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Legal Notice

Reimagining ADR in the Midst of Crisis: Neutrals Responding to the Foreclosure Dilemma

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We mediators pride ourselves on providing intelligent, personal, compassionate services to individuals, families, and groups caught up in conflict. In doing so, we seek to promote party self-determination and we insist on a process that is confidential. We believe that these characteristics of mediation facilitate creative problem solving and can add value not just in individual cases, but in times of larger public crisis.

Most mediators have a clear picture of what constitutes a traditional mediation session: two people sitting in a room together, speaking confidentially about their one-of-a-kind conflict in a conversation facilitated by an impartial, unbiased neutral trained in mediation. We follow codes of conduct that pertain specifically to the mediation process and our role as mediators. We use the name “mediation” for processes that are governed by such codes, and we try to fit mediation to many different types of disputes.

We need to recognize, however, that mediation as we define it is not always the dispute resolution mechanism best positioned to assist in a crisis. Sometimes adapting a process to fit a particular situation facilitates the most effective outcomes. We’ve seen neutrals do just that in the most varied of emergency situations. To give just one example, Kenneth Feinberg served as Special Master for the September 11th Victim Compensation Fund, in which he decided how best to distribute government funds to

families of those killed that day. He wasn’t always popular. Deep-seated anger after September 11th was directed toward him for deciding the economic value of a life, even though judges and juries do this frequently. However, Feinberg’s public discussion of ADR’s value in traumatic situations educated the public about the benefit of carefully-crafted ADR options and led to his further appointments as a Special Master for the Virginia Tech shooting victims fund and the BP Deep Water Horizon Victim Compensation Fund, among others.

There is no clearer recent example than the development of foreclosure dispute resolution. Consider the Iowa experience. When the farm-lender crisis hit the Midwest in the 1980s, Iowa’s dispute resolution community responded. In partnership with the Iowa legislature and the USDA, neutrals mediated between farmers and their creditors, in the hope of avoiding many farm foreclosures. So, when the residential foreclosure crisis hit in 2007, Iowa had a model to follow. The Iowa

Attorney General called on the dispute resolution community to start mediating between borrower and lender. Mediators were already trained and adapted well to the differences between traditional mediation and foreclosure mediation.

For states that did not have experience mediating cases involving farm foreclosures, the transition was more difficult. In one of the first states

"We need to guard against being so rigid about process or style that we can't help in crises where our skills are needed."

to create a mediation program to address residential foreclosures, the mediation director recalls returning to the office after a long weekend to find legislation signed by the governor. The legislation required the director to create and run a new mediation program that brought lenders and borrowers together to negotiate a mortgage default. The director read the multi-page law, thinking, “This isn’t mediation. What is this and how am I supposed to run it?”

Many mediators will likely have the same reaction when they hear about the procedures in foreclosure ADR programs that are called “mediation”. While there is great variance in the 25-plus programs that exist across the country, the general structure is fairly consistent. A notice about the availability of mediation goes out to borrowers who are in default on their mortgage payments. The borrowers then request, or are automatically scheduled for, a mediation session. Some documents may be required from both the lender and the borrower prior to the session. Usually, a lender representative participates in mediation by phone, while a borrower is present in the room. A neutral facilitates discussion about the mortgage and options for avoiding foreclosure.

What looks different from most ADR processes is that the options for avoiding foreclosure are almost always set before the borrower ever enters the room. The ability to “expand the pie” is rare. The numbers—mortgage debt, fees, borrower’s income and expenses—dictate the options.

Even more, the representative at the table may not be the one who determines what options are allowed. The concept of everyone in mediation having the authority to settle is a core expectation for mediators. But in the foreclosure context, a representative on the phone may have authority to sign only one type of agreement (a short sale, for instance) and not be authorized to sign a loan modification agreement. That kind of decision would have to go to another department. An additional wrinkle in the authority question is that many banks and other lenders routinely sell their loan portfolios to investors (*e.g.*, pension funds), which then contract with the lender to service the mortgage. So, the investors, who are never on the phone, often have the final say in whether the lender can offer a settlement. This lack of authority issue is a major barrier to concluding the mediation in one or even two sessions.

With these departures from the core underpinnings of mediation, neutrals echo the question, “What is this and how am I supposed to run it?” Mediators become frustrated with the narrow menu of options; where is the mutual self-determination? They balk at requirements that mediators make determinations about party behavior that could impact whether the foreclosure proceeds and sanctions are issued; where is the impartiality? They reel when asked to conduct complicated calculations to determine whether lenders are really offering their best deal; where is the joint problem solving? With this in mind, it is easy to see why, when the Attorney General’s office in Oregon offered Oregon’s community mediation centers the opportunity to conduct the mediations for foreclosure cases, the centers there gave a firm “no, thank you.”

But does foreclosure mediation’s seeming deviation from traditional mediation principles mean that neutrals, and dispute resolution more generally, should turn away from helping in the foreclosure crisis? Should long-time mediators leave the foreclosure mediations to people with little experience with mediation and its codes of conduct because the process doesn’t look like mediation?

We stand at the edge of a great opportunity. Instead of arguments among ourselves about what is and is not mediation, why not explore our own assumptions about dispute resolution more generally? Why not explore how and what dispute resolution processes may be appropriate and beneficial for resolving the foreclosure crisis? While many of these programs should not be called mediation, we can use this opportunity to educate the public about what mediation is, and more importantly, what ADR variations might be used to help address the crisis.

As legislatures, courts, and city councils craft these programs’ governing documents, they need assistance from us as ADR professionals. Some don’t understand that mediation is different than mitigation, or that the mediator is a third-party neutral and not an advocate for the borrower. In the politics of the legislative process, those drafting and promoting a foreclosure mediation bill might be consumer advocates intent on punishing the banks or lenders who think mediators will interfere with their legal right to enforce mortgage contracts by foreclosing on homes. Very rarely do legislators, advocates, and lobbyists talk to actual mediators to learn more about mediation. And frankly, many mediators would resist getting involved in the legislative process.

But once neutrals saw that these bills were passing, and that programs were being created with or without their input, many neutrals realized they could impact not only how the session itself is run, but how the decision is made to create and use ADR for foreclosure cases. In Utah, a private mediation office was responsible for drafting the first proposed bill that would create a mediation program. The bill included reference to the ethics articulated in the Uniform Mediation Act and also clearly defined the role of a mediator. To better understand the needs of those impacted by the bill, the mediators partnered with the Utah Attorney General to gather, for the first time, representatives from the state banking association and consumer advocates. It was the neutrals’ involvement that made possible such a gathering, and neutrals who could start discussion about the genuine concerns each group had with the bill. While the bill did not become law, that was in spite of, not because of, the mediators’ involvement in its drafting.

Seeing mediation skills at work in single cases, states are now inviting mediators to participate on a larger scale in the discussions about resolving the foreclosure crisis. In Washington State, the initial foreclosure mediation legislation was passed without much input from the mediation community. But when the first few months of the program revealed significant flaws in the legislation as it related to mediator immunity and confidentiality of the sessions, Washington turned to the mediators themselves to help the state figure out what to do. One foreclosure mediation program administrator impressed the legislature so much that he was asked to facilitate all future discussions about how to modify the bill. He led representatives of the stakeholders, including the vice president of a major bank and the director of the state’s legal aid organization, through a dispute resolution process until the group had a joint recommendation for how to change the program. Now, the legal aid director and the bank vice president have begun to turn to the mediators for suggestions for how mediation may benefit their clients in other disputes.

States that have experienced success with foreclosure ADR are also looking to neutrals to show them other disputes in which mediation will be useful. In Connecticut, the program has been

so successful, with over two-thirds of homeowners remaining in their homes and nearly three-quarters of cases avoiding foreclosure, that the state's banking association has been willing to fund the entire program. While this outcome may stir jealousy in some mediation program administrators, perhaps the follow-up outcome provides more hope: the ADR administrator who was at first confounded that the legislature would call its process "mediation" is now head of a taskforce to develop a comprehensive ADR plan for all case types in the courts.

This view of ADR as an essential component to resolving public crises is not limited to state efforts, but has now taken the national stage. Seeing the increase in state-and-county-sponsored foreclosure mediation programs across the country, the Department of Justice (DOJ) gathered foreclosure mediation program administrators, consumer advocates, and researchers from around the country in March 2011 to discuss best practices in foreclosure dispute resolution programs. In 2012, the DOJ released "Foreclosure Mediation: Emerging Research and Evaluation Practice", a report that highlighted what foreclosure mediation programs were achieving and what such programs needed to do their work even better. The report advocated that mediation programs receive funding for evaluations. Such evaluations would ensure these programs were transparent, as Feinberg's critics often called for, while still preserving the confidentiality of each session. The report went on to say that best practices should be developed and published, so programs did not have to start from scratch. In this report, the public saw that high-quality, well-designed dispute resolution programs facilitate real solutions and are not just band-aids. The report showed states and municipalities that such programs are worthy of more attention, official partnerships, and financial support.

Over the years, many mediators have scoffed at litigators who see every conflict as a lawsuit, saying, "If all you have is a hammer, everything looks like a nail." We mediators are not immune from this kind of thinking. If the only tool we intend to use is traditional mediation, we are limiting the situations in which we can be helpful.

In this foreclosure crisis, the public is experiencing what ADR can do. Mediators can be an essential part of planning and creating mediation programs, not just performing the services. We can decide when dispute resolution fits best in a dispute or crisis. If we are willing to let go of the idea that mediation is the default process to address a crisis, we can explore what type of process is most appropriate for the type of dispute, and what rules and steps that process may entail.

When ADR programs are being designed to address public crises, we need to be flexible enough to have a seat at the table, where we can apply our expertise concerning what core values in ADR need to be preserved. Helping our communities find the right ADR approach is especially critical when the stakes are as high as they are in foreclosure and other crises.



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