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DRAFTING AGREEMENTS AS AN ATTORNEY-MEDIATOR: REVISITING WASHINGTON STATE BAR ASSOCIATION ADVISORY OPINION 2223

Caitlin Park Shin*

Abstract: This Comment argues that Washington State Bar Association Advisory Opinion 2223 (WSBA Advisory Opinion 2223) should be revisited. WSBA Advisory Opinion 2223 reaches the unqualified conclusion that an attorney-mediator violates the Washington Rules of Professional Conduct (RPC) when drafting legal documents such as Property Settlement Agreements, Orders of Child Support, or Parenting Plans for unrepresented parties. WSBA Advisory Opinion 2223 creates confusion because it contains two significant flaws: (1) an omission of relevant comments to the RPC, and (2) an inconsistent reliance on extra-jurisdictional authority. Given WSBA Advisory Opinion 2223's practical ramifications, the opinion should be reconsidered. Reexamining this opinion should include a thorough discussion of all applicable RPC comments and an analysis of guidance from other jurisdictions that have faced the same question. These considerations may lead to a conclusion different from the one reached in WSBA Advisory Opinion 2223. Yet because Washington attorneys turn to WSBA advisory opinions for guidance concerning their ethical obligations, it is particularly important that WSBA Advisory Opinion 2223 be accurate, comprehensive, and clear.

INTRODUCTION

In 2012, the Washington State Bar Association's Rules of Professional Conduct Committee (the Committee) released Advisory Opinion 2223.¹ The Committee drafted Washington State Bar Association Advisory Opinion 2223 (WSBA Advisory Opinion 2223) in response to an inquiry about "[w]hether a lawyer who is acting as a neutral mediator pursuant to RPC 2.4 may prepare a Property Settlement Agreement, Order of Child Support, or Parenting Plan for unrepresented parties."² In WSBA Advisory Opinion 2223, the Committee opined that a lawyer acting as a neutral mediator preparing "complex and customized provisions using original language and choices" in drafting a document for unrepresented parties is (1) practicing law; (2) representing parties who may have interests directly in conflict; and (3)

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1. Wash. State Bar Ass'n Rules of Prof'l Conduct Comm., Advisory Op. 2223 (2012), available at <http://mcle.mywsba.org/IO/print.aspx?ID=1669> [hereinafter *WSBA Advisory Op. 2223*].

2. *Id.*

violating RPC 1.7,³ which governs conflicts of interest with regard to current clients.⁴ Mediators often draft documents such as those WSBA Advisory Opinion 2223 describes.⁵ WSBA Advisory Opinion 2223 has therefore caused confusion and concern among Washington's mediation community.⁶ Consequently, Washington attorney-mediators are left to wonder⁷ whether they may no longer ethically perform a traditional step in the mediation process, as well as what WSBA Advisory Opinion 2223 means for clients seeking mediation's benefits.

This Comment discusses WSBA Advisory Opinion 2223, and so extensively examines the Washington Rules of Professional Conduct (RPC). Many mediators are not attorneys,⁸ and Washington's Uniform Mediation Act does not require a mediator to be an attorney.⁹ But because the RPC generally govern only lawyers,¹⁰ and do not create

3. WASH. RULES OF PROF'L CONDUCT R. 1.7 (2006).

4. *WSBA Advisory Op. 2223*, *supra* note 1.

5. See KIMBERLEE K. KOVACH, *MEDIATION IN A NUTSHELL* 276 (2003) ("In many instances, mediators in divorce cases also took on the responsibility for drafting not only the memorandum of agreement at the close of the mediation, but also the final court documents, including the decree of divorce.").

6. See *Advisory Opinion 2223 Discussion Group*, WASH. ST. B. ASS'N. ALTERNATIVE DISP. RESOL. SEC., <http://wsba-adr.org/groups/group/show?groupUrl=advisory-opinion-2223-discussion-group&id=4703052%3AGroup%3A32862&page=1#comments> (last visited Sept. 14, 2014) (providing a forum discussion in which Washington attorney-mediators express concerns about WSBA Advisory Opinion 2223); WASH. STATE BAR ASS'N. ALT. DISPUTE RESOLUTION SECTION, 21ST NORTHWEST DISPUTE RESOLUTION CONFERENCE SESSION SUMMARIES 7 (2014), available at <http://api.ning.com/files/72JodliYAGFvMeXHYy16U9ZI3F-8mJC8SVW-gjNQUF28QtcfsvVFyD5r7zlc40y0Drjzjv9Mh-cXDUtteyQNexPfbzmojkr/21stDisputeResolutionConferenceSessionSummaries3.pdf> (summarizing a conference workshop entitled *Scrivener's Dilemma: Mediators Who Draft Settlement Agreements (WSBA Advisory Opinion 2223)*); Bob Collins, *Put Down that Pen . . . and Keep Your Hands up Where I Can See Them!*, COMMON SENSE DIVORCE MEDIATION (Sept. 2, 2013), <http://www.bobcollinsmediation.com/put-that-pen-down-and-keep-your-hands-out-where-i-can-see-them/#more-400> (last visited Aug. 25, 2014) (discussing WSBA Advisory Opinion 2223 and referencing a meeting with a group of concerned mediators in Spokane, Washington).

7. Washington State Bar Association Advisory Opinions are advisory only. *Advisory Opinions*, WASH. ST. B. ASS'N., <http://www.wsba.org/Resources-and-Services/Ethics/Advisory-Opinions> (last visited Sept. 3, 2014); see also *WSBA Advisory Op. 2223*, *supra* note 1 ("Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association."). Despite this "advisory only" status, Washington attorneys pay close attention to the WSBA's advisory opinions. See *infra* note 79 and accompanying text.

8. SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 10:10 (2012–2013 ed.).

9. See Uniform Mediation Act, WASH. REV. CODE § 7.07.080(6) (2012) ("This chapter does not require that a mediator have a special qualification by background or profession.").

10. See generally WASH. RULES OF PROF'L CONDUCT (2006). Note that the RPC's preamble and scope, and indeed the majority of the rules, mention only lawyers and nonlawyer assistants.

concerns for nonlawyer third-party neutrals,¹¹ this Comment's scope will be limited to WSBA Advisory Opinion 2223's effects on attorney-mediators. This Comment will not examine WSBA Advisory Opinion 2223's implications for mediators who are not attorneys.¹²

This Comment explores WSBA Advisory Opinion 2223 in depth, focusing on both its reasoning and its effects on Washington attorney-mediators' practices. Part I gives a brief overview of mediation's history and development. Part II examines the fundamentals of the mediation process, including the principles generally applicable to mediation and mediation's basic steps. Part III takes a detailed look at WSBA Advisory Opinions in general, and WSBA Advisory Opinion 2223 in particular. Part IV analyzes WSBA Advisory Opinion 2223's flaws, focusing on two categories: (1) an omission of relevant comments to the RPC, and (2) an inconsistent reliance on extra-jurisdictional authority. Part V then argues that because of WSBA Advisory Opinion 2223's practical ramifications, revisiting WSBA Advisory Opinion 2223 is necessary. Finally, Part VI maintains that when reexamining WSBA Advisory Opinion 2223, the Committee should carefully consider all applicable RPC comments and seek guidance from other jurisdictions that have faced the same question. The Committee should be open to the possibility that these considerations may lead to a conclusion different from that reached in WSBA Advisory Opinion 2223.

I. A BRIEF HISTORY OF MEDIATION

Mediation is defined broadly as “a process where an impartial person

11. See, e.g., WASH. RULES OF PROF'L CONDUCT R. 2.4 cmt. 3 (“Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems . . .”).

12. Whether mediation qualifies as the practice of law, therefore indicating that non-attorney mediators are engaging in the unauthorized practice of law, is a serious concern without a clear answer in many jurisdictions. See COLE ET AL., *supra* note 8, § 10:10 (“Despite considerable concern about the possibility that a nonlawyer mediator may engage in the unauthorized practice of law, there are few reported cases.”). The American Bar Association Section of Dispute Resolution has stated that “[m]ediation is not the practice of law,” a mediator's preparation of a settlement agreement “incorporating the terms of settlement specified by the parties, does not constitute the practice of law,” and that all unauthorized practice of law statutes and regulations “should be interpreted and applied in such a manner as to permit all individuals, regardless of whether they are lawyers, to serve as mediators.” ABA Section of Dispute Resolution, *Resolution on Mediation and the Unauthorized Practice of Law*, AM. B. ASS'N (Feb. 2, 2002), http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/resolution2002.authcheckdam.pdf. WSBA Advisory Opinion 2223, however, begins with a definition of the practice of law that seems to encompass drafting documents as described in the inquiry. See *WSBA Advisory Op. 2223*, *supra* note 1. WSBA Advisory Opinion 2223 may thus have unauthorized practice of law implications for non-attorney mediators who draft these documents. This issue is beyond the scope of this Comment.

assists others in reaching a resolution of a conflict or dispute.”¹³ Humans have long practiced mediation. For example, there are reported uses of mediation in China over 4000 years ago.¹⁴ In the United States, mediation became increasingly prominent through the development of labor relations.¹⁵ Additionally, during the twentieth century mediation was used as a cost-effective method for resolving cases outside of adjudication.¹⁶

The modern mediation movement is generally considered to have begun with the Pound Conference in 1976.¹⁷ The Pound Conference was a gathering of judges and scholars in the American Bar Association who wanted to examine why people were dissatisfied with the American justice system.¹⁸ The conference contained a series of discussions and debates, including one that addressed the overcrowded and costly court system.¹⁹ The Pound Conference gave rise to a pilot project creating Neighborhood Justice Centers designed to test mediation’s role in resolving minor disputes.²⁰ These programs grew to become Dispute Resolution Centers, which now exist throughout the United States.²¹ These community mediation centers in turn spurred the development of mediation’s widespread use in the court system.²² Today, mediation programs operate in both state and federal trial and appellate courts, as well as small claims courts.²³ Additionally, mediation is practiced in law schools through mediation courses and clinics.²⁴ The private mediation

13. KOVACH, *supra* note 5, at 16.

14. *Id.* at 17; Cao Pei, *The Origins of Mediation in Traditional China*, 54 DISP. RESOL. J. 32, 32 (1999).

15. KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 31 (3d ed. 2004). For example, the first government-mediated labor settlement in the United States occurred in 1838, when President Martin Van Buren facilitated the settlement of a shipyard workers’ strike. *Our History*, FED. MEDIATION & CONCILIATION SERVICES, <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=21&itemID=15810> (last visited Sept. 3, 2014).

16. COLE ET AL., *supra* note 8, § 4:1; *see also* Reginald Heber Smith, *The Place of Conciliation in the Administration of Justice*, 9 A.B.A. J. 746–47 (1923); George H. Ostefeld, *Danish Courts of Conciliation*, 9 A.B.A. J. 747–48 (1923); George F. Shafer, *North Dakota’s Conciliation Law*, A.B.A. J. 748–49 (1923); Thomas H. Salmon, *Minneapolis Conciliation Court*, 9 A.B.A. J. 749 (1923); C.J. Dempsey, *Conciliation in the City of Cleveland*, 9 A.B.A. J. 749–51 (1923).

17. KOVACH, *supra* note 15, at 31.

18. *Id.* at 32.

19. *Id.*

20. *Id.*

21. *Id.* at 32–33.

22. *Id.* at 33.

23. KOVACH, *supra* note 5, at 24, 26.

24. *Id.* at 31–32.

practice has grown to the point where it is now considered an independent profession.²⁵

Mediation's prominence in the United States is particularly evident in its role in family law. Thousands of divorce-related disputes use mediation each year.²⁶ Since the late 1970s, the use of mediation in divorce settlement and child custody disputes has increased dramatically.²⁷ No-fault²⁸ and "do-it-yourself" divorces—along with the realization that an adversarial divorce process did not always best serve the parties' interests—contributed to family law mediation's growth.²⁹ Today, the vast majority of family law courts offer mediation services.³⁰ Domestic relations courts sometimes even compel mediation participation by parties who have custody or visitation disputes.³¹ In the family law context, mediation provides parties with a way to achieve flexible resolutions while saving on the costs of litigation.³² Mediation's role in family law illustrates why it is important that attorney-mediators have clear guidance about the ethical permissibility of family law mediation practices.

II. THE MEDIATION PROCESS

The root of the term "mediate" is the Latin word *mediare*, meaning "to be in the middle."³³ According to the Washington Uniform Mediation Act,³⁴ mediation is "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."³⁵ The

25. *Id.* at 34.

26. COLE ET AL., *supra* note 8, § 15:2.

27. *Id.* § 4:3; KOVACH, *supra* note 5, at 28.

28. Washington is a no-fault divorce state. *See* WASH. REV. CODE § 26.09.080 (2012). This means that in a marriage dissolution proceeding the trial court may not consider "marital misconduct" when making a disposition of the property and liabilities of the parties. *Id.*; *see also In re Marriage of Muhammad*, 153 Wash. 2d 795, 803–04, 108 P.3d 779, 783–84 (2005) (holding that trial court's division of property in dissolution decree was an abuse of discretion because trial court considered marital fault).

29. KOVACH, *supra* note 5, at 28.

30. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 373 (2009) (citing a survey showing that ninety-two percent of family courts have mediation programs).

31. COLE ET AL., *supra* note 8, § 15:2.

32. *Id.* § 4:3.

33. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 770 (11th ed. 2003).

34. Uniform Mediation Act, WASH. REV. CODE ch. 7.07 (2012).

35. *Id.* § 7.07.010(1).

mediation process can take many forms; yet there are principles that are generally applicable to all mediations and steps that most mediations follow.³⁶ This section explores these general principles and steps.

A. *Key Principles of Mediation*

Mediation involves a neutral third party, called the mediator, who helps the parties in reaching a mutually acceptable agreement.³⁷ Mediation is a consensual process in which the mediator has no power to rule or to compel the parties to agree to a particular resolution.³⁸ Some courts or contracts mandate mediation, but such mediations are mandatory only in the sense that the parties are required to attend the mediation and try the process.³⁹ The parties can discuss what they wish without using evidentiary or procedural rules.⁴⁰ Mediation is, by definition, voluntary and both parties must agree to those resolutions reached.⁴¹

Self-determination is a key element in the mediation process.⁴² “Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”⁴³ This principle requires that the individuals are free to make their own decisions throughout the mediation.⁴⁴ How to proceed in the mediation, and whether to resolve a dispute or create an agreement, and on what terms, is at the discretion of each mediation party.⁴⁵ Self-determination sets mediation apart from other dispute resolution processes, such as adjudication or arbitration, in which a third party may make the decision for the parties.⁴⁶ Self-determination gives the parties the ability to be the final decision makers in their dispute, and is therefore an important aspect of mediation.⁴⁷

36. KOVACH, *supra* note 5, at 40; *see also* KOVACH, *supra* note 15, at 27–28 (listing eleven different basic definitions of mediation).

37. KOVACH, *supra* note 15, at 26.

38. DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION* 3 (Vicki Been et al. eds., 2d ed. 2012).

39. *Id.*

40. *Id.*

41. *Id.*

42. KOVACH, *supra* note 5, at 230.

43. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I.A. (2005).

44. KOVACH, *supra* note 5, at 165–66.

45. *Id.* at 36–37.

46. *Id.* at 36.

47. *Id.* at 36–37.

B. Mediation's Basic Steps

Mediation does not have to follow a set format,⁴⁸ but most mediation models include the same basic steps.⁴⁹ The first step in mediation is the mediator's opening statement.⁵⁰ This opening generally encompasses introductions, confirms the presence and authority of the necessary parties, gives an overview of relevant principles, and provides an explanation of the mediation process.⁵¹ In some mediations, although not all, after the first step the mediator will move the parties into a caucus and proceed in a shuttle-style mediation, where the mediator moves back and forth between the two parties.⁵² Next, the mediator may give the parties the opportunity to describe the situation leading to the mediation.⁵³ In this stage, the mediator may ask clarifying questions and reflect back the parties' statements.⁵⁴ Once both parties have had the opportunity to express their positions, the mediator may set a detailed agenda outlining which issues the parties wish to address.⁵⁵ The mediation then proceeds to negotiation, in which the mediator facilitates conversation and helps the parties contemplate their goals and options.⁵⁶ If the negotiating phase results in an agreement, the next step is often to outline the arrangement.⁵⁷

The final product created in the agreement drafting stage can take several forms. In some mediations, the mediator creates a synopsis of the main terms of agreement that the parties and their lawyers later use to create detailed agreement documents.⁵⁸ Sometimes the mediator drafts a formal agreement but the parties wait to review the document with their

48. See generally DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 145 (Vicki Been et al. eds., 2006) ("A mediator has almost complete freedom to improvise, and in practice good neutrals use widely varying approaches."); KOVACH, *supra* note 5, at 39 ("While guidelines do exist, such guidelines are rarely precise or detailed.")

49. KOVACH, *supra* note 5, at 40 ("Over the years, numerous outlines or views of mediation have evolved. A variety of stages or segments of the mediation process have been outlined. These range from a four or five-stage model to one with ten or more stages.")

50. FRENKEL & STARK, *supra* note 38, at 134.

51. *Id.* at 135.

52. COLE ET AL., *supra* note 8, § 3:3. Mediation can occur with the parties in the same room or in separate rooms. FRENKEL & STARK, *supra* note 38, at 260. A mediator can also meet with the parties both together and in a separate caucus. KOVACH, *supra* note 5, at 43.

53. KOVACH, *supra* note 5, at 42.

54. *Id.* at 148.

55. *Id.* at 44.

56. *Id.*

57. *Id.*

58. *Id.* at 208.

own attorneys before signing.⁵⁹ In other cases, the parties sign the mediation agreement at the conclusion of the mediation.⁶⁰ A mediated agreement can take the form of a simple outline.⁶¹ Other cases require formal contracts using legal terms.⁶² In family law cases, the mediation agreement can include form documents used to effectuate the divorce.⁶³ These documents can include a Property Settlement Agreement,⁶⁴ an Order of Child Support, or a Parenting Plan.⁶⁵

The mediator's role in drafting the agreement can vary. Sometimes the parties or their attorneys draft the agreement.⁶⁶ In other mediations, the mediator may only review his or her notes from the mediation's discussions with the parties to help them formalize their agreement.⁶⁷ In many instances, the mediator drafts the agreement for the parties.⁶⁸ The mediator asks questions to ensure the agreement is clear and specific.⁶⁹ Regardless of the form of the agreement, "it remains the mediator's duty to be sure that the participants do not leave the mediation without a complete understanding of the details of their agreement."⁷⁰ The mediator serves an important purpose in implementing the mediated agreement,⁷¹ and therefore needs clear guidance about the attorney-mediator's ethical responsibilities at this final mediation stage.

III. WSBA ADVISORY OPINION 2223

This Section explores WSBA Advisory Opinion 2223 in detail. Part A begins with a discussion of WSBA advisory opinions in general, with a particular focus on what these opinions mean for Washington attorneys.

59. KOVACH, *supra* note 15, at 350.

60. *Id.* at 348.

61. *See id.* at 346.

62. *Id.*

63. KOVACH, *supra* note 5, at 28.

64. A Property Settlement Agreement is "[a] contract that divides up the assets of divorcing spouses and is incorporated into a divorce decree." BLACK'S LAW DICTIONARY 1338 (9th ed. 2009) (giving the definition of "property settlement," then stating that it is "[a]lso termed . . . *property settlement agreement*." (emphasis in original)).

65. A Parenting Plan is "[a] plan that allocates custodial responsibility and decision-making authority for what serves the child's best interests and that provides a mechanism for resolving any later disputes between parents." BLACK'S LAW DICTIONARY 1224 (9th ed. 2009).

66. KOVACH, *supra* note 5, at 205.

67. *Id.* at 206.

68. *Id.* at 205.

69. KOVACH, *supra* note 15, at 343–44.

70. KOVACH, *supra* note 5, at 207.

71. *See id.*

Next, Part B provides an overview of WSBA Advisory Opinion 2223's factual background. Finally, Part C examines WSBA Advisory Opinion 2223's specifics: what it says, what authority it relies on, and what conclusions it draws.

A. *Washington State Bar Association Advisory Opinions in General*

WSBA advisory opinions are influential in the Washington legal community. While the Washington Supreme Court approves and adopts Washington's RPC,⁷² the WSBA claims "a major responsibility" for the ethics rules governing law practice in Washington.⁷³ To carry out this responsibility and to aid Washington attorneys in understanding their ethical duties, the WSBA issues advisory opinions.⁷⁴ These advisory opinions are issued by a Bar Association committee.⁷⁵ The opinions concern both new and recurring ethical issues WSBA members face, and are often issued in response to ethical questions WSBA members submit.⁷⁶ WSBA advisory opinions are advisory only⁷⁷—the Washington State Supreme Court "bears the ultimate responsibility for lawyer discipline."⁷⁸ Despite this "advisory only" status, Washington attorneys pay close attention to the WSBA's advisory opinions. Washington attorneys and courts both cite WSBA advisory opinions to lend authority to arguments.⁷⁹ Furthermore, Washington Court Rule

72. *Advisory Opinions*, WASH. ST. B. ASS'N, <http://www.wsba.org/Resources-and-Services/Ethics/Advisory-Opinions> (last visited Sept. 3, 2014).

73. *Id.*

74. *Id.*

75. *Id.* Currently this committee is called the Committee on Professional Ethics, although prior to October 1, 2012, this committee was called the Rules of Professional Conduct Committee. *Rules of Professional Conduct Committee*, WASH. STATE BAR ASS'N, <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/RPC-Committee> (last visited Sept. 3, 2014).

76. *See Rules of Professional Conduct Committee*, WASH. ST. B. ASS'N, <http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/RPC-Committee> (last visited Sept. 3, 2014); *Advisory Opinions*, WASH. ST. B. ASS'N, <http://www.wsba.org/Resources-and-Services/Ethics/Advisory-Opinions> (last visited Sept. 3, 2014).

77. *Advisory Opinions*, WASH. ST. B. ASS'N, <http://www.wsba.org/Resources-and-Services/Ethics/Advisory-Opinions> (last visited Sept. 3, 2014); *see also WSBA Advisory Op. 2223*, *supra* note 1 ("Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association.").

78. *In re Disciplinary Proceeding Against DeRuiz*, 152 Wash. 2d 558, 571, 99 P.3d 881, 888 (2004).

79. *See, e.g., Rafel Law Group PLLC v. Defoor*, 176 Wash. App. 210, 226–28, 308 P.3d 767, 776–77 (2013) (Schindler, J., concurring) (citing Wash. State Bar Ass'n Rules of Prof'l Conduct Comm., Advisory Opinion 2209 (2012) to demonstrate the current interpretation of WASH. RULES

General Rule 12.1 specifically authorizes the WSBA to “inform and advise lawyers regarding their ethical obligations.”⁸⁰ Finally, the WSBA’s own goal of “assist[ing] members in interpreting their ethical obligations by issuing advisory opinions on specific issues,”⁸¹ supports Washington attorneys’ reliance on WSBA Advisory Opinions. This reliance explains why it is so important that WSBA Advisory Opinions provide clear guidance.

B. WSBA Advisory Opinion 2223’s Background

WSBA Advisory Opinion 2223 was issued in 2012 in response to an inquiry asking whether a lawyer acting as a neutral mediator under RPC 2.4 may prepare specific family law documents for unrepresented parties.⁸² These documents included a Property Settlement Agreement, an Order of Child Support, and a Parenting Plan.⁸³ The inquirer stated that preparing these documents “is not a matter of checking boxes on standardized forms, but frequently involves the drafting of complex and customized provisions using original language and choices that impact the party’s legal and property rights.”⁸⁴ In response to this question and this factual premise, the Committee issued WSBA Advisory Opinion 2223.

C. WSBA Advisory Opinion 2223’s Specifics: Its Statements, Its Authority, and Its Conclusions

WSBA Advisory Opinion 2223 concludes that attorney-mediators violate the Washington RPC when they draft documents such as Property Settlement Agreements, Orders of Child Support, or Parenting Plans as part of a mediation for unrepresented parties. WSBA Advisory Opinion 2223 begins by citing Washington State Courts General Rule

OF PROF’L CONDUCT R. 1.8(a)); *Ferguson Firm, PLLC v. Teller & Associates, PLLC*, 178 Wash. App. 1033, *9 (2013) (citing Wash. State Bar Ass’n, Advisory Opinion 1522 (1993) to define the term “legal responsibility” as used in WASH. RULES OF PROF’L CONDUCT R. 1.5(e)); *Mayers v. Bell*, 167 Wash. App. 1039, *3 (2012) (analyzing Wash. State Bar Ass’n, Advisory Opinions 1610 (1995) and 1838 (1998) after defendant law firm argued reliance on these opinions).

80. WASH. CT. GEN. R. 12.1(b)(5) (2013), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=gr&ruleid=GAGR12.1.

81. *Advisory Opinions*, WASH. STATE BAR ASS’N, <http://www.wsba.org/Resources-and-Services/Ethics/Advisory-Opinions> (last visited Sept. 3, 2014).

82. *WSBA Advisory Op. 2223*, *supra* note 1.

83. *Id.*

84. *Id.*

(GR) 24⁸⁵ to define the practice of law.⁸⁶ GR 24 states that “[t]he practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law.”⁸⁷ WSBA Advisory Opinion 2223 continues to cite GR 24(a)(1)–(2) for the proposition that “the practice of law includes giving advice and drafting documents that affect the rights and responsibilities of an entity or person.”⁸⁸ WSBA Advisory Opinion 2223 recognizes that GR 24(b)(4) permits a lawyer “to serve ‘in a neutral capacity as a mediator,’”⁸⁹ regardless of whether this service constitutes the practice of law.⁹⁰ WSBA Advisory Opinion 2223 then asks whether the preparation of documents moves an attorney-mediator out of a neutral role and into a representation role. WSBA Advisory Opinion 2223 cites RPC 2.4⁹¹ to explain that a lawyer is a third-party neutral “when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.”⁹² WSBA Advisory Opinion 2223 cautions that when the lawyer mediates for unrepresented parties there is potential for confusion regarding the lawyer’s role.⁹³

WSBA Advisory Opinion 2223 next examines RPC 1.7.⁹⁴ WSBA Advisory Opinion 2223 begins this discussion by stating that a conflict of interest may exist for an attorney representing both parties in a dissolution matter because “the parties’ interests may be directly in conflict.”⁹⁵ To explain how other jurisdictions have handled the ethics involved in this scenario, WSBA Advisory Opinion 2223 refers to Texas Ethics Opinion Number 583 (TX Ethics Opinion 583).⁹⁶ TX Ethics Opinion 583 concludes that while divorce mediation is not the practice

85. WASH. CT. GEN. R. 24(a) (2002), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=gagr24&pdf=1.

86. *Id.*

87. *Id.*

88. *WSBA Advisory Op. 2223*, *supra* note 1.

89. WASH. CT. GEN. R. 24(b)(4), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=gagr24&pdf=1.

90. *Id.*

91. WASH. RULES OF PROF’L CONDUCT R. 2.4 (2006).

92. *WSBA Advisory Op. 2223*, *supra* note 1 (citing WASH. RULES OF PROF’L CONDUCT R. 2.4).

93. *Id.*

94. *See generally id.*

95. *Id.*

96. *Id.*; State Bar of Tex. Prof’l Ethics Comm., Ethics Op. 583 (2008).

of law, preparing documents implementing a divorce agreement reached through mediation “clearly involves” the lawyer-mediator’s providing legal services and therefore preparing documents for unrepresented parties to bring about the settlement constitutes “representation of both parties in the divorce litigation.”⁹⁷ TX Ethics Opinion 583 considers this practice a violation of a Texas ethics rule prohibiting lawyers from representing parties opposed in the same litigation.⁹⁸ WSBA Advisory Opinion 2223 takes a similar position, citing RPC 1.7 comment 23 and comment 15 for the principles that, respectively, “representation of opposing parties in the same litigation” is non-consentable, and that representation is prohibited when an attorney “cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.”⁹⁹

WSBA Advisory Opinion 2223 next briefly examines three Oregon cases as examples of other jurisdictions having concerns about an attorney’s “ability to provide competent and diligent representation when representing both parties in a family law case.”¹⁰⁰ The first case WSBA Advisory Opinion 2223 cites is *In re McKee*.¹⁰¹ WSBA Advisory Opinion 2223 states that the Oregon Supreme Court in *In re McKee* disciplined a lawyer for representing copetitioners in divorce, and that the concurrence suggested “consent usually will not cure conflict of interest between copetitioners in divorce.”¹⁰² WSBA Advisory Opinion 2223 also refers to *In re Bryant*,¹⁰³ in which a lawyer had a conflict of interest when putting into legal terms a dissolution agreement the divorcing couple developed.¹⁰⁴ Finally, WSBA Advisory Opinion 2223 mentions *In re Taub*,¹⁰⁵ in which the Oregon Supreme Court sanctioned a lawyer for representing both parties in a divorce after rejecting the lawyer’s defense that he was only a scrivener.¹⁰⁶ From these three cases, WSBA Advisory Opinion 2223 draws the conclusion that other

97. *WSBA Advisory Op. 2223*, *supra* note 1; State Bar of Tex. Prof’l Ethics Comm., Ethics Op. 583 (2008).

98. *WSBA Advisory Op. 2223*, *supra* note 1; State Bar of Tex. Prof’l Ethics Comm., Ethics Op. 583 (2008).

99. *WSBA Advisory Op. 2223*, *supra* note 1 (citing WASH. RULES OF PROF’L CONDUCT R. 1.7 cmt. 15 (2006)).

100. *Id.*

101. 849 P.2d 509 (Or. 1993).

102. *WSBA Advisory Op. 2223*, *supra* note 1.

103. 12 Disciplinary B. Rptr 69 (Or. 1998).

104. *See generally id.*

105. 7 Disciplinary B. Rptr. 77 (Or. 1998).

106. *See generally id.*

jurisdictions are similarly uneasy with joint representation of parties in family law cases.¹⁰⁷

WSBA Advisory Opinion 2223 concludes that “because the preparation of ‘complex and customized provisions using original language and choices’ as part of a mediation for unrepresented parties goes beyond the role of a mediator, and is instead the representation of the parties, the practices raised in this inquiry violate RPC 1.7 and are prohibited.”¹⁰⁸

In sum, WSBA Advisory Opinion 2223 takes the following positions:

1. Under GR 24, drafting documents that impact parties’ legal and property rights constitutes the practice of law.¹⁰⁹
2. Under GR 24(b) and RPC 2.4, an attorney may serve as a neutral mediator, regardless of whether the attorney-mediator’s service constitutes the practice of law.¹¹⁰
3. Yet, as explained in RPC 2.4, there is potential confusion regarding the attorney-mediator’s role when the mediation parties are unrepresented.¹¹¹
4. The question becomes whether preparing documents as described in this fact pattern removes an attorney from a neutral role to a role of representation. WSBA Advisory Opinion 2223 refers to a Texas ethics opinion that found (1) preparing documents implementing a divorce agreement reached through mediation is providing legal services, (2) preparing documents for unrepresented parties to bring about the settlement constitutes representation of both parties, and (3) preparing divorce documents for unrepresented parties violates a Texas ethics rule prohibiting lawyers from representing adverse parties in the same litigation.¹¹²
5. Under RPC 1.7, a conflict of interest may exist for an attorney representing both parties in a dissolution because the parties’ interests may be directly opposed.¹¹³ Comment 23 to RPC 1.7 clarifies that representation of opposing parties in the same litigation is a nonconsentable conflict of interest.¹¹⁴

107. *WSBA Advisory Op. 2223, supra* note 1.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*; State Bar of Tex. Prof’l Ethics Comm., Ethics Op. 583 (2008).

113. WASH. RULES OF PROF’L CONDUCT R. 1.7 (2006).

114. WASH. RULES OF PROF’L CONDUCT R. 1.7 cmt. 23.

Comment 15 to RPC 1.7 prohibits a representation when the lawyer “cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.”¹¹⁵

6. Other jurisdictions have concerns about an attorney’s “ability to provide competent and diligent representation when representing both parties in a family law case,” as shown in three Oregon disciplinary cases.¹¹⁶
7. WSBA Advisory Opinion 2223 concludes that preparing the documents described in the inquiry for unrepresented parties “goes beyond the role of a mediator, and is instead the representation of the parties,” and the practice is therefore prohibited as a violation of RPC 1.7.¹¹⁷

WSBA Advisory Opinion 2223’s conclusion draws a clear line: it is not ethically permissible for attorney-mediators to draft documents such as Property Settlement Agreements, Orders of Child Support, or Parenting Plans as part of a mediation for unrepresented parties.¹¹⁸ This opinion, however, contains significant flaws that give rise to questions about its accuracy. Part IV explores these flaws, and their ramifications, in detail.

IV. WSBA ADVISORY OPINION 2223’S FLAWS

This Part argues that WSBA Advisory Opinion 2223 is flawed and proposes that the Committee reexamine the opinion. WSBA Advisory Opinion 2223’s flaws fall into two categories: (1) an omission of relevant comments to the RPC, and (2) an inconsistent reliance on extra-jurisdictional authority. WSBA Advisory Opinion 2223’s practical ramifications make it necessary to revisit this opinion. When reconsidering WSBA Advisory Opinion 2223, the Committee should carefully examine all applicable comments to the RPC and look for guidance from other jurisdictions who have addressed WSBA Advisory Opinion 2223’s ethical considerations. Revisiting WSBA Advisory Opinion 2223 may involve drawing a different conclusion.

115. *WSBA Advisory Op. 2223*, *supra* note 1 (citing WASH. RULES OF PROF’L CONDUCT R. 1.7 cmt. 15).

116. *Id.*

117. *Id.*

118. *See generally id.*

A. *WSBA Advisory Opinion 2223 Does Not Discuss Relevant Comments to RPC 1.7*

WSBA Advisory Opinion 2223 cites RPC 1.7, governing conflicts of interest between current clients,¹¹⁹ in support of its conclusion that an attorney-mediator who drafts the described documents is in violation of the Washington RPC.¹²⁰ WSBA Advisory Opinion 2223 also references RPC 1.7 comment 23 and RPC 1.7 comment 15.¹²¹ However, two relevant comments to RPC 1.7—comments 17 and 28—are omitted from WSBA Advisory Opinion 2223’s analysis.¹²² This section explores the idea that RPC 1.7 comments 17 and 28 may permit an attorney-mediator to draft the documents at issue in WSBA Advisory Opinion 2223 without violating his or her ethical obligations. This section argues that WSBA Advisory Opinion 2223’s analysis is incomplete without considering RPC 1.7 comments 17 and 28.

1. *RPC 1.7 Comment 17*

In certain circumstances a concurrent conflict of interest cannot be waived.¹²³ RPC 1.7 comment 17 describes how to determine whether clients are aligned directly against each other such that the representation is impermissible under RPC 1.7(b)(3).¹²⁴ RPC 1.7(b)(3) prohibits representation that involves a claim by one client against another client in the same litigation or proceeding before a tribunal.¹²⁵ Comment 17 provides that determining “[w]hether clients are aligned directly against each other within the meaning of [(b)(3)] requires examination of the context of the proceeding.”¹²⁶ Comment 17 proceeds to state that “this paragraph does not preclude a lawyer’s multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a ‘tribunal’ under Rule 1.0(m)).”¹²⁷ Comment 17 is directly

119. WASH. RULES OF PROF’L CONDUCT R. 1.7.

120. *WSBA Advisory Op. 2223*, *supra* note 1 (citing WASH. RULES OF PROF’L CONDUCT R. 1.7 & 2.4 (2006)).

121. *See generally id.*

122. *WSBA Advisory Op. 2223*, *supra* note 1.

123. *See* WASH. RULES OF PROF’L CONDUCT R. 1.7 (prohibiting representation in which one client asserts a claim against another client represented by the lawyer in the same litigation).

124. *Id.* at R. 1.7 cmt. 17.

125. *Id.* at R. 1.7(b)(3).

126. *Id.* at R. 1.7 cmt. 17.

127. *Id.* The RPC define “tribunal” as “a court, an arbitrator in a binding arbitration proceeding or legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral

applicable to the mediation context but WSBA Advisory Opinion 2223 does not mention it.¹²⁸

Considering comment 17 might have led the Committee to draw a different conclusion. WSBA Advisory Opinion 2223's conclusion assumes the parties in the inquiry have directly opposed interests.¹²⁹ But this need not be an assumption—comment 17 provides a framework for analyzing whether the interests of the parties indeed conflict. Under comment 17, one seeking to determine if RPC 1.7(b)(3) is satisfied would first examine the context of the proceeding¹³⁰—in this case, the mediation. RPC 1.7(b)(3) prohibits only representation that concerns a claim by one client against another “in the same litigation or proceeding before a tribunal.”¹³¹ Comment 17 expressly states that mediation is not a proceeding before a tribunal.¹³² Thus, the mediation context is not one that automatically contains clients aligned directly against each other under RPC 1.7(b)(3). Therefore, under comment 17's analysis, the fact pattern at issue in WSBA Advisory Opinion 2223 does not automatically violate RPC 1.7(b)(3). WSBA Advisory Opinion 2223 does not explore comment 17's impact on the inquiry.

2. *RPC 1.7 Comment 28*

Furthermore, RPC 1.7 comment 28 explains that conflict consentability “depends on the circumstances.”¹³³ Comment 28 gives an example to illustrate this concept: a lawyer may not represent multiple parties with “fundamentally antagonistic” interests in the same negotiation, but may represent both parties when the clients' interests are “generally aligned” even though some differences exist.¹³⁴

Comment 28 is particularly relevant in the mediation context. When documents are drafted at the end of the mediation, the parties have already reached an agreement. The parties' interests are perhaps no longer directly opposed, but instead aligned with a common goal: memorializing the results of their mediation. Indeed, at the agreement-

official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.” WASH. RULES OF PROF'L CONDUCT R. 1.0(m).

128. *WSBA Advisory Op. 2223*, *supra* note 1.

129. *Id.*

130. WASH. RULES OF PROF'L CONDUCT R. 1.7 cmt. 17.

131. *Id.* at R. 1.7(b)(3).

132. *Id.*

133. *Id.* at R. 1.7 cmt. 28.

134. *Id.*

writing phase it is likely the parties' interests are more aligned than they have been at any point during the mediation. If a lawyer-mediator is representing the parties during the document drafting stage, it is possible that the lawyer is not representing parties with "fundamentally antagonistic" interests in the same negotiation, but instead is aiding parties with "generally aligned" interests. Comment 28 does not require the interests to be completely aligned—instead it permits some differences to exist without preventing the attorney from representing both parties.¹³⁵ Comment 28 gives examples of scenarios where an attorney may commonly represent parties with differing interests, including when "arranging a property distribution in settlement of an estate."¹³⁶ The property distribution scenario comment 28 describes is analogous to WSBA Advisory Opinion 2223's context, when the parties share a common goal of drawing up their agreements (including a Property Settlement Agreement) to implement their divorce. It is therefore conceivable that the attorney-mediator in WSBA Advisory Opinion 2223's inquiry is faced with a consentable conflict of interest, rather than a conflict of interest in clear violation of RPC 1.7.

This analysis extends further. RPC 1.7(a) prohibits joint representation when "the representation of one client will be directly adverse to another client."¹³⁷ One may wonder whether parties who reach a complete agreement through mediation necessarily qualify as "adverse." Things are adverse when they are "acting against or in a contrary direction."¹³⁸ At the end of a successful mediation, two parties will have reached a full concurrence on how to resolve their dispute. The only remaining task is to put that agreement in writing. The family law system requires that to completely resolve the dispute (the divorce), this agreement must take the form of specific, required paperwork that must be filed with the court.¹³⁹ This one remaining task does not seem to fit the definition of "adverse."¹⁴⁰ To the contrary, the parties now have the

135. *Id.* ("[C]ommon representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.").

136. *Id.*

137. *Id.* at R. 1.7(a).

138. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 19 (11th ed. 2003).

139. *See* 20 KENNETH W. WEBER ET AL., WASHINGTON PRACTICE, FAMILY & COMMUNITY PROPERTY LAW § 31.4 (2013) ("Legislation enacted in 1990 directed the Office of the Administrator for the Courts to develop standardized forms for most family law proceedings, including dissolutions. These forms have now been promulgated and, with few exceptions, their use is mandatory.").

140. The Utah Rules of Professional Conduct support this argument. *See* UTAH RULES OF PROFESSIONAL CONDUCT R. 2.4 cmt. 5(a) (2006) ("Rule 2.4(c) is intended to permit a lawyer-mediator for parties

common goal of completing the documents necessary to finalize their agreement. Because divorcing parties at the conclusion of mediation proceedings are not necessarily “adverse,” it seems there may be situations in which drafting documents, such as those described in WSBA Advisory Opinion 2223, is not a violation of RPC 1.7.

In fact, initially WSBA Advisory Opinion 2223 seems to consider this possibility when it states “[i]n a dissolution matter, the parties’ interests *may* be directly in conflict.”¹⁴¹ Yet, WSBA Advisory Opinion 2223 then concludes that “the practices raised in this inquiry violate RPC 1.7 and are prohibited.”¹⁴² This unqualified prohibition is puzzling, given the opinion’s recognition that directly conflicting interests are not a certainty and in light of comment 17’s framework for determining when a conflict is consentable. WSBA Advisory Opinion 2223 is flawed because of this gap in analysis.

B. WSBA Advisory Opinion 2223 Inconsistently Relies on Extra-Jurisdictional Authority

WSBA Advisory Opinion 2223 is also flawed because of the authority it cites. WSBA Advisory Opinion 2223 relies on two sources of authority outside Washington: three Oregon attorney discipline cases and TX Ethics Opinion 583.¹⁴³ This section explains why this reliance is misguided and why these authorities are insufficient to support WSBA Advisory Opinion 2223’s position. First, Part 1 explores why the Oregon cases do not adequately support WSBA Advisory Opinion 2223’s conclusion. Next, Part 2 explains that WSBA Advisory Opinion 2223’s analysis is incomplete because it relies solely on TX Ethics Opinion 583 while neglecting to consider the positions of many other jurisdictions that have explored this ethical issue. Part 2 also provides an overview of these other jurisdictions’ positions. Finally, Part 3 examines New York State Bar Association Committee on Professional Ethics Opinion 736 (NY Ethics Opinion 736)¹⁴⁴ as an example of how a thorough

who have successfully resolved all issues between them to draft a legally binding agreement and, to the extent necessary or appropriate, record or file related papers or pleadings with an appropriate tribunal. In so doing, the lawyer will be jointly representing the parties in their common goal of effecting proper legal filings or obtaining judicial approval of their fully resolved issues. Because the parties in this situation have fully resolved their issues, they are not considered “adverse” under Rule 1.7(a)(1).”

141. *WSBA Advisory Op. 2223*, *supra* note 1 (emphasis added).

142. *Id.*

143. *Id.*

144. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Ethics Op. 736 (2001).

consideration of other opinions might lead to a conclusion different from that reached in WSBA Advisory Opinion 2223.

1. *The Oregon Disciplinary Cases Are Distinguishable and Do Not Adequately Support WSBA Advisory Opinion 2223's Conclusion*

WSBA Advisory Opinion 2223 references three attorney discipline cases from Oregon, but its reliance on these cases is flawed. The first case, *In re Conduct of McKee*,¹⁴⁵ is distinguishable from the facts in WSBA Advisory Opinion 2223's inquiry. Mr. McKee was not functioning as a mediator; the decision does not mention mediation at all.¹⁴⁶ While it is true that Mr. McKee was disciplined for representing copetitioners in divorce,¹⁴⁷ Mr. McKee also committed a number of other ethical breaches. In particular, he failed to advise the parties that their interests were potentially in conflict.¹⁴⁸ Mr. McKee also later provided both parties with legal advice in disputes concerning the completed divorce agreement¹⁴⁹ and then, without consent, sued one party on behalf of the other in a claim involving the family home, one asset at issue in the dissolution agreement.¹⁵⁰ The Oregon Bar did not discipline Mr. McKee for the drafting of the divorce agreement, and the Court's opinion in *McKee* does not mention this action as a violation.¹⁵¹

Significantly, the Oregon State Supreme Court's decision in *McKee* supports the proposition that it is at least possible to represent adverse parties in a divorce proceeding.¹⁵² Under the Oregon Disciplinary Rules (Oregon DR), the Court explained, "[i]n situations involving dissolution of marriage where the parties have minor children and jointly acquired assets, it may seldom be 'obvious that the lawyer can adequately represent the interest of each [client]'"¹⁵³ Thus, while it may be seldom, it was still possible to represent copetitioners in a divorce. The Oregon DR were amended during *McKee*, and the Court noted that under the new rule there were "ten factors that must be present in order for a

145. 849 P.2d 509 (Or. 1993), *reinstatement granted sub nom. In re* Reinstatement of McKee, 37 P.3d 987 (2002).

146. *See generally id.*

147. *See generally id.*

148. *Id.* at 512.

149. *Id.*

150. *Id.* at 513.

151. *See generally id.*

152. *Id.* at 516–17.

153. *Id.* at 517.

lawyer's joint representation of parties in a marital dissolution to avoid an actual conflict of interest."¹⁵⁴ Joint representation of a divorcing couple was therefore permissible under the new Oregon ethics rules as well.

In *McKee*, two justices concurred in the result but "[wrote] separately to venture the opinion that rarely, if ever, can a lawyer represent both spouses in a marital dissolution proceeding."¹⁵⁵ With this hesitation in mind, the concurrence nevertheless continued on to say: "The law, and the Disciplinary Rules, should be sensitive to the all too common situation in which neither spouse can afford *one* lawyer, much less two. Perhaps allowing the lawyer to 'represent' both is preferable to having one spouse go unrepresented" ¹⁵⁶ WSBA Advisory Opinion 2223 states that the *McKee* "concurring opinion suggests that consent usually will not cure conflict of interest between copetitioners in divorce."¹⁵⁷ This interpretation focuses on only part of the *McKee* concurrence's conclusion. While it is true that the *McKee* concurrence was concerned with a lawyer's ability to represent both parties to a divorce, the concurrence also suggests that joint representation is preferable to having one spouse go unrepresented.¹⁵⁸

Neither the concurring nor the majority opinions in *McKee* stand for the premise that joint representation of parties in a divorce proceeding is always impermissible. Mr. McKee was not disciplined because he drafted a divorce agreement, but rather because he failed to adequately disclose the conflict of interest present in the joint representation,¹⁵⁹ among a multitude of other ethics violations.¹⁶⁰ Additionally, *McKee* does not concern mediation. Thus, *In re McKee* does not provide definitive support for WSBA Advisory Opinion 2223's conclusion.

Furthermore, both of the other cases WSBA Advisory Opinion 2223 relies on, *In re Bryant*¹⁶¹ and *In re Taub*,¹⁶² are disciplinary cases from

154. *Id.* at 517 n.13.

155. *Id.* at 519 (Peterson, J., concurring).

156. *Id.* at 520 (Peterson, J., concurring) (emphasis in original).

157. *WSBA Advisory Op.* 2223, *supra* note 1.

158. *In re McKee*, 849 P.2d at 520 (Peterson, J., concurring).

159. *Id.* at 516 ("That disclosure, however, falls far short of that required by *former* DR 5-105(C) . . . which requires a *full* disclosure of the possible effect of multiple representation on the exercise of the lawyer's independent professional judgment on behalf of each client." (emphasis in original) (internal citations omitted)).

160. *Id.* at 510 ("We find the accused guilty of several violations").

161. 12 Disciplinary B. Rptr 69 (Or. 1998).

162. 7 Disciplinary B. Rptr 77 (Or. 1993).

the 1990s based on old Oregon DRs. Importantly, since these opinions were issued, Oregon has amended the Oregon DRs to expressly state that “[a] lawyer serving as a mediator: (1) may prepare documents that memorialize and implement the agreement reached in mediation.”¹⁶³ Under the modern Oregon DRs, the ethics violations in both *Bryant* and *Taub* do not exist. The facts of both cases are somewhat similar to those in WSBA Advisory Opinion 2223’s inquiry: in both cases an attorney drafted documents for copetitioners to a divorce, although the attorney was not serving as a mediator.¹⁶⁴ WSBA Advisory Opinion 2223 cites both cases as evidence that “[o]ther courts have raised concerns about a lawyer’s ability to provide competent and diligent representation when representing both parties in a family law case.”¹⁶⁵ These “concerns,” however, no longer exist in Oregon—so much so that Oregon altered the Oregon DRs to expressly permit attorney-mediators to prepare documents. Thus, WSBA Advisory Opinion 2223’s reliance on these Oregon cases as proof that other jurisdictions are similarly concerned about drafting the agreements described in the inquiry is flawed.

2. *WSBA Advisory Opinion 2223 Did Not Thoroughly Examine the Opinions of Other Jurisdictions*

Several jurisdictions have addressed the factual scenario at issue in WSBA Advisory Opinion 2223. WSBA Advisory Opinion 2223, however, relies solely on one extra-jurisdictional ethics opinion: TX Ethics Opinion 583.¹⁶⁶ Yet, Texas is only one of many jurisdictions that have discussed this ethical issue. The bar associations of nine states have issued opinions advising that it is ethically impermissible to draft documents like those described in WSBA Advisory Opinion 2223.¹⁶⁷ One of these nine states, Utah, subsequently amended its Rules of Professional Conduct to expressly permit the drafting of such

163. OR. RULES OF PROF’L CONDUCT R. 2.4(b)(1) (2005).

164. See generally *In re Bryant*, 12 Disciplinary B. Rptr 69 (Or. 1998); *In re Taub*, 7 Disciplinary B. Rptr 77 (Or. 1993).

165. *WSBA Advisory Op. 2223*, *supra* note 1.

166. See generally *id.*

167. These nine states are: Illinois, Ill. State Bar Ass’n, Advisory Op. 04-03 (2005); Michigan, State Bar of Mich., Legal Ethics Op. RI-351 (2011); New Hampshire, N.H. Bar Ass’n Ethics Comm., Formal Op. 1993-94/4 (1993); North Carolina, N.C. State Bar, Formal Ethics Op. 2012-2 (2012); Ohio, Ohio Bd. of Comm’rs on Grievances and Discipline, Legal Ethics Op. 2009-4 (2009); Texas, State Bar of Tex. Prof’l Ethics Comm., Legal Ethics Op. 583 (2008); Utah, Utah State Bar Ethics Advisory Op. Comm., Ethics Op. 05-03 (2005); Vermont, Vt. Bar Ass’n, Advisory Ethics Op. 80-12 (1980); and Washington, *WSBA Advisory Op. 2223*, *supra* note 1.

documents.¹⁶⁸ On the other hand, fourteen states permit attorney-mediators to draft agreements reached in divorce mediation. In four of these fourteen states bar association ethics committees have produced ethics opinions that directly address WSBA Advisory Opinion 2223's concerns and find that the practice is ethically permissible.¹⁶⁹ There are four states that have issued ethics advisory opinions that, while not specifically discussing WSBA Advisory Opinion 2223's factual scenario, endorse practices that encompass drafting documents similar to those at issue in WSBA Advisory Opinion 2223.¹⁷⁰ Four states have provisions in their Rules of Professional Conduct or Bar Rules that permit attorney-mediators to draft documents implementing agreements reached in mediation.¹⁷¹ And two of the fourteen states have court rules that allow an attorney-mediator to draft documents.¹⁷² Finally, one state

168. UTAH RULES OF PROF'L CONDUCT R. 2.4(c) (2006) ("A lawyer serving as a mediator in a mediation in which the parties have fully resolved all issues: (c)(1) may prepare formal documents that memorialize and implement the agreement reached in mediation; (c)(2) shall recommend that each party seek independent legal advice before executing the documents; and (c)(3) with the informed consent of all parties confirmed in writing, may record or may file the documents in court, informing the court of the mediator's limited representation of the parties for the sole purpose of obtaining such legal approval as may be necessary."); *see also id.* at R. 2.4 cmt. 5(a) ("Rule 2.4(c) is intended to permit a lawyer-mediator for parties who have successfully resolved all issues between them to draft a legally binding agreement and, to the extent necessary or appropriate, record or file related papers or pleadings with an appropriate tribunal. In so doing, the lawyer will be jointly representing the parties in their common goal of effecting proper legal filings or obtaining judicial approval of their fully resolved issues. Because the parties in this situation have fully resolved their issues, they are not considered 'adverse' under Rule 1.7(a)(1).").

169. These four states are: Florida, Fla. State Bar Ass'n Comm. on Prof'l Ethics, Legal Ethics Op. 86-8 (1986); Massachusetts, Mass. Bar Ass'n, Ethics Op. 85-3 (1985); Missouri, Mo. Bar, Informal Advisory Op. 2010-0055 (2010); and New York, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 736 (2001).

170. These four states are: Connecticut, Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 97-12 (1997) (approving a mediation collaboration in which the attorney would draft documents in divorce mediation); Kentucky, Ky. Bar Ass'n, Ethics Op. E-335 (1989) (recognizing that the mediator cannot insist that the parties have independent counsel, but instructing mediators to encourage unrepresented parties to have separate counsel review any proposed agreement prepared in the mediation and to warn of the risks of being unrepresented); Pennsylvania, Penn. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Ethics Op. 93-210 (1994) (advising attorney who wishes to form organization that creates pro se consent custody orders to inform parties attorney is a mediator); and Virginia, Va. State Bar, Legal Ethics Op. 1368 (1990) (ruling that a mediator who mediated a dispute and then drafted an agreement was not in violation of ethics rules).

171. Three of these four states are: Maine, ME. BAR R. 3.4(h)(4) (2012); Oregon, OR. RULES OF PROF'L CONDUCT R. 2.4(b)(1)-(2) (2014); and Tennessee, TENN. RULES OF PROF'L CONDUCT R. 2.4(e) (2011). Utah has also amended its Rules of Professional Conduct to allow a lawyer-mediator to draft documents that "memorialize and implement" the mediation agreement. UTAH RULES OF PROF'L CONDUCT R. 2.4(c) (2006).

172. These two states are Kansas and Indiana. Kansas permits attorney-mediators to draft mediation agreements under both the Kansas Supreme Court Rules and the Kansas Court Rules

Bar Association Ethics Committee faced WSBA Advisory Opinion 2223's ethical question and was unable to reach a consensus.¹⁷³ The remaining twenty-seven states plus Washington D.C. have not provided guidance on this issue.

Additionally, the American Bar Association Alternative Dispute Resolution Section's Committee on Mediator Ethics (ABA Committee) has issued Mediator Ethical Guidance Opinion 2010-1 (ABA Opinion 2010-1), which expressly permits a lawyer-mediator to prepare an agreement concerning the division of property and custody plans for unrepresented parties in a divorce.¹⁷⁴ ABA Opinion 2010-1 addresses a fact pattern in which a couple with one minor child seeks an uncontested no-fault divorce with joint custody.¹⁷⁵ The couple jointly retains a mediator to help them work out the terms of a property settlement, custody, and support agreement.¹⁷⁶ At the conclusion of the mediation, the parties request that the mediator prepare the agreement for them.¹⁷⁷ The parties do not want to retain their own attorneys and will not have an attorney review the agreement the mediator prepares.¹⁷⁸ In ABA Opinion 2010-1, the ABA Committee states that it "sees no ethical

Relating to Mediation. *See* KAN. SUP. CT. R. 901 ("The attorney-mediator advises and encourages the parties to seek independent legal advice before the parties execute any settlement agreement drafted by the attorney-mediator."); KAN. SUP. CT. R. RELATING TO MEDIATION VII(D) ("Any memo of understanding or the proposed agreement which is prepared in the mediation process should be separately reviewed by independent counsel for each participant before it is signed. While a mediator cannot insist that each participant have separate counsel, they should be discouraged from signing any agreement which has not been so reviewed. If the participants, or either of them, choose to proceed without independent counsel, the mediator shall warn them of any risk involved in not being represented, including where appropriate, the possibility that the agreement they submit to a court may be rejected as unreasonable in light of both parties' legal rights or may not be binding on them."). Similarly, Indiana court rules pertaining to dispute resolution permit mediators to draft documents during mediation. *See* IND. RULES OF CT., RULES FOR ALT. DISPUTE RESOLUTION R. 2.7(f) (2014) ("Mediator shall also review each document drafted during mediation with any unrepresented parties. During the review the Mediator shall explain to unrepresented parties that they should not view or rely on language in documents prepared by the Mediator as legal advice. When the document(s) are finalized to the parties' and any counsel's satisfaction, and at the request and with the permission of all parties and any counsel, the Mediator may also tender to the court the documents listed below when the mediator's report is filed.").

173. Arizona's Bar Association Ethics Committee wrote "[a]s the Committee has not be[en] able to reach a consensus on whether a lawyer-mediator may draft pleadings and other documents implementing understandings reached by participants in the mediation, lawyers are advised to exercise their own professional judgment on this issue." State Bar of Ariz., Ethics Op. 96-01 (1996).

174. ABA Comm. on Mediator Ethical Guidance, Advisory Op. 2010-1 (2010).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

impediment under the Model Standards to the mediator performing a drafting function that he or she is competent to perform by experience or training.”¹⁷⁹ The ABA Committee writes that in drafting the agreement the mediator may act as a “scrivener”—simply memorializing the parties’ agreement without adding terms or operative language.”¹⁸⁰ The ABA Committee also maintains that a “lawyer-mediator with the experience and training to competently provide additional drafting services could do so,” if the attorney-mediator acts consistent with mediator standards concerning “party self-determination and mediator impartiality.”¹⁸¹ ABA Opinion 2010-1 clarifies, however, that before entering a drafting role, the mediator must explain the role’s implications, advise the parties of their right to consult a lawyer, and obtain the parties’ consent.¹⁸²

In reaching these conclusions, ABA Opinion 2010-1 relies on the 2005 Model Standards of Conduct for Mediators¹⁸³ as adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution.¹⁸⁴ The ABA Committee also references, while specifically not interpreting, the Model Standards of Practice for Family and Divorce Mediation (Family Standards)¹⁸⁵ approved by the ABA House of Delegates, the Association of Family and Conciliation Courts, and the Association for Conflict Resolution.¹⁸⁶ The Family Standards provide that “[w]ith the agreement of the participants, the mediator may document the participants’ resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.”¹⁸⁷ ABA Opinion 2010-1 notes that “the Family Standards expressly contemplate the drafting role of the mediator, whether a lawyer-mediator or a mediator with another profession-of-origin.”¹⁸⁸ ABA Opinion 2010-1 does not rely on any state’s ethics rules.¹⁸⁹ The

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).

184. ABA Comm. on Mediator Ethical Guidance, Op. 2010-1 (2010).

185. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (Ass’n of Family and Conciliation Courts 2000).

186. ABA Comm. on Mediator Ethical Guidance, Op. 2010-1 (2010).

187. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION § VI.E (Ass’n of Family and Conciliation Courts 2000).

188. ABA Comm. on Mediator Ethical Guidance, Op. 2010-1 (2010).

189. *See generally id.* (“The Committee is not applying any other mandatory aspirational codes of

ABA Committee cautions that professional codes of conduct for lawyers may be relevant, and advises “the lawyer-mediator to consider their possible application.”¹⁹⁰ ABA Opinion 2010-1 is therefore not expressly relevant under any state’s ethics rules. It does, however, provide evidence that drafting agreements such as those at issue in WSBA Advisory Opinion 2223 is common practice for mediators across the country, and the concerns of WSBA Advisory Opinion 2223 have been considered, and found ethically permissible, by a national organization.

While TX Ethics Opinion 583 supports WSBA Advisory Opinion 2223’s position, it represents only one of the many opinions concerning WSBA Advisory Opinion 2223’s ethical dilemma. WSBA Advisory Opinion 2223 does not explain why it relies solely on TX Ethics Opinion 583, nor why it does not examine the opinions of other jurisdictions.¹⁹¹ This cursory glance at the extensive body of work discussing this ethical issue renders WSBA Advisory Opinion 2223’s analysis incomplete.

3. *NY Ethics Opinion 736 Is an Example of How a Careful Consideration of Other Opinions Might Lead to a Conclusion Different from that Reached in WSBA Advisory Opinion 2223*

WSBA Advisory Opinion 2223 fails to consider extra-jurisdictional opinions based on facts and ethics rules that are essentially identical to those at issue in WSBA Advisory Opinion 2223—some of which reach an outcome directly contrary to that of WSBA Advisory Opinion 2223. This section examines one such opinion in detail: NY Ethics Opinion 736.¹⁹² NY Ethics Opinion 736 was issued in response to background facts and ethical considerations similar to that of WSBA Advisory Opinion 2223.

NY Ethics Opinion 736 addresses whether “an attorney engaged in matrimonial mediation [may] draft and file a separation agreement and divorce papers that incorporate terms agreed upon by the marital parties in the course of the mediation.”¹⁹³ NY Ethics Opinion 736 begins by stating that a lawyer serving as a mediator in a matrimonial context does not represent either party for the purposes of rules governing conflicts of

ethics adopted by states or by other mediation organizations.”).

190. *Id.*

191. *See generally* WSBA Advisory Op. 2223, *supra* note 1.

192. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Ethics Op. 736 (2001).

193. *Id.*

interest.¹⁹⁴ While NY Ethics Opinion 736 recognizes that sometimes a lawyer-mediator must not mediate in a particular situation because a party's interest cannot be adequately protected without obtaining legal representation, "the fact that the parties may begin with differing interests that would preclude joint representation does not, in and by itself, foreclose the possibility of mediation."¹⁹⁵ NY Ethics Opinion 736 then discusses whether at the completion of a mediation the lawyer-mediator may "represent the parties and draft and file legal documents on their behalf—in particular, the separation agreement and divorce papers."¹⁹⁶

Like WSBA Advisory Opinion 2223, NY Ethics Opinion 736 assumes that in drafting these documents the attorney-mediator switches from a neutral role to a representational role.¹⁹⁷ But unlike WSBA Advisory Opinion 2223, NY Ethics Opinion 736 concludes that when a disinterested lawyer would believe that the attorney-mediator could competently represent both parties' interests in preparing and filing the settlement agreement and divorce papers, the joint representation is permissible.¹⁹⁸ NY Ethics Opinion 736 cautions that it is likely uncommon that a disinterested lawyer can conclude that he or she can competently represent both parties' interests.¹⁹⁹ But NY Ethics Opinion 736 states that it may be possible if the lawyer objectively concludes that the parties are committed to the mediated terms, the terms are consistent with both spouses' goals and legal rights, there are no remaining points of disagreement, and "the lawyer can competently fashion the settlement agreement and divorce documents."²⁰⁰ In such a circumstance, the spouses should be permitted "to avoid the expense incident to separate representation and [permitted] 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."²⁰¹

The conclusion drawn in NY Ethics Opinion 736 applies to the factual inquiry and ethical considerations in WSBA Advisory Opinion

194. *Id.*

195. *Id.*

196. *Id.*

197. See generally *WSBA Advisory Op. 2223*, *supra* note 1; N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 736 (2001).

198. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 736 (2001).

199. *Id.*

200. *Id.*

201. *Id.*

2223. NY Ethics Opinion 736 recognizes that under the relevant ethics rules conflicts of interest do arise in joint representation of parties to a divorce. Nonetheless, NY Ethics Opinion 736 also recognizes that the conflict of interest rules do not prohibit all representations of parties with conflicting interests. The Washington RPC similarly do not prohibit all representations with conflicts of interest between current clients. RPC 1.7(a) states that “[e]xcept as provided in paragraph (b),” a lawyer may not engage in a representation with a concurrent conflict of interest.²⁰² Paragraph (b) expressly permits dual representation where (1) the lawyer “reasonably believes” he or she can provide each client with “competent and diligent representation,” (2) the law does not prohibit the representation, (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.”²⁰³ In WSBA Advisory Opinion 2223’s factual scenario, element (2) is not at issue, because Washington law does not prohibit the drafting of documents for both parties to a divorce. Element (3) is not at issue because, as discussed in Part IV.A.1, RPC 1.7 comment 17 expressly permits this representation when it states that paragraph (b)(3) “does not preclude a lawyer’s multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a ‘tribunal’ under Rule 1.0(m)).”²⁰⁴ Element (4) can be satisfied if the attorney-mediator obtains informed consent, in writing, from each client. Finally, as explored further below, it is conceivable that there will be some situations in which the attorney-mediator can satisfy element (1). If these four requirements of paragraph (b) are satisfied, then the dual representation is permissible.

A lawyer can conceivably satisfy element (1). To do so, the lawyer must “reasonably believe”²⁰⁵ the lawyer can provide each client with “competent and diligent representation.”²⁰⁶ NY Ethics Opinion 736 opines that this is rare but possible.²⁰⁷ WSBA Advisory Opinion 2223 does not give any reason why satisfying element (1) is impossible.²⁰⁸ If, as NY Ethics Opinion 736 requires, “the parties are firmly committed to

202. WASH. RULES OF PROF’L CONDUCT R. 1.7(a) (2006).

203. *Id.* at R. 1.7(b).

204. *Id.* at R. 1.7 cmt. 17.

205. *Id.* at R. 1.7(b).

206. *Id.*

207. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Ethics Op. 736 (2001).

208. *See generally* WSBA Advisory Op. 2223, *supra* note 1.

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,"²⁰⁹ it seems that a lawyer could satisfy element (1), and therefore make this dual representation permissible under RPC 1.7.

The conclusion that an attorney-mediator may represent both parties to a divorce for the purpose of drafting agreements reached after mediation implicates one more ethical consideration. Under RPC 1.12 "Former Judge, Arbitrator, Mediator or Other Third-Party Neutral,"²¹⁰ a former mediator may not "represent anyone in connection with a matter in which the lawyer participated personally and substantially . . . as an arbitrator, mediator or other third party neutral, unless all parties to the proceeding give informed consent, confirmed in writing."²¹¹ Furthermore, RPC 1.12(b) prohibits a lawyer from negotiating for employment with any person involved as a party in a matter in which the lawyer served "personally and substantially" as a mediator.²¹² Thus, an attorney-mediator drafting documents such as those in WSBA Advisory Opinion 2223 must not negotiate for this work and must be sure to obtain the parties' informed consent, confirmed in writing.

In sum, NY Ethics Opinion 736 provides guidance that addresses WSBA Advisory Opinion 2223's factual circumstances and ethical concerns, yet leads to a conclusion opposite from that of WSBA Advisory Opinion 2223. Consistent with the Washington RPC, and as reasoned in NY Ethics Opinion 736, it is conceivable that at the conclusion of a successful mediation an attorney-mediator may draft divorce documents, including a Property Settlement Agreement, Order of Child Support, and Parenting Plan, for unrepresented parties provided:

1. The lawyer does not negotiate with the parties for the document drafting work;
2. The lawyer reasonably believes he or she can provide each client with "competent and diligent representation" in the instant matter;
3. The parties are fully informed of the implications of the lawyer-mediators' drafting of the documents; and

209. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 736 (2001).

210. WASH. RULES OF PROF'L CONDUCT R. 1.12 (2006).

211. *Id.* at R. 1.12(a).

212. *Id.* at R. 1.12(b).

4. The lawyer obtains informed consent from both parties in writing.

WSBA Advisory Opinion 2223's unqualified prohibition of the drafting of these documents does not consider this possibility.

WSBA Advisory Opinion 2223 does not discuss NY Ethics Opinion 736.²¹³ Instead, WSBA Advisory Opinion 2223 relies solely on TX Ethics Opinion 583.²¹⁴ WSBA Advisory Opinion 2223 does not explain why TX Ethics Opinion 582 is its favored authority, nor why other jurisdictions' opinions do not warrant examination.²¹⁵ But as this section shows, consistent with the Washington RPC, WSBA Advisory Opinion 2223 could have relied on other opinions—such as New York's—to have reached a different conclusion. WSBA Advisory Opinion 2223 remains incomplete without an examination of all extra-jurisdictional authority.

V. WSBA ADVISORY OPINION 2223'S PRACTICAL RAMIFICATIONS

WSBA Advisory Opinion 2223 has several serious practical ramifications for mediation in Washington. First, Washington's attorney-mediators may need to alter their current mediation practice. Some attorney-mediators may have previously believed it was ethically permissible to draft divorce documents at the conclusion of mediation.²¹⁶ Since WSBA Advisory Opinion 2223's issuance, however, these attorney-mediators may have altered their practice in an attempt to comply with the Committee's opinion. Some attorney-mediators may no longer memorialize the agreements reached in the mediation, but instead require the parties to obtain their own independent legal counsel to formalize their agreement. This practice can be expensive, inefficient, and prone to error. Parties will now have to hire not only a mediator to facilitate the agreement, but also two additional attorneys to draft any agreement reached. This new procedure increases the cost of divorce mediation significantly. Involving more attorneys is also inefficient, especially compared to a practice in which the mediator can memorialize

213. *See generally* WSBA Advisory Op. 2223, *supra* note 1.

214. *Id.*

215. *Id.*

216. KOVACH, *supra* note 5, at 276; *see also supra* note 6 (detailing the Washington attorney-mediator community's concerns regarding WSBA Advisory Opinion 2223's practical implications); *supra* Part IV.B.2 (examining the many jurisdictions where this ethical issue has arisen, thus indicating that drafting these documents at the conclusion of a mediation for unrepresented parties is a common mediation practice).

the parties' agreement at the conclusion of the mediation, and the parties can leave knowing that their dispute is conclusively resolved. Furthermore, more hands drafting the agreement will likely lead to increased error. The mediator, having just worked with the parties, will likely have the best grasp of how to memorialize what the parties want.²¹⁷ Requiring another attorney to draft the documents—an attorney who perhaps was not present at the mediation and likely will be drafting some time after the mediation's conclusion—increases the chance that the drafted document will not accurately reflect the parties' resolution.

Second, WSBA Advisory Opinion 2223 has potential social implications. As discussed in Part II.A, self-determination is a critical aspect of mediation. By prohibiting parties from choosing their attorney-mediator as the one to memorialize their agreement, WSBA Advisory Opinion 2223 interferes with the parties' ability to fully direct their own mediation. Furthermore, WSBA Advisory Opinion 2223 could have serious implications for access to justice. Many parties seek divorce mediation because it is a lower cost alternative to traditional adversarial litigation. It may be very difficult, if not impossible, for some clients to afford to pay for a mediator and an independent attorney.

Altering common mediation practice to comply with WSBA Advisory Opinion 2223 will have significant practical consequences. Before taking such a step, Washington's attorney-mediators deserve comprehensive guidance concerning the ethics of this issue. WSBA advisory opinions are advisory only.²¹⁸ Yet as discussed in Part III.A, attorneys look to the WSBA advisory opinions for direction in understanding their ethical obligations.²¹⁹ WSBA Advisory Opinion 2223's practical ramifications make it particularly important that WSBA Advisory Opinion 2223 be clear, well-reasoned, and well-supported. In light of its practical effects, the Committee should revisit WSBA Advisory Opinion 2223 soon.

VI. WSBA ADVISORY OPINION 2223 SHOULD BE REVISITED

Given its flaws, WSBA Advisory Opinion 2223 should be revisited. In this reconsideration, the Committee should thoroughly examine all relevant comments to the RPC. Specifically, the Committee should discuss whether RPC 1.7 comment 17 and RPC 1.7 comment 28 have

217. KOVACH, *supra* note 5, at 206 ("In most instances, the mediator is in the best position to know and record the material aspects of the agreement.").

218. See *WSBA Advisory Op. 2223*, *supra* note 1; see also *supra* note 72 and accompanying text.

219. See *supra* note 79 and accompanying text.

bearing on the Committee's decision. The Committee should also consider guidance from the multitude of other jurisdictions that have faced the same question. The Committee should carefully examine which extra-jurisdictional authority the Committee wishes to rely on. The Oregon disciplinary cases cited in WSBA Advisory Opinion 2223 do not provide the authority the opinion needs. Additionally, TX Ethics Opinion 583 is only one of many opinions that discuss this ethical situation. Other jurisdictions' decisions are also relevant—for example, NY Ethics Opinion 736 grapples with similar facts and ethical concerns. A detailed analysis of both sides of the debate will provide Washington's attorney-mediators with a more complete opinion, and will provide answers to many of the questions that WSBA Advisory Opinion 2223 leaves open.

The Committee should consider an alternative conclusion to the inquiry in WSBA Advisory Opinion 2223. As discussed in Part IV.A, RPC 1.7 prohibits representation of a client when the representation involves a concurrent conflict of interest, which exists when (1) the representation of one client is directly adverse to another client, or (2) there is a significant risk client representation will be materially limited by the lawyer's responsibilities to another.²²⁰ Part IV.A.2 explored how, at the conclusion of a mediation after the parties have reached complete agreement resolving all disputed issues, the parties' interests may no longer be "adverse" because the parties now share the common goal of memorializing their agreement. If, however, the parties do still qualify as "adverse," or there is a risk the lawyer's responsibilities to another will materially limit the representation, RPC 1.7(a) cannot be read in isolation. RPC 1.7(b) details four elements that, if satisfied, permit representation despite a concurrent conflict of interest. As examined in Part IV.B.3, if certain conditions are satisfied it is possible that an attorney-mediator may reasonably believe he or she can provide "competent and diligent" representation to both clients, obtain written informed consent from both parties, and therefore satisfy RPC 1.7(b)'s requirements. In this perhaps rare, but not impossible, situation, the attorney-mediator's drafting of the documents described in WSBA Advisory Opinion 2223 would not violate RPC 1.7. Such a conclusion is aligned with the reasoning in NY Ethics Opinion 736.

WSBA Advisory Opinion 2223 addresses a particularly thorny ethical conundrum—one grappled with in a multitude of jurisdictions. The Committee may have responses to the questions this Comment raises—

220. WASH. RULES OF PROF'L CONDUCT R. 1.7 (2006).

responses that support WSBA Advisory Opinion 2223's conclusion. But WSBA Advisory Opinion 2223 itself does not provide the answers to these questions. Without a more thorough discussion of the issue, Washington's attorney-mediator community is left to ponder this matter without clear guidance.

WSBA Advisory Opinion 2223 has many practical ramifications, including implications for mediation cost and efficiency, mediation agreements' accuracy, party self-determination, and access to justice. Furthermore, while WSBA Advisory Opinions are "advisory only," Washington attorneys turn to these opinions for guidance on their ethical obligations.²²¹ This reliance makes it particularly important that WSBA Advisory Opinions are accurate, comprehensive, and clear. In light of WSBA Advisory Opinion 2223's wide-reaching effects, and its important role in providing ethical guidance to Washington attorney-mediators, the Committee should revisit WSBA Advisory Opinion 2223 soon.

CONCLUSION

Advisory Opinion 2223 of the Washington State Bar Association's Rules of Professional Conduct Committee has created concern in the Washington mediation community.²²² WSBA Advisory Opinion 2223 reaches the unqualified conclusion that attorney-mediators who draft legal documents such as Property Settlement Agreements, Orders of Child Support, or Parenting Plans for unrepresented parties are in violation of the Washington Rules of Professional Conduct. Drafting such documents, however, is common in mediation practice both in Washington and throughout the country. Washington's attorney-mediators are therefore concerned about how WSBA Advisory Opinion 2223 affects both their mediation process and their ability to provide comprehensive service to mediation clients. WSBA Advisory Opinion 2223 creates confusion because it contains two significant flaws: (1) an omission of relevant comments to the RPC, and (2) an inconsistent reliance on extra-jurisdictional authority. Given WSBA Advisory Opinion 2223's practical ramifications, the Committee should reexamine this opinion. In doing so, the Committee should thoroughly discuss all applicable RPC comments and seek guidance from the many other jurisdictions that have faced the same question. The Committee should be open to the possibility that these considerations may lead to a

221. *See supra* note 72 and accompanying text.

222. *See supra* note 6.

different conclusion. It is only through such an analysis that the Committee can provide Washington's attorney-mediators with the guidance necessary to best serve mediation parties while complying with their ethical obligations.