ACR Commercial Section Newsletter

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Update from Section Chair

Dear Commercial Section Colleagues:

Commercial Section members gathered at the Section's Annual Business Meeting during ACR's 2011 Conference in October held in San Diego, California, to hear reports on last year's activities and accomplishments and to plan for 2011-2012. As out-going Chair, I have the pleasure of welcoming Bob Gross and Ken Reed as the new Co-chairs for the Section. Congratulations also to Advisory Council members elected for a new one-year term. They are Cindy Alm, Frances Mossman, Tom Oswald and Angelia Tolbert. Members continuing on the Council are Kurt Dettman, Jerome Allen Landau, Will Miller, Michele Riley, Lisa Renee Pomerantz and Jim Rosenstein. Information about the Section's leadership and committees is on our website.

The Section held its fifth Advanced Commercial Mediation Institute (ACMI) during the ACR Conference, co-sponsored this year by the American Institute of Mediation (AIM) as well as the American Arbitration Association (AAA). This year's theme was "Beyond Settlement Broker: Enhancing your Value as a Mediator." Attendees had the opportunity for direct interaction with the distinguished speakers and panelists enabling a robust exchange of information, ideas and comments. Keynote speakers were Ken Cloke and Doug Noll along with Eric Tuchman, General Counsel for AAA. Co-chairs for ACMI were Lee Jay Berman and Jerome Allan Landau, who also served as moderators for the two-day program.

Several Section members were instrumental in organizing and presenting workshops at the conference. They included Cindy Alm, Lisa Renee Pomerantz, Michele Riley, Jim Rosenstein and Angelia Tolbert. Information about these workshops is on the Section's website. Presentations along with extensive resource materials can be accessed through the ACR website.

In the next few weeks, Bob and Ken will announce their plans and activities for next year. They include a campaign to attract new members and the launch of the Commercial Section Teleseminar Series for 2012. Business-to-Consumer issues and disputes will be a focus for the Section. Matt Caras' informative article below on how mediation is being utilized in foreclosures is an excellent introduction to the discussions the Section's B2C Committee will have in determining what programs we might undertake. Your comments and participation on the committee are welcomed.

What should you do and say when a judge, who has an interest in a case you have mediated, contacts you for information? Should you even talk to that judge? Mediation Ethics Coach, Mel Rubin, has the answers in this issue's column. Mel discusses the "confidentiality conundrum" and how to deal with the challenges raised. He describes nine considerations to evaluate that will help you determine how to respond.

We want to encourage you to actively participate in Section activities and help us grow membership, expand networking and open new opportunities for our members. Consider contributing news and articles for the quarterly newsletters and submitting commercial related workshop proposals for ACR's 2012 Conference in New Orleans. The call for conference proposals will be out before the end of this year.
Thank you for your continued membership and support of the Commercial

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UPCOMING EVENTS

ACR 2012 Annual Conference
September 12-15, 2012
Sheraton Hotel
New Orleans, LA

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For the latest articles and information, visit the ACR Commercial Section website.

Section. Your ideas and comments are always welcomed.

Sincerely,
Frances

Frances I. Mossman, Immediate Past Chair, ACR Commercial Section

Foreclosure Mediation by Matthew L. Caras

Foreclosure Mediation: A New Species of Mediation Plays an Important Role in the National Foreclosure Conundrum

Introduction

The nationwide residential foreclosure crisis has spawned a new species of mediation. Over the course of just three years, mediation of consumer foreclosures has grown from little more than an idea to a multi-state institution upon which federal and state officials are relying to curb the tidal wave of foreclosures that are a major impediment to the nation's economic recovery. The consumer is the most visible beneficiary of foreclosure mediation. However, due to the monumental scale of residential foreclosures and mortgage loan modifications, the nation's largest financial institutions, as well as entire commercial and financial industries that rely on the residential mortgage market, are affected by foreclosure mediation. Indeed, foreclosure mediation will play an important role in minimizing the impact of the foreclosure crisis on consumer and commercial interests alike.

The Mortgage Foreclosure Crisis

Three themes dominate the daily headlines on the nationwide foreclosure crisis: (1) Its economic impact on local housing markets and the U.S. housing industry generally; (2) litigation and claims arising from the crisis, including (a) institutional securities fraud claims such as those asserted by Goldman Sachs and twenty-one other financial institutions based on mortgage-backed securities issued by Bank of America, which claims were recently settled by Bank of America for $8.5 billion, and (b) consumer cases such as the recent Massachusetts ruling that failure of a mortgage holder to comply with the federal Home Affordable Modification Program (HAMP) gives rise to a private cause of action under state consumer protection law; and (3) the federal government's failure to adequately respond to the crisis. However, what the headlines don't reveal is that where mediation intervenes, the results have been positive, resulting in consensual alternatives to foreclosure, such as loan modification, from which consumer and mortgage holder benefit.

The Response: Foreclosure Mediation Programs

Almost twenty-five states have foreclosure mediation programs. In some cases the programs are statewide and administered at the state level, and in other cases they are administered at county or municipal levels. And because there is no end in sight to the wave of new residential foreclosures being initiated each month, it is likely that more states will develop foreclosure diversion programs that include mediation as a critical component of the program.

Many of the programs mandate mediation. Maine's statute (which was modeled after Connecticut's statute) provides a good illustration. In Maine, foreclosure requires a lawsuit by the party seeking to foreclose a mortgage on a residential property. When the mortgage holder commences a foreclosure action, the homeowner is entitled to mediation, which stays the action pending mediation. The State of Maine Judicial Branch has certified a panel of mediators, which certification requires training in foreclosure law, loan modification programs and regulations, and mediation skills. Maine's statute requires that the homeowner, the mortgage holder, and the mortgage holder's lawyer attend the mediation. However, provided the mortgage holder's lawyer attends in person, the statute permits the mortgage holder to attend telephonically. The representative of the mortgage holder attending must have "the authority to agree to a proposed settlement, loan modification, or dismissal of the action." Under Maine's statute, the mediator is required to inform the court if the mortgage holder, the homeowner, or an attorney fails to attend or does not "make a good faith effort to mediate," and the court is authorized to impose sanctions.

While programs differ from state to state, the general idea is the same: If a forum is created in which the mortgage holder and the homeowner can have a direct dialogue accompanied by candid production of information and authority to resolve the foreclosure action, a skilled mediator (with a working knowledge of consumer mortgage rights, remedies and economics, and familiarity with federal and state loan modification programs), can assist the parties in reaching agreement on a mutually rewarding loan modification or other alternative to foreclosure.

Foreclosure programs that simply mandate discussion between the homeowner and mortgage holder have a lower likelihood of success than programs that include a mediator. It is not surprising that the American Bar Association's House of Delegates has adopted a resolution "support[ing] federal, state or territorial legislation, regulations, or court rules that promote the use of mediation to assist in resolving disputes that could lead to foreclosure of mortgages on residential real property." That said, while thousands of foreclosure mediations are now occurring across the nation, some have argued that foreclosure mediation is not really mediation. That simply isn't the case, even though foreclosure mediation differs from mediation in many other contexts.

Differences in Foreclosure Mediation
Foreclosure mediation differs from many other types of mediation in that: (1) The mediator is often appointed and paid by someone other than the parties to the dispute; (2) there is usually a legislatively or court-mandated purpose and objective of the mediation, with the desired result sometimes even defined by statute; (3) it tends to draw individuals as mediators who are, politically or in professional practice, consumer advocates and thus bent on the outcome that is always desired by one-the homeowner-of the two parties to the mediation; (4) one party, the mortgage holder, is usually represented by counsel, but the other party, the homeowner, is often not represented by counsel; (5) substantively, it involves a complex and constantly changing set of federal and state rules and regulations, as well as investor and guarantor-imposed limitations and restrictions, which the consumer usually does not understand and which the mortgage holder, absent a mediator with command of the rules and regulations, can utilize to its advantage if it so desires; and (6) the mediator sometimes has authority to recommend sanctions and the court to order sanctions against a non-complying party or a party not acting in good faith.

In Maine, for example, there is no ambiguity about the objective of the mediation: The program is called The Foreclosure Diversion Mediation Program, and the enabling legislation is entitled An Act To Preserve Home Ownership and Stabilize the Economy by Preventing Unnecessary Foreclosures. If a party does not make a good faith effort to mediate, the party will be sanctioned, and sanctions have ranged from awarding fees and expenses, to creating a legal defense fund, to ordering that interest ceases to accrue under the mortgage note, to dismissing the foreclosure action.

That mediators often come from practices that are consumer-oriented, and perceive their role to be one of defending the consumer, is of course a problem. It is a problem because, among other things, it raises questions about the integrity of the mediation and it is inconsistent with a mediator's objective of letting the parties resolve the dispute in the manner that they see fit. One of the ways a consumer-orientation manifests itself is in the perception of some mediators that delay of foreclosure is desirable and in the interest of the homeowner, when in fact it is not in the homeowner's interest because, individually, it simply increases unresolved arrearages and, collectively, the longer it takes to foreclose a mortgage the more expensive it will become for consumers to obtain mortgage financing. Finally, it is apparent that, where a mediator does not have knowledge of federal and state loan modification programs, a mediator is far less likely to be a factor in the outcome of the mediation-alternatives to foreclosure that the mortgage holder may not offer, or may not even be familiar with, will be overlooked.

Conclusion
Foreclosure mediation has to date resulted in resolving many foreclosures in a mutually beneficial fashion. And it will for the foreseeable future play an important role in managing the foreclosure crisis and stabilizing the nation's housing markets, positively impacting local, regional and national consumer and commercial interests alike.

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The Mediation Ethics Coach by Melvin A. Rubin, Esquire

Mediation intruders? Does the judiciary have the right to inquire of mediators under any circumstances?

Introduction
How many of you have experienced the following: *"Hi. This is Judge Smith, you were the mediator in that case that I'm going to have to preside over in about one month. There are several pending motions right now that I need to rule on. I wonder if you could give me some idea of where everyone is on this case and how you see it?!" Or, "Hi Jim, this is Judge Smith and I received your mediator's report of no agreement in the Jones case. I get the feeling that plaintiff's counsel has been a bit of a problem. I know there is confidentiality and I don't want to breach that. All I was concerned about is whether or not what seems to be happening is also going on in the mediation. Please don't give me any specifics or words, but just your general impression of how these attorneys are behaving?!"*

How should you respond to these inquiries?

The Confidentiality Conundrum
Whether the mediator is an attorney or not, when the mediator is functioning within the power and parameters of the court, there is an obligation of respect, loyalty and adherence to the basic legal requirements associated with that system.

Indeed, various codes and ethical guidelines provide very specifically the mediator's obligations to work with respect and candor toward judges. How far does this go? Rule 10.500 of the Florida rules for certified and court appointed mediators provides that mediators shall at all times act with respect and candor to the courts and be fully responsive. This may apply to all matters or as stated in 10.510 as to the mediator "and other administrative matters." Rule 10.500 also states:

"a mediator is accountable to the referring court with ultimate authority over the case." The statement is qualified that all interactions shall be consistent with the ethical rules.

But what happens when this obligation to the courts runs into issues such as confidentiality, conflicts of interest, professional misbehavior or other actions. Do the courts have legitimate concerns that relate to their responsibility in making sure that all processes and procedures associated with the judicial system are functioning properly, appropriately, and efficiently? May a court inquire as to a mediator's withdrawal from a case when there is the "sense" that something may be wrong?

In some states, the process and the provider have been given the highest level of immunity. See, e.g. Florida statute 44.107. Confidentiality seems almost religious in its shield. Almost every state now has confidentiality statutes or rules protecting the process, the parties, the mediator, or a combination of them. See, e.g., Fl. St. 44.401-406 (note that Fl. St. 44.406 even creates a cause of action for a breach and allows the recovery of attorneys' fees and costs). Therefore, disclosure presents a possible exposure to the uninitiated mediator.

Understandably, any intrusion of the court is usually met with skepticism. "Why is the court intruding?" "This is a very slippery slope!" "Do I have any responsibility to protect this process when the court has ordered me to 'sing'?'" "I truly agree with what the court is saying, but..."

On the other side is avoidance of being an accomplice to an egregious agreement. Could there be an effort to "hide"' something that a court would order disclosed or that could possibly constitute a fraud on the court? Could professional malpractice, professional misconduct, products liability, criminal conduct, rico violations, and on and on welcome the use of mediation as the "veil of secrecy"? After all, the mediator often plays a key role in the deal being made.

The Mediators' Challenges

What are the dilemmas that the mediator faces? One is the court's intrusion into the mediation process. It is one thing to be subpoenaed by a party, which allows the mediator to seek a court's determination-- it is quite another thing when the court seeks the information itself.

While the mediator may hope (yea, pray) for judicial review and possible rejection in cases that trouble their conscience, their duty to silence and often excessive commitment to a successful agreement may unintentionally allow miscarriages of fairness. This is where judicial interference may present itself as either a threat or a relief. Note several cases, especially class action cases, where the required court review and the finding of waivers have uncovered significant conflicts giving rise to actions that could implicate the mediator. See, e.g. Alford v. Bryant, 137 s.w.3d 916 (2004) and MCC Management v. Arnold & Porter, 2010 wl 1817585 (m.d. Fla).

A variety of factual situations may occur that causes this conflict to come to the forefront. But what is the mediator to do?

1. The mediator withdraws due to an inability to proceed as a result of some ethical prohibition applicable to the conflict. Fraud, coercion, etc., may all contribute to this. The court notes the withdrawal of the mediator and seeks information of the circumstances. Add to this that the mediator was specifically selected by the presiding judge.
2. Or the general nature of the case is well known to all, especially the judge, who selected this mediator because of the personalities or notoriety of the conflict. The judge may ask casually in a variety of settings: "Hey Jack, so what the heck is going on in that case I sent you?!"
3. Or the mediator is so successful that the judge wants to know what went on.
4. Or there is no resolution and the matter lands back on the court's calendar for a three month long trial on an already crowded docket. The court seeks to get a better handle on the case and makes a call to the mediator that sounds like this: "Hey Jack, who was the bad apple?" Or "any way I can help if I send this back to you?"
5. Or the court has implemented emergency procedures utilizing the mediation process. The court must know what is wrong to improve the system. This is particularly true when one of the parties is consistently a single institution or private entity, e.g., the government, banks, insurance companies or the like.

In deciding how to respond to a court's inquiry, consider the following:

1. Will a preliminary discussion with the judge help in resolving the mediator's dilemma?
2. Is there any question as to confidentiality and who owns it?
3. Does the right even apply to the question? Determine if the applicable statute or rule delineates when the mediation begins and ends, are there exceptions to which the rule would not apply, was there a waiver of any kind and is there a reason why the inquiry and answer would override such an inquiry?
4. Is there an argument that the confidentiality may not apply to process or procedures as opposed to substantive matters?
5. Does the court have the right to know if its processes are working and whether the procedures are being followed, as in large ADR design systems implemented for a specific reason? (e.g., the courts and the ADR community that helped devise the process have the right to know how it is functioning and more importantly what changes are necessary to fulfill the goals of the court, or the legislature or executive emergency orders, as in disaster mediation programs.

6. Can an answer be framed that provides the court with the essential information without specifics that would be violative of confidentiality requirements? (e.g., my overall impression of all these cases that I have been mediating is...")
7. Or in the alternative, reframing the question by the court into a general status or assessment so that it does not invade the confidentiality "cone of silence."
8. While of legitimate purpose is "how is the insurance industry handling the disaster?" The question of how XYZ Insurance Company is behaving would be subject to debate. Certain inquiries may employ creative linguistic management. "Were the adjuster and the insurance lawyer respectful and cooperative?" Answer: "I think all the parties aggressively argued their positions with passion and conviction."
9. This is also an opportunity for the mediator to embark on a subtle educational journey into why confidentiality is so important and how it protects the court. "Y'know this 2 ½ page statute 44 that the legislature drafted is pretty clear in certain language and not so in other parts. I wonder if you could help me with this?" (Making sure that the court understands that the judiciary has a vested interest in the maintenance of the confidentiality rule and in no way destroying the respect for the mediation process.)

At all times, the mediator in trying to frame the response must maintain neutrality and freedom from creating a conflict of interest. Another interesting question is whether there is any obligation on the part of the mediator to report to the parties the inquiry made by the court. Is the call to be treated as anonymous or non-existent in terms of issues of transparency and disclosure?

Finally, while this article is focused on the court's inquiry, please note that other persons may intrude or inquire of the mediator. Mediators are very much aware of additional participants that may show up or associated parties who call up after the mediation to ask what happened. These calls may take the nature (or camouflage) of a question for clarification purposes: what was the last offer or demand; is the offer or demand still on the table etc. The calls could even come from the alleged secretary for one of the parties or attorneys. The call could come from a superior to the person who actually attended the mediation. The call could come from a creditor of one of the parties or a governmental entity waiting to assert a lien. In general these types of calls will be much easier to deal with than the call from the judge or someone from the judge's office.

Conclusion

Because ADR and particularly mediation has come to play such an important part in our judicial system, it is natural for the courts to have a greater interest in its efficiency, efficacy and its appropriateness. Indeed, this is a reflection of the maturity of the process. With it has come, and will continue to appear ethical and practical issues that challenge the "professional" mediator. Judicial inquiry is real, sincere and presents mediators with perhaps one of the greatest opportunities to display their professional talents-finding a balance between competing interests that share the desire to ultimately benefit the community in which we live.

Mel Rubin *writes a regular Ethics column for the Commercial Section Newsletter. He has been a mediator for over 26 years. He sits on the Florida Supreme Court ADR Policy Committee, has trained over 6,000 professionals in ADR and is an adjunct faculty at the University of Miami Law School. He regularly deals with ethical conundrums in newly designed and existing ADR systems. Section members are encouraged to write with ethics questions, which may be used for future columns. Questions can be sent to: mrubin@melrubin.com. Note that you should avoid using specific names or circumstances to protect the confidentiality of the process.*

Election Results: Co-Chairs and Advisory Council

The Section's Nominating Committee is pleased to announce the results of the election for Co-chairs and Advisory Council Members conducted earlier this year:

Co-chairs for 2012-2013 are Bob Gross and Ken Reed.

Advisory Council Members, each serving a term ending at the Annual Conference in 2012, are Cindy Alm, Frances I. Mossman, Thomas J. Oswald, and Angelia Tolbert.

The additional members of the Advisory Council serving terms ending at the Annual Conference in 2013 (not subject to election this year) are Kurt L. Dettman, Jerome Alan Landau, William N. Miller, and Michele S. Riley. Those serving terms ending at the Annual Conference in 2014 are Robert C. Gross, Lisa Renee Pomerantz, Kendall Reed, and James A. Rosenstein.

The ACR Commercial Section Newsletter is designed to provide accurate and authoritative information in regard to the subject matters covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the service of a competent professional person should be sought.

Editorial Policy:

The views expressed in this newsletter are those of the various authors for the purpose of encouraging discussion. Unless expressly noted, they do not reflect the formal policy, nor necessarily the views, of the Association for Conflict Resolution.