

June 1, 2010

**The Question**

I am a certified county, family and circuit mediator, and I have a question regarding confidentiality during the mediation process under the following circumstances:

Court ordered foreclosure mediation. Borrower is *pro se* or represented by counsel. Lender is represented by counsel at the table and by representative with full authority on speaker phone.

Before completion of my opening statement, lender's representative announces that the telephone conversation is being recorded for "compliance" purposes, etc.

After being advised by the mediator that the mediation process is confidential and that the recording of the conversation violates the rule of confidentiality, the lender's representative advises that they are required to record all phone conversations and refuses to turn off the recording device.

**Questions:**

1. Is the referenced recording a violation of confidentiality *per se*?
2. Since the privilege is that of the parties, can the borrower or his counsel agree to go forward despite the recording?
3. If the borrower does not waive his right to object to the recording, should the mediator terminate the process and report a "lender non-attendance" or an "impasse"? Does it make a difference if the issue arises after completion of the mediator's opening statement?

Certified County, Family and Circuit Mediator  
Central Division

**Authorities Referenced**

rules 10.210, 10.400, 10.420(b)(3), 10.520, Florida Rules for Certified and Court-Appointed Mediators

Sections 401-406, Mediation Confidentiality & Privilege Act, Florida Statute

AOSC09-54 In Re Final Report and Recommendations on Residential Mortgage Foreclosure Cases

## Summary

While the parties have the ability to make decisions regarding the mediation process, mediators have an obligation to adhere to the law and Florida Rules for Certified and Court-Appointed Mediators. If decisions made by the parties in the mediation process raise ethical issues for the mediator, the mediator must decide how, and if, the process will continue.

## Opinion

A mediator is many things to many people, having obligations to the parties, the mediation process, the courts, and the mediation profession. At all times, “[a] mediator is responsible for safeguarding the mediation process.” Rule 10.400. Accordingly, the mediator is ethically obligated to conduct the mediation in an informed and balanced manner. Additionally and significantly, a mediator is required to “comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.” Rule 10.520. For example, the Supreme Court of Florida has issued an Administrative Order (AOSC09-54) which provides information mediators mediating mortgage foreclosure cases must know, and sets mandatory training standards for all mediators who will be mediating mortgage foreclosure cases.

Question One: Is the referenced recording a violation of confidentiality *per se*?

Although the recording of a mediation session is not *per se* a violation, the referenced recording, at a minimum, violates the very spirit of mediation. Technically, confidentiality has not been violated because the tape had not (at least yet) been released to anyone not permitted to have it. Mediation parties have a privilege to refuse to disclose or prevent someone else from disclosing mediation communications. Had the tape been given or played to someone not authorized by statute to hear the mediation communications, there would be a violation of mediation confidentiality. Florida Statute 44.406 provides for serious civil remedies for a mediation participant who knowingly and willfully discloses a mediation communication in violation of the Mediation Confidentiality and Privilege Act. Even if the borrower in this scenario had agreed to the recording, that would not have been a waiver of confidentiality for purposes of releasing the tape’s contents.

The unilateral decision to tape the mediation flies in the face of the underlying values and principles of mediation. Mediation “is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.” Rule 10.210. Taping has a chilling effect on the mediation process, and is not consistent with an informal non-adversarial environment in which parties can brainstorm and problem solve, knowing that their communications will be afforded the protection carried by law. In this fact pattern, the refusal of the lender’s representative to turn off the recording device also raises the issue of illegal taping. At the very least, the issue of taping should have been discussed by the parties, not one party dictating a result. Mediation is first and foremost **mediation**, and does not morph into a different process because an individual appears by phone.

Question Two: Since the privilege is that of the parties, can the borrower or his counsel agree to go forward despite the recording?

Even if the parties had agreed to audio record the mediation (which they clearly had not), the act of recording the mediation would not waive the confidentiality provisions of the Mediation Confidentiality and Privilege Act. A sharp distinction exists between agreeing to the taping and waiving confidentiality to allow dissemination of mediation communications.

While the parties have the ability to make decisions regarding the mediation process, mediators have an obligation to adhere to the law and Florida Rules for Certified and Court-Appointed Mediators. If decisions made by the parties in the mediation process raise ethical issues for the mediator, the mediator must decide how, and if, the process will continue [see Rule 10.420(b)(3)]. In this example, the Committee believes that the recording of mediation communications for “compliance purposes” so fundamentally alters the process that a mediator would likely be unable to fulfill the ethical obligation of safeguarding the process. The mediator should have adjourned this mediation until such time as the parties agreed or the court determined how the mediation would proceed.

Question Three: If the borrower does not waive his right to object to the recording, should the mediator terminate the process and report a “lender non-attendance” or an “impasse”? Does it make a difference if the issue arises after completion of the mediator’s opening statement?

Yes, the mediator should either terminate or adjourn the mediation. The answer does not change based on whether the issue arose after completion of the mediator’s opening statement.

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Date

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Fran Tetunic, Committee Chair