

# MORTGAGE FORECLOSURE MEDIATION IN FLORIDA—IMPLEMENTATION CHALLENGES FOR AN INSTITUTIONALIZED PROGRAM

Sharon Press\*

## I. INTRODUCTION

Picture this: the biggest road out of town. Now imagine it is rush hour. In a thunderstorm. Add that it is also a hurricane evacuation. A lane is closed due to construction delayed by budget impacts. Imagine the traffic jam.

[Now] [i]magine every car is a case. The General Jurisdiction Courts . . . have a certain amount of judicial infrastructure, just like there is a certain amount of room on the road. There is a certain capacity of judges, of court staff, of clerks, of filing space, of hearing time, of courtrooms, even of hours in the day. Year in, year out, that capacity flexes with the caseload traffic to afford reasonable, prompt, efficient and fair justice.

The enormous increase in foreclosure filings has overwhelmed those resources in many circuits and represents a caseload traffic jam that the infrastructure cannot meet in a timely and efficient manner without support and traffic management.<sup>1</sup>

This Symposium is filled with examples from around the country of states grappling with how to respond to the economic crisis in general and the overwhelming number of mortgage foreclosure cases in particular. For states that require judicial intervention,<sup>2</sup> the severe economic downturn that led to

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\* Sharon Press is Associate Professor and Director of the Dispute Resolution Institute at Hamline University School of Law. At the time the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases was created, she was the Director of the Florida Dispute Resolution Center and served as staff to the Task Force. The author expresses deep appreciation to: Jean Sternlight for organizing the Conference on Conflict Resolution and the Economic Crisis along with the participants who provided useful perspectives on this topic; Chelsea Griffin for her research assistance; Greg Firestone, Cal Goodlett, Kimberly Ann Kosch, Bobbi McAdoo, and Peter Thompson for reviewing drafts and providing helpful comments; and to the Task Force on Residential Mortgage Foreclosure Cases, the Florida Supreme Court Committee on Alternative Dispute Resolution Rules and Policy, the Mediator Ethics Advisory Committee and my colleagues at the Florida Dispute Resolution Center with whom I was fortunate enough to work with and learn from. They remain a constant source of inspiration for me. I am solely responsible for any errors.

<sup>1</sup> TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FLA. SUPREME COURT, FINAL REPORT AND RECOMMENDATIONS ON RESIDENTIAL MORTGAGE FORECLOSURE CASES 4 (2009) [hereinafter FINAL REPORT], available at [http://www.floridasupremecourt.org/pub\\_info/documents/Filed\\_08-17-2009\\_Foreclosure\\_Final\\_Report.pdf](http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf).

<sup>2</sup> “Judicial action is the sole foreclosure method in about 40 percent of the states. . . . The remaining states utilize ‘power of sale’ foreclosure, a nonjudicial process that is substantially less complicated and costly than its judicial counterpart.” Grant S. Nelson & Dale A. Whit-

increased demand for judicial resources also has left the judiciary without any excess capacity to absorb these cases. In Florida, the “foreclosure filings increase[d] from 74,000 in 2006 to 370,000 in 2008, an increase of 400 percent,”<sup>3</sup> and there was “no corresponding increase in court infrastructure and resources to accommodate this caseload growth.”<sup>4</sup> The Washington Economic Group found:

Due to Florida’s growing population and the significant increase in the number of Real Property/Mortgage Foreclosure cases filed, the court caseload throughout the state has grown dramatically and, as a result, has created growing and serious backlogs within the court system.<sup>5</sup>

By the time the Florida Supreme Court created the Task Force on Residential Mortgage Foreclosure Cases in March 2009 the situation was severe and expected to get even worse.<sup>6</sup>

In light of this crisis, many states opted to create or expand mediation programs as a way to relieve the burden.<sup>7</sup> Given Florida’s extensive experience with court-connected mediation, one would have expected that Florida would have been the first state to pursue mediation of mortgage foreclosure cases. Further, given the extensive infrastructure in place, Florida would have easily accomplished the task. Instead, the degree to which mediation has been institutionalized added a layer of complexity and created additional obstacles to Florida’s attempt to establish mortgage foreclosure mediation.

Florida’s history with mediation began in the 1970s when the first community mediation programs or “citizen dispute settlement” centers opened.<sup>8</sup> In the 1980s, Florida was among the first states to adopt a “comprehensive statute” to allow the trial judge to order civil cases to mediation.<sup>9</sup> The statute was

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man, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403 (2004) (footnote omitted). Florida requires judicial action. FLA. STAT. ANN. § 702.01 (West 1994) (“All mortgages shall be foreclosed in equity.”).

<sup>3</sup> TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FLA. SUPREME COURT, INTERIM REPORT 1 (2009) [hereinafter INTERIM REPORT], available at [http://www.florida.supremecourt.org/pub\\_info/documents/05-08-2009\\_Foreclosure\\_TaskForce\\_Interim\\_Report.pdf](http://www.florida.supremecourt.org/pub_info/documents/05-08-2009_Foreclosure_TaskForce_Interim_Report.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> WASH. ECON. GRP., INC., THE ECONOMIC IMPACTS OF DELAYS IN CIVIL TRIALS IN FLORIDA’S STATE COURTS DUE TO UNDER-FUNDING 1 (2009), available at [http://www.florida.bar.org/TFB/TFBResources.nsf/Attachments/1C1C563F8CAFFC2C8525753E005573FF/\\$FILE/WashingtonGroup.pdf](http://www.florida.bar.org/TFB/TFBResources.nsf/Attachments/1C1C563F8CAFFC2C8525753E005573FF/$FILE/WashingtonGroup.pdf).

<sup>6</sup> INTERIM REPORT, *supra* note 3, at 3.

<sup>7</sup> See Heather Scheiwe Kulp, *Foreclosure Mediation Program Models*, A.B.A. (Nov. 12, 2010), <http://www.abanet.org/dispute/mediation/resources.html> (listing and describing foreclosure mediation programs in the United States).

<sup>8</sup> EARNESTINE RESHARD, FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM 93 (20th ed. 2008).

<sup>9</sup> Comprehensive legislation permitting the trial judge to order civil cases to mediation was adopted in 1987. Act effective Jan. 1, 1988, ch. 87-173, 1987 Fla. Laws 1202 (codified as amended at FLA. STAT. ANN. §§ 44.1011-.406 (West 2003 & Supp. 2011)). Since that time, the Florida Dispute Resolution Center of the Office of the State Courts Administrator estimates that over two million cases have been mediated. E-mail from Kimberly Ann Kosch, Assoc. Dir., Fla. Dispute Resolution Ctr., to Sharon Press, Assoc. Professor, Hamline Univ. Sch. of Law (Feb. 22, 2011) (on file with author).

supplemented by court rules of procedure for mediation,<sup>10</sup> certification requirements,<sup>11</sup> training standards,<sup>12</sup> ethical standards,<sup>13</sup> a grievance process<sup>14</sup> to handle ethical complaints filed against Florida Supreme Court certified mediators and those who accept court appointments, and a committee to provide advisory ethics opinions to mediators who are subject to the ethical standards.<sup>15</sup>

By 2008, when the ramifications of the mortgage foreclosure crisis were becoming clear, nearly six thousand individuals had been certified by the Florida Supreme Court as mediators—<sup>16</sup> many of whom were not mediating as often as they would like.<sup>17</sup> There also was a strong state office of dispute resolution in the Office of the State Courts Administrator and an impressive state-wide system of mediation program administrators in each of the twenty judicial circuits.<sup>18</sup> By all measures, Florida had and continues to have a strong receptivity to mediation.<sup>19</sup> Despite these apparent indicators for success, the reality was that substantial institutionalization made implementation more difficult.

In Part II of this Article, I will identify the key impacts institutionalization had on implementation efforts. Part III will describe the various approaches pursued to address the obstacles. In this part, I will examine in detail the development of a rule to define “appearance” at mediation because of its implications for the practice of mediation as a whole beyond merely the foreclosure context. Part IV will provide the current status of mortgage foreclosure cases in Florida and revisions to the general mediation framework with another special emphasis on appearance at mediation. In the conclusion, I will highlight what has been learned from Florida’s experience and what still remains to be learned.

## II. OBSTACLES TO IMPLEMENTATION

In order to understand the obstacles encountered, it is helpful to understand how the Florida court system is organized. There are twenty judicial

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<sup>10</sup> FLA. R. CIV. P. 1.700-.750 (procedure rules for civil mediation); FLA. R. JUV. P. 8.290 (procedure rules for dependency mediation); FLA. FAM. L. R. P. 12.740-.741 (procedure rules for family mediation).

<sup>11</sup> FLA. R. CERTIFIED & COURT-APPOINTED MEDIATORS 10.100-10.130.

<sup>12</sup> See generally Mediation Training Standards and Procedures, Admin. Order No. AOSC09-34 (Fla. July 24, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-34.pdf>.

<sup>13</sup> FLA. R. CERTIFIED & COURT-APPOINTED MEDIATORS 10.200-10.690.

<sup>14</sup> *Id.* R. 10.700-10.880.

<sup>15</sup> *Id.* R. 10.900.

<sup>16</sup> *Dispute Resolution Center Mediator Reporting System*, FLA. ST. COURTS, <http://www.flcourts.org> (follow “Mediator Search” hyperlink; then follow “Comprehensive List” hyperlink) (last visited Mar. 8, 2011).

<sup>17</sup> In my former capacity as director of the Dispute Resolution Center, I had conversations with many mediators who expressed their concern about not being able to mediate as often as they wished to.

<sup>18</sup> See generally RESHARD, *supra* note 8.

<sup>19</sup> See Frank E.A. Sander, *Developing the MRI (Mediation Receptivity Index)*, 22 OHIO ST. J. ON DISP. RESOL. 599, 599 (2007) (noting that Florida “appear[s] to have a high level of mediation activity.”).

circuits in Florida, some of which are single county (e.g., the Eleventh Judicial Circuit includes only Miami-Dade county) and some of which are multi-county (e.g., the Sixth Judicial includes both Pinellas and Pasco Counties).<sup>20</sup> Within each circuit, there are “county” courts and “circuit” courts.<sup>21</sup> County courts handle misdemeanor criminal, traffic, and civil cases under \$15,000 in controversy, including small claims cases.<sup>22</sup> Circuit courts handle felony criminal, family (including dissolution of marriage, domestic violence, guardianship, and juvenile), probate, and civil cases with \$15,000 and above in controversy.<sup>23</sup>

The institutionalization of mediation in the state courts has taken place primarily in relation to civil cases. The comprehensive statute authorizes mediation in five categories which track how the court system is organized: namely, appellate,<sup>24</sup> circuit court,<sup>25</sup> county court,<sup>26</sup> family,<sup>27</sup> and dependency (and in need of services) mediation.<sup>28</sup> Because “circuit court” technically encompasses all of the cases included within the definition of family mediation,<sup>29</sup> circuit court non-family cases became commonly known as “circuit civil.” Mortgage foreclosure cases fall under the jurisdiction of the circuit courts.

Each category has specific procedural rules<sup>30</sup> and individual mediator certification standards.<sup>31</sup> Furthermore, each category developed in a unique manner<sup>32</sup> in terms of practice, funding, and administration. These differences prove to be highly significant in understanding Florida’s response to the mortgage foreclosure crisis as will be seen below.

#### A. “But We’ve Never Mediated Foreclosure Cases.”

Pursuant to Florida Statutes, “[a] court, under rules adopted by the Florida Supreme Court . . . may refer to mediation all or any part of a filed civil

<sup>20</sup> FLA. STAT. ANN. § 26.021 (West Supp. 2011).

<sup>21</sup> *Id.* § 29.001(1).

<sup>22</sup> *Id.* § 34.01(1)(a)-(c).

<sup>23</sup> *Id.* § 26.012(2)(a)-(d).

<sup>24</sup> “‘Appellate court mediation,’ . . . means mediation that occurs during the pendency of an appeal of a civil case.” *Id.* § 44.1011(2)(a).

<sup>25</sup> *Id.* § 44.1011(2)(b).

<sup>26</sup> *Id.* § 44.1011(2)(c).

<sup>27</sup> *Id.* § 44.1011(2)(d).

<sup>28</sup> *Id.* § 44.1011(2)(e).

<sup>29</sup> “‘Family mediation’ . . . means mediation of family matters, including married and unmarried persons, before and after judgments involving dissolution of marriage; property division; shared or sole parental responsibility; or child support, custody, and visitation involving emotional or financial considerations not usually present in other *circuit civil* cases.” *Id.* § 44.1011(2)(d) (emphasis added).

<sup>30</sup> See FLA. R. CIV. P. 1.700-.730 (rules governing circuit court mediation); *Id.* R. 1.750 (rules governing county court mediation); FLA. FAM. L. R. P. 12.740-.741 (rules governing family mediation); FLA. R. JUV. P. 8.290 (rules governing dependency mediation); and appellate mediation is governed by the recently adopted FLA. R. APP. P. 9.700-.740.

<sup>31</sup> FLA. R. CERTIFIED & COURT-APPOINTED MEDIATORS 10.100-10.130.

<sup>32</sup> The statutory definitions foreshadow some of these differences by acknowledging, for example, that in circuit mediation “[i]f a party is represented by counsel, the counsel of record must appear unless stipulated to by the parties or otherwise ordered by the court.” FLA. STAT. ANN. § 44.1011(2)(b). While the definition of both county and family mediation state, “[n]egotiations . . . are primarily conducted by the parties.” *Id.* § 44.1011(2)(c)-(d).

action.”<sup>33</sup> The Rules of Civil Procedure clarify that “[a] civil action may be ordered to mediation . . . upon motion of any party or by the court, if the judge determines the action to be of such a nature that mediation could be of benefit to the litigants or the court.”<sup>34</sup> The rule continues by listing five categories of actions which “under no circumstances may the following . . . be referred to mediation: (1) [b]ond estreatures; (2) [h]abeas corpus and extraordinary writs; (3) [b]ond validations; (4) [c]ivil or criminal contempt; (5) [o]ther matters as may be specified by administrative order of the chief judge in the circuit.”<sup>35</sup>

While mortgage foreclosure cases are not on the list of specific exclusions from mediation pursuant to court rule, as a practical matter, trial judges did not refer mortgage foreclosure cases to mediation. Possible reasons for non-referral to mediation included: (1) there was nothing to mediate given that the banks had all of the power and the home owner had none, (2) there was little incentive for the banks to reach a settlement with the homeowners because it was easy to re-sell the home, (3) residential mortgage foreclosure actions tended to be summary in nature so there would be no time or cost savings for parties to mediate, (4) most of the cases involved pro se defendants who were unprepared and uninterested in mounting a defense, and (5) there was a large number of cases that resulted in default judgments.

Thus, even though technically, one could mediate mortgage foreclosure cases, at the point when experts began debating the use of mediation in mortgage foreclosure cases, mediators in Florida had almost no experience with mortgage foreclosure cases and there was an even stronger judicial sentiment that these cases were inappropriate for mediation. While the strides made in institutionalizing mediation provided a foundation for mediating these cases, the infrastructure developed created a significant barrier to implementation as will be seen in the next section.

#### B. “That’s Not a State Responsibility.”

To understand the administrative barrier, one must return to the early years of institutional implementation of mediation in Florida. When Florida’s legislature adopted comprehensive court-ordered mediation and arbitration legislation in 1987,<sup>36</sup> the conception was that state-funded court alternative dispute resolution (ADR) offices would be established in each of the twenty judicial circuits.<sup>37</sup> These offices would be responsible for providing administrative support as well as the neutral services of mediation and arbitration in court-ordered cases.<sup>38</sup> As part of the bill, funding was provided for a pilot project in the Thirteenth Judicial Circuit (Hillsborough County) and funding was also set

<sup>33</sup> *Id.* § 44.102(2)(b).

<sup>34</sup> FLA. R. CIV. P. 1.710(b).

<sup>35</sup> *Id.* R. 710(b)(1)-(5).

<sup>36</sup> See Act effective Jan. 1, 1988, ch. 87-173, 1987 Fla. Laws 1202 (codified as amended at FLA. STAT. ANN. §§ 44.1011-406 (West 2003 & Supp. 2011)).

<sup>37</sup> Sharon Press, *Institutionalization: Savior or Saboteur of Mediation*, 24 FLA. ST. U. L. REV. 903, 907 (1997).

<sup>38</sup> See Martah C. Merrell, *The Circuit Civil Diversion Program*, in KARL D. SCHULTZ, FLORIDA’S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT 20, 20 (1990).

aside for an evaluation of the project.<sup>39</sup> The pilot project was set up and the evaluation was completed;<sup>40</sup> however, the rest of the state did not wait for the completion of the pilot and the results to embrace the use of court-connected mediation. Instead, almost at the same time as the establishment of the pilot project, private mediators began conversations with judges around the state, encouraging them to order cases to mediation.<sup>41</sup>

By the time the official pilot project evaluation was completed, the landscape in Florida had changed significantly. Mediation of circuit cases<sup>42</sup> was taking place successfully in all of the major urban centers by private mediators, who were selected and paid by the parties—at no cost to the state.<sup>43</sup> In addition, Florida was experiencing a budget downturn and thus the legislature was not looking for ways to expand the courts' budget; instead, most programs sustained cuts. The result was that despite the pilot project's favorable evaluation, the legislature opted not to fund court-connected mediation of large civil cases and the private market quickly filled the void. Mediation continued in this fashion for the next decade. Circuit trial judges continued to expand their referrals of circuit cases to mediation and the parties continued to be responsible for scheduling the mediation sessions and paying for the mediator's services with no assistance from court administration.

In 1998, a major change took place in the form of a constitutional amendment to Article V of the Florida Constitution, which establishes the judicial branch of state government and defines the elements of the state courts system. Initially proposed by the Florida Constitution Revision Commission, the goal of the amendment was to provide a uniform funding system for the trial courts

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<sup>39</sup> *Id.* at 20-23.

<sup>40</sup> The results of the study demonstrated that mediation was faster and cheaper than standard court processing, and the participants viewed it as a "good and legitimate method of resolving legal disputes." FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT, *supra* note 38, at vii.

<sup>41</sup> Such efforts are best exemplified by James Chaplain who founded Mediation, Inc. *About us*, MEDIATION, INC., [http://www.mediationinc.com/index.php?option=com\\_content&view=article&id=5&Itemid=2](http://www.mediationinc.com/index.php?option=com_content&view=article&id=5&Itemid=2) (last visited Mar. 8, 2011). Chaplain and his colleagues traveled the state in the early years of the statute meeting with judges and offering their services to handle the most contentious cases, often at cut rates in order to foster positive experiences with mediation for the judiciary and the legal community. On their current website, Mediation, Inc. boasts a stable of "more than 50 active attorney mediators who have conducted well over 150,000 mediation conferences in state and federal court cases." *Welcome to Mediation, Inc.*, MEDIATION, INC., <http://www.mediationinc.com> (last visited Mar. 8, 2011).

<sup>42</sup> When used to describe mediation, "circuit" refers to non-family civil cases. Mediators often refer to them as "circuit civil," but in this Article I will use the simpler "circuit" reference.

<sup>43</sup> Two notable exceptions to this general rule were the Eleventh and Fifteenth Judicial Circuits. In the Fifteenth Judicial Circuit, the county-funded court ADR office handled administrative scheduling and collections, in addition to providing space in the courthouse for private mediators. ERIC LACHANCE, SHARON PRESS & RISETTE POSEY, FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM 5-2, 5-12 (1993). In the Eleventh Judicial Circuit, the county-funded court ADR office had mediators on staff and on contract to provide mediation services. RISETTE POSEY & SHARON PRESS, FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM 5-6 (1994) [hereinafter 1994 COMPENDIUM]. While parties could select a mediator who was not "in-house," if they did so, they would be responsible to pay for the mediator's services. *Id.* at 5-2.

of Florida by requiring the state to provide funding for the “essential elements” of the court system.<sup>44</sup> Prior to the amendment, the trial courts were funded by the sixty-seven boards of County Commissioners in the counties in which they sat.<sup>45</sup> As a result, there was great fluctuation in the amount of funding in each county and consequently, the level of services provided. If someone was lucky enough to live in a county with a lot of resources, he or she had access to numerous kinds of court services. If someone lived in a less prosperous county, he or she had access to a state-funded judge and not much else.<sup>46</sup>

The constitutional amendment had a final effective date of July 1, 2004; however, the legislature provided for implementation of the amendment in phases.<sup>47</sup> In a special session in 2003, the legislature codified the “essential services” which the state would fund in all sixty-seven counties.<sup>48</sup> On the list of “the elements of the state courts system to be provided from state revenues appropriated by general law” were judges, juror compensation and

Mediation and arbitration, limited to trial court referral of a pending judicial case to a mediator or a court related mediation program, or to an arbitrator or a court related arbitration program, for the limited purpose of encouraging and assisting the litigants in partially or completely settling the case prior to adjudication on the merits by the court.<sup>49</sup>

While the legislature defined what would be considered “essential,” there still were a myriad of implementation issues for the courts. These issues were ultimately addressed by the Florida Supreme Court Trial Court Budget Commission.<sup>50</sup> With most of the listed elements, there was no debate about what

<sup>44</sup> The 1998 amendment became known as Revision 7 to Article V. See OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, MANY ARTICLE V TRIAL COURTS FUNDING ISSUES STILL NEED TO BE RESOLVED, REP. NO. 01-54, at 2 (Fla. 2001), available at <http://www.oppaga.state.fl.us/reports/pdf/0154rpt.pdf>.

<sup>45</sup> The previous major amendment to Article V came in 1972, when the trial courts were reorganized into a unified courts system funded by the counties, the state, and court users. Prior to 1972, the Florida courts were a “hodgepodge of municipal courts, county courts, justices of the peace and other court venues” with varying jurisdictions and funding court sources. *Id.* at 1 (internal quotation marks omitted).

<sup>46</sup> See *Revision 7—Archives*, FLA. ST. COURTS, [http://www.flcourts.org/gen\\_public/funding/revision7-archives.shtml](http://www.flcourts.org/gen_public/funding/revision7-archives.shtml) (last visited Mar. 8 2011).

<sup>47</sup> The phases were scheduled for fiscal years: 2000-01 and 2001-02 for the state courts system; 2001-02 and 2002-03 for state attorneys and public defenders; and 2002-03 and 2003-04 for clerks of the circuit and county courts. Act effective June 7, 2000, ch. 2000-237, § 3(1)(a), (2)-(3), 2000 Fla. Laws 2299, 2301.

<sup>48</sup> Act effective July 1, 2004, ch. 2003-402, sec. 40, § 29.004, 2003 Fla. Laws 3647, 3689-90 (codified as amended at FLA. STAT. ANN. § 29.004 (West Supp. 2011)).

<sup>49</sup> *Id.* sec. 40, § 29.004(1)-(2), (11), 2003 Fla. Laws at 3689-90. The additional essential elements were: reasonable court reporting and transcription services, construction or lease of facilities for the district courts of appeal and the Florida Supreme Court, court foreign language and sign language interpreters and translators, expert witnesses, judicial assistants and law clerks; masters and hearing officers, court administration, case management, basic legal materials reasonably accessible to the public, the Judicial Qualifications Commission, and offices of the appellate clerks and marshals and appellate law libraries. *Id.* sec. 40 § 29.004(3)-(10), (12)-(13), 2003 Fla. Laws at 3689-90.

<sup>50</sup> See Trial Court Budget Commission, Admin. Order No. AOSC00-50, at 1 (Fla. Nov. 27, 2000), available at <http://www.floridasupremecourt.org/clerk/adminorders/2000/sc00-50.pdf>.

the element included.<sup>51</sup> With regard to mediation, there were several issues.<sup>52</sup> The one most relevant to this topic is that few trial courts funded—through county funds or otherwise—circuit mediation programs. Given how difficult it would be to identify sufficient funds to cover all of the agreed upon essential elements, it was nearly impossible to argue that the state should fund something that had not traditionally been funded by the counties.<sup>53</sup>

As a result, the current posture of the state is that the following mediation services are to be offered by the court and paid from state funds:

- Small claims mediation (civil cases less than \$5,000)<sup>54</sup>
- County cases above small claims (civil cases from \$5,000 - \$15,000)<sup>55</sup>
- Family cases, wherein the parties combined income does not exceed \$100,000<sup>56</sup> and

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<sup>51</sup> An exception to this general statement was the court reporting element because the legislation defined the essential element as “reasonable” court reporting and transcription services. Act effective July 1, 2004, ch. 2003-402, sec. 40, § 29.004(3), 2003 Fla. Laws at 3689. As one might expect, each circuit thought that their expenses for court reporting and transcription services was reasonable and they were wildly different. Over the years since the adoption of Revision 7, the court has spent a lot of time and resources defining this element. *See generally* COMM’N ON TRIAL COURT PERFORMANCE & ACCOUNTABILITY, SUPREME COURT OF FLA., RECOMMENDATIONS FOR THE PROVISION OF COURT REPORTING SERVICES IN FLORIDA’S TRIAL COURTS (2007), *available at* [http://www.flcourts.org/gen\\_public/TCPACtReportingFinalReport.pdf](http://www.flcourts.org/gen_public/TCPACtReportingFinalReport.pdf); COMM’N ON TRIAL COURT PERFORMANCE & ACCOUNTABILITY, SUPREME COURT OF FLA., RECOMMENDATIONS FOR THE PROVISION OF COURT REPORTING SERVICES IN FLORIDA’S TRIAL COURTS: SUPPLEMENTAL REPORT (2009), *available at* [http://www.flcourts.org/gen\\_public/court-services/bin/CourtReportingSupplementalReport2009.pdf](http://www.flcourts.org/gen_public/court-services/bin/CourtReportingSupplementalReport2009.pdf).

<sup>52</sup> For mediation, because every county operated differently, keeping the positions and level of services exactly as it had been would merely have perpetuated the disparity of service that Revision 7 was meant to eliminate. COMM’N ON TRIAL COURT PERFORMANCE & ACCOUNTABILITY, SUPREME COURT OF FLA., RECOMMENDATIONS FOR ALTERNATIVE DISPUTE RESOLUTION SERVICES IN FLORIDA’S TRIAL COURTS 14-15 (2008) [hereinafter RECOMMENDATIONS FOR ADR SERVICES], *available at* [http://www.flcourts.org/gen\\_public/court-services/bin/ADR%20Mediation%20Report%2008-2008.pdf](http://www.flcourts.org/gen_public/court-services/bin/ADR%20Mediation%20Report%2008-2008.pdf). As a result, the Office of the State Courts Administrator contracted with consultants to assist court staff with developing a mediation model that would be funded by the state. *Id.* at 15. The consultants generated a report that formed the basis of what became a “comprehensive, statewide model for the delivery of court-connected county, family, and dependency mediation services.” *Id.*

<sup>53</sup> Even without circuit civil mediation, the funding request for the ADR element in fiscal year 2004-05 was for \$13.4 million dollars (including 146 positions). *FY 2004-05 Revision 7 Budget*, FLA. ST. COURTS, [http://www.flcourts.org/gen\\_public/funding/bin/Differences%20Court%20and%20Leg.pdf](http://www.flcourts.org/gen_public/funding/bin/Differences%20Court%20and%20Leg.pdf) (last visited Mar. 8, 2011).

<sup>54</sup> RECOMMENDATIONS FOR ADR SERVICES, *supra* note 52, at 15. Mediation services are provided for small claims cases and residential eviction cases for no additional charge to the parties (beyond the court filing fee). FLA. STAT. ANN. § 44.108(2) (West Supp. 2011).

<sup>55</sup> RECOMMENDATIONS FOR ADR SERVICES, *supra* note 52, at 15. Parties are assessed \$60 per person per scheduled session for county court cases (above small claims) unless they are indigent. FLA. STAT. ANN. § 44.108(2)(c).

<sup>56</sup> RECOMMENDATIONS FOR ADR SERVICES, *supra* note 52, at 16. For families with a joint income \$100,000 and above, mediation may be required but the parties must select and pay for a private mediator and are not eligible to utilize the services of the court-funded mediation program. *Id.* Parties with a joint income under \$100,000 are eligible to utilize the subsidized court program. *Id.* Unless they are indigent, they will be required to pay for these services based upon the following sliding scale: \$120 per person per scheduled session when the parties’ combined income is greater than \$50,000 but less than \$100,000; \$60 per

- Dependency cases.<sup>57</sup>

Notably absent from this list of services are civil cases worth \$15,000 and above, which would include all mortgage foreclosure cases. Thus, while in some states<sup>58</sup> the court programs could be quickly retooled to offer mediation services in mortgage foreclosure cases, in Florida, the state-funded ADR offices are prohibited from devoting “significant” resources to handling mortgage foreclosure mediations and court mediation personnel are prohibited from mediating foreclosure cases.<sup>59</sup> Florida’s extensive development and infrastructure prevented it from being able to quickly mobilize to mediate mortgage foreclosure cases.

C. “*The Current Mediation Procedural Rules Will Not Work for Foreclosure Cases.*”

As was described above, the hallmark of Florida’s mediation program is its extensive set of rules and procedures.<sup>60</sup> Among the many procedural rules governing court-ordered circuit mediation are procedures for selecting a mediator,<sup>61</sup> what may be communicated to the court after mediation,<sup>62</sup> who must appear at the mediation, and sanctions for failure to appear,<sup>63</sup> among others. Because these rules were not drafted with mortgage foreclosure cases in mind, some questioned whether they would be appropriate to handle these unusual cases.

1. *Selection of the Mediator*

Rule 1.720(f) of the Florida Rules of Civil Procedure, provides that parties have ten days from the order of referral to mediation in which to agree upon a mediator. The mediator may be one certified by the Florida Supreme Court or one who is not certified but is “otherwise qualified by training or experience to mediate all or some of the issues in the particular case.”<sup>64</sup> While all cases

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person per scheduled session when the parties’ combined income is less than \$50,000; and \$60 per person per scheduled session in county court cases. FLA. STAT. ANN. § 44.108(2).

<sup>57</sup> RECOMMENDATIONS FOR ADR SERVICES, *supra* note 52, at 16. The funding portion of the statute does not include any reference to dependency mediation. At the time Revision 7 was implemented, less than half of the court programs were offering dependency mediation services. Given that a significant number of the parents involved in dependency mediation through the court program were indigent and the other parties were the Department of Children and Families and Guardians ad Litem, there was strong support for dependency mediation to be offered with no additional fee assessment. *Id.* at 29. In fact, some programs anticipated that dependency mediation would fail if the parties were forced to pay. Since including a statement in the funding section that explicitly exempted dependency mediation was deemed to be politically risky (given how expensive implementation of Revision 7 was to the state, the legislature was anxious to recoup service fees wherever possible), the decision was made to remain silent on dependency mediation in that section. The impact has been that there are no fees collected for dependency mediation.

<sup>58</sup> *See* Kulp, *supra* note 7.

<sup>59</sup> RECOMMENDATIONS FOR ADR SERVICES, *supra* note 52, at 15-16.

<sup>60</sup> *See supra* notes 20-32 and accompanying text.

<sup>61</sup> FLA. R. CIV. P. 1.720(f).

<sup>62</sup> *Id.* R. 1.730.

<sup>63</sup> *Id.* R. 1.720(b).

<sup>64</sup> *Id.* R. 1.720(f)(1)(B).

involve some degree of power differences, mortgage foreclosure cases contain extreme power differences. Homeowners typically have little or no experience with legal processes while the banks and holders of the mortgage are “repeat players.” Most individuals who are in danger of losing their homes to mortgage foreclosure do not have the resources to hire an attorney to protect their interests; the mortgage holders are typically well represented.<sup>65</sup> Given the great disparity in power and knowledge about the process between the defendant homeowner and the plaintiff mortgage holder, it was difficult to imagine that the plaintiff would participate in discussions with the homeowner to agree on the selection of a mediator—especially within ten days of the order of referral as the rule required.

Further, many homeowners report inability to reach anyone to talk to about the substance of their situation,<sup>66</sup> never mind the more mundane selection of a mediator. While the rules contain a provision for the court to appoint a mediator if the parties cannot agree,<sup>67</sup> the courts rarely are called upon to make these appointments because the vast majority of circuit mediations are conducted by mediators selected by the parties.<sup>68</sup> With mortgage foreclosure filings estimated at 383,147 during fiscal year 2009-10,<sup>69</sup> there would be a great strain on court resources if the court had to manage the appointment of mediators in each of these cases—especially without the assistance of the court ADR programs which, as discussed above, would be statutorily prohibited from providing assistance.

## 2. Appearance at Mediation

Rather than require “good faith” participation in mediation,<sup>70</sup> the Florida procedures provide that once the court orders mediation, the parties are required to “appear” at the mediation.<sup>71</sup> Further, the rule provides for sanctions

<sup>65</sup> The Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases identified the problem as:

Borrowers suffer from a significant imbalance of power when negotiating with their note-holders. Many do not understand the information, can be confronted with take it or leave it deals, and can have unrealistic expectations of the loss mitigation process and/or available government programs. Further, many borrowers, particularly in the subprime market, are not confident in dealing with the significant document-based requirements of the loss mitigation process.

FINAL REPORT, *supra* note 1, at 48.

<sup>66</sup> *Id.* at 47.

<sup>67</sup> FLA. R. CIV. P. 1.720(f)(2).

<sup>68</sup> RESHARD, *supra* note 8, at 76.

<sup>69</sup> Lisa Goodner, *Message from Lisa Goodner, State Courts Administrator*, FULL CT. PRESS (Fla.), Spring 2010, at 1, [http://www.flcourts.org/gen\\_public/pubs/bin/fcp\\_spring10.pdf](http://www.flcourts.org/gen_public/pubs/bin/fcp_spring10.pdf).

<sup>70</sup> See generally Roger L. Carter, *Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367; Carol L. Izumi & Homer C. La Rue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67; John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

<sup>71</sup> See generally *Avril v. Civilmar*, 605 So. 2d 988 (Fla. Dist. Ct. App. 1992). In *Avril*, the court reversed an imposition of sanctions against a party for failing to “negotiate in good faith” during a court-ordered mediation when the defendants’ attorney and a representative of the insurance carrier appeared at the mediation, offered \$1000 to settle the case, and then

if a party “fails to appear at a duly noticed mediation conference without good cause.”<sup>72</sup> Under the rule, a party’s appearance is defined as the physical presence of the following:

- (1) The party or its representative having full authority to settle without further consultation.
- (2) The party’s counsel of record, if any.
- (3) A representative of the insurance carrier for any insured party who is not such carrier’s outside counsel and who has full authority to settle up to the amount of the plaintiff’s last demand or policy limits, whichever is less, without further consultation.<sup>73</sup>

The theory behind this formulation was that if the court required the people who actually have authority to settle the case to attend mediation, they will make good use of their time and there would be no need to require “good faith” participation,<sup>74</sup> which would be both difficult to define and impossible to enforce given the presumption of confidentiality which cloaks mediation.<sup>75</sup>

Supporting efforts to ensure that the right people attend the mediation, the Mediator Ethics Advisory Committee<sup>76</sup> opined in 1995

[i]f the parties [to a court-ordered mediation] display a reluctance to participate in the orientation phase of the process, and the mediator is unable to persuade the parties to participate, the mediator is not permitted to require the parties remain at mediation; however, *the mediator may report to the court the lack of appearance by the party or parties pursuant to rule 1.720(b).*<sup>77</sup>

As a result of this opinion, it became generally accepted practice that the requirement to “appear” at mediation meant the parties not only had to physically appear at the mediation but also had to allow the mediator to complete

“steadfastly refused to increase the offer.” *Id.* at 989-90. The court held that it is “clearly not the intent [of the mediation statute] to force parties to settle cases they want to submit to trial before a jury. There is no requirement that a party even make an offer at mediation, let alone offer what the opposition wants to settle.” *Id.* at 990.

<sup>72</sup> FLA. R. CIV. P. 1.720(b).

<sup>73</sup> *Id.*

<sup>74</sup> STANDING COMM. ON MEDIATION & ARBITRATION RULES, FLA. SUPREME COURT, FINAL REPORT exhibit f, at 4 (1989).

<sup>75</sup> At the time the procedural rules governing court-connected mediation were adopted in 1988, the confidentiality statute was as follows:

Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding. All oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of Chapter 119 [Open Government] and shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

FLA. STAT. ANN. § 44.102(3) (West 2003) (repealed 2004).

<sup>76</sup> In addition to having well-established procedural rules, Florida has had Standards of Conduct and a grievance procedure for mediators in place since 1992 along with an Ethics Advisory Committee, which provides written opinions in response to questions posed by mediators subject to the rules established in 1994. RESHARD, *supra* note 8, at 9, 96. At the time the 1995 opinion was issued, the committee was called the Mediator Qualifications Advisory Panel. *Id.* at 97. The name was changed in 2000 to the Mediator Ethics Advisory Committee, which was more descriptive of its actual function. *Id.* at 100.

<sup>77</sup> Mediator Qualifications Advisory Panel, Advisory Op. 95-009, at 3 (Fla. 1995), [http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/1995%20Opinion%20009.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/1995%20Opinion%20009.pdf) [hereinafter MQAP Advisory Op. 95-009] (emphasis added).

his/her opening statement.<sup>78</sup> In the event a representative appeared absent full authority or refused to participate in, at a minimum, the opening statement by the mediator, the mediator could report to the court that the party had not appeared and thus would be subject to sanctions pursuant to rule 1.720 of Florida Rules of Civil Procedure.

In the context of mortgage foreclosure cases, this rule, as interpreted by the Mediator Ethics Advisory Committee in 1995, would appear to have been sufficient to require participation by all parties except for two countervailing forces. First, the Rules of Civil Procedure make clear if no agreement has been reached at mediation, the mediator “shall report the lack of an agreement to the court without comment or recommendation.”<sup>79</sup> This prohibition against making a comment or recommendation to the court would include any report that someone without authority appeared at the mediation. Second, in 2004, the Florida legislature adopted the Mediation Confidentiality and Privilege Act<sup>80</sup> which established both confidentiality and privileges for mediation communications.<sup>81</sup> The Act also defines when mediation begins and ends for purposes of confidentiality and privilege.<sup>82</sup> Pursuant to the Act, “[a] court-ordered medi-

<sup>78</sup> The same opinion clarified that there was no rule that required a party to “negotiate in good faith,” but if the parties refused to participate in an introductory statement “or comply with the mediator’s request to be present when presentations are made . . . a mediator may report to the court a party’s lack of appearance at mediation.” *Id.* at 2, 4.

<sup>79</sup> FLA. R. CIV. P. 1.730(a). With the consent of the parties, the mediator 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.” *Id.*

<sup>80</sup> FLA. STAT. ANN. §§ 44.401-406.

<sup>81</sup> The Act creates both confidentiality for “all mediation communications” and a privilege for each mediation party “to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.” *Id.* § 44.405(1)-(2).

Notwithstanding [the confidentiality and privilege] subsections, there is no confidentiality or privilege attached to a signed written agreement reached during mediation unless the parties agree otherwise, or for any mediation communication:

- (1) For which the confidentiality or privilege against disclosure has been waived by all parties;
- (2) That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;
- (3) That requires a mandatory report pursuant to chapter 39 or chapter 415 solely or the purpose of making the mandatory report to the entity requiring the report;
- (4) Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;
- (5) Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or
- (6) Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

*Id.* § 44.405(4)(a).

<sup>82</sup> One of the reasons the statute codified such an early beginning point for mediation was because of Mediator Ethics Advisory Committee Opinion Number 97-009 in which a Florida Supreme Court certified county, family, and dependency mediator inquired, under the original confidentiality language, whether information obtained “prior to the commencement of mediation” is covered by confidentiality. Mediator Qualifications Advisory Panel, Advisory Op. 97-009, at 1-2 (Fla. 1997), [http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/1997%20Opinion%20009.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/1997%20Opinion%20009.pdf). The situation presented was as follows. The circuit court mediation program had an eligibility cap of \$50,000 for family (dissolution) cases. *Id.*

ation begins when an order is issued by the court”<sup>83</sup> not at the time the parties gather together for mediation or after the mediator begins his or her opening statement. Thus, even if a representative’s lack of authority is known before the mediator delivers an opening statement, for purposes of confidentiality, mediation has already begun and “mediation communications”—including those disclosing lack of authority—would be confidential.

The inherent conflict between the statute, the appearance rule, and general practice was brought to light in 2006 when a county court mediator submitted the following question to the Mediator Ethics Advisory Committee.

Upon reaching an impasse, (but only because a litigant did NOT have full settlement authority, even though they were instructed to have such on the NOTICE TO APPEAR FOR PRETRIAL CONFERENCE/MEDIATION, *and*, told the Judge they had the FULL AUTHORITY), is it a breach of Confidentiality to state on the Stipulation in the open body, “Did not have FULL settlement authority”?<sup>84</sup>

The Committee responded that it would be a violation of the Confidentiality and Privilege Act,<sup>85</sup> Florida Rules of Civil Procedure 1.730(a), which states “[i]f 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,”<sup>86</sup> and ethical rule 10.360(a) of the Florida Rules for Certified and Court-Appointed Mediators, which states “[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.”<sup>87</sup>

In answering the mediator’s question, the Committee noted the significance of the adoption of the Mediation Confidentiality and Privilege Act and therefore the Committee was “obligated to recede from the opinions offered in 95-009<sup>88</sup>, 99-002,<sup>89</sup> and 2001-010<sup>90</sup> relating specifically to the mediator’s report to the court based on nonappearance. . . . Under the circumstances

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at 1. Prior to scheduling mediation, the program sent a questionnaire, which included, among other things, disclosure of the party’s gross annual income. *Id.* The husband returned his form indicating his gross income at \$70,000. *Id.* Since it was above the \$50,000 cap, the program canceled the upcoming mediation. *Id.* Following the cancellation, the wife’s attorney requested a copy of the husband’s questionnaire for “income proof and impeachment purposes” because the husband had testified at a deposition that his income was \$25,000. *Id.* The MQAP responded that “a general questionnaire sent to all parties prior to a scheduled mediation is part of a mediation proceeding and should therefore be treated as a confidential document.” *Id.*

<sup>83</sup> FLA. STAT. ANN. § 44.404(1).

<sup>84</sup> Mediator Ethics Advisory Comm., Advisory Op. 2006-003, at 1-2 (Fla. 2006), [http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202006-003.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202006-003.pdf) [hereinafter MEAC Advisory Op. 2006-003].

<sup>85</sup> FLA. STAT ANN. §§ 44.401-.406.

<sup>86</sup> FLA. R. CIV. PROC. 1.730(a).

<sup>87</sup> FLA. R. CERTIFIED & COURT-APPOINTED MEDIATORS 10.360(a).

<sup>88</sup> See generally MQAP Advisory Op. 95-009, *supra* note 77; see also *supra* text accompanying notes 77-78.

<sup>89</sup> Opinion 99-002 addressed several different questions. Mediator Qualifications Advisory Panel, Advisory Op. 99-002, at 1-2 (Fla. 1999), [http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/1999%20Opinion%20002.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/1999%20Opinion%20002.pdf). For purposes of this discussion, the only relevant question was 99-002(c) in which the Florida Supreme Court certified county, family, and circuit mediator inquired whether a mediator was

[described], the mediator is limited to reporting that no agreement was reached.”<sup>91</sup> While this was of potential significance in all cases, given the unique dynamics of mortgage foreclosure cases, it was even more problematic. The plaintiffs in foreclosure cases asserted it would be physically impossible for them to send representatives with full authority to every mediation given the tremendous case volume.<sup>92</sup> If confidentiality prevented anyone from reporting noncompliance, the procedural rule would be unenforceable and therefore meaningless, and mediation would be ineffective. The combined problems of lack of administrative staff to handle the huge number of cases, lack of mediators who were ready to accept these cases, lack of financial resources by the homeowner parties to pay for mediation, lack of willingness for the plaintiffs to engage in negotiations, and procedural impediments meant that there would be no easy fix to the mortgage foreclosure crisis.

On the other hand, outside forces began to shift and the plaintiffs no longer had all of the power. The federal government adopted programs like Home Affordable Modification Program (HAMP), which was “designed to enable borrowers that meet eligibility requirements to avoid foreclosure by

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authorized (or required if requested to do so by the adverse effective party) to file a written report . . . in order to indicate to the court the mediation could not commence because of the non-appearance of a party, or party with full authority, or that the mediation had to be terminated because the party claiming to have full authority did not have full authority?

*Id.* In response, the MEAC opined that if the mediation did not begin “because of the absence of full authority by one or more of the parties[ ], the mediation never began and the mediator may report to the court that one or more of the parties did not appear.” *Id.* When the mediation is concluded after it commenced because of perceived or actual lack of authority, based on information revealed in caucus to the mediator, the mediator is prohibited from revealing this to the other party or the court. *Id.* at 4-5. Finally, if the revelation of lack of authority is made in front of the other party, the party may decide to proceed with or end the mediation. *Id.* at 5. Under this scenario, if the party chooses not to go forward with the mediation, “the mediator may make a report to the court that one or more of the parties did not appear at the mediation.” *Id.*

<sup>90</sup> In 2001, a question similar to MEAC 99-002 was submitted by a Florida Supreme Court certified county mediator in the context of small claims mediation. Mediator Ethics Advisory Comm., Advisory Op. 2001-010, at 1 (Fla. 2002), [http://www.flcourts.org/gen\\_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202001-010.pdf](http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202001-010.pdf). Specifically, the mediator referenced “a serious and ongoing problem” that representatives who may appear on behalf of parties so long as they have “full authority” were stating to the judge that they had authority prior to the judge’s referral of the case to mediation, and then informing the mediator, once mediation had begun, that in fact they did not have authority. *Id.* The mediator inquired, “would simply informing the judge of a violation of rule 1.750 [the appearance rule of small claims cases] constitute a violation of the confidentiality of mediation?” *Id.* Although this question was submitted after the adoption of the Mediation Confidentiality and Privilege Act, the MEAC reiterated its previous opinion as stated in 99-002 that “when a mediation does not begin because one or more of the parties does not have full authority the mediator may report to the court that one or more of the parties did not appear at the mediation pursuant to the Florida Rules of Civil Procedure.” *Id.* at 2 (internal quotation marks omitted).

<sup>91</sup> MEAC Advisory Op. 2006-003, *supra* note 84, at 1. The Committee clarified that the restriction placed on mediator reporting was only for communications relating to appearance. *Id.* at 2. The mediator was still permitted to “report nonappearance in the event that a party did not *physically* appear at the mediation.” *Id.* (emphasis added).

<sup>92</sup> FINAL REPORT, *supra* note 1, at 11.

modifying loans.”<sup>93</sup> In addition, as the real estate market continued to drop, foreclosing on homes no longer was as attractive to the plaintiff mortgage holders. In many instances, the properties were worth less than the mortgage and if the bank was fortunate enough to sell the home, it would be sold at a discount.<sup>94</sup> Suddenly, negotiating with the person in the home became more attractive. It was against this backdrop that the Florida judiciary had to decide how to intervene.

### III. RESPONSES TO THE MORTGAGE FORECLOSURE CRISIS

#### A. Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases

Initially, the response to the crisis was piecemeal with individual chief judges establishing programs for their individual circuit—or in some cases specific to a single county within a multi-county circuit—<sup>95</sup> rather than a coordinated state response. The most comprehensive attempt to address all of the issues identified above was pursued by three circuits on a contractual basis, with the non-profit Collins Center for Public Policy.<sup>96</sup> In these circuits, “managed” mediation services<sup>97</sup> were provided pursuant to administrative orders.<sup>98</sup>

<sup>93</sup> *About HMPadmin.com*, HMPADMIN.COM, <https://www.hmpadmin.com/portal/resources/overview.jsp> (last visited Mar. 8, 2011).

<sup>94</sup> GEOFFRY WALSH, NAT’L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? 3 (2009), available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-state-mediation-programs.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf).

<sup>95</sup> Some circuits, such as the Ninth Judicial Circuit, attempted to treat foreclosure cases similarly to other circuit civil cases—namely, requiring plaintiffs to schedule mediation with a certified mediator prior to requesting a trial date. Mandatory Circuit Court Mediation for Owner-Occupied Residential Mortgage Foreclosures, Admin. Order No. 2009-02, at 2 (Fla. Cir. Ct. 9th Feb. 25, 2009), available at <http://www.ninthcircuit.org/programs-services/dispute-resolution-services/downloads/2009-02.pdf>. Others, such as the Twelfth Judicial Circuit, required servicers to attempt a telephone conference—without any neutral person to facilitate the conversation—with the homeowner prior to requesting a trial date. FINAL REPORT, *supra* note 1, at 28. Others, such as the Fifteenth Judicial Circuit, created low administration court-based models to provide mediation services in many cases, ignoring the funding prohibition. See generally Homestead Foreclosure Actions by Institutional Lenders, Admin. Order No. 3.305-1/09 (Fla. Cir. Ct. 15th Jan. 2009), vacated as obsolete, Admin. Order No. 3.305-7/10 (Fla. Cir. Ct. 15th July 16, 2010), available at <http://www.jeffblampert.com/documents/Admin3.305.pdf>.

<sup>96</sup> The Collins Center for Public Policy “was established in 1988 as a statewide nonprofit organization to seek out creative, non-partisan solutions to Florida’s toughest issues.” *Collins Center—About Us*, COLLINS CTR. FOR PUB. POLICY, [http://www.collinscenter.org/?page=about\\_us](http://www.collinscenter.org/?page=about_us) (last visited Mar. 8, 2011). The Collins Center had experience with provision of managed mediation services because they were the entity retained by the Florida Department of Financial Services (DFS) to manage the hurricane mediation program from 2004 to 2008. *Model Mediation Program Helps Resolve Damages After 8 Hurricanes*, COLLINS CTR. FOR PUB. POLICY, <http://www.collinscenter.org/?page=HurricaneMediation> (last visited Mar. 8, 2011).

<sup>97</sup> Managed mediation was defined by the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases as:

[M]ediations, conducted on a large scale basis across the state, which involve substantially similar issues, which can be coordinated by an outside coordinator to best assist the parties to best use their time, effort and resources to achieve resolution. In order to have managed mediation,

A major problem with this individualized approach was that there were at least twenty<sup>99</sup> different sets of rules and procedures for attorneys and mortgage holders to learn. In addition, some of the carefully developed rules governing mediation were ignored in the interest of expediency.<sup>100</sup>

Recognizing the need for a statewide response to address the complex implementation issues, in March 2009, Chief Justice Peggy Quince<sup>101</sup> entered

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you must have management who will contact and enroll the parties, make the necessary referrals, supervise the exchange of information, recruit and train the mediators, schedule, monitor compliance, and report and evaluate program effectiveness.

FINAL REPORT, *supra* note 1, at 30.

<sup>98</sup> On February 26, 2010, the chief judges from these three circuits held a joint ceremony via video conferencing technology at which time the chief judges signed administrative orders that implemented managed mediation for all owner occupied residential foreclosure cases filed in their circuits. *Residential Mortgage Foreclosure Mediation Program (RMFM)*, FIRST JUD. CIRCUIT FLA., <http://www.firstjudicialcircuit.org/programs-and-services/mortgage-foreclosure> (last visited Mar. 8, 2011). The First and Nineteenth Judicial Circuits began their programs in March 2009 pursuant to administrative orders. Case Management Order and Mandatory Referral of Residential Mortgage Foreclosure Cases to Mediation, Admin. Order No. 2009-18, at 9 (Fla. Cir. Ct. 1st Mar. 17, 2009), *available at* <http://www.firstjudicialcircuit.org/zones/org1/uploads/AO200918.pdf>; Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Owner-Occupied Residents to Mediation, Admin. Order No. 2009-01, at 8 (Fla. Cir. Ct. 19th Feb. 20, 2009), *available at* <http://www.circuit19.org/documents/AO/2009-01%20Foreclosure%20Mediation.pdf>. The Eleventh Judicial Circuit began its program on May 1, 2009. Establishment of 11th Circuit Homestead Access to Mediation Program (“CHAMP”) for Case Management of Residential Foreclosure Cases, Admin. Order No. 09-08, at 7 (Fla. Cir. Ct. 11th Apr. 2009), *available at* [http://reports.jud11.flcourts.org/Administrative\\_Orders/1-09-08-Establishment%20of%20HOME%20Mediation%20Program.pdf](http://reports.jud11.flcourts.org/Administrative_Orders/1-09-08-Establishment%20of%20HOME%20Mediation%20Program.pdf). While the chief judges and chief administrative judges from the three circuits consulted with each other regarding implementation of managed mediation, the orders were not identical. Many of the provisions recommended by the Task Force and eventually adopted by the Florida Supreme Court were piloted in these three circuits. *See generally* Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-01 (Fla. Cir. Ct. 1st Feb. 26, 2010), *available at* [http://www.firstjudicialcircuit.org/sites/default/files/document\\_library/AO2010-01.pdf](http://www.firstjudicialcircuit.org/sites/default/files/document_library/AO2010-01.pdf); Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 10-03 A1 (Fla. Cir. Ct. 11th Mar. 17th, 2010), *available at* [http://reports.jud11.flcourts.org/Administrative\\_Orders/1-10-03-A1-Foreclosure%20Case%20Management%20Referral%20Homestead%20Residences%20to%20Mediation.pdf](http://reports.jud11.flcourts.org/Administrative_Orders/1-10-03-A1-Foreclosure%20Case%20Management%20Referral%20Homestead%20Residences%20to%20Mediation.pdf); Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order 2010-03 (Fla. Cir. Ct. 19th Feb. 26, 2010), *available at* <http://www.circuit19.org/documents/AO/2010-03%20RMFP.pdf>.

<sup>99</sup> Each circuit developed its own approach to the crisis, and, in some cases, each county within a circuit developed a different approach.

<sup>100</sup> For example, using individuals who were not certified as circuit court mediators and who were not selected by agreement of the parties, requiring parties to pay for services that the legislature had not authorized, and requiring reports from mediators that were not permitted under the Mediation Confidentiality and Privilege Act. *See* FLA. STAT. ANN. § 44.401-.406 (West Supp. 2011).

<sup>101</sup> The chief justice is the chief administrative officer for the state courts. In 2009, a Judicial Branch Governance Study Group was created “to examine the present governance system of the branch and further strengthen its capacity to support the effective and efficient management of the courts.” Judicial Branch Governance Study, Admin. Order No.

an administrative order<sup>102</sup> establishing a Task Force to recommend “policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties” through “mediation and other alternative dispute resolution strategies, case management techniques, and approaches to providing *pro bono* or low-cost legal assistance to homeowners.”<sup>103</sup> Given the exigent circumstances surrounding the mortgage foreclosure crisis,<sup>104</sup> the Task Force was charged with submitting an interim report by May 8, 2009, and a final report by August 15, 2009.<sup>105</sup> In order to accomplish its task in the compressed time frame, the Task Force split into two subcommittees, one focused on case management and the other on alternative dispute resolution.<sup>106</sup> This Article focuses primarily on the ADR subcommittee which was chaired by Dr. Gregory Firestone.<sup>107</sup>

By the time the Task Force was created there was a great deal of animosity amongst the various factions that would ultimately be governed by the dispute resolution processes. Defense attorneys—especially those who worked in legal aid/services offices—accused the plaintiffs of filing suits in which they were not legally the mortgage holder due to securitization.<sup>108</sup> The plaintiffs bar accused the defendants of mounting frivolous defenses just to delay the inevita-

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AOSC09-43, at 1-2 (Fla. Oct. 19, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-43.pdf>.

<sup>102</sup> Task Force on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-8, at 1-2 (Fla. Mar. 27, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-8.pdf>.

<sup>103</sup> *Id.* at 2. Because there was no budget for the Task Force, it created on-line surveys for borrowers, lenders, and judges rather than host public hearings. INTERIM REPORT, *supra* note 3, at 6.

<sup>104</sup> An economic analysis of the situation by The Washington Economic Group found “Due to Florida’s growing population and the significant increase in the number of Real Property/Mortgage Foreclosure cases filed, the court caseload throughout the state has grown dramatically and, as a result, has created growing and serious backlogs within the court system. This situation is adversely impacting the competitiveness of the State to create, retain and expand jobs and private-sector enterprises.” WASH. ECON. GRP., INC., *supra* note 5, at 1.

<sup>105</sup> *Task Force on Residential Mortgage Foreclosure Cases*, Admin. Order No. AOSC09-8, at 2.

<sup>106</sup> INTERIM REPORT, *supra* note 3, at 4.

<sup>107</sup> At the time of his appointment as chair of the subcommittee, Dr. Firestone was also vice-chair of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy. Also serving on the subcommittee were April Charney, a legal aid attorney; Judge Burton Conner, who had been instrumental in setting up the Nineteenth Judicial Circuit’s mortgage foreclosure mediation program through the Collins Center and was also a member of the Supreme Court Committee on ADR Rules and Policy; Sandra Fascell Diamond, an attorney and immediate past chair of The Florida Bar Real Property, Probate and Trust Section who was instrumental in setting up The Florida Bar’s attorney assistance program for individuals in foreclosure; Michael Fields, non-attorney government relations expert with Bank of America (former president of the Tallahassee offices of Bank of America); Judge Lee Haworth, chief judge from the Twelfth Judicial Circuit; Perry Itkin, attorney-mediator and member of the Supreme Court Committee on ADR Rules and Policy; and Rebecca Storrow, ADR director for the Fifteenth Judicial Circuit (at the time of her appointment and service. She has since resigned from that position). Judge Jennifer Bailey, chair of the Mortgage Foreclosure Task Force—who was also instrumental in establishing the mortgage foreclosure mediation program in the Eleventh Judicial Circuit through the Collins Center—served *ex officio* on both subcommittees.

<sup>108</sup> FINAL REPORT, *supra* note 1, at 46-47.

ble.<sup>109</sup> Developing a set of common principles provided an initial consensus in what would be a difficult discussion.<sup>110</sup> The principles are included here to be instructive to others embarking on similar tasks when faced with polarized participants:

- We recognize and will not impair legal, equitable and constitutional rights which form the basis of foreclosure actions.
- We will strive to be consistent with existing statutes, rules, case law, and policies (or as amended).
- Our recommendations will be cost effective and affordable.
- We will promote and recommend public education on mortgage foreclosure issues.
- We will be responsive to the needs of various stake holders in designing and implementing case management and ADR process [sic].
- Our solutions will value uniformity and simplicity.
- Whatever we recommend will contain a program evaluation component to assess program effectiveness.<sup>111</sup>

In addition to these general principles, the ADR Subcommittee adopted principles specific for its work, which included the following:

- Foreclosure ADR should promote the free and confidential exchange of information and avoid disclosure of information to parties not controlled by confidentiality.
- Foreclosure ADR should preserve mediation as a confidential process under the Mediation Confidentiality and Privilege Act.
- Foreclosure ADR should have consistent objective criteria for referral.
- The Task Force should consider a range of ADR methods.
- Our ultimate recommendation should include a process for approval of other forms of ADR as proposed by chief judges in order to explore innovation and best practices in this dynamic environment.
- Foreclosure ADR should invite all defendants to participate in the ADR process.
- Foreclosure ADR should provide that neutrals are specifically trained to serve as ADR foreclosure neutrals.
- Foreclosure ADR should provide participants with opportunity to become prepared to participate constructively in ADR.
- Our solutions should minimize the financial impact of ADR on the parties.
- Our solutions should be accessible to residential mortgage foreclosure ADR participants.
- Our solutions should utilize only Florida Supreme Court certified circuit mediators to mediate residential foreclosures.
- Our solutions should provide that the parties exchange essential information prior to mediation.

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<sup>109</sup> See Ben-Ezra & Katz, P.A.'s Objection to the Proposed Amendments to the Florida Rules of Civil Procedure and Forms for Use with the Rules of Civil Procedure Submitted by the Supreme Court's Task Force on Residential Mortgage Foreclosure Cases at 5, *In re* Amendments to Fla. Rules of Civil Procedure, No. SC09-1460 (Fla. Oct. 1, 2009) [hereinafter Ben-Ezra & Katz, P.A.'s Objection], available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/09/09-1460/Filed\\_10-01-2009\\_Comment\\_Ben-Ezra.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/09/09-1460/Filed_10-01-2009_Comment_Ben-Ezra.pdf).

<sup>110</sup> Gregory Firestone had success with this approach when he served as official observer to the National Conference of Commissioners of Uniform State Laws initially for the Academy of Family Mediators and later for the Association for Conflict Resolution during the drafting of the Uniform Mediation Act. See generally Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265 (2002).

<sup>111</sup> INTERIM REPORT, *supra* note 3, at 7-8.

- We should establish a definition of what “Appearance at mediation” means, which is a work in progress.<sup>112</sup>

By the time the interim report was filed, the Task Force had reached consensus that an ADR program would be designed for the court’s consideration,<sup>113</sup> the Task Force would only address cases which had already been filed,<sup>114</sup> uniformity was needed, and due to budgetary constraints and time constraints the Task Force would not hold public hearings but would instead gather information through surveys and other requests for written submissions.<sup>115</sup>

The Task Force submitted its Final Report and Recommendations on August 17, 2009.<sup>116</sup> Given the continuing budget crisis, the Task Force did not include recommendations for foreclosure case managers, additional judges and support staff, special magistrates, or court-funded mediation.<sup>117</sup> The recommendations focused on the use of mediation through a residential mortgage foreclosure mediation program and case management techniques which could be implemented at low or no cost. The statewide mediation program was to be implemented primarily via adoption by the chief justice of the Florida Supreme Court of a model administrative order, which in turn would be adopted by the chief judges in each judicial circuit.<sup>118</sup>

Key features of the mediation program recommended by the Task Force include:

- Mandatory referral to mediation<sup>119</sup> of all foreclosure cases involving residential homestead property unless the plaintiff<sup>120</sup> and borrower agree otherwise, or unless a comparable pre-suit mediation was conducted;

<sup>112</sup> *Id.* at 8-9.

<sup>113</sup> There was a minority opinion that raised concerns that the “issues involving securitized mortgages” would be not be appropriate for mediation and should instead be resolved by a court. *Id.* at 9.

<sup>114</sup> This decision was based on jurisdictional concerns not on the merits. Since the Task Force was appointed by the chief justice of the Florida Supreme Court, it was obligated to focus on activities within the jurisdiction of the judiciary. Obviously, prior to a foreclosure filing, courts have no jurisdiction to require the parties to do anything.

<sup>115</sup> FINAL REPORT, *supra* note 1, at 7. The Task Force also invited key stakeholders to meet via conference call with the Task Force to gather a larger perspective. *Id.* at 9. Among those invited were a foreclosure counseling expert, attorneys from two of the large volume plaintiff firms and one from a mid-size plaintiff firm, an experienced foreclosure defense attorney, a team of lenders and servicers, and the president of the Collins Center. *Id.*

<sup>116</sup> *Id.* at 1.

<sup>117</sup> *Id.* at 4.

<sup>118</sup> While the Florida Supreme Court adopted the Task Force’s recommendations on December 28, 2009, the order contained no deadline for the chief judges to adopt their administrative orders and, consequently, there was no deadline for the establishment of mortgage foreclosure mediation for the state. *See generally* Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54 (Fla. Dec. 28, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf>.

<sup>119</sup> The program manager was required to schedule mediation “[n]o earlier than 60 days and no later than 120 days after suit is filed.” FINAL REPORT, *supra* note 1, app. J, at 9.

<sup>120</sup> The Task Force had many discussions as to how to refer to the “plaintiff” initially starting with calling the parties the “lender” and the “borrower.” Since many of the cases involve a “servicer” rather than the original “lender” and there may have been questions with the chain of title, the more generic reference to “plaintiff” was adopted.

- Mediation would be managed by an “independent, nonpartisan, non-profit organization which has demonstrable ability to assist the courts with managing the large number of residential mortgage foreclosure actions”<sup>121</sup> that had been filed;
- Mediation to be conducted by a Florida Supreme Court certified circuit court mediator<sup>122</sup> who had received supplemental training specific to mortgage foreclosure cases;<sup>123</sup>
- Referral of the borrower to foreclosure counseling prior to mediation;<sup>124</sup>
- Early exchange of borrower and lender information prior to mediation;<sup>125</sup>
- Requirement that counsel for the plaintiffs in all newly filed residential mortgage foreclosure actions involving property that is not a homestead residence “affirmatively certify whether the origination of the note and mortgage sued upon was subject to the provisions of the Federal Truth in Lending Act, Regulation Z . . . [and] whether the property is a home-

<sup>121</sup> FINAL REPORT, *supra* note 1, app. J, at 3. While the Model Administrative Order included “nonprofit” in the description of the mediation manager, the Parameters for Providers of Managed Mediation Services stated that the Managed Mediation Provider should be a “[n]on-profit entity, or associated with a reputable organization of proven competence, autonomous and independent of the judicial branch.” *Id.* app. N, at 1.

<sup>122</sup> From 1988 to 2007, in order to be certified by the Florida Supreme Court as a circuit mediator, one had to be a Florida attorney with five years of Florida practice or be a retired judge from any U.S. jurisdiction along with having completed a Florida Supreme Court certified forty-hour circuit mediation training program, and a mentorship. 1994 COMPENDIUM, *supra* note 43, at 5-1. In November 2007, the Florida Supreme Court revised the certification scheme to remove educational barriers by adopting a point system. *See generally* Petition of the Alternative Dispute Resolution Rules and Policy Committee on Amendments to Florida Rules for Certified and Court-Appointed Mediators, 969 So. 2d 1003 (Fla. 2007). Under the current system, for initial certification as a circuit (non-family) mediator, one must have at least a bachelor’s degree and one hundred points. FLA. R. CERTIFIED & COURT-APPOINTED MEDIATORS 10.100(d). One receives thirty points for completion of the required training program and thirty points for the required mentorship experience. *Id.* R. 10.100 (d)(1), (3). In addition, the applicant must have at least twenty-five points in “education/mediation experience.” *Id.* R. 10.100(d)(2). “Additional points above the minimum requirements may be awarded for completion of additional educational/mediation experience, mentorship, and miscellaneous activities.” *Id.* R. 10.100(d).

<sup>123</sup> *See* Residential Mortgage Foreclosure Training Standards, *infra* Appendix C.

<sup>124</sup> There was agreement from all sides that “foreclosure counseling served to assist in educating borrowers, documenting and promoting the loss mitigation effort, and aided in the effective effort to resolve these cases.” FINAL REPORT, *supra* note 1, at 9. The Task Force saw Foreclosure counseling as critical to the program, going so far as to make failure of the borrower to participate in foreclosure counseling as cause for terminating the case from the mediation program. *Id.* app. J, at 8.

<sup>125</sup> The borrower could request from the plaintiff any of the following information and documents by delivering a written request for the information to the program manager no later than twenty-five days prior to the mediation:

[d]ocumentary evidence the plaintiff is the owner and holder in due course of the note and mortgage sued upon; a] history showing the application of all payments by the borrower during the life of the loan; a] statement of the plaintiff’s position on the present net present value of the mortgage loan (sic); t]he most current appraisal of the property available to the plaintiff.

*Id.* app. J, at 7. If requested, plaintiff’s counsel was “responsible for assuring Plaintiff’s Disclosure For Mediation is electronically transmitted to the web-enabled information platform . . . no later than 3 business days before the mediation session.” *Id.* app. J, at 8.

stead residence.” Plaintiff’s counsel was prohibited from responding to the certification with “‘unknown,’ ‘unsure,’ ‘not applicable,’ or similar nonresponsive statements.”<sup>126</sup> If the property is to be included for mediation, plaintiff’s counsel must also certify “the identity of the plaintiff’s representative who will appear at mediation.”<sup>127</sup>

- Ability of plaintiff’s representative to appear by telephone (or other “communication device”);<sup>128</sup>
- Required data collection for assessment of the program.<sup>129</sup>

In addition to the ADR components, the Task Force made some case management recommendations. It is important to remember that given the magnitude of the crisis, ADR alone would not be able to provide relief. The key features of the case management recommendations are listed below in order to provide a sense of the additional recommendations but not explained in detail.

- Differentiated processing for three types of cases:
- Homestead properties that are referred to mediation
- Vacant and abandoned properties
- Other foreclosure cases<sup>130</sup>

<sup>126</sup> Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-01, at 5 (Fla. Cir. Ct. 1st Feb. 26, 2010), available at [http://www.firstjudicialcircuit.org/sites/default/files/document\\_library/AO2010-01.pdf](http://www.firstjudicialcircuit.org/sites/default/files/document_library/AO2010-01.pdf); FINAL REPORT, *supra* note 1, app. J, at 6.

<sup>127</sup> FINAL REPORT, *supra* note 1, app. J, at 6. Plaintiff’s counsel was permitted to designate more than one representative but at least one of the designated representatives was required to attend “any mediation session scheduled.” *Id.* Form A could be amended up to five days prior to the scheduled mediation session. *Id.*

<sup>128</sup> *Id.* at 8; Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, app. A, at A-3 (Fla. Dec. 28, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf> (“‘Communication equipment’ means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other . . .”). The Task Force included in its report a strongly written statement that the recommendations of the Task Force must not compromise “the traditional mediation framework and structure, which has been established over a quarter century’s work and which is acknowledged as a leading national mediation framework among the states.” FINAL REPORT, *supra* note 1, at 28-29. The recommended modification of the plaintiff’s appearance requirement “must not provide any opening or opportunity for those who wish to avoid traditional appearance in mediation in non-foreclosure matters to use these recommendations to try to erode the superstructure of mediation created in Florida statutes and years of rules work.” *Id.* at 29.

<sup>129</sup> The Supreme Court Committee on Alternative Dispute Resolution Rules and Policy was directed to implement a reporting system to collect data on “the number of cases statewide that are referred to managed mediation programs; whether the cases were settled, adjourned, or ended in impasse; and other relevant information.” *Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, Admin. Order No. AOSC09-54, at 8. The court specified that the success of the program would be evaluated based on:

- (1) the percentage of cases referred to the program that result in the program manager successfully contacting borrowers;
- (2) the percentage of scheduled mediation failing to go forward because plaintiff’s representative did not appear;
- (3) the percentage of scheduled mediations failing to go forward because the borrower did not appear; and
- (4) the percentage of mediations resulting in partial or complete agreements compared to those resulting in impasse.

*Id.* at 8-9.

<sup>130</sup> FINAL REPORT, *supra* note 1, at 8. “Other foreclosure cases” would include “tenant-occupied or non-borrower-occupied properties, in which the borrower has been unable to

- A rule change to require verification of mortgage foreclosure complaints<sup>131</sup>
- An amended civil cover sheet to include additional categories for mortgage foreclosure.<sup>132</sup>

The report included a proposed administrative order for the chief justice to adopt and amendments to the rules of civil procedure and forms for use with the rules of civil procedure.

#### B. Task Force Response to Comments on the Procedural Rules

The Florida Supreme Court bifurcated the procedural rule amendments from the rest of the Report<sup>133</sup> and the amendments were published for comment in The Florida Bar News on September 15, 2009.<sup>134</sup> Comments<sup>135</sup> came from individual lawyers, the Florida Bankers Association, Legal Services organizations, a judicial circuit, the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy, and a “full-time working mother representing herself pro se in a Palm Beach County foreclosure action.”<sup>136</sup> Most of the comments addressed the specific rule revision requiring verification of complaints in residential mortgage foreclosure cases<sup>137</sup> and the suggested adoption of a new Affidavit of Diligent Search form to require disclosure of efforts made by plaintiffs to locate defendants.<sup>138</sup> Of those commenting on the mediation pro-

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communicate with the plaintiff to resolve the case, and which may be referred to the managed mediation program at equal cost to both parties.” *Id.*

<sup>131</sup> Florida Rule of Civil Procedure 1.110(b) would be amended to require a verification to be attached to foreclosure actions in the form of an “oath, affirmation, or the following statement: ‘Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.’” *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460, at 13 (Fla. Feb. 11, 2010), available at <http://www.floridasupremecourt.org/decisions/2010/sc09-1460.pdf>.

<sup>132</sup> The original coversheet contained one category that included real property and mortgage foreclosure. FINAL REPORT, *supra* note 1, app. K, at 5. The proposed amendment created a separate category for real property and another for mortgage foreclosure with three subcategories: residential homestead properties, residential non-homestead properties, and commercial properties. *Id.*

<sup>133</sup> *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460, at 2-3 n.1.

<sup>134</sup> *Proposed Rules Dealing with Foreclosures*, FLA. B. NEWS, Sept. 15, 2009, at 18, available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/Articles/BF2D3DAAAD62CA128525762000472590>.

<sup>135</sup> See *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460, at 11-12 (listing various comments received). Some comments were received but were stricken by the court as untimely filed. See, e.g., *In re Amendments to Fla. Rules of Civ. Procedure*, No. SC09-1460 (Fla. Oct. 20, 2009) (striking a comment filed by the “Put Something Back Pro Bono Project”), [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/09/09-1460/Filed\\_10-20-2009\\_Order\\_Striking.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/09/09-1460/Filed_10-20-2009_Order_Striking.pdf).

<sup>136</sup> See *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460, at 11-12 (listing various comments received); Lisa Epstein, Comment on the Emergency Rule and Form Proposals of the Supreme Court Task Force on Residential Mortgage Foreclosure Cases at 1, *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460 (Oct. 15, 2009), <http://146.201.5.144/library/flsupct/sc09-1460/09-1460CommentsEpstein.pdf>.

<sup>137</sup> *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460, at 13.

<sup>138</sup> See *id.* at 4-5 (discussing comments on the “diligent search.”).

gram, most expressed support in general<sup>139</sup> but had specific suggestions to improve it. These included a revision from automatic referral to an opt-in process so mediations would be held only in those cases where there were defendants who were interested in working out a resolution,<sup>140</sup> additional required disclosures by the plaintiffs prior to mediation,<sup>141</sup> funds so that neither party would have to bear the expense of the mediation,<sup>142</sup> and pegging the referral to mediation from the date the defendant is served rather than the date the case is filed to avoid the unfairness of a defendant having to appear shortly after service.<sup>143</sup> The final series of comments on mediation rules related to the appearance rule.

Thomas H. Bateman and Janet E. Ferris began the series by filing a comment suggesting that the Task Force recommendation for amending the Rules of Civil Procedure did not go far enough.<sup>144</sup> Citing their experience as circuit judges, they asserted that many lender representatives in mortgage foreclosure cases “either do not appear at all, or . . . appear without full settlement authority, or . . . are handling several mediations at a time causing the instant mediation session to be delayed unnecessarily.”<sup>145</sup> To address the problem of non-appearance and inability for the mediator to report non-appearance, they suggested the following rule revision:

**RULE 1.720. MEDIATION PROCEDURES**

**(b) Sanctions for Failure to Appear.** If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorneys’ fees and other costs, against the party failing to appear. If a party to mediation is a public entity required to conduct its business pursuant to chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless stipulated by the

<sup>139</sup> See Comments on the Proposed Amendments to the Rules of Civil Procedure at 1-3, *In re* Amendments to Fla. Rules of Civil Procedure, No. SC09-1460 (Fla. Sept. 30, 2009), <http://146.201.5.144/library/flsupct/sc09-1460/09-1460CommentsLombardi.pdf>.

<sup>140</sup> Ben-Erza & Katz, P.A.’s Objection, *supra* note 109, at 14.

<sup>141</sup> Housing Umbrella Group of Florida and Consumer Umbrella Group (two hundred legal services and legal aid attorneys) suggested that servicers should be required to provide the physical copy of the actual net present value (NPV) calculations, the current appraisal, and the pooling and servicing agreement, HUD1, and Truth and Lending Disclosure. Comments of the Housing Umbrella Group and Consumer Umbrella Group of Florida Legal Services, Inc. at 7, *In re* Amendments to Fla. Rules of Civil Procedure, No. SC09-1460 (Fla. Aug 17, 2009), [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/09/09-1460/Filed\\_10-01-2009\\_HUG\\_Comment.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/09/09-1460/Filed_10-01-2009_HUG_Comment.pdf).

<sup>142</sup> Because of concern for the defendants, Housing Umbrella Group of Florida and Consumer Umbrella Group suggested that there be funds for the service, or at a minimum, not have the fee liability shift. *Id.* at 8.

<sup>143</sup> Comments of Legal Services of North Florida Inc., and the North Florida Center for Equal Justice at 2, *In re* Amendments to Fla. Rules of Civil Procedure, No. SC09-1460 (Fla. Aug 17, 2009), <http://146.201.5.144/library/flsupct/sc09-1460/09-1460CommentsLSN-FandNFCFEJ.pdf>.

<sup>144</sup> Comments of Thomas H. Bateman III and Janet E. Ferris at 4, *In re* Amendments to Fla. Rules of Civil Procedure, No. SC09-1460 (Fla. Oct. 1, 2009), <http://146.201.5.144/library/flsupct/sc09-1460/09-1460CommentsBatemanFerris.pdf>.

<sup>145</sup> *Id.* at 1 nn.1, 5.

parties or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present:

- (1) The party or its representative having full authority to settle without further consultation.
- (2) The party's counsel of record, if any.
- (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

Notwithstanding the limitations on reporting to the court in rule 1.730, the mediator shall report to the court if a party or representative has not complied with the appearance requirements of this subdivision. The mediator's report shall be limited to reporting only that a party or representative did not appear, without further explanation or comment. An appearance by a party or representative without full authority to settle without further consultation shall be considered a failure to appear under this subdivision.<sup>146</sup>

The Task Force was able to reach consensus on a response to all of the comments filed, but remained divided as to the Bateman-Ferris proposal.<sup>147</sup> In order to develop a response, the Task Force requested that the court extend the time for comments to permit the Supreme Court Committee on Alternative Dispute Resolution (ADR) Rules and Policy to submit comments.<sup>148</sup> The court granted the ADR Rules and Policy Committee until October 15, 2009 to file its comments.<sup>149</sup> Given the brief extension, the Committee was unable to hold a meeting with a quorum by the required deadline. In its response, the Committee indicated that it had been studying the issue and had approved "in concept, a somewhat different approach to the problem, proposing that the parties be required to sign a statement prior to the mediation identifying the person who will be attending the mediation and providing an attestation that the person has full authority to settle the case."<sup>150</sup>

The Committee also highlighted the competing interest of "protecting the confidentiality and privilege of communications which occur during a mediation and the need for disclosure in the event sanctions are appropriate to be imposed pursuant to the rule."<sup>151</sup> Finally, the Committee expressed its intent to advise the court of its official position on the issue by oral argument.<sup>152</sup>

<sup>146</sup> *Id.* at 6-7.

<sup>147</sup> Response of the Task Force on Residential Mortgage Foreclosure Cases at 9, *In re* Amendments to Fla. Rules of Civil Procedure, No. SC09-1460 (Fla. Oct. 12, 2009), <http://146.201.5.144/library/flsupct/sc09-1460/09-1460Response.pdf>.

<sup>148</sup> *Id.*

<sup>149</sup> Comment of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy to the Rules Proposals of the Task Force on Residential Mortgage Foreclosure Cases and the Bateman-Ferris Comment Thereto at 1, *In Re* Amendments to Fla. Rules of Civil Procedure, No. SC09-1460 (Fla. Oct. 15, 2009), <http://146.201.5.144/library/flsupct/sc09-1460/09-1460CommentsADRRPC.pdf>.

<sup>150</sup> *Id.* at 2.

<sup>151</sup> *Id.* at 2-3.

<sup>152</sup> *Id.* at 3. Interestingly, the court determined that it would hear oral argument only from four individuals: the chair of the Task Force; Marc Ben-Ezra, of Ben-Ezra & Katz; the Florida Bankers Association; and the chair of the Civil Procedures Rules Committee, but not

In response, the Task Force filed the following with the court:

In keeping with the Task Force's general approach to avoid significant rule changes or statutory changes to deal with this foreclosure emergency which could have unintended consequences, we recommend to the Florida Supreme Court that the Bateman/Ferris rule proposal be referred to the Committee on Alternative Dispute Resolution Rules and Policy for further study.<sup>153</sup>

The Task Force also noted that the ADR Rules and Policy Committee comment "indicates its approval in concept of the approach requiring parties to sign a statement prior to mediation identifying the person who will be attending the mediation and providing an attestation that the person has full authority to settle the case."<sup>154</sup> Noting that while the requirement is "substantially similar" to the Task Force proposal, it failed to address the "fundamental confidentiality issue of how the failure to comply with the representation of settlement authority can be reported to the court as a non-appearance."<sup>155</sup>

Between the time the Task Force filed its initial response and the response to the ADR Rules and Policy Committee response, the Task Force agreed to the following proposal<sup>156</sup> to be implemented in the interim and only to deal with foreclosure cases:

At the time that the mediation is scheduled to physically commence, the mediation manager shall enter the mediation room, prior to the commencement of the mediation conference and prior to any discussion of the case in the presence of the mediator, and take written roll. That written roll will consist of a determination of the presence of the borrower, the Plaintiff's lawyer, and *the Plaintiff's representative with full authority to settle*. If the mediation manager determines that anyone is not present, that party shall be reported by the mediation manager as a non-appearance by that party on the written roll. *If the mediation manager determines that the plaintiff's representative present does not have full authority to settle, the mediation manager shall report that the plaintiff's representative did not appear on the written roll as a representative with full settlement authority as required by this Model Administrative Order. The written roll and communication of authority is not a mediation communication.*<sup>157</sup>

The Task Force proposal attempted to address the dilemma on reporting appearance despite the Confidentiality and Privilege Act<sup>158</sup> by involving the program manager, not the mediator, to determine who is present with full settlement authority prior to the actual commencement of the mediation by the

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from anyone related to the appearance rule at mediation. *Case Docket for In re Amendments to Florida Rules of Civil Procedure*, FLA. SUP. CT., [\(select "SC-09" from the "FSC Case Number" drop-down menu; then enter "1460"\)](http://jweb.flcourts.org/pls/docket/ds_docket_search%20(select%20SC-09%20from%20the%20FSC%20Case%20Number%20drop-down%20menu;then%20enter%201460)) (last visited Mar. 8, 2011).

<sup>153</sup> Response of the Task Force on Residential Mortgage Foreclosure Cases to the Alternative Dispute Resolution Rules and Policy Committee's Comment on the Bateman-Ferris Proposal at 2, *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460 (Fla. Oct. 22, 2009) [hereinafter *Task Force Response to the Bateman-Ferris Proposal*], <http://146.201.5.144/library/flsupct/sc09-1460/09-1460ResponseToADRcommentTask%20Force.pdf>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> It was supported by nine members of the Task Force, opposed by two members, and two members abstained. *Id.* at 2-3.

<sup>157</sup> *Id.* at 3 (emphasis added).

<sup>158</sup> FLA. STAT. ANN. §§ 44.401-.406 (West Supp. 2010).

mediator. The proposal goes so far as to explicitly state that the “written roll and communication of authority is not a mediation communication.”<sup>159</sup> However, given that the communication is made “by . . . a mediation participant . . . in furtherance of mediation,”<sup>160</sup> this assertion is questionable. The Task Force wisely noted in its Final Report that its recommendations on foreclosure mediation, “should *never* be utilized to suggest that these are acceptable across the board solutions outside this particular unique emergency situation.”<sup>161</sup> Further, the Task Force stated in its Response to the ADR Rules and Policy Committee Response that the proposal be adopted on an interim basis, pending additional work by the ADR Committee, “in connection with this emergency mediation program to deal with foreclosure cases alone.”<sup>162</sup>

### C. Task Force Response to Comments on the Final Report

On October 22, 2009, the Task Force submitted its Response of the Task Force on Residential Mortgage Foreclosure Cases to Comments on its Final Report and Recommendations.<sup>163</sup> The Task Force noted two issues which “permeate[d] a significant number of the comments received,” namely, “opt-in” versus “opt out” and the timeline for mediation.<sup>164</sup> The Task Force response suggested that its proposal should be considered a “modified opt-in” in that after the lender pays an initial fee, the mediation manager contacts the homestead borrower to inquire if s/he wishes to participate in mediation. If the borrower wishes to participate in the program, s/he “opts in.”<sup>165</sup> The plaintiffs, however, preferred that the mediation manager have no involvement—thus eliminating the need for payment—until the borrower affirmatively “opts in.”<sup>166</sup> In terms of the timeline for the mediation process, the Task Force noted

<sup>159</sup> Task Force Response to the Bateman-Ferris Proposal, *supra* note 153, at 3.

<sup>160</sup> FLA. STAT. ANN. § 44.403(1).

<sup>161</sup> FINAL REPORT, *supra* note 1, at 29. The Task Force was specifically referring to the recommendations in “connection with fee-based outside management, with the plaintiff paying the cost, borrower counseling requirement, and permitting telephone appearance.” *Id.*

<sup>162</sup> Task Force Response to the Bateman-Ferris Proposal, *supra* note 153, at 3.

<sup>163</sup> Comments on the report were to be submitted no later than October 15, 2009. Thirty-nine comments were received by the deadline. Response of the Task Force on Residential Mortgage Foreclosure Cases to Comments on Its Final Report and Recommendations at 7, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 22, 2009) [hereinafter Oct. 22 Task Force Response] (on file with author).

<sup>164</sup> *Id.* at 3, 5.

<sup>165</sup> *Id.* at 3.

<sup>166</sup> See Comments of the Collins Center at 8-9, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-15-2009\\_Collins\\_Center.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-15-2009_Collins_Center.pdf); Comments of FannieMae at 2-3, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-15-2009\\_Fannie\\_Mae.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-15-2009_Fannie_Mae.pdf); Comments of the Florida Bankers Association at 3-5, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-15-2009\\_Florida\\_Bankers.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-15-2009_Florida_Bankers.pdf) [hereinafter Comments of Florida Bankers]; Comments of Freddie Mac at 2, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), <http://www.florida>

its belief that the managed mediation program would not result in delay because the proposed 120 days for mediation to be accomplished was consistent with the procedural rules for mediation<sup>167</sup> and is the same time allowed to accomplish service of process.<sup>168</sup>

The Task Force noted the comments generally reflected consensus in terms of support for mediation of foreclosure actions and the value of foreclosure counseling for borrowers.<sup>169</sup> The comments also reflected a concern that the mediation process not unduly delay the case, the need for pre-suit mediation, legal help for unrepresented borrowers who cannot afford counsel, and expedited calendars for vacant properties and cases in which borrowers seek to surrender property.<sup>170</sup> In addition, there continued to be disagreement about how to pay and who should pay for mediation, qualifications of the mediator, the court's authority to implement the program and how much flexibility each circuit should retain.<sup>171</sup>

An additional area which generated some comments and for which no consensus was reached, related to questions of appearance<sup>172</sup> and specifically, whether plaintiff's counsel should be permitted to appear electronically.<sup>173</sup>

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supremecourt.org/pub\_info/documents/foreclosure\_comments/Filed\_10-15-2009\_Freddie\_Mac.pdf; Comments of the Law Firm of Ben-Ezra & Katz, P.A. in Response to the Final Report & Recommendation of the Residential Mortgage Foreclosure Task Force at 5-6, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-15-2009\\_Ben\\_Ezra.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-15-2009_Ben_Ezra.pdf) [hereinafter Comments of Ben-Ezra]; Comments of Malcom E. Harrison at 1-2, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-15-2009\\_Harrison.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-15-2009_Harrison.pdf) [hereinafter Comments of Harrison]; Comments of Roy A. Diaz at 2, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-15-2009\\_Diaz.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-15-2009_Diaz.pdf); Comments of The Florida Bar Real Property, Probate & Trust Law Section at 2-3, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 9, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-09-2009\\_Real\\_Property\\_Section.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-09-2009_Real_Property_Section.pdf) [hereinafter Comments of RPPTL Section]; Comments of Virginia R. Hiatt at 1, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 2, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-02-2009\\_Hiatt.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-02-2009_Hiatt.pdf) [hereinafter Comments of Hiatt].

<sup>167</sup> See FLA. R. CIV. P. 1.710(a) ("Mediation shall be completed within 45 days of the first mediation conference *unless extended by order of the court or by stipulation of the parties.*") (emphasis added).

<sup>168</sup> Oct. 22 Task Force Response, *supra* 163 note, at 5.

<sup>169</sup> *Id.* at 6.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 6-7.

<sup>172</sup> See Comments of Harrison, *supra* note 166, at 2-3; Comments of RPPTL Section, *supra* note 166, at 2.

<sup>173</sup> See Comments of Ben-Ezra, *supra* note 166, at 6; Comments of Eugene Presley at 1, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_comments/Filed\\_10-15-2009\\_Presley.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_comments/Filed_10-15-2009_Presley.pdf); Comments of Florida Bankers, *supra* note 166, at 10; Comments of Hiatt, *supra* note 166, at 4-5; Comments of Louis F. Ray, Jr. at 1, *In re* Final Report & Recommendations on Residential Mortg. Foreclosure Cases, No. AOSC09-1460 (Fla. Oct. 15, 2009), <http://www.floridasupremecourt.org/>

Ignoring that the report and proposed administrative order would permit plaintiff's representative to appear electronically so long as s/he had "full authority to settle without further consultation,"<sup>174</sup> concerns raised by some plaintiffs included that physical appearance added extra expense, did nothing to facilitate settlement, and was outdated due to the availability of technology which could allow appearance via web cam, video conference, or other electronic means.<sup>175</sup> The advanced notification requirement was objectionable as restricting flexibility which was needed given that the plaintiffs "are attempting to conduct mediations all over the United States. Many of the mediations are cancelled at the last minute or not attended by the Borrower. The original person could be tied up on the phone, out sick or busy with another mediation."<sup>176</sup>

In support of the requirement that plaintiffs send a representative with full authority, defense attorney Malcolm E. Harrison included the following example from a case in which he was involved:

I represented a Palm Beach County school teacher, who worked summer school this year while drawing her normal monthly salary. She wanted and should have qualified for the Home Affordability Modification Program. Unfortunately, the statistical average of her income for the year was distorted upward by her summer school wages to the point that it appeared that her mortgage payment on a month-to-month basis was lower than the 31% mortgage threshold established for participation in HAMP. Everyone—the mediator, the bank's lawyer, the bank's representative, my client, and I—recognized the problem. Unfortunately, the bank representative could not do anything about it because she did not have the authority to act outside of the box. Her only authority was to put numbers into a program and then read the results.

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pub\_info/documents/foreclosure\_comments/Filed\_10-02-2009\_Ray.pdf [hereinafter Comments of Ray].

<sup>174</sup> FINAL REPORT, *supra* note 1, at 37. Here again, the Task Force explicitly made the point that this recommendation was made solely due to the unique character of the emergency. *Id.* Underscoring the unique nature of the mortgage foreclosure situation, the Task Force included the results of its research into the top five foreclosure filers in each county, and the results revealed that the list includes only ten institutions: "Deutsche Bank, U.S. Bank, Wells Fargo, Chase Home Finance, SunTrust Mortgage, Bank of New York, Bank of American [sic] and Countrywide Financial Corporation, J.P.Morgan [sic] and CitiMortgage." *Id.* at 37 n.3.

<sup>175</sup> Virginia R. Hiatt contended:

Requiring the attorney, or any of the parties, to personally appear at a foreclosure mediation is expensive, multiplying the cost of the mediation to the plaintiffs at least four fold and is completely unnecessary. It does not facilitate settlement, it impedes it. It is an outdated concept at a time when technology is available to us all, and one that costs far too much money. We can appear by web cam, video conference, go to meeting, telephone, or any other electronic manner the mediator or borrower suggests. In many jurisdictions, we are requesting to be permitted to appear electronically, the judges are granting many of our requests, and there has been no negative impact on the mediation process. When we have opposing counsel in a mediation, they rarely object to us appearing electronically, and in fact they quite often make the same request. Comments of Hiatt, *supra* note 166, at 4; *see also* Comments of Ben-Ezra, *supra* note 166, at 6.

<sup>176</sup> *See* Comments of Hiatt, *supra* note 166, at 4-5; *see also* Comments of Ben-Ezra, *supra* note 166, at 4-5. Louis F. Ray, Jr. requested that the practice where plaintiff's attorney of record retains special mediation counsel in the city where the mediation is to take place be permitted to continue. Comments of Ray, *supra* note 173, at 1. Under this practice, "the special counsel is physically present at the mediation and participates together with the attorney who filed the foreclosure, who 'appears by phone.'" *Id.*

That mediation failed. If lenders really want to avoid foreclosure with people who have the means to make payments, it is in their best interest to comply with the requirement to send a true decision maker and not just a dedicated “mediations representative,” i.e. a re-tooled customer representative from loss mitigation.<sup>177</sup>

Even those objecting to the process of identifying in advance who will appear at mediation recognized the importance that the “lender representative appearing at the mediation have full knowledge of the borrower’s submitted financial information and full authority to negotiate and settle the case on behalf of the lender.”<sup>178</sup> The Florida Bankers Association suggested that borrowers’ counsel should be required to attend if affirmative defenses and counterclaims have been raised because the borrower will be mediating more than the modification of the loan.<sup>179</sup>

#### IV. CURRENT STATUS

##### A. *Florida Supreme Court Opinion on Rule Amendments and Administrative Order of the Chief Justice*

On December 28, 2009, the chief justice issued Administrative Order AOSC09-54. In it, the chief justice recognized that the “best method to open communication and facilitate problem-solving between the parties to foreclosure cases while conserving limited judicial resources,”<sup>180</sup> was the Task Force’s recommendation that the court adopt a uniform, statewide managed mediation program implemented through a model administrative order to be issued by each circuit chief judge. Under this model:

[A]ll foreclosure cases in the state courts that involve residential homestead property will be referred to mediation, unless the plaintiff and borrower agree otherwise or unless effective pre-suit mediation that substantially complies with the managed mediation program requirements has been conducted. Referral of the borrower to foreclosure counseling prior to mediation, early electronic exchange of borrower and lender information prior to mediation, and the ability of a plaintiff’s representative to appear at mediation by telephone are features of the model administrative order.<sup>181</sup>

As part of the Administrative Order, the court adopted the proposed model administrative order with only “minor changes”<sup>182</sup> and the recommended written parameters for qualifying providers of managed mediation services.<sup>183</sup> The

<sup>177</sup> Comments of Harrison, *supra* note 166, at 2-3.

<sup>178</sup> Comments of RPPTL Section, *supra* note 166, at 2.

<sup>179</sup> Comments of Florida Bankers, *supra* note 166, at 10-11.

<sup>180</sup> Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, at 3 (Fla. Dec. 28, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf>.

<sup>181</sup> *Id.* at 2-3.

<sup>182</sup> *Id.* at 3. The most significant deviations from the Task Force Recommendations was allowing information disclosed between the plaintiffs, the borrowers, and the mediation managers to be transmitted via a “secure dedicated e-mail address” rather than only via a web-enabled information platform since it may not be possible in the short term to develop such a platform. *Id.* at 5-6.

<sup>183</sup> *Id.* at 3. The administrative order stressed the importance that the providers of the managed mediation services be “independent of the judicial branch, capable of sustained operation without fiscal impact to the courts, politically and professionally neutral, and have a

court also accepted the recommendations relating to borrower opt-out,<sup>184</sup> training standards and learning objectives for training mediators in foreclosure cases,<sup>185</sup> and mediation fees.<sup>186</sup> Rather than change the Rules of Civil Procedure, the court opted to accept the Task Force recommendation “that plaintiffs must have present at the mediation conference a representative who has full authority to settle and can bind the plaintiff to any mediated settlement agreement.”<sup>187</sup> The model Administrative Order allows appearance by telephone or other electronic method consistent with rule of the Florida Rules of Civil Procedure 1.720(b), which permits a change in the appearance requirement “by order of the court.”<sup>188</sup> No exception from physical appearance was made for the plaintiff’s counsel, the borrower and borrower’s counsel. The court also adopted the Task Force consensus recommendation, filed in response to the comments, requiring the program manager to take “written roll.”<sup>189</sup>

In relation to the specific rule amendments, the Florida Supreme Court consolidated case number SC09-1460, *In Re: Amendments to the Florida Rules of Civil Procedure* submitted by the Task Force on Residential Mortgage Foreclosure Cases and case number SC09-1579, *In Re: Amendments to the Florida Rules of Civil Procedure—Form 1.996 (Final Judgment of Foreclosure)* submitted by the Civil Procedure Rules Committee.<sup>190</sup> Rule 1.110(b) was amended to require verification of mortgage foreclosure complaints involving residential real property.<sup>191</sup> The primary purposes of the amendment were

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demonstrated ability to efficiently manage the extremely high volume of foreclosure actions in the circuit or circuits in which services are to be provided.” *Id.* at 3-4.

<sup>184</sup> A borrower may opt out by declining to participate after “being contacted by the mediation manager, or by not completing the pre-mediation requirements.” *Id.* at 4. If the parties participated in an “independent, genuine, fair, and impartial” pre-suit mediation conducted by a Supreme Court-certified circuit civil mediator after the borrower had participated in foreclosure counseling, they also could opt out. *Id.* at 4-5.

<sup>185</sup> The Residential Mortgage Foreclosure Training Standards recommended by the Task Force and adopted by the Florida Supreme Court follow the model of the Mediation Training Standards and Procedures. *See generally* Mediation Training Standards and Procedures, Admin. Order No. AOSC09-34 (Fla. July 24, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-34.pdf>. *See infra* Appendix C for a full copy of the mortgage foreclosure training standards.

<sup>186</sup> The court adopted the model administrative order process, which “provides for staged payments: part paid at the time the complaint is filed and the balance paid after the mediation is scheduled.” *Final Report and Recommendations on Residential Mortgage Foreclosure Cases*, Admin. Order No. AOSC09-54, at 6-7. The costs would be recoverable in the final judgment of foreclosure and plaintiffs would be entitled to a refund of fees for foreclosure counseling if the borrower did not participate. *Id.* at 7. Fees would also be refunded if the case settled prior to mediation or if the borrowers opted out of mediation. *Id.* The Task Force did not recommend a specific fee, but the court adopted a cap of \$750. *Id.*

<sup>187</sup> *Id.* at 7.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 7-8, app. A, at A-9.

<sup>190</sup> *See generally In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460, at 13 (Fla. Feb. 11, 2010), available at <http://www.floridasupremecourt.org/decisions/2010/sc09-1460.pdf>. *See generally In re Amendments to Fla. Rules of Civil Procedure—Mgmt. of Cases Involving Complex Litig.*, 30 So. 3d 477 (Fla. 2009) (Task Force petition amendments to form 1.997 (Civil Coversheet)).

<sup>191</sup> Rule 1.110 General Rules of Pleading now requires,

(1) to provide incentive for the plaintiff to appropriately investigate and verify its ownership of the note or right to enforce the note and ensure that the allegations in the complaint are accurate; (2) to conserve judicial resources that are currently being wasted on inappropriately pleaded 'lost note' counts and inconsistent allegations; (3) to prevent the wasting of judicial resources and harm to defendants resulting from suits brought by plaintiffs not entitled to enforce the note; and (4) to give the trial courts greater authority to sanction plaintiffs who make false allegations.<sup>192</sup>

The court also adopted an Affidavit of Diligent Search and Inquiry modified consistent with statutory requirements<sup>193</sup> and comments received to which the Task Force agreed,<sup>194</sup> a new Form 1.996(b) Motion to Cancel and Reschedule Foreclosure Sale modified consistent with comments received to which the Task Force agreed,<sup>195</sup> and a revised Form 1.996 Final Judgment of Foreclosure as requested by the Civil Procedure Rules Committee. No other rule amendments were made.

#### *B. Florida Supreme Court Committee on Alternative Dispute Resolution Rules and Policy*

As promised, the Florida Supreme Court Committee on Alternative Dispute Resolution Rules and Policy continued to work on a proposed amendment to rule 1.720(b) to address the apparent conflict with respect to confidentiality and reporting failure to appear with full authority to settle. On December 12, 2010, the Committee filed the following language in a petition to the Florida Supreme Court:

##### **Rule 1.720 Mediation Procedures**

~~(b) Sanctions for Failure to Appear. Appearance at Mediation. If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorneys' fees, and costs, against the party failing to appear. If a party to a mediation is a public entity required to conduct its business pursuant to Chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Otherwise, unless~~ Unless otherwise permitted by court order or stipulated by the parties in writing or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present:

- (1) The party or its a party representative having full authority to settle without further consultation.

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When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement: 'Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.'

FLA. R. CIV. P. 1.110.

<sup>192</sup> *In re Amendments to Fla. Rules of Civil Procedure*, No. SC09-1460, at 3-4.

<sup>193</sup> Specifically, a statement that the person to be served is over or under age 18 or that the person's age is unknown. FLA. STAT. ANN. § 49.041(2) (West 2006). This was not included in the form proposed by the Task Force.

<sup>194</sup> E-mail from Janice Fleischer, Dir. Fla. Dispute Resolution Ctr., to Sharon Press, Assoc. Professor, Hamline Univ. Sch. of Law (July 8, 2010) (on file with author).

<sup>195</sup> *Id.* at 6.

- (2) The party's counsel of record, if any; and
- (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

**(c) Party Representative Having Full Authority to Settle.** A "party representative having full authority to settle" shall mean the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party. Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.

**(d) Appearance by Public Entity.** If a party to a mediation is a public entity required to operate in compliance with Chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.

**(e) Confirmation of Authority.** Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, shall file written notice with the court and opposing counsel identifying the person or persons who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by subdivision (b).

**(f) Sanctions for Failure to Appear.** If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorneys' fees, and costs, against the party failing to appear. The failure to file a confirmation of authority required under subdivision (e) above, or failure of the persons actually identified in the confirmation to appear at the mediation conference, shall create a rebuttable presumption of a failure to appear.<sup>196</sup>

[Remainder of rule renumbered but otherwise substantially unchanged]

The Committee's proposal would maintain the process begun under the mortgage foreclosure crisis of requiring the filing of a written notice identifying the person or persons who will be attending the mediation and confirming that any representatives have the authority required by rule.<sup>197</sup> The amendment requires this filing to be completed by all parties—not just the plaintiffs as in

<sup>196</sup> Petition of Committee on Alt. Disp. Resol. Rules & Policy to Amend the Fla. R. of Civ. Pro. app. B, at 1-3, *In re* Amendments to Fla. Rules of Civil Procedure, No. SC10-2329 (Fla. Dec. 6, 2010), [http://www.floridasupremecourt.org/decisions/probin/sc10-2329\\_AppendixB.pdf](http://www.floridasupremecourt.org/decisions/probin/sc10-2329_AppendixB.pdf) [hereinafter ADR Dec. 6, 2010 Petition]. Rule 1.720(a) remained unchanged:

Interim or Emergency Relief. A party may apply to the court for interim or emergency relief at any time. Mediation shall continue while such a motion is pending absent a contrary order of the court, or a decision of the mediator to adjourn pending disposition of the motion. Time for completing mediation shall be tolled during any periods when mediation is interrupted pending resolution of such a motion.

FLA. R. CIV. P. 1.720(a).

<sup>197</sup> ADR Dec. 6, 2010 Petition, *supra* note 196, app. B, at 2-3.

the mortgage foreclosure situation—<sup>198</sup> and that it be filed with the trial court and served on opposing counsel<sup>199</sup> (the mortgage foreclosure procedure requires that the form be filed with the court and the program manager rather than opposing counsel given that many of the defendants are unrepresented in foreclosure cases).<sup>200</sup> Requiring the parties to file with the court serves another purpose. Namely, since attorneys will be disinclined to file false documents with the court, it is unlikely parties will designate an individual who does not have authority. The proposed amendment also defines “full authority to settle” for the first time as a representative (1) who is “the final decision maker with respect to all issues presented by the case [and (2)] who has the legal capacity to execute a binding settlement agreement on behalf of the settling party.”<sup>201</sup>

Recognizing the possibility that some will misinterpret the requirement to suggest that parties must “negotiate in good faith” or that parties are obligated to resolve their case in mediation, the rule amendment continues, “Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.”<sup>202</sup> The Committee Note to the proposed amendment further highlights the Committee’s continued commitment to self-determination by clarifying that “any and all elements of this rule are subject to revision or qualification with the mutual consent of the parties.”<sup>203</sup>

## V. CONCLUSION

As of July 19, 2010, the chief judges in all twenty judicial circuits have entered administrative orders for mortgage foreclosure cases and most closely follow the model administrative order.<sup>204</sup> A variety of entities were selected to

<sup>198</sup> Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, app. A, at A-5 (Fla. Dec. 28, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf>.

<sup>199</sup> *Id.* The proposed committee note clarifies that requiring direct representation to the court is a means to protect the mediator:

[A]ny verification of this representation would be upon motion by a party or inquiry by the court without involvement of the mediator and would not require disclosure of confidential mediation communications. *Nothing in this rule shall be deemed to impose any duty or obligation on the mediator* selected by the parties or appointed by the court to ensure compliance.

ADR Dec. 6, 2010 Petition, *supra* note 196, app. B, at 5 (emphasis added).

<sup>200</sup> Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, app. A, at A-5.

<sup>201</sup> The proposed committee note highlights that these standards are “objective” and “can be determined without reference to any confidential mediation communications.” ADR Dec. 6, 2010 Petition, *supra* note 196, app. B, at 4.

<sup>202</sup> The proposed committee note emphasizes this point by highlighting that “[a] decision by a party representative not to settle does not, in and of itself, signify the absence of full authority to settle.” *Id.*

<sup>203</sup> The final paragraph of the proposed committee note is: “The concept of self determination in mediation also contemplates the parties’ free choice in structuring and organizing their mediation sessions, including those who are to participate. Accordingly, any and all elements of this rule are subject to revision or qualification with the mutual consent of the parties.” *Id.* app. B, at 5.

<sup>204</sup> See Task Force on Residential Mortgage Foreclosure Cases, FLA. SUP. CT., [http://www.floridasupremecourt.org/pub\\_info/foreclosure.shtml](http://www.floridasupremecourt.org/pub_info/foreclosure.shtml) (last visited Mar. 8, 2011) (providing

serve in the capacity of mediation manager. Five circuits selected The Collins Center for Public Policy, Inc.,<sup>205</sup> another five circuits chose bar associations,<sup>206</sup>

hyperlinks to all the “Local Orders.”). One area in which some of the chief judges deviated was by imposing “geographic, residency, experience, or Florida Bar Membership eligibility requirements on mediators participating in the local managed mediation programs.” Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC10-57, at 2-3 (Fla. Nov. 5, 2010), available at <http://www.floridasupremecourt.org/clerk/adminorders/2010/AOSC10-57.pdf>. For example, the Second Judicial Circuit modified the Model Administrative Order to require that the mediators not only be Florida Supreme Court certified circuit mediators but that they also be members of The Florida Bar and reside or have a primary practice or business in the circuit. Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-05, at 4 (Fla. Cir. Ct. 2d May 19, 2010), available at [http://image.clerk.leon.fl.us/official\\_records/download\\_document.asp?book=4117&page=1420](http://image.clerk.leon.fl.us/official_records/download_document.asp?book=4117&page=1420).

<sup>205</sup> Specifically, the First, Tenth, Eleventh, Fourteenth, and Nineteenth Judicial Circuits. Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-01, at 2 (Fla. Cir. Ct. 1st Feb. 26, 2010), available at [http://www.firstjudicialcircuit.org/sites/default/files/document\\_library/AO2010-01.pdf](http://www.firstjudicialcircuit.org/sites/default/files/document_library/AO2010-01.pdf); Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 3-30.0, at 1 (Fla. Cir. Ct. 10th June 17, 2010), available at [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_orders/10th\\_Circuit.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/10th_Circuit.pdf); Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 10-03 A1, at 2 (Fla. Cir. Ct. 11th Mar. 17, 2010), available at [http://www.floridasupremecourt.org/pub\\_info/foreclosure.shtml](http://www.floridasupremecourt.org/pub_info/foreclosure.shtml) (follow “11th Circuit” hyperlink); Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-00-02, at 2 (Fla. Cir. Ct. 14th Cir. Mar. 29, 2010), available at <http://www.jud14.flcourts.org/Administrative%20Orders/2010-00-02.pdf>; Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-03, at 2 (Fla. Cir. Ct. 19th Feb. 26, 2010), available at <http://www.circuit19.org/documents/AO/2010-03%20RMFP.pdf>. In addition, the Twelfth Judicial Circuit selected the University of South Florida Conflict Resolution Collaborative in conjunction with the Collins Center. Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-11.1, at 1-2 (Fla. Cir. Ct. 12th May 20, 2010), available at [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_orders/Signed\\_05-20-2010\\_12th\\_Circuit.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/Signed_05-20-2010_12th_Circuit.pdf).

<sup>206</sup> Specifically, the Second, Fourth, Ninth, Thirteenth, and Fifteenth Judicial Circuits. Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-05, at 1 (Fla. Cir. Ct. 2d May 19, 2010), available at [http://www.floridasupremecourt.org/pub\\_info/foreclosure.shtml](http://www.floridasupremecourt.org/pub_info/foreclosure.shtml) (follow “2nd Circuit” hyperlink); Residential Homestead Foreclosure Cases Mandatory Referral to Mediation, Admin. Order No. 2010-01, at 1 (Fla. Cir. Ct. 4th Oct. 13, 2010), available at [http://www.jaxbar.org/1stamend\\_AdminOrder2010-1.pdf](http://www.jaxbar.org/1stamend_AdminOrder2010-1.pdf); Mandatory Circuit Court Mediation for Owner-Occupied Residential Mortgage Foreclosures, Admin. Order No. 2009-02, at 1-2 (Fla. Cir. Ct. 9th Feb. 25, 2009), available at <http://www.ninthcircuit.org/programs-services/dispute-resolution-services/downloads/2009-02.pdf>; Residential Mortgage Foreclosure Case Management and Mandatory Mediation of Homestead Foreclosure Cases, Admin. Order S-2010-051, at 1 (Fla. Cir. Ct. 13th July 19, 2010), available at [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_orders/13th\\_Circuit.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/13th_Circuit.pdf); Case Management of Residential Foreclosure Cases and Mandatory Mediation Referral, Admin. Order No. 3.308-12/10, at 1 (Fla. Cir. Ct. 15th Dec. 1, 2010), available at [http://www.palmbeachbar.org/downloads/AO\\_RMFP.pdf](http://www.palmbeachbar.org/downloads/AO_RMFP.pdf). The

three circuits selected the American Arbitration,<sup>207</sup> and the remaining six circuits opted for a variety of independent, nonpartisan organizations.<sup>208</sup>

The Committee on Alternative Dispute Resolution Rules and Policy was directed to “implement a reporting system to collect data on the number of cases statewide that are referred to managed mediation programs; whether the cases were settled, adjourned, or ended in impasse; and other relevant informa-

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Ninth Judicial Circuit is comprised of two counties. The Orange County Bar Association was selected by one of the counties while Osceola County opted to use certified mediators without specifying a manager. *Mandatory Circuit Court Mediation for Owner-Occupied Residential Mortgage Foreclosures*, Admin. Order No. 2009-02, at 1-2.

<sup>207</sup> Specifically, the Eighth, Seventeenth, and Eighteenth Judicial Circuits. Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 3.0954, at 2 (Fla. Cir. Ct. 8th July 20, 2010), available at <http://www.circuit8.org/web/ao/3.0954.pdf>; Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-29-Civ, at 1 (Fla. Cir. Ct. 17th Mar. 25, 2010), available at <http://www.17th.flcourts.org/2010-29-Civ.pdf>; Foreclosure—Mediation Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 10-09-B, exhibit 2, at 21 (Fla. Cir. Ct. 18th Dec. 3, 2010), available at [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_orders/18th\\_Circuit.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/18th_Circuit.pdf). Note the Eighteenth Judicial Circuit is comprised of two counties; Brevard County selected the American Arbitration Association while Seminole County did not specify a manager. *Compare Foreclose Procedures—Brevard County*, EIGHTEENTH JUD. CIRCUIT COURTS, [http://www.flcourts18.org/foreclosures\\_brevard.html](http://www.flcourts18.org/foreclosures_brevard.html) (last updated Dec. 6, 2010), with *Foreclosure Procedures: Seminole County*, EIGHTEENTH JUD. CIRCUIT COURTS, [http://www.flcourts18.org/foreclosures\\_seminole.html](http://www.flcourts18.org/foreclosures_seminole.html) (last visited Mar. 8, 2011).

<sup>208</sup> Specifically, the Third, Fifth, Sixth, Seventh, Sixteenth, and Twentieth Judicial Circuits. Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 2010-003, at 1-2 (Fla. Cir. Ct. 3rd Apr. 7, 2010), available at [http://www.jud3.flcourts.org/admin\\_orders/Admin\\_Order\\_2010-003.pdf](http://www.jud3.flcourts.org/admin_orders/Admin_Order_2010-003.pdf); Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. A-2010-13, at 2 (Fla. Cir. Ct. 5th May 25, 2010), available at <http://www.circuit5.org/ao/A-2010-13.pdf>; Mortgage Foreclosure Procedures, Admin. Order No. 2010-025 PA/PI-CIR, at 2 (Fla. Cir. Ct. 6th May 21, 2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/AOSAndRules/aos/aos2010/2010-025.htm>; (Amended) Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order CV-2010-022-SC (A), at 2 (Fla. Cir. Ct. 7th Dec. 3, 2010), available at [http://www.floridasupremecourt.org/pub\\_info/documents/foreclosure\\_orders/7th\\_Circuit.pdf](http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/7th_Circuit.pdf); Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 3.005, at 2 (Fla. Cir. Ct. 16th June 29, 2010), available at <http://www.keyscountys.net/foreclosure/adminorder3.005.pdf>; Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation, Admin. Order No. 1.12, at 2 (Fla. Cir. Ct. 20th Dec. 6, 2010), available at [http://www.ca.cjis20.org/pdf/ao/ao\\_1\\_12.pdf](http://www.ca.cjis20.org/pdf/ao/ao_1_12.pdf). Interestingly, the Sixth and Sixteenth Judicial Circuits opted to select a for-profit organization as the mediation manager. *Mortgage Foreclosure Procedures*, Admin. Order No. 2010-025 PA/PI-CIR, at 2; *Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation*, Admin. Order No. 3.005, at 2.

tion.”<sup>209</sup> In evaluating the success of the program, the court expressed interest in:

(1) the percentage of cases referred to the program that result in the program manager successfully contacting the borrowers; (2) the percentage of scheduled mediations failing to go forward because plaintiff’s representative did not appear; (3) the percentage of scheduled mediations failing to go forward because the borrower did not appear; and (4) the percentage of mediations resulting in partial or complete agreements compared to those resulting in impasse.<sup>210</sup>

It is still too early to know the full results from the program<sup>211</sup> and how success will be defined. The early data reported from the Nineteenth Circuit<sup>212</sup> provides some insights and challenges for the ADR Rules and Policy Committee as it tries to evaluate the program. For example, the Nineteenth Circuit reports that the percentage of borrowers contacted—compared with total cases received for the month—have increased from August through November 2009 when the average was 38 percent, to an average of 46 percent for the period of December 2009 through March 2010.<sup>213</sup> The increase is a positive sign, but the program still falls short of reaching even half of the borrowers. The numbers do not explain why the percentage is so low. In order to assess the value of the program, more information is needed.

Another important statistic is the number of cases received for mediation each month. This number, compared with the total number of foreclosures filed, should provide some initial indications of the impact of the program on the processing of mortgage foreclosure cases. While fluctuating from month to month, on average, the number of cases received for mediation has not decreased between August through November 2009 and December 2009 through March 2010.<sup>214</sup> From August through November, the average number of cases received was 562 and from December through March, it was 585.5 cases.<sup>215</sup> This slight increase in the average number of cases referred for mediation means that Florida has not yet turned the corner on the crisis. What is unclear is what else it means. Members of the Task Force hope that the procedures outlined in the administrative order will encourage plaintiffs to contact defendants in advance of filing the foreclosure proceeding in those cases where

<sup>209</sup> Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, at 8 (Fla. Dec. 28, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf>.

<sup>210</sup> *Id.* at 8-9.

<sup>211</sup> The Committee was scheduled to report in December 2010; however, it is unclear whether there will be a sufficient sample size to draw conclusions because AOSC09-54 contained no implementation date. As a result, implementation in the various circuits has been staggered. For example, the chief judge in the Thirteenth Judicial Circuit did not sign his administrative order until July 19, 2010 with an effective date of August 2, 2010. *Residential Mortgage Foreclosure Case Management and Mandatory Mediation of Homestead Foreclosure Cases*, Admin. Order S-2010-051, at 13.

<sup>212</sup> The Nineteenth Judicial Circuit, which initially began its program in March 2009, has been collecting statistics since August 2009. See generally FLA. NINETEENTH JUDICIAL CIRCUIT, RMFM PROGRAM 120 DAY STATUS REPORT (July 12, 2010) (on file with author).

<sup>213</sup> E-mail from Judge Burton Conner, Fla. 19th Judicial District Court, to Sharon Press, Assoc. Professor, Hamline Univ. Sch. of Law (July 29, 2010) (on file with author).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

settlement is possible. While the Florida Supreme Court could not mandate pre-suit mediation, the procedures could and do encourage this activity.<sup>216</sup> Without knowing more about the total number of homes in danger of foreclosure, it is impossible to know if pre-suit activity has increased or not. Again, more information is needed to draw conclusions.

In addition to the issues specific to the mortgage foreclosure mediation program, the field should closely monitor the procedural revisions to mediation which may impact mediation in general in order to judge their efficacy. In particular, the mortgage foreclosure procedures codify for the first time that someone other than the mediator “take attendance,” plaintiffs are permitted by administrative order—not just on a case by case basis—to appear electronically, and plaintiffs are required to disclose in advance of the mediation who will appear at the mediation “with full authority.” What impact will these decisions have on perceptions of procedural justice,<sup>217</sup> confidentiality, and self-determination?

Finally, the mortgage foreclosure crisis highlighted the difficulties an established mediation program had in responding quickly. Does this signal the maturation of court-connected mediation? Is it really a negative that it took time and careful deliberation to begin a new program?

While I have long speculated and expressed concerns about the dark side of institutionalization,<sup>218</sup> on balance, I believe that ultimately, the Florida mortgage foreclosure mediation program was designed better and offered greater protection to the parties by virtue of the extensive infrastructure that existed. While flexibility must remain the hallmark of mediation, there are limits. Flexibility does not mean that one sacrifices core values such as confidentiality of the process, self-determination of the parties and impartiality of the mediator in the interests of expediency. In the end, Florida was able to honor these values both in its approach to the crisis and its program.

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<sup>216</sup> The model order makes clear that participation in pre-suit mediation “in a manner consistent with the requirements of the model order can satisfy the plaintiff’s requirement to participate in mediation prior to foreclosure litigation.” FINAL REPORT, *supra* note 1, at 38. Thus, if a plaintiff participated in pre-suit mediation with the mediation manager, the path to litigation is clear. The Task Force stated in its Final Report “[t]he model order explicitly encourages pre-suit mediation. . . . For case management purposes, the best case is the one that is never filed.” *Id.*

<sup>217</sup> See generally Nancy A. Welsh, *Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RES. 179; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2000).

<sup>218</sup> See generally, Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV 43 (2003); Press, *supra* note 37, at 903.

APPENDIXES

- A. Model Administrative Order<sup>219</sup>
- B. Form “A”<sup>220</sup>
- C. Residential Mortgage Foreclosure Training Standards<sup>221</sup>
- D. Parameters for Providers of Managed Mediation Services<sup>222</sup>

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<sup>219</sup> This model order is adapted from the Florida Supreme Court. Final Report and Recommendations on Residential Mortgage Foreclosure Cases, Admin. Order No. AOSC09-54, app. A, at A-1 (Fla. Dec. 28, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf>.

<sup>220</sup> This form is adapted from the Florida Supreme Court. *Id.* exhibit 1, at A-20.

<sup>221</sup> These standards are adapted from the Florida Supreme Court. *Id.* exhibit 12, at A-59.

<sup>222</sup> These parameters are adapted from the Florida Supreme Court. *Id.* exhibit 13, at A-68.

IN THE *[number]* JUDICIAL CIRCUIT OF FLORIDA

OFFICE OF THE CHIEF JUDGE

ADMINISTRATIVE ORDER NUMBER 2009-*[#]*

**ADMINISTRATIVE ORDER FOR CASE MANAGEMENT OF  
RESIDENTIAL FORECLOSURE CASES AND  
MANDATORY REFERRAL OF MORTGAGE  
FORECLOSURE CASES INVOLVING  
HOMESTEAD RESIDENCES TO MEDIATION**

Whereas, pursuant to Article V, section 2(d) of the Florida Constitution, and section 43.26, Florida Statutes, the chief judge of each judicial circuit is charged with the authority and power to do everything necessary to promote the prompt and efficient administration of justice, and rule 2.215(b)(3), Florida Rules of Judicial Administration, mandates the chief judge to “develop an administrative plan for the efficient and proper administration of all courts within the circuit;” and

Whereas, rule 2.545 of the Rules of Judicial Administration requires that the trial courts “. . .take charge of all cases at an early stage in the litigation and. . .control the progress of the case thereafter until the case is determined. . .”, which includes “. . .identifying cases subject to alternative dispute resolution processes;” and

Whereas, Chapter 44, Florida Statutes, and rules 1.700-1.750, Florida Rules of Civil Procedure, provide a framework for court-ordered mediation of civil actions, except those matters expressly excluded by rule 1.710(b), which does not exclude residential mortgage foreclosure actions; and

Whereas, residential mortgage foreclosure case filings have increased substantially in the *[number]* Judicial Circuit, and state and county budget constraints have limited the ability of the courts in the *[number]* Judicial Circuit to manage these cases in a timely manner; and

Whereas, high residential mortgage foreclosure rates are damaging the economies of the count*[y]/[ies]* in the *[number]* Judicial Circuit; and

Whereas, the Supreme Court of Florida has determined that mandatory mediation of homestead residential mortgage foreclosure actions prior to the matter being set for final hearing will facilitate the laudable goals of communication, facilitation, problem-solving between the parties with the emphasis on self-determination, the parties’ needs and interests, procedural flexibility, full disclosure, fairness, and confidentiality. Referring these cases to mediation will also facilitate and provide a more efficient use of limited judicial and clerk resources in a court system that is already overburdened; and

Whereas, the *[name of program manager]* is an independent, nonpartisan, nonprofit organization that has demonstrable ability to assist the courts with managing the large number of residential mortgage foreclosure actions that recently have been filed in the *[number]* Judicial Circuit.

**NOW, THEREFORE, IT IS ORDERED:**

**Definitions**

As used in this Administrative Order, the following terms mean:

1. “RMFM Program” (Residential Mortgage Foreclosure Mediation Program) means the mediation program managed by *[name of program manager]* to implement and carry out the intent of this Administrative Order.
2. “The program manager” means *[name of program manager]*, qualified in accordance with parameters attached as Exhibit 13. Also referred to as the “Mediation Manager.”
3. “Plaintiff” means the individual or entity filing to obtain a mortgage foreclosure on residential property.
4. “Plaintiff’s representative” means the person who will appear at mediation who has full authority to settle without further consultation and resolve the foreclosure suit.
5. “Borrower” means an individual named as a party in the foreclosure action who is a primary obligor on the promissory note that is secured by the mortgage being foreclosed.
6. “Homestead residence” means a residential property for which a homestead real estate tax exemption was granted according to the certified rolls of the last assessment by the county property appraiser prior to the filing of the suit to foreclose the mortgage.
7. “Form A” means the certifications required herein in the format of Exhibit 1 attached.
8. “Plaintiff’s Disclosure for Mediation” means those documents requested by the borrower pursuant to paragraph 7 below.
9. “Borrower’s Financial Disclosure for Mediation” means those documents described in Exhibit 5 attached.
10. “Foreclosure counselor” means a counselor trained in advising persons of options available when facing a mortgage foreclosure, who has no criminal history of committing a felony or a crime of dishonesty, and who is certified by the United States Department of Housing and Urban Development (HUD) or National Foreclosure

Mitigation Counseling Program (NFMC) as an agency experienced in mortgage delinquency and default resolution counseling.

11. "Communication equipment" means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other, provided that all conversation of the participants is audible to all persons present.

### **Scope**

1. ***Residential Mortgage Foreclosures (Origination Subject to TILA).*** This Administrative Order shall apply to all residential mortgage foreclosure actions filed in the [number] Judicial Circuit in which the origination of the note and mortgage sued upon was subject to the provisions of the federal Truth in Lending Act, Regulation Z. However, compliance with this Administrative Order varies depending on whether the property secured by the mortgage is a homestead residence.

Upon the effective date of this Administrative Order, all newly filed mortgage foreclosure actions filed against a homestead residence shall be referred to the RMFM Program unless the plaintiff and borrower agree in writing otherwise or unless pre-suit mediation was conducted in accordance to paragraph 23. The parties to the foreclosure action shall comply with the conditions and requirements imposed by this Administrative Order. In actions to foreclose a mortgage on a homestead residence, the plaintiff and borrower shall attend at least one mediation session, unless the plaintiff and borrower agree in writing not to participate in the RMFM Program or the program manager files a notice of borrower nonparticipation.

Upon the effective date of this Administrative Order, all newly filed residential mortgage foreclosure actions involving property that is not a homestead residence shall comply with the requirements of filing a Form A as required by paragraph 5 below and the requirements of paragraph 18 below (plaintiff's certification as to settlement authority).

At the discretion of the presiding judge, compliance with this Administrative Order may also be required for homestead residential mortgage foreclosure actions filed prior to the effective date of this Administrative Order, to residences that are not homestead residences, and any other residential foreclosure action the presiding judge deems appropriate. A party requesting that the case be sent to mediation with the RMFM Program at the discretion of the presiding judge shall make the request in format of Exhibit 3 attached.

2. ***Referral to Mediation.*** This Administrative Order constitutes a formal referral to mediation pursuant to the Florida Rules of Civil Proce-

ture in actions involving a mortgage foreclosure of a homestead residence. The plaintiff and borrower are deemed to have stipulated to mediation by a mediator assigned by the program manager unless pursuant to rule 1.720(f), Florida Rules of Civil Procedure, the plaintiff and borrower file a written stipulation choosing not to participate in the RMFM Program. Referral to the RMFM Program is for administration and management of the mediation process and assignment of a Florida Supreme Court certified circuit civil mediator who has been trained in mediating residential mortgage foreclosure actions and who has agreed to be on the panel of available certified circuit civil mediators. Mediators used in the RMFM Program shall be trained in accordance with the standards stated in Exhibit 12 attached. Mediation through the RMFM Program shall be conducted in accordance with Florida Rules of Civil Procedure and Florida Rules for Certified and Court-Appointed Mediators.

3. ***Compliance Prior to Judgment.*** The parties must comply with this Administrative Order and the mediation process must be completed before the plaintiff applies for default judgment, a summary judgment hearing, or a final hearing in an action to foreclose a mortgage on a homestead residence unless a notice of nonparticipation is filed by the program manager.
4. ***Delivery of Notice of RMFM Program with Summons.*** After the effective date of this Administrative Order, in all actions to foreclose a mortgage on residential property the clerk of court shall attach to the summons to be served on each defendant a notice regarding managed mediation for homestead residences in the format of Exhibit 2 attached.

### **Procedure**

1. ***Responsibilities of Plaintiff's Counsel; Form A.*** When suit is filed, counsel for the plaintiff must file a completed Form A with the clerk of court. If the property is a homestead residence, all certifications in Form A must be filled out completely. Within one business day after Form A is filed with the clerk of court, counsel for plaintiff shall also electronically transmit a copy of Form A to the program manager along with the case number of the action and contact information for all of the parties. The contact information must include at a minimum the last known mailing address and phone number for each party.

In Form A, plaintiff's counsel must affirmatively certify whether the origination of the note and mortgage sued upon was subject to the provisions of the federal Truth in Lending Act, Regulation Z. In Form A, plaintiff's counsel must also affirmatively certify whether the property is a homestead residence. Plaintiff's counsel is not per-

mitted to respond to the certification with “unknown,” “unsure,” “not applicable,” or similar nonresponsive statements.

If the property is a homestead residence and if the case is not exempted from participation in the RMFM Program because of pre-suit mediation conducted in accordance with paragraph 23 below, plaintiff’s counsel shall further certify in Form A the identity of the plaintiff’s representative who will appear at mediation. Plaintiff’s counsel may designate more than one plaintiff’s representative. At least one of the plaintiff’s representatives designated in Form A must attend any mediation session scheduled pursuant to this Administrative Order. Form A may be amended to change the designated plaintiff’s representative, and the amended Form A must be filed with the court no later than five days prior to the mediation session. All amended Forms A must be electronically transmitted to the program manager via a secure dedicated e-mail address or on the web-enabled information platform described in paragraph 8 no later than one business day after being filed with the clerk of court.

2. ***Responsibilities of Borrower.*** Upon the program manager receiving a copy of Form A, the program manager shall begin efforts to contact the borrower to explain the RMFM Program to the borrower and the requirements that the borrower must comply with to obtain a mediation. The program manager shall also ascertain whether the borrower wants to participate in the RMFM Program.

The borrower must do the following prior to mediation being scheduled: meet with an approved mortgage foreclosure counselor, and provide to the program manager the information required by the Borrower’s Financial Disclosure for Mediation. The Borrower’s Financial Disclosure for Mediation will depend on what option the borrower wants to pursue in trying to settle the action.

It shall be the responsibility of the program manager to transmit the Borrower’s Financial Disclosure for Mediation via a secure dedicated e-mail address or to upload same to the web-enabled information platform described in paragraph 8; however, the program manager is not responsible or liable for the accuracy of the borrower’s financial information.

3. ***Plaintiff’s Disclosure for Mediation.*** Within the time limit stated below, prior to attending mediation the borrower may request any of the following information and documents from the plaintiff:
  - a. Documentary evidence the plaintiff is the owner and holder in due course of the note and mortgage sued upon.
  - b. A history showing the application of all payments by the borrower during the life of the loan.
  - c. A statement of the plaintiff’s position on the present net value of the mortgage loan.

- d. The most current appraisal of the property available to the plaintiff.

The borrower must deliver a written request for such information to the program manager in the format of Exhibit 6 attached no later than 25 days prior to the mediation session. The program manager shall promptly electronically transmit the request for information to plaintiff's counsel.

Plaintiff's counsel is responsible for ensuring that the Plaintiff's Disclosure for Mediation is electronically transmitted via a secure dedicated e-mail address or to the web-enabled information platform described in paragraph 8 below no later than five (5) business days before the mediation session. The program manager shall immediately deliver a copy of Plaintiff's Disclosure for Mediation to the borrower.

4. **Information to Be Provided on Web-Enabled Information Platform.** All information to be provided to the program manager to advance the mediation process, such as Form A, Borrower's Financial Disclosure for Mediation, Plaintiff's Disclosure for Mediation, as well as the case number of the action and contact information for the parties, shall be submitted via a secure dedicated e-mail address or in a web-enabled information platform with XML data elements.
5. **Nonparticipation by Borrower.** If the borrower does not want to participate in the RMFM Program, or if the borrower fails or refuses to cooperate with the program manager, or if the program manager is unable to contact the borrower, the program manager shall file a notice of nonparticipation in the format of Exhibit 4 attached. The notice of nonparticipation shall be filed no later than 120 days after the initial copy of Form A is filed with the court. A copy of the notice of nonparticipation shall be served on the parties by the program manager.
6. **Referral to Foreclosure Counseling.** The program manager shall be responsible for referring the borrower to a foreclosure counselor prior to scheduling mediation. Selection from a list of foreclosure counselors certified by the United States Department of Housing and Urban Development shall be by rotation or by such other procedures as may be adopted by administrative order of the chief judge in the circuit in which the action is pending. The borrower's failure to participate in foreclosure counseling shall be cause for terminating the case from the RMFM Program.
7. **Referrals for Legal Representation.** In actions referred to the RMFM Program, the program manager shall advise any borrower who is not represented by an attorney that the borrower has a right to consult with an attorney at any time during the mediation process and the right to bring an attorney to the mediation session. The pro-

gram manager shall also advise the borrower that the borrower may apply for a volunteer *pro bono* attorney in programs run by lawyer referral, legal services, and legal aid programs as may exist within the circuit. If the borrower applies to one of those agencies and is coupled with a legal services attorney or a volunteer *pro bono* attorney, the attorney shall file a notice of appearance with the clerk of the court and provide a copy to the attorney for the plaintiff and the program manager. The appearance may be limited to representation only to assist the borrower with mediation but, if a borrower secures the services of an attorney, counsel of record must attend the mediation.

8. ***Scheduling Mediation.*** The plaintiff's representative, plaintiff's counsel, and the borrower are all required to comply with the time limitations imposed by this Administrative Order and attend a mediation session as scheduled by the program manager. No earlier than 60 days and no later than 120 days after suit is filed, the program manager shall schedule a mediation session. The mediation session shall be scheduled for a date and time convenient to the plaintiff's representative, the borrower, and counsel for the plaintiff and the borrower, using a mediator from the panel of Florida Supreme Court certified circuit civil mediators who have been specially trained to mediate residential mortgage foreclosure disputes. Mediation sessions will be held at a suitable location(s) within the circuit obtained by the program manager for mediation. Mediation shall be completed within the time requirements established by rule 1.710(a), Florida Rules of Civil Procedure.

Mediation shall not be scheduled until the borrower has had an opportunity to meet with an approved foreclosure counselor. Mediation shall not be scheduled earlier than 30 days after the Borrower's Financial Disclosure for Mediation has been transmitted to the plaintiff via a secure dedicated e-mail address or uploaded to the web-enabled information platform described in paragraph 8.

Once the date, time, and place of the mediation session have been scheduled by the program manager, the program manager shall promptly file with the clerk of court and serve on all parties a notice of the mediation session.

9. ***Attendance at Mediation.*** The following persons are required to be physically present at the mediation session: a plaintiff's representative designated in the most recently filed Form A; plaintiff's counsel; the borrower; and the borrower's counsel of record, if any. However, the plaintiff's representative may appear at mediation through the use of communication equipment if plaintiff files and serves at least five (5) days prior to the mediation a notice in the format of Exhibit 7 attached advising that the plaintiff's representative will be

attending through the use of communication equipment and designating the person who has full authority to sign any settlement agreement reached. Plaintiff's counsel may be designated as the person with full authority to sign the settlement agreement.

At the time that the mediation is scheduled to physically commence, the program manager shall enter the mediation room prior to the commencement of the mediation conference and, prior to any discussion of the case in the presence of the mediator, take a written roll. That written roll will consist of a determination of the presence of the borrower; the borrower's counsel of record, if any; the plaintiff's lawyer; and the plaintiff's representative with full authority to settle. If the program manager determines that anyone is not present, that party shall be reported by the program manager as a non-appearance by that party on the written roll. If the program manager determines that the plaintiff's representative present does not have full authority to settle, the program manager shall report that the plaintiff's representative did not appear on the written roll as a representative with full settlement authority as required by this Administrative Order. The written roll and communication of authority to the program manager is not a mediation communication.

The authorization by this Administrative Order for the plaintiff's representative to appear through the use of communication equipment is pursuant to rule 1.720(b), Florida Rules of Civil Procedure (court order may alter physical appearance requirement), and in recognition of the emergency situation created by the massive number of residential foreclosure cases being filed in this circuit and the impracticality of requiring physical attendance of a plaintiff's representative at every mediation. Additional reasons for authorizing appearance through the use of communication equipment for mortgage foreclosure mediation include a number of protective factors that do not exist in other civil cases, namely the administration of the program by a program manager, pre-mediation counseling for the borrower, and required disclosure of information prior to mediation. The implementation of this Administrative Order shall not create any expectation that appearance through the use of communication equipment will be authorized in other civil cases.

If the plaintiff's representative attends mediation through the use of communication equipment, the person authorized by the plaintiff to sign a settlement agreement must be physically present at mediation. If the plaintiff's representative attends mediation through the use of communication equipment, the plaintiff's representative must remain on the communication equipment at all times during the entire mediation session. If the plaintiff's representative attends through the use of communication equipment, and if the mediation results in an impasse, within five (5) days after the mediation session, the plain-

tiff's representative shall file in the court file a certification in the format of Exhibit 8 attached as to whether the plaintiff's representative attended mediation. If the mediation results in an impasse after the appearance of the plaintiff's representative through the use of communication equipment, the failure to timely file the certification regarding attendance through the use of communication equipment shall be grounds to impose sanctions against the plaintiff, including requiring the physical appearance of the plaintiff's representative at a second mediation, taxation of the costs of a second mediation to the plaintiff, or dismissal of the action.

Junior lienholders may appear at mediation by a representative with full settlement authority. If a junior lienholder is a governmental entity comprised of an elected body, such junior lienholder may appear at mediation by a representative who has authority to recommend settlement to the governing body. Counsel for any junior lienholder may also attend the mediation.

The participants physically attending mediation may consult on the telephone during the mediation with other persons as long as such consultation does not violate the provisions of sections 44.401-406, Florida Statutes.

10. ***Failure to Appear at Mediation.*** If either the plaintiff's representative designated in the most recently filed Form A or the borrower fails to appear at a properly noticed mediation and the mediation does not occur, or when a mediation results in an impasse, the report of the mediator shall notify the presiding judge regarding who appeared at mediation without making further comment as to the reasons for an impasse. If the borrower fails to appear, or if the mediation results in an impasse with all required parties present, and if the borrower has been lawfully served with a copy of the complaint, and if the time for filing a responsive pleading has passed, the matter may proceed to a final hearing, summary judgment, or default final judgment in accordance with the rules of civil procedure without any further requirement to attend mediation. If plaintiff's counsel or the plaintiff's representative fails to appear, the court may dismiss the action without prejudice, order plaintiff's counsel or the plaintiff's representative's to appear at mediation, or impose such other sanctions as the court deems appropriate including, but not limited to, attorney's fees and costs if the borrower is represented by an attorney. If the borrower or borrower's counsel of record fails to appear, the court may impose such other sanctions as the court deems appropriate, including, but not limited to, attorney's fees and costs.
11. ***Written Settlement Agreement; Mediation Report.*** If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. Pursuant to rule 1.730(b),

Florida Rules of Civil Procedure, if a partial or full settlement agreement is reached, the mediator shall report the existence of the signed or transcribed agreement to the court without comment within 10 days after completion of the mediation. 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. In the case of an impasse, the report shall advise the court who attended the mediation, and a copy of Form A or any amended Form A shall be attached to the report for the court to determine if at least one of the plaintiff's representative named in Form A appeared for mediation. The mediator's report to the court shall be in the format of Exhibit 9 attached.

12. **Mediation Communications.** All mediation communications occurring as a result of this Administrative Order, including information provided to the program manager that is not filed with the court, shall be confidential and inadmissible in any subsequent legal proceeding pursuant to Chapter 44, Florida Statutes, the Florida Rules of Civil Procedure, and the Florida Rules for Certified and Court-Appointed Mediators, unless otherwise provided for by law.
13. **Failure to Comply with Administrative Order.** In all residential foreclosure actions, if a notice for trial, motion for default final judgment, or motion for summary judgment is filed with the clerk of court, no action will be taken by the court to set a final hearing or enter a summary or default final judgment until the requirements of this Administrative Order have been met. In cases involving a homestead residence, the presiding judge shall require that copies of either 1) the most recently filed Form A and the report of the mediator, or 2) the most recently filed Form A and the notice of borrower's nonparticipation be sent to the presiding judge by the plaintiff or plaintiff's counsel prior to setting a final hearing or delivered with the packet requesting a summary or default final judgment.

The failure of a party to fully comply with the provisions of this Administrative Order may result in the imposition of any sanctions available to the court, including dismissal of the cause of action without further notice.

14. **Mediation Not Required If Residence Is Not Homestead.** If the plaintiff certifies in Form A that the property is NOT a homestead residence when suit is filed, plaintiff's counsel must file and serve with the complaint a certification identifying the agent of plaintiff who has full authority to settle the case without further consultation. The certification shall be in the form of Exhibit 10 attached.

If the plaintiff certifies in Form A that the property is NOT a homestead residence, the matter may proceed to a final hearing, summary judgment, or default final judgment in accordance with the rules of

civil procedure without any further requirement to attend mediation, unless otherwise ordered by the presiding judge.

### **RMFM Program Fees**

1. ***RMFM Program Fees.*** The fee structure for the RMFM Program is based on the assumption that a successful mediation can be accomplished with one mediation session. Accordingly, pursuant to rule 1.720(g), Florida Rules of Civil Procedure, the reasonable program fees for the managed mediation, including foreclosure counseling, the mediator's fee, and administration of the managed mediation program, is a total of no more than \$750.00 payable as follows:
  - a. not more than \$400.00 paid by plaintiff at the time suit is filed for administrative fees of the RMFM Program, including outreach to the borrower and foreclosure counseling fees; and
  - b. not more than \$350.00 paid by plaintiff within 10 days after notice of the mediation conference is filed for the mediation fee component of the RMFM Program fees

If more than one mediation session is needed, the total program fee stated above will also cover a second mediation session. However, if an additional mediation session is needed after the second session, the plaintiff shall be responsible for the payment of the program fees for such additional mediation sessions, unless the parties agree otherwise. The program fees for the third and each subsequent mediation session shall be no more than \$350.00 per session.

All program fees shall be paid directly to the program manager. If the case is not resolved through the mediation process, the presiding judge may tax the program fees as a cost or apply it as a set off in the final judgment of foreclosure.

If the borrower cannot be located, chooses not to participate in the RMFM Program, or if the borrower does not make any contact with the foreclosure counselor, the plaintiff shall be entitled to a refund of the portion of the Program fees attributable to foreclosure counseling. If mediation is scheduled and the borrower announces an intention not to participate further in the RMFM Program prior to the mediation session, or if the case settles and the program manager has notice of the settlement at least five (5) days prior to the mediation session, the plaintiff shall be entitled to a refund of the Program fees allocated for the mediation session. If notice of settlement is not received by the program manager at least five (5) days prior to the scheduled mediation session, the plaintiff shall not be entitled to any refund of mediation fees.

The total fees include the mediator's fees and costs; the cost for the borrower to attend a foreclosure counseling session with an approved mortgage foreclosure counselor; and the cost to the program manager for administration of the managed mediation program, which includes but is not limited to providing neutral meeting and caucus space, scheduling, telephone lines and instruments, infrastructure to support a web-enabled information platform, a secure dedicated email address or other secure system for information transmittal, and other related expenses incurred in managing the foreclosure mediation program.

### **Program Manager to Monitor Compliance and Satisfaction**

1. ***Monitoring Compliance Concerning Certain Provisions of This Administrative Order, Satisfaction with RMFM Program, and Program Operation.*** The program manager shall be responsible for monitoring whether Form A has been filed in all residential foreclosure actions that commence after the effective date of this Administrative Order and whether the RMFM Program fees have been paid if the residence is a homestead residence. The program manager shall send compliance reports to the chief judge or the chief judge's designee in the format and with the frequency required by the chief judge.

The program manager may assist with enforcing compliance with this Administrative Order upon filing a written motion pursuant to rule 1.100(b), Florida Rules of Civil Procedure, stating with particularity the grounds therefor and the relief or order sought. Example orders are attached as Exhibit 11.

The program manager shall also provide the chief judge with periodic reports as to whether plaintiffs and borrowers are satisfied with the RMFM Program.

The program manager shall also provide the chief judge with reports with statistical information about the status of cases in the RMFM Program and RMFM Program finances in the format and with the frequency required by the chief judge.

2. ***Designation of Plaintiff Liaisons with RMFM Program.*** Any plaintiff who has filed five (5) or more foreclosure actions in the [number] Judicial Circuit while this Administrative Order is in effect shall appoint two RMFM Program liaisons, one of whom shall be a lawyer and the other a representative of the entity servicing the plaintiff's mortgages, if any, and, if none, a representative of the plaintiff. Plaintiff's counsel shall provide written notice of the name, phone number (including extension), email, and mailing address of both liaisons to the chief judge and the program manager within 30 days after the effective date of this Administrative Order, and on the first Monday of each February thereafter while this Administrative Order is in effect.

The liaisons shall be informed of the requirements of this Administrative Order and shall be capable of answering questions concerning the administrative status of pending cases and the party's internal procedures relating to the processing of foreclosure cases, and be readily accessible to discuss administrative and logistical issues affecting the progress of the plaintiff's cases through the RMFM Program. Plaintiff's counsel shall promptly inform the chief judge and program manager of any changes in designation of the liaisons and the contact information of the liaisons. The liaisons shall act as the court's point of contact in the event the plaintiff fails to comply with this Administrative Order on multiple occasions and there is a need to communicate with the plaintiff concerning administrative matters of mutual interest.

#### **List of Participating Mediators and Rotation of Mediators**

1. ***List of Participating Mediators and Rotation of Mediators.*** The program manager shall post on its website the list of Florida Supreme Court certified mediators it will use to implement the RMFM Program and will state in writing the criteria, subject to approval by the chief judge, the program will use in selecting mediators. The program manager shall also state in writing the procedure, subject to the approval by the chief judge, the program will use to rotate the appointment of mediators. The RMFM Program shall encourage the use of mediators who have been trained to mediate mortgage foreclosure cases, reflecting the diversity of the community in which it operates. Assignment of mediators shall be on a rotation basis that fairly spreads work throughout the pool of mediators working in the RMFM Program, unless the parties mutually agree on a specific mediator or the case requires a particular skill on the part of the mediator.

#### **Pre-Suit Mediation Encouraged**

1. ***Pre-Suit Mediation.*** Mortgage lenders, whether private individuals, commercial institutions, or mortgage servicing companies, are encouraged to use any form of alternative dispute resolution, including mediation, BEFORE filing a mortgage foreclosure lawsuit with the clerk of the court. Lenders are encouraged to enter into the mediation process with their borrowers PRIOR to filing foreclosure actions in the [number] Judicial Circuit to reduce the costs to the parties for maintaining the litigation and to reduce to the greatest extent possible the stress on the limited resources of the courts caused by the large numbers of such actions being filed across the state and, in particular, in the [number] Judicial Circuit.

If the parties participated in pre-suit mediation using the RMFM Program or participated in any other pre-suit mediation program having procedures substantially complying with the requirements of this Administrative Order, including provisions authorizing the exchange

of information, foreclosure counseling, and requiring use of Florida Supreme Court certified circuit civil mediators specially trained to mediate residential mortgage foreclosure actions, the plaintiff shall so certify in Form A, in which case the plaintiff and borrower shall not be required to participate in mediation again unless ordered to do so by the presiding judge. A borrower may file a motion contesting whether pre-suit mediation occurred in substantial compliance with the RMFM Program.

Nothing in this paragraph precludes the presiding judge from sending the case to mediation after suit is filed, even if pre-suit mediation resulted in an impasse or there was a breach of the pre-suit mediation agreement.

This Administrative Order shall be recorded by the clerk of the court in each county of the [number] Judicial Circuit, takes effect on [effective date], and will remain in full force and effect unless and until otherwise ordered.

**ORDERED** on \_\_\_\_\_, 20[\_\_\_].

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[NAME OF CHIEF JUDGE], Chief Judge  
[number] Judicial Circuit, State of Florida

*Please complete online at [http://www.\\*\\*\\*](http://www.***) and file original with the Clerk of Court*

IN THE CIRCUIT COURT IN AND FOR \_\_\_\_\_ COUNTY,  
FLORIDA

[Name of Plaintiff]  
Plaintiff,

Case No.:

vs.

[Names of Defendant(s)]  
Defendant(s)

**Form "A"**

(Certifications Pursuant to [number] Judicial Circuit Administrative Order  
200[\_\_\_])

**Certificate of Plaintiff's Counsel Regarding Origination  
of Note and Mortgage**

THE UNDERSIGNED, as counsel of record for plaintiff and as an officer of the court, certifies the origination of the note and mortgage sued upon in this action \_\_\_ WAS or \_\_\_ WAS NOT subject to the provisions of the federal Truth in Lending Act, Regulation Z.

**Certificate of Plaintiff's Counsel Regarding Status  
of Residential Property**

THE UNDERSIGNED, as counsel of record for plaintiff and as an officer of the court, certifies the property that is the subject matter of this lawsuit \_\_\_ IS or \_\_\_ IS NOT a homestead residence. A "homestead residence" means a residential property for which a homestead real estate tax exemption was granted according to the certified rolls of the last assessment by the county property appraiser prior to the filing of the suit to foreclose the mortgage.

*If the residential property is a homestead residence, complete both of the following:*

**Certificate of Plaintiff's Counsel Regarding Pre-Suit Mediation**

The following certification \_\_\_ DOES or \_\_\_ DOES NOT apply to this case:

THE UNDERSIGNED, as counsel of record for plaintiff and as an officer of the court, certifies that prior to filing suit a plaintiff's representative with full settlement authority attended and participated in mediation with the borrower, conducted by [name of program manager], and the mediation resulted in an impasse or a pre-suit settlement agreement was reached but the settlement agreement has been breached. The undersigned further certifies that prior to mediation the borrower received services from a HUD or NFMC approved

foreclosure counselor, Borrower's Financial Disclosure for Mediation was provided, and Plaintiff's Disclosure for Mediation was provided.

**Certificate of Plaintiff's Counsel Regarding Plaintiff's  
Representative at Mediation**

THE UNDERSIGNED, as counsel of record for plaintiff and as an officer of the court, certifies the following is a list of the persons, one of whom will represent the plaintiff in mediation with full authority to modify the existing loan and mortgage and to settle the foreclosure case, and with authority to sign a settlement agreement on behalf of the plaintiff (*list name, address, phone number, facsimile number, and email address*):

Plaintiff's counsel understands the mediator or the RMFM program manager may report to the court who appears at mediation and, if at least one of plaintiff's representatives named above does not appear at mediation, sanctions may be imposed by the court for failure to appear.

As required by the Administrative Order, plaintiff's counsel will transmit electronically to the RMFM program manager the case number of this action, the contact information regarding the parties, and a copy of this Form A, using the approved web-enabled information platform.

Date:

\_\_\_\_\_  
(*Signature of Plaintiff's Counsel*)

[Printed name, address, phone number and  
Fla. Bar No.]

## RESIDENTIAL MORTGAGE FORECLOSURE TRAINING STANDARDS

*A. Introduction*

Achieving an informed and committed workforce of Residential Mortgage Foreclosure Mediators requires not only a grasp of the obvious mediation skills, but an extension of those skills into practical and substantive knowledge areas including, but not limited to, mortgage loan products, securities, loan servicers, court processes, and resolution options. A training model which includes both a preliminary online modular dissemination of information followed by live classroom training will provide this knowledge. Participants' completion of online training modules prior to a one-day live class will facilitate better discussion and greater comprehension. Post training access to online practice resources can improve statewide practice and provide real time content updates.

Development of this training model is not only feasible, but also can be developed in a timely way. We recommend that each training provider maintain a needs-based approach to training, reflect on and respond to the participants' needs, and clearly state a training rationale that will serve as a methodological and ethical touchstone. It is our hope that this outline for Residential Mortgage Foreclosure Mediation Training Objectives and Standards will lead to quality mortgage foreclosure mediation training and practice throughout the State of Florida.

*B. Mortgage Foreclosure Mediation Training Goals*

At the conclusion of the training, the participants shall be able to:

1. Recognize Basic Legal Concepts in Mortgage Foreclosure Mediation
2. Identify Negotiation Dynamics in Mortgage Foreclosure Mediation
3. Identify Mediation Process and Techniques in Mortgage Foreclosure Mediation
4. Recognize Financial Issues in Mortgage Foreclosure Mediation
5. Identify Communication Skills in Mortgage Foreclosure Mediation
6. Recognize Ethical Issues in Mortgage Foreclosure Mediation

*C. Learning Objectives*

## Basic Legal Concepts in Mortgage Foreclosure Mediation

1. Recognize basic legal concepts in mortgage foreclosures.
2. Explain the process of, and timelines in, mortgage foreclosure and in the mortgage foreclosure mediation process.
3. Identify the state rules, state and federal statutes, servicing guidelines, and local procedures and forms governing mortgage foreclosure mediation.
4. Identify the protections, constraints, and exceptions of the Florida Confidentiality and Privilege Act in the context of Mortgage Foreclosure Mediation.

**Negotiation Dynamics in Mortgage Foreclosure Mediation**

1. Recognize the issues of settlement authority as they relate to the stakeholders in Mortgage Foreclosure Mediation.
2. Recognize the impact of physical, telephonic, videoconference, online or other electronic means of appearance at the mediation conference on the negotiation.
3. Recognize the role(s) of the following in the Mortgage Foreclosure Mediation process:
  - a. lender
  - b. loan servicer
  - c. investor
  - d. mortgage broker
  - e. mortgage pool
  - f. second mortgagee
  - g. condominium association
  - h. homeowners' association
  - i. lien holders (e.g., municipal, mechanics lien)
  - j. MERS
  - k. appraiser
4. Recognize techniques for assessing risks and incentives in a mortgage foreclosure case.
5. Recognize the concept of "good faith" and distinguish it from state court appearance requirements.
6. Recognize basic mortgage nomenclature and sources, and types and structure of mortgages.
7. Identify options for resolution such as:
  - a. modification of mortgage terms
  - b. partial loan forgiveness
  - c. placement of delinquent payments at the end of the loan term
  - d. short sale
  - e. deed in lieu of foreclosure
  - f. waiver of deficiency judgment
  - g. stipulation to modify (i.e., if mortgagor makes X number of payments, then the loan will be modified)
  - h. principal set aside
  - i. repayment plan
  - j. loan reinstatement
  - k. "right to rent" (i.e., the bank owns the property and rents it to the former borrower at the market rental rate)

**Mediation Process and Techniques in Mortgage Foreclosure Mediation**

1. Identify procedural elements that should be addressed prior to the parties' entry into the mediation room including telephonic and other electronic equipment.
2. Identify information that needs to be exchanged prior to mediation (i.e., Pooling and Servicing Agreement; life of loan history; mortgagee current financial disclosure; different loss mitigation, loan modification and other resolution options).

3. Identify issues that are appropriate for mortgage foreclosure mediation and those that are not appropriate.
4. Identify individuals who are essential participants in mortgage foreclosure mediation as well as those who are entitled to be present and those who are not required to participate but whose participation may be helpful.
5. Describe techniques for mediating when all parties are self-represented, some parties are self-represented, or all parties are represented by counsel.
6. Identify appropriate techniques for handling a situation where a representative appearing for a party does not have full authority to settle.
7. Discuss the dynamics of mediating when one or more parties, participants, or representatives frequently participate in mediation.
8. Discuss how emotions affect mortgage foreclosure issues and a party's ability to effectively mediate.
9. Identify the role and procedures of the program manager.

#### Financial Issues in Mortgage Foreclosure Mediation

1. Understand the Net Present Value Model of the Making Home Affordable Program.
2. Understand debt-to-income ratios and guidelines and potentials for re-defaults.
3. Identify Fannie Mae, Freddie Mac, FHA, VA, and other loan servicer and investor issues and options.

#### Communication Skills in Mortgage Foreclosure Mediation

1. Identify appropriate questions to assist the parties see their own and the other party's issues.
2. Identify resources for foreign language interpreters and when and how to use them.

#### Ethical Issues in Mortgage Foreclosure Mediation

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.

#### *D. Training Parameters*

##### Training Provider

1. Training may be provided by the program manager(s) OR by independent training providers.

### Funding

1. Fees should be paid by mediators to training provider(s) and may include the entire training process.

### Structure

1. A series of self-study web based modules corresponding to the six categories of learning objectives outlined in these recommendations—each followed by an online quiz; completed at participant's own pace.
2. Final online test for pass code entry to live class.
3. Live classroom training.
  - a. Length of Training: An instructional hour is defined as 50 minutes.
  - b. Span of Training: Live mortgage foreclosure mediation training shall be presented over a period of one (1) day.
4. Certificate of Completion of Advanced Course on Florida Residential Mortgage Foreclosure Mediation given to participant. Access to web-based modules terminates.
5. Optional Online Learning Forum for continued learning provided by program manager(s) OR by independent training providers for an additional monthly fee

### *E. Recommended Course Content Requirements*

Required Training Materials. At a minimum, training providers shall provide each of their attendees with a training manual that includes:

1. An agenda annotated with the learning objectives to be covered in each section and the intended method of instruction;
2. Sample mortgage foreclosure mediated settlement agreements;
3. Sample federal government forms (e.g., HAMP Program Hardship Affidavit, HAMP Trial Period Plan, HAMP FAQs, IRS Form 4506-T, Foreclosure Mediation Financial Worksheet);
4. Suggested readings including:
  - a. Chapter 44, Florida Statutes—Mediation Alternatives to Judicial Action
  - b. Florida Rules for Certified and Court-Appointed Mediators
  - c. Rules 1.510 and 1.700-1.750, Florida Rules of Civil Procedure
  - d. Chapter 697, Florida Statutes—Instruments Deemed Mortgages and the Nature of a Mortgage
  - e. Chapter 701, Florida Statutes—Assignment and Cancellation of Mortgages
  - f. Chapter 702, Florida Statutes—Foreclosure of Mortgages, Agreements for Deeds, and Statutory Liens
  - g. Chapter and/or sections pertaining to Condominiums and Homeowner Associations
  - h. Section 55.10(1), Florida Statutes (2004) pertaining to judgment liens
  - i. Federal statutes (e.g., Bankruptcy; Truth in Lending Act, Hope for Homeowners Act of 2008, Fair Debt Collection Practices Act, Service

- Members Civil Relief Act of 2003, and others to be identified and defined more specifically)
- j. Homeowner Affordability and Stability Plan, Home Affordable Modification Program (HAMP), and guidelines for servicers
  - k. Glossary of Terms
  - l. List of local, state and federal resources for borrowers
  - m. Internet Links to useful on line resources
  - n. Current Supreme Court of Florida Administrative Order, *In Re Task Force on Residential Mortgage Foreclosure Cases*
  - o. Local Judicial Circuit Administrative Order on Residential Mortgage Foreclosure Cases
  - p. Additional reading resources provided by the Mediation Manager

*F. Training Methodology*

1. Pedagogy. Residential mortgage foreclosure mediation training programs shall include, but are not limited to, the following: lecture, group discussion, and a mortgage foreclosure mediation demonstration.
  - a. Use of subject matter specialists (e.g., lender, borrower, loan servicer, investor, plaintiff and defense counsel, mortgage foreclosure counselor, community resources).
  - b. A subject matter specialist shall have a substantial part of his or her professional practice in the area about which the specialist is lecturing and shall have the ability to connect his or her area of expertise with the residential mortgage foreclosure mediation process.
2. Residential Mortgage Foreclosure Mediation Demonstration. All mortgage foreclosure mediation training programs shall present a residential mortgage foreclosure role play mediation demonstration either live (including video conferencing) or by video/DVD presentation.
3. Web-Based Methodologies. Web-based technologies may be used as an optional delivery method or as a post-training forum for continued learning and discussion for mediators. An online version of the training may provide a repository for the rapidly changing residential mortgage foreclosure training information.
4. Assessment. Post-training assessment by participants, using post-training surveys combining a Likert scale with narrative response components, should inform content development and methodologies and provide quality assurance for training providers. The post-training survey would give the participants the opportunity to evaluate the effectiveness of the trainer(s), the substantive content of the program, and the practical value of the training, and to offer additional suggestions or comments.

## PARAMETERS FOR PROVIDERS OF MANAGED MEDIATION SERVICES

Purpose: To define the parameters of managers directing mediation services for parties involved in residential mortgage foreclosure litigation.

*A. Characteristics of Program Manager*

1. Compliant with ADR principles as promulgated by the supreme court, and ADR statutes and rules;
2. Non-profit entity or associated with a reputable organization of proven competence, autonomous and independent of the judicial branch;
3. Capable of efficient administration of large case loads;
4. Sensitive to cultural, diversity, and Americans with Disabilities Act issues;
5. Politically and professionally neutral;
6. Knowledgeable of court procedures, current trends, laws, rules, and regulations affecting residential foreclosures;
7. Fiscally transparent and accountable;
8. Quickly adaptable to a dynamic and rapidly evolving legal environment;
9. Financially stable;
10. Capable of sustained operation without fiscal impact on the courts;
11. Capable of effectively implementing information technology systems and web-based programs;
12. Alert to ethical and confidentiality issues; and
13. Agreeable to acting as manager for voluntary pre-suit mediation.

*B. Services to be Provided by Program Manager*

1. Receive mediation referrals and, within designated time limits, schedule and coordinate mediation conferences: date, place and time; reserve and provide venues for mediation and caucus; manage continuances and re-scheduling;
2. Maintain financial books and records to insure transparency and accuracy of receipts and expenditures;
3. Prepare financial statements, financial reports, and performance reports (for example, attendance and failure to attend mediation reports);
4. Establish and maintain performance standards for staff and mediators, including maintaining a roster of mediators comprised of persons who are properly trained in accordance with the standards attached, and who are otherwise qualified, and effective in foreclosure mediation;
5. Assist in specialized training of mediators for workout options and resources;
6. Arrange and pay for interpreters;

7. Bill, collect, deposit, and disburse mediation fees and refunds; pay for necessary services and costs incidental to mediation managing as required to implement mediation administrative order;
8. Establish procedures for managing and communicating with *pro se* litigants and attorneys. This includes implementing a process for prompt outreach to borrower-owners immediately after suit has been filed; the goal of the outreach is to inform mortgagors about the mediation program, invite their participation, and to start the process of referral to mortgage foreclosure counseling and the collection of required financial information;
9. Establish procedures for complying with confidentiality rules;
10. Establish a system for managing mediators that:
  - a. Provides for the impartial assignment of mediators, for example, by the use of a rotating list;
  - b. Is open to qualified supreme court certified mediators who are capable of providing effective services in the residential foreclosure setting; and
  - c. Allows for more than one Mediation Managing entity in the circuit if approved by the chief judge.
11. Monitor or supervise the preparation of mediation settlement agreements;
12. In accordance with the Administrative Order establish the schedule for division of fees between mediators, managers, and others;
13. Prepare operational reports as required by the chief judge regarding the number of cases mediated, impasse or successful mediations, etc.;
14. Solicit qualified mediators and maintain current list of mediators available for residential foreclosure cases;
15. Establish procedures for disqualifying and replacing mediators with ethical or other conflicts;
16. Coordinate the referral of mortgagors to certified foreclosure counselors pre-mediation;
17. Refer unrepresented parties to legal aid or panels of pro bono or reduced fee attorneys;
18. Facilitate the exchange of documents between the parties, pre- and post-mediation, including the establishment and maintenance of a secure web-based communication system between the program manager and all parties to mediation using a platform capable of transmitting financial data, email, mediation forms, and attachments, and able to track participant payments and refunds;
19. Maintain for dissemination to owner-borrowers a list of approved foreclosure counselors willing to perform services at the rates established by the court;
20. Answer inquiries from mediators and parties regarding the mediation process and forms;
21. Establish a system for resolving complaints against mediators and other persons involved in the Managed Mediation Program;

22. Establish procedures for participant evaluation of mediation program services, including satisfaction surveys;
23. Develop the forms and procedures necessary to verify compliance with the residential foreclosure mediation program by lender/servicer representatives, their attorneys, and borrowers; and
24. Using judicial disqualification criteria as a model, disclose to the chief judge any direct or indirect financial ties to lenders/servicers (including any immediate family members), whether present or within the past three (3) years, with a continuing obligation to disclose.