

April 15, 2011

**The Question:**

In discussing these MEAC opinions with other mediators, there remains an area for which additional guidance would be appreciated, that being the apparent conflict between FRCP 1.720 (c), which provides that the mediator may adjourn the mediation conference at any time and may set times for reconvening the adjourned conference, and MEAC 2001-004, which provides that a mediator should declare an impasse upon request of a party.

Although the issues have relevance to a broad range of mediation situations, I'd like to use the RMFMP as a point of reference for my inquiry.

It is quite common for a mediator to be faced with one of a number of scenarios in an RMFMP mediation which present an obstacle to the parties exercising their right of self determination. Among those scenarios are

- a) The lender's representative advises that the borrowers' financial package was not forwarded in a timely fashion such as would allow a decision regarding a modification, short sale, or waiver of deficiency (for purposes of this inquiry, I believe it is irrelevant as to whether the cause is the borrowers failure to timely submit the package, or a failure of the lender's counsel to forward the package to their client).
- b) Lender's representative advises that because of the passage of time since financials were submitted, supplemental documentation is required from the borrower in the form of more recent pay stubs, bank statements, or the like.
- c) Despite having advised the Program Manager that the lenders representative has authority to modify the loan or otherwise settle the case, after commencement of the session the representative advises that the financial package must be submitted to an investor or underwriter prior to any final decision being made.
- d) The borrower is not seeking a modification of the loan but rather a short sale or deed in lieu with deficiency waiver, and despite the representation to the Program manager that the representative has authority to settle the case, the mediator is advised that the representative has authority only to discuss modification of the loan, and that other departments/representatives deal with short sale or waiver of deficiency requests.

Putting aside all issues of fault, or blame, or whether the parties are in compliance with the mediation referral order (in the case of the RMFMP the AO), it becomes apparent that the parties either cannot meaningfully discuss resolution of the problem, or that although there can be significant discussions regarding settlement, the lender is unable to complete its evaluation and make a decision regarding resolution of the case.

Under these circumstances, it would seem appropriate to adjourn the mediation until another date. Frequently, however, the lender will “demand” an impasse be declared.

The question is whether the mediator may, without comment or disclosure of the circumstances involved, adjourn (continue) the mediation even though one of the parties has requested that an impasse be declared or if the mediator is compelled declare an impasse, terminate the mediation, and report the lack of an agreement to the court.

Rule 1.720 (c) would indicate that the mediator has the authority to adjourn the mediation conference. The rule makes no reference to a requirement that the parties “consent” to the continuation.

MEAC 2001-004, however, includes the clear statement that “A mediator should declare an impasse upon request of a party”.

Rule 10.420 (b) of the Rules for Certified and Court-Appointed Mediators references adjournment upon agreement of the parties in subsection (1), but includes adjournment as an option under subparagraphs (2) and (3). Focusing on 10.420 (b) (3), which allows the mediator to “adjourn or terminate the mediation if the mediator believes...any party is unable or unwilling to participate meaningfully in the process”, I would submit that if the mediator’s ability to adjourn the session is predicated on agreement of the parties and can therefore be invoked only under subsection (1), then the use of the term “adjourn” in both subsections (2) and (3) would be mere surplusage and without meaning, contrary to the general rules of statutory construction.

I do note that Rule 10.310 (b) of the Rules for Certified and Court-Appointed Mediators provides that “A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation” (emphasis added), but that begs the issue of whether the invocation of Rule 1.720 (c) and Rule 10.420 (b) (3) is in fact improper, or instead falls under the same circumstances as a referral order itself, which may have been entered over objection of one of the parties.

I would submit that there is a difference between a scenario in which one of the parties determines that they are unwilling to negotiate further with the other party, and one in which for reasons which may well be legitimate, it is clear that the parties are unable to engage in meaningful negotiations on that day, but would be able to do several days later. In the former scenario, MEAC 2001-004 is clearly applicable. I am not quite as comfortable as to the application of that opinion where the parties are simply unable to fulfill the mandate of the

referral to mediation at the time of the initially scheduled session, which is not the context under which the opinion in 2001-004 was rendered.

Certified County and Circuit Court Mediator  
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### **Authorities Referenced**

Rule 1.720 (c), Florida Rules of Civil Procedure  
Rules 10.310(a)-(d) and 10.420 (a) and (b)(1)-(3), Florida Rules for Certified and Court-Appointed Mediators  
MEAC Opinions 1995-009, 2001-004 and 2010-014

### **Summary**

The MEAC remains confident in its previous decisions, most recently 2010-014. Upon the request or demand of a party at the mediation, the mediator must declare an impasse. Mediators must act in accordance with the Florida Rules for Certified and Court-Appointed Mediators and must conduct the mediation so that the principles of self-determination are protected. However, a mediator should not declare an impasse under this scenario before the opening statement is delivered pursuant to Rule 10.420(a) and should attempt to explore options or alternatives to impasse with the party requesting same.

### **Opinion**

Most recently, the MEAC has issued Opinion 2010-014 in which it remains confident and states:

“A mediator does not have the authority to compel attendance at subsequent mediation conferences when the parties and/or counsel have made it clear that they wish to end their further participation in mediation and clearly object to an adjournment and scheduling of an additional mediation session. While rule 1.720(c), Florida Rules of Civil Procedure, grants a mediator the procedural flexibility to adjourn and continue mediation, the rule does not bestow upon the mediator the unilateral authority to compel attendance”. [emphasis added]

In the instant case, the mediator is questioning whether this scenario would also cover instances in which the adjournment is for the purpose of allowing additional time for the gathering of additional or missing information rather than the parties’ inability to reach a decision after negotiations. Regardless of the reasons of the mediator for wanting to adjourn, “It would therefore be inappropriate for the mediator to substitute his/her judgment for that of the parties and/or their counsel”. (MEAC 2010-014)

However, a mediator must also adhere to his or her obligation under Rule 10.420(a) to conduct an orientation session upon the commencement of mediation. A mediator is bound to deliver an opening statement (“shall describe the mediation process and the role of the mediator”) to the participants. See MEAC Opinion 95-009, which states, among other items: “When the mediation is court-ordered, the parties are required to appear at mediation. If the parties refuse to participate in the orientation phase, the mediator may report to the court the lack of appearance by the party or parties”.

Further, the mediator must consider his or her role as defined in Rule 10.220, “The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate decision-making authority, however, rests solely with the parties”. A mediator should attempt to take advantage of the opportunity to discuss possible alternatives to impasse with the parties during the orientation phase. In doing so, a mediator should make reasonable use of his or her skills to encourage further participation in the mediation without crossing the line of coercion or improper influence. Once these preliminary discussions have taken place, if the party continues to request an impasse, the mediator must honor the party’s right to self-determination and conclude the mediation by reporting no agreement without further comment or recommendation to the court.

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Date

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Beth Greenfield-Mandler, Committee Chair