



Best Practices for Representing Borrowers in Foreclosure Mediation

Before Referral to Mediation:

- What foreclosure notices has borrower received?
 - Notice of Pre-Foreclosure Options (NOPFO)
 - Notice of Default (NOD)
 - Notice of Trustee's Sale (NOTS)
- Where is borrower in the foreclosure timeline?
 - Borrower may be referred to mediation any time after receiving a NOD and no later than twenty days after the date a NOTS has been recorded.
- Identify Beneficiary.
 - Make sure beneficiary is not an Exempt Institution. Check Commerce's website for the most up-to-date [Exemption List](#).
- Review Eligibility
 - Must be borrower's primary residence and owner occupied
 - Does borrower qualify for a modification?
 - Run Net Present Value Test (NPV) or Federal Housing Administration (FHA) Waterfall Analysis.
 - What type of modification does borrower qualify for?
 - HAMP
 - In-House
 - Who is the investor?
 - Fannie/Freddie
 - FHA, USDA, VA
 - Securitized Trust
 - Portfolio
 - Has the borrower received a previous modification?
 - If a modification is not possible, inform borrower as soon as possible so borrower has time to make a well-informed decision about other options.
 - Is borrower eligible for Short Sale, Deed in Lieu, Cash for Keys?
 - Advise borrower on mediation timeline, process, and fees.

Referral to Mediation

- Use correct [referral form](#).
 - Check Commerce's website for most up-to-date version.
- Identify proper parties.

- Borrower, Servicer, Trustee, Beneficiary
- Use the “Additional information which may be helpful to the foreclosure mediation,” box to identify if the borrower is Limited English Proficient (LEP) and will need an interpreter or has any disabilities that require reasonable accommodations.
- Make sure referral is timely submitted.
 - Notify Trustee that borrower has been referred to mediation.
 - Make sure any pending Trustee’s Sale has been stopped.
 - Send copy of referral to borrower for their records.
- When you receive the Notice of Mediation from Commerce, call borrower to explain content of the letter.
 - Identify mediator and when mediator’s fee is due. Explain where and how borrower should make payment to the mediator.
 - Inform borrower that if more than one mediation session is required additional fees will be required.
 - Explain document exchange and deadlines.
 - Explain borrower should submit documents to you prior to document deadline so you have time to review and address any inconsistencies and identify any missing documents.

After Referral and Before Mediation:

- Manage Borrower Expectations.
 - Set realistic expectations based on income and desired outcome.
 - If borrower is applying for a modification, explain modification review process.
 - Borrower will most likely need to provide additional documents.
 - Borrower may or may not be eligible for certain types of modifications depending on what type of loan it is and the investor.
 - Review NPV/FHA analysis so borrower knows how much a potential payment might be.
 - Meet with borrower (in-person or over the phone) prior to mediation to discuss strategy and prepare for mediation.
 - Review mediation timeline and process with borrower.
- Contact mediator and opposing counsel so everyone knows who will be attending mediation.
- Schedule mediation in a timely manner.
 - Make sure it is within the 70 day statutory timeframe.
 - Mediation can be held outside the statutory timeframe, if parties agree.
 - If borrower needs an interpreter or reasonable accommodations, make those arrangements now.
- Submit borrower documents on time.
 - Make sure you have a complete packet. Review document checklist. Identify any documents that are missing or unattainable.

- If you do not receive beneficiary's disclosures on time, contact beneficiary's counsel.
 - Review disclosures.
 - Do you have any questions? If so, ask.
 - Did beneficiary provide a NPV? If so, review the inputs.
- Prior to mediation, check in with mediator and beneficiary's counsel.
 - Has beneficiary completed the loan modification review? Is anything else needed?
- Run updated NPV/FHA analysis to make sure your inputs are current.
- Be a proficient advocate.
 - Know the Foreclosure Fairness Act.¹
 - Know the inputs in borrower's and beneficiary's NPV/FHA analysis.
 - Know the borrower's options (home-retention *and* non-retention)

At Mediation

- During mediation, stay focused on the foreclosure-related issues.
 - Attorneys must comply with the Rules of Professional Conduct, including Rule 8.4 Misconduct, and refrain from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.
 - Housing Counselors must comply with the Duty of Care pursuant to RCW 61.24.160.
 - Advocates must work with their client (borrower) to ensure compliance with the good faith participation requirements per RCW 61.24.163(10).
- Caucus with the borrower before making important decisions.
 - If a modification is not offered, make sure you understand why.
 - If a trial period plan is offered, request that mediation stay open until permanent modification is finalized.
- Make sure you have the contact information for the beneficiary's representative and beneficiary's attorney for any follow-up needed after mediation.
- Be clear on the outcome of the mediation session.
 - Have a timeline moving forward.
 - If coming back for another session, make sure you schedule the time, date, and location and are clear on when the mediator expects payment.
 - Advise borrower on additional mediation costs.
 - If no further session will be held, be clear on the foreclosure timeline.

After Mediation:

- Debrief with borrower.
 - Review what, if anything, is supposed to happen next.
 - If borrower is unable to retain home, review graceful exit plan.
 - If borrower is pursuing home-retention outside of mediation, continue to negotiate with beneficiary through escalation.
 - Attorney General

¹ It is also beneficial to be familiar with the Deed of Trust Act and Consumer Protection Act.

- Making Home Affordable
- Consumer Financial Protection Bureau
- Housing Finance Committee
- Northwest Justice Project
- State Bar Association

Duty of Care for Participating Housing Counselors:

RCW 61.24.160 Housing counselors — Good faith duty to attempt resolution — Resolution described — Mediation — Liability for civil damages — Annual report.

Housing counselors have a duty to act in good faith to assist borrowers by:

- (a) Preparing the borrower for meetings with the beneficiary;
- (b) Advising the borrower about what documents the borrower must have to seek a loan modification or other resolution;
- (c) Informing the borrower about the alternatives to foreclosure, including loan modifications or other possible resolutions; and
- (d) Providing other guidance, advice, and education as the housing counselor considers necessary.

Rules of Professional Conduct for Attorneys:

RULE 1.3 DILIGENCE:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comments:

- [1] [Washington revision] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client’s behalf.
- [2] A lawyer’s work load must be controlled so that each matter can be handled competently.
- [3] Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. A lawyer’s duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for postponement that will not prejudice the lawyer’s client.
- [4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is

limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

RULE 1.4 COMMUNICATION:

(a) A lawyer shall;

(1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5 FEES:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent; and

(9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation except when the

lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

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RULE 1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

RULE 8.4 MISCONDUCT: It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

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(g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;

(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel,

jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments.

(i) commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer, or otherwise, and whether the same constitutes felony or misdemeanor or not; and if the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding;

(j) willfully disobey or violate a court order directing him or her to do or cease doing an act which he or she ought in good faith to do or forbear;

(k) violate his or her oath as an attorney;

...

(n) engage in conduct demonstrating unfitness to practice law.