

FORECLOSURE DIVERSION PROGRAM

GUIDELINES FOR FDP MEDIATORS ON REPORTS OF NONCOMPLIANCE NOVEMBER, 2012

Foreclosure Diversion Mediators (FDP mediators) must report to the court when they observe a party's failure to attend or failure to make a good faith effort to mediate. 14 M.R.S. § 6321-A(12); M.R. Civ. P. 93(j). This memo discusses how FDP mediators should address this requirement, as well as other possible failures of parties to meet program requirements, in the filing of Reports of Noncompliance.

FDP mediators should be consistent in assessing and reporting noncompliance to the court. If a Report of Noncompliance is to be filed, the mediator should inform both parties at the time of mediation. When filing a Report of Noncompliance, mediators do not recommend sanctions.

Guidance to FDP Mediators

A. General standard: The mediator's role is to facilitate discussion of all relevant issues and to keep parties working together by focusing on common interests and goals. Mediators should do their best to preserve a working relationship among the parties, to steer the discussion away from blame and recrimination, to explore available options, and to focus on planning for resolution.

While it is difficult to draw a bright line to guide an FDP mediator's decision whether or not to file a Report of Noncompliance, it is important to consider, among other factors, the following:

- the parties' behaviors and attitudes before, during, and following mediation;
- the parties' independent actions, their policies and customary practice, and their actions in response to each other;
- the manner and the substance of the parties' communications in and outside mediation.

Using common sense, and making every effort to preserve the parties' trust in the mediator's neutrality, the mediator should report noncompliance only where a party's behavior arguably amounts to a lack of good faith and impedes the functioning of the FDP mediation process. No Report of Noncompliance should be filed in instances of excusable error or minor, harmless noncompliance with requirements.

B. Evaluating Behavior: Noncompliant behavior does not always warrant a report. Frequently **both** parties have not complied exactly with program requirements, but in very different ways that are difficult to compare. For example, the defendant might appear without an ex-spouse defendant who is also on the note, while the plaintiff

might appear without the financial form. Parties' efforts to make the mediation work, to mitigate harm, and to expedite the process are weighed against any technical noncompliance.

Ask yourself the following questions as you evaluate the situation:

- Is this the first time the conduct or event has occurred?
- Was the conduct intentional? Does it reflect a customary practice, or mere oversight?
- Is there a plausible, credible explanation?
- How much harm, if any, resulted from this behavior?
- Does the other party share any responsibility?
- Can the other party help the situation? Should that party do so?
- Has the offending party offered to repair the harm?
- Do I have any tools to prevent this from happening again?
- In the face of this behavior, can the parties work together?

Based on answers to these questions, the following factors would mitigate against reporting noncompliance:

- first-time errors;
- plausible explanations;
- offers to expedite service or mitigate any damage; and
- assurances that the error will not be repeated, or other efforts to repair trust.

In contrast, the following factors favor reporting noncompliance:

- repeated failures to follow through on promised actions;
- weak explanations for these failures;
- lack of a future plan; and
- lack of interest.

Where these occur, the mediator should narrow the focus of parties' actions and be specific in reporting parties' agreements. If the offending party still fails to participate actively, refuses to mitigate, or repeats the behavior, noncompliance should be reported.

C. Examples

The following is a list of the most common failings that have resulted in reports of noncompliance to date:

- Failure to attend a scheduled mediation;
- Failure to timely file required court forms (FDP-02A, FDP-02B);
- Failure to communicate, either in response to inquiry, or as agreed in a previous mediation; and
- Failure to perform as agreed in Mediator's Report.

Whether a Report of Noncompliance is warranted depends on the context and the severity of the failing.

The following are examples of common situations FDP mediators face, with guidance as to what action, if any, should be taken.

1. Situations That Generally Do Not Warrant A Report of Noncompliance

These are examples of situations that generally do not warrant the filing of a Report of Noncompliance:

- a. The lender's financial form (FDP-02A) contains errors. Correct numbers are supplied at mediation. Variation: no FDP-02A form is on file, but counsel brings it, or provides the numbers at mediation, and the form is filed on the same day. If the lender lacks one or more of the figures, the mediator should help to make arrangements to obtain them.
- b. The borrower submitted a financial package, including the court form, but some items were missing or submitted incorrectly. The required items are identified and explained, and a plan is made for submission, receipt and review.
- c. The lender's representative has authority to discuss retention options, but the borrower wants to discuss short sale. The representative offers basic information and a phone number. The mediator is able to reach the new contact for further details.
- d. At a previous mediation, each party agreed to complete certain tasks toward a common goal (e.g., determination of qualification for loan modification), but the goal was not accomplished. Each party claims the other failed to perform as agreed.
- e. The borrower or lender missed the deadline for submitting or reviewing documents by a day or two, but late performance caused little or no harm.
- f. Discovery is made at mediation that the property at issue is not owner-occupied residential property.

2. Situations in Which Noncompliance Might or Might Not be Reported

The following situations might or might not constitute grounds for filing a Report of Noncompliance. The following factors should be given substantial weight in arriving at your decision:

- Whether the problem can be solved at today's mediation;
- Whether there is agreement on who failed to perform;

- Whether the failure has been repeated (and how many times);
- The extent of effort to comply or to rectify the harm; and
- The extent of cooperation with the process, and respect for the other party.

These are examples of situations where filing a Report of Noncompliance is typically discretionary:

- a. The borrower's required forms, either for the court file or for the lender, are not submitted in a timely manner, or are incomplete for a second time.
 - b. The lender's financial form is not filed or provided at mediation. The only reason not to file a report is if that form is truly irrelevant to the mediation in the particular case.
 - c. The lender's representative has denied the borrower for a loan modification based on proprietary guidelines or on a government directive, but the representative cannot provide a citation or written copy of the guidelines, directive, or other basis for denial.
 - d. Counsel received documents but failed to transmit them to lender client. One failure might be tolerable, but a second instance would likely warrant a report.
 - e. The lender's representative has authority to discuss modification and home retention options only, and the lender does not make available mediation representatives who can discuss short sales at that mediation session.
 - f. The lender's review of an application is not completed.
3. Situations that Generally Warrant A Report of Noncompliance

These are examples of situations that generally warrant the filing of a Report of Noncompliance:

- a. Failure to attend mediation by the lender or its counsel, without explanation or message left with clerk. (The borrower's failure to attend results in a Final Mediator's Report and return of the case to the civil docket.)
- b. The lender's counsel appears at repeated mediations without the financial form filed or in its possession, though the court provided it in

a timely manner.¹ Even if harm is minimal, this should generate a report, because it both indicates a pattern and raises the possibility that counsel is ignoring FDP requirements. Once the mediator begins to file Reports of Noncompliance for this reason, the mediator should continue each time to track this behavior and issue additional reports if warranted. **Note: if a mediator notices a plaintiff repeatedly failing to file the FDP-02A in DIFFERENT cases, please notify the Program Manager**

- c. A denial is claimed to be based upon “regulations”, and the mediator has previously requested citation or copy of regulation relied upon, but the lender has not complied.
- d. Despite repeated, documented attempts to communicate by one party, the other has never responded or attempted to respond, resulting in actual harm. No suggestion or effort to mitigate is offered.
- e. The borrower failed to make an attempt to get the appropriate information to the lender for review, or lender failed to make an attempt to review it, without explanation or showing of good cause.
- f. Failure to perform according to an agreement reached at prior mediation, without explanation or showing of good cause.

Conclusion

Foreclosure mediation affords a meaningful opportunity for exploration of possible alternatives to foreclosure. In some instances, when the behavior of a party impedes that process, it is the responsibility of the mediator to decide how to respond. Mediators should attempt to assist parties with discussion of realistic options whenever possible. Sometimes, despite the mediator’s best efforts, a party either refuses to engage in the required process or is ineffective to the point of lacking a good faith effort to participate. These damaging failures should be reported to the court in a Report of Noncompliance so that a judge is able to assess the harm and impose whatever sanctions, if any, may be appropriate.

¹ At the first occurrence, the mediator should give a warning that a second instance will trigger a report.