

January 24, 2011

The Questions:

Committee Note: The MEAC recognizes that the Residential Mortgage Foreclosure Mediation (RMFM) Program was designed to respond to a crisis affecting lenders, borrowers and the courts. As such, some rules and procedures have been relaxed to assist in implementing this Program only and would not apply to any mediation held outside the Program.

I am a certified mediator wishing to participate in the Residential Mortgage Foreclosure Mediation (RMFM) Program. I have several ethical questions. The first three are of general application to all Circuits' RMFM Programs, since they all seem to share these features. The last questions pertain specifically to the Administrative Order in one particular Circuit (although many of the concerns are mirrored in other Circuits' AOs).

1. Is the description of the method of mediator compensation in the Administrative Order sufficient to meet the mediator's obligation under Rule 10.380(c), Fla. R. Med., which requires the mediator to provide, in advance of the mediation, a written disclosure of mediator's fees and costs? (See also, Rule 1.720(g), Fla. R. Civ. P.)
2. Under Fla. R. Civ. P. 1.730, is it sufficient for a mediator to complete a Mediator's Report and give it to the RMFM Program Manager (as an agent of the court) or must the mediator also file the report with the Clerk of Court directly?
3. Under Fla. R. Civ. P. 1.730(a), a mediator is required to report to the court the existence of an impasse (i.e., that mediation was held but no agreement reached); under Rule 1.730(b), a mediator is required to report the existence of an agreement. In many of these RMFM mediations, the parties may reach a deal involving an interim repayment agreement (a "trial payment plan" or "plan of action"). Depending on other contingencies (such as whether the borrower makes the interim payments timely), this interim agreement may lead to a final, permanent modification of the note sued on. Because of the interim nature of the agreement frequently reached, one party (typically the Plaintiff/Lender) may, despite the signatures on the agreement, nonetheless ask the mediator to report that an impasse has occurred. (This is typically done for litigation strategy purposes: in the event of a default on the interim repayment plan, the Plaintiff/Lender need not refile the dismissed action.) Typically, in these cases, the borrower wants the mediator to report this outcome as an agreement. How may or must the mediator report this outcome to the Court? Does the answer vary if the parties have agreed to ask the Court to toll or abate the action pending successful completion of the interim or "trial" payment plan?

4. My last questions pertain specifically to one Circuit’s RMFM Administrative Order, although there are similar features in many other Circuits’ AOs. First, the AO specifically refers qualifying foreclosure actions to mediation administered by the Program Manager (thus, these mediators are subject to Fla. R. Med., as the mediators must be certified and are all court-appointed). The AO further provides, among other things, for the “mediator or a representative of the Program Manager” to take roll of those in attendance, not just to determine who is there but also to determine whether individuals with required settlement authority are there. Thus, in pertinent part, the AO provides:

“At the time that the mediation is scheduled to physically commence, the assigned mediator or a representative of the Program Manager will enter the mediation room prior to the commencement of the mediation conference and, prior to any discussion of the case in the presence of the mediator, will present a written roll to be signed by each party (the borrower, the borrower's counsel of record, if any, the plaintiff's counsel, and the plaintiff's representative with full authority to settle) to indicate their attendance. If the plaintiff's representative appears via telephonic means that must be notated on the written roll call by the mediator or the representative of the Program Manager. If anyone that is required to be present is not present, that party will be reported by the mediator or the representative of the Program Manager as a non-appearance by that party on the written roll. If the person designated on Form A by the Plaintiff as having full authority to settle is not present, the Program Manager will report that the plaintiff's representative did not appear on the written roll as a representative with full settlement authority as required by this administrative order. If the borrower, the borrower's counsel, if any, the plaintiff's counsel, or the plaintiff's representative are not present, the mediator or the representative of the Program Manager will advise the Program Manager and the mediation will be cancelled. The written roll and communication of authority to the Program Manager is not a mediation communication.”

The last sentence appears to be the Circuit Court determining what may or may not be a mediation communication; of course, that term has special significance under the Florida Mediator Confidentiality and Privilege Act, in which the Legislature has defined the term (Fla. Stat. § 44.403(1)), and that meaning appears to have been adopted by the Supreme Court in Fla. R. Med. 10.360(a) – see, e.g., MEAC Opinions 2006-003, 2006-008, and 2007-001. I recognize that whether a Court may order something is beyond MEAC’s purview; likewise, I do not ask what constraints there may be on a “representative of the Program Manager” (unless that representative is the mediator appointed in the case). I am also aware, from the cited MEAC opinions, that a mediator may report the physical nonappearance of a person. Thus, my questions:

- a. Since a mediator necessarily must learn the identity of the persons in attendance by asking the persons either to identify themselves orally or to present photo identification or the like, i.e., via a mediation communication as defined in Fla. Stat. § 44.403(1), please confirm that mediators may nonetheless report the physical absence of any person expected to attend the mediation.

- b. If a person listed on the Form A (a pre-mediation designation by the Plaintiff/Lender of who will attend with the requisite settlement authority) is not present, but another person is substituted by Plaintiff/Lender, must/may the mediator report this to the Program Manager? Does the answer vary based on whether the parties consent to the mediator making such a report?
- c. In the situation in (b) above, must/may the mediator cancel the mediation (assuming that such cancellation is within the mediator's ambit, rather than the Program Manager's) or may the mediator allow the mediation to proceed, with the parties' agreement? (Note: to persuade the Defendant/borrower to agree to move forward with the mediation, one would expect the Plaintiff/Lender to advise the mediator and the parties that the substituted person has the same settlement authority as the person designated on the Form A. – i.e., via a mediation communication.)

Certified County and Circuit Civil Mediator
Central Division

Authorities Referenced

Rules 10.310(a), 10.380(c), 10.500, 10.510, 10.520, Florida Rules for Certified and Court-Appointed Mediators

MEAC Opinions 2007-002 and 2010-007

Florida Supreme Court Administrative Orders AOSC09-54 and AOSC10-57

Rules 1.720(b) & (g) and 1.730(b), Florida Rules of Civil Procedure

Summary

Questions regarding mediator fees, reports to the court, participation of parties without full authority to settle in general and in connection with the Residential Mortgage Foreclosure Mediation (RMFM) Programs are examined, explained and responses given in the six questions posed in this opinion.

Opinion

Answer to Question One: Yes, Supreme Court of Florida Administrative Orders, AOSC09-54, AOSC10-57 and the revised Model Administrative Order (MAO), provide sufficient detail to satisfy the requirements of rule 10.380(c), Florida Rules for Certified and Court-Appointed Mediators and rule 1.720(g), Florida Rules of Civil Procedure.

Answer to Question Two: It is sufficient to give the mediator's report to the RMFM Program Manager (PM) or the PM's designated agent for receiving the Mediator Report. Section 20 of the MAO, designates the PM as the responsible party for monitoring the satisfaction with the Program, as well as reporting statistics to aid in evaluating the Program to the chief judge in each circuit. Therefore, the court intended for the PM, as an agent of the court, to be responsible for the oversight of having mediation reports filed appropriately in order for them to capture statistics accurately and efficiently.

Answer to Question Three: Any settlement document signed by the parties outlining responsibilities of the parties is an agreement pursuant to Fla. R.Civ. P. 1.730(b) and, as such, a mediation report reflecting an agreement was reached shall be filed with the court. (See MEAC Opinions 2010-007 and 2007-002) If a party asks a mediator to report an impasse despite the existence of a signed agreement and the mediator acquiesces, the mediator is placing himself in a precarious position that may ultimately result in a disciplinary action. (See Rules 10.500, 10.510 and 10.520) The Committee notes that the answer will not vary if the parties have agreed to toll or abate the action pending successful completion of the agreement reached.

Answer to Question 4A: It is common knowledge that a mediator may report physical non appearance of a party to the court and either terminate or adjourn the mediation. (See Fla. R. Civ. P. 1.720(b)) The MAO provides for the PM to take roll and confirm that all parties and representatives are present and that the appropriate parties have full authority to settle. However, in this specific instance, it seems the administrative order quoted is not in compliance with the newly revised MAO which was issued along with AOSC10-57. In the newly revised MAO at Section 13 (see Page A-9), it is only the PM who takes the roll and reports non attendance to the court, not the mediator.

Answer to Question 4B: See the response to 4A above. However, if the mediator were to find out this information after the PM's roll call and during the course of the mediation session this knowledge would be as a result of a mediation communication and would be confidential. For purposes of the RMFM Program, it would make no difference if the parties consented.

Answer to Question 4C: If the parties agree to move forward despite the appearance of a substitute representative with full authority to settle, the mediator may allow the mediation to go forward pursuant to Rule 10.310(a) Self-Determination.

Date

Beth Greenfield-Mandler, Committee Chair