Utah Ethics Opinions

2005.

05-03. UTAH STATE BAR ETHICS ADVISORY OPINION COMMITTEE

Opinion No. 05-03

Issued May 6, 2005

The following opinion issued by the Ethics Advisory Opinion Committee and its effectiveness has been stayed pending the appeal to the Bar Commission. The Commission will be holding and hearing on the appeal on July 12, 2005.

1 **Issue:** 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?

2 **Opinion:** 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. It may be possible after the mediation has terminated, in limited circumstances, for the lawyer-mediator to act as the lawyer for one party in drafting a settlement agreement and in obtaining a divorce decree after disclosure and consent of both parties consistent with Rule 1.7.

3 **Analysis:** The issue considered here was the subject of a prior opinion issued by this Committee in 1992. We have been asked to revisit this issue again because of the expansion and apparent success of divorce mediators in resolving domestic relations matters for pro se litigants for whom the cost of retaining legal counsel may be a serious financial burden. 1

4 Utah Ethics Advisory Opinion 116 considered the following issue: "Under what circumstances may an attorney represent both parties in a divorce?" 2 The answer given in Opinion 116 was "never," based on the clear ethical mandates of Rules 1.7(a) and 1.7(b) of the Utah Rules of Professional Conduct. 3 These rules establish a duty of undivided loyalty of counsel to a client. 4 Opinion 116 concluded that our rules preclude concurrent representation of clients with directly adverse interests in the matter. Opinion 116 included a lengthy discussion of policy arguments favoring dual representation and policy arguments opposing dual representation in divorce proceedings and concluded that: "The concurrent representation of both parties in a divorce is an ethically unacceptable practice." 5

5 In the 12 years since Opinion 116 was issued, the applicable rules and the arguments bearing upon dual representation in divorce proceedings have not materially changed. The arguably successful and beneficial development of alternative dispute resolution and mediation in the interim does not change our conclusion here. Since our Committee has no policy-making authority, the fact that parties to all lawsuits, including divorces, are increasingly turning to alternative dispute resolution with reportedly positive results to the public and Bar alike cannot alter the clear mandate of our Rules. Whatever the social, financial or other impacts of the alternative dispute resolution trend, and even assuming its worth and inevitability, the ethical rules we are charged to uphold have no "public policy" exceptions that would permit this Committee to rewrite the rules to achieve a result some may believe is beneficial, even if that revision is a carefully reasoned, narrowly crafted exception. 6

6 Several states have considered this issue and arrived at a similar conclusion to this opinion and Opinion 116 7. Other states have concluded otherwise. 8 However, the opinions of other bar associations, while instructive, are not controlling.

7 We reaffirm our conclusion in Opinion 116 because we believe that Rule 1.7(a) creates a per se bar to dual representation of a plaintiff and a defendant in litigation, even in the settlement phase of that litigation. The official comment to our Rule 1.7(a) makes this conclusion clear: "Paragraph (a) prohibits representation of opposing parties in litigation."

8 Rule 1.7(a) recognizes that under certain limited circumstances a lawyer may represent a client adverse to another client. A lawyer may do so only when (1) the lawyer "reasonably believes the representation will not adversely affect the relationship with the other client," and (2) each client consents after consultation. The comment to Rule 1.7(a) provides that the "reasonable belief" that the representation will not adversely affect the relationship with the other client is tested by the objective standard of a disinterested lawyer. The comment provides: "When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer cannot properly ask for such agreement or provide representation on the basis of the client's consent." The direction in the comment that Rule 1.7(a) prohibits representation of opposing parties in litigation is simply the

recognition that a disinterested lawyer would not recommend that a single lawyer represent adverse parties in litigation.

9 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. 9

10 One court in Utah has specifically addressed the issue of a mediator-turned-lawyer. In *Poly Software International v. Su*, 10 litigants moved the trial court to disqualify plaintiff's counsel where plaintiff's lawyer had previously acted as mediator for the parties. The *Poly Software* court held that the lawyer who had previously been a mediator had received confidential information from both parties and was therefore unable to represent anyone in connection with the same or a substantially factually related matter unless all parties consented after disclosure. *Poly Software* stands for the proposition that, with consent of both parties, Rule 1.7 would permit the mediator to become the lawyer for one party, not both parties in the factually related matter.

11 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. If the mediator-turned-lawyer for both parties does not then advise both clients of all considerations and possible alternatives previously overlooked in the hopes of securing a deal, the lawyer would not be acting ethically.

12 In Opinion 116, we noted the substantial danger of improper influence exercised by a dominant spouse to prevent adequate disclosure of conflicts. 11 That observation remains just as true today. Divorced couples often make recurrent visits to the courts despite what once appeared as a mutually agreed-on decree. In fact, the recurrent disputes over property, custody, visitation, child support amounts and alimony termination is at least as significant as the number of so-called successful mediations.

13 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. In Opinion 116 and here, 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. 12

14 Strong policy arguments favor the position of the Committee in Opinion 116 and here. Opinion 116 explained these policy considerations:

Allowing dual representation tends to erode confidence in the courts as a tool for equitable resolution of disputes. The risk of the appearance of impropriety is great in divorce cases where the inherent adversity of the parties is so obvious. Furthermore, the court is presented with only one view of the facts in the divorce, substantially reducing the court's ability to protect both parties.

Besides an appearance of impropriety, dual representation can foster impropriety by facilitating a fraud on the court, either with or without the attorney's collusion. The potential for fraud enlarges when one spouse dominates the marriage.

Additionally, the attorney representing both parties has a financial disincentive to inquire too closely into the details of the property settlement he is arranging, because he must withdraw from the case entirely if he discovers a conflict. 13

15 Rule 1.7(a) does not allow these potential conflicts to be remedied simply by disclosure and consent. As we said in Opinion 116, "The danger to the parties and the courts outweighs the advantages of cost and convenience advanced as the reasons for adoption of a rule allowing dual representation." 14

16 **Representing One Party Following Mediation**. It may be possible, under limited circumstances, for a lawyer-mediator, after a mediation has terminated, to represent one party to divorce litigation, in order to draft final court documents to effectuate the mediated settlement. This representation may only be undertaken if the mediator-turned-lawyer complies with Rule 1.7(b) and the lawyer's duties as a mediator to the non-represented party.

15 This could occur in the event of the following:

17 a. Full disclosure by the lawyer of the lawyer's ethical responsibilities as a former mediator not to disclose confidential information revealed to the mediator by the non-represented party, and that such non-disclosure may limit the lawyer's ability to represent the client fully;

18 b. Full disclosure of the potential conflict of interest by the lawyer to both parties, and an informed consent by both parties to the conflict after independent consultation, which shall include an explanation to each client of the implications of the representation and the advantages and risks involved; 16 and

19 c. An independent good-faith assessment by the lawyer that the representation of the one client whom the lawyer undertakes to represent will not be materially limited by the lawyer's responsibilities to the other party or to a third person or by the lawyer's own self interest.

20 It may seem incongruous, and even ironic, that the mediator-turned-lawyer might undertake to represent the interests of only one party to a mediated divorce, but may not represent both parties. Rule 1.7(a) simply does not allow representation by one lawyer of both parties in the same lawsuit. On the other hand, the rules allow for the possibility of representation of one party to a lawsuit, even if the lawyer's representation may be limited by the lawyer's responsibility to a third person. The teaching of *Poly Software* is that confidential information may be obtained when acting as a mediator in the course of mediation, and the subsequent representation of one party in the same or a substantially factually related matter is possible with consent and full disclosure. 17 It is expected that the lawyer-mediator would sufficiently alert the parties to the mediation of all of the potential pitfalls in this situation to permit the parties to make a truly informed decision whether to allow the mediator to act as a lawyer representing only one of the opposing parties in divorce litigation.

We respectfully dissent:

21 The majority has reached two results that we believe are wrong - one that imposes an unnecessarily narrow constraint on parties to resolve disputes that is not required under the Utah Rules of Professional Conduct; and one that produces an illogical result inconsistent with the overall goals and aspiration of the Rules of Professional Conduct.

22 Contrary to the claim of the majority, their results are not mandated by the Rules of Professional Conduct. Indeed, we believe the majority has lost sight of at least one fundamental principle: The Rules are "rules of reason, . . . [to be] interpreted with reference to the purposes of legal representation and of the law itself" 18 Because of an unnecessarily rigid interpretation of Rule 1.7, the opinion produces an inequitable result, one that is logically and internally inconsistent, and one that does not serve the best interests of a segment of the public that is looking to the legal profession for effective, low-cost legal services. 19

23 Under a careful and reasonable interpretation of the Rules, we conclude that they permit an attorney-mediator, in limited circumstances, to undertake the subsequent joint representation of the mediating parties in obtaining final judicial approval of a fully successful settlement.

BACKGROUND

24 *Increasing Role of Alternate Dispute Resolution*. Parties with domestic disputes are increasingly turning to alternative dispute resolution approaches to resolving their disputes. Indeed, court rules may require certain domestic litigants to attempt mediation before arguing contested issues to the court. 20 Some believe that the use of mediation is a superior way to resolve disputes when there are strong personal feelings or a need for an on-going relationship. Many believe that mediation may be a more affordable process than adversary litigation.

25 But, even mediating parties often need legal advice or information about their options under the law in order to make informed decisions. And, parties often need legal assistance in preparing the final agreement so that it will be enforceable. Similarly, when parties have a domestic dispute that must ultimately be presented to a court for a final judgment, they may need legal services in preparing required court pleadings. The desire for a consensual process, an informed process and an affordable process presents challenges regarding how mediators and lawyers might work together for the best interests of their clients.

26 Turning to the specific situation of a divorcing couple, Ethics Advisory Opinion 116 concluded that it is impermissible for one lawyer to "concurrently represent both parties in a divorce in any circumstances." 21 The current question concerning post-mediation representation requires a closer analysis of a situation that may not have been fully contemplated by Opinion 116. 22

27 We also note that the new ABA Model Rules of Professional Conduct (the "Model Rules"), adopted from the ABA's Ethics 2000 project, address various issues that are implicated in the issues before us. 23 In particular, Model Rule 1.12 includes, for the first time, the lawyer-mediator regarding subsequent representation and related conflicts of interest, and new Model Rule 2.4 addresses a lawyer serving as a third-party neutral, including as a mediator.

28 *Mediation Is Not the Practice of Law*. There is wide agreement that mediation, *per se*, is not the practice of law. The Utah Alternative Dispute Resolution Act defines "mediation" 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." Similarly, Utah's "Alternative Dispute Resolution Provider Act" identifies mediation as a form of "alternative dispute resolution" 25 and defines a "dispute resolution provider" as "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." 26

29 It is generally agreed that a mediator - whether a lawyer or a lay person - may draft a "memorandum of understanding" that precisely reflects the parties' agreement and does not go beyond it, without engaging in the practice of law. However, once a mediator adds to the parties' agreement or selects language with its legal import in mind, the mediator may be engaged in the practice of law. 27

30 *A Mediator's Preparation of the Parties' Settlement Agreement and Court Pleadings Is the Practice of Law*. The question presented suggested that any mediator might prepare the settlement agreement and court pleadings as a mediator. However, once the attorney-mediator begins drafting final settlement agreements or court documents, he is engaging in the practice of law as defined by the Utah Supreme Court. In the *Utah State Bar v. Petersen* case, the Court stated:

[W]ith the aid of forms he selected, he drafted such things as complaints, summonses, motions, orders, and findings of fact and conclusions of law for pro se clients; . . . Thus Petersen held himself out to the public as a person qualified to provide, for a fee, services constituting the practice of law. 28

Clearly, the mediator-lawyer would not be engaged in the unauthorized practice if he were to prepare and file such documents. The only remaining question is whether the Utah Rules of Professional Conduct would prohibit him from doing so.

31 *Parties in Mediation Should Have Access to Independent Legal Advice*. Where parties have independent counsel, there is much less concern about the mediator drafting agreements for the parties. Mediation standards and guidelines unanimously and unequivocally recommend that parties consult with independent counsel - before, during or at the conclusion of the mediation. The lawyer can advise a party about legal standards and a range of options. During the mediation a lawyer can advise a party about the legal import of any proposed agreement. At the conclusion of the mediation, the lawyer can advise the party not only about his rights, but about the best ways to carry out the proposed agreement. A lawyer can prepare - or review - documents that will be filed in court to insure that they are complete and will accomplish what the parties have agreed. This benefit of having access to legal counsel exists even if counsel has limited the objectives of the representation (after consultation and with client consent) as provided for by Rule 1.2(b).

DISCUSSION

32 *The General Approach and Rationale of Opinion 116 Is Still Valid*. In Opinion 116 the Committee considered whether an attorney could concurrently represent both parties in a divorce and decided that no such representation was possible.

33 The Opinion considered such representation to be governed by Rule 1.7(a) regarding concurrent representation of clients with "directly adverse interests." That rule permits dual representation only when the representation of one client will not adversely affect "the relationship" with the other client. Moreover, the rule imposes a requirement on the lawyer that the lawyer "reasonably believe" that such dual representation will not adversely affect the relationship with either client. Thus, even if both clients consented to such representation, a lawyer would not be permitted to undertake it unless the lawyer "reasonably believed" there would be no adverse affect on the relationship with either client.

34 The Committee concluded that an attorney representing both parties in a divorce would have a disincentive to inquire closely into the parties' financial circumstances and thus discover a conflict between them. It noted that the attorney might be disinclined to point out any inequities to a disadvantaged party and thus upset the dual representation.

35 We agree with these concerns and the conclusion that a lawyer, serving solely as counsel, may not undertake to represent both parties to a divorce. At the outset of such a representation, the lawyer would have too little information to reasonably conclude such a representation could be undertaken without harming the relationship with one or the other client.

36 However, we note that "mediation" is not "representation," and the mediation process provides for sharing of information and development of proposed solutions, separate and apart from legal representation in a divorce. Therefore, it is possible that an attorney-mediator could reasonably conclude, after an entirely successful mediation, that he could then serve as lawyer and fairly represent the interests of both clients without adversely affecting the relationship with either client. However, the

circumstances in which an attorney-mediator would fairly so conclude are limited and would need to be thoroughly understood.

37 *The Role of Rule 1.2*. The Committee has considered at various times the possibility of a lawyer's providing limited legal services. 29 Under Rule 1.2, parties engaged in divorce mediation have the option of retaining counsel for narrowly limited representation as appropriate in the individual case. Limiting the representation to the drafting of the settlement agreement and related court documents is a sensible approach:

Even drafting the stipulated judgment is a task often ceded to the mediator. By the end of the process, both parties usually have a high level of confidence in the mediator's impartiality and may be more comfortable in the settlement agreement is prepared by the neutral mediator instead of either party's consulting attorney. 30

38 In this context, Rule 1.2 provides a major tool by which parties may limit the scope of the engagement of a lawyer. No one would argue that a lawyer who is a "stranger" to the transaction could not so limit her involvement to come in at the conclusion of the mediation. This, of course, makes perfect sense from a public-policy perspective, as long as the limitation is not so narrow as to render the lawyer's role a nullity. 31 But, it may be far more economical for this to be done by the lawyer who has absorbed all of the facts and circumstances leading to a successful mediation to do so. And that, in turn, furthers the general goals of providing mechanisms that allow parties to resolve their disputes in an effective and economical way.

39 Thus, pursuant to that rule, it is perfectly reasonable for the two now-resolved parties to say to their mediator-lawyer, "Will you now represent us in or common goal to have this matter made final by the legal system?" To the extent that this request is memorialized with the consent of the two parties that satisfies the requirements of Rule 1.7(a) ("each client consults after consultation") and Rule 1.12 ("all parties to the proceeding consent after consultation"), 32 we believe it would be well within the prerogative of the parties and their selected mediator-turned-lawyer to continue to assist the parties to negotiate the final legal formalities of filing papers and obtaining the appropriate court disposition.

40 *Other Jurisdictions' View of the Issue*. Other states have considered the same issue posed here. 33 Some states prohibit a mediator from doing anything that could constitute the "practice of law." 34 These states permit drafting a memorandum of understanding, but prohibit giving a legal opinion as to its effect. This broad approach of requiring mediators never to opine on the law is widely criticized by the national organizations for mediation. Given the Utah Supreme Court's loose definition of the practice of law in Petersen, it is not necessary to prohibit a mediator from providing an opinion that could be construed as the practice of law or to prohibit a lawyer-mediator from providing such legal advice.

41 Early ethics opinions from Florida 35 and Massachusetts 36 permit the lawyer-mediator to draft the separation agreement following a fully successful divorce mediation under certain circumstances and with certain guidelines. 37 A recent opinion by the New York State Bar specifies limited circumstances when such a practice is permitted and prohibits lawyer-mediators from advertising this possible service, given the limited circumstances in which it will be appropriate. 38

42 The 2001 New York State Bar opinion partially modified its prior opinion that a lawyer cannot represent both spouses in a divorce, concluding that, in some cases, at the conclusion of the mediation, a "disinterested lawyer" could conclude that he could competently represent both parties consistent with DR5-105(C). 39 The New York committee stated:

[T]he 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. In those circumstances, the per se ban of NY State 258 should be relaxed to permit spouses to avoid the expense incident to separate representation and permit them to consummate a truly consensual parting, provided both spouses consent to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

43 The New York opinion notes that full disclosure must include informing the parties that the absence of separate representation creates a risk that the agreement might be successfully challenged. The opinion goes on to say that "because the disinterested lawyer test cannot easily be met" the lawyer may not do this as a regular practice. The lawyer may not indicate that the lawyer will routinely do this in advertising or in retainer agreements. The opinion also notes that where the lawyer-mediator does draft and file divorce papers, "If the lawyer does not make a formal appearance in the divorce proceeding, the lawyer must ensure that his or her role is disclosed to the court."

44 The only Utah case of which we are aware that touches on a related subject is *Poly Software International, Inc. v. Su*. 40 This case involved a mediator's attempt to represent one of the mediating parties in a subsequent related matter

that was opposed by the other party to the mediation.. The mediator-turned-lawyer was disqualified by U.S. District Judge David Winder under Rule 1.12 because there was no consent. Poly Software has no application to the post-mediation representation of one or both parties by the mediator-lawyer where there is full consent.

45 The main opinion's claim that, "*Poly Software* stands for the proposition that, with consent of both parties, Rule 1.7 would permit the mediator to become the lawyer for one party, not both parties in the factually related matter" is, quite simply, incorrect. On this issue, Judge Winder's decision addressed *only* the conditions under which the former mediator can represent a mediating party *when the other party will not consent*. One can draw *no* inference from *Poly Software* concerning the breadth or narrowness of post-mediation representation if the parties consent. 42

ANALYSIS

46 Our analysis is founded primarily on a reading and interpretation of Rule 1.7, in connection with Rules 1.2 and 1.12. 43 Rule 1.7(a) addresses "direct adversity" where the lawyer can represent both parties only if "each client consents after consultation" and "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client." Because the parties to a divorce will, at least initially, oppose one another in a litigated matter, and because their interests are then "directly adverse," Rule 1.7(a) applies. 44 The question under Rule 1.7(a), like the question before the Massachusetts and New York bars, is whether a mediator-lawyer could, at the conclusion of a totally successful mediation, "reasonably believe" he could undertake to represent both parties.

47 We start with Rule 1.7(a), first assuming that, even after a completely successful mediation, husband and wife are deemed to be technically "adverse." Here, it must be assumed that their agreement at the end of the mediation has resolved all the issues before the parties. Further, we are specifically dealing with a situation in which the mediator is a lawyer. Notwithstanding that during the mediation he has not represented a party, he is, nonetheless, engaged in a law-related activity. By our prior ethics opinions, he carries the "baggage" of adherence to the Rules of Professional Conduct with him as he carries out those activities. 45 In particular, under Rule 1.1, he is required to be competent in such endeavors. Thus, we must assume that a mediated result that is acceptable to the parties has been supplied with competent mediation guidance. Accordingly, it would be inconsistent with the conditions put before us to assume that there are still unresolved issues and that the parties are still at odds on one or more issues.

48 *The Rule 1.7 Comment*. In analyzing whether Rule 1.7(a) precludes the kind of post-mediation assistance under consideration here, some have seized on an isolated sentence in the comment to Rule 1.7 as categorically prohibiting it: "Paragraph [1.7](a) prohibits the representation of opposing parties in litigation." 46 There are two independent arguments that show this does not dispose of the issue.

49 First, this statement must be read in the context of the rule it refers to. It can not trump the plain reading of 1.7(a), which quite clearly admits of situations where directly adverse parties can be concurrently represented under the "unless" clauses. If the rule were meant to exclude absolutely all representation of adverse parties in the same matter, it would not have been hard for the drafters to have explicitly said so. They did not. In this case, the apparent absoluteness of the comment must be read with and understood to be conditioned by the "unless" clauses of the black-letter rule. That is, it must be read: "Unless clauses (1) and (2) can be satisfied, p]aragraph (a) prohibits the representation of opposing parties in litigation." It is not possible to take the "unless" clauses out of the black-letter rule by an out-of-context reading of an isolated sentence in the comment. If the parties consent and the lawyer-mediator concludes that his representations will not be adversely affected, then Rule 1.7(a) is satisfied.

50 Second, we consider the role of the term "adverse" in Rule 1.7(a). We believe that, after the parties have come to an agreement under the guidance of a competent lawyer-mediator, they may be considered no longer "adverse" under Rule 1.7(a). The two parties are, by definition, adverse going into a mediation. But, if the mediation has been completely successful, having had the assistance of a skilled mediator trained in the law, the parties will shake hands, agree that their differences are resolved, that all that is left to do is memorialize their agreement. And, because society has declared that divorcing parties must complete the procedure before a magistrate of some kind, they must submit appropriate paperwork to satisfy the legal requirements.

51 At this point, the parties have a single, common goal in the matter: They wish only to get the legal system to put its stamp of approval on what they've agreed to. Are they "adverse?" Not under a common interpretation of the word. An authoritative dictionary tells us that things (such as parties) are adverse if they are "[a]cting or serving to oppose; antagonistic" or that they are "[m]oving in an opposite or opposing direction." 47 Does this describe parties who have settled their differences? Not at all. Indeed, to continue to refer to them as "adverse" is rather an artificial and non-standard use of the term. 48

52 *ABA Model Rule 1.12*. In its Ethics 2000 modifications to the Rules of Professional Conduct dealing with the

restriction on the representation of clients by former adjudicators, the ABA expressly included mediators. That rule reads:

Former Judge, Arbitrator, Mediator Or Other Third-party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, *unless all parties to the proceeding give informed consent, confirmed in writing*. 49

This makes it crystal clear that the former mediator may subsequently represent a party to the mediation if all parties to the proceeding give informed consent, confirmed in writing; 50 there is nothing inherent in this rule that would limit the representation to one party.

53 For those who would find that the mediator-turned-lawyer could represent one of the settling parties (with appropriate consent) in the post-mediation proceedings, but not both, we find such a result perplexing, at best. The legal profession would be telling the outside world that it is perfectly all right for the parties to agree that their former mediator can now line up with one of the parties, while the other party must either go without representation or must obtain (and presumably pay for) a lawyer to come to the process for the first time. But, should we tell the same two parties that they are incapable of agreeing that they are comfortable to have the mediator who led them through the thicket of issues to hand-hold them through the rest of the process? We think this result is indefensible - from both logical and public-policy perspectives. It's no wonder that the public sometimes looks at lawyers and wonders where their common sense is. 51

54 In addition, denying the settling parties in a divorce the opportunity to consent to post-mediation representation by their lawyer-mediator is inconsistent with the latitude granted under Rule 1.12. How could one logically deny these parties the flexibility afforded under Rule 1.12 and not other types of once-adverse-but-now-settled parties to avail themselves of the continuing services of their lawyer-mediator?

55 *The Lawyer-Mediator May Undertake Limited Representation of Both Parties*. We have reviewed the ethics opinions from other states as well as the ABA's proposed Model Rules from Ethics 2000. We believe that the best reading of the applicable rules is that, in limited circumstances, the mediator may undertake to represent both parties in a divorce, following an entirely successful mediation.

56 We, like the New York committee, are persuaded that a lawyer could "reasonably believe" dual representation is possible where "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." 52

57 We note that not every case settled through mediation will qualify under this standard and agree with the Massachusetts bar opinions that drafting the separation agreement involves "dual representation" that is fraught with challenges. While it may be the case that the mediation process was so thorough and the agreement reached so uncomplicated that the drafter's efforts are truly those of a mere 'scrivener or secretary,' [citation omitted] this will not usually be the case." 53 We find this analysis persuasive, particularly insofar as it notes that there will usually be choices to make in the drafting of such an agreement, so that the lawyer-mediator must reasonably believe that he can discuss the choices with both parties as his clients in order to proceed.

58 We also believe that, at the point the mediator is asked to begin dual representation, "Rule 1.7(b) must also be considered, for there is an unavoidable risk . . . that [the lawyer's] best efforts on behalf of one of the parties will 'materially limit' what can be done for the other." 54 Rule 1.7(b) regarding potential conflicts of interests requires that each client consent "after consultation" and that the lawyer fully explain "the implications of the common representation and the advantages and risks involved." Here that would require explaining to the clients the challenges in drafting a final agreement, the risk that the settlement could come undone, and the requirement that the lawyer-mediator have no further involvement for either party if that were to occur.

59 Moreover, we observe that the lawyer-mediator who declines during mediation to indicate what typical outcomes are ordered by the court may not continue to avoid providing the parties with such information once he undertakes to provide them with dual legal representation. At that point, the lawyer must inform both parties of their legal rights and respond to their questions in order to comply with applicable ethical rules. 55 For these reasons, there will be some settled cases in which the lawyer-mediator will not be able reasonably to conclude he can serve both parties as their lawyer at that point.

60 However, in some cases the parties' agreement will so closely follow typical court orders that this will not be a problem. Similarly, parties may be so committed to their

particular agreement that learning what a court would order in the absence of an agreement will not influence them at all.

61 We agree with the analysis of the New York committee that the attorney-mediator should not advertise that he will regularly serve the dual roles of mediator and lawyer for both parties, since this will not be typical. Such a statement could constitute a violation of Rule 7.1 as prohibited "false or misleading communication about the lawyer or the lawyer's services." Also, the lawyer-mediator who undertakes to prepare court pleadings on behalf of the divorcing parties should indicate his representation of both parties and his prior role as the mediator in these pleadings in order to comply with the obligation of candor toward the tribunal required by Rule 3.3. This will provide the court with the proper and accurate information with which to review the parties' agreement and proposed judgment.

62 *Opinion 116 - Reprise*. We believe that permitting the two spouses to give informed consent to the joint representation is not inconsistent with the basic analysis of Opinion 116. Opinion 116 was founded on the premise that the two divorcing parties had, at least potentially, unresolved issues between them and that it was not possible to postulate that the parties could reasonably consent to joint representation under those circumstances. Here, however, we have a situation where the issues have, by definition, been resolved by a lawyer-mediator and the remaining task is to deal with the legal formalities of making the result final. This, in our, judgment, is a situation that can be the subject of consent by the two settling parties.

63 Thus, we have two parties who, through mediation conducted by a lawyer, have reached a full concurrence on how to resolve the issues of their divorce and the only remaining hurdle is to memorialize the agreement in a fashion that will (a) capture the agreement of the parties, and (b) satisfy such legal requirements as will allow the agreement to be effected through appropriate legal proceedings. This was not the context in which the analysis of Opinion 116 was conducted. We, accordingly, would not overrule Opinion 116 except to the extent that parties who have reached a comprehensive settlement of the relevant divorce issues through the assistance of a competent lawyer serving as a mediator under Utah law may seek and consent to limited joint representation by the mediator-lawyer to obtain final disposition of the divorce proceedings.

CONCLUSION

64 We conclude that a lawyer-mediator could undertake to represent both parties and to prepare the ultimate Settlement Agreement and to prepare the necessary court pleadings for the parties' divorce at the conclusion of a fully successful mediation only when:

The lawyer could "reasonably believe that the representation" of both parties "will not adversely affect the relationship with" either in this directly adverse representation. Rule 1.7(a).

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.

Both parties give fully informed consent.

The lawyer-mediator makes known to the court the nature of his dual role.

Accordingly, five members of the Committee dissent, including:

Robert A. Burton

Keith A. Call

Gary G. Sackett

Linda F. Smith

Footnotes

1. The actual question put to the Committee was whether it was permissible for an attorney who serves as a domestic relations mediator to draft the parties' settlement agreement and pleadings (complaint, findings of fact, conclusions of law, and divorce decree) so that the settlement reached in mediation could be entered as a judgment of the court. When the mediator drafts a settlement agreement and pleadings, the mediator is acting as an attorney and, if purporting to act for both parties, the mediator is attempting to represent the petitioner and respondent simultaneously - opposing parties in litigation.

2. Utah Ethics Advisory Op. 116, 1992 WL 685249 (Utah St. Bar) (hereinafter Opinion 116).

3. (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) Each client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation to each client of the implications of the common representation and the advantages and risks involved.

Utah Rules of Professional Conduct 1.7 (2004).

4. The Utah Supreme Court has observed that "[T]he [R]ules [of Professional Conduct] establish the general impropriety of an attorney representing separate clients with adverse interests." State v. Brown, 853 P.2d 851, 858 (Utah 1992).

5. Opinion 116, at *5.

6. *Tanasse v. Snow*, 929 P.2d 351, 355 (Ut. Ct. App. 1996).

7. N.C. Ethics Op. 286 (Jan. 14, 1981); Va. Ethics Op. 511 (Sept. 8, 1983); N.H. Bar Assn. Ethics Comm. Formal Op. 1989-90115 (July 25, 1990).

8. New York, for example, concluded that dual representation may be possible where "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," New York State Bar Assn. Op. 763 (Jan. 3, 2001); Mass. Bar Assn. Ethics Op. 85-3 (Dec. 31, 1985).

9. It is beyond the purview of the Committee to define the practice of law. Historically, the preparation of pleadings in litigation by a representative of a party has been considered the practice of law. Utah State Bar v. Peterson, 937 P. 2d 1263, 1268 (Utah 1997). Even if the preparation of such pleadings by a non-lawyer mediator would not constitute the unauthorized practice of law, their preparation by a lawyer-mediator would constitute a law-related activity. Unless the lawyer discontinued the practice of law, the lawyer would be required to comply with the Utah Rules of Professional Conduct. Utah Ethics Advisory Op. 02-04, 2002 WL 459018 (Utah State Bar).

10. 880 F. Supp. 1487 (D. Utah 1995).

11. Opinion 116 at *2.

12. It has been brought to the Committee's attention that Rule 101(e) of the Utah Rules of Court Annexed Alternative Dispute Resolution currently authorizes the mediator to prepare a settlement agreement and "any documents appropriate for resolution of the action." A proposed amendment to this rule would not permit the mediator to prepare legal documents for the parties. It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as the lawyer for either party. We see no problem with a lawyer-mediator engaging in this task. We conclude that under the Utah Rules of Professional Conduct a mediator may not ethically create pleadings to implement the mediated settlement.

13. Opinion 116, at *2.

14. *Id*. at *5.

15. Mediations are often administered by alternative dispute resolution ("ADR") providers. Many such providers have codes or rules of ethical conduct for mediators. A mediator must abide by all such applicable codes or rules of ethical conduct. For example, the Center for Public Resources ("CPR") has drafted a model rule for lawyers serving as third-party neutrals which it has proposed for adoption by the American Bar Association. CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS IN ALTERNATIVE DISPUTE RESOLUTION MODEL RULE FOR THE LAWYER AS THIRD-PARTY NEUTRAL (2002). CPR Model Rule 4.5.4(a)(2) prohibits a lawyer serving as a third-party neutral from subsequently representing any party to an ADR proceeding (in which the lawyer served as a neutral) "in the same or a substantially related matter, unless all parties consent after disclosure." CPR Model Rule 4.5.2 prohibits the lawyer serving as neutral from using (after an ADR proceeding) to the disadvantage of any party to the ADR proceeding any information acquired in the ADR proceeding, except in limited circumstances. Similarly, the American Arbitration Association restricts the lawyer-arbitrator from accepting representation of a party to the arbitration or using information acquired in any arbitration proceeding to the disadvantage of a party to the arbitration. AAA Code of Ethics for Arbitrators in Commercial Disputes, Canons I.C and VI.A (2004). These rules and codes place similar restrictions on lawyers serving as neutrals, as does Rule 1.9 of the Utah Rules of Professional Conduct with regard to legal representation of a client.

16. The Committee recommends that the disclosures include a recommendation to the party that will not be represented by the mediator-turned-lawyer to seek the advice of independent counsel before giving the consent. If disputes do arise between the parties in the course of the former mediator's preparation of settlement documentation,

the lawyer needs to assess whether the disclosures made were adequate and the consent of the unrepresented party is valid and enforceable. If they were not, the lawyer may be ethically required to withdraw from the representation in the preparation of the settlement documentation.

17. The *Poly Software* court found that the lawyer-mediator (Broadbent) was constrained by our ethical rules:

Poly Software argues that, because Wang was present whenever Su revealed anything to Broadbent, Poly Software does not gain access, by employing Broadbent in the present litigation, to any confidential information that it does not already possess. However, this argument ignores the fact that Broadbent's professional expertise afforded him a perspective on the legal significance of the confidences that Wang himself could not possibly obtain or communicate to new counsel. In short his role as a mediator with experience in intellectual property litigation gives him an unfair advantage as an attorney in the present case.

Poly Software, 880 F. Supp at 1495.

18. Utah Rules of Professional Conduct, Scope 1.

19. The main opinion implies (at 5) that our conclusion is an attempt to "rewrite the rules" and make public-policy judgments that are not consistent with the Rules. To the contrary, our view is wholly compatible with the Rules. We fully understand the limited role of the Committee in interpreting the Rules. But, we also recognize that the Rules aren't always crystal clear and do not directly address every possible ethical situation. It is the charge of the Committee to fill the interstices of the Rules' framework when called upon to do so - admittedly driven in part by public policy where those considerations are not inconsistent with the Rules.

20. Utah Code Ann. § 30-3-38 (West 2004), regarding visitation enforcement; Utah Code Ann. § 78-3a-109 (West 2004), regarding mediation in abuse/neglect petitions.

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

22. There is no discussion in Opinion 116 of a situation in which the parties have come to complete agreement with the mediation services of a lawyer.

23. It is important to take the ABA Model Rules into account here, because the Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct is currently evaluating the adoption of those rules - either as written or in modified form - in Utah. Although we do not know the outcome of the process, we anticipate that many of the provisions in the new Model Rules will ultimately be adopted by the Court.

24. Utah Code Ann. § 78-31b-2 (West 2004).

25. Utah Code Ann. § 58-39a-2 (West 2004).

26. *Id.*§ 58-39a-2(4).

27. *See Utah State Bar v. Peterson*, 937 P.2d 1263, 1268 (Utah 1997), regarding the definition of the practice of law; see also Utah Ethics Advisory Op. 02-10, 2002 WL 31922503 (Utah State Bar), concerning advice to a non-attorney mediator.

28. 937 P.2d 1263, 1268 (Utah 1997).

29. *See, e.g.*, Utah Ethics Op. 47 (1978) (attorney may provide legal advice, consultation and assistance to inmates regarding initial pleadings in civil matters, after which the inmate will proceed pro se); Utah Ethics Op. 74 (1981) (attorney may give advice to a party who is proceeding pro se); Utah Ethics Op. 98-14 (attorney representing a client in a divorce case may advise the client of the right to obtain a protective order pro se): Utah Ethics Op. 02-10 (lawyer may provide limited representation to a party engaged in divorce mediation).

30. Franklin Garfield, Unbundling Legal Services in Mediation, 40 Fam. Ct. Rev. 76, 82 (2002).

31. *See, e.g.*, Utah Ethics Advisory Opinion 02-01, 2002 WL 231939 (Utah St. Bar).

32. Existing Utah Rule of Professional Conduct 1.12(a) encompasses judges and arbitrators, but not mediators. The new ABA Model Rule 1.12(a) expressly includes mediators, and this technical modification is currently proposed to be adopted in the near future in Utah. Nothing in the current Utah rule or corresponding comment is inconsistent with the inferential extension of the operation of Rule 1.12 to mediators, and that is corroborated by the change to Model Rule 1.12.

33. Fla. Ethics Op. 86-8 (Oct. 15, 1986), Mass. Bar Assoc. Ethics Op. 85-3 (Dec. 31, 1985), N.Y. State Bar Assoc. Ethics Op. 736 (Jan. 1, 2001), Ariz. Ethics Op. 96-01, Va. Ethics Op. 511 (Sept 8, 1983), N.C. Ethics Op. 286 (Jan. 14, 1981).

34. N.C. Ethics Op. 286 (Jan. 14, 1981); Va. Ethics Op. 511 (Sept. 8, 1983); Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law, N.C. Bar Assoc. Dispute Resolution Section (April 14, 1999).

35. Fla. Ethics Op. 86-8 (Oct. 15, 1986), www.flabar.org/, states that lawyers can engage in mediation, and sets forth

various standards and precautions. The lawyer-mediator "may prepare a settlement agreement. . . that reflects the decisions made by [the parties] during the mediation. The lawyer should advise the parties to consult independent legal counsel before signing any such agreement."

36. Mass. Bar Assoc. Ethics Op. 85-3 (Dec. 31, 1985), massbar.org/publications/ethics_opinions, concludes: "An attorney may also represent both parties in drafting a separation agreement, the terms of which are arrived at through mediation, but must advise the parties of the advantages of having independent legal counsel review any such agreement, and must obtain the informed consent of the parties to such joint representation."

37. Arizona considered this question and was unable to decide what guidance to offer the members of its bar who are mediators in Arizona Ethics Op. 96-01.

38. N.Y. State Bar Assoc. Op. 736 (Jan. 3, 2001), www.nysba.org/Content/NavigationMenu/-Attorney_Resources/Ethics_Opinions.

39. Both the New York and Massachusetts opinions interpret Disciplinary Rule 5-105(C) of the Code of Professional Responsibility which "permitted a lawyer to undertake concurrent representation only where it was 'obvious' that he could 'adequately' represent each client's interests. . . . Today Model Rule 1.7(a) has replaced DR 5-105." HAZARD & HODES, THE LAW OF LAWYERING, § 11.6, at 11-16 (2003).

40. 880 F. Supp. 1487 (D. Utah 1995).

41. *Poly Software* would be relevant if, after consent is given, a conflict between the parties were to develop and consent withdrawn. The mediator-turned-lawyer could not continue to represent any party, given *Poly Software's* citation to Rule 1.9 and the mediator's acquisition of confidential information.

42. The main opinion makes the Logic 101 error of arguing that p implies q leads to the conclusion that not-*p* implies not-*q*.

43. For clarification, Rule 1.7 of the new ABA Model Rules is constructed somewhat differently from the current Utah Rule 1.7, but there appear to be no material differences in application.

44. *See* HAZARD & HODES § 11.4 , at 11-9, and § 11.7, at 11-31.

45. *See, e.g.*, Utah Ethics Op. 04-05, 2004 WL 2803336; Utah Ethics Op. 01-05, 2001 WL 829237 (Utah St. Bar); see also ABA Model Rules of Professional Conduct 5.7, Responsibilities Regarding Law-related Services (2002), a version of which seems likely to be adopted by the Utah Supreme Court.

46. Rule 1.7, cmt., "Conflicts in Litigation." There is no further explanation or expansion of this isolated remark.

47. *American Heritage Dictionary* 25 (4th ed. 2000).

48. We also note that the new ABA Model Rule 1.7 and the associated comment are slightly different from the current Utah Rule 1.7:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

ABA Model Rules of Professional Conduct 1.7 (2004). ABA Rule 1.7 comment [23] states: "Paragraph(b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent." Again, if this taken out of context, it seems to address the situation we have in front of us. But, as before, it must be read in the context of the now-changed ABA Model Rule. Paragraph (b)(3), to which comment [23] refers, deals with the "the assertion of a claim by one client against another client represented by the lawyer in the same litigation." The foundational premise of the matter before us is that there is no longer any "assertion of a claim by one client against another client." To the contrary, the two putative clients are, by definition, no longer asserting claims against one another, and subparagraph (b)(3) does not apply, nor does the part of comment [23] that refers to (b)(3). Hence, even under the re-engineered version of the Model Rules, the mediator may, with the parties' informed consent, provide the limited representation described.

49. ABA Model Rules of Professional Conduct 1.12(a) (2004) (emphasis added). The written confirmation is an addition to the Model Rule that is not included in the current Utah Rule 1.12. The reference to paragraph (d) is "An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from

subsequently representing that party."

50. The requirement for a written confirmation is not presently in Utah Rule 1.12, but this is likely to be adopted in Utah. Even if not required, it is a recommended practice - particularly in a case of this type.

51. Indeed, the policy that underlay Opinion 116 is hindered by prohibiting a neutral mediator who obtained confidential information from both parties from providing candid legal counsel to both parties while permitting such candid lawyering for only one party. The main opinion here could encourage the precise imbalance of power that Opinion 116 sought to avoid. The mediator lawyer might be motivated to take up the case of whichever party got "the better deal" and now, being answerable as attorney only to that party, would deny candid legal counsel to the other. Far better, if the mediator is to assume the lawyering role, for the mediator to be candid with both parties. Then, if the deal falls apart, the lawyer-mediator has not manipulated the case in an inequitable way.

52. N.Y. State Bar Assoc. Op. 736 (Jan. 3, 2001).

53. Mass. Bar Assoc. Ethics Op. 85-3 (Dec. 31, 1985).

54. HAZARD & HODES, § 11-7, at 11-31.

55. Utah Rules of Professional Conduct 1.2, 1.4 and 2.1, regarding counseling clients.