

MEDIATOR CASE STUDY OUTPUTS

November 5, 2015

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

SESSION 4: CASE STUDY

MEDIATION STAGE/TIMELINE

Certification and beyond (incl. complaints)

DISCUSSION FOCUS (based on May 2015 survey)

#1 Good faith determination
#13 Complaints

CASE BACKGROUND

The beneficiary changes after the referral from Commerce. The previous beneficiary does not transfer the borrower's documents to the new beneficiary. Borrower is asked to provide a whole new set of documents. The borrower complains, but he eventually re-submits them. Documents required by statute from the beneficiary were never provided. Throughout the process the new beneficiary attorney participates in a disrespectful, hostile, and volatile manner. During session he is inattentive, condescending, and argues loudly with the mediator and borrower. A modification offer is given during session and the borrower is asked to accept it on the spot or it's off the table. The borrower accepts it. The borrower representative requests a finding of not-in-good-faith participation on the part of the beneficiary and beneficiary's attorney. The beneficiary argues that a modification was offered and accepted, therefore there is no need for such a finding.

One month after the session, the borrower contacts Commerce requesting a copy of the certification—he had not received it, but his representative apparently had within the last week. After Commerce sends him a copy, the borrower complains that the mediator did not find the beneficiary in lack of good faith despite the beneficiary's behavior during the entire mediation process and indicates he had no choice but to accept the loan modification that was offered.

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):

- Certification sent to Commerce and trustee, with copies to the parties, within 7 business days after the conclusion of the session. (RCW 61.24.163(12))
- Certification must include:
 - whether a resolution was reached
 - pass/fail if NPV was run (if no agreement)
 - location, date, time of sessions

- all participants
- beneficiary's authority to settle
- determination of good faith participation (RCW 61.24.163(12))

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):

- Certification submitted per the statutory deadline or provide explanation of the delay in the Comments section.
- Mediator must send a copy of the certification to Commerce, the trustee, the borrower (regardless of representation), and the beneficiary.

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

- Certification is completed in its entirety.
- Use of Comments box for any clarifications, relevant information.
- Leave no room for guessing.

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 group flipcharts:

- Mediator Tools
 - Ground Rules Anchor: code of conduct, effective mediation skills, established upfront
 - Process: reality testing; shuttle; caucus
 - Certification Discussion
 - Establish mediation timeline and action items

Case Study 4 – Question 3 Mediator Group Responses	
Group 1	<ul style="list-style-type: none"> • Caucus, and caucus again • If verbal offer – Session occurred <ul style="list-style-type: none"> ○ No agreement reached ○ Bad faith • If written offer <ul style="list-style-type: none"> ○ Session occurred ○ Agreement reached ○ Comments – lacked good faith • ?? Not adjourned until opp to review by borrower

Group 2	<ul style="list-style-type: none"> • Send post session summary days before certifying • Discuss Code of Conduct, caucus if necessary • Hold phone conference – discuss deadlines and exchange of documents • If behavior affects the integrity of the mediation then explain what constitutes lack of good faith • When pressure exerted on borrower employ reasonableness standard. Reasonable time for borrower to consider
Group 3	<ul style="list-style-type: none"> • Borrower has 14 days to respond to an offer • Require timely submission • Certify mediation within 7 days • New timeframe with new beneficiary
Group 4	<ul style="list-style-type: none"> • Take a break, explore why the urgency for decision today • Explore options with borrower. Why lack of documents • Ask beneficiary what would they need to provide more time? • Manage expectations regarding good faith finding
Group 5	<ul style="list-style-type: none"> • Caucus • Meet with borrower rep after session to discuss conduct • Schedule another session to hold open • Ask where statute permits demanding a response from borrower on spot
Group 6	<ul style="list-style-type: none"> • Reschedule mediation – appropriate fees apply • Schedule conference call with beneficiary representative and borrower representative – what do you need? When do you need it? Come to agreement • Remind beneficiary representative of legislative guidelines and good faith behavior – reinforce our responsibilities as mediator to maintain décor and disallow abusive behavior • Our house – our rules
Group 7	<ul style="list-style-type: none"> • Mediator must control behavior of parties. Ensure good behavior • Check in to see if person agreeing to modification did so with informed and true consent • Get more information • Preserve integrity of process of mediation
Group 8	<ul style="list-style-type: none"> • Have caucus with party under pressure • Caucus with misbehavior • Authority in proportion to bad behavior • Refer back to standards of conduct • Shuttle as a backup strategy • Model the tone, don't rise to the bait • Pre-meeting to address hostile communications before sessions begins
Group 9	<ul style="list-style-type: none"> • Continue case • Intervene earlier on documents • Documentation for anticipation of complaint • Understand both FFA and CFP? • Strategies <ul style="list-style-type: none"> ○ Caucus to deal with bad behavior ○ Alert borrower to resource process and options

Group 10	<ul style="list-style-type: none"> • Setting clear ground rules • Use of caucus <ul style="list-style-type: none"> ○ Shift to shuttle mediation • Reality test <ul style="list-style-type: none"> ○ Know applicable regs • Addressing expectations
Group 11	<ul style="list-style-type: none"> • Will documents be forwarded to new beneficiary • Send in narrative/timeline • Mediator standards • End lack of good faith ...in response to attorney poor practice • What questions to ask RE: CFBB • Clarify expectations prior to session or in caucus
Group 12	<ul style="list-style-type: none"> • New beneficiary request new package from borrower • Acknowledge borrower frustration • Discuss borrower perspective/willingness to resubmit • Remind new beneficiary has inherited actions of old beneficiary • If hostile representative, separate parties • Remind representative and client of risk of bad faith-preventing meaningful discussion/Alternatives to foreclosure

4. Good Faith: (a) How would you certify this case? (b) How would you respond to the complaint? Brainstorm with the group and record on the flip chart.

Scenario elements that impact Determination of Good Faith

Themes from the group flipcharts:

- Statute gives guidance to the elements of good faith
- Mediator conversation with parties: "Here's what good faith means to me."

Case Study 4 – Question 3 Mediator Group Responses	
Group 1	<ul style="list-style-type: none"> • Timeline and Documents • Provide notes which show in caucus offered opportunity to get offer reviewed
Group 2	<ul style="list-style-type: none"> • Certify as is • Talk about how mediator dealt with the attorney's behavior. Borrower received offer and accepted it
Group 3	<ul style="list-style-type: none"> • Can't demand an answer on the spot • Documents not provided according to statute • Can't find Not In GF if there is an agreement (can we change this PLEASE!?)
Group 4	<ul style="list-style-type: none"> • If mod accepted, then good faith because only option. Document concerns in comments • If Mod not accepted, bad faith because insufficient time to consider offer, no timely document production

Group 5	<ul style="list-style-type: none"> • Agreement reached • Add to comment section if mediator feels lack of good faith occurred by beneficiary or beneficiary representative • Reference – no documents from beneficiary • Demand for immediate response
Group 6	<ul style="list-style-type: none"> • No response
Group 7	<ul style="list-style-type: none"> • Representative of record has responsibility to forward documents • Outcome v process • No damages if agreement reached?
Group 8	<ul style="list-style-type: none"> • Say “Here’s what good faith means to me”
Group 9	<ul style="list-style-type: none"> • Lack of beneficiary documents • Amend certification if certification is in bad faith <ul style="list-style-type: none"> ○ Failure to provide documents ○ Forced choice for borrower ○ Behavior during sessions
Group 10	<ul style="list-style-type: none"> • No response
Group 11	<ul style="list-style-type: none"> • Who can/will file complaint against attorneys • Certify with good faith and attach comments • Volatile behavior • Take it or leave it at table • No documents from beneficiary • Ask borrower to write letter explaining caucus/complaints and attach to certification • Acknowledge borrower’s concerns and admit mistake
Group 12	<ul style="list-style-type: none"> • Beneficiary failure to submit documents • Beneficiary conduct • Beneficiary ultimatum • Consider if offer was oral or written • If an offer letter – what does letter say about date of acceptance • Does this violate CFPB • Timely certification