

EMERGING STRATEGIES FOR
EFFECTIVE FORECLOSURE MEDIATION
PROGRAMS



About HUD

The U.S. Department of Housing and Urban Development's mission is to create strong, sustainable, inclusive communities and quality affordable homes for all. HUD is working to strengthen the housing market to bolster the economy and protect consumers, meet the need for quality affordable rental homes, utilize housing as a platform for improving quality of life, build inclusive and sustainable communities free from discrimination, and transform the way HUD does business. More information about HUD and its programs is available on the Internet at www.hud.gov and espanol.hud.gov. HUD provides foreclosure prevention information for homeowners in foreclosure or worried about foreclosure on its Avoiding Foreclosure website.

About the Access to Justice Initiative

The Access to Justice Initiative of the U.S. Department of Justice has several distinct but related missions. It is charged with improving the availability and quality of indigent defense; enhancing civil legal representation for those without great wealth, including the middle class as well as the poor; focusing with special care upon the legal needs of the most vulnerable among us, including immigrants, juveniles, the homeless, veterans, and victims of domestic and sex-based violence; working with federal, state, and tribal judiciaries in strengthening fair, impartial, and independent adjudication; promoting less lawyer-intensive and court-intensive solutions when possible; exchanging information with foreign ministries of justice and judicial systems on our respective efforts to improve access; and encouraging the development of more thoroughly evidence-based solutions to problems in the delivery of legal services. More information about the Initiative is available at www.justice.gov/atj.

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Introduction

The loss of a home to foreclosure can be devastating for a family. In addition to losing what is often their most significant asset, families are uprooted from community supports and may find themselves with no place to go. The losses extend beyond individual families: Foreclosures destabilize entire neighborhoods through declines in surrounding property values, loss of tax revenue, and blight. As foreclosures continue to impact homeowners, tenants, and communities, the Access to Justice Initiative of the U.S. Department of Justice and the U.S. Department of Housing and Urban Development (HUD) have joined with the Vice President's Middle Class Task Force to seek solutions to the foreclosure crisis that focus on homeowners. That endeavor has included a close study of efforts already underway that have demonstrated some success in protecting homeowners in danger of losing their homes, and of ways in which the government can support those efforts.

Federal, state, and local law and policy makers have initiated a broad array of interventions to the foreclosure pandemic, including loan modification programs such as the federal Home Affordable Modification Program (HAMP), mortgage payment assistance and principal reduction programs, counseling assistance, funds to promote neighborhood stabilization, and regulatory reform. One vehicle that can usefully coordinate a number of these foreclosure mitigation tools is foreclosure mediation. Jurisdictions around the country are increasingly offering mediation programs as an opportunity for lenders¹ and homeowners to reach mutually agreeable and beneficial alternatives to foreclosure. Mediation programs have the potential to decrease the number of defaults resulting in foreclosure, increase the likelihood that mortgage terms can be renegotiated, and facilitate “graceful exits” by negotiating short sales, deeds-in-lieu of foreclosure (where the homeowner deeds the home to the lender in exchange for a release of liabilities under the mortgage), or other alternatives for homeowners who are unable to keep their homes.

More than 25 foreclosure mediation programs have been created in at least 14 states. Although many programs are still finding their footing, outcomes from several established programs are impressive, with some boasting 70-75 percent settlement rates with approximately 60 percent of homeowners reaching settlements that allow them to remain in their homes.²

Given the promise shown by foreclosure mediation programs, the Access to Justice Initiative and HUD have reviewed programs around the country in order

¹ The term “lenders” is used in this report to refer collectively to lenders as well as servicers, who collect and process loan payments during the life of a loan on behalf of lenders.

² See Alon Cohen, Andrew Jakobovics, Center for American Progress, Now We're Talking 5 (June 2010).

to identify strategies that promote successful outcomes. The purpose of this report is to describe several program features that appear to have a positive impact on the effectiveness of mediation programs, and to offer those features for consideration by jurisdictions that are seeking to develop or expand programs. Also included is a list of a number of existing foreclosure mediation programs throughout the nation that are interested in sharing their experiences with mediation program stakeholders in other jurisdictions.³

Importantly, this report is not intended to promote a one-size-fits-all approach, as each state's respective statutory framework for the foreclosure process and other variations in local context and needs will and should dictate program design at the sub-national level. We also stress that this report is not intended to encompass the full scope of the Obama administration's policy response to the ongoing challenges facing homeowners. Our administration will continue to rigorously pursue the interventions noted above and to actively monitor the market to make sure we are doing all we can to help homeowners in need.

³ This list is not meant to be comprehensive, and the mention of any specific program in this report does not constitute an endorsement by the U.S. Department of Justice or the U.S. Department of Housing and Urban Development.

Program Administration and Design

A defining feature of mediation programs is the presence of neutral third-party mediators who can help parties reach agreement on an alternative to foreclosure in circumstances where such an outcome is feasible. The third party does not have to be present at every stage of mediation. For example, the foreclosure mediation program in Philadelphia relies on pre-mediation “conciliation conferences,” where the parties are required to meet to discuss foreclosure alternatives. A mediation session with a third-party mediator is required only where the parties are unable to reach an agreement at the conciliation meeting. Further, foreclosure cases come before a judge only if formal mediation fails to resolve the matter. These conferences and mediation sessions ensure that judges are being called upon to address only the toughest cases, and thus are an effective way to decrease the mediation program’s burden on court officers.

Although many programs rely on sitting judges to oversee mediation sessions, this is by no means uniformly true. New York City’s foreclosure mediation program and others rely on court-supervised “referees” – typically retired judges and lawyers – to supervise mediation. Several jurisdictions have contracted with non-profit organizations, such as the Center for Conflict Resolution in Illinois and the Collins Center for Public Policy in Florida, to administer mediation programs. In Milwaukee, Wisconsin, the Milwaukee Foreclosure Mediation Program is run by Marquette University Law School, where a full-time chief mediator oversees a roster of trained volunteer attorney-mediators.

Judicial foreclosure states⁴ are also not the only forums in which mediation programs have been established. The state of Nevada, a non-judicial foreclosure state, requires lenders to participate in mediation before a foreclosure can proceed. Providence, Rhode Island imposes a fine on servicers that proceed to foreclosure without attempting mediation, while New Hampshire’s foreclosure mediation program relies on the voluntary participation of lenders.

Mediation programs can also be used as an intervention tool prior to the lender’s filing of a foreclosure notice, when homeowners may be in the best position to rectify arrears and when servicers can potentially avoid the significant costs of initiating the foreclosure process. Fannie Mae has recently announced a new policy that requires servicers to determine whether delinquent mortgage loans secured by properties in Florida are eligible for mediation prior to initiating foreclosure proceedings and, if they are eligible, to proceed in accordance with Fannie Mae’s policy guidance on pre-filing mediation.

⁴ In judicial foreclosure states foreclosures are processed through the courts. In contrast, in non-judicial foreclosure states lenders are permitted to proceed directly to a foreclosure sale without court action.

Automatically Scheduled vs. Opt-in Process for Homeowners

Mediation programs generally follow one of two models for homeowner participation: an opt-in process, where the homeowner is notified of his or her eligibility but must affirmatively request mediation before being entered into the program; or an automatically scheduled, or opt-out, process, where homeowners who receive a notice that foreclosure has begun are automatically scheduled for a mediation session. Participation rates appear to be considerably higher in jurisdictions that have automatically scheduled programs, generally 70 percent and higher in jurisdictions such as Connecticut and New York, as compared to opt-in programs, which typically have participation rates for eligible home owners below 25 percent. Notably, Connecticut's program, the nation's first state-wide foreclosure mediation program, was originally opt-in and did not see a drop in settlement rates when the program switched to an automatically scheduled process, despite an increase in the number of homeowners participating in the program. An important question for any jurisdiction that is contemplating an opt-in versus an automatically scheduled program is whether the program has the capacity to accommodate the higher volume of homeowners who will likely be brought into the program through automatic scheduling.

Foreclosure mediation programs of either type should consider how they will ensure adequate levels of homeowner participation. Philadelphia and Milwaukee County are examples of jurisdictions that have invested in outreach programs that have sent community coordinators or organizers door-to-door in targeted neighborhoods to educate homeowners at risk of foreclosure about the benefits of mediation programs and to link them with counselors who can assist them during the process.

Stakeholder Involvement

Stakeholder involvement is a major factor in the success of mediation programs. In several jurisdictions, the courts, legislatures, lenders, and homeowner advocates have come to the table at an early stage to devise meaningful interventions in the context of foreclosure mediation programs. By working together, all parties can voice their concerns and help craft a process that is both efficient and fair, and not unduly burdensome to either party. To the extent possible, the involvement of all parties, including representatives from the lending community, during the planning stages increases the likelihood that parties will be receptive and active participants once the program gets off the ground.

Access to Counselors

There is broad consensus that homeowners fare better in mediation when assisted by a knowledgeable housing counselor and/or lawyer. These advocates can also help the process run more smoothly by helping gather loan documents, identifying loan modification options, and facilitating communication between the homeowner, mediator, and counsel for the lender. Almost all mediation programs provide homeowners with notice of the availability of free housing counselors, and sometimes legal assistance, or otherwise require the lender to do so. A smaller number of programs, including those in Cook County, Illinois, Philadelphia, and New Jersey, go further by coordinating or requiring counseling assistance prior to or at mediation sessions. Some programs also have established or facilitated relationships between counseling agencies, legal aid providers, and pro bono attorneys. For example, the Circuit Court of Cook County's Mortgage Foreclosure Mediation Program requires a homeowner who is seeking mediation to meet with a HUD-certified housing counselor (either with an on-site counselor directly through the program or with another HUD-certified housing counselor of his/her choosing) and with an attorney in advance of mediation. The program provides housing counseling services and legal services at no cost to any homeowner who needs the assistance and meets the eligibility requirements, regardless of income. The housing counselor helps the homeowner obtain necessary paperwork and make an assessment of the best option for the homeowner (modification, short sale, etc.). The homeowner also has a consultation session with a *pro bono* attorney who reviews the paperwork to make an initial determination of whether the homeowner has a legal defense to foreclosure that should be pursued through the courts. Where appropriate, the attorney will help the homeowner prepare a request to the court for appointment of *pro bono* counsel. If there is no defense to the foreclosure, and the case proceeds to mediation, the homeowner will have the assistance of a pro-bono attorney throughout the mediation process. At least anecdotally, additional assistance by counselors and attorneys in foreclosure mediation programs such as Cook County's has proved effective at improving access to qualified housing counselors and legal assistance for homeowners facing foreclosure.

Training and Support

In order to be successful, mediation programs must ensure that participants helping to facilitate the mediation process are well-trained. The housing counseling agencies that participate in many programs have extensive in-house training both on available resources and programs at the federal and state level, including state and federal mortgage assistance programs and community-based resources, as well as on the details and functioning of the mediation program itself. NeighborWorks®, a national non-profit created by Congress that administers the National Foreclosure Mitigation Counseling Program, will offer a workshop dedicated exclusively to mediation-related education at its NeighborWorks Training Institute in December 2010.

Well-trained lawyers are also an important tool in mediation programs, as there may be homeowners for whom mediation reveals a legal issue that requires the assistance of an attorney. Although legal resources for homeowners in mediation programs generally are quite limited, many programs do enjoy the participation of legal aid offices and *pro bono* attorneys coordinated by a local bar association or other organization. However, these attorneys may well be hamstrung by a lack of familiarity with the complex legal issues that arise in the foreclosure context. To that end, HUD plans to record and disseminate a new training program for *pro bono* and legal services lawyers who are assisting homeowners in connection with foreclosure mediation programs.

Integration with Federal and State Foreclosure Relief Programs

The Obama Administration's foreclosure relief programs, including the Home Affordable Modification Program (HAMP), the Hardest Hit Fund, principal reduction programs, FHA loss mitigation options, and the Home Affordable Foreclosure Alternatives (HAFA) programs, as well as state relief programs, have increased the options available to homeowners at risk of foreclosure. Mediation programs that take advantage of and/or help facilitate homeowners' access to these programs, either through the assistance of knowledgeable mediators or counselors, or with other program requirements, will in all likelihood achieve greater success than programs that do not.

The recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act also offers protections to homeowners that may be realized in the context of a mediation program. For example, the Act requires that every servicer participating in HAMP that denies a homeowner's loan modification request on the basis of net present value (NPV) analysis provide that homeowner with the data used to make its calculation. A foreclosure mediation program is a proper venue in which a lender may provide the information to a homeowner, and well-structured programs should provide a space for that transaction to occur.

Several mediation programs have been working to educate program administrators about HAMP and other federal and state foreclosure prevention programs, and have instituted oversight measures to help increase the number of homeowners who are able to secure foreclosure relief through these programs. Connecticut's foreclosure mediation program retains all mediation cases in which a homeowner has received a temporary HAMP modification until a permanent HAMP modification is obtained. Vermont is the first mediation program to require lenders, as part of the mediation process, both to calculate the NPV in accordance with HAMP guidelines and actually to produce the NPV inputs and outcome to the homeowner and mediator. If the lender fails to comply with the mediation statute, the court is empowered to impose sanctions, including prohibiting the lender from scheduling or conducting a foreclosure sale.

Documentation Requirements

Most foreclosure mediation programs require homeowners participating in the program to provide documentation of available resources and a budget plan. Some programs, like Maine's foreclosure mediation program, also require homeowners and lenders to provide information to complete the FDIC's publicly-available NPV worksheet that determines whether a loan modification is feasible, and also require that the lender or its representative participating in mediation have authority to agree to a proposed settlement. Although requiring documentation by the lender at the outset of mediation may prove to be an unnecessary obstacle to commencing the negotiation process, there may come a time during mediation where such documentation is necessary. Thus, facilitating and/or requiring the production of documents may be an important feature of the program.

Accountability Measures

Several jurisdictions have developed program rules that help ensure accountability by mediation program participants. For example, in some court-run mediation programs such as Maine's, courts have the authority to assess costs and fees to either party for failure to appear at mediation sessions or to make a good faith effort to mediate. Providence's foreclosure mediation program allows mediators to request that lenders provide written documentation of reasons for rejecting a loan modification proposal. Vermont's foreclosure mediation program requires lenders to provide a copy of any pooling and servicing or similar agreement when a lender claims that such an agreement prohibits a loan modification.

Research and Evaluation

The way to determine whether a mediation program is actually effective is through careful tracking and evaluation of program data. At a minimum, participation and settlement rates should be tracked. A more comprehensive approach would include tracking not just the occurrence of a settlement, but also the substance of the agreement (e.g., loan modification, HAMP/non-HAMP, repayment/forbearance plan and principal forbearance amount, cash for keys, short sale, and other agreements), the time period for achieving resolution (tracked in Cuyahoga County, Ohio), and whether homeowners had the assistance of a counselor or attorney (tracked in New York City).

The Philadelphia mediation program has also been tracking homeowner participant demographics to ensure that there are not unwarranted disparities in community participation rates. Several programs have been evaluated with private foundation support, but smaller programs like that in Butler County, Pennsylvania have been experimenting with low-cost ways to track at least some data.

Conclusion

For millions of homeowners at risk of foreclosure, mediation programs offer an opportunity to evaluate their options and appraise possible alternatives to losing their homes. Well-structured foreclosure mediation programs that are designed to take advantage of available resources at the local, state, and federal level can be valuable and even essential tools as jurisdictions around the country seek ways to combat the foreclosure crisis. The program features described in this report should be considered by states and localities as they study how to construct new programs or support existing ones.

Mediation Program List⁵

Connecticut

State of Connecticut Judicial Branch Foreclosure Mediation Program
<http://www.jud.ct.gov/foreclosure/>

Delaware

Delaware Residential Foreclosure Mediation Program
<http://deforeclosurehelp.org/mediation.html>

Florida

Florida Statewide Managed Mediation Program
http://www.floridasupremecourt.org/pub_info/documents/AOSC09-54_Foreclosures.pdf

Hawaii*

Third Circuit Court Foreclosure Mediation Pilot Project
http://www.courts.state.hi.us/docs/form/hawaii/foreclosure_mediation_notice.pdf

Illinois

Circuit Court of Cook County Mortgage Foreclosure Mediation Program
<http://cookcountyforeclosurehelp.org/>

Indiana

Indiana Foreclosure Settlement Conference Program
<http://www.in.gov/judiciary/home/#how>

Kentucky

Jefferson County Foreclosure Conciliation Project
<http://www.louisvilleky.gov/Housing/News/2009/>

Maine

Maine Foreclosure Diversion Program
http://www.courts.state.me.us/court_info/fdp/index.html

⁵ This foreclosure mediation program list includes a least one program in every state that has established a foreclosure mediation program that utilizes a neutral third-party to oversee at least some aspect of the mediation process. This list is not meant to be comprehensive, and does not constitute an endorsement by the U.S. Department of Justice or the U.S. Department of Housing and Urban Development.

Maryland*

Maryland Foreclosure Mediation Program
<http://www.mdhope.org/ForeclosureMediation.aspx>

Nevada*

Nevada Foreclosure Mediation Program
<http://www.nevadajudiciary.us/index.php/foreclosuremediation>

New Hampshire*

New Hampshire Judicial Branch Office of Mediation and Arbitration Foreclosure Mediation Program
<http://www.courts.state.nh.us/adrp/foreclosure/index.htm>

New Jersey

New Jersey Judiciary Foreclosure Mediation Program
<http://www.nj.gov/foreclosuremediation/index.html>

New Mexico

First Judicial District Court Foreclosure Mediation Program
www.firstdistrictcourt.com/Forms/doc/Foreclosure%201.doc

New York

New York City Mandatory Settlement Conference in Residential Foreclosure Actions
<http://www.banking.state.ny.us/hetpinf6.htm>

Nevada*

Nevada Foreclosure Mediation Program
<http://www.nevadajudiciary.us/index.php/foreclosuremediation>

Ohio

Cuyahoga County Foreclosure Prevention Program
<http://cp.cuyahogacounty.us/internet/ForeClosureMediation.aspx>

Pennsylvania

Philadelphia Residential Mortgage Foreclosure Diversion Program
<http://www.courts.phila.gov/mfdp/>

Rhode Island*

Providence
<http://library.municode.com/ordinances/11458/Chapter%20No.%202010-2.pdf>

Vermont

Vermont Foreclosure Mediation Program
<http://www.uvm.edu/consumer/?Page=foreclosure.html>

Wisconsin

Milwaukee Foreclosure Mediation Program

<http://law.marquette.edu/foreclosure/>

* States with an asterisk have a non-judicial foreclosure process.

Helpful Links

- HUD Foreclosure Resources
http://portal.hud.gov/portal/page/portal/HUD/topics/avoiding_foreclosure
- NeighborWorks America Foreclosure Resources
<http://www.nw.org/network/foreclosure/default.asp>
- FTC Foreclosure Rescue Scam Information
<http://www.ftc.gov/bcp/edu/microsites/moneymatters/your-home.shtml>
- Making Home Affordable Program
<http://www.makinghomeaffordable.gov/>