

MEDIATOR CASE STUDY OUTPUTS

November 5, 2015

Created at All-Foreclosure Mediator Event—November 2, 2015

SESSION 2: CASE STUDY

MEDIATION STAGE/TIMELINE

Document exchange through pre-session check-in, incl. cancellation by mediator (RCW 61.24.163(11))

DISCUSSION FOCUS (based on May 2015 survey)

#8 Facilitating the document exchange
#10 Mediator's authority to cancel the mediation
#11 Pre-session check-in with parties, readiness for session
Borrowers poorly or not represented (based on survey comments)

CASE BACKGROUND

Borrower's primary language is Spanish and his attorney speaks only English, so communication is through a friend. The borrower's attorney has only handled one previous FFA case. Both borrower and beneficiary have been very late sending the required documents. Many of the submissions from both parties are incomplete. The beneficiary does not submit the NPV inputs, despite repeat requests from the borrower's attorney. Ninety days into the mediation process, the representatives argue via emails about incomplete and stale documents. They eventually agree on final document submissions and deadlines. At some point, the beneficiary representative included Commerce in the email thread. Commerce responded and asked the parties to work with the mediator. The mediator had been copied on all the back and forth correspondence. Three days prior to the session date, the mediator sends a reminder and asks the parties if they are prepared for mediation. The borrower representative does not respond. The beneficiary representative responds the next day that the borrower did not send all of the documents that they agreed to submit. He asks the mediator to cancel the session, close the mediation, and determine the borrower is non-responsive and not acting in good faith. The mediator attempts one more time to contact the borrower representative. The borrower representative still does not respond. The mediator cancels the case and certifies it the day before the scheduled session.

1. **Required by RCW: What are the relevant provision(s) of the FFA for this case? Brainstorm with the group and record.**

Commerce perspective (not an exhaustive list – see statute for complete requirements):

- Borrower submits documents within 23 days from Notice receipt. (RCW 61.24.163(4))
- Beneficiary submits documents within 20 days from receipt of borrower's documents. (RCW 61.24.163(5))

- Beneficiary submits NPV inputs. (RCW 61.24.163(5)(g))
- Mediator “may cancel” a *scheduled* mediation if borrower is unresponsive. (RCW 61.24.163(11))

Also (not included in Case Study scenario, but required within this phase of mediation)

- Mediator may schedule phone conferences to ensure a productive session. (RCW 61.24.163(7)(a))

2. Expected by Commerce: What is the relevant guidance from Commerce for this case? Brainstorm with the group and record.

Commerce Perspective (not an exhaustive list – see Commerce guidelines for more detail):

- Contact parties 1-2 weeks in advance to ensure readiness.
- Facilitate the document exchange, clarify requirements, and set deadlines if disputes arise or process stalls.
- Document attempts to contact BOTH borrower and representative before cancelling a mediation.

Also (not included in Case Study scenario, but expected within this phase of mediation)

- Submit certification to all parties & Commerce when mediation is cancelled.
- Provide borrower representation options to un- or poorly represented borrowers.

3. Mediator Discretion, Best/Effective Practices: What best/effective practices could the mediator have used in this case (strategies, skills, responses)? Brainstorm with the group and record on the flip chart.

Themes from the mediator group flipcharts:

- Early and effective communication
 - Conference calls, email, reminders
 - Mediator talk to borrower?
- Document communication
 - Timeline, expectations, reminders
- ESL
 - Translator? AT&T hotline?
 - Mediator competence?
 - Referral form – box for ESL

Case Study 2 – Question 3 Mediator Group Responses	
Group 1	<ul style="list-style-type: none"> • Explore why documents not received • Check in right away to see if beneficiary has received the complete package needed for review – also set this as expectation • 30 day conference call with representing and/or all parties to verify all docs needed have been received

	<ul style="list-style-type: none"> • Intervene if parties/beneficiary/ reps are emailing and not moving conversation forward • If unusual circumstances – call Commerce • Require a “stale” date from beneficiary for borrower docs • Provide name of servicer or beneficiary who will be on phone • Require NPV 30 days prior to session
Group 2	<ul style="list-style-type: none"> • Clarify expectation with borrower’s rep • If borrower’s rep unresponsive contact borrower directly, employ multiple methods if necessary, cc borrower’s rep • Remind borrower’s rep of obligation regarding interpretation/translation • Hold the session to create accountability and clarify next steps and timeframe • Use of BATNA • Proactive and firm communication • Create schedule with deadlines and identify consequences
Group 3	<ul style="list-style-type: none"> • Honor mediation timeline requirements • Reminder notice sent earlier than 3 day (week) • Contact borrower directly if rep is non-responsive • Notify parties of impending deadlines • Go forward with scheduled mediation
Group 4	<ul style="list-style-type: none"> • Explain expectations to reps (med. & Commerce) • Share statute w/all parties to gain compliance • Contact borrower directly w/all issues requiring action • Offer factual observations of what’s happened or not happened in process so far • To fix document confusion hold conference calls • “Lack of Good Faith” but if intentional/egregious: “Bad Faith”
Group 5	<ul style="list-style-type: none"> • Mediator reaches-out to borrower if BO’s rep is unresponsive. Use interpreter if possible • Mediator lets beneficiary know the NPV is needed, prior to session • To nudge document exchange <ul style="list-style-type: none"> ○ Telephone conference w/reps ○ Electronic nudging(email) ○ Notify parties session will be held and document exchange will be discussed
Group 6	<p><u>ESL</u></p> <ul style="list-style-type: none"> • Have initial notices and/or other documents in Spanish or other languages • Consider that the mediation may take longer • Note on referral if borrower is ESL or doesn’t speak English • Get Info on interpreter before mediator from Borrower rep <p><u>Document Exchange</u></p> <ul style="list-style-type: none"> • Do you check for documents completion? • Yes, all • No, note it’s up to them • Just the statutory documents <p><u>Rescheduling</u></p> <ul style="list-style-type: none"> • Most charge fees, fees vary higher fees when within 3 days or more

	<p><u>Ways to check contact information during mediation</u></p> <ul style="list-style-type: none"> • Have parties confirm their contact information • Ask parties how the communication was – get single point of contact • When do you use your authority to cancel mediation • Parties agree • When parties not participating • Nonpayment of fees • If borrower rep says borrower not responsive – call borrower before canceling • If it won't be productive
Group 7	<ul style="list-style-type: none"> • Good management of document exchange • Commerce develop calendar/excel form • Ask open ended questions on where status of getting documents exchanged • Individual caucus – first sessions as shuttle mediation • Check in earlier on parties as prep for mediation • Proper interpreter check in • Warning letter – certified letters to bring parties in line with statute • Mediator takes extra steps – maybe borrower very disadvantaged – if by language; other factors • Extension process in writing
Group 8	<ul style="list-style-type: none"> • Encourage borrower's advocates to turn in new package if one document has a problem (to avoid a stale finding) • Hold session instead of cancelling it (many had strong feelings that this was important) • Hold both in bad faith • Make contact with the borrower directly • Hold mediation to determine understanding of documents needed, when due • Reach out at least 7 to 10 days before session • Make sure there is a decision 10 days before mediation or ask to agree to reschedule
Group 9	<ul style="list-style-type: none"> • Notice of one week in advance • Contact friend for communication with borrower (assumes borrower consented) • Identify language communication at beginning • Include interpretation in written communication • Follow through with in-place timeline by holding a session • Document the contact. Notify Commerce • Pursue multiple avenues/sources for language interpretation • Mediator discretion to reschedule when documents are stale • Mediator can amend/withdraw certification if borrower had poor or inadequate representation (lack of notice or material failure)
Group 10	<ul style="list-style-type: none"> • Pre-mediation survey requesting info on accommodations • Consider phone conferences • Reach out to borrower with rep copied if borrower communication is difficult • Course correction philosophy

Group 11	<ul style="list-style-type: none"> • Good contact with borrower • Summarizing emails to parties – ask parties if prepared for mediation • List of missing documents from beneficiary prior to mediation • Bring language challenges cases to table earlier than later for clarity • Too soon to certify/close mediation
Group 12	<ul style="list-style-type: none"> • Be proactive <ul style="list-style-type: none"> ○ Dates and deadlines ○ Recap email agreements ○ Make sure borrower knows (add to email) ○ Intervene • Reserve judgment <ul style="list-style-type: none"> ○ Ask about communication barriers ○ Contact borrower if rep not responsive

4. **Good Faith: What, if anything, in this case would you take into consideration when determining good faith participation? Brainstorm with the group and record on the flip chart.**

Scenario elements that impact Determination of Good Faith

Themes from the mediator group flipcharts:

- Borrower's lack of timely submission
- Beneficiary's failure to provide NPV inputs
- Why is the party non-responsive???

Case Study 2 – Question 4 Mediator Group Responses	
Group 1	<ul style="list-style-type: none"> • Before issuing 'Not Good Faith' if borrower rep unresponsive, check in with borrower directly • No NPV from beneficiary • Hold the session before a "Not good faith" finding
Group 2	<ul style="list-style-type: none"> • Why is party being unresponsive? • Language barrier • Lack of inputs/NPV provided • Was borrower informed?
Group 3	<ul style="list-style-type: none"> • Non-timely exchange of documents • NPV values not provided • Not a "timely" mediation • Non-responsive or no-show at mediation
Group 4	<ul style="list-style-type: none"> • Interpretations/Trans: has there been comm'tion? • Mutual bad faith ok w/com • Extend time to submit docu and NPV inputs rather than immed certification
Group 5	<ul style="list-style-type: none"> • Consider – failure to exchange documents • BO rep failure to respond in timely manner
Group 6	Did not respond

Group 7	<ul style="list-style-type: none"> • Language issues/language barrier • The new attorney – inattentive; incompetent • Parties’ responsiveness on both sides • Factors regarding bad faith decision when personnel by one of parties • Huge consequences for borrower if held not in good faith • Does mediator have enough information to make determination • Pre-foreclosure – was borrower difficult to deal with • Very circumstance determinant
Group 8	<ul style="list-style-type: none"> • Borrower’s lack of timely submission • Beneficiary’s failure to provide NPV inputs
Group 9	<ul style="list-style-type: none"> • Were all required documents produced? • Were documents timely under the circumstances? • At session clarity, problem with producing documents • Mediator “bad faith” • In comments in closing file differentiate between borrower and representation
Group 10	<ul style="list-style-type: none"> • Mediator introspection – did mediator contribute to bad faith • Consider lack of good faith with the totality of the circumstances
Group 11	<ul style="list-style-type: none"> • NPV inputs not produced • Document submission timeline • Too soon to certify without contact with borrower
Group 12	<ul style="list-style-type: none"> • Documents late/incomplete • Deadlines not met • Borrower rep unresponsive • Can’t automatically impute to borrower • Contact borrower