

**Commission on the Unauthorized Practice of Law
Of the NEBRASKA SUPREME COURT**

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Mediator Role in Developing a Parenting Plan
Advisory Opinion 01-2015

The Commission on Unauthorized Practice of Law received a request for an advisory opinion regarding the role of mediators in negotiating and drafting a parenting plan. This opinion is issued pursuant to Neb. Ct. R. §3-1012(D).

- 1) Is it unauthorized practice of law for a nonlawyer mediator to negotiate and draft a parenting plan?

No, the Rules on Unauthorized Practice of Law provide an exception that allows nonlawyer mediators to provide assistance that constitutes the practice of law, as long as the mediator functions in a neutral capacity. This accords with the Parenting Act, which provides that nonlawyers may negotiate and draft parenting plans so long as the mediator is neutral, does not provide legal advice and the draft is limited to a parenting plan.

In any proceeding in which “parenting functions for a child are at issue”, a parenting plan (“the Plan”) must be developed and approved by the court to ensure the best interests of the child are served. (Neb. Rev. Stat. §43-2929(1)). The development of the Plan includes consideration of the child’s perspective, age and developmental needs. Pursuant to Neb. Rev. Stat. §43-2929 the Plan must include detailed provisions and or procedures for the following:

- 1) legal and physical custody of the child
- 2) apportionment of parenting time
- 3) day-to-day decision-making
- 4) communication between the parents regarding the child’s physical location as well as for major decisions regarding the health, education and religious upbringing of the child
- 5) arrangements for the safety of the parties and the child
- 6) provisions for future modifications of the Plan

The Plan is intended to enhance healthy relationships in the restructured family. The participation of both parents in developing the Plan is encouraged. Where a Plan is not developed and submitted to the court, the court develops the Plan. Amongst other methods, the Plan may be developed by the parties with the aid of an approved mediator.

Work performed by mediators under the authority of the Parenting Act for the purpose of drafting a parenting plan constitutes the practice of law under the Rules on Unauthorized Practice of Law (“UPL Rules”) Neb. Ct. R. §3-1001 to §3-1021. However, nonlawyer mediators are provided an exception through a provision of the UPL Rules. To qualify under this exception, “Nonlawyers must be serving

in *neutral capacities* as mediators, arbitrators, conciliators, or facilitators.” (Emphasis added.) Neb. Ct. R.1004 (D).

The Nebraska Parenting Act (“Parenting Act”) (Neb. Rev. Stat. §43-2920 to §43-2943) sets forth the requirements and responsibilities for a mediator who may be approved to mediate matters in which parenting functions for a child are at issue. Approved mediators must complete both basic mediation and family mediation as well as other specialized training. (Neb. Rev. Stat. § 43-2938 (2)). Basic training requirements for mediators set forth under the Dispute Resolution Act include the completion of “at least thirty hours of training in conflict resolution techniques, neutrality, agreement writing, and ethics”; and the mediator is required to be “*impartial, neutral, and unbiased*”. (Emphasis added.) Neb. Rev. Stat.25-2913 (1)(3).

The *Nebraska Standards of Practice and Ethics for Family Mediators* provides thirteen categories of practice standards with guidelines for mediations conducted pursuant to the Parenting Act. Standard IV provides extensive guidance regarding impartiality. Standard IV (A) and (B) direct the mediator to “provide mediation services in an impartial manner” and to “avoid conduct that raises a question as to the mediator’s actual or perceived impartiality”. Standard IV (C) further provides that a mediator “shall be impartial to the contents of the parties’ decisions and agreements while raising questions about the feasibility of options under consideration or their impact.” A mediator is required to “decline or withdraw from a mediation if the mediator cannot be impartial with respect to all of the parties or the subject matter of the dispute.” Standard IV (D).

Information for the public provided on the Nebraska Judicial Branch website states that approved Parenting Act Mediators have met the following criteria:

- 1) Have been approved by the Office of Dispute Resolution
- 2) Have met statutory and policy requirements including mediator training, continuing education, and apprenticeship standards;
- 3) Have agreed to adhere to the Nebraska Standards of Practice and Ethics for Family Mediators
- 4) Maintain active status as a Parenting Act mediator
- 5) Have passed a background check
(<https://supremecourt.nebraska.gov/parenting-act-mediators>)

To be in compliance with the requirements of the Parenting Act, the mediator must demonstrate the ability to function in a neutral capacity in mediation. The statutory provisions mandating mediator neutrality are implemented through the *Nebraska Standards of Practice and Ethics for Family Mediators*. The extensive statutory provisions and policy guidelines pertaining to the neutrality of approved mediators under the Parenting Act provide persuasive evidence that approved nonlawyer mediators qualify for the exception under §3-1004(D).

For the foregoing reasons, it is the opinion of the Commission that nonlawyer mediators, who are approved pursuant to the Parenting Act may negotiate and draft parenting plans.

- 2) Is it unauthorized practice of law for a nonlawyer to negotiate and draft property settlement and financial support settlement agreements?

Yes, because negotiating and drafting such settlement agreements require “the application of legal principles” with regard to another person’s legal rights and responsibilities.

The negotiation and drafting of property settlement and financial support agreements entail the practice of law as defined under the UPL Rules as follows:

§ 3-1001. General definition.

The “practice of law,” or “to practice law,” is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:

(A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.

(C) Representation of another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(D) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(E) Holding oneself out to another as being entitled to practice law as defined herein.

The narrow exception provided for mediators under Neb. Ct. R. §3-1004(D) does not extend to the negotiation and drafting of such agreements. Similarly, The Parenting Act provisions regarding the role of the mediator in family law related matters limit that role to mediating and drafting the Parenting Plan. There is no authority granted mediators under the Parenting Act to engage in negotiations or the drafting of legal documents in connection with property and financial settlement agreements.

Nebraska court decisions demonstrate that property and financial support negotiations and agreements have far reaching and potentially irreversible legal implications for the parties:

“Pursuant to § 42-366, upon marital separation, parties may enter into a written agreement for the disposition of their property, and the terms of such an agreement are binding on the court unless found to be unconscionable. *Parties are bound by stipulations that are voluntarily made, and relief from such stipulations is warranted only under exceptional circumstances.*”

(Emphasis added. Shearer v. Shearer, 700 N.W.2d 580, 270 Neb. 178,180 (Neb. 2005) quoting Hickenbottom v. Hickenbottom, 239 Neb. 579, 477 N.W.2d 8 (1991)).

The UPL Rules recognize the right of individuals to represent themselves regardless of skill or training in law. (Statement of Intent, UPL Rules) However the privilege of representing the rights of others is limited to attorneys who are licensed upon fulfilling the requirements set forth by the Nebraska Supreme Court. (Neb. Ct. R. § 3-100 to § 3-129) The UPL Rules are intended to protect the public from harm caused by nonlawyers who “may be untrained and inexperienced in the law. They are not officers of the courts, are not accountable for their actions, and are not prevented from using the legal system for their own purposes to harm the system and those who unknowingly rely on them.” (Statement of Intent, UPL Rules)

Pursuant to § 43-2938 of the Parenting Act, mediators are expected to have “general knowledge” of the child support calculation guidelines, however there are no other provisions regarding training

related to property settlement and financial support. Nebraska law regarding property settlement in connection with the dissolution of marriage is complex. Statutory provisions are often explained through case law, which is not easily accessed by the nonlawyer. For example, the distribution of marital property as set forth by Neb. Rev. Stat. §42-365, has been explained by Nebraska courts as follows:

“Under Neb. Rev. Stat. § 42-365 (Reissue 2004), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. Property which one party brings into the marriage is generally excluded from the marital estate. The burden of proof to show that property is nonmarital remains with the person making the claim in a dissolution proceeding. (Citations omitted.) *Gress v. Gress*, 271 Neb. 131 (2006), 710 N.W.2d 318.

The UPL Commission previously addressed the role of nonlawyers in relation to support agreements in connection with child support lien release and subordination forms. In Advisory Opinion 2013-001, the Commission explained that the completion of such forms had a legal effect on the judgment lien holder and constituted the unauthorized practice of law when performed by nonlawyers (title companies):

“Under Neb. Ct. R. § 3-1004 (A) (5) title companies may not prepare documents effectuating releases or subordination of child support liens. . . A child support judgment provides future protection for the judgment lien holder as “a lien not only for past due installments but also as security for installments to fall due in the future.” *McCook Nat. Bank v. Myers*, 243 Neb. 853 at 868 (1983) *Citing* *Action Realty Co., Inc. v. Miller*, 191 Neb. 381, 385-86. The release of a child support judgment lien extinguishes that lien, thereby disabling the judgment lien holder from using the property to enforce the judgment for any future payments. Neb. Rev. Stat. § 42-371(2). . . (t)he subordination of a child support lien reduces its impact by placing the judgment lien holder’s rights in an inferior position to that of another. The effect on the judgment lien caused by either a release or subordination is potentially injurious to the lien holder if the judgment debtor ceases payments in the future. For § 3-1004(A) (5) to apply as an exception, releases prepared by title companies (and other specified nonlawyers) must not affect judgment liens. Therefore, the preparation of a release or subordination of a child support judgment lien by title companies is UPL.”

Here also, property and financial support agreements effectuate lasting legal consequences for the parties. The negotiation and document preparation constitute the practice of law and require the “knowledge, judgment and skill of a person trained as a lawyer”. For the foregoing reasons, the negotiation and drafting of property and financial support agreements by nonlawyer mediators constitutes the unauthorized practice of law. This does not preclude nonlawyer mediators from mediations where the parties are represented by legal counsel, and the legal counsel draft and finalize any legal documents resulting from such mediations.

- 3) Is it unauthorized practice of law for a nonlawyer mediator to negotiate and draft final pleadings?

Yes, for the same reasons given in response to question #2.