

Banking on Mediator Skills

Mediation programs are springing up across the country to assist record numbers of homeowners facing foreclosure.¹ The long-term effectiveness of these mediation initiatives is yet to be determined. Some consumer advocates question how a process geared at obtaining voluntary concessions can address the binding contractual concerns governing mortgage-backed securities.² Critics perceive mandatory mediation processes as being unnecessary and overly burdensome to the banking industry.³ Homeowners, desperate for a lifeline, oftentimes bring their own unrealistic expectations to the table. Stuck in the middle of this increasingly popular foreclosure fix is the mediation community

¹ Geoff Walsh, *State and Local Foreclosure Mediation Programs: Updates and New Developments*, Jan. 2010, http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf (updating Geoffrey Walsh, *State and Local Foreclosure Mediation Programs: Are they Saving Homes?* Sept. 2009, http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf (referencing 25 state and local foreclosure mediation programs) (last visited December 2, 2010).

² Andrew Jakobovics & Alon Cohen, *It's Time We Talked: Mandatory Mediation in the Foreclosure Process* at 29-34, June 2009 available at http://www.americanprogress.org/issues/2009/06/pdf/foreclosure_mediation.pdf; Id., June 2010 (discussing the status of statewide mortgage foreclosure mediation programs and stating "Foreclosure mediation boasts a short but proven track record in preventing foreclosures, and it does so only because it permits both parties to see that there is a better deal to be had instead of foreclosure.") available at http://www.americanprogress.org/issues/2010/06/foreclosure_mediation.html (last visited December 2, 2010).

³ FLORIDA SUPREME COURT TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FINAL REPORT AND RECOMMENDATIONS ON RESIDENTIAL MORTGAGE FORECLOSURE CASES (Aug. 17, 2009) (Haworth et. al., Minority Report) available at http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Appendix_L.pdf; VANESSA Blum, *Justices Debate Mandatory Mediation to Ease Crisis*, Nov. 5, 2009, <http://www.burgesslawfirm.com/mortgage-modification-news/justices-debate-mandatory-mediation-to-ease-crisis/>.

itself - caught within its own dilemma of promoting Alternative Dispute Resolution (ADR) exposure while ensuring the professionalism of its services.⁴

Foreclosure mediation programs are showcasing mediation, traditionally a more private process, as it has never been before. A danger of these emerging mass production mediations, however, is the erosion of mediation integrity. In states having adopted mediator standards, usually a variation of the Model Standards of Conduct for Mediators, these same ethical goal posts arguably apply to foreclosure mediator performance.⁵ While codified standards provide important guidance, mediator skills are at the heart of any successful mediation. Mortgage foreclosure mediations, with their heightened emotions, economic realities, and extreme power imbalances, provide unique challenges to mediators' skill sets. Mediators must be adept at developing and fine tuning the necessary tools of their trade to facilitate productive dialogue exchange.

While the construct of foreclosure mediation programs may vary among jurisdictions,⁶ mediator skills cross jurisdictional boundaries. As in any subject area negotiation, mediators in foreclosure cases are responsible for setting the tone, exploring interests, facilitating information exchange, and providing a fair

⁴ See Alon Cohen, *Walk the Talk: Best Practices on the Road to Automatic Foreclosure Mediation*, November 8, 2010, at 11 (noting "Some of these (mediation) regulations may not be conducive with fast paced world of foreclosure mediation.") Available at http://www.americanprogress.org/issues/2010/11/pdf/walk_the_talk.pdf (last visited December 2, 2010).

⁵ See Model Standards of Conduct Mediators (2005) (initially prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution and the Society of Professionals in Dispute Resolution (which later evolved into the Association for Conflict Resolution. Amended in 2005 by a joint committee of representatives from the same successor organizations revised these standards *that* have been approved by the participating organizations).

⁶See "Emerging Strategies for Effective Foreclosure Mediation Programs," U.S. Departments of Housing and Urban Development (HUD) and Justice (DOJ) reporting that states in which foreclosures are processed through the courts "are 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." <http://portal.hud.gov/hudportal/documents/huddoc?id=EFFCTMEDIATPRGSTRATEGYREPORT.pdf> (last visited February 1, 2010.)

forum for generating and assessing options for settlement.⁷ This article uses scenarios, typical of real cases mediated by the author, to illustrate the effective use of mediation skills in assisting the parties in mortgage foreclosure mediation in meeting their underlying interests - the hallmark of a successful negotiation.⁸

Setting the tone

The Courthouse waiting area was filled with anxious homeowners. In the corner sat a man drumming his fingers. His eyes darted coldly at the lender's attorney across the room as the housing counselor reviewed his most recent paystubs. His wife was preoccupied with amusing their toddler. The mediator approached them with kind eye contact and a firm handshake – apologizing for the delay and making them as comfortable as possible. She welcomed the housing counselor and the lender's attorney, repeat players in the foreclosure mediations, with cordial handshakes and led them all to a private room.

The mediator began with introductions but did not push handshakes or direct communications immediately between the parties. She succinctly explained the confidential mediation process and her role as a neutral facilitator. At the table, she stated that although she was a lawyer, she could not give legal advice. Homeowners would have the opportunity to have an attorney review any proposed resolution. She introduced the private meeting. She accompanied lender's counsel to a waiting area, taking the opportunity to thank him for his anticipated patience and asking for his preliminary assessment before returning quickly to the homeowners.

In beginning the caucus with the homeowners, the mediator ignored the urge to delve right into financials with the housing counselor. She expressed empathy. She didn't know how this would ultimately work out but she would explore all possibilities with the parties. The focus was on moving forward to explore a practical way of meeting everyone's concerns. Although much of the discussion would revolve around numbers, their story was an important one. She was there to hear what they wanted to share.

In many foreclosure mediation programs, a party's first contact with a mediator is the day of mediation. Upon meeting, much is said in a mediation before a word is uttered. Much of what is communicated in social interaction is nonverbal so mediators must be aware that subconscious cues are being relayed through every action.⁹

⁷ ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, (2nd ed. Penguin Books 1991).

⁸ Id. at 40-55

⁹ Susan M. Heathfield, *Listen with Your Eyes: Tips for Understanding Nonverbal Communication*, unknown date, available at

If at all possible, parties should have separate waiting areas so that they may be brought together simultaneously to avoid the perception of favoritism. Oftentimes there is insufficient space to accommodate this procedural luxury. A mediator should be mindful that her informal polite conversation with one party could be misinterpreted by the arriving party. This is an easy trap for many high volume foreclosure mediators who deal with repeat plaintiff and defense counsel as well as housing counselors. In the author's experience, explaining this situation to homeowners seems to ease fairness concerns while underscoring the experience of the mediator. Otherwise, seemingly benign hallway chats not only erode perceptions of mediator impartiality but threaten the confidentiality of the process.¹⁰ Mediators must be particularly sensitive to the parties' perception of procedural fairness.

A mediator's introduction is critical in establishing confidence in the process. Mediator impartiality is expressed through mediator conduct. Therefore foreclosure mediations, like the vast majority of mediations, should begin with all parties at the table. An explanation of the mediation process and the role of the mediator should be presented to all participants simultaneously.¹¹

Ensuring to give parties' equal attention, including eye contact, is important mediator behavior. Parties are continually reading the mediator for hints of substantive content and procedural neutrality. Head nodding, for example, which may denote listening, also implies agreement and therefore partiality when selectively applied.

Mediators must address confidentiality during the introductory statement and vigilantly monitor it throughout the mediation process. Many states have adopted a variation of the federal Uniform Mediation Act providing for confidentiality within mediation with limited exceptions.¹² Court rules, mediation

http://humanresources.about.com/od/interpersonalcommunication/a/nonverbal_com.htm (last visited December 13, 2010) (stating, "One study at UCLA indicated that up to 93 percent of communication effectiveness is determined by nonverbal cues. Another study indicated that the impact of a performance was determined 7 percent by the words used, 38 percent by voice quality, and 55 percent by the nonverbal communication.") citing MELE KONEYA & ALTON BARBOUR, *LOUDER THAN WORDS...NONVERBAL COMMUNICATION* 4 (Bobby R. Patton & Kim Giffin eds., Charles E. Merrill 1976).

¹⁰ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS: IMPARTIALITY § II (2005); MODEL STANDARDS OF CONDUCT FOR MEDIATORS: CONFIDENTIALITY § V (2005).

¹¹ See footnote 2, *supra*. Typically, lenders and servicers participate via speakerphone, although many program guidelines require other participants to be physically present.

¹² *A Few Facts About The . . . Uniform Mediation Act (2001)(2003)*, UNIFORM LAW COMMISSIONERS: THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

orders, program guidelines and mediator standards are other guardians of confidentiality. The public nature of foreclosures necessitates clearly articulated safeguards within the mediation setting. It is not unheard of to have neighboring homeowners in the same waiting area on a foreclosure mediation day. Public discussions of a homeowner's private finances must be avoided regardless of the challenges frequently posed by limited facilities. Some lenders historically taped consumer calls – a violation of confidentiality within the mediation setting. Through educating the parties as to acceptable behavior, the mediator alleviates many such concerns at the onset.

Some negotiation and mediation instruction prescribes defusing emotion - particularly in the introductory stage of the mediation. Deep-seeded emotion is not so easily defused. Fear, sadness, anger, frustration, embarrassment, and sense of failure are only some of the strong feelings associated with losing one's home. Even the most expert mediator is unlikely to dissipate such emotional turbulence in the average one to one and a half hour foreclosure mediation. Instead, the mediator should acknowledge the feelings in a nonjudgmental manner and skillfully redirect the homeowners' emotional energy towards realistically meeting their underlying needs. Though most persons facing foreclosure want to share the special nature of their individual circumstances, they also seem to take solace in knowing that so many others are facing similar financial setbacks. Acknowledging the global nature of this economic crisis sometimes helps in softening some of the shame expressed by those facing foreclosure. Moving the parties from the past through the present and towards the future is a routine mediator challenge pronounced in foreclosure matters.¹³

Setting the tone means engendering trust. If the parties lack confidence in the mediator, the entire process is suspect. Another powerful mediator skill is learning how to capitalize on the caucus. A private meeting provides a safe haven for establishing the rapport necessary to look behind positions for interests which may otherwise lie dormant.¹⁴

Exploring interests through shuttle diplomacy

available at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited December 2, 2010).

¹³ See Fisher and Ury, *supra*, footnote 6, at 52

¹⁴ See Doug Frenkel & James Stark, *The Practice of Mediation* (Aspen Publishers 2008).

The former teacher was nearly three years delinquent on her mortgage. She lived in a single home in a fairly affluent neighborhood for the past six years. She fell behind after an accident left her disabled. Her modest disability income could barely cover her escalating property taxes. Her house had fallen into a state of disrepair. She had no money in savings since every penny had gone into a lump payment required for an earlier unrealistic loan modification which had failed almost immediately. Though property values have declined statewide, she still retained equity in her house. A sheriff sale was scheduled in two weeks. She had exhausted her statutory stays.

Prior to mediation, the homeowner met with a housing counselor and consulted a state subsidized attorney. The housing counselor prepared various loan modifications including a proposal extending the terms of the mortgage to forty years and decreasing the interest rate to a graduated fixed rate of 2% - 6% to demonstrate affordability.

After introductory statements, the mediator initiated shuttle diplomacy. She focused her full attention on the distraught homeowner. The mediator listened patiently to her dissertation of life's past injustices. Using nonjudgmental open ended questions, the mediator focused the discussion. She discovered that the homeowner's initial position of keeping the house was not really meeting her needs. By asking questions which followed the fear the defendant articulated, the mediator discovered she was not afraid of losing her house but in living too far from her support network.

Through listening to herself responding to the mediator's gentle direct inquiries, the homeowner realized she did not want another loan modification. Actually, the maintenance of the older house was draining her. She wanted a life change. This opened the door to other discussions with the lender which secured the homeowner the time needed to prepare for a housing transition.

Private caucuses are useful tools in foreclosure mediations. They provide the mediator with a crucial opportunity to actively listen, establish trust, identify genuine interests, and explore realistic options. In private meetings, homeowners facing foreclosure have an opportunity to share their emotions and stories with the mediators. Mediators can listen and empathize without appearing partial to the other side. Many homeowners feel the need to explain what happened regardless of the feasibility of continued home ownership. An empathetic mediator validates the homeowner's feelings. Expressing empathy is not only

acceptable mediator behavior; it is frequently cited as one of the most desirable mediator traits.¹⁵

Mediators should typically start with the homeowner. If separate meeting rooms are available, it is good practice for the mediator to walk out with the party with whom he is caucusing. If a separate room is not available, accompanying the other party to the waiting area is good practice. This simple courtesy demonstrates respect and eases tension while affording a valuable opportunity to briefly obtain cues from the plaintiff's counsel as to the lender's initial assessment of the feasibility of home retention before returning to meet with the homeowner. A conscientious mediator does not want to unrealistically raise a homeowner's expectations during the initial caucus.

The mediator begins the caucus by listening to the participant's words, tone and body language. Venting is a necessary ingredient of a successful mediation.¹⁶ Even homeowners who are not able to save their homes in mediation have reported satisfaction with the opportunity to have been heard. Homeowners will typically share their greatest fears first if initially encouraged to speak freely. Mediators, pressed for time and goal oriented, often try to circumvent this stage by asking specific questions related to employment and financial status. Sadly, a precious cathartic opportunity for the homeowner may be lost. A private meeting with the homeowner affords an excellent opportunity for a mediator to gauge the homeowner's emotional investment in the house, discover the interests behind the position of home retention and detect the financial feasibility of continued home ownership.

Lenders may also be more inclined to share information in a private meeting which could be inflammatory in a group session. They may have concerns such as whether the house at issue is a primary residence or if the homeowner is actually occupying the premises.¹⁷ Such valid concerns, which

¹⁵ Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 308 (2004).

¹⁶ See Chris Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 173-175 (Jossey-Bas 2003) (discussing the important role of venting which is historically underscored in other books, articles and training materials on mediation and stating "Strong emotions are often best expressed in private caucus between a party and the mediator...greater understanding can be achieved regarding the links between emotions and substantive issues.")

¹⁷ Many state mortgage foreclosure mediation program guidelines require that the property in question be owner occupied and a primary residence. See e.g. New Jersey Mediation Program Description, Judiciary Civil Practice Division, October 2009 available at

may seem hostile when broached by the lender's attorney, can be raised in a less threatening manner by the mediator. Sometimes seemingly benign inquiries by the lender or its counsel provoke hostile homeowner reaction. Just as the homeowner and his advocates are afforded a respectful forum for discussion, so must the lender and counsel. The mediator must ensure a safe haven for all participants.¹⁸ If it becomes apparent that the discussions at the table cannot be conducted in a civil manner, the mediator's first recourse is usually to resort to private meetings. In the most volatile matters, a mediator must distinguish between a homeowner's emotional venting and potential threats of injury against himself or others. Under the Model Uniform Mediation Act, there is no privilege for a communication made in mediation that contains a threat or statement of a plan to inflict bodily injury or commit a crime. Ever sensitive to the importance of confidentiality, a mediator must err on the side of caution if there is a credible threat of physical injury.¹⁹

Mediators also use the caucus strategically to steer the negotiations. Within the confidential cocoon of the private meeting, the mediator can test the practicality of potential agreements from each party's perspective. After all, short term fixes, especially in this foreclosure crisis, can ultimately backfire leaving all parties worse off than they were pre-mediation. Reality testing is among the most difficult mediator skills to master and is usually best conducted in the private caucus. Refraining from filling silences within mediation is an important component of testing options for it is then when parties may be more reflective than reactive. Typically in normal discourse, conversers are reacting, formulating mental responses, while another is still speaking. During times of silence, parties may be reflecting on the impact of what has been shared and readjusting their priorities.

www.judiciary.state.nj.us/civil/foreclosure/1290_foreclosure_med_info.pdf (last visited December 2, 2010); Connecticut Foreclosure Mediation, at question 4 available at www.jud.ct.gov/foreclosure/_qs.htm (last visited December 2, 2010); Ohio Foreclosure Mediation, at question 9 available at www.sc.ohio.gov/JCS/disputeResolution/foreclosure/SAQ. (last visited December 2, 2010).

¹⁸ In court-sponsored foreclosure mediation programs, such as New Jersey, foreclosure mediations are conducted in the courthouse where all participants, including court personnel and mediators, are afforded security precautions and protections available at www.nj.gov/foreclosuremediation/ (last visited December 2, 2010).

¹⁹ Model Uniform Mediation Act, Section 6, Paragraph 3, available at www.mediate.com/article/umafinalstyled.cfm (last visited December 2, 2010).

While private meetings assist the mediator in effectively communicating with the individual parties, group sessions enable the parties to share vital information and explore options for settlement. Facilitating discussions within mortgage foreclosure mediation requires a balance of sensitivity and strength. Table talk, with all its potential, is riddled with communication landmines. A mediator must be ever vigilant of verbal and nonverbal cues as she captains the exchange.

Facilitating the exchange

In escorting the lender's attorney out of the room to meet first privately with the homeowners, the mediator discovers that counsel is not optimistic. His contact, a mortgage representative across the country, has told him the homeowners do not make enough money for a loan modification. Even under the best possible modification, their income was insufficient to meet their fixed expenses.

The mediator returned to the homeowners to hear their story. She asked the housing counselor to assist the homeowners in reviewing their financials with her. Instantly it became apparent that the financial information on which the bank was basing its analysis must be inaccurate.

The mediator brought everyone together asking plaintiff's counsel to get the bank's representative with authority on speaker phone. The bank did have the most recent financials that had been provided two weeks earlier. However, the homeowners' weekly income was mistakenly tabulated to be their monthly income. The actual income figures supported a provisional loan modification.

Reviewing the financials together should be a routine requirement at every foreclosure mediation.²⁰ This important information exchange can occur before or after private meetings with the parties. Many loan modifications within the mediation setting are initially denied based on inaccurate homeowner financials and/or lender misinterpretation of the financial data.²¹ This is particularly a

²⁰ Caroline M. Petrilla-Sagnip, *Primer on New Jersey's Mortgage Foreclosure Program*, New Jersey Lawyer, at 21, October 2010.

²¹ The inappropriate denial of loan modifications based on incomplete, outdated or erroneous financial information is not an uncommon experience within the mediation programs. Deirdre Franklin, *Director of Housing/Lead Internal Auditor with American Credit Alliance, Inc.* reports

concern when homeowners itemize their own financial information. Reviewing the income and debt figures line by line helps clarify any misunderstandings. If housing counselors are not available to assist homeowners, mediators can ask the homeowner questions such as those regarding potential sources of income which may not have been considered by the homeowner, such as disability or child support payments. However, if the homeowner shares information privately with the mediator which fraudulently conflicts with data provided to the lender, a mediator cannot continue with the mediation and at the minimum should withdraw from the proceedings. In addition to mediator standards, lawyer mediators may also be bound by their state's Rules of Professional Conduct especially if the jurisdictions in which they are mediating find mediation to be considered the practice of law.²²

Mediator persistence in ascertaining the reason for a loan modification denial is a critical component of the process. The government modification analyses, and internal loan modification requirements in particular, are confusing, rarely transparent and superficially unpredictable. Investor guidelines, cited but not usually shared at the mediation, usually dictate the terms and percentages of internal lender loan modifications granted. Homeowners often feel that there is a wizard behind the abstract curtain of the phone who holds their fate with a yes or no answer after the numbers have been run. Some lender representatives immediately volunteer the information which is available to them. Others report only the final outcome. In some states, housing counselors, program funded attorneys, or private counsel may be available as frontline resources at the mediation session to explore rationale behind denials. If they are not present or do not raise the issue, obtaining more information is a valid mediator role. Having that piece of the puzzle is critical. For example, a monthly deficit in income of \$100.00 is much easier to overcome than one of \$3000.00. A lien on a property which muddles the analysis can sometimes be cleared. Information on credit reports relied upon by lenders to confirm the homeowner's debts, may be inaccurate.²³

experiencing "lenders duplicating numbers in error in their data base which has led to loan modification denials. I have routinely asked the lender representative in mediations to read back the budget to verify that they are looking at the correct information before causing a homeowner to become homeless due to incorrect data entry."

²² Arbitration Assoc. in N.J., Comm. on the Unauthorized Practice of Law, Formal Op. 43 (2007)

²³ U.S. PIRG available at www.credit.com/press/statistics/credit-report-and-score-statistics-html. (last visited December 1, 2010) (finding that "25% of credit reports surveyed by the US PIRG contained serious errors that could result in the denial of credit. Altogether, 79% of credit reports surveyed contained an error or mistake of some kind).

Some states are now moving away from impromptu mediations to case management models. A mediator or case manager spends time before the actual mediation helping to prepare the parties. In mortgage foreclosure cases the focus is on information exchange – ensuring complete and timely financials are submitted by the homeowner and specific loan information/documentation is provided by the lender prior to the mediation date. Intuitively, pre-mediation case management efforts seem more likely to ensure that the participants are as prepared as possible for the continuum of settlement options leading to fewer and more productive mediation sessions.²⁴

Monitoring interim resolutions to ascertain whether further discussions are necessary is also an important mediator/case manager function. Additional in-person sessions or phone conferences may be useful to follow up on contingency settlements involving trial payment periods or provisional loan modifications. For example HAMP (Home Affordable Modification Program) is a federally launched mortgage assistance initiative geared at homeownership retention which typically requires a successful three month modification trial period before a permanent modification may be effectuated.²⁵ It is difficult to assess the long term effectiveness of mortgage foreclosure mediation initiatives if provisional settlements fizzle.²⁶ Lenders are frustrated when homeowners default on trial period payments. Homeowners making timely payments can ultimately be denied permanent modifications, thus leaving them without a house and with less money than prior to the mediation. Though lenders may balk at participating in additional sessions when several months, or even years, have

²⁴ Office of the Public Defender: New Jersey Office of Dispute Settlement, September 2010 (showing foreclosure median statistics). NJ is utilizing both a case management system and a same day mediation model in handling foreclosure mediations. Statistical data from each program will be compared to ascertain the most effective and efficient mediation modality for specific classes of residential foreclosure cases. Preliminary statistics show greater success rates, that is cases settling in mediation, when document exchange is facilitated in advance.

²⁵ Available at <http://makinghomeaffordable.gov/borrower-faqs.html#32> (last visited December 2010).

²⁶ See e.g., Tom Harmon, COMMUNITY DEVELOPMENT DIGEST (Apr. 20, 2010) available at <http://housinganddevelopment.com/cdd/> (stating that “[d]espite the Treasury Departments mortgage modification program finally gaining some traction, its progress is being nixed by a major surge in canceled trial modifications . . . the latest (Treasury) numbers show trial modifications conversions have reached permanent status in (only) about 20% of cases”). However, the October 2010 US Department of Housing and Urban Development (HUD) and the US Department of Treasury reports indicate that at nine months, almost 90% of homeowners remain in their permanent HAMP modifications, with 11% defaulted available at www.makinghomeaffordable.gov/pr_10252010.html (last visited December 2, 2010).

passed since the homeowner's initial default, additional time may be necessary to culminate the mediation. It is possible for a permanent modification to be denied based on erroneous information. Without programmatic mandates prescribing mediation control dates to monitor provisional loan modifications, mediators are left with their skills of persuasion to engage the lenders' ongoing participation.

Getting the right parties to the table, a critical component of mediation, is difficult to achieve in mortgage foreclosure matters. A bank may service the loan, but a separate entity may actually own the mortgage note. Since many mortgages were bundled together and sold as securities, investor guidelines often impact greatly upon the servicer's ability to modify the loan. Although having all parties present at the table contributes to equalizing the parties and maximizing interaction, in-person lender participation is unlikely given the physical locations and volume of national foreclosure mediations. Typically, plaintiff's bar is present with phone access to their lender clients with settlement authority

Phone negotiations present unique communication challenges. It is the responsibility of lender's counsel to reach his client on the phone. Most lenders' inclination is to immediately delve into the financial review. Once the lender is on line the mediator should take immediate control of the conference call. The mediator has seconds to establish a rapport with the voice on the other line and model a positive tone for all participants. Simple professional courtesies, such as addressing lender representatives by their names and thanking them for their participation help to defuse the tension. A couple sentences shared by the mediator capturing the homeowners' hardship(s), succinctly summarizing his efforts to overcome them, and highlighting the homeowner's renewed potential for success appear to momentarily shift the focus to future possibilities.

In facilitating dialogue, the mediator can call upon sympathetic homeowners or persuasive advocates to share their input with the lenders. Conversely, an astute mediator knows when not to invite open discussion. Displaced anger and resentment only serves to impair the negotiations. It is far easier to retain control of the process than it is to regain it. Unlike neighborhood disputes, mortgage foreclosure mediations are not the forums in which to permit more rambunctious party ramblings at the table. Venting, particularly among homeowners, is more cathartic in private session where it need not be continually censored. Reminding the homeowner that the lender's counsel and mortgage representative engaged in the process are people with jobs and not rich

conglomerates after their homes, sometimes help homeowners to adopt more conciliatory tones in group discussions.²⁷

The mediator's goal is to facilitate productive dialogue among the parties. Although the mediation of some case types may focus heavily on shuttle diplomacy, successful mortgage foreclosure mediations are information and fact sensitive. Successful mediators must artfully facilitate direct communication and information exchange among the parties. Working with the parties in joint sessions is beneficial in ensuring accurate information exchange, clarifying objective criteria, and extracting settlement options.²⁸

Throughout every step of the process, perceived and actual power imbalance concerns riddle foreclosure mediation efforts and provide the greatest challenge to mediator performance. Although some of these concerns may be ameliorated through program design and educational efforts, mediators must learn to carefully traverse the uneven terrain of foreclosure mediation.

Promoting a fair process for option assessment

In a private meeting, the homeowner shared with the mediator that she was stunned to have received a notice of foreclosure. She had lived in her modest affordable housing unit for several years. She had never sought out a refinance; however, she had been approached on a couple occasions and encouraged to tap into the equity in her home. At the time, she thought the extra money could help with her new grandchild. She now owed twice of what she originally owed. The lender was adamant that she did not qualify for a modification. A cursory review of her financial situation supported that analysis. The woman owed way beyond the regulated costs of the units in her complex and the mediator was aware that her situation raised potential legal defenses.

The mediator suggested the homeowner seek legal advice. Lists of legal service organizations with pro bono or reduced fee counsel prepared for the mortgage foreclosure program were

²⁷ Caroline M. Petrilla-Sagnip, *Primer on New Jersey's Foreclosure Mediation Program*, New Jersey Lawyer at 22, October 2010.

²⁸ Fisher, Ury & Patton, *supra* at 6.

provided to the homeowner.²⁹ In accordance with program guidelines and mediator standards, the mediator did not counsel her as to the nature of a potential defense or any specifics thereof.

In a private meeting with the lender's attorney and her client, the mediator expressed that there may be potential legal defenses in this case and perhaps reconsideration of a principal reduction and/or reduction of fees may be warranted. The mediator stressed, however, that her only role was to refer the homeowner to obtain appropriate assistance in assessing her options.

When the mediator terminated the mediation process since there was a power imbalance too great to be overcome within the process, her only comment to the court staff was that the homeowner would require the opportunity to consult with other professionals so she could make an informed decision.³⁰

In helping the parties reach a sustainable settlement, the mediator must ensure a fair forum for assessing options. This includes some semblance of leveling the playing field. Power imbalances, though pronounced, are not unique to mortgage foreclosure mediation proceedings. Mediators are trained to recognize and address such situations. In meeting with the homeowner first, the mediator's conduct helps to alleviate the homeowner's power imbalance concerns. Homeowners without legal counsel frequently feel at a great disadvantage given the lender's resources. If the homeowner is not represented by counsel, the mediator may directly assure the homeowner that there is no procedural disadvantage by not being represented at the mediation table.³¹

²⁹ MODEL STANDARDS OF CONDUCT FOR MEDIATORS § III comment on Conflicts of Interest (1994) ("A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals").

³⁰ MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I comments (1994) ("A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions"); See also MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IV comment on Quality of the Process (finding that "[m]ixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. Where appropriate a mediator should recommend the parties seek outside professional advice . . .").

³¹ See also MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994) (determining that the mediator, under the self-determination and quality of process Model Standards of Conduct for Mediators, would still recommend the homeowner seek outside professional assistance if deemed appropriate).

Using shuttle diplomacy in cases involving pro se homeowners also helps to ensure they do not injure their own position in the negotiations. This reasoning also supports the preference for separate waiting areas, or at least an initial sign-in sheet administered by the mediator or program staff, so that a homeowner does not inadvertently begin discussions with the lender's attorney before the arrival of his advocates and/or the mediator's introductory statement describing the process. However, most foreclosure mediation programs are operating with limited resources and overburdened staff. Mediators should cultivate positive working relationships with all involved players knowing the optimal physical mediation environment is not always the possible one. This reality only underscores the importance of skillful mediation techniques.

Mortgage foreclosure mediators are typically trained in the facilitative style of mediation. Facilitative mediation provides for party participation in the decision making process. The facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.³² Although mediators "cannot personally assure that each party has made a fully informed choice to reach a particular agreement," they are expected to make the parties aware of the importance of consulting other professionals to assist them in the decision making process.³³

Training in basic foreclosure law enables mediators to pursue mutually acceptable settlements through questioning the lenders in private caucus,³⁴ suggesting further exchange of documents if necessary,³⁵ advising homeowners to seek other professional assistance if their needs cannot be met in the mediation forum,³⁶ and withdrawing without comment if the scales are too

³² Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1:7 HARV. NEGOT. L. REV. 7, 24 (1996) (describing facilitative mediation); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. (2003) (proposing, in a later article, a more complex grid system describing a journey utilizing a more flexible continuum of mediator methods for reaching goals).

³³ New Jersey Mediator Standards of Conduct (2000).

³⁴ See Model Standards of Practice for Mediators of the ABA, SPIDR and AAA under comments to Standard IV. Quality of Process (discussing a mediator should not mix their roles and provide professional legal advice whether in a private or group mediation session).

³⁵ See Geoffry Walsh, "State and Local Foreclosure Mediation Programs: Can they save homes?" National Consumer Law Center, September 2009 available at www.consumerlaw.org (last visited December 2, 2010) (stating that consumer advocates have called for mandatory document production by lenders/servicers prior to participation in mediation sessions).

³⁶ See Geoffry Walsh, *supra*.

lopsided to support a safe environment for self determination.³⁷ Consumer advocates are correct that some homeowners with valid legal defenses may obtain a better resolution through litigating than mediating. However, given the scarcity of free legal services, some homeowners facing foreclosure with potential legal defenses have neither the resources, nor desire, to pursue legal remedies. Through exercising their right of self-determination under the auspices of a skilled mediator, they are able to negotiate resolutions which meet their needs. It is not the mediator's role to determine what is fair. It is the mediator's responsibility to proceed fairly.

Some programs also train their mediators in mortgage assistance programs, particularly when housing counselor participation is not a required component of their program.³⁸ Implementation of government backed initiatives, such as lease back options, may take several weeks to months for even participating lender representatives to process the details. Having a mediator familiar with such programs can spur discussions of possible remedies which may otherwise be left unexplored. Mediator neutrality, however, may be compromised if the mediator becomes the substantive expert. Asking questions, rather than offering solutions, is a more impartial mediator method of soliciting information on potential assistance programs.

Homeowners are often accompanied to the mediation by lawyers and/or housing counselors to assist them in the negotiation process. In addition to providing valuable legal and technical expertise to the homeowner, these participants fill an advocacy void which may otherwise tempt mediators to intervene in a partial manner. Quality homeowner advocates are crucial in addressing the underlying power imbalance concerns.³⁹ The mediator, however,

³⁷ Supra at 42.

³⁸ See e.g. State of Connecticut Judiciary Branch Foreclosure Mediation Publication available at <http://www.jud.ct.gov/Publications/CV092.pdf> (last visited December 2, 2010) (stating that in Connecticut, mediators are trained in mortgage foreclosure law, as well as, mortgage assistance programs though homeowners are also frequently referred to Housing Counselors).

³⁹ See Geoff Walsh, *State and Local Foreclosure Mediation Programs: Updates and New Developments*, January 2010. The issue of free or affordable program defense lawyers and housing counselors is discussed in various articles on foreclosure matters, including the National Consumer Law Center and Center for American Progress reports, referenced earlier in this paper. My lack of discussion of this important area merely reflects that this is program design concern more than a mediator skill discussion.
http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf (updating Geoffrey Walsh, *State and Local Foreclosure Mediation Programs: Are they Saving Homes?* Sept. 2009. and Andrew Jakabovics & Alon Cohen, supra at 4, *It's Time We Talked: Mandatory Mediation in the Foreclosure Process*, June 2009).

should always remember to solicit the homeowners' input rather than deferring solely to their valued experts and advocates.

Frequently homeowners bring family members or other persons to the mediation session. Appropriately assessing nonparty involvement is another frequently overlooked mediator skill. Jurisdictions have different practices regarding the participation of nonparties within the mediation process. The Model Uniform Mediation Act provides for nonparty advocate participation. The mediator must carefully address this issue to protect the confidentiality of all parties while ensuring procedural fairness. Nonparty friends or family members not only provide emotional support to homeowners, occasionally they provide financial resources to make loan modifications possible. Some programs provide confidentiality agreements for nonparty participants and program observers to sign. If not, mediators should craft a brief confidentiality statement for endorsement when confidentiality is a concern. It is suggested that the proper practice is to limit the number of program observers. Although occasionally beneficial for quality control purposes, observers change the dynamics of an already sensitive negotiation and could compromise "cross agency" confidentiality concerns, particularly if both prosecutorial and judicial entities are involved in administering or monitoring a statewide mediation program.

As is the case with most mediations, foreclosure mediation settlements should be captured in writing with specificity. Though mediators may be required to complete program reporting forms, they should not sign these settlement agreements since they are not party to the agreements. Signing on as a witness is not advisable; it only invites confidentiality challenges when questions of clarification arise or motions to enforce settlement are pursued

Despite program timetables which oftentimes schedule multiple foreclosure mediation sessions a day, mediators should not rush homeowners into making decisions usually involving their greatest lifetime investment. Additional time may be necessary for pro se homeowners to consult outside professionals or deliberate among family members. The principle of self-determination is premised upon each party making free and informed choices as to process and outcome in a voluntary and uncoerced manner.⁴⁰

Conclusion

There is an ongoing debate regarding the effectiveness of mortgage foreclosure mediation programs.⁴¹ National and state policy initiatives aimed at

⁴⁰ MODEL STANDARDS OF CONDUCT FOR MEDIATORS § 1 (2005),

stabilizing and maintaining home ownership continue to evolve, ultimately enhancing the mediation experience.⁴² However, it is not the role of mediators to champion these causes. That is the role of legislators, policymakers, and the consumer advocacy community.

The mediator is protector of the process. Objective evaluative mechanisms are being explored to measure the success of mortgage mediation programs. Although there is much discussion as to whether mortgage foreclosure mediations truly involve the typical give and take that defines mediation, foreclosure mediation programs at minimum serve to connect the parties. A mediation conducted skillfully will enable the parties to share emotions, exchange information and perspectives, explore and assess options, and potentially reach resolution.

Increasing numbers of homeowners are retaining their homes as a result of successful foreclosure mediation efforts. And although an impetus of some court and government-founded foreclosure mediation programs is to save homes,⁴³ sometimes even when a home is lost there can be valued savings. Homeowners who cannot afford to retain their houses need not lose their dignity as well. The need for efficiency in mass production mortgage foreclosure

⁴¹ See e.g., Tom Harmon, COMMUNITY DEVELOPMENT DIGEST (Apr. 20, 2010) available at <http://housinganddevelopment.com/cdd/> (stating that “[d]espite the Treasury Departments mortgage modification program finally gaining some traction, its progress is being nixed by a major surge in canceled trial modifications . . . the latest (Treasury) numbers show trial modifications conversions have reached permanent status in (only) about 20% of cases”). However, the October 2010 US Department of Housing and Urban Development (HUD) and the US Department of Treasury reports indicate that at nine months, almost 90% of homeowners remain in their permanent HAMP modifications, with 11% defaulted, www.makinghomeaffordable.gov/pr_10252010.html.

⁴² See www.makinghomeaffordable.go
www.mortgagemediation.org/media/2178/18th%20circuit%20circuit%20a0%2010/09/d%20amended.pdf

⁴³ Some programs have emphasized bringing parties together and relieving court backlogs, rather than home retention, as neutral goals of foreclosure mediation programs. See Supreme Court of Florida No. AOSC09-54 IN RE: FINAL REPORT AND RECOMMENDATIONS ON RESIDENTIAL MORTGAGE FORECLOSURE CASES ADMINISTRATIVE ORDER, http://www.floridasupremecourt.org/pub_info/documents/AOSC09-54_Foreclosures.pdf

“In its report, the Task Force identified lack of communication between plaintiffs and borrowers as the most significant issue impeding early resolution of foreclosure cases, and concluded that effective case management and mediation techniques are the best methods the courts can employ to ensure that such communications occur early enough in the case to avoid wasted time and resources for the courts and the parties.” (last visited February 1, 2011).

mediation efforts should never eclipse the mediators' role as guardian of the integrity of the process.

The young lawyer at the table representing the lender did not grasp the distinction. The end result of a sheriff sale and a short sale or deed in lieu was the same he argued. The unemployed teacher at the mediation table would lose his house regardless of the process. Plaintiff's counsel advocated strongly for the efficiency of a sheriff sale.

The mediator knew that there was some debate among the lenders' lawyers and homeowner advocates as to whether the homeowners' credit would be comparably injured by either option. She also understood the lender's concern in securing clear title impacted the deed in lieu analysis. Still, she tried to explain to the bank and its lawyer what homeowner interest could be met in exploring a short sale or deed in lieu.

The mediator spoke in private caucus with the plaintiff bank and its counsel. "If this house goes to a sheriff sale, you are taking it. Were the homeowner to deed it back, he is giving it to you. If at all possible, why not let him write his own ending."⁴⁴

⁴⁴ In April 2010 the Treasury Department rolled out the HAFAs program (Home Affordable Foreclosure Alternatives) – a sister program to those persons ineligible for a permanent HAMP modification. HAFAs employs comparable eligibility criteria as HAMP but is geared to providing incentives for short sales or deeds in lieu to decrease the adverse impact on homeowners' credit, provide relocation assistance if qualified, and prescribe that in certain circumstances participating primary lenders forego deficiency judgments. See www.makinghomeaffordable.gov/borrower-faqs.html, at 66 (last visited December 1, 2010).