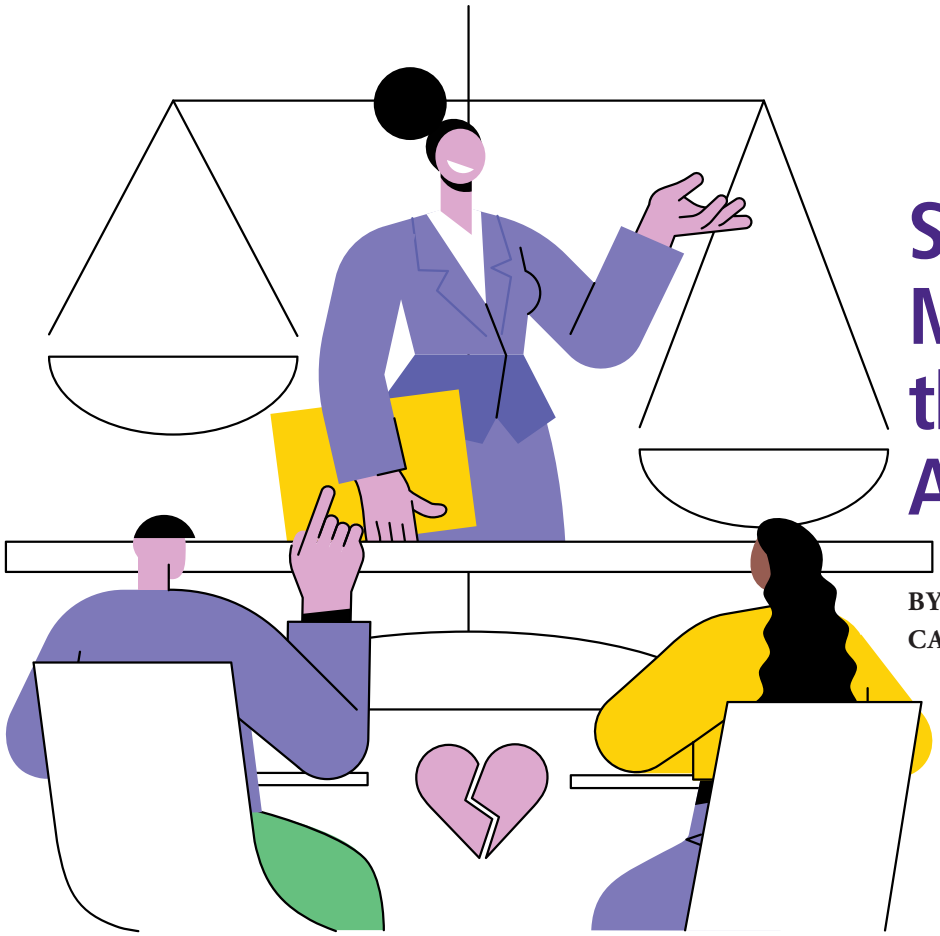


Should the Mediator Draft the Divorce Agreement?

BY ROCHELLE B. GROSSMAN AND CAROLYN MORAN ZACK

A successful divorce mediation culminates in the memorializing and signing of an agreement resolving the economic issues. But should this final hurdle involve the mediator? Although the mediator may be asked, and, even expected, to draft the agreement, whether they should is controversial. Clearly mediators who are not lawyers should not draft agreements, as doing so constitutes the unauthorized practice of law. Lawyer-mediators who undertake the drafting role may unintentionally serve as more than a mere scrivener, thus creating an ethical and professional dilemma. This article will identify the potential risks when a mediator-attorney drafts a divorce agreement and suggest options to avoid or limit any pitfalls in the process. This article is limited in scope to divorce agreements, although some of the same considerations may apply to other family law agreements, including support and custody.

The ABA Section of Dispute Resolution on Mediation and the Unauthorized Practice of Law opined that the mediator may serve as a scrivener of the agreements reached during session, but if the mediator adds language beyond the terms specified by the parties, the mediator may be engaged in the practice of law, unless:

> (a) all parties are represented by counsel and
>
> (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

A.B.A. Sec. of Dis. Res. on Mediation and the Unauthorized Prac. of L. (2002).

This opinion leaves open the question of whether the mediator crosses the line from neutral to advisor by adding only standard provisions to the agreement if one or both parties choose to be self-represented.

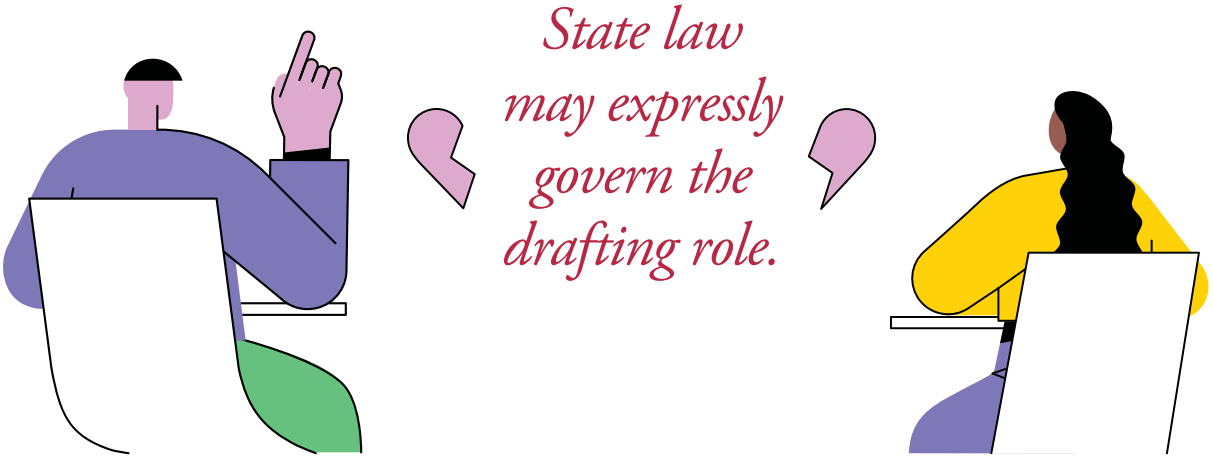
In a Memorandum decision filed in a Massachusetts case, *Reid v. Kroll*, No. 2181CV00769, 2021 WL 5711257 (Mass. Super. Nov. 29, 2021), the husband filed a claim against a mediator for negligently drafting the agreement which enabled his spouse to collect alimony, despite the parties' intent to waive alimony. Although the agreement acknowledged the mediator's limited role as scrivener, the husband alleged that the mediator acted as a lawyer by both drafting

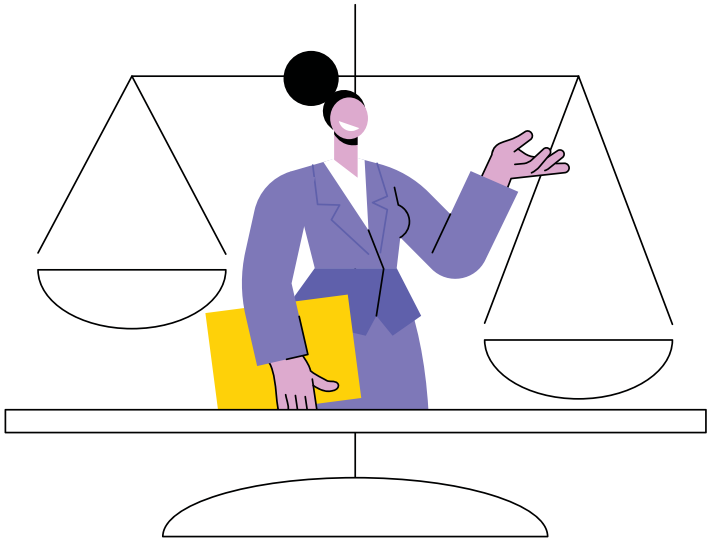
the agreement and agreeing to file a joint petition for divorce. On a motion to dismiss, the trial court noted under the Massachusetts rules of dispute resolution, a mediator is not permitted to provide legal advice in connection with the dispute resolution process, even if the mediator is an attorney. A mediator does not practice law by developing a settlement agreement or drafting a memorandum of understanding. However, the mediator engages in the practice of law by drafting a settlement agreement on which the clients will rely to secure rights in their divorce action or probate court.

The court reasoned that nonlawyer mediators are not permitted to draft a legal separation agreement to be used in court since they do not practice law. The court also recognized an inherent conflict in the mediator-attorney's joint representation of the parties in an adversarial matter such as a divorce. The husband's complaint supported a finding that an attorney-client relationship existed between the mediator, the husband, and his ex-wife pursuant to which the lawyer had a duty to furnish legal services competently, including the drafting of the agreement. Moreover, the husband alleged sufficient facts to support his claim that the mediator breached this duty by negligently drafting the agreement. The trial court therefore denied the mediator's motion to dismiss and allowed the case to move forward.

The Model Standards of Conduct for Mediators do not expressly address the lawyer-mediator's duties regarding drafting agreements. Model Standards of Conduct for Mediators (2005) have been adopted by the American Bar Association, American Arbitration Association, and the Association of Conflict Resolution. Under Standard VI "Quality of the Process," the mediator may not undertake an additional dispute resolution role in the same matter without consent of the parties, and by taking on different duties and responsibilities, the mediator may be governed by other standards. For example, if the mediator's role transitions to lawyer, then adherence to the Rules of Professional Conduct is necessary. The attorney-mediator who not only drafts a divorce agreement but also files a joint petition for divorce may risk violating the Rules of Professional Conduct barring a lawyer from representing opposing parties in the same litigation, regardless of their consent. Rule 1.7(a) states that, "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the parties' consent. Under Rule 1.7, a lawyer is also duty-bound not to represent a client if the representation involves a concurrent conflict of interest with another client.

State law may expressly govern the drafting role. In Wisconsin, Supreme Court Rule 20:2.4 specifically permits lawyer-mediators to draft documents memorializing the resolutions reached at mediation, as long as the lawyer maintains his or her neutrality throughout the process and both parties give their informed consent, confirmed in a writing signed by the parties to the mediation. Informed consent requires the lawyer to disclose any interest or relationship that is likely to affect the lawyer's impartiality in the case or the appearance of partiality and that the lawyer explain all of the following to each of the parties: the limits of the lawyer's role, that the lawyer does not represent either party to the mediation, that the lawyer cannot give legal advice or advocate on behalf of either party to the mediation, and the desirability of seeking independent legal advice before executing any documents prepared by the lawyer-mediator. Rule 20:2.4 provides that the drafting of documents does not create a client-lawyer relationship between the lawyer and a party; however, the lawyer shall exercise the





same competence and due diligence as the ethical rules require for a lawyer representing the parties to the mediation. The lawyer serving as mediator who has prepared documents pursuant to this rule may, with the informed consent of the parties, file those documents with the court, but may not appear in court on behalf of either or both parties. Any document prepared by the lawyer-mediator that is filed with the court should indicate that it was "prepared with the assistance of a lawyer acting as mediator."

Minnesota reached a different conclusion when they enacted Rule 114. Rule 114 prohibits neutrals from drafting legal documents that are intended to be submitted to the court to be signed by a judge.

In the absence of specific state rules governing drafting of mediation agreements, a lawyer-mediator is left to navigate an ethical minefield. People want mediators to accomplish a comprehensive resolution to their domestic relations conflicts. Attorney-mediators want to avoid crossing the line from neutral to attorney-advisor. As such, the mediator should educate and encourage the parties to seek the advice of individual counsel before, during, and after the negotiation of the terms of an agreement through mediation. To ensure the memorialized agreement is forever lasting and comprehensive, the advice of individual counsel is crucial. Individual counsel protects the needs of each party, and thereby enables the mediator to maintain their role as a neutral facilitator. In those circumstances where one or both parties refuse to seek independent advice, the lawyer-mediator may need to weigh the potential risks and engage in risk-reducing strategies, such as confirming in writing that the party was encouraged to retain separate counsel, before providing this beneficial drafting service.

For emotional and legal reasons, parties want a written agreement to put finality on the agreement reached through the mediation process. Having been deeply involved in the details of the negotiation and agreement, the mediator is often in the best position to memorialize the terms. To maintain ethical boundaries and avoid crossing the line to advisor, some mediators may require *both* parties to retain individual counsel as a pre-condition to drafting their agreement. The lawyer-mediator could decide to limit their role to drafting a memorandum of understanding or setting forth a bullet-point list of the terms of the agreement with the expectation that the parties will retain counsel to draft a comprehensive agreement. In some cases, however, the parties may sign off on the bullet point list but never sign a comprehensive agreement. An incomplete agreement could lead to litigation that the parties had tried to avoid through mediation.

For those lawyer-mediators intent on meeting their mediation clients' need for closure by drafting the agreement, best practice suggests that they maintain their neutrality throughout the process and obtain the informed consent of the parties, confirmed in a writing signed by the parties. This consent should expressly state the limits of the lawyer's role, that the lawyer does not represent either party to the mediation, that the lawyer cannot give legal advice or advocate on behalf of either party to the mediation and encourage the parties each to obtain independent legal advice before executing any documents prepared by the lawyer-mediator. Such disclosure and waivers should be reconfirmed in the property settlement agreement. Finally, some mediators may choose to add a review of standard or boilerplate language to their mediation agenda so the parties may consider, select, or modify those provisions they wish to include in their Agreement. In this way, the mediator is not adding any terms to the written agreement the parties did not already discuss and agree upon. With these options in mind, a mediator can help the parties achieve closure while maintaining their "self-determination." FA

ROCHELLE B. GROSSMAN (shelly@pottsshoemaker.com) is the head of the Alternative Dispute Resolution department of Potts, Shoemaker & Grossman, LLC, a Pennsylvania-based law firm focused exclusively on family law. With her 15 years of experience as a family court master/hearing officer, Shelly regularly acts as an arbitrator, mediator, and parenting coordinator.

CAROLYN MORAN ZACK (czack@momjiananderer.com) is a partner at Momjian Anderer LLC, a Philadelphia-based law firm focusing exclusively on family law. She regularly serves as a mediator and binding arbitrator for divorce matters, as well as a parenting coordinator for high-conflict custody matters.