

New rules coming to family law

By: Erika Strebel, erika.strebel@wislawjournal.com June 21, 2017 7:47 am



Milwaukee County Circuit Court Judge Mike Dwyer sits in a jury box at the Milwaukee County Courthouse. Dwyer is one of the authors of a new rule allowing lawyer-mediators to draw up settlement documents in family law cases. (File photo by Kevin Harnack)

On paper, the new rule appears simple: Starting July 1, lawyer-mediators will be able to draw up settlement documents in family law cases.

In practice, though, it's far from easy.

Even the drafters and proponents of the new rule say practitioners shouldn't rush into taking advantage of it without first undergoing additional training, lest they inadvertently do something that violates ethical guidelines.

Perhaps the biggest source of the new rule's complexity is its insistence that practitioners maintain neutrality throughout family law proceedings — even during the drafting phase.

Sue Hansen, a Milwaukee lawyer-mediator at Hansen & Hildebrand who helped develop the rule change, said the requirement would seem to go against many lawyers' instincts. Most legal practitioners, she said, are trained to seek the best outcome for a particular client. Maintaining neutrality requires that they adopt not only a different approach but also a new perspective.

"Functioning as a neutral does not mean you are without personal opinions and biases," Hansen said. "It's self-awareness of your foundational views and not imposing them on the couple."

None of this is easy, said Paul Stenzel, a Shorewood attorney who started working as mediator in 2007.

"It's learning a new way to think," he said. "I remember when I started as a mediator, being in my first mediation and the feeling of that lawyer-advocate brain kicking in."



GET THE SCOOP

Various groups and organizations are hosting training sessions for lawyers interested in learning more about a recent rule change that will allow lawyer-mediators to draft documents in family law cases. Anyone interesting in attending must first register.

The Collaborative Family Law Council of Wisconsin and the Wisconsin Association of

Stenzel, also a deputy court commissioner in Racine County, said he helps himself get into the right frame of mind by thinking back to lessons he learned from his first mediation trainer, who happened to be a nonlawyer.

"She said she doesn't worry about what the law is," Stenzel said. "It's self-contained in the room: What can we do with these parties assuming that there's no imbalance and we've got a good space? That is really liberating."

Another way to look at the changes is to recognize that lawyer-mediators should no longer be telling parties in a dispute what they should be doing. They should instead limit themselves to laying out options.

"Take the word 'should' out of your vocabulary, and the concept out of the transaction," advised Milwaukee County Circuit Court Judge Michael Dwyer, one of the rule's authors.

The new rule will also put forward a new set of expectations that lawyer-mediators will be under when drafting documents in family cases. Dwyer said lawyer-mediators should be taking pains to leave out the sort of legal jargon and boilerplate provisions — such as defense waivers — that are common in agreements drawn up by a lawyer representing one particular party.

Hansen agreed, saying that documents should be drafted not only so that parties can understand what they've agreed to and why, but also so that judges and court commissioners are made aware of any deviations from routine procedures.



BRACE YOURSELVES

Lawyer-mediators are not the only subject of new rules that will take effect July 1. Other new rules deal with:

Business courts

The state is scheduled at the start of next month to begin testing business courts in both Waukesha County and the Eighth Judicial District, which encompasses Marinette, Oconto, Door, Kewaunee, Outagamie and Waupaca counties. These courts, which will deal exclusively with commercial matters, will be tried out for three years. Anyone interested in the courts can learn more by going to www.wicourts.gov/services/attorney/comcourtpilot.htm.

"You are drafting with your legal knowledge," she said. "But you are drafting as a neutral with the goal of capturing and clarifying the language of their agreement. It's a completely different function, and you won't be in court to say why they agreed to something or explain to a judge or court commissioner what a clause is intended to mean."

Dwyer, Hansen and Stenzel agree that lawyers should get training before trying their hand at the services allowed by the new rule. They should also be on the lookout for several possible pitfalls.

Mediators will hold a training session from 9 a.m. to noon June 28 at von Briesen & Roper, 411 E. Wisconsin Ave., Milwaukee.

The training session, which will also be live-streamed, will have a question-and-answer session and will count for three continuing-legal-education requirements. The cost is \$99 for CFLCW and WAM members and \$129 for nonmembers. The deadline for registration is Friday.

The State Bar of Wisconsin's Family Law Section will hold a training session from 10:15 a.m. to 11:05 a.m. Aug. 5 at its annual workshop at Stone Harbor Resort in Sturgeon Bay.

The bar's Solo, Small Firm and General Practice Section will also be offering a session at its annual workshop, which runs from Oct. 26 to 28 at the Kalahari Resort in the Wisconsin Dells.

The Wisconsin chapter of the Association of Family and Conciliation Courts will hold a training session at its regional conference, which will run from Nov. 2 to 4 at the Hyatt Regency Milwaukee.

Hansen & Hildebrand, Marquette University Law School, the Wisconsin State Bar's Family Law Section and the Wisconsin Chapter of the Association of Family and Conciliation Courts are sponsoring a 40-hour mediation-training session from 8:30 a.m. to 5 p.m. on Sept. 14 to 15, Sept. 28 to 29 and Oct 6. The session will take place at the University Club of Milwaukee, 924 E. Wells St. The organizers expect the session to count for 40

There, practitioners can find the forms and class codes needed to file a case in business court.

Deadman's statute

Come July 1, the state's deadman's statute will be put to rest after more than a century. The statute prevents the admission of testimony about a transaction if one of the parties involved has died. The rule stems from the common-law notion that false testimony can more easily get into court if one of the people most capable of disputing it is no longer among the living.

Deadman's statutes are now often considered antiquated, leading many states either to repeal or amend them. Wisconsin's deadman's statute, which was codified in 1858, has long been among the most expansive in the country, even though state courts began restricting its use in 1970. The Wisconsin Supreme Court in October voted to repeal the dead man's statute.

Expanding online CLEs

A rule change brought by the Board of Bar Examiners will give attorneys more ways to complete their continuing-legal-education requirements. For lawyers to remain licensed to practice in Wisconsin, they now must obtain at least 30 hours of continuing legal-education credits every two years. Current rules permit only 10 of those required credits to be acquired online in any given reporting period. The new rules will increase that limit to 15 hours. The rule change will also allow lawyers to earn up to six hours of credit for courses on practice

And, new rule or not, some things are remaining the same.

The new rule, for instance, calls on lawyer-mediators to be competent and diligent, just as they would if they were representing a single client. It also makes no change to the current prohibition that forbids lawyers to represent two parties whose legal interests are adverse.

"The challenge is if the lawyer doesn't get fully trained, understand the law and do it well, they may slip to behaving like a lawyer and lead the couple into thinking they have joint representation, which is not permitted," Hansen said.

Even after the rule goes into effect, more work will have to be done. Dwyer said the hardest task could quite likely be informing the public. Judges will also have to determine what their role will be in telling self-represented parties about the options they will have under the new rule, he said.

Ultimately, Dwyer said he believes the rule will make legal representation more affordable and help lower the number of unrepresented litigants who are now seen in family cases.

"I think it will ultimately change, in a significant way, the tone of the practice of family law," Dwyer said. "What this makes possible, in a way not available before, is legally assisted cooperative dispute resolution, which is what we need in family cases, especially when there are kids involved."

continuing-legal-education credits, including three ethics credits. The event includes a two-day session with the mediation trainer Zena Zumeta of Ann Arbor, Mich., as well as Wisconsin mediators.

management and six hours of credit on courses related to understanding matters concerning stress management, work-life balance, mental illness and substance abuse can affect the practice of law.

Conditional admission

This rule change codifies current practices allowing for conditional admissions to the bar. In particular, it clarifies what procedures should be followed when the Board of Bar Examiners revokes a lawyer's conditional admission to the bar.

Edit

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