

FLORIDA SUPREME COURT  
Mediator Ethics Advisory Committee

Opinion Number: 2014-007  
Date of Issue: November 12, 2014

**The Question**

I request an advisory opinion regarding confidentially based on the following scenario.

Reference the UNIFORM ORDER OF REFERRAL TO FORECLOSURE MEDIATION, (The "ORDER"), exhibit 1.

The Order refers appropriate cases to the Hillsborough County Bar Foundation Residential Mortgage Foreclosure Mediation Program ("RMFM Program") for administration.

**The Order provides for fees to be paid by the plaintiff to the RMFM Program for scheduling and rescheduling, as may be required, in the amounts of \$650.00 and \$325.00, respectively.**

The Order states: "At least 15 days prior to the scheduled mediation conference the plaintiff must review all of the documents and other information submitted by the borrower and determine if the plaintiff needs additional documentation from the borrower. If the plaintiff requires additional documentation or information from the borrower, or if any of the originally requested documentation or information was not received, or if documents received were completed incorrectly, not fully completed, or if any of the documents or information needs to be updated, the plaintiff must advise the borrower and the RMFM Program by filing and serving an Amended Plaintiff's Certification Form at least 15 days prior to the scheduled mediation conference."<sup>1</sup>

The RMFM Program Attendance Sheet states: "**If a party representative does not have full authority to settle without further consideration, the Program Manager will report to the court that the party failed to appear at mediation.**" The RMFM Program Attendance Sheet further provides that, "The parties agree that this document [RMFM Program Attendance Sheet] is not confidential or privileged to the extent provided by Florida Statute 44.401-44.406 (the Florida Mediation Confidentiality and Privileges Act) and some exceptions to confidentiality and privilege exist under the law." The RMFM Program Attendance Sheet goes on to state: "For Completion by Program Manager Representative Upon verbal Verification by the Plaintiff Representative." and in "Yes" or "No" format goes on to ask:

The plaintiff representative has full authority to settle without further consultation including, but not limited to, authority to approve loan modifications, consent to borrower

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<sup>1</sup> The Order, ¶4, pg. 2.

refinancing or short sales, to authorize deed in lieu of foreclosure, consent to waiver of deficiencies and consent to other workout option.

The plaintiff representative's name is listed on the Plaintiff Certification Form filed with the court.

The plaintiff representative received the borrower documentation at least 15 days in advance of mediation and reviewed said documentation prior to mediation.

A RMFM Program administrator challenges the plaintiff representative verbally on each of these above points. Additionally, the plaintiff representative is verbally queried if any documents or information is inaccurately completed, incomplete, or stale dated. Then each participant, prior to the beginning of the mediation conference, signs the RMFM Program Attendance Sheet.

**Negative response by the plaintiff representative to any of these challenges is treated likewise as failure to appear warranting retention of the scheduling fee and collection of a rescheduling fee from the plaintiff as provided for in the Order.**

### **Hypothetical**

The plaintiff representative answers in the affirmative to all challenges, the RMFM Program administrator exits the room, and the mediator makes his opening statement, and at that point, the plaintiff representative presents a laundry list of additional documentation and/or information they require due to omissions, inaccuracies, incompleteness, and/or due to being stale dated. **It would appear the reason for the deception being to avoid the \$325.00 rescheduling fee.**

### **Questions**

1. Has confidentiality attached due to the mediation having begun based on Florida Statute 44.401-44.406 (the Florida Mediation Confidentiality and Privileges Act) thus rendering the defendant a compromised, if not voided, opportunity for a mediated settlement without means to register a complaint?
2. Or, does 44.405 Confidentially; privilege; exceptions (4)(a) Apply, in pertinent part, "...[T]here is no confidentiality or privilege attached... for any mediation communication... (2) That is willfully used to plan a crime, commit or attempt a crime..." that crime being subornation of perjury?
3. May the mediation conference be terminated and voided by either the mediator or defense (and/or defensive counsel) based on such an act?
4. May/must the mediator inform the RMFM Program administrator and/or the court, directly, or indirectly, as to the termination of the mediation and the cause thereof?

5. May the defense and/or defense counsel file a complaint with the court and seek civil remedies under 44.406 Confidentiality; civil remedies.
6. Are sanctions available?

### **Authorities Referenced**

Rules 10.310 and 10.420(b)(2)-(5), Florida Rules for Certified and Court-Appointed Mediators  
Sections 44.401-44.406, Florida Statutes  
MEAC Opinion 2010-007

### **Summary**

This opinion contains multiple questions regarding the confidentiality provisions of a Residential Mortgage Foreclosure Mediation Program (“RMFM Program”).

The confidentiality of a court-ordered mediation begins when the order is issued by the court referring the parties to mediation.

Whether subornation of perjury constitutes an exception to confidentiality under section 44.405, Florida Statutes, is a legal question and therefore the MEAC will refrain from responding to this inquiry.

If one of the conditions for termination of the mediation set forth in rule 10.420(b) is present, a mediator is required to terminate the mediation.

A mediator shall not report to the court or the RMFM Program Administrator directly, or indirectly, as to the cause for termination.

### **Opinion**

Answer to Question One:

Sections 44.401-44.406, Florida Statutes, is entitled the “Mediation Confidentiality and Privilege Act (Act).” The Act determines when confidentiality attaches to a mediation, the extent to which mediation communications are confidential, and when a mediation ends for purposes of confidentiality. Section 44.404(1) clearly states “a court-ordered mediation begins when an order is issued by the court . . .” Therefore, upon a case being referred to mediation by a court, confidentiality attaches. In the instance case, confidentiality has attached.

The MEAC will not comment on whether the circumstances presented have rendered “the defendant a compromised, if not voided, opportunity for a mediated settlement without means to register a complaint.”

Answer to Question Two:

The MEAC believes the question of whether subornation of perjury constitutes an exception to confidentiality under section 44.405 is a legal question and therefore will refrain from responding to this inquiry.

Answer to Question Three:

The MEAC's authority to offer ethical opinions is limited to ethical opinions regarding the conduct of mediators.

Rule 10.420(b)(2)-(5) dictates the instances when it is the responsibility of the mediator to adjourn or terminate a mediation. If one of these conditions is present, a mediator is required to adjourn or terminate the mediation. Whether these conditions are present must be determined on a case by case basis. The term "voided" is not mentioned under the rules.

Answer to Question Four:

No, a mediator shall not report to the court or the RMFM Program Administrator directly, or indirectly, as to the cause for termination. A mediator may only report "agreement" or "no agreement" without comment or recommendation. In MEAC Opinion 2010-007, the MEAC stated a mediator may report an adjournment but if the mediator feels the need to "terminate" a mediation, the mediator may only report "no agreement."

Answer to Question Five:

This is a legal question beyond the jurisdiction of the MEAC.

Answer to Question Six:

This is a legal question beyond the jurisdiction of the MEAC.

 11/12/14  
Signed and Dated by Beth Greenfield-Mandler, MEAC Committee Chair