MQAP 96-003

Advisory Opinion

January 2, 1997

MEDIATOR QUALIFICATIONS ADVISORY PANEL c/o Dispute Resolution Center • Supreme Court Building • Tallahassee, FL 32399-1905

THE QUESTION:

In a previous query, I asked, "Is a mediator who becomes aware that a plaintiff in a wrongful death action is making no claim for loss of consortium, which claim would appear to the mediator to be appropriate under the circumstances, bound to inform that party of this matter?" (95-005C)

Your reply was, "It is the opinion of the panel that it is an ethical violation for a mediator to give legal advice to a party." (95-005C)

I pose the following in the context of my previous question. Please answer assuming that plaintiff is represented by counsel, and then answer assuming plaintiffs are pro se.

A. Rule 10.090(a) permits a mediator to "provide information" that the mediator is "qualified by training or experience to provide". I am a member of the Florida Bar.

1. May I tell the plaintiff of the right to make a claim for a loss of consortium without advising that the claim should be made?

2. May I ask plaintiff why the claim is not being made?

3. If I am not permitted to inform, or to ask the questions as posed above, how might I learn whether I should "advise the participants to seek independent legal counsel" as required by Rule 10.090(b)?

For the remaining questions, please assume that plaintiff has made a claim for bodily injury, and that plaintiff's spouse is present at the mediation conference. Examination of the pleadings shows that plaintiff's spouse is not a party, and that no claim for a loss of consortium has been made.

B. Plaintiff and spouse have pointedly discussed damage to their marital relationship, and the plaintiff is now ready to accept the settlement offered by the defense. How may I learn whether the "party (plaintiff) does not understand or appreciate how an agreement may adversely affect legal rights or obligations" of the non-party spouse? Plaintiff's spouse's rights are derivative, and will be forfeited if the agreement is signed.

C. Rule 10.060(a) requires that, "A mediator shall assist the parties in reaching an informed ... settlement." How might I assure that the plaintiff understands the legal consequences for plaintiff's spouse if plaintiff signs the settlement agreement?

D. Rule 10.060(e) requires that, "A mediator shall promote consideration of the interests of persons affected by actual or potential agreements and who are not represented at the bargaining table." Plaintiff's spouse is not a party. Counsel represents only the plaintiff

according to the pleadings filed. Is plaintiff's spouse "represented at the bargaining table"? If not, how do I "promote consideration of the interests" of the non-party spouse in receiving damages for loss of consortium?

Again, I appreciate your time and thoughtful consideration of my requests.

Your answers will be helpful .... It seems we will have to explore a good deal more before we are certain of just how much of the adversarial model will be imported into mediation conferences. Just what is meant by Rule 10.020(b)'s declaration that mediation is a "nonadversarial process"?

How much deference must be given by mediators to the idea (clearly drawn from the adversarial trial model) that legal issues (such as defenses and claims) may only be raised by the parties, and never by the third party? If mediation is intended to be truly not adversarial, then the role of the third party should be markedly different than that of a judge in an adversarial trial system.

Sincerely,

County, Family & Circuit Certified Mediator
Central Division

SUMMARY OF THE OPINION:

A.1. No, a mediator may not inform a plaintiff, regardless of whether the plaintiff is represented, of a right to make a claim for loss of consortium because that would be providing legal advice.

A.2. No, a mediator may not ask directly why the claim is not being made, regardless of whether the party is represented. If unrepresented, however, the mediator should determine if the parties are competent to enter into negotiations and reach an informed agreement.

A.3. The mediator is permitted to ask questions such as "Have you consulted legal counsel? Do you wish to?" and should be attuned to statements made by any party which indicates a lack of understanding or appreciation of how an agreement might adversely affect legal rights or obligations.

B. See A.3 above

C. This question may be based on a faulty legal principle, namely, that the plaintiff spouse's claim is automatically precluded. If the parties are represented, the mediator must assume competence by counsel and that the ramifications of any agreement have been explained. If the parties are unrepresented, refer to the answers provided above.

D. The mediator may ask if counsel represents both spouses. It is also possible for the spouse who is present to participate in the mediation. It is unclear from the question whether the spouse is participating or there merely for moral support.

AUTHORITY REFERENCED:

Rules: Florida Rules for Certified and Court-Appointed Mediators - 10.060(a), 10.060(b), 10.070(a)(1), 10.070(b)(4), 10.090(a), 10.090(b), 10.110(a)(3), (b)(1), (b)(2).

OPINION:

A.1. No, a mediator, even one who is a member of The Florida Bar and theoretically is "qualified by training or experience," may not inform a plaintiff, regardless of whether the plaintiff is represented or not, of a right to make a claim for loss of consortium because that would be in the nature of providing legal advice, not merely providing information. Rule 10.090(a). A lawyer mediator is specifically precluded from representing either party during the mediation. Rule 10.070(b)(4). The appropriate course of action is found in 10.090(b) which states: "When a mediator believes a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, **the mediator shall advise the participants to seek independent legal counsel."** [emphasis added] Implicit in this rule is that a mediator shall not provide the advice him or herself. One of the reasons a mediator may not provide advice is that advice inevitably will favor one party over another and thus, by its very nature, advice can not be provided while maintaining impartiality. Rule 10.070(a)(1).

2. No, a mediator may not ask directly why the claim is not being made regardless of whether the party is represented. If unrepresented, a mediator, however, should determine if the parties are competent to enter into negotiations and reach an informed agreement. See Rule 10.110(a)(3), (b)(1), and (b)(2) and Rule 10.060(a). It is the opinion of the Advisory Panel that the mediator is permitted to ask questions such as "Have you consulted legal counsel? Do you wish to? Do you feel comfortable that you have considered all possible legal rights and responsibilities in this situation?" If the party is represented, the mediator must assume that counsel is competent and has considered all relevant issues and causes of action. It is improper for a mediator to substitute his or her judgment for that of counsel.

3. The standard to be applied under Rule 10.090(b) is "when a mediator **believes** a party does not understand or appreciate how an agreement may adversely affect legal rights or obligations." [emphasis added]. Thus, the rule is intended to prescribe the course of action a mediator must take when the mediator becomes concerned, for whatever reason, about a party's understanding of his or her rights and obligations and to make clear that the mediator's obligation under such circumstances is not for the mediator to provide the party with advice, but rather to suggest that the party obtain such independent legal advice. It is the opinion of the Advisory Panel that the mediator is permitted to ask questions such as those listed above. In addition, the mediator should be attuned to statements made by any of the parties which indicate a lack of understanding or appreciation of how an agreement might adversely affect legal rights or obligations.

B. In order to answer this question, the Advisory Panel was required to make several assumptions: 1) the parties are unrepresented (because if the parties are represented, the mediator is under no obligation to substitute the mediator's judgment for the parties' counsel);

2) the plaintiff's spouse signed the agreement and the agreement contains a specific release of all claims, including derivative claims (because if the plaintiff's spouse as a non-party does not sign the agreement and there is no specific release, it is unclear whether in fact the spouse has relinquished any future claim). Having made those assumptions, we refer you to opinion A.3. above. In addition, it should be noted that the parties are entitled to exercise self-determination in making an agreement which includes the right not to seek independent legal counsel and to enter into agreements which may or may not be "the legally correct" result. In fact rule 10.060 is titled "Self-Determination" and specifically states: "A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties themselves." Rule 10.060(a), and "A mediator . . . shall not make substantive decisions for any party to a mediation process." Rule 10.060(b).

C. This question may be based on a faulty legal principle, namely, that the plaintiff spouse's claim is automatically precluded. Again, if the parties are represented, the mediator must assume competence by counsel and that the ramifications of any agreement have been explained. If the parties are unrepresented, please refer to the answers provided above.

D. In this final question, you ask whether the plaintiff's spouse is represented at the table. Under the scenario as presented, the spouse is present. The mediator may ask if counsel represents both spouses, as both spouses may be represented even though the pleadings indicate that counsel only represents the plaintiff. It is unclear from the scenario as presented whether the spouse is participating in the mediation or is there merely as moral support. When a party (or parties) is represented, competency of counsel is assumed.

January 7, 1997
Date

Charles M. Rieders
Charles Rieders, MQAP Chair