

FLORIDA'S STATEWIDE APPROACH TO THE RESIDENTIAL MORTGAGE FORECLOSURE CRISIS: THE RESIDENTIAL MORTGAGE FORECLOSURE MEDIATION MODEL *

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"[I]magine it is rush hour. In a thunderstorm. Add that it is also a hurricane evacuation. A lane is closed due to construction delayed by budget impacts. Imagine the traffic jam."¹

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1. Fla. Sup. Ct. Task Force on Residential Mortg. Foreclosure Cases, *Final Report and Recommendations on Residential Mortgage Foreclosure Cases 4* (Aug. 17, 2009) (available at http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf) [hereinafter *Final Report*].

I. INTRODUCTION

According to the Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases (Task Force), the above traffic congestion on “the biggest road out of town” best described the case-management crisis facing the courts in 2009.² The Task Force further stated, “The enormous increase in foreclosure filings has overwhelmed those [court] resources in many circuits and represents a caseload traffic jam that the infrastructure cannot meet in a timely and efficient manner without support and traffic management.”³

Given the overwhelming volume of residential mortgage foreclosure mediation cases, Florida Supreme Court Chief Justice Peggy A. Quince recognized the need to address the residential mortgage foreclosure crisis on a statewide basis.⁴ In March 2009, Chief Justice Quince appointed fifteen members to the Task Force⁵ to recommend “policies, procedures, strategies, and methods for easing the backlog of pending residential mortgage foreclosure cases while protecting the rights of parties.”⁶ This Task Force was specifically directed to consider “mediation and other alternate dispute resolution strategies, [case-management] techniques, and approaches to providing *pro bono* or low-cost legal assistance to homeowners” that could facilitate timely and equitable resolution of these cases.⁷

Accordingly, “[t]he Task Force . . . looked for ways to create off-ramps to get traffic off the road, in the form of managed medi-

2. *Id.* (explaining that the judicial infrastructure of state courts has a limited capacity threshold that allows “reasonable, prompt, efficient[,] and fair justice”).

3. *Id.*

4. *Id.*; *In re: Task Force on Residential Mortgage Foreclosure Cases*, Fla. Admin. Or. AOSC09-8 at 1 (Mar. 27, 2009) (available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-8.pdf>).

5. The Task Force included representatives of the various foreclosure-crisis stakeholders as well as court and alternative dispute resolution experts: judges; court staff; mediators; attorneys; a past president of the Florida Bar; a deputy chief financial officer of Florida; members of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy; the Real Property, Probate, and Trust Section of the Florida Bar; the Florida Bar Rules of Civil Procedure Committee; and the Florida Bankers Association. Fla. Admin. Or. AOSC09-8 at 3–5 (listing the members appointed to the Task Force and the respective position held by each).

6. *Final Report*, *supra* n. 1, at 5; Fla. Admin. Or. AOSC09-8 at 2–5.

7. *Final Report*, *supra* n. 1, at 5; Fla. Admin. Or. AOSC09-8 at 2 (emphasis in original).

ation to resolve cases at the beginning instead of at the end; and in the use of expedited proceedings in cases involving vacant or abandoned property.”⁸ The Task Force recommended a residential mortgage foreclosure managed mediation model (RMFM). The RMFM program represents an innovative public–private partnership in response to the residential mortgage foreclosure crisis.

This Article focuses on the RMFM recommended by the Task Force and adopted by the Florida Supreme Court and its implementation and operation. Innovations to the initial RMFM administrative order in the Twelfth Judicial Circuit and implementation challenges in the Thirteenth Judicial Circuit will also be highlighted along with a discussion of the termination of the mandate for a statewide RMFM model.

II. TASK FORCE RECOMMENDATIONS

The Florida Supreme Court gave the Task Force a strict deadline by which it was to submit its recommendations.⁹ In order to meet the timeframe, the Task Force members were assigned to one of two subcommittees: Case Management or Alternative Dispute Resolution (ADR).¹⁰ The ADR subcommittee faced deciding which method of alternative dispute resolution would best resolve the case-management crisis in a manner that preserved the rights of the parties and alleviated the overburdened courts.¹¹ The subcommittee initially considered various solutions, including “[nonbinding] arbitration, private judging, special magistrates, conciliation conference[s,] and mediation,” but quickly concluded that the only method of alternative dispute resolution readily in place and able to handle the volume of cases was mediation.¹²

8. *Final Report, supra* n. 1, at 4. The Task Force realized that the traffic remaining on the congested roads must be guided through the judicial system “to keep it moving safely and as swiftly as possible.” *Id.* To achieve this result, the Task Force recognized that a set of “standard[ized] . . . procedures and form[s]” was needed. *Id.*

9. *See* Fla. Admin. Or. AOSC09-8 at 2 (detailing the approximately twenty-week timeframe allocated to the Task Force).

10. *See Final Report, supra* n. 1, at 5–6 (listing the Task Force members assigned to each subcommittee). The ADR subcommittee included Dr. Gregory Firestone, as Chair, April Charney, Judge Burton Conner, Sandra Fascell Diamond, Michael Fields, Chief Judge Lee Haworth, Perry Itkin, and Rebecca Storrow. *Id.* at 6.

11. *Id.* at 27, 31.

12. *Id.* at 27–28 (indicating that “[m]ediation is the obvious vehicle for optimizing the possibility of meaningful ADR settlement”). The Task Force chose mediation because it fostered “an opportunity for communication: for the borrower and the lender to convene in

Mediation was the best option through which to implement the program because the groundwork had been previously established.¹³ The Court already had thousands of available Florida Supreme Court-certified circuit civil mediators.¹⁴ Procedural rules to govern the flow of cases to mediation already existed.¹⁵ Rules for certified and court-appointed mediators, which included mediator qualifications, standards of professional conduct, and mediator discipline, were already in place.¹⁶ Statutory mediator immunity¹⁷ and confidentiality provisions already governed court-ordered mediations.¹⁸ In addition, the Mediator Ethics Advisory Committee was available to issue advisory guidance to mediators.¹⁹ Further, the Florida Supreme Court Alternative Dispute Resolution Rules and Policy Committee and the Court's Dispute Resolution Center had the capability to support any new mediation initiatives the Task Force implemented.²⁰ As such, the ADR subcommittee concluded that mediation was the most viable alternative dispute resolution method because no other option could support, in such a comprehensive fashion, the settlement of cases with minimal court action.²¹

Once mediation was selected as the preferred method of alternative dispute resolution, the next step was to create a model administrative order (AO) that could be implemented on a circuit-

an informal and non-adversarial session to determine what could be worked out if anything." *Id.* at 28.

13. *Id.*

14. See Sharon Press, *Mortgage Foreclosure Mediation in Florida—Implementation Challenges for an Institutionalized Program*, 11 Nev. L.J. 306, 308 (2011) (indicating that by 2008 there were nearly six thousand mediators in Florida).

15. See Fla. R. Civ. P. 1.700–1.730 (2011) (stating the rules of civil procedure governing mediations and arbitrations).

16. Fla. R. for Certified & Ct. Appointed Meds. §§ 10.100–10.900 (2007) (available at http://www.flcourts.org/gen_public/adr/bin/Resource%20Handbook%202006/Rules%20for%20Certified%20Mediators%2011-15-07.pdf).

17. Fla. Stat. § 44.107(1) (2011) (declaring that mediators serving in court-ordered mediation “shall have judicial immunity in the same manner and to the same extent as a judge”).

18. *Id.* at §§ 44.401–44.406 (explaining the extent of confidentiality that mediators are required to uphold).

19. Fla. R. for Certified & Ct. Appointed Meds. § 10.900 (establishing the Committee).

20. See Fla. St. Cts., *Alternative Dispute Resolution*, http://www.flcourts.org/gen_public/adr/brochure.shtml (accessed July 22, 2012) (explaining that the Florida Dispute Resolution Center assists mediation boards, provides mediation training, and supports the court system).

21. *Final Report*, *supra* n. 1, at 28.

by-circuit basis in all twenty circuits in Florida.²² Fortunately, three circuits had adopted their own AOs and were already piloting a managed mediation program in concert with the Collins Center for Public Policy.²³ Their AOs served as the starting point for development of a statewide model AO.²⁴ These pilot programs had already established timeframes for each stage of the RMFM, provided for outreach and foreclosure counseling for borrowers, created mediator panels, and established a viable financial model for sustaining these programs at no cost to the circuit courts.²⁵

In addition to reviewing the initial judicial circuit AOs, the ADR subcommittee considered presentations made by many experts in the foreclosure field.²⁶ Combining the examples from the judicial circuit AOs, the information from the presentations, and the extensive knowledge and experience of its various members, the ADR subcommittee developed a comprehensive set of RMFM recommendations including a managed mediation process, mediator qualifications, mediation training standards, modified appearance requirements, and new court forms.²⁷

Four of the major issues the Task Force faced included: appearance, confidentiality, pre-suit mediation, and imposition of costs.²⁸ For each issue, the Task Force tried to find solutions that would maximize RMFM's potential for success and would not require any statutory or court-rule revisions.²⁹

22. *Id.* at 8, 28.

23. Press, *supra* n. 14, at 320. The Collins Center for Public Policy first worked with the First, Eleventh, and Nineteenth Judicial Circuits. *Mediation Can Help Homeowners Racing Foreclosure*, St. Petersburg Times, <http://www.tampabay.com/opinion/editorials/mediation-can-help-homeowners-racing-foreclosure/1033839> (last modified Sept. 7, 2009, 4:30 a.m.).

24. *Final Report*, *supra* n. 1, at 29.

25. See e.g. *In re: Mediation*, Fla. Admin. Or. 2009-18 at 6 (Mar. 17, 2009) (available at http://www.myfloridalawyer.com/Assets/Admin_Order_2009-18.pdf) (stating that the plaintiff must pay a \$750 fee to the Collins Center and that a portion of the fee will be used to pay for the homeowner to attend consumer credit counseling, and the rest will fund the mediation program's administrative costs).

26. *Final Report*, *supra* n. 1, at 9 (noting that the ADR subcommittee invited attorneys from various firms with different pools of clients, "lenders and servicers, and the President of the Collins Center").

27. *Id.* at 30; Press, *supra* n. 14, at 324–326.

28. *Final Report*, *supra* n. 1, at 32–33.

29. *Id.* at 29, 32–33, 42–44.

A. Appearance

Given the volume of cases and the fact that many plaintiffs were not located in Florida, the Task Force sought a way to enable plaintiffs to appear via electronic communication.³⁰ Rule 1.720(b) of the Florida Rules of Civil Procedure provides that a party be physically present in mediation “unless stipulated by the parties or changed by order of the court.”³¹ After much debate, the Task Force recommended the plaintiff’s representative be permitted to appear by telephone or another similar electronic method as long as plaintiff’s counsel was physically present at the mediation hearing.³² According to the Task Force, “The appearance exception is justified by the emergency nature of the statewide mortgage foreclosure crisis, the involvement of a mediation manager who is actively involved in outreach and coordination of the mediation process[,] and the requirement that borrowers receive financial counseling prior to mediation.”³³ In creating this exception, the Task Force carefully spelled out the above considerations so as not to set a precedent for other types of mediation cases conducted pursuant to the Florida Rules of Civil Procedure.³⁴

B. Confidentiality

The Task Force considered competing interests: maintaining the mediation’s confidentiality to encourage frank and open communication among the parties, and the court’s need to monitor compliance with the RMFM AO.³⁵ The Task Force resolved this issue by being careful not to place any new burdens on the medi-

30. *Id.* at 37.

31. Fla. Stat. § 1.720(b) (providing that a party is considered present at the mediation if the party’s attorney or a representative having authority to settle is present).

32. *See* Press, *supra* n. 14, at 332–333 (explaining that some concerns about electronic appearance included additional expense and that it “did nothing to facilitate settlement,” which was the purpose of the RMFM).

33. *Final Report*, *supra* n. 1, at 37.

34. *Id.* at 37–38 (requesting the matter be sent back to the Task Force if the court decides that the rules must be changed “to allow for electronic appearance”).

35. *Id.* at 30–31; *see* Fla. R. for Certified & Ct. Appointed Meds. § 10.360 (providing the confidentiality rules governing mediators).

ator to report party compliance with the requirements of the AO³⁶ as Mediator Ethics Advisory Opinion 2007-001 prohibited the mediator from reporting whether a party has full authority without further consultation.³⁷

C. Pre-Suit Mediation

The Task Force realized that when appropriate, early resolution of foreclosure cases would benefit all involved parties.³⁸ To encourage lenders and servicers to engage borrowers before foreclosure filing, the Task Force recommended that plaintiffs who engage borrowers in an RMFM pre-suit mediation not be automatically required to participate in mediation when filing to foreclose on the property.³⁹

D. Imposition of Costs

The Task Force debated who should pay for the cost, as the cost could not be absorbed into the Court's budget.⁴⁰ Most Task Force members recommended that the plaintiff pay the program's entire cost, believing this arrangement would expedite the mediation process and still allow the plaintiff the opportunity to recoup costs as part of the settlement or, if the plaintiff was the prevailing party, in the court's final judgment.⁴¹ The minority of the Task Force, however, asserted that the lenders and servicers were already financially overburdened with the massive number of foreclosures being filed and the RMFM program would create an additional financial burden for them.⁴² This differs from the

36. *Final Report*, *supra* n. 1, at 35, 37 (appointing the mediation manager to "oversee the mediation training and compliance" and the program manager to oversee that parties comply and submit reports).

37. Med. Ethics Advisory Comm. Op. 2007-001 at 3 (Mar. 29, 2007) (available at http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202007-001.pdf).

38. *Final Report*, *supra* n. 1, at 36. "By allowing plaintiffs to satisfy the mediation requirement by participating in the managed mediation process prior to filing, we believe there will be even greater savings to the plaintiffs by avoiding filing fees and attorneys' fees." *Id.*

39. *Id.* at 38.

40. *Id.* at 30 (explaining that in Florida's emergency foreclosure situation, the Judicial Branch cannot wait for funding and must instead act quickly).

43. *Id.* at 35-36.

42. *Id.* at app. L, 2.

norm because non-indigent parties in Florida are generally required to pay for mediation, and thus the borrower would be more invested in the process if required to pay part of the cost.⁴³ Ultimately, the Task Force recommended the plaintiff pay the full fee; however, a minority report recommending more equal division of financial responsibility was included in the final Task Force report.⁴⁴

III. MODEL RMFM AO

Chief Justice Peggy Quince largely adopted the Task Force's recommendations by signing Administrative Order No. AOSC09-54 on December 28, 2009.⁴⁵ The Order required that all judicial circuits implement an RMFM program consistent with the model included in AOSC09-54.⁴⁶

The RMFM AO outlined a series of steps for plaintiffs and borrowers to follow.⁴⁷ The plaintiffs were now required to complete Form A.⁴⁸ Form A indicated the name(s) and contact information of the borrower(s), if the property was a homesteaded property, if the loan was a Truth in Lending Act loan, and if the borrower had already participated in a comparable pre-suit RMFM program.⁴⁹ Form A was sent to the RMFM program manager along with an initial payment of four hundred dollars,⁵⁰ and the program manager was then responsible for contacting and inviting the borrower to participate in the RMFM program.⁵¹ If the borrower elected to participate, the borrower was then referred to a foreclosure financial counselor consistent with the

43. *Id.* at 36.

44. *Id.* at 35.

45. Fla. Admin. Or. AOSC09-54 at 10.

46. *Id.* at 2-3; see e.g. *Diedrick-Clarke v. Wash. Mut. Bank*, 2011 WL 4578137 (Fla. 4th Dist. App. Oct. 5, 2011) (explaining that the Seventeenth Judicial Circuit adopted a required mediation program in compliance with the Florida Supreme Court's homestead-foreclosure AO).

47. See Fla. Admin. Or. AOSC09-54 at app. A (containing a model AO and sample forms).

48. *Id.* at app. A, A-5, A-20.

49. *Id.* at app. A, A-20.

50. *Id.* at app. A, A-12. AOSC09-54 provided that RMFM programs could charge an initial fee up to four hundred dollars. *Id.* In the event that financial counseling was not provided, the plaintiff would be entitled to a refund of a portion of the fee. *Id.*

51. *Id.* at app. A, A-6.

requirements specified in the AO.⁵² After counseling was complete, the borrower's financial disclosure form and the required documentation (such as the borrower's tax return) were transmitted to the plaintiff.⁵³ The mediation hearing was required to be scheduled within 120 days after the suit was filed,⁵⁴ and the plaintiff was required to pay an additional fee of three hundred fifty dollars for the mediator's services.⁵⁵

Unlike other court-ordered mediation in Florida, the AO allowed the plaintiff to appear by telephone or other similar electronic communication provided that someone who could execute an agreement on behalf of the plaintiff attended mediation.⁵⁶ The plaintiff's attorney, if properly authorized, could satisfy this requirement.⁵⁷ Another deviation from Florida's standard court-ordered mediation required that the program manager confirm attendance and inquire if the plaintiff had full authority to settle without further consultation.⁵⁸ The AO determined that this inquiry by the program manager does not constitute a mediation communication pursuant to the Florida Statutes.⁵⁹

IV. RMFM TRAINING

RMFM training, including both an online and a "live" course, began before implementation of the RMFM programs established pursuant to AO No. AOSC09-54.⁶⁰ The online course was required to include a series of tests, and course participants were required to complete the online program before attending the live course.⁶¹

The methods and objectives of the RMFM training programs were designed to ensure that "[a]t the conclusion of the training, the [mediator] participants shall be able to:

52. *Final Report*, *supra* n. 1, at 34.

53. *Id.* Foreclosure counselors help the borrower(s) fill out financial disclosure forms, which are then given to the lender(s) prior to mediation. *Id.*

54. Fla. Admin. Or. AOSC09-54 at 5.

55. *Id.* AOSC09-54 provided that RMFM programs could charge up to \$350 for mediation. *Id.* This fee would cover a second mediation session if the first session was adjourned. *Id.* Plaintiffs would be assessed additional fees if the number of mediation sessions exceeded two sessions. *Id.* at app. A, A-13.

56. *Id.* at 7.

57. *Id.*

58. *Id.* at app. A, A-9.

59. Fla. Stat. §§ 44.401–44.406.

60. Fla. Admin. Or. AOSC09-54 at app. A, A-59.

61. *Id.* at app. A, A-59, A-63.

- (1) Recognize Basic Legal Concepts in Mortgage Foreclosure Mediation
- (2) Identify Negotiation Dynamics in Mortgage Foreclosure Mediation
- (3) Identify Mediation Process and Techniques in Mortgage Foreclosure Mediation
- (4) Recognize Financial Issues in Mortgage Foreclosure Mediation
- (5) Identify Communication Skills in Mortgage Foreclosure Mediation
- (6) Recognize Ethical Issues in Mortgage Foreclosure Mediation.”⁶²

Since there was no formal procedure for reviewing and approving programs, training programs needed to be approved by each judicial circuit.⁶³ The ultimate goal of supplemental training was to have experienced mediators additionally trained to handle the specific issues that arise in residential-foreclosure mediation.⁶⁴

V. IMPLEMENTATION OF THE RMFM AO

Implementing the RMFM AO statewide was significant not only because it was a novel attempt to quickly develop the program to manage foreclosure mediations, but also because residential mortgage foreclosure mediations were not previously referred to mediation as often as most other circuit civil cases.⁶⁵

62. *Id.* at app. A, A-59.

63. *See id.* (stating training standards, but only making recommendations for programs rather than requirements).

64. Press, *supra* n. 14, at 325.

65. *Id.* at 310.

While mortgage foreclosure cases are not on the list of specific exclusions from mediation pursuant to court rule, as a practical matter, trial judges did not refer mortgage foreclosure cases to mediation. Possible reasons for non-referral to mediation included: (1) there was nothing to mediate given that the banks had all of the power and the home owner had none, (2) there was little incentive for the banks to reach a settlement with the homeowners because it was easy to re-sell the home, (3) residential mortgage foreclosure actions tended to be summary in nature, so there would be no time or cost savings for parties to mediate, (4) most of the cases involved pro se defendants who were unprepared and uninterested in mounting a

Each judicial circuit was required to adopt a local AO and select a mediation manager based upon the program parameters established in the AO to operate the RMFM program.⁶⁶ A range of mediation-manager programs were selected including: the Collins Center for Public Policy,⁶⁷ the American Arbitration Association,⁶⁸ five bar associations and foundations,⁶⁹ the University of South Florida,⁷⁰ and local nonprofit organizations established by groups of mediators and lawyers.⁷¹

The Florida Supreme Court's RMFM program's goal was statewide uniformity, which was considered to be essential to streamline the process for the various stakeholders.⁷² Issuing a model rather than a mandatory AO, however, allowed each circuit's chief judge to adopt the program with slight variations

defense, and (5) there was a large number of cases that resulted in default judgments.

Id.

66. Fla. Admin. Or. AOSC09-54 at app. A, A-67 to A-71.

67. The Collins Center originally acted as the program manager in four circuits and as the infrastructure provider in one circuit. *Final Report*, *supra* n. 1, at 14–15. As of September 2011, the Collins Center was the program manager in three circuits. *Id.*

68. The American Arbitration Association is the program manager in the Eighth, Seventeenth, and Eighteenth Circuits. Fla. Sup. Ct., *Managed Mediation Contact Information*, http://www.floridasupremecourt.org/pub_info/documents/Foreclosure/Local_Mediation_Contacts.pdf (accessed July 15, 2012).

69. The bar associations and foundations are Hillsborough County, Jacksonville, Orange County, Palm Beach County, and Tallahassee. *Id.*

70. Press, *supra* n. 14, at 338–340; *see generally* University of South Florida, *USF Conflict Resolution Collaborative*, <http://www.crc.usf.edu/> (accessed July 15, 2012) (outlining the program, which works with the Collins Center for Public Policy in the Twelfth Circuit).

71. Press, *supra* n. 14, at 339–340; *see e.g.* Conant Med. Mgt. Inc., *Conant Mediation Center*, <https://www.conantcenter.com/> (accessed July 15, 2012) (stating the Conant Mediation Center is the program manager for the Twentieth Circuit); Med. Managers, Inc., <https://www.mediationmanagersinc.com/> (accessed July 15, 2012) (stating that Mediation Managers, Inc. is the program manager for the Sixth Circuit); Oasis Alliance, *Mediation Management Services*, <http://www.foreclosureoasis.org/about.html> (accessed July 15, 2012) (stating that it is a nonprofit organization that provides mediation services for residential-foreclosure matters); Performance Med., <http://www.performancemediation.com/> (accessed July 15, 2012) (indicating that the company provides mediation services to a host of clients); Suwannee Valley Foreclosure Med., Inc., <http://www.suwanneemediation.org/> (accessed July 15, 2012) (stating that the company is the program manager for the Third Judicial District); Upchurch, Watson, White & Max Med. Group, <http://uww-adr.com/> (accessed July 15, 2012) (indicating that the company provides mediation and arbitration services).

72. *Final Report*, *supra* n. 1, at 8.

based on the circuit's local needs.⁷³ Consequently, some significant differences emerged that affected the various stakeholders.⁷⁴

To deal with the vast number of mediators who applied to provide services, some circuits allowed their program managers to limit the number of eligible mediators by imposing certain restrictions for participation.⁷⁵ This was accomplished by permitting program managers to qualify only mediators who resided or had offices in their circuits or by allowing program managers to require applicants to submit Florida Bar numbers before being placed on the mediator list.⁷⁶ Some circuits, such as the Twelfth and Thirteenth Circuits, had neither residence requirements nor a cap on the number of mediators who could participate.⁷⁷

Some circuit courts required mediators to file mediation reports that contained additional information beyond that required by the model AO's mediation-report form.⁷⁸ As a result, some mediators declined to comply with the local AO because doing so could be a violation of Rule 10.520 of the Florida Rules for Certified and Court Appointed Mediators.⁷⁹ The mediators' failure to provide this information resulted in potential program-manager noncompliance with local court orders.⁸⁰

73. *Id.* at 32.

74. Press, *supra* n. 14, at 320–321.

75. *In re: Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases*, Fla. Admin. Or. AOSC10-57, at 2-3 (Nov. 5, 2010) (available at <http://www.floridasupremecourt.org/clerk/adminorders/2010/AOSC10-57.pdf>) (stating that examples of restrictions include: geographic, residency, experience, or Florida Bar membership eligibility requirements).

76. *Id.*

77. See Thirteenth Jud. Cir. Ct. of Fla., *Residential Mortgage Foreclosure Mediation Program, Mediators-FAQs*, <http://www.fljud13.org/LegalCommunity/ResidentialMortgageForeclosureMediationProgram/MediatorsFAQs.aspx> (accessed July 15, 2012) (acknowledging that mediators are selected on a random basis with no limit on the number of mediators); see generally Twelfth Jud. Cir. Ct. of Fla., *Shared Foreclosure Info*, <http://www.jud12.flcourts.org/ProgramsServices/ForeclosureSarasota/SharedForeclosureInfo.aspx#RMFM> (accessed July 15, 2012) (listing a mediator search on its website).

78. See generally Fla. Admin. Or. AOSC10-57 at ex. 9, A-48 to A-49 (including a copy of the model mediation-report form).

79. See Fla. R. Certified & Court-Appointed Med. 10.520 (“Compliance with Authority: A mediator shall comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.”).

80. See generally Med. Ethics Advisory Comm. Op. 2010-011 (Jan. 24, 2011) (available at http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEACOpinion2010-011.pdf) (addressing a number of ethical concerns faced by mediators pursuant to the RMFM program).

Furthermore, some mediators voiced concerns about being pressured by some plaintiffs' representatives to report that the cases were at impasse rather than adjourned, even when nonwritten partial agreements were reached in mediation.⁸¹ While the parties intended to continue to resolve the outstanding issues, the banks wanted the ability to immediately set the cases for summary judgment.⁸² The mediators were concerned that they were being pressured into stating inaccurate information by reporting that the cases were at impasse.⁸³ Additionally, some mediators were concerned that reporting an impasse violated the Florida Mediation and Confidentiality Act because mediators should only report the "lack of an agreement" when the parties are at an actual impasse.⁸⁴ Also, some mediators believed that reporting an impasse violated the Florida Rules of Civil Procedure because reporting "termination" provides the court with a comment about the mediation.⁸⁵

In some circuit courts, the AOs were modified to require program managers to contribute to a court fund or a legal-aid fund in exchange for the privilege of serving in this capacity.⁸⁶

As some of these modifications raised concerns for the Florida Supreme Court, Administrative Order No. AOSC11-44 was adopted to supplement and clarify the initial AO.⁸⁷ This new AO clarified that no eligibility requirements could be imposed on mediator participation other than Florida Supreme Court circuit-

81. See *e.g. id.* (asking questions related to the proper way to report an impasse at mediation).

82. See *Final Report, supra* n. 1, at 20–21 (discussing the concerns related to cases being resolved after a final judgment and a judge's role in ensuring that necessary evidence has been presented before a summary judgment is entered on a case).

83. See *e.g. Med. Ethics Advisory Comm. Op. 2010-011, supra* n. 80, at 1–2 (discussing litigation strategies employed at mediations that would force a mediator to inaccurately declare an impasse).

84. See Fla. Stat. § 44.404(1)(b) ("The mediator declares an impasse by reporting to the court or the parties the lack of an agreement."); see *e.g. Fla. Med. Ethics Advisory Comm. Op. 2010-011, supra* n. 80, at 1–2 (questioning how to label the interim nature of certain agreements reached in mediation and whether those qualify as an impasse).

85. See Fla. R. Civ. P. 1.730(a) ("No Agreement. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation."); see *generally* Med. Ethics Advisory Comm. Op. 2010-011, *supra* n. 80 (discussing the concern about how to define an agreement).

86. See Fla. Admin. Or. AOSC10-57 at 5 (indicating that program managers are not paid from the circuit courts for administrative costs associated with running the program).

87. *Id.* at 4–5.

court certification and completion of a specified training program.⁸⁸ It also amended the mediation-report form to delete the mediation outcomes of “[p]arties reached impasse” and “[m]ediation was terminated” and directed that only the information in the model mediation report should be reported.⁸⁹ Further, the AO directed mediators to only provide accurate information.⁹⁰ The Florida Supreme Court advised that circuit courts are not authorized to charge or accept payments from program managers for their services under this program.⁹¹

VI. INNOVATIONS IN THE TWELFTH JUDICIAL CIRCUIT AO

Numerous circuits modified the initial model AO to improve the operation of the RMFM program. For example, the Twelfth Judicial Circuit made changes to increase the likelihood that the parties would have exchanged and timely reviewed the necessary documents before mediation and that the parties would be prepared to address all settlement options that might arise in mediation.⁹² These changes, which were adopted in AO 2010-11.1A, included the following:

- (1) The plaintiff is required to “designate a single individual as authorized agent to receive financial materials submitted by borrowers” in the Form A when filing the case in order to ensure that the documents are provided to the actual plaintiff’s representative who will review the documents prior to mediation.⁹³
- (2) The borrower must provide additional documents (specified in AO 2010-11.1A) to the Plaintiff in order to increase the likelihood that the plaintiff will have all documents necessary to consider a loan modification.⁹⁴

88. *Id.* at 3.

89. *Id.* at 5.

90. *Id.*

91. *Id.*

92. *First Amendment to Twelfth Judicial Circuit Administrative Order 2010-11.1*, Fla. Admin. Or. No. 2010-11.1A at 1–3 (Dec. 1, 2010) (available at http://12circuit.state.fl.us/LinkClick.aspx?fileticket=_c5N8dB3DHs%3d&tabid=36).

93. *Id.* at 1.

94. *Id.* at 2.

- (3) Credit counselors are authorized to provide the borrower's financial information directly to the person designated in Form A by the plaintiff in order to increase the likelihood that the financial documents are provided to the plaintiff along with a financial disclosure form.⁹⁵
- (4) The plaintiff must confirm receipt of documents to the RMFM program prior to the RMFM program scheduling mediation to ensure that the plaintiff will be prepared to negotiate in mediation.⁹⁶
- (5) The meaning of "full authority to settle" is clearly delineated to include authority to settle a broad range of possible outcomes to ensure that the plaintiff has full authority to address any solutions proposed by the borrower.⁹⁷

VII. IMPLEMENTATION CHALLENGES: THE THIRTEENTH JUDICIAL CIRCUIT'S EXPERIENCE

The experience of the Hillsborough County Bar Foundation (HCBF)⁹⁸ in implementing and operating the RMFM program in the Thirteenth Judicial Circuit illustrates the challenges that program managers face.⁹⁹ To provide needed infrastructure, with court approval, HCBF contracted with Interlink to use its infor-

95. *Id.*

96. *Id.* at 1, 3.

97. *Id.* at 6 (stating that plaintiff's counsel should have "full authority to settle the foreclosure case, including, but not limited to, authority to approve loan modifications, consent to borrower refinancing or short sales, to authorize deeds in lieu of foreclosure, and consent to waivers of deficiencies and to consent to other workout options").

98. The Hillsborough County Bar Foundation is a charitable organization that works with the Hillsborough County Bar Association. *See generally* Hillsborough Co. Bar Found., *About*, http://hillsbarfoundation.com/?page_id=2 (accessed July 15, 2012) (stating that the Foundation was created for charitable purposes only and listing its mission and purpose). It was created by the Hillsborough County Bar Association in 1996 to support and promote projects and programs that encourage assistance to those in need of legal assistance and access to the legal system in Hillsborough County. *Id.* Unlike the other four bar associations that participate as program managers in the RMFM program, the Hillsborough County Bar Association is the only one that operates through a separate foundation. *Id.* For purposes of this Article, the HCBF will be referred to interchangeably as the foundation and the bar association.

99. As Director of Managed Mediation for the Hillsborough County Bar Foundation, Leslie Reicin Stein was responsible for the RMFM program for the Thirteenth Judicial Circuit. This Part's content relies heavily upon her observations and experiences.

mation technology web-enabled-database platform¹⁰⁰ and with the Center for Financial Consulting LLC to provide the mailing of informational packets, acceptance of administrative fees, initial contact with borrowers, and the required financial counseling.¹⁰¹ Further, HCBF arranged for low-cost or no-cost volunteer lawyers to defend borrowers and provided no-cost training for attorneys and mediators.¹⁰² HCBF also enrolled and qualified mediators, solicited the services of Bay Area Legal Services,¹⁰³ and engaged in targeted marketing of its services to the community.¹⁰⁴ Additionally, HCBF met with the clerk of the court¹⁰⁵ and process servers and corresponded with and visited plaintiffs' law firms to train the firms' representatives to use the web-enabled platform.¹⁰⁶

From the outset, there were difficulties in contacting borrowers. Although the plaintiffs' counsel had the burden to provide

100. The five bar associations selected as mediation-manager programs use the web-enabled-database platform provided by Interlink Service Associates, Inc. See generally Interlink Serv. Assocs., Inc., *Residential Mortgage Foreclosure Mediation Program*, <http://www.rmfm.com/> (accessed July 15, 2012) (displaying the platform used by local circuits to manage their programs). As of September 2011, nine of the twenty program managers use this platform. *Id.* The program is used by the program managers of the Second, Fourth, Seventh, Ninth, Thirteenth, Fifteenth, Sixteenth, and Twentieth Circuits. *Id.*

101. See *Residential Foreclosure Case Management & Mandatory Mediation of Homestead Foreclosure Cases*, Fla. Admin. Or. S-2010-051 at 6 (Aug. 2, 2010) (available at http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/13th_Circuit.pdf) (stating that foreclosure-counseling services will be provided to the borrower through the Center for Financial Consulting LLC). The Center for Financial Consulting LLC's HUD-qualified counselors were not only experienced in financial counseling but were familiar with how to accommodate individuals with special needs and handle a high volume of callers. *Id.* The Center for Financial Consulting LLC administers, among other things, special needs trust funds. *Id.*

102. See *id.* at 6–7 (stating that the program manager will advise borrowers of legal representation options with costs that are reduced or free of charge).

103. See Bay Area Leg. Servs., Inc., <https://www.bals.org/our-services/help-with-basic-needs> (accessed July 15, 2012) (offering assistance with foreclosure). Bay Area Legal Services provides free civil legal services to qualified and low-income residents and non-profit entities throughout the Tampa Bay area. *Id.*

104. See generally Hillsborough Co. Bar Found., *supra* n. 98 (displaying the efforts of the organization, including its participation in the RMFM program).

105. See Thirteenth Jud. Cir. Admin. Off. of the Cts., *Clerk of the Circuit Court*, <http://www.fljud13.org/>; select Residential Mortgage Foreclosure Mediation Program (accessed July 15, 2012) (noting HCBF's participation in the Residential Mortgage Foreclosure program). The clerk of the court for the Thirteenth Judicial Circuit, Pat Frank, her deputy, Carla Snavely, and Angela Gary volunteered to provide the HCBF a daily report listing the residential foreclosure mediation cases filed. *Id.* Their services are most appreciated and invaluable.

106. See Interlink Serv. Assocs., Inc., *supra* n. 100 (discussing the web platform utilized to upload documentation for the program).

accurate and complete contact information, the information they provided rarely met this standard. Often, the names of the borrowers and other interested parties were incomplete, missing, or inaccurate.¹⁰⁷ Phone numbers were listed as all zeros, as the number for the lender or a national restaurant, or the telephone number was simply disconnected. Further, while any plaintiff's counsel who had five or more cases was required to designate a liaison between the firm and the program managers,¹⁰⁸ the liaison often could not be reached: the liaison was often not designated, unavailable, or no longer with the firm. As a result, HCBF staff spent hours on hold every day trying to contact plaintiff's counsel to obtain the required information. Even if the counsel who signed the complaint could be reached, that person routinely had no knowledge of the case or of how to contact the borrowers. As the program depends upon contacting the borrowers and explaining why they should participate, these failures had a serious adverse effect on the program's success.

In the many cases in which it received inaccurate or incomplete contact information, HCBF conducted its own comprehensive search. Its efforts included repeatedly reviewing the court docket to determine if a defense attorney had filed a Notice of Appearance; sending out multiple mailings to the borrower, including a "last chance" letter;¹⁰⁹ forwarding mailings if the mail was returned with a forwarding address; reviewing the county property appraiser's website to determine if a different or an additional mailing address was available; using multiple internet search engines to locate the borrower's address and phone number; and repeatedly attempting to contact plaintiff's counsel to obtain better contact information.¹¹⁰ The program manager also initially employed skip tracing and called 411, but neither of these efforts yielded satisfactory results.¹¹¹

While the local AO required plaintiff's counsel to submit a copy of the return of service to the program manager so the mana-

107. See *Final Report*, *supra* n. 1, at 15 (explaining that due to incorrect contact information for borrowers, cases are being returned to court).

108. Fla. Admin. Or. S-2011-010 at 13.

109. A "last chance" letter notifies the borrower of the final deadline the borrower must meet before a Notice of Borrower Non-Participation would be filed against the borrower.

110. For personal experience that informs this Part, see *supra* note 99.

111. Interview with Kristen Foltz, Thirteenth Jud. Cir. RMFM Program Adm'r (Sept. 29, 2011).

ger would know where and when service was effected,¹¹² few firms actually complied with this requirement.¹¹³ In an effort to mitigate this deficiency, HCBF receives a weekly report from ProVest containing information on the process it manages.¹¹⁴ As it might take thirty days or more for a borrower to be served with process in a mortgage-foreclosure case, the RMFM program materials often arrived before the summons and complaint and, therefore, were ignored by the borrowers who were still unaware that their property was being foreclosed.¹¹⁵

Due to the difficulties in obtaining correct contact information and receiving responses from borrowers, the program manager requested and received changes to the local AO that enlarged the time for contacting borrowers from thirty to sixty days.¹¹⁶ During this extended time frame, Notices of Appearance for borrower's counsel would often also be filed with the clerk of the court, thereby enabling the program manager to contact the borrowers through their counsel. The Florida Supreme Court also changed the reporting of statistics so that the time frame for contacting borrowers did not start until the plaintiff provided correct contact information,¹¹⁷ which put additional pressure upon the plaintiffs, as their foreclosure actions would be held in abeyance if they did not act.

Once the financial information was collected from the borrower and posted by the program manager on the web-enabled platform for the plaintiff to review, the plaintiff, if requested by the borrower, was required to provide relevant information with respect to the loan.¹¹⁸ At that time, the program manager sched-

112. Fla. Admin. Or. S-2011-010 at 4.

113. Interview, *supra* n. 111.

114. ProVest LLC is one of the largest legal support services firms in the country. ProVest LLC, *Welcome to ProVest, One of the Nation's Largest Legal Support Services Firms*, <http://web.provest.us/default.aspx> (accessed July 15, 2012). One of the services it provides is process management for law firms and financial institutions. *Id.* Its General Counsel and Chief Compliance Officer, Karen Kelly, who is a member of the Hillsborough County Bar Association, graciously provides this report to the HCBF.

115. Email from Matthew Hitchcock, Asst. Corp. Counsel for ProVest LLC, to Leslie Stein, Dir. of Managed Med. for the Hillsborough Co. Bar Found., *RE: RE: Stetson Law Review Article* (Oct. 21, 2011, 11:23 a.m. ET) (copy on file with *Stetson Law Review*).

116. Fla. Admin. Or. S-2011-010 at 6.

117. *Id.*

118. *Id.* at 5–6. This included providing proof that plaintiff owns and holds the note and mortgage that is sued upon; a history of the payments made by borrower during the life of

uled the case for mediation. The implementation of this process has proved challenging for HCBF for several reasons: plaintiffs often fail to review the posted financial information; they often require borrowers to post additional information that is not specified in the AO; and they fail to timely respond to the borrower's requests for information.¹¹⁹ As a consequence, mediations are often scheduled and rescheduled. The local AO was amended to require a plaintiff to pay an additional three hundred fifty dollar fee if a mediation is cancelled within five days of its scheduled date due to plaintiff's failure to post a response to borrower's requests for information.¹²⁰

VIII. EVALUATION OF PROGRAM

In the initial RMFM AO, the Florida Supreme Court identified four key determinates to assist the court in evaluating the RMFM programs. Those determinants were:

- (1) the percentage of cases referred to the program that result in the program manager successfully contacting borrowers;
- (2) the percentage of scheduled mediations failing to go forward because plaintiff's representative did not appear;
- (3) the percentage of scheduled mediations failing to go forward because the borrower did not appear; and
- (4) the percentage of mediations resulting in partial or complete agreements compared to those resulting in impasse.¹²¹

While the above points provided the Court with a method for determining whether the program managers were adequately performing their services, these determinants were not as helpful in measuring the program's overall success. Although the last determinant would appear to measure the success of the RMFM programs in resolving the foreclosure cases, in reality, it only measures case outcomes at one point in time. As many cases settle before mediation, and other cases settle after mediation—as a result of the outreach, foreclosure counseling, information

the loan; the plaintiff's valuation of the present net valuation of the loan; and a current appraisal of the property. *Id.*

119. For personal experience that informs this Part, see *supra* note 99.

120. Fla. Admin. Or. S-2011-010 at 11.

121. Fla. Admin. Or. AOSC09-54 at 8–9.

exchange, and mediation components of the RMFM programs—settlement rates at mediation likely underestimate the ultimate success of the programs. While some program managers attempted to track the number of cases that resolved before and after mediation, insufficient data currently exists with respect to this matter.

To best assess the effectiveness of the RMFM programs as a case-management method, the cases would ideally need to be followed from referral to the RMFM program through final resolution. Given the nature of RMFM cases, many cases cannot be settled at mediation and require additional time before resolution may be possible. The RMFM program appears to provide a good start to resolving these disputes with a minimal use of court resources. One preliminary study, however, sheds some light on the effectiveness of the program. The Collins Center researched 2,851 residential mortgage foreclosure case referrals received from January 1, 2010, to June 31, 2010, in four judicial circuits.¹²² In particular, it tracked those cases in which the mediator reported an impasse or failure to reach an agreement.¹²³ Significantly, the study found that by July 2011, “17% of cases were [subsequently] dismissed voluntarily by the plaintiff or by order of the court[;] 5% of cases went to Final Judgment, i.e., the property was sold[;] [and] 78% of the 2,851 cases researched remained open without a date for Final Judgment.”¹²⁴

In September 2011, Chief Justice Canady appointed an assessment workgroup for the managed mediation program for residential mortgage foreclosure cases to: (1) “[a]ssess the success of the statewide managed mediation program . . . as evidenced by data collected to date, as well as any other relevant information,” and make recommendations to the Court “to continue, modify, or eliminate the statewide program;” and (2) “[r]ecommend steps to be taken to manage pending and new residential [mortgage] fore-

122. Ned Pope & Chris Bailey, *Collins Center RMFMP 2010 Impasse Research* 3–5 (copy on file with *Stetson Law Review*) (researching the First Circuit, which includes Escambia, Okaloosa, Santa Rosa, and Walton; the Eleventh Circuit, which covers Dade; the Fourteenth Circuit, which covers Bay, Calhoun, Gulf, Holmes, Jackson, and Washington; and the Nineteenth Circuit, which covers Indian River, Martin, Okeechobee, and St. Lucie).

123. *Id.* at 3.

124. *Id.* at 5.

closure cases if the mandate for [the statewide program] is eliminated.”¹²⁵

The workgroup reported its findings and recommendations in October 2011.¹²⁶ Although the workgroup concluded that a “number of cases settle after impasse is declared at mediation,” and “[u]nfortunately, the current data collection system does not accurately gauge the success of the program,” it recommended the Court terminate the mandate for a statewide managed mediation program.¹²⁷ The workgroup determined:

A number of factors skewed the success rate of the program downward. . . . [S]ervicers on a broad scale resisted providing representatives at mediation with full authority to settle and refused to consider more than a narrow range of settlement options, most of which were of little value to borrowers. Servicers had economic incentives not to settle and to keep foreclosure cases in limbo to avoid the expenses that accompany home ownership. . . . In addition, because the managed mediation program was not well publicized as a court-referred program, borrowers mistrusted the program and were uncertain about its legitimacy. These factors contributed to the low rate of borrower contact.¹²⁸

The workgroup’s second recommendation was to “allow circuits to opt in to a new, revised uniform model [AO], either as an exclusive approach or in addition to referral of cases to mediation on a case-by-case basis under relevant court rules and statutes.”¹²⁹ The workgroup also proposed that a new group be appointed to consider revisions addressing eleven elements identified for change¹³⁰ and “concluded that for those circuits that

125. *In re: Statewide Managed Mediation Program Assessment Workgroup*, Fla. Admin. Or. AOSC11-33 at 3–4 (Sept. 26, 2011) (available at <http://www.floridasupremecourt.org/clerk/adminorders/2011/AOSC11-33.pdf>).

126. The Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases, *Workgroup Final Report* (Oct. 21, 2011) (available at http://www.floridasupremecourt.org/pub_info/documents/Foreclosure/10-21-2011_Workgroup_Final_Report.pdf) [hereinafter *Workgroup Final Report*].

127. *Id.* at 2, 4.

128. *Id.* at 4.

129. *Id.* at 2.

130. *Id.* at 2–3. The new workgroup would make modifications that would:

- Require borrowers to affirmatively opt in to the program upon service of suit papers

choose to continue a managed mediation program, adherence to a modified model [AO] is important to maintain consistency throughout the state.”¹³¹

IX. TERMINATION OF THE STATEWIDE RMFM MANDATE

In December 2011, Chief Justice Canady followed the first recommendation of the workgroup and issued AO No. AOSC11-44, *In re: Managed Mediation Program for Residential Mortgage Foreclosure Cases*, which terminated the Court’s previously established statewide mandate.¹³² Unfortunately, AOSC11-44 did not provide any guidance for circuits that may wish to continue their own circuit RMFM program. While the workgroup’s report emphasized the need for uniformity and the need to assist those judicial circuits that wish to refine existing programs,¹³³ no guidance was provided nor was a subsequent group appointed to follow through with the workgroup’s second recommendation. As a consequence, at the time of this Article’s submission, each circuit chief judge must determine whether to continue or discontinue the RMFM program, or institute custom-

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- Develop steps to improve the integrity of borrowers’ financial information and to identify the appropriate lender contact
 - Develop steps to improve performance on document exchange and document review
 - Review and update document exchange requirements for both parties
 - Clarify the correlation between bankruptcy and participation in the program
 - Explore options for sanctions for noncompliance by either party
 - Explore fee reductions, including borrower contributions to fees, borrower payment of foreclosure counseling fees, and reduction of overall program costs
 - Develop data mechanisms to track post-mediation settlements
 - Shorten the time frame for completion of mediation
 - Eliminate the mandate for referral of all residential mortgage foreclosure cases to the program[]
 - Examine the manner in which the results of mediation are reported

Id.

131. *Id.* at 2.

132. *In re: Managed Mediation Program for Residential Mortgage Foreclosure Cases*, Fla. Admin. Or. No. AOSC11-44 (Dec. 19, 2011) (available at http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/12-19-2011_Order_Managed_Mediation.pdf).

133. *Workgroup Final Report*, *supra* n. 126, at 2.

ized mediation or other ADR programs in his or her respective circuit.

X. PRE-SUIT RMFM MEDIATION

The RMFM AO has resulted in the development of pre-suit RMF mediation in Florida.¹³⁴ The incentive for pre-suit mediation is to avoid the payment of court filing fees and to settle cases in a more timely manner when borrowers are less behind in their mortgage payments.¹³⁵ In judicial circuits where the court-referred RMFM program is still in operation, participation in a pre-suit mediation program with procedures substantially complying with the requirements of the AO may allow the plaintiff to avoid automatic referral to the RMFM program.

XI. CONCLUSION

The initial Task Force was asked to develop a comprehensive RMFM program in a short amount of time and with a limited budget.¹³⁶ The Task Force recommendations provided a sound basis for starting an RMFM program, but the challenges of implementing the programs have led many chief judges and program managers to find ways to improve the program by implementing innovative solutions based upon their local experiences.¹³⁷

To date, the RMFM-program mediation-settlement rates have not been as successful as other court-mediation programs such as family and county court mediation programs.¹³⁸ As described ear-

134. *Re: (Amended) Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation*, Fla. Admin. Or. CV-2010-022-SC(A) at 11 (Dec. 3, 2010) (available at http://www.floridasupremecourt.org/pub_info/documents/foreclosure_orders/7th_Circuit.pdf) (encouraging mediation before filing a foreclosure lawsuit).

135. *Id.* (providing that pre-suit mediation reduces the cost to the parties).

136. Fla. Admin. Or. AOSC09-8 at 2 (providing the Task Force with less than two months to prepare an initial report and less than six months to submit a final report).

137. *E.g. Re: Administrative Order for Case Management of Residential Foreclosure Cases and Mandatory Referral of Mortgage Foreclosure Cases Involving Homestead Residences to Mediation*, Fla. Admin. Or. 2010-11.1 (May 20, 2010).

138. Kimberly Miller, *Foreclosure Mediation Program's Low Rate of Success Leaves Its Future in Doubt*, The Palm Beach Post (last updated Sept. 21, 2011, 6:31 a.m. ET) (available at <http://www.palmbeachpost.com/money/foreclosures/foreclosure-mediation-programs-low-rate-of-success-leaves-1869726.html>) (quoting the statistics presented to the Florida State House Civil Justice Committee that stated just 3.6% of the cases referred statewide to the RMFM Program in the year-long period beginning March 2010 resulted in a written agreement between the borrower and the lender). The percentage is 25% if calculated on

lier in this Article, however, there are unique qualities of the RMFM model, as well as unique aspects of foreclosure cases, that suggest that measuring success only at the point of mediation termination is somewhat short-sighted. As of this writing, there does not appear to be any reliable report of the number of cases that settle as a result of the RMFM-program efforts. This includes those cases that settle before mediation, during mediation, or after mediation. Ultimately, the success of these programs will be determined by their ability to divert cases from the court and resolve them in a constructive manner before trial.

One innovation in the model AO is the integration of online and live education of mediators.¹³⁹ While online education still does not provide the opportunity to meaningfully and constructively teach the interpersonal skills inherent in mediation training, the success of the online programs suggests that in the future, substantive material including Florida law and court rules may, at least in part, be taught via online educational programs. These programs could include tests to measure educational accomplishments.

The RMFM-mediation court model has fostered the development of pre-suit residential mortgage foreclosure mediation. This development enables parties to come together more quickly and hopefully will provide the parties with better opportunities for resolving mortgage-payment problems in a manner that allows more homeowners to remain in their homes. Early pre-suit mediation also saves court time because many cases are settled before the filing of a foreclosure action.¹⁴⁰

The RMFM programs are innovative public-private partnerships that have allowed the Court to develop court-supervised mediation programs outside the courthouse. While the impetus for this public-private partnership was the absence of

the basis of homeowners who chose to participate. *Id.* For 2007–2008, approximately 33% of county court mediations and 57% of all family court mediations in Hillsborough County resulted in settlement. Elizabeth S. Roach, *Florida Mediation Programs—An Abbreviated Compendium: Court Connected Caseload Data* 4, 7 (21st ed., Fla. Dispute Res. Ctr. 2007–2008) (available at http://www.flcourts.org/gen_public/adr/bin/FY2007-2008CompendiumCaseloadFinal.pdf).

139. *Supra* n. 60 and accompanying text (discussing the online components of the RMFM training).

140. Fla. Admin. Or. CV-2010-022-SC(A) at 11 (suggesting that pre-suit mediation reduces the stress placed on the limited resources of the court).

statutory authorization for the Court to collect funds for circuit court mediation,¹⁴¹ the result may serve as a model for other legal matters in creating public-private partnerships to constructively provide ADR options that may not be available in the courthouse. Unfortunately, the statewide mandate for RMFM programs has been terminated. At the time of Article submission, it is not clear if any of the RMFM programs will continue on a circuit-by-circuit basis or if new mediation and ADR models will be developed to address the continued high rate of foreclosure filings. Hopefully the judicial circuits will find a means to promote collaborative resolution of residential foreclosure cases in a timely, constructive, and cost-effective manner.

141. See Fla. Stat. § 44.108(2) (explaining that statutory authorization is provided for courts to charge a fee for family and county court mediation).