the party's decisions are informed. Accordingly, it is inappropriate for an attorney to limit her services to assisting a divorcing party to prepare divorce pleadings while failing or refusing to advise the divorcing party about the relevant law.

#### Footnotes

1. Utah Code Ann. §§ 58-39a-1 *et seq.* (2002), "Alternative Dispute Resolution Provider Act." An ADR Providers Certification Board, comprising two judges, one lawyer and four members of the general public with a demonstrated interest in ADR, is to grant certification to persons who "complete a program of education or training, or both, in ADR or have demonstrated sufficient experience in ADR." *Id.* §§ 58-39a-3 and -5

2. *Id.* § 58-39a-2.

3. *Id.* § 58-39a-2(1)(a).

4. *Id.* § 58-39a-2(4).

5. Utah Code Ann. §§ 78-31b-1 *et seq.* (2002), "The Alternative Dispute Resolution Act."

6. *Id.* § 78-31b-5(3)(h). This statute explicitly provides that ADR providers may, but need not, be certified under the

ADR Provider Certification Act.

7. *Id.* § 78-31b-4(4).

8. *Id.* § 78-31b-2(8).

9. Standards of Conduct for Mediators, Standard I and cmt.

10. *Id.*, Standard V cmt.

11. Utah Rules of Professional Conduct 5.5, cmt.

12. Utah Ethics Advisory Op. 95-01, 1995 WL 49472 (Utah St. Bar). Publication of such forms is not the practice of law where no personal advice is given. (The Committee's opinions are also available at [www.utahbar.org/options/index.html](http://www.utahbar.org/options/index.html)).

13. Utah Ethics Advisory Op. 116, 1992 WL 685249 (Utah St. Bar).

14. *Utah State Bar v. Petersen*, 937 P.2d 1263 (Utah 1997)

15. *Id.* at 1263.

16. *Petersen* was found to have violated Utah Code Ann. § 78-51-25.

17. *Petersen*, 937 P.2d at 1268.

18. *Florida Bar v. Brumbaugh*, 335 So. 2d 1186 (Fla. 1978).

19. *In re: Doser*, 281 B.R. 292, 294 (Bkrcty. D. Idaho 2002).

20. *Id.* at 304-06.

21. *Id.* at 306-09.

22. Such a concurrent representation would likely create a conflict of interest under Rules of Professional Conduct 1.7. Whether this conflict could be waived by the consent of the mediator and the divorcing party would depend on the facts and circumstances.

23. Utah Ethics Advisory Op. 47 (Utah St. Bar, July 1978).

24. Utah Ethics Advisory Op. 53 (Utah St. Bar, April 1979).

25. Utah Ethics Advisory Op. 74 (Utah St. Bar, Feb. 1981).

26. Utah Ethics Advisory Op. 95-01, 1995 WL 49472 (Utah St. Bar).

27. Utah Ethics Advisory Op. 96-12, 1997 WL 45137 (Utah St. Bar).

28. Utah Ethics Advisory Op. 97-09, 1997 WL 433814 (Utah St. Bar).

29. Utah Ethics Advisory Op. 98-14, 1998 WL 863905 (Utah St. Bar).

30. Utah Ethics Advisory Op. 01-03, 2001 WL 314288 (Utah St. Bar).

31. Utah Rules of Professional Conduct 1.2 (c) (emphasis added). *See also* Utah Ethics Advisory Op. 47.

32. *See* Utah Ethics Advisory Op. 98-14.

33. *See* Utah Ethics Advisory Op. 47.

34. Utah Ethics Advisory Op. 96-12.

35. Utah Ethics Advisory Op. 02-03.

36. Utah Ethics Advisory Op. 97-09.

37. *Id.*

38. *Id.*

39. Utah Rules of Professional Conduct 2.1.

40. Preamble, Utah Rules of Professional Conduct.

41. *Id.*

42. *See* Forrest S. Mosten, *Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte*, (ABA Law Practice Management Section, 2000) (hereinafter, "Mosten").

43. *Johnson v. Freemont* 868 F. Supp. 1226 (D. Colo. 1984). Our Opinion 74 considers an attorney providing "extensive undisclosed" assistance to be unethical as assisting in a misrepresentation.

44. *Wesley v. Dan Stein Buick*, 987 F. Supp. 884 (D. Kans. 1997).

45. *See* Kimberly Pochneau, *Unbundling Civil Legal Services, A Critical Reader* (ABA 1998).

46. Colo. R. Civ. P 11(b).

47. Alaska Bar Association Ethics Opinion No. 93-1 (permissible to interview client and draft pleadings without appearing in court); ABA Informal Ethics Opinion 1414 (1978) (permissible to advise and prepare pleadings; but extensive undisclosed participation would constitute misrepresentation); Arizona Opinion 91-03 (attorney may advise on domestic relations matters and prepare pleadings); Colorado Bar Association Ethics Committee

Formal Opinion No. 101 (1998) (attorney may limit representation provided she makes sufficient inquiry into and analysis of factual and legal elements to provide competent representation); New York Opinion 613 (1990) (attorney may advise and prepare pleadings for a *pro se* litigant without entering an appearance).

48. *See, e.g.*, Mosten, *supra* note 42; Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 *Wake Forest L. Rev.* 295 (1997)

49. Utah R. Civ. P. 11.

#### **Rules Cited:**

#### **5.51.21.1**