

f. Ethical Issues in Mortgage
Foreclosure Mediation

Overview

- 1) Recognize power imbalances and when a mediator shall advise the parties of the right to seek independent legal counsel.
- 2) Understand that a mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, direct a resolution of any issue or indicate how the court in which the case has been filed will resolve the dispute.
- 3) Memorializing the parties' agreement.

1) Power imbalances and when a mediator shall advise the parties of the right to seek independent legal counsel

Power Imbalances

- It will be difficult to level the playing field in a mortgage foreclosure mediation.
 - The borrower is facing the loss of the biggest investment of their lives
 - Often there are strong emotional ties for the home
 - They are possibly facing financial ruin
 - They are possibly facing bankruptcy
 - Often, they are involved in domestic relations actions due to the stress finances put on their marriages
 - It will be difficult to diffuse negative emotions

- The Lender usually looks at the foreclosure as a business transaction
- It is difficult for the borrower to do so for the foregoing reasons
- the question arises is it possible for the borrower to make voluntary decisions, or are they forced into settlements. The duty of the mediator is to be aware when there is coercion by the circumstances, and adjourn or terminate the mediation.
- Due to the high emotion, the borrower may not be inclined to be “collaborative, non-coercive and non-adversarial.”

- The power imbalances may (but not necessarily will) be dissipated by
 - Caucus
 - By agreement of the other side allowing a supportive person to be at the mediation
 - Empowerment
 - Adjournment
 - Termination

Advise the Parties of Their Right To Counsel

- This is clearly defined by Rules For Certified and Court Appointed Mediators, rule 10.370(b) Independent Legal Advice. 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 party of the right to seek independent legal counsel
 - The mediation may have to be adjourned to effectuate this provision.

2. A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, direct a resolution of any issue or indicate how the court in which the case has been filed will resolve the dispute.

Rules for Court Appointed and Certified Mediators, Rule 10.370

- Consistent with standards of impartiality and preserving party self-determination, a mediator may provide information which he/she is qualified to give based upon training or experience.
- A mediator shall not offer personal or professional opinion intended to coerce the parties, **unduly influence the parties**, decide the dispute or direct a resolution of any issues. Consistent with standards of impartiality and preserving self-determination, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.
- There is a fine line between information and advice; so great care must be given not to cross that line. The line gets less defined when the borrower is not represented by counsel and has no clue about what is going on in the process. At that point (b) comes into effect on advising about the right to confer with an attorney.

3) Memorializing the parties' agreement

- The requirement for memorializing the agreement and its requirements are found in the following areas:
 - Florida Rules for Certified and Court Appointed Mediators
 - Rule 10.370 in the Committee Notes, “While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty for the mediator to advise the parties of the importance of understanding such matters and giving them the opportunity to see such advice if they desire”.

- 10.420(c)-“Closure- The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.”
- Florida Rules of Civil Procedure 1.730(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’

- The agreement should contain the following elements:
 - The style of the case including the names of the parties
 - the case number,
 - the proper designation of the court division (ex. Civil Division)
 - the label that it is a mediated settlement agreement.

- It is critical that the terms of the agreement are discussed with all the parties in depth. Don't leave any issue open for discussion. Thus, the following issues should be discussed: Who will prepare the agreement and in what time period. The method of exchange for signatures, and specific time periods for all actions must be discussed? Who specifically must do all actions, and what actions must be completed.

- Whether the mediator signs the agreement is up to the individual. If the mediator signs the agreement it should be only as the scrivener and to certify that he/she was the mediator, and the mediation process was untainted. Procedural matters are subject to the mediators control and he/she may take responsibility for them. For example, if the mediation is adjourned, and the mediator will send the notices of the new date, or if an agreement is to be held in escrow. Do not infer that you are in any way responsible to do substantive things, or that you are a party to the performance of the agreement.
- The attorneys should sign the agreement along with any party or participant who is required to perform any act under the terms of the agreement.

- You will note that there is no requirement for, nor prohibition against the mediator preparing the agreement. This is left up to the individual mediator's discretion. There are pros and cons as on the issue.
 - Some benefits are that the mediation will end at the signature session of the agreement and avoid the logistical nightmare of assuring the agreement is completed, and executed. It would avoid buyer's remorse since the parties would not have the option of pondering over it for days and days, and then refusing to sign the agreement.
 - It assures that standardized, legally sufficient agreements are prepared for the Court. If you are preparing the agreement, use tried and true language, preferably Supreme Court Approved language from the approved Forms contained in the applicable rule of procedure.
- Some con's are it would prolong the process by the time necessary to complete the agreement. It could result in the mediator raising issues or substituting his/her language for the parties. If one or more parties appear telephonically, it is very difficult to get them to execute the agreement.

- If the mediator is preparing the agreement, it may be advisable to ascertain any boiler plate language customarily used in the jurisdiction in which you practice, and include that language in the agreement.
- If there needs to be other documents prepared after the mediation, the agreement should include specific recitals as to what will be included in that agreement and who will prepare it.
- It may be advisable to have the parties initial each page to the agreement. This would counter any allegation that they did not have the opportunity to read and understand the agreement.

- The agreement should not favor any party.
- Avoid vagueness and make it sensitive to the diversity of the parties.
 - For example, in Europe, dates are recorded differently than in the United States, so 2/1/2006 may mean different things to different parties.
- Sometimes the parties do not want the agreement to be filed, and become public record.
 - In those instances, a report that an agreement has been entered will be the only thing the mediator files.