

Mediator Ethics Advisory Committee c/o Florida DRC, Supreme Court Building, 500 S. Duval Street, Tallahassee, FL 32399

January 14, 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 circuit civil mediator who intends to participate in the Residential Mortgage Foreclosure Mediation (RMFM) Program. At least one judicial circuit has issued a local administrative order prescribing a specific Mediator Report that should be completed by the mediator at the completion of the mediation session. Rather than adopting the Florida Supreme Court's sample Mediator Report set forth in Exhibit 9 of Administrative Order SC09-54, local Mediator Reports require substantially more detail and, therefore, present ethical concerns about the mediator's ability to comply with Rule 1.730 of the Florida Rules of Civil Procedure, Florida Statutes Chapter 44, and Rules 10.360, 10.510, and 10.520 of the Florida Rules for Certified & Court-Appointed Mediators.

The relevant portion of one of the local judicial circuit's Exhibit 9, Mediator Report, is represented below:

OUTCOME OF MEDIATION FOR FORECLOSURE ACTIONS

Plaintiff's Representative: (print) _____

Plaintiff's Counsel (print) _____

Defendant (print) _____

Defendant represented by: _____ Pro Se Counsel: _____

The mediation conference for the above case was scheduled for _____ and the undersigned reports to the Court the outcome of mediation for said conference as follows:

_____ **Mediation Conference took place and the parties have:**

_____ **Reached a Full Settlement and completed a Mediation Agreement**

_____ **Reached a Partial Agreement**

_____ **Reached a Temporary Agreement**

_____ **Agreed for the mediation to continue and be reset**

_____ **Reached an impasse**

_____ **Reached an impasse with Plan of Action**

_____ **Mediation Conference did not take place due to:**

Timely cancellation by the parties due to:
 Settlement/Agreement or **Scheduling Conflict**
 Untimely cancellation by: **Petitioner** **Defendant**
 Plaintiff Representative or Attorney failed to appear
 Defendant Homeowner(s) failed to appear
 Other

Fees paid:
Mediator's Fee: **Paid in full** **Partial payment** **Not paid.**
Administrative fee: **Paid in full** **Partial payment** **Not paid.**

Certified Circuit Mediator

Date

As required by [Local Administrative Order] a copy of the most recently filed Form A is attached.

[Certificate of Service]

Relevant Rules and Statutes:

Rule 1.730 of the Florida Rules of Civil Procedure expressly limits the mediator's report to the following:

(a) No Agreement. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court **without comment or recommendation.** With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(b) Agreement. If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. The agreement shall be filed when required by law or with the parties' consent. A report of the agreement shall be submitted to the court or a stipulation of dismissal shall be filed. By stipulation of the parties, the agreement may be electronically or stenographically recorded. In such event, the transcript may be filed with the court. The mediator shall report the existence of the signed or transcribed agreement to the court **without comment within 10 days thereof.** No agreement under this rule shall be reported to the court except as provided herein.

[Emphasis added]

Florida Statutes, Section 44.405, expressly provides that "all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel."

Florida Statutes, Section 44.403(1), defines a “Mediation communication” as “an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation.”

Rule 10.360(a) of the Florida Rules for Certified & Court-Appointed Mediators restricts the mediator’s ability to disclose information revealed during a mediation as follows: “A mediator shall maintain confidentiality of **all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.**” [Emphasis added]

Rule 10.510 of the Florida Rules for Certified & Court-Appointed Mediators states: “A mediator shall be candid, accurate, and fully responsive to the court concerning the mediator’s qualifications, availability, and other administrative matters.”

Rule 10.520 of the Florida Rules for Certified & Court-Appointed Mediators states that “A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.”

For purposes of each question below, assume that the parties have not authorized the mediator to reveal communications made during the mediation conference.

Question 1:

Form A of the Supreme Court’s Administrative Order, as well as the Form A of at least one local judicial circuit, requires a Plaintiff’s Counsel to make certifications regarding (1) Origination of Note and Mortgage, (2) Status of Residential Property, (3) Pre-suit Mediation, and (4) Plaintiff’s Representative at Mediation. The Form A is prepared prior to and in furtherance of the mediation conference. Does a completed Form A fall within the definition of a “mediation communication” as defined by Florida Statute 44.403?

Question 2:

Pursuant to the Supreme Court’s Administrative Order, as well as the conditions of at least one judicial circuit’s Administrative Order, the Plaintiff’s Counsel is required to file a copy of the Form A with the Clerk of Court. The Supreme Court’s Administrative Order and the local judicial circuit’s administrative order require the mediator to attach a “copy of the most recently filed Form A” to the Mediator Report. If the answer to Question 1 above is yes, may the mediator attach a copy of the completed Form A to the Mediator Report notwithstanding the limitations set forth in Rule 1.730 of the Florida Rules of Civil Procedure and the other rules and statutes referenced above?

Question 3:

In light of the rules and statutes referenced above, particularly Rule 10.360 of the Florida Rules for Certified & Court-Appointed Mediators which directs a mediator to maintain confidentiality of **all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties**, may a mediator file a Mediator Report revealing the identity of the Plaintiff’s representative, Plaintiff’s Counsel, Defendant, and

Defendant's representative if the mediator only learns their names through communications made during the course of a mediation conference? It is important to note that the following language appearing above the signature line on the Form A and signed by the plaintiff's counsel may be sufficient to authorize the disclosure of information identifying Plaintiff's representative and counsel: "Plaintiff's counsel understands the mediator or the RMFM Program Manager may report to the court who appears at mediation." I am unaware of any similar acknowledgment or authorization provided by the defendant.

Question 4:

In light of the rules and statutes referenced above, particularly Rule 1.730 of the Florida Rules of Civil Procedure limiting the mediator's report to reporting the existence of a full agreement, partial agreement, or impasse **without comment**, may a mediator reveal that the mediation conference resulted in a "Temporary Agreement?"

Question 5:

Occasionally, parties reach a written agreement during the mediation conference which requires one of the parties to fulfill obligations during a trial period. This is often referred to as a "Temporary Agreement" and does not become final unless the trial period is satisfied. The parties may enter into such a written agreement and prefer that the mediator not report the existence of the agreement since doing so might result in a premature dismissal of the lawsuit. In light of the rules and statutes referenced above, particularly Rule 1.730 of the Florida Rules of Civil Procedure limiting the mediator's report to reporting the existence of a full agreement, partial agreement, or impasse **without comment**, may the mediator report that the mediation conference resulted in an "Impasse with a Plan of Action?" Bear in mind that the mediator only learned of the "Plan of Action" through confidential mediation communications.

Question 6:

As noted above, Rule 10.510 of the Florida Rules for Certified & Court-Appointed Mediators states: "A mediator shall be candid, accurate, and fully responsive to the court concerning the mediator's qualifications, availability, and other administrative matters." In the event the parties reach a written "Temporary Agreement" as referenced above, but one or both parties directs the mediator to file a Mediator Report reflecting that the mediation resulted in an "Impasse" so as to avoid premature dismissal of the lawsuit, may the mediator comply with the parties' direction without violating the mediator's obligation to be candid and accurate concerning administrative matters?

Question 7:

MEAC Opinion 2006-003 indicates, in relevant part, that the mediator may report nonappearance in the event that a party does not physically appear at the mediation. This would seem to address subparts c. and d. below, but leaves unanswered a., b., and e. In light of the rules and statutes referenced above, particularly Rule 1.730 of the Florida Rules of Civil Procedure limiting the mediator's report to reporting the existence of a full agreement, partial agreement, or impasse **without comment**, may a mediator reveal that the mediation did not take place due to:

- a. Timely cancellation by the parties due to settlement agreement or scheduling conflict;
- b. Untimely cancellation by either the Petitioner or Defendant;

- c. Plaintiff Representative or Attorney failed to appear;
- d. Defendant homeowner(s) failed to appear; or
- e. Any other explanation for why the mediation conference did not take place?

Question 8:

In light of the rules and statutes referenced above, particularly Rule 1.730 of the Florida Rules of Civil Procedure limiting the mediator's report to reporting the existence of a full agreement, partial agreement, or impasse **without comment**, may a mediator reveal that the Mediator's Fee and Administrative Fee were paid, partially paid, or not paid?

Question 9:

As noted previously, Rule 10.520 of the Florida Rules for Certified & Court-Appointed Mediators states that "A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation." What should a mediator do to comply with the statutes, local court rules, and administrative orders when the local judicial circuit's administrative orders require disclosures in a Mediator's Report contrary to what is permitted under the Florida Rules of Civil Procedure, Florida Statutes, and Florida Rules for Certified & Court-Appointed Mediators?

Submitted by a Florida Supreme Court Certified County and Circuit Mediator
Central Division

Authorities Referenced

Rule 10.500, Florida Rules for Certified and Court-Appointed Mediators
MEAC opinions 2000-003, 2004-006, 2005-007, 2010-007, 2010-010 and 2010-011
Florida Supreme Court Administrative Orders AOSC09-54 and AOSC10-57
Rules 1.720(b) and 1.730(a) & (b), Florida Rules of Civil Procedure

Summary

A mediator is accountable to the referring court with ultimate authority over the case. Any interaction discharging this responsibility, however, shall be conducted in a manner consistent with these ethical standards. If a mediator believes a court program is asking the mediator to violate the mediator's ethical standards, the mediator shall decline to do so.

Opinion

Answer Question One: No, under procedures established in AOSC09-54, AOSC10-57 and the Revised MAO, Form A does not fall within the definition of a mediation communication.

Answer Question Two: Yes, the mediator may attach a copy of the completed Form A to the Mediator's Report in accordance with the court's administrative order.

Answer Question Three: Yes, a mediator may file a mediator report revealing the identity of the plaintiff's representative, plaintiff's counsel, defendant, and defendant's representative. In issuing AOSC10-57, the court also adopted a newly revised Mediator Report

Form (See Exhibit 9 to that AO). This report form substantially follows the format considered in MEAC 2010-007. Further, pursuant to Fla. R. Civ. P. 1.720(b), mediators are not prohibited from reporting the physical presence or absence of a party to a mediation.

Answer to Question Four: No, a mediator may not reveal that the mediation conference resulted in a “Temporary Agreement”. Mediators are limited to reporting full or partial agreement or no agreement without further comment. (See MEAC 2010-007)

Answer to Question Five: A mediator may only report an agreement or no agreement without further comment or recommendation. (Fla. R. Civ. P. 1.730(a) & (b) and MEAC Opinions 2010-011, 2010-007, 2005-007 and 2000-003)

Answer to Question Six: The Committee has previously answered this question in MEAC 2010-011 and still remains confident in its analysis thereof.

Answer to Question Seven: A mediator should not report timely or untimely cancellation or any other explanation for nonappearance or why the mediation conference did not take place. See MEAC opinions 2010-007, 2010-011, 2005-007 and 2000-003 for appropriate reports to the court by the mediator.

Answer to Question Eight: No, a mediator may not include in the mediator’s report to the court that the mediator’s fee and administrative fee were paid, partially paid, or not paid. (Fla. R. Civ. P. 1.730(a) & (b) and MEAC opinions 2010-011 and 2010-007)

Answer to Question Nine: It is the opinion of this Committee that this question was received prior to the dispositive analyses and opinions contained in:

AOSC10-57 with newly revised Exhibit 9: Mediator’s Report

MEAC 2010-007 and MEAC 2010-011

Rule 10.500, Florida Rules for Certified and Court Appointed Mediators, states: “A mediator is accountable to the referring court with ultimate authority over the case. Any interaction discharging this responsibility, however, shall be conducted in a manner consistent with these ethical standards (emphasis added)”.

In addition, MEAC Opinion 2004-006 states in part, “When a mediator receives a court order in advance of a mediation, which contains provisions which are contrary to the mediator’s role and requires the mediator to act in a manner that is inconsistent with the mediator’s ethical rules, the mediator should decline participation in the mediation.”

In conclusion, if a mediator believes a court is asking the mediator to violate the mediator’s Standards of Professional Conduct, the mediator shall decline to do so.

Date

Beth Greenfield-Mandler, Committee Chair