

The questions contained in the original text of the mediator's letter have been reformatted for appearance & clarity.

THE QUESTION:

Case Scenario

Douglas Stern, an authorized agent for Tough Financing, Inc., has brought an action in small claims court against Mary Naive for failure to make monthly payments as agreed in a contract and note executed several months ago. Both the contract and the note are standard documents used by the consumer lending company throughout the State of Florida. The claim is for \$1250. At a pre-trial session, Mary admits to owing the money. The judge asks the defendant if there is any reason why he should not award a judgment to the plaintiff. Mary responds that she would like to work out a payment schedule so the judge orders a session of mediation.

At the mediation session, Al Nicely, the mediator, scans the agreements and learns that Mary has obligated herself to pay interest at the rate of 29.5% per year if the payments are in arrears. The mediator also learns that Doug Stern told Ms. Naive in the hallway before the court session that she should avoid a judgment because it would hurt her credit. Mr. Nicely is aware that interest on judgments accrues at the rate of 8% per year. Ms. Naive states that she can afford to make payments of \$110 per month and the plaintiff quickly accepts the offer.

Question 95-002A

Would it be permissible for the mediator to ask: *Are you aware that the monthly payments do not cover the interest as it is accruing and you will be paying on this loan forever?*

Question 95-002B

Would it be permissible for the mediator to ask: *Ms. Naive, are you aware that if a judgment were entered against you, the interest would be reduced from 29.5% to 8%?*

Question 95-002C

Would a mediator be interfering with a contractual relationship by pointing out the above to the defendant?

Question 95-002D

While it is known that a mediator should not advise, can a question be asked even if the framing of the question tends to advise or inform one or both of the parties involved?

Sincerely,

Certified County Mediator,
Northern Division

Summary of The Opinion:

95-002A It is the opinion of the panel that by asking the question as framed, the mediator would misrepresent material facts in the course of conducting a mediation, which if done intentionally or knowingly would be an ethical violation.

95-002B It is the opinion of the panel that by asking this question a mediator would violate the prohibition relating to the provision of legal advice.

95-002C The panel is of the opinion that the questions you raised are of a legal rather than an ethical nature and therefore are not within the jurisdiction of the panel.

95-002D It is the opinion of the panel that it is improper for a mediator to provide legal advice by any method during the mediation.

AUTHORITY REFERENCED:

Rules: Florida Rules for Certified and Court-Appointed Mediators -
10.020(b), 10.020(d)(1), 10.020(d)(2), 10.020(d)(5), 10.060(c), 10.070(a),
10.070(a)(1), 10.090(a), 10.090(b).

Opinion 95-002A

The mediator's role as defined in Rule 10.020(b) includes identifying issues, reducing obstacles to communication, and maximizing alternatives to help the parties reach a voluntary agreement. In so doing, however, the mediator must maintain impartiality and refrain from giving legal advice.

In question 95-002A, the mediator asks one party to verify knowledge of inaccurate information. Thus, the mediator's question is false, leading and inappropriate. Based on the figures in the case scenario, the respondent will not pay on the loan forever if she decides to pay the amount in the proposed offer. Raising this question would, if done intentionally or knowingly, constitute a violation of rule 10.060(c) by misrepresenting material facts in the course of conducting a mediation. However, even in the event that the mediator were faced with information which demonstrated that the party would be paying on a loan forever, the question as framed would violate rule 10.070(a)(1), which requires that mediators maintain impartiality while raising questions for the parties to consider as to the fairness and equity of settlement proposals.

Opinion 95-002B

While the mediator's inquiry is indeed in question form, it is designed to advise the party about her legal options, a role that is appropriate for an attorney, but inappropriate for a mediator. Providing such advice in the form of a question does not lessen the impropriety of the act; as such, the mediator violates rule 10.090(a) & (b) by providing information the mediator is not qualified by training to provide and by failing to advise the participant to seek independent legal counsel.

Opinion 95-002C

As submitted, question 95-002C asks the advisory panel to give legal advice; this is beyond the jurisdiction of the panel and thus inappropriate.

Opinion 95-002D

It is improper for a mediator to provide legal advice by any method within the scope of a mediation, whether such advice be by statement, question or any other form of communication.

The mediator, while fulfilling the role of reality tester, must be aware of, and consciously avoid crossing the line between partiality and impartiality, neutrality and non-neutrality. The mediator may, however, often obtain the desired information if the question is framed more generally. It appears to the panel that the mediator wishes to be certain that the party is aware of the alternatives available for satisfaction of the debt -- fulfillment of the contracted payments or payment through a judgment. It is the opinion of the panel that the mediator can obtain that information by asking the following: "Is interest levied on a judgment? Do either of you know?" These two questions set the stage for the parties to provide information to the mediator and to each other without placing the mediator in the position of providing that information. In so doing, the mediator assists in maximizing the exploration of alternatives, and adheres to the principles of fairness, full disclosure, self determination, and the needs and interests of the participants [rule 10.020(d)(1), (2) and (5)], while honoring the commitment to all parties to move toward an agreement [rule 10.070(a)].

Date

Charles Rieders, MQAP Chair