



## BEST PRACTICES IN FORECLOSURE MEDIATION

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With the proliferation of [foreclosure mediation programs](#), legislation, and reports, states and other entities attempting to create such programs need clear, expert guidance about lessons learned during foreclosure mediation's four-year history. This report highlights wisdom collected from existing programs, failed attempts to create programs, and mediation's long history of success in resolving court-based and other types of disputes.

### PROGRAM BEGINNINGS

#### Set Goals and Define Success

The initial step of gathering everyone in a room to talk about goals is a difficult one, but is [essential](#) for the subsequent foreclosure mediation program to succeed. Though it is tempting for one side of the foreclosure crisis to insist on a solution, all stakeholders need to feel engaged in the process. Many attempts to create and sustain programs have been thwarted because a servicer (the entity [often a bank] that services the loan for the entity/individual that owns it) was not on board or because borrower advocates were never asked to help develop the process meant to achieve resolution.

At a minimum, these [stakeholders](#) in a court-connected program would include attorneys for the banks, programs involved in helping homeowners deal with foreclosures, judges, mediators, and court administrators. Other stakeholders would be government agencies, such as consumer protection offices, housing offices, and attorneys general; attorney groups, such as legal aid and bar associations; or not-for-profits, such as housing advocacy and community mediation organizations. This allows all the stakeholders to have their interests and skills brought to the table to buy into and support the program, which increases the probability of success. Once the program is in place, the stakeholders can continue to advise the program, revisit policy, and so forth.

Once the stakeholders are together, they must determine their goal for the mediation program before talking about details of the program. When the goal is clearly defined, each program design decision can be made with the goal in mind. In the past few years, court systems have developed foreclosure mediation programs with a variety of stated goals: ensuring communication, improving efficiency

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and timeliness, assisting borrowers to stay in their homes, and stabilizing communities. Click [here](#) for an RSI report on the goals and purposes of foreclosure mediation programs in 26 states.

A note about program success: many successful mediation programs have defined success more broadly than just keeping borrowers in their homes. For instance, Connecticut's statewide mediation program has a [settlement rate](#) of 82%. About 4 in 5 of those settlements involve a borrower retaining their home, but the program still sees the other options—short sales, move-out provisions, etc.—as [successful settlements](#) because borrowers have been able to discuss all their options and be part of deciding to leave the property.

### **Establish a Clear Process that Achieves Goals**

A process that helps achieve established goals is one that effectively analyzes and [uses](#) the resources available (human and financial) and clearly communicates expectations to all participants. For instance, a court rule establishing the program may not get into much detail about where the required documents should be delivered, in what format they should be delivered, and by when they should be delivered. But, if the program then does not fill in those details and communicate the details to each person involved in the process, the program has created an information gap that will result in case flow problems. To identify such gaps, stakeholders have found it helpful to create [flow charts](#), [timelines](#), and [contact sheets](#) so everyone in the program has the same point of reference. Stakeholders should also consider the audience that will be receiving such communications. For instance, is communication about the process available in the languages of the participants? Are forms in legalese, or can they easily be understood by all borrowers? Is someone following the borrowers and servicers through the process, so if a deadline is missed or a document incomplete the parties will be contacted? Asking these questions when stakeholders are creating the process will lead to fewer complications once the program begins. Ohio offers a [good example](#) of a process that is clearly articulated.

### **Set Up Monitoring and Evaluation Systems to Give Regular Feedback**

It is tempting to create a mediation program, then decide later to evaluate it. But [ongoing monitoring and evaluation](#) points out challenges earlier, leading to timely, rather than reactive, programmatic changes. It also helps stakeholders keep the goals of the program in mind, and determine whether the goals themselves need to change.

Two main questions need to be answered before putting the system into place: what will be monitored and how will that monitoring be done? Whatever [information will be tracked](#), programs should aim to track input from all involved in the process, including housing counselors, servicer and borrower attorneys, borrowers, mediators, program managers, and the courts. Of course, when considering how monitoring will be done, the program should consider the personnel or systems it has in place to enter data. At minimum, the program should select a tracking system that gives it the ability to get a bird's eye view (e.g., how many cases are closed each month) and zoom in on



particular portions of the process (e.g., how many borrowers are receiving housing counseling before mediation, and what impact that has on rate of settlement). Tracking this information throughout the process will ensure a [comprehensive evaluation](#), like a recent study of the New England states' foreclosure mediation programs, can be done at any stage of the mediation program's existence.

## PRE-MEDIATION SESSION ELEMENTS

### Conduct Extensive, Personalized Outreach to Borrowers

Outreach to borrowers [is key](#) to getting participation in the program. Most people do not open their mail or answer the phone when they are in foreclosure. For those that do, legal notices should be written in simple language with a clear instruction for what borrowers should do next. Programs should find ways other than mail to help borrowers access mediation programs.

One jurisdiction has [dedicated funds](#) for the program to engage community organizations in door-to-door outreach. A worker from the community receives information on recent foreclosure filings, then will go to the borrower's home to invite them to set up a housing counseling appointment (the first step in the program). This has resulted in [36,145 borrowers](#) contacting the program hotline to set up an appointment.

Another jurisdiction hosts [outreach events](#) at churches, community centers, and other gathering places. Borrowers can meet with housing counselors and sign up for mediation right there.

### Ensure Borrowers Have a Support System

Borrowers are angry, confused, and frustrated with the foreclosure process. While mediators can address these emotions in the mediation session itself, the [mediator should not](#) also be the one educating borrowers about the foreclosure process, ensuring borrowers understand their legal rights, and encouraging borrowers to select certain options. So, to ensure the mediation session is a productive conversation about the borrower's options, the borrower needs support prior to the mediation from someone other than the mediator.

Some programs require that the borrower meet with an [attorney](#) before mediation. This [can be helpful](#), especially for screening the borrower for legal defenses to the foreclosure. But often, there are not enough attorneys available at a rate reasonable for the borrowers to pay. Pro bono attorneys may provide some support, but if they do not specialize in foreclosure law, they may not have enough information to advocate well for the borrowers.

Over half of current foreclosure mediation programs require that the borrower speak with a [housing counselor](#), who is an expert on the loan modification process and other alternatives to foreclosure, before mediation. Borrowers who meet with a housing counselor are [1.7 times](#) more likely to find an alternative to foreclosure than borrowers who do not. This meeting or meetings educates the borrower and begins the document preparation process. The housing counselor may also make a first



attempt at communicating directly with the servicer on the borrower's behalf. Some programs [allow](#) and encourage borrowers to bring their housing counselors with them to mediation.

### **Provide Screening to Ensure Cases Appropriate for Mediation are Scheduled for Mediation**

Some programs believe that [all foreclosure cases](#) should go through mediation, so screening is not necessarily an element they need to consider. However, for programs that are not opt-out, programs should screen cases based on the programs' goals, to ensure the right cases are sent to mediation. In a [few](#) smaller [programs](#), the program's manager reviews the borrower's financials and determines whether they could afford to spend [31% of their income](#) on a mortgage. Other [programs](#) only send cases to mediation if the parties comply with document exchange requirements first. These screening mechanisms ensure that the mediation session is a productive conversation rather than a place where documents are exchanged for the first time.

### **Charge Reasonable Fees**

In these economic times, states express concern that creating a mediation program will result in extensive additional expenses incurred by the state. However, many programs have identified ways that the mediation program can be [self-sustaining](#). In many settings, this includes assessing filing fees and additional mediation costs to one or both parties.

If a program chooses to require payment from one or both parties, the program needs to select reasonable fees that will not discourage borrowers from participating. Some programs, like in the [District of Columbia](#), define reasonable as asking the parties to split the cost of mediation. D.C. charges a \$50 flat fee to borrowers and a \$300 flat fee to lenders. This may be effective at setting the table for an equal process, but depending on the cost, it may render mediation out of reach for some borrowers. Programs that require parties to pay for mediation experience fewer participants and, subsequently, fewer agreements. For instance, Maryland's [program](#) charges \$300 for lenders and \$50 for borrowers to participate. In 2010, it received only 130 mediation requests out of 55,629 foreclosures. Other programs have determined that a [filing fee](#) increase, born only by the servicer, will subsidize the mediation portion. Still other programs decide that offering mediation to borrowers [for free](#) will encourage the highest level of participation (whether the servicer pays the whole fee or the state/county subsidizes the program).

Click [here](#) for a review of funding structures for foreclosure mediation programs around the country, which includes information about whether and how parties pay for program costs. An executive summary may be found [here](#).

## **MEDIATION SESSION ELEMENTS**

### **Ensure Mediators are Well-Trained**



Some programs, fearing they will not be able to attract people to mediate, lower the requirements for training mediators. Instead of the normal 40 hour mediation training, they may require only [12 hours](#) of training with an additional training in foreclosure law, or only require that the mediator be an [attorney](#). This lack of training jeopardizes the mediation process itself, as people may not have the tools after 12 hours of training to manage such a complicated discussion. Connecticut's program boasts a high settlement rate, in part because its mediators are dedicated ADR court staff with extensive mediation training that regularly mediate foreclosure cases.

### **Allow Multiple Sessions and Communication Between Sessions**

Connecticut's mediators also attribute their success to their ability to manage the communications between borrower and servicer in between sessions. Managing communication before and between sessions is a [key to success](#), as communication between servicer and borrower has often been the key challenge to settling the case prior to mediation. If the program permits mediators to engage in communication with each party separately in between sessions, the mediator may facilitate progress on the case where before, parties just sat on the file until the next mediation session.

Communication between sessions gives the case a sense of urgency and is a good use of the mediator's facilitation skills. It may also reduce the number of sessions needed before a case settles. As Florida's statewide program [mediators identified](#), most cases did not settle in one session because work needed to be done by both parties (documents exchanged, checking a settlement option with an investor, etc.) before a final decision could be made. So, allowing multiple sessions can lead to a higher rate of settlement, especially if coupled with communication between sessions.

### **Provide Judicial Enforcement Mechanisms for Not Complying with Program Requirements**

Some programs require mediators to [report](#) on non-compliance with mediation requirements. If the only program requirement is attendance, having the mediators report on it is acceptable. But, if program requirements include document review and exchange, certain behavioral expectations (like good faith participation), or other things that require a subjective interpretation of communication or behavior, mediation best practices state that a mediator [should not](#) be the reporting mechanism for such requirements.

Even if a program requires the mediator to report some behaviors, the mediator should never, in any circumstance, determine the enforcement mechanism for non-compliance. This turns the mediator—a role [defined](#) by neutrality to ensure equal treatment of parties and confidentiality to ensure freedom to explore options—into a judge. As highlighted in recent foreclosure [case law](#), only judges should sanction parties for not complying with program requirements, and the judges should not rely on information provided by the mediator to do so.

Therefore, compliance with program requirements should be checked in one or both of two settings: prior to mediation in a public session or in a court hearing after the mediation session occurs. In the former, a screener will check documents from one or both parties to determine readiness for



mediation. If more documents need to be exchanged or updated, the screener can complete an order requiring those steps before mediation is scheduled. In the later, a judge reviews whether parties complied with mediation program requirements. Since oral statements made during mediation should not be allowed in the court proceedings, the judge may review a prepared form that resulted from the mediation. This form may include an action plan for what needs to happen next (which could be the basis for an order) or may articulate the agreement both parties reached (which may be entered as the final order). Either way, this document can form the basis for an enforceable order. If there are problems with compliance, the court or other management entity should have [specific consequences](#)—applied consistently and equally—for each type of non-compliance.

### **Treat Parties Equally**

As in any mediation, parties should be treated equally not only by the mediator, but also by the program and program partners.

Programs have struggled with this concept in the area of party preparation before mediation. Some programs, citing the [goal](#) of holding the servicer's feet to the fire, require servicers to submit extensive documentation before allowing the mediation (and thus the foreclosure process) to move forward. Often, these programs do not require anything of the borrower. Even before the mediation begins, the servicer feels like the mediation is designed to punish them and let the borrower coast. This does not set up mediation to be a productive discussion. Therefore, if an expectation is set for the servicer (e.g., the servicer must send someone with authority to sign an agreement, or the foreclosure is barred), that same expectation should apply to the borrower (e.g., every person on the note must appear, or the foreclosure may go forward). A perceived sense of fairness from both sides helps set the stage for a process that values [each parties' voice and interests equally](#).

Another potential area for inequality in foreclosure mediation is in the discussion itself. Most borrowers already feel an imbalance of power as they face their bank's representative, perhaps for the first time. They may feel even more uncomfortable actually talking about options with their bank and as a consequence, may not bring up information that would actually assist the settlement process. Therefore, it is essential that mediators be trained in how to level the playing field as much as possible during the mediation. This includes developing skills around giving parties equal time to share their stories, not letting the servicer's attorney dominate the process, and addressing emotions from both servicer and borrower related to the foreclosure process.

## **FURTHER ASSISTANCE**

### **Resources on Foreclosure Mediation**

Resolution Systems Institute (RSI) offers an extensive, free resource center that features expert information on foreclosure mediation. This includes rules, abstracts of reports and evaluations, contact information for current programs, and RSI-developed resources about program funding,



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purposes, and development. Find these resources for free online at [courtadr.org/specialtopics.php?sec=6](http://courtadr.org/specialtopics.php?sec=6).

### **Latest News on Foreclosure Mediation**

RSI staff members blog regularly about the latest developments in the field of foreclosure mediation, including updates on individual states, court decisions, and general trends. Subscribe to the Just Court ADR blog at [blog.aboutrsi.org/](http://blog.aboutrsi.org/).

### **Assistance with Program Development**

RSI provides expert consulting services for courts and other entities wishing to develop or improve foreclosure mediation programs. To contact a foreclosure mediation system design expert, please call staff attorney Heather Scheiwe Kulp at 312-922-6475 or email [hskulp@aboutrsi.org](mailto:hskulp@aboutrsi.org).