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A Study for the Design and Administration of a Successful Foreclosure Mediation Program in Massachusetts

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Recommended Citation

Palihapitiya, M. & Eisenkraft, K. (2013, February). A Study for the Design and Administration of a Successful Foreclosure Mediation Program in Massachusetts. Boston, MA: Massachusetts Office of Public Collaboration (MOPC), University of Massachusetts Boston

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Executive Summary

This study confirms that Massachusetts is still in the midst of a foreclosure crisis, a complex and expensive phenomenon harming all parties involved in foreclosure proceedings as well as communities across the state. Massachusetts' state-level response to the foreclosure challenge includes new legislation that responds to the early phase of the foreclosure crisis. Legislative interest in foreclosure mediation, ignited by concern over the crisis in Massachusetts, has manifested itself in a number of bills to establish a foreclosure mediation program. However, interest in foreclosure mediation has fallen short of the critical mass required for adoption of such a program.

A lack of communication between parties is typical in foreclosure actions. The media is replete with anecdotal accounts of mortgage servicers who ignore homeowner attempts to initiate discussions about addressing loan defaults and of homeowners who evade contact with their mortgage servicers in order to stymie the collection process. This failure of communication alone reinforces the need for foreclosure mediation.

A number of states and cities across the nation have concluded that mediation can help reduce the incidence of residential foreclosures and have established foreclosure mediation programs. Mediation is a dispute resolution process which incorporates the values of impartiality, confidentiality, exploration of options, mutuality and voluntariness of agreements. By engaging in mediation, parties address their foreclosure issues in a non-adversarial process that respects each party's interests and needs, addresses them in an even-handed way, and encourages the exploration of a variety of foreclosure alternatives.

Evidence is emerging from foreclosure dispute resolution programs in Philadelphia and Connecticut that mediation is a valuable tool for preventing and/or mitigating the harmful effects of foreclosure on families, communities and lending institutions.

This study examines foreclosure mediation programs and legislation in ten jurisdictions across the nation as well as relevant research and scholarship in the field in order to capture best practices and lessons learned to inform the authorization and design of effective foreclosure mediation programming for Massachusetts.

Highlights of key findings and recommendations from the study are as follows:

- 1. Adoption of foreclosure mediation should be part of a multi-pronged approach to addressing the foreclosure crisis in Massachusetts.** Homeowners and lenders collaborating through a non-adversarial process and exploring an array of alternatives to foreclosures have multiple advantages for all parties, including the state.
- 2. All stakeholders in the foreclosure crisis should work together to establish access to mediation as a tool for collaborative problem-solving of foreclosure issues.** No single party can resolve the foreclosure problem alone: it is too complex, too extensive, involving

government entities, private businesses, non-profit organizations, and individuals. All stakeholders must collaborate to find a mutually acceptable solution.

3. **If foreclosure mediation is adopted in Massachusetts, it should be implemented by a neutral entity and should be built on existing state-funded infrastructure.** Foreclosure has gained a reputation as an adversarial process, and the assignment of a neutral entity to administer foreclosure mediation would help allay any initial suspicions and skepticism that may be transferred to the foreclosure mediation process. Enlisting the services of community mediation centers as infrastructure in a foreclosure mediation program and leveraging their community ties on behalf of foreclosure mediation could do much to combat homeowner aversion to foreclosure-related initiatives and to promote homeowner participation in mediation.
4. **Participation in foreclosure mediation by both creditors and borrowers should be maximized.** Maximizing foreclosure mediation participation makes economic sense since it would increase the likelihood of foreclosure prevention while permitting economies of scale.
5. **Parties should be required by law to be adequately prepared for mediation before participating in mediation sessions.** Settlement discussions are futile without the participation of parties with the authority to craft viable agreements. The verification of facts critical to foreclosure legitimacy rests on the presentation of relevant documentation by both the lender and the homeowner during mediation.
6. **For successful foreclosure mediation, parties should participate in good faith, and failure to comply should have consequences.** Good faith participation needs to be defined in foreclosure mediation legislation and/or program policies with consequences for violating the duty of good faith also specified.
7. **Mediation process integrity should be maintained by protecting the confidentiality of the proceeding and relieving the mediator of policing duties.** Foreclosure mediation must be confidential, and the determination of good faith participation by parties must be ministerial, rather than discretionary, on the part of the mediator.
8. **Obstacles to participation in mediation and undue delays in the foreclosure process should be avoided.** Mediation costs should not bar participation, and the mediation period should be long enough for parties to prepare for and participate in mediation but not so long as to unduly delay the foreclosure process.
9. **State funding for foreclosure mediation can demonstrate state commitment, but diversified funding can ensure long-term sustainability.** A combination of filing or recording fee surcharges, party fees, and an initial state investment is vital to the design and implementation of a sustainable foreclosure mediation program.

- 10. The state foreclosure mediation program's performance should be assessed and the results reported to the legislature.** Reporting requirements are critical to generate information that will permit a performance-based assessment of the success of any foreclosure mediation program. For a list of suggested indicators and an evaluation matrix for foreclosure mediation, see Appendices B and C.

Recommended programmatic features of an effective foreclosure mediation program:

- 11. A program design that maps out a path for achieving the program's overarching goal combined with vigorous program policies and procedures should dictate implementation of the program.** The design of a foreclosure mediation program that contains vigorous program policies and procedures can maximize participation, reduce delays, establish facts, elicit party cooperation, tailor mediation to foreclosure challenges, and ensure responsible disbursement of public funding.
- 12. Mediators should be trained to handle the complexity of foreclosure issues.** Suitable mediation practitioners must be identified, trained, qualified, and assigned to serve on the program roster through a proven, rigorous process.
- 13. Mediators serving the foreclosure mediation program should be periodically evaluated to ensure the quality of mediation services.** The development of an integrated approach to mediator quality assurance is recommended.
- 14. The foreclosure mediation program should educate all stakeholders about mediation and its attendant benefits.** The foreclosure mediation program should conduct direct outreach and education about the mediation program, mediation process, and associated benefits and services to lenders and borrowers.
- 15. The foreclosure mediation program should engage in data collection that will protect the confidentiality of respondents.** The foreclosure mediation programs should create clear guidelines that ensure the maintenance of participant confidentiality while contributing to the knowledge base for effective and accountable programming.

Purpose of study

The purpose of this foreclosure mediation study is to analyze the role of mediation in preventing and/or mitigating harmful effects of foreclosures on both borrowers and lenders. The lens for the analysis is the need for foreclosure mediation in Massachusetts and the statutory and programmatic frameworks necessary for the design and implementation of a successful foreclosure mediation program. The study will provide an account of how Massachusetts is dealing with residential foreclosures at present and the ways mediation can contribute to resolving foreclosure disputes.

This study is being conducted by the Massachusetts Office of Public Collaboration (MOPC) at the University of Massachusetts Boston (UMass Boston). MOPC is the statutory state office of dispute resolution for the Commonwealth. The office functions as a neutral forum that assists government and stakeholders to address important civic issues through the use of dispute resolution and other collaborative processes while simultaneously producing knowledge that is useful to the design and implementation of state-wide programs in furtherance of its public mandate under M.G. L. ch.75 §46.¹ Over its 25-year history, MOPC has assisted in the design and administration of numerous dispute resolution programs for Massachusetts courts and public agencies. MOPC has developed expertise in foreclosure mediation programs through its operation of the USDA-funded Massachusetts Agricultural Mediation Program, which deals with foreclosure cases in the agricultural sector.² In recent years, MOPC has advocated for robust foreclosure mediation policies and procedures that address important programmatic and legislative considerations such as maximizing program participation, reducing delays, establishing facts, eliciting cooperation from parties, tailoring mediation to the challenges posed by foreclosure disputes, funding, and evaluating program performance. MOPC presented testimony on foreclosure mediation bills to the Joint Committee on the Judiciary in October 2009 and January 2012 citing best practices from other states with specific recommendations on strengthening foreclosure mediation bills presented at that time. A variety of stakeholders, including drafters of foreclosure mediation bills from both inside and outside of government have consulted with MOPC as a neutral state-level knowledge-based resource.³

¹ MOPC was formerly a state agency within the Executive Office for Administration & Finance charged under M.G.L. ch. 7 §51. In 2005, the office's functions and personnel were transferred to the University of Massachusetts Boston through enactment of M.G. L. ch. 75 §46. From 1999 to 2003, the office led the implementation of Executive Order #416: Integrating Dispute Resolution into State Government. The office was formerly known as the Massachusetts Office of Dispute Resolution.

² This program regularly mediates cases between the USDA and its borrowers (agricultural producers and rural homeowners) facing foreclosure as a result of adverse decisions by the Farm Service Agency and the Rural Development Agency (Rural Housing Service). Through these services, the borrowers and the USDA loan managers are provided with an opportunity to share information and discuss each foreclosure situation and options. As a result borrowers may be provided with opportunities to apply for a moratorium on the foreclosure proceedings, or to re-amortize, create a payment plan, or make other arrangements/workouts that could potentially keep the borrowers in their homes and on their farms.

³ It should be noted that because of its experience, mandate, and role as a neutral forum, MOPC has been regarded by some drafters of foreclosure mediation bills as a potential administrator of a state-wide foreclosure mediation program. For example, in Fiscal Year 2012, MOPC was named the administrator for a state-wide foreclosure mediation program under Senate Bill 2287, as amended and presented to House Ways and Means for reconciliation with the House Bill 4087 to prevent unlawful and unnecessary foreclosures.

The research team at MOPC developed the following methodology to conduct the study and recommendations:

- a) An extensive literature review of previous studies, academic articles and publications on mediation, particularly foreclosure mediation;
- b) Interview of selected experts to delve deeper into recent foreclosure mediation efforts in Massachusetts.
- c) Research on existing foreclosure mediation models from other states and criteria for an effective program model and legislation.
- d) Benchmarking of ten successful foreclosure mediation models and how these programs have overcome challenges that foreclosure poses in Connecticut, Delaware, the District of Columbia (DC), Hawaii, Maine, Nevada, New Hampshire, New York, Philadelphia, and Washington.
- e) Collection of Massachusetts and national data on the foreclosure situation and development of indicators of success for program evaluation;
- f) Analysis and recommendations for the design and administration of a potential future foreclosure mediation program, identification of partnerships and funding opportunities; and
- g) Preparation of research summaries with relevant citations; recommendations, a comprehensive bibliography, and relevant appendices.

The following questions guided the analysis:

- 1. Can mediation contribute to resolving foreclosure disputes?
- 2. Can mediation be tailored to meet the challenges involved in foreclosure disputes?
- 3. Can well-designed programming increase access to foreclosure mediation?
- 4. Can participation in a foreclosure mediation program be maximized?
- 5. Which facts should be substantiated during the dispute resolution process?
- 6. Can cooperation be obtained from foreclosure parties?
- 7. Can timeliness be incorporated into the foreclosure mediation process?
- 8. How can a state foreclosure mediation program be funded?
- 9. How can a state foreclosure mediation program be held accountable?
- 10. How can a state foreclosure mediation program be designed and administered?

The findings emerging from this study provide a framework for a foreclosure mediation program to be established in Massachusetts while taking Massachusetts' own unique situation and interests into account. The lessons to be learned from the experiences of existing programs, their benefits as well as their deficiencies reviewed in this study, provide a solid basis for designing a vision and structure for an effective state-wide foreclosure mediation program in Massachusetts.

Based upon the best practices and thinking of practitioners and other knowledgeable experts, the recommendations set out here provide a vision of a program that empowers parties dealing with foreclosure – the borrowers/mortgagors/homeowners as well as the creditors/mortgagees/mortgage servicers/ lenders – which will enable them to take full advantage of the opportunity to mediate their foreclosure issues and achieve satisfactory outcomes.

Findings show that for one, foreclosure mediation does not prolong the foreclosure process. As for costs, foreclosure mediation offers lenders the opportunity to mitigate their losses since loan modifications, particularly those involving a net present value analysis, tend to be less costly to lenders than foreclosures. Finally, to the extent that the foreclosure crisis itself has significantly contributed to a depressed housing market, with foreclosed homes blighting neighborhoods, mediation can positively affect home values by reducing foreclosures.

The harmful impact of the foreclosure crisis

The foreclosure crisis has had ruinous effects on the housing market by depressing sales and property values; on people's lives as homes and real estate investments are lost and credit is damaged; on communities pockmarked by abandoned housing that depresses the value of surrounding properties; on the bottom line of lending institutions as the value of the debt in a first mortgage diminishes by over 50% and costs from property maintenance and foreclosure procedures accrue; and on the taxpayer as property tax revenues shrink, court dockets swell, and demand for social services soar (Walsh, 2012; Clifford, 2011, September). Nationwide, between 8-10 million mortgages are expected to end in foreclosure before the crisis abates. Solving this crisis on the state level is a high priority for Massachusetts.

In the five years between 2005 and 2010, there were 126,444 foreclosures in Massachusetts (Clifford, 2011, September). Although the housing market is showing some signs of recovery (Schmit, 2012, November 28), recent calculations indicate that over 45,000 Massachusetts residents have lost their homes, and the Attorney General's Office continues to be inundated by about 300 daily calls from residents seeking to avoid foreclosure (Norton, 2012, May 3). Twenty-six jurisdictions across the country have responded to this crisis by establishing foreclosure mediation or dispute resolution programs (RSI, 2012, Fall/Winter). Massachusetts has not yet established a foreclosure mediation program.

Massachusetts' response to residential foreclosures

The foreclosure crisis has enveloped Massachusetts, with recent figures showing that more than 45,000 people in the state have lost homes to foreclosure (Attorney General of Massachusetts, 2012, April 25). At present, thousands more Massachusetts citizens are facing the loss of their homes. Compared to the first five months of 2011, 77% more foreclosures were initiated during the equivalent period in 2012 (Chesto, 2012, July 9). In a monthly analysis, the number of foreclosures launched in February 2011 more than doubled to 1,394 in February 2012. (Attorney General of Massachusetts, 2012, April 25). At present, income reduction from job loss has replaced inappropriate subprime loans as the major factor accounting for foreclosures in Massachusetts (Chesto, 2012, July 9).

Massachusetts' state-level response to the foreclosure challenge thus far includes new legislation, which responds to the early phase of the foreclosure crisis induced by subprime loans by changing foreclosure procedures, particularly for subprime mortgage loans, and by providing loan modification and other types of assistance through the Attorney General's Office to borrowers dealing with foreclosure. Despite various legislators' efforts, the state has yet to establish a state-wide foreclosure mediation program.

The current legal framework for foreclosure in Massachusetts: Pursuant to M.G.L. ch.244, recently modified by Chapter 194 of the Acts of 2012, residential foreclosures in Massachusetts proceed under a statutory power of sale outside the purview of the judicial system unless there is a court challenge (Hovey, Pill, & Baird, 2010). The lender (which should be understood to also refer either to the creditor, the mortgagee, or the mortgage servicer) is empowered by M.G.L. ch.244, to respond to the borrower's (also referred to as the homeowner or mortgagor) default on the mortgage with a foreclosure sale of the mortgaged premises once notice and other conditions are met.

A valid foreclosure action under a power of sale requires the foreclosing party to hold the mortgage as well as the mortgage note and, when assignments are involved, to be assigned both the mortgage and the note (U.S. Bank National Association v. Ibanez). The mortgage holder, if the authorized agent of the note holder, may also have the power to foreclose (Eaton v. Federal National Mortgage Association). Thus, according to section 35C, publication of the foreclosure sale is forestalled "when the creditor knows or should know that the mortgagee is neither the holder of the mortgage note nor the authorized agent of the note holder."

The bona fide lender embarks on a foreclosure action under M.G.L. ch.244 §14, in part, by providing 30-day notice of the impending foreclosure sale to the borrower. In the case of mortgages held under assignment, the notice of sale must reference the assignment or chain of assignments, which must also be recorded in the appropriate registry of deeds. For all residential mortgage foreclosures, the borrower must be informed of his or her right to cure the mortgage default.

Until January 1, 2016, the right to cure is granted under M.G.L. ch.244 §35A once per three-year period for a particular mortgage, and the borrower gets 150 days in which to exercise the right to cure without acceleration of the mortgage balance. The right to cure period is reduced to 90 days if the creditor offers to negotiate a foreclosure alternative and either the borrower fails to respond within 30 days to the negotiation offer or the creditor's good faith effort to negotiate a commercially reasonable foreclosure alternative fails to resolve the dispute. The creditor demonstrates a good faith effort by assessing the borrower's current circumstances, including income, debts, and other obligations, conducting a compliant analysis of the net present value (NPV) of a modified mortgage loan compared to the anticipated net recovery (ANR) from foreclosure, taking into account creditor interests, serving documentation of the good faith effort to the borrower before meeting, and meeting with the borrower at least once (in person or by telephone) to negotiate.

From 2016 on, the right to cure is abridged. Notably, the cure period gets shortened to 90 days, the right can only be exercised once per five-year period, and no mention is made of negotiating foreclosure alternatives and its effect on the length of the cure period. During the summer of 2012, however, borrower protection against foreclosure expanded with respect to a subset of residential mortgages, namely for 'certain mortgage loans' (M.G.L. ch.244 §35B).

So-called certain mortgage loans are residential mortgage loans which do not originate through the Massachusetts Housing Finance Agency or the Massachusetts Housing Partnership Fund Board and have at least one of the following eight characteristics:

1. Introductory interest rate for 3-year period or less that is at least 2% lower than the fully indexed rate;
2. Interest-only payments for any period of time except in cases of open-ended home equity line of credit or a construction loan;
3. Payment option feature where any one of the options is less than the principal and interest fully amortized over life of loan;
4. Loan did not require full documentation of income or assets;
5. Prepayment penalties exceeding §56 of ch.183 or applicable federal law;
6. Loan was underwritten with a loan to value ratio of 90% or more and ratio of borrower's debt to borrower's income exceeded 38%;
7. Loan was underwritten as a component of a loan transaction where combined loan-to-value ratio exceeded 95%; or
8. The creditor cannot determine if the loan has one or more of the loan features above.

In the case of such loans, the creditor is required to provide the borrower with notice of the right to pursue a loan modification with a copy sent to the Attorney General (AG) and to include contact information for loan modification assistance from the Attorney General's Office (AGO). The borrower must respond within 30 days by notifying the creditor about which of four options he or she intends to pursue – a modified mortgage loan (accompanied by an income statement and list of debts and obligations), a foreclosure alternative such as a short sale or deed-in-lieu, a right to cure period, or waiver of the right to cure period followed by foreclosure. The borrower's failure to timely respond results in forfeiture of the right to cure period and subjects the borrower to a 90-day right to cure period. The right to a modified mortgage loan under section 35B is granted once per mortgage over a three-year period.

Additionally, the creditor is obliged to take reasonable steps and make a good faith effort to avoid foreclosure, which, upon the borrower's selection of the loan modification option, consists of an assessment of the borrower's ability to make an affordable monthly payment, identification of a modified loan that is consistent with the affordable monthly payment, a compliant analysis that compares the NPV of payments under the modified loan to the ANR of foreclosure, and consideration of the interests of creditors, with written statements detailing these various determinations submitted to the borrower. When the NPV exceeds the ANR, the creditor manifests good faith compliance by agreeing to so modify the loan. In the event of a modified loan offer, the borrower may respond in writing within 30 days by choosing either to accept the offer, to make a reasonable counteroffer, or to waive borrower's rights and proceed to foreclosure. Failure to respond leads to a 90-day right to cure period. If the NPV is less than the ANR or exceeds the affordable monthly payment, the creditor must notify the borrower that no offer will be made and must provide a written summary of the NPV and affordable monthly payment calculation. The absence of an offer does not preclude discussion of other foreclosure alternatives. The process for exploring loan modification cannot take more than 150 days. The creditor violates M.G.L. ch.244 in relevant part if the creditor makes statements to the court about foreclosure or about compliance with M.G.L. ch.244 which are false or which the creditor should know are false, e.g. statements regarding a loan modification offer, the borrower's payment history, the validity of mortgage assignment, the creditor's status as the mortgage holder of record, or the creditor's compliance with chapter requirements (M.G.L. ch.244 §35C).

Massachusetts initiatives to mitigate and prevent foreclosure: Massachusetts has taken steps to combat the toll taken by residential foreclosures. Mediation has not as yet been included in the state's efforts. However, the Commonwealth, under the auspices of the AGO, has undertaken several initiatives to reduce the incidence of foreclosure and mitigate its effects, including institution of the HomeCorps program. HomeCorps' funding of \$44.5 million derives from Massachusetts' share of a \$25 billion settlement deal between five major mortgage servicers and 49 attorneys general plus the federal government that resulted from investigations into mortgage servicer malfeasance. The deal seeks to compensate the public and aggrieved borrowers for losses due to servicer misconduct and to fund programs for borrower assistance (Morgenson, 2012, February 12).

The HomeCorps program includes a Loan Modification Initiative that provides loan modification advocacy to borrowers in fulfillment of the AG's statutory duty to assist borrowers of 'certain mortgage loans'; a Borrower Representation Initiative that funds legal aid services to represent borrowers over issues concerning loan modifications, questionable foreclosures, etc.; a Borrower Recovery Initiative that furnishes resources to families who lost homes to foreclosure; and two grant programs that award a total of \$10 million to nonprofits and government entities for services to "mitigate the impact of foreclosure on Massachusetts borrowers" and "work to repair the harm to neighborhoods and municipalities" (Attorney General of Massachusetts, 2012, April 25; Attorney General of Massachusetts, 2013).

Sampling of recent legislative proposals in Massachusetts to establish a foreclosure mediation program: Legislative interest in foreclosure mediation, ignited by concern over the foreclosure crisis in Massachusetts, has manifested itself in a number of bills to establish a foreclosure mediation program. At least six such bills were filed with the 187th General Court and an additional three have been filed so far during the present legislative session. Bills to study the viability of a foreclosure mediation program have also been filed. Other organizations like the Massachusetts Bar Association and the Massachusetts Alliance Against Predatory Lending have demonstrated an interest in developing proposals for a foreclosure mediation program for the legislature to consider. None of the bills have won passage as yet. To give a sense of the variety of the approaches taken towards fashioning this kind of program, the provisions of three of the bills filed are described below.

To date, the foreclosure mediation amendment to SB 2287, sponsored by Senator Spilka, has progressed the furthest, passing the Senate in June 2012 but failing to survive the conference committee. SB 2287 included foreclosure mediation among the options for borrowers facing foreclosure on so-called "certain mortgage loans," i.e. problematic residential mortgage loans that have at least one of eight specified features. Notice about this option would be provided by the creditor. Senator Spilka's amendment created a foreclosure mediation program to be administered by the state dispute resolution office. The program would employ an opt-in approach where the borrower's election of mediation compels the creditor to make an effort to negotiate an alternative to foreclosure by participating in mediation. The borrower's right to elect foreclosure mediation is limited to once per three-year period per mortgage. Mediation requirements include negotiating authority on the part of the creditor's representative and documentation from the creditor prior to mediation (including proof of mortgage ownership, written NPV and ANR analysis with supporting documentation when required). The creditor,

however, is not required to modify the mortgage pursuant to the mediation section. Once mediation is elected by the borrower, foreclosure cannot proceed without the mediator's certification that the creditor participated in the program, engaged in good faith mediation, made all reasonable efforts to find a foreclosure alternative, and that the agreement, if one is reached, complies with state and federal guidelines. Funding for the program is provided through a 50% surcharge on the filing fee for foreclosure complaints filed under the Service Members Civil Relief Act. Program costs are also to be shared by both parties, with a 15% cap on the borrower's costs and no barrier to borrower participation due to inability to pay.

HB 1355/SB 673, sponsored by Representative Pedone and Senator Chandler, proposed the establishment of a foreclosure mediation program under the auspices of the Attorney General. It too provides for borrower opt-in with consequent compulsory lender participation. Notice about the right to mediate is to be provided to the borrower by both the program and the lender. The borrower may be referred to, and encouraged to work with, a non-profit housing counseling agency. The borrower's decision to mediate stays acceleration of the note or initiation of foreclosure proceedings during a 120-day mediation period unless the mediator certifies that the lender engaged in good faith mediation, made all reasonable efforts to find a foreclosure alternative, and that the agreement, if achieved, complies with federal and state guidelines. Good faith mediation involves the lender's review of borrower's situation, which includes eligibility for loan modification programs and a written net present value analysis. The lender's representative must have negotiating authority, and the lender must provide proof of ownership and written NPV analysis no later than five days before mediation. If mediation does not lead to agreement, the court's permission is required for the mortgagee to proceed with foreclosure. Failure to comply with the good faith requirement is a defense to foreclosure. The program's costs are met by filing fees for the foreclosure complaint and by both parties, with the borrower's contribution's not to exceed 15% of the total and the borrower's inability to pay fees no bar to participation.

HB 1454, filed by Representative Malia in 2011, sought to facilitate mediation of residential foreclosure in Boston through the establishment of a mediation program administered by a neutral not-for-profit organization. Notice to all parties is provided by the City and party participation is automatic and mandatory. The mediation period lasts 90 days unless the mortgagee agrees to prolong it. A mediator's certificate of mortgagee's good faith participation in mediation is required to proceed with a foreclosure sale unless the mortgagor fails to either attend or cooperate with mediation. Other mediation requirements include a good faith effort at negotiation by both parties; negotiation and settlement authority for the creditor's representative; prior consultation with a loan counselor by the mortgagor; furnishing of documentation from both the mortgagor (e.g., financial, employment, loan applications) and mortgagee (e.g., mortgage, note, assignments, balance, analysis of mortgagor's eligibility for loan modification). Fee-shifting is forbidden and the homeowner mediation fees cannot exceed \$75. Annual evaluations of mediators and of the program are required.

A prior bill sponsored by Senator Spilka, SB 865, differs in relevant respects from her SB 2287 amendment. For instance, it provides that the AGO run the foreclosure mediation program, extends the time period during which the borrower has the right to foreclosure mediation to five years, shortens the mediation period to 50 days with the option of a ten-day extension by order of

the court; omits the requirement of good faith participation; and conditions the continuation of foreclosure during the mediation period on the mediator's report to the court. In the report, the mediator indicates whether there would be no benefit to the parties from continued mediation (thus terminating the mediation period) or the parties would so benefit, allowing mediation period to continue within the allotted time until terminated by the filing of a subsequent report that describes the proceedings and issues. The mediator's determination cannot form the basis of an appeal of the foreclosure judgment.

Present-day situation for a future, state-supported foreclosure mediation program in Massachusetts: The upshot of all the attempts to win legislative approval for a foreclosure mediation program is that twenty-six states have state foreclosure mediation programs, but Massachusetts is not one of them (RSI, 2012, Fall/Winter). Up to now, legislative interest in foreclosure mediation has fallen short of the critical mass required for approval of such a program. The version of the foreclosure prevention bill that finally passed muster in the legislature in Chapter 194 of the Acts of 2012 omitted both the mediation option and Senator Spilka's foreclosure mediation amendment to SB 2287.

According to the chair of the foreclosure conference committee, more information about the effectiveness of a foreclosure mediation program is needed (Young, 2012, July 25). Chapter 194 of the Acts of 2012, M.G.L. ch.244 §35C (4), passed by the Legislature in July 2012, sets up a 13-member task force in part to evaluate foreclosure mediation programs throughout the United States and issue findings and recommendations by the end of 2013. The required membership consists of one representative of the Massachusetts Bankers Association, the AG (or her designee) as chair, two chairs of the joint housing committee, two chairs of the joint committee on financial services, two chairs of the joint judiciary committee, one appointee of the minority leader of the House, one appointee of the Senate minority leader, and three governor appointees, two of whom represent legal organizations which represent consumers or homeowners). The task force appointments were completed in January 2013. Despite the absence of a specific mandate for representation by mediation practitioners on the task force, an attorney with mediation experience has been among those appointed. As this committee sets about its work, it will confront the question whether and how Massachusetts should take advantage of the contributions that mediation can make to alleviate the foreclosure crisis.

Mediation's contribution to resolving foreclosure disputes.

A number of states and cities across the nation have concluded that mediation can help reduce the incidence of residential foreclosures and have therefore established foreclosure mediation programs. Mediation is a voluntary consensual process over which the parties have decision-making authority and in which an impartial third party assists disputants in discussing their issues and exploring options for a mutually acceptable and voluntary agreement (Wilkinson, 2001, August; Carter, 2002, citing Florida statute s. 44.1011(2)). Mediation holds out the promise of success in producing sustainable agreements on foreclosure alternatives by virtue of various dimensions of the process. As for costs, foreclosure mediation offers lenders the opportunity to mitigate their losses since loan modifications, particularly those involving a net present value analysis, tend to be less costly to lenders than foreclosures (Walsh, 2009). Finally, to the extent that the foreclosure crisis itself has significantly contributed to a depressed housing

market, with foreclosed homes blighting neighborhoods, mediation can positively affect home values by reducing foreclosures.

The value of mediation: At a minimum, mediation opens up a channel of communication between foreclosing lender and borrower. Foreclosure typically is an adversarial process that often finds one side avoiding contact with the other side (Brackey, 2011, June 10; Community Affairs Department, 2007, June). The lack of communication between parties involved in a foreclosure is an important impediment to resolving foreclosure issues, and “mediation techniques are [among] the best methods ... to ensure that such communications occur...” (Bay, 2010, January 5). The likelihood of productive communication is enhanced by the assistance of an experienced mediator who can call upon such techniques as, for example, active listening, reframing and issue clarification to manage the dynamics of the parties’ interaction and thereby promote conditions favorable to a non-adversarial, problem-solving approach, where serious consideration is given to each side’s interests, needs, and choices.

Mediation offers a safe environment for parties to interact with one another. The impartiality of the mediator ensures even-handed treatment of the parties, allowing each side’s concerns to get a fair hearing. The confidentiality of mediation proceedings, enshrined in practice protocols and state statutes, prevents the mediator from revealing what happens during mediation sessions to an adversary or the public, and, as a result, protects party privacy and encourages the sharing of information, even sensitive information (Bush, 1994). Impartiality and confidentiality together allow the parties’ discussions during mediation to be more productive.

Through mediation, parties get to explore an array of potential solutions to their dispute in a neutral forum. Mediation grants parties the opportunity to expand their discussion beyond any one approach to encompass other possibilities. Whether the foreclosure involves a subprime or “certain mortgage loan” or other residential mortgage loan, whether it arises from job loss, from unexpected expenses, or from some other cause, parties can address the feasibility of such options as loan modifications, mortgage refinancing, loan repayment plan, forbearance plan, partial claim, ‘graceful exits,’ including short sales, cash for keys, and deeds-in-lieu, and homeowner qualification for financial assistance from government programs, as well as any other plausible foreclosure alternatives that they can conjure up before settling on an outcome that addresses both sides’ needs and interests (Walsh, 2012; Clifford, 2011, September). The voluntary nature of parties’ consent to an agreement combines with the wide-ranging investigation of alternatives to yield settlements that are mutually satisfactory, that both parties can own, and so are more likely to win compliance.

Evidence regarding mediation’s effectiveness in tackling foreclosures: Foreclosure mediation programs tend to be recent arrivals in the dispute resolution field and so are works in progress. Foreclosure mediation’s lack of longevity, the variations in statutes and program structure, and the differences in outcome measures dictate caution in generalizing from their reported outcomes. Nonetheless, there are promising signs that these programs can contribute to foreclosure reduction. In Connecticut, a judicial foreclosure state, 79% of 9,472 homeowners participating in foreclosure mediation avoided foreclosure, with 50% of them obtaining loan modifications and 64% remaining in their home (Clifford, 2011, September). Philadelphia’s Foreclosure Diversion Program reported that 35% of 1,600 foreclosures ended in agreements,

with 88% of the homeowners who reached agreement staying in their homes for at least 21 months (Walsh, 2012). During the first year of Maine's program, 21% of 505 cases that completed mediation achieved settlements on a foreclosure alternative (Clifford, 2011, September).

One of the key successes of foreclosure mediation programs is that they coordinate many already-existing foreclosure mitigation tools such as loan modification programs (including the federal Home Affordable Modification Program (HAMP)), mortgage payment assistance and principal reduction programs, counseling assistance, funds to promote neighborhood stabilization, and regulatory reform (Clark & Olmos, 2011, December). Many housing counselors believe mediation programs provide a structure for negotiations that saves time in establishing lines of communication with loan servicers. Even attorneys have endorsed mediation, saying they found foreclosure mediation programs helpful for providing them and their homeowner-clients with much-needed time to investigate the facts of a client's case, and that this respite leads to more informed decisions about potential legal claims (Walsh, 2012).

Massachusetts mediation infrastructure: Senate Bill 2287, as amended and presented to House Ways and Means for reconciliation with the House Bill 4087 to prevent unlawful and unnecessary foreclosures, highlights the need to consider access to mediation services in the state. Massachusetts has its fair share of private practitioners who offer mediation services. The Commonwealth has an additional dispute resolution resource in its network of community mediation centers overseen by the state office of dispute resolution (Jeghelian, Palihapitiya, & Eisenkraft, 2011, November). Community mediation centers, are community-based organizations that offer affordable services from trained community volunteer mediators (Wilkinson, 2001, citing NAFCM) and are "more likely than courts and ... [government] agencies to be familiar, comfortable, and welcoming environments" and are in a "position to provide more timely assistance due to their proximity to where families live[,] to already offer assistance with other concerns[,] [and are likely to have a] history of serving low-income people and diverse communities" (Moses, 2009, November, p. 20). Massachusetts' state-wide network of community mediation centers receives state support through the recently enacted M.G. L. ch.75, §47, establishing the Massachusetts Community Mediation Center Grant Program, which authorizes the deployment of community mediation on state-wide community objectives, which would include foreclosure prevention and mitigation: "(b) There shall be a statewide community mediation center grant program to be funded by the commonwealth. The mission of the grant program shall be to promote the broad use of community mediation in all regions of the state. Public agencies shall use community mediation in support of statewide and community objectives." The fifteen centers awarded grants under this program have an average track record of 25 years each of mediation service to the community (Massachusetts Office of Public Collaboration, 2013, January).

Community mediation centers provide dispute resolution services free or at low cost, assess party needs during case intake and refer parties to social services, legal services, financial/bankruptcy/mental health counseling services, veteran, elder and disability services and other forms of assistance (food and fuel assistance, daycare subsidies, etc.) wherever applicable. The centers have been the primary training ground for mediators in both the private and community sectors and have been the prime innovators in conflict resolution programs for

communities (Wilkinson, 2001). In Massachusetts, ties between private practitioners and community mediation center are strong, with private practitioners often serving on rosters and boards of directors and partnering on community projects.

With respect to housing and foreclosure issues, community mediation centers can provide mediation services to borrowers who have lost or are about to lose their home by mediating landlord-tenant disputes, disputes around relocation (cash for keys), back rent payments, landlord-tenant agreements (for example, disputes around timelines for tenants vacating houses/apartments), security deposits and late fees, agreements to make repairs to houses/apartments, disputes over damages, move-out dates, use and occupancy issues and supplementary process (for eviction, etc.) (Massachusetts Office of Public Collaboration, 2013, January). As community-based institutions spread throughout the state, these centers can help borrowers navigate the difficult foreclosure process and its attending stresses on individuals and families by mediating bankruptcy, credit-lender disputes, divorce, custody-visitation disputes, domestic relations, family business disputes, financial disagreements, parenting plans, separation, veteran re-integration issues and a host of other issues that can bar borrowers from holistic, long-term recovery.

Mediation is not a silver bullet for resolving foreclosure disputes. As the experience of other states shows, the effectiveness of a foreclosure mediation program in Massachusetts will depend on the extent to which it meets the challenges posed by foreclosure issues. Mediation effectiveness will rest on the proper combination of quality programming, statutory authority, utilization of suitable mediation infrastructure, good faith participation of parties, funding, and the demonstration of program impact for purposes of accountability.

Maximizing participation in a foreclosure mediation program

The extent of the foreclosure crisis – nationwide, 8-10 million additional homes are predicted to end up in default leading to foreclosure (Walsh, 2012) – makes it imperative that a program which offers a dispute resolution approach to the problem be designed so as to maximize participation by both homeowners/borrowers/mortgagors and lenders/mortgage servicers/mortgagees. The greater the number of participants in the search for foreclosure alternatives, the greater the dent made in the incidence of foreclosures. At the same time, substantial participation in foreclosure mediation programs permits economies of scale to reduce the expense of providing mediation services. An example from divorce mediation is instructive: while a voluntary divorce counseling program in Oregon that attracted few clients generated costs that were higher than comparable court cases, a mandatory mediation program in Los Angeles County handled 747 cases and saved the county \$175,000 (Pearson & Thoennes, 1984). Encouraging participation is, however, complicated by the often conflicting interests and motivations of the parties as well as the impact of other program features, and involves balancing a whole host of considerations.

Opt-in versus automatic participation and the issue of notice: Connecting a mediation program to the foreclosure process raises the question whether referrals to the program should be opt-in or automatic/opt-out. In an automatic/opt-out approach, party entry into mediation is triggered automatically with the choice of withdrawal. Where entry into mediation is opt-in, the party has the choice whether to engage in mediation. An opt-in feature respects party freedom to choose to

participate in dispute resolution. At the same time, that freedom is distorted by the opt-in model since the latter is affected by inertia, which means that the default option (here, non-selection of mediation or dispute resolution) is favored out of the array of choices (Nudge, nudge, 2012, March 24). A related challenge posed by the opt-in process is ensuring that the selection decision be fully informed.

Usually, the opt-in feature is directed at homeowners since lenders have already made a decision to pursue foreclosure. Indeed, lender resistance to foreclosure dispute resolution is part of the foreclosure landscape to date, and mediation election is made a homeowner prerogative in order to bypass lender opposition to foreclosure mediation. The exclusion of lenders from the opt-in choice, however, may be too broad, limiting the scope of a foreclosure mediation statute going forward. There is no inherent contradiction between initiating a foreclosure and seeking mediation about the foreclosure. The absence of any provision for a lender-opt-in alternative sets up a road-block to accommodating both a lender's embrace of mediation for a current pending foreclosure and positive attitudes towards such mediation on the part of the lending industry in the future. Delaware (Administrative Directive No. 2011-2, Delaware Superior Court) and New Hampshire are exceptions to this rule since they opened the door somewhat to lender opt-in. Lenders and homeowners in New Hampshire were authorized to participate in the foreclosure mediation program by agreement. In Delaware, when the homeowner is unable to develop a good faith proposal regarding mortgage payments, the homeowner is encouraged to negotiate with the lender, and the lender is then authorized to request mediation. Narrowing the population of would-be initiators of foreclosure mediation by making the opt-in feature the exclusive prerogative of homeowners militates against mediation's widespread use. Be that as it may, in Maine, Nevada, the District of Columbia (DC), and Washington, the mediation process is triggered by the homeowner's request for mediation, the absence of which allows the foreclosure process to proceed. Thus, in DC, the homeowner who fails to timely elect mediation forfeits the right to mediate the loan default unless good cause is shown.

Besides favoring the default condition of no participation in dispute resolution, this opt-in version tends to disadvantage many homeowners, particularly those who lack information, sophistication, economic means, or are confused or intimidated by legal procedures and so fail to take advantage of the mediation opportunity (Walsh, 2009). The ineffectiveness of the federal Independent Foreclosure Review program presents a cautionary tale about homeowner abstention from all things foreclosure, even from measures designed to ameliorate foreclosure's adverse consequences (Noguchi, 2010, May 9). Under this federal program, nearly 4.3 million homeowners were eligible to participate in a no-cost foreclosure review process conducted by participating mortgage servicers and obtain up to \$100,000 in compensation for defective foreclosures. Despite direct mailings, public service announcements, and media interviews, fewer than 4% of eligible homeowners applied for the review. Homeowner avoidance of foreclosure-related proceedings should not be underestimated. In general, participation rates for opt-in foreclosure mediation programs typically top out at 20% (Clifford, 2011, September). Opt-out programs, by contrast, usually have participation rates that exceed 50%.

The freedom to elect mediation is illusory without adequate notice and information about the process and the program. Some jurisdictions, like Maine, put the onus on the lender to provide the homeowner, along with notice of the foreclosure action, notice of the mediation opportunity,

program information, and requisite application forms. Nonetheless, making the lender solely responsible for notice of the right to mediation can run the risk of lenders shirking their responsibility to the detriment of homeowner participation (Walsh, 2012).

Various efforts at mitigating the risk of defective notice have been adopted. Delaware is noteworthy in its attempts to reduce language barriers to effective notice by including both Spanish and English versions (Administrative Directive No 2011-2). Washington requires more than written notice from the lender: the lender must provide notice both in writing and by telephone about the homeowner's right to a 60-day opportunity for an in-person meeting and about the right to request mediation through a housing counselor or attorney prior to the lender's issuing a Notice of Default.

Other efforts at avoiding defective notice have taken the tack of requiring that the notice burden be shared between the lender and some neutral third party. Hawaii supplements the lender's notice about dispute resolution with notice from the department administering the foreclosure dispute resolution program (the Department of Commerce & Consumer Affairs or DCCA): when the lender files a notice of non-judicial foreclosure with the DCCA, the DCCA sends the homeowner a notice of opportunity to participate in dispute resolution plus relevant information and forms. An alternate procedure, which fortifies the shared notice burden, requires that, when notified by the lender that notice of the right to cure or of the foreclosure action was served on the homeowner, the mediation program administrator also notify and telephone the homeowner about the right to mediation, thus adding personal contact to what is normally a formal, arms-length procedure (e.g., proposed Massachusetts bill HB 01355/SB 00673).

DC relies on evidence and sanctions to forestall ineffective notice. There, the lender must retain evidence of mailing of notice to borrower for two years, and deficiencies in notice compliance may result in cancelled notice unless the noncompliance was harmless error.

Nevada's foreclosure mediation statute (NRS 107.086) enhances homeowner participation with protection against a homeowner's uninformed rejection of mediation by requiring that the lender document the homeowner's failure to choose mediation in an affidavit to be served on both the homeowner and the mediation program administrator.

The barriers to participation raised by a reluctant mortgage lending industry that is opposed to mandating loan modifications or to documenting loan modification calculations, and by uninformed, confused or intimidated homeowners are overcome when referral to mediation or dispute resolution is automatic/opt-out. This approach has been adopted by Connecticut (CT Public Act 11-201), Philadelphia (Court of Common Pleas Joint General Court Regulation No. 2008-01), Maine (14 Maine Rev. Stat. Ann. S. 6321-A), Hawaii (Act 48), and New York (CPLR 3408). The mediation or dispute resolution process can be triggered in Maine and Connecticut with the homeowner's appearance in the foreclosure action without needing to file a mediation request too. Parties are automatically referred to mediation in Maine when the homeowner returns a mediation notice, requests mediation, or appears in the foreclosure action. In Connecticut, the court acts to schedule mediation upon receipt of a completed information form and mediation certificate from the defendant, which allow the court to determine that defendant is the mortgagor, or upon the mortgagor's filing an appearance in the foreclosure action. In

Hawaii, after notice from the lender and the DCCA, the homeowner has 30 days after the department's notice is mailed to submit a mediation program participation form, certify that mortgagor is the owner-occupant and pay a \$300 program fee.

The lender's legal actions in pursuit of foreclosure are sufficient to prompt dispute resolution in Philadelphia and New York. Philadelphia's Common Pleas Court issues a Case Management Order which assigns a date and place for a conciliation conference upon service of the foreclosure complaint and requires the homeowner to call a hotline for a housing counseling agency. New York's mediation process is initiated upon the lender filing a Request for Judicial Intervention (RJI) along with proof of service of notice of the foreclosure action and of the availability of, and request for, settlement conferences to the homeowner. New York courts routinely respond to the filing by scheduling a settlement conference and notifying parties to that effect along with information about the process and guidelines for supportive documentation. In practice, though, this routine is undermined by lender attorneys who deliberately omit filing the RJI needed to proceed with the settlement process (Walsh, 2012).

Automatic referral may lead to a large volume of cases with substantial homeowner participation, and ineligible cases may not be ruled out initially. The Philadelphia Residential Foreclosure Diversion Program has a participation rate of 70% and impacts between 60%-70% of the average of 4,714 eligible foreclosures per year (The Reinvestment Fund, 2011, June). Connecticut data for July 2008-April 2009 indicate that, with 16,851 mediation-eligible cases, 2,545 mediations were completed out of the 5,778 cases where homeowners requested mediation (Walsh, 2009). During the early days of New York's mediation program in the first half of 2009, 2,890 settlement conferences were scheduled in New York City, Buffalo, Syracuse, and Nassau and Suffolk Counties with nearly 60% homeowner participation despite lender attempts to thwart the dispute resolution process (Walsh, 2009). In any event, where mediation or dispute resolution is automatically linked to foreclosure, mediation or dispute resolution programs need to be prepared with funding and staff to handle a large caseload.

Washington and Connecticut are examples of foreclosure dispute resolution programs that filter out ineligible cases during the early stages of the dispute resolution process. As part of the mediation entry procedure, Connecticut demands information from the foreclosure defendant sufficient to confirm the party's mortgagor status. Washington's Foreclosure Mediation program rejects lenders with low volume foreclosures (less than 250 foreclosures annually) and has the potential to filter out ineligible homeowners by requiring that the homeowner's mediation request come from an intermediary: the borrower's housing counselor or attorney requests mediation on behalf of the homeowner and notifies the lender and the Department of Commerce that mediation is appropriate.

Mandatory participation and voluntary settlement: Settlement discussions are futile without the participation of disputing parties who have the authority to craft and accept viable agreements. The media is replete with anecdotal accounts of mortgage servicers who ignore homeowner attempts to initiate discussions about addressing loan defaults and of homeowners who evade contact with their mortgage servicers in order to stymie the collection process (Brackey, 2011, June 10; Community Affairs Department, 2007, June). Thus, Philadelphia, Maine, Connecticut,

DC, Hawaii, Washington, and New York require the presence of both parties during mediation or dispute resolution sessions. DC, Hawaii, Nevada, and Washington mandate mortgagee participation in mediation sessions once the mortgagor exercises the choice to mediate, and effectively compel homeowner presence by connecting absence to foreclosure. The caveat for Washington is that not all foreclosing lenders are required to participate in mediation – only those conducting a large volume of foreclosures in the state.

Parties must have a physical presence at mediation sessions, although exceptions are allowed, e.g., Maine allows telephonic or electronic participation; court permission for telephone or video conferencing is available in New York. In all these instances, the mortgagee or his/her representative must have authority to settle the case or be in immediate contact with someone with such authority.

As applied, these mandates appear to promote party participation. With rates of approximately 70%, 60%, and 38% for Philadelphia, New York, and Connecticut, respectively (The Reinvestment Fund, 2011, June; Walsh, 2012), homeowner participation in mandatory foreclosure mediation or dispute resolution appears substantial. As for lender cooperation, Washington and Nevada, for instance, provide encouragement by withholding necessary foreclosure certification upon mortgagee non-compliance with mediation requirement. Washington further provides that lender failure to mediate in good faith constitutes a defense against foreclosure in court. Nevada, Connecticut, and New York authorize an array of court-ordered sanctions for absentee or unauthorized lenders, variously including the award of costs and fees, denial of certification required for foreclosure, mandatory loan modifications, tolling accrual of interest or fees, imposition of monetary sanctions, including those that reduce the loan principal (Walsh, 2012).

When sanctions are unavailable or are unexercised, the lack of negative consequences for absence may have the effect of discouraging compliance with the participation requirement. New York's experience with settlement conferences made unproductive by the dearth of deal-making authority on the part of lender representatives has led it to establish a pilot program in which four major banks agreed to send authorized officials to settlement conferences conducted by judges with the ability to sanction non-compliance (Glaberson, 2012, February 23).

Irrespective of the presence or absence of a participation mandate, access to foreclosure mediation services may be broadened by using community mediation centers as mediation service providers. As already noted, community mediation centers are “more likely than courts and ... [government] agencies to be familiar, comfortable, and welcoming environments” and are in a “position to provide more timely assistance due to their proximity to where families live[,] to already offer assistance with other concerns[,] [and are likely to have a] history of serving low-income people and diverse communities” (Moses, 2009, November, p. 20).

Incorporating timeliness into a foreclosure mediation process

Foreclosure delays are blamed for prolonging the foreclosure crisis (Cho, 2012, May 18). The belief in the inevitability of an avalanche of foreclosures and their downward pressure on the housing market has been used to justify acceleration of foreclosure processes as a way to fix the problem sooner rather than later (Walsh, 2012). Detractors contend that foreclosure mediation

will merely serve to prolong the foreclosure process. Evidence that such concern is misplaced is available – consider that after Philadelphia instituted its dispute resolution program, foreclosure times were reduced from 10 months to 54 days following the onset of its program (The Reinvestment Fund, 2011) and that Massachusetts has the eighth longest foreclosure time (517 days instead of the officially allotted 200 days) yet has no foreclosure mediation program (Walsh, 2012). Indeed, foreclosure delays have been associated with court involvement and blamed on insufficient court resources: “lenders in judicial states have to go through the courts first; this leads to a lengthier process when pushing foreclosures through the pipeline, leading to a higher number of homes in foreclosure inventory” (Cho, 2012, May 18). In any event, concerns about foreclosure mediation remain, and designers of foreclosure mediation programs have responded by including three types of features to promote timeliness: deadlines, including those that restrict response time; limitations on the mediation period; and caps on mediation opportunities. The downside of these timeliness measures resides in discouraged homeowner participation, reduced lender motivation to cooperate during mediation, infringed homeowner’s mediation rights, and facilitated stalling tactics.

When mediation depends on the homeowner’s choice, homeowner participation may be affected by the time allotted for the homeowner to request mediation. The second-longest response period is 30 days (Nevada, Hawaii, Delaware). Connecticut allows 15 days for the homeowner to request mediation or dispute resolution. Presumably, the shorter the time for homeowner reaction, the greater the likelihood that deadlines will be missed and participation in dispute resolution curtailed. When the request period is triggered by sending notice – as in Hawaii, where the mailing of notice by the Department of Commerce & Consumer Affairs initiates the 30-day mediation request period – any delay in the homeowner’s actual receipt of notice will shorten the homeowner’s response time. Arguably, extending the time period for mediation requests throughout the foreclosure process may mitigate the obstacle that an opt-in mediation program presents for homeowner participation (Walsh, 2012). Washington has adopted this last approach, authorizing mediation requests up to the time Notice of Trustee Sale is issued. The time period set aside for mediation or dispute resolution to occur typically ranges from a low of 60 days to a high of 120 days. Nevada provides for a 90-day mediation period. Party consent may extend DC’s 90-day mediation period to 120 days. Connecticut has a 60-day mediation period with a 30-day extension for good cause or at the mediator’s request. In general, shorter mediation periods may prove less accommodating to scheduling difficulties, and so may undercut dispute resolution.

The coexistence of the mediation period with the ongoing pursuit of foreclosure poses an even greater threat to effective foreclosure dispute resolution. For example, in Connecticut and Maine, the mediation period suspends the entry of a judgment of foreclosure until the period ends or is terminated, but does not otherwise interrupt the foreclosure process nor excuse the homeowner’s need to respond. Under these circumstances, the lender’s motivation to engage in good faith mediation is diminished (Walsh, 2009). In contrast, foreclosure stays during mediation create conditions that motivate good faith participation (Walsh, 2012). Where a mediation period stays the progress of foreclosure, as in Nevada and Washington, foreclosure remains blocked until mediation is completed. The absence of a foreclosure stay, as in Connecticut and Maine, means that good faith participation cannot be rewarded by shortening mediation’s obstruction of continued foreclosure nor may bad faith be discouraged by prolonging it. Furthermore, when the

expiration of the mediation period brings closure to the foreclosure process, as in Connecticut, the time frame for the homeowner's response to foreclosure is abbreviated, hampering the homeowner's ability to mount a challenge (Walsh, 2012).

Limitations on the number of mediation sessions or restrictions on mediation requests impose a ceiling on dispute resolution. Connecticut effectively confines the dispute resolution process to a single session by conditioning a second session upon the mediator's determination that the parties would benefit from continued mediation. Similarly, one of the issues addressed at a conciliation conference in Philadelphia is the necessity for a second conference. By contrast, New York does not appear to have an upper limit on settlement conferences. Philadelphia, which has experienced a reduction in foreclosure times from 10 months to 54 days after onset of its dispute resolution program (The Reinvestment Fund, 2011), illustrates the time savings that may result from curbing repeated sessions. The benefit of delay mitigation, however, needs to be weighed against the cost of limiting sessions. Such limitations may enable unwilling lenders to wait out the process until they can proceed with foreclosure – or the limitations may shorten party discussions to the point where foreclosure alternatives remain undiscovered.

Several Massachusetts foreclosure mediation bills presented in FY2012, or before, aligned limitations on the right to foreclosure mediation with limitations on the right to cure. Two bills (HB 01355/SB 00673 and SB 2287, §35D) limited the right to mediate to a single mediation per three-year period for the same mortgage. Other bills (e.g., SB 00865) extended this restriction period to five years. A cap on the opportunity to request foreclosure mediation may be considered an efficiency that counters borrower financial irresponsibility and mortgage re-default. On the other hand, a restriction period that is measured in years may amount to an infringement on mediation rights because it fails to allow for the likelihood of changed circumstances or of an unrealistic prior agreement, either of which may warrant another opportunity to mediate.

Substantiating facts during the foreclosure mediation process

Foreclosures based on shaky facts: The foreclosure process rests on a number of mortgage-related facts, such as the identities of the parties to the mortgage, their obligations under the mortgage, the value and nature of the mortgaged property, and the sums of money involved – of the loan, of payments made and payments missed. The integrity of these facts came under assault during the 2000s due to slipshod and/or illegal practices engaged in by the mortgage industry. Some lending practices resulted in lowered standards and the offering of higher-risk mortgage products to unqualified borrowers, and some borrowers accepted loans like subprime mortgages that they could ill afford, thereby increasing the likelihood of default (Burry, 2011, Summer). During this period, financial institutions were lax about tracking the documentation regarding ownership of loans in their pursuit of profit from the sale of mortgage-backed financial instruments like collateralized debt obligations and mortgage-backed securities (U.S. Bank National Association v. Ibanez). The practice of robo-signing, where thousands of foreclosure documents were hastily and improperly processed without appropriate review or verification, was common among bank and other mortgage servicers (Schwartz & Silver-Greenberg, 2012, March 13). As a result, lender claims that foreclosure sales were justified by borrower defaults are uncorroborated due to missing or erroneous documents, and investigators report that a number of foreclosures were probably improper (Schwartz & Silver-Greenberg, 2012, March

13). This history of unsavory dealing places a great deal of importance on the verification of facts underlying foreclosure claims, particularly those relating to the lender's status as owner of the mortgage and the homeowner's payment history and economic circumstances.

The role of proof of mortgage ownership and borrower qualifications in foreclosures under Massachusetts law: Massachusetts law bolsters the importance of scrutinizing the factual basis of a mortgage foreclosure sale. The relevance of the economic qualifications of the borrower to the foreclosure process is acknowledged in *Commonwealth v. Fremont Investment and Loan*, which upheld an injunction that restricted, but did not eliminate, the lender's ability to foreclose on a loan when the latter was presumptively unfair due to, among other things, the borrower's foreseeable inability to meet the obligations of a subprime mortgage loan.

In Massachusetts, foreclosures take place under a statutory power of sale (see M.G.L. ch.244) and ordinarily escape rigorous scrutiny unless challenged in court (Hovey, Pill, & Baird, 2010). The Massachusetts Uniform Commercial Code requires that a foreclosing lender be holder of both the promissory note and the mortgage, possess the original promissory note, and be able to produce a complete chain of assignments of the mortgage and note (Hovey, Pill, & Baird, 2010). Consequently, the homeowner can challenge a foreclosure proceeding as based upon incomplete, backdated, fraudulent, or forged documentation (Hovey, Pill, & Baird, 2010). Thus, in *U.S. Bank National Association v. Ibanez*, the court ruled that a foreclosure sale was invalid when the mortgage holder was not accurately identified, and that backdated mortgage assignments were insufficient evidence of the mortgage holder's identity. A recent decision in *Eaton v. Federal National Mortgage Association* held that a foreclosure by sale by a mortgage holder who did not hold the mortgage note would still be valid if the mortgage holder was an authorized agent acting on behalf of the note holder.

The role of facts in foreclosure dispute resolution: The importance of establishing facts for a valid foreclosure is transferred to the foreclosure mediation realm through document production requirements for the lender and the homeowner. Lender document requirements relate to three issues – the legitimacy of the mortgage ownership claim, the financial basis of the foreclosure action, and the rationale regarding alternatives to foreclosure or loss mitigation. Homeowner obligations to document income, liabilities, assets, and alternative requests for assistance mostly relate to the circumstances surrounding mortgage payments and to the homeowner's current economic situation as relevant to developing a response to foreclosure, including developing a viable foreclosure alternative.

Nevada, Maine, Hawaii, Washington, the District of Columbia, and New York all call for lender documentation relating to proof of mortgage ownership, with Nevada, Hawaii, Washington, the DC, and Maine enumerating the necessary documents. By contrast, New York is less detailed: New York only demands the mortgage and note and contact information for the legal owner of the mortgage and note.

The basis for foreclosure is addressed by the requirement of a payment history by New York, Hawaii, Washington, DC, and Nevada. Washington and Nevada also require a current property appraisal, with the former including a further demand for the homeowner's credit history; New York adds a requirement for itemization of the loan balance. A net present value analysis (NPV),

useful in assessing the viability of foreclosure alternatives, is required from the lender by New York, Maine, Hawaii, Washington, and the District of Columbia. Notably, Nevada not only asks the lender for the evaluative methodology used to determine the borrower's eligibility for a loan modification, but goes so far as to encourage consideration of foreclosure alternatives by demanding that the lender supply a confidential proposal for resolving foreclosure. Washington demands that the lender supply an explanation for the denial of a foreclosure alternative.

In response to the robo-signing scandal, New York has increased the lender's documentation burden by imposing a document requirement upon the lender's representative (Glaberson, 2012, February 9). The lender's foreclosure attorney must certify that he/she personally checked the accuracy of foreclosure claims. In practice, the effectiveness of this requirement has been undermined by attorneys in an estimated 25,000 cases, who file foreclosure actions and then pursue them just short of this certification requirement. In some instances, attorneys have filed false certifications (Glaberson, 2012, February 9).

Washington is unique among the foreclosure mediation statutes under consideration in expressly asking the lender to both provide a pooling and servicing agreement – relevant to restrictions on loan modifications (Walsh, 2009) – and to explain its denial of a foreclosure alternative. Philadelphia and Delaware are silent about the lender's document obligations.

The documentation required from homeowners relates to their evidence of mortgage payments and their current economic circumstances. Connecticut requires the mortgagor to provide sufficient information to permit the court to confirm that the defendant in the foreclosure action is a mortgagor and to complete a form with financial and non-financial information that will be useful to mediation. Nevada and Philadelphia require information about the homeowner's current situation, consisting of a housing affordability worksheet and financial statement for Nevada and, for Philadelphia, certification of contact with a housing counseling agency and documentation concerning income, employment, and eligibility for work-out programs. In Hawaii, borrowers are required to bring documents regarding income, including pay stubs, W-2, or other income relevant to paying the mortgage; records or correspondence regarding the dispute over the default; records/correspondence showing loan modification/amendment; records/correspondence indicating that parties are negotiating a settlement; contact information for housing, budget, and credit counselors, or mortgagee representatives with whom mortgagor may have been working; and verification of counseling (Hawaii Act 48). In contrast, Maine does not mention homeowner document obligations.

Nevada, Philadelphia, and Delaware obligate the homeowner to entertain a foreclosure solution. Nevada mandates a confidential proposal for resolving foreclosure from the homeowner just as it does from the lender. Philadelphia demands that homeowners work with a housing counseling agency to submit a report for a loan work-out plan. Likewise, Delaware requires the homeowner, with counselor assistance, to prepare a good faith proposal under which the homeowner can reasonably sustain monthly mortgage payments that do not amount to more than 38% of the homeowner's gross monthly income.

The greater the number of the aforementioned documents supplied by the parties during mediation, the more solid will be the foundation for resolving foreclosure issues: the legitimacy

of the foreclosure process can be thoroughly tested and the likelihood of a viable alternative that will avoid re-default can be realistically assessed. This rosy prospect, however, is dependent upon the parties' compliance as well as their respect for document production deadlines (e.g., the lender must produce documents ten business days before a mediation session in the case of Washington). New York's experience, duplicated throughout the country, of inordinate delays caused by lender attorneys' requests for unnecessary information, for updates on information made stale by the delays, and for replacements of allegedly lost documents, reveals that achieving compliance is a challenge (Glaberson, 2012, February 9; Walsh, 2012).

Obtaining cooperation from foreclosure parties

Cooperation with the mediation process is a *sine qua non* of effective dispute resolution. Yet parties have been resistant to complying with mediation demands (Walsh, 2012; Morgenson, 2012, February 12). Despite analyses that demonstrate that loan modifications are less costly to lenders than foreclosures, lenders remain unwilling to entertain foreclosure alternatives (Walsh, 2009), which may ultimately fuel their opposition to mediation itself. Statutes that establish foreclosure mediation programs typically rely on compulsory measures to elicit cooperation with the mediation program. Such measures include mandating party appearance and participation, commanding good faith participation, and authorizing negative consequences for non-compliant behavior.

Mandating cooperation: Mandatory party appearance and participation in mediation sessions characterize all the enabling statutes to one degree or another. The quality of the parties' participation is addressed by provisions for good faith participation and sanctions for non-compliance.

The requirement of good faith participation is included, for example, in Washington's Foreclosure Fairness Act, with good faith participation defined and consequences for the violation of good faith identified. New York and Maine have good faith participation requirements – New York's good faith requirement is non-specific while Maine's is detailed, Connecticut and Philadelphia, on the other hand, do not expressly demand good faith participation. Nevertheless, as judicial foreclosure jurisdictions, these states may all avail themselves of the array of judicial orders available for enforcing compliance with their respective foreclosure mediation statutes.

The variety of non-compliant behaviors that trigger sanctions available from the courts is illustrated by Nevada, which has embedded its foreclosure mediation program in its court system even though it is a non-judicial foreclosure state (Walsh, 2012). Nevada provides that sanctions for failure to comply may be triggered by failure to attend mediation, failure to participate in good faith, failure to provide required documents, or failure to show that a participant was authorized to modify loan or had direct access to someone with such authority. Like non-judicial foreclosure jurisdictions, the available sanctions available in judicial foreclosure states include blocking foreclosure through denial of certification necessary for foreclosure (Nevada), or entry of judgment, or dismissal of foreclosure action (with or without prejudice) (Maine).

In addition, courts in these states enforce the foreclosure mediation statute with sanctions such as monetary penalties, tolling of interest and costs, assessment of costs, fees, or lost wages, and

monetary sanctions that reduce the outstanding loan principal (Nevada, Connecticut, Maine). Connecticut, for example, expressly forbids the award of attorney's fees to any mortgagee for time spent in any mediation session if the mortgagee did not attend mediation sessions or was not authorized to agree to settlement or mortgage modifications, except for reasonable cause.

Hawaii and DC, however, demonstrate that even non-judicial foreclosure jurisdictions can expand the consequences of mediation non-compliance to include monetary fines along with ramifications for the resumption of foreclosure. In Hawaii, the neutral's determination that non-compliance with mediation was unjustified because circumstances were within the party's control may lead to sanctions against an offending lender that consist of a foreclosure stay and/or a fine of no more than \$1,500 while the non-compliant homeowner may be subjected to the removal of the foreclosure stay and/or a fine of \$1500 or less. In either case, the fines are payable to the other party. DC has a schedule of monetary penalties for designated lender offenses, with \$500 fines for non-attendance per missed mediation session, for each day that documents and information are not timely delivered, and for failure to mediate in good faith. The lender who breaches the settlement agreement is subject to a \$1,000 penalty and will be required to perform the terms of the settlement agreement. By contrast, the homeowner's breach of the settlement agreement or failure to act in good faith – such as not attending mediation, etc. – will be sanctioned by the issue of a mediation certificate that allows foreclosure to continue.

Additionally, Maine courts have ventured beyond monetary punishments, ordering, for instance, the mortgage servicer to request a waiver of investor restrictions on loan modification or to extend a previously offered loan modification. As mentioned above, DC provides for the enforcement of the mediated settlement by authorizing non-judicial orders for performance. Thus, the borrower can request that the mediation administrator issue an order to perform to the lender who breached the settlement (an order which the lender may challenge). Nevada courts have gone so far as to order loan modification, a ruling that is being appealed in *Renslow v. Wells Fargo Bank* (Walsh, 2012).

New York's situation is instructive about the problems caused by lax or occasional enforcement of a good faith participation requirement. The inability of court attorneys who conduct settlement conferences to impose sanctions has allowed the bad faith participation of lender's attorneys to largely go unchecked, thwarting resolution of foreclosure issues. New York is now experimenting with a program that replaces hapless court attorneys with empowered judges to run settlement conferences (Glaberson, 2012, February 23).

Tailoring mediation to meet the foreclosure challenge

The dispute resolution model that is selected as an appropriate vehicle for resolving foreclosure disputes should ideally be chosen on the basis of demonstrated effectiveness as well as compatibility between the values of the dispute resolution model and achieving compliance with foreclosure dispute resolution program rules. The accomplishment of this goal must overcome the challenges arising from uncertainty about the facts on the ground and a potential clash of values.

Problems with ascertaining what actual dispute resolution models are in use: The search for accounts of the actual processes used by foreclosure dispute resolution programs to resolve

disputes reveals difficulties with identifying what model of dispute resolution is currently being used in other states. For some programs, the nature of the homeowner-lender interaction during dispute resolution attempts is not specified. Hawaii's statute only refers to dispute resolution that is conducted by a neutral. In the Philadelphia foreclosure diversion program, lenders and homeowners meet to discuss alternatives to a Sheriff Sale. The manner of party interaction during the Philadelphia meeting is not detailed, and presumably may comprise any of a multitude of influence methods, ranging from the assertion of power such as browbeating or pleading, to negotiation, to collaborative problem-solving. However, one detail that has emerged is that the parties' meeting takes place outside the presence of a third party. It is only when progress in the talks stalls that a third party – usually a volunteer attorney acting as a judge pro tem – is called in to move the talks along (The Reinvestment Fund, 2011, June; Walsh, 2012). Except for the presence of a court attorney or judicial hearing officer to preside over settlement conferences, the dispute resolution process in New York's residential foreclosure settlement program – characterized as an exploration by the homeowner and lender of the possibility of a loan workout or settlement or of a case management plan – is equally opaque (NYS Unified Court System, 2008, June). Notably, judges get involved in both the Connecticut and New York programs when decisions or orders regarding compliance and other issues are needed.

The conceptual clash between mediation values and the enforcement of mediation

compliance: Uncertainty about the operative dispute resolution methods remains even where mediation is identified as the statutorily designated foreclosure dispute resolution process, as in Connecticut, Nevada, Maine, and Washington. The Washington program stands out because of its explicit identification of mediation as the program dispute resolution process: Washington's foreclosure mediators are instructed that their "role is to conduct a non-judicial process where each party is fully and fairly heard [; that] the goal of mediation is to reach a resolution that all parties can agree to[;] successful mediation requires fairness and impartiality[; and] foreclosure mediators must avoid conflicts of interest" (State of Washington, Department of Commerce).

Questions about the nature of the dispute resolution processes arise because of the apparent inconsistencies between mediation as a voluntary consensual process and the mandatory features of ostensible foreclosure mediation programs. Mediation is described as a voluntary consensual process over which the parties have decision-making authority and in which an impartial third party assists disputants in discussing their issues and exploring options for a mutually acceptable and voluntary agreement (Wilkinson, 2001, citing NAFCM; Carter, 2002, citing Florida statute section 44.1011(2)).⁴

⁴ A typical mediation session would proceed as follows:

The mediator generally beg[ins] the session by explaining the process, emphasizing its nonbinding nature and the confidentiality of the discussions, and describing the mediator's role as a neutral third party unable to give legal advice or decide the case. Each ...[side or their attorney then gives] a factual summary of the case, with the mediator asking questions to bring out additional facts, summarizing the presentations, and inviting clarification from the parties when necessary. Mediators frequently [hold] private caucuses with each side to explore with them their interests and concerns, the strengths and weaknesses of their positions, and the advantages and disadvantages of going forward with litigation. The mediator [helps] the parties develop and evaluate possible settlement options and work toward an agreement that would address both sides' inter- / ests (Wissler, 1997, pp. 583-584).

The mediation process manifestly incorporates the values of voluntariness, third-party neutrality, and mediation confidentiality in the interest of fairness, respect, and the promotion of durable agreements (Izumi & La Rue, 2003; Nolan-Haley, 2008, Winter). Mediation furthers self-determination through voluntariness by putting parties in charge of structuring the process, defining the issues, and determining the elements needed for a solution to their dispute while allowing them to abandon the process at will (Izumi & La Rue, 2003; Hedeem, 2005). The non-judgmental and non-advisory even-handedness demanded of the mediator displays the neutrality necessary to promote party trust in the mediator, thereby allowing parties to accept the mediator's assistance (Izumi & La Rue, 2003). The confidentiality attached to mediation promotes productive party discussion by minimizing the "difficulties of communicating with an adversary, the intervention of a neutral third party, and the potential for information to reach a judge" (Izumi & La Rue, 2003). Controversy over the appropriateness of employing mediation for foreclosure disputes has developed because of the uneasy relationship between mediation values (of confidentiality, self-determination through voluntariness, and mediator neutrality) and program rules to enforce program compliance and good faith participation.

Evidence that mandating entry into mediation is not coercive: Increasing participation is a challenge for mediation programs. "Despite parties' typically high levels of satisfaction with mediation, mediation programs that depend on parties' willingness to participate attract relatively few cases, even when offered at low or no cost" (Wissler, 1997). Mandating mediation is a common tactic for encouraging participation in mediation, often employed by the courts as well as by foreclosure dispute resolution programs, including those reviewed here. Under opt-in programs, only one of the parties – the lender – is obliged to appear while both parties are so obliged when dispute resolution is made mandatory.

At first, concern that "coercion into mediation can evolve into coercion to settle" dogged the practice (Wissler, 1997). Now, research indicates that any infringement upon voluntariness by mediation entry mandates is more theoretical than real. In a comparison between small claims cases where mediation was court-ordered and those for which mediation was chosen by the parties, the evidence for a significant difference in settlement rates was negligible ($p = .98$) (Wissler, 1997). Similarly, a study of common pleas cases that were court-nominated, selected by both parties, or chosen by a single party indicated that "the manner in which the case entered mediation had a marginally significant effect on the likelihood of settlement." The absence of strong evidence for significantly different settlement rates and for differences in party reports about control over the process or over the outcome suggests that mandating entry into mediation does not compel settlement (Wissler, 1997).

Controversy over participation requirements: Controversy persists, though, over the propriety of a foreclosure mediation program accommodating requirements for party participation. Participation requirements typically involve demands for party attendance, good faith participation, and deal-making authority upon pain of sanctions for non-compliance. The rationale for these requirements is that they are necessary for meaningful mediation to occur. Only consider that Washington expects that foreclosure mediators "must require participants to exchange financial and loan documents...[to] ensure that all parties have the information they need to reach a resolution" (State of Washington, Department of Commerce). The absence of a party or of a party representative imbued with authority to negotiate precludes the likelihood of a

settlement and so insures the futility of engaging in mediation. Good faith participation is needed to protect parties against abusive and inappropriate behavior, to prevent “one party [from using] mediation as a club with which to abuse the other,” to create the conditions of effective mediation – collaborative problem-solving, flexibility, recognizing other perspectives, and so on (Izumi & La Rue, 2003; Carter, 2002). Good faith requirements are “designed to ensure process integrity and procedural fairness” (Carter, 2002). “If good faith is not present, all we will be left with is a pro forma mediation These mediations are usually a waste of time for the mediator, a waste of time for the attorneys ... and a waste of [time and] expense for the parties” (Carter, 2002, quoting Kovach, 1997, p. 595). In order to secure compliance with these requirements, sanctions for their violation have a critical role to play (Walsh, 2010), and mediator reports can be an important and reliable source of evidence about party compliance. Confidentiality becomes controversial when violators are shielded because evidence is withheld (Walsh, 2010).

Critics counter that parties’ freedom not to settle, which is essential to mediation, is infringed by participation requirements. Whatever their reasons to reject an agreement – to avoid establishing precedents, to attain vindication, whatever – parties are assured that in mediation “they have nothing to lose if they fail to reach settlement because they can always go to trial” (Carter, 2002; Nolan-Haley, 2008, Winter, p. 4). Participation requirements, particularly when accompanied by the threat of sanctions, have the potential to dictate behavior and entrench upon the “parties’ choice as to such forms of participation, how to present and argue their case, what information to reveal, whether to make offers or counteroffers and whether to settle” (Sherman, 1997, Winter, p. 14). Non-specific participation requirements, e.g. a requirement of good faith participation *simpliciter* as in New York, have the added disadvantage of vagueness that fails to provide notice to participants about proscribed behavior. Furthermore, assigning mediators the task of reporting on parties’ good faith efforts propels them out of their role as facilitators to fulfill “quasi-policing” duties to the detriment of their neutrality and of the preservation of confidentiality (Izumi & La Rue, 2003). Overall, enforcement of a good faith requirement will have the added disadvantage of creating pressure to settle that arises from “the fear of having confidential communications with the mediator revealed to the judge, the likelihood of economic sanctions, the potential for an adversarial proceeding on the content of mediation sessions, and the possibility of strategic disadvantage” (Izumi & La Rue, 2003).

Bridging the potential gap between mediation values and participation requirements: At present, efforts are afoot to devise participation requirements that attempt to align party autonomy and voluntariness with preventing abuse of the mediation process. Mediation protocols employed by the Washington and DC programs are instructive in this regard in that they contain a good faith requirement that avoids the perils of vagueness by specifying the behaviors that constitute good faith participation. In Washington, for example, good faith is violated by the failure to timely participate in mediation without good cause, the lender’s or borrower’s failure to timely provide specified documents, failure to pay mediation fees, the absence of the party’s settlement authority, the lender’s failure to explain the denial of foreclosure alternative, and so on. The borrower’s failure to mediate in good faith authorizes the continuation of the foreclosure proceeding while the violation of good faith by the lender blocks the foreclosure sale and may constitute a defense to a non-judicial foreclosure sale.

In terms of the documentation obligation, the Washington statute eschews vagueness by enumerating the desired documents. It requires the lender to timely furnish, e.g., the loan balance, mortgage note and deed of trust, proof of note ownership, statement of arrearages, data used for NPV, recent appraisal, excerpt of pooling and servicing agreement if applicable, list of outstanding fees and charges, and an explanation of any denial of a foreclosure alternative. The borrower must provide documents concerning income, debts and obligations, as well as tax returns.

A credible argument can be made that document requirements amount to no more than preparation for informed participation in the mediation (Carter, 2002) and do not impact party freedom to refrain from settlement. This requirement admittedly restricts the withholding of documents, which arguably may constrain a strategy to weaken the other party's position. Otherwise, producing documents does not, in and of itself, dictate what, if any, settlements are to be undertaken, nor does the document exchange oblige the parties to act on the basis of the documents produced. The same cannot be said about a provision that obliges the mortgagor to cooperate with a loan program or the mortgagee to provide a loan modification based upon NPV and ANR calculations: these read as apparent bans on settlement rejection by one party or the other under certain conditions.

Mediation values and the enforcement of participation requirements: Current data suggest that compliance with mediation remains problematic. Nevada's Foreclosure Mediation Program found that lending banks "failed to participate in good faith or were not complying with other aspects of the mediation law" in 42% of completed mediations (or 5,771 cases) during the two-year period ending September 2011 (Morgenson, 2012, February 12, p. 5). The percentage of mediations beset by lender non-compliance rose during the six months prior to February 2012 (Morgenson, 2012, February 12).

The Washington statute fashions consequences for party satisfaction of its mediation requirements by making such satisfaction a necessary condition for further foreclosure action. A party's failure to live up to requirements for documentation or for physical presence of an authorized participant, for instance, will preclude the party's desired foreclosure result – in short, absent satisfaction of necessary mediation requirements, the party loses the foreclosure dispute. Hence, the mortgagor's deficient compliance means the foreclosure moves forward; for the under-complying mortgagee, the foreclosure remains stalled. Although compliance's potential effect on foreclosure may influence parties to satisfy the participation requirements, influence is not the same as coercion.

Lightening the mediator's enforcement burden by encouraging compliance through economic compensation and rewards: The enforceability of the mediation agreement is an important advantage of the mediation process, opening the door to litigation with its attendant consequences, including penalties. The Washington statute, for instance, expressly provides that failure to comply with mediation requirements constitutes a defense to foreclosure. Nevertheless, the threat of litigation is not unique to mediation and need not implicate the independence of mediation participants any more than it would for other contracting parties.

Other means of inducing cooperation that are compatible with mediation values may prove a valuable addition to the mediation process. Economic awards to compensate parties for actual losses caused by violations of participation requirements can encourage compliance without the compulsion associated with penalties (Carter, 2002). In this respect, it is noteworthy that a November 2011 review of mortgage servicers' foreclosure records, instigated by federal banking regulators, allows homeowners to receive compensation for financial injury after an independent review of their foreclosure (Silver-Greenberg, 2012, April 2).

Additionally, the usefulness of rewards to influence behavior is well-documented, and its application to foreclosure mediation may reinforce party cooperation. Precedents for this approach in the foreclosure context is provided by the Massachusetts foreclosure statute, which rewards the lender for a good faith effort to negotiate a foreclosure alternative (that earlier proved fruitless) by reducing the right-to-cure period from 150 to 90 days (M.G.L. ch.244 §35A (b), effective until January 1, 2016). DC uses the reward of second chances to mitigate penalties and elicit cooperation by providing that a lender who fails to mediate in good faith shall be subject to a fine and remain bereft of a Mediation Certificate "until the lender is subsequently determined to have participated in the mediation in good faith" (DC Municipal Regulations 26C c. 27).

The promise of access to a lost note procedure may be another way to reward compliance. Nevada's procedure for dealing with the lost document issue requires the party to either "obtain a court order stating that it has complied with the UCC's requirement for proof of a lost note" or, in a non-judicial foreclosure, to record a notarized affidavit describing "the prior beneficiaries, the status of possession of the note, the authority of the trustee to exercise the power of sale, and the chain of title and recordings of beneficial interests" (Walsh, 2012, p. 33). Perhaps access to a rigorous lost note procedure can be used to reward a defined measure of party compliance.

The use of rewards to reinforce compliance instead of penalties to reduce non-compliance requires understanding party motivations in order to be effective. Analyses have demonstrated the greater economic benefits of loan modifications as compared to foreclosure (Walsh, 2009). Yet, lender resistance to loan modifications persists, indicating that the financial savings achieved through loan modification are insufficient to overcome lenders' preference for foreclosures. A more satisfactory explanation of lenders' preference for foreclosures over loan changes is needed. In sum, greater insight into the motivation underlying parties' resistance to cooperating in mediation is necessary to generate an effective reward structure. That insight may be gained with the help of experienced and informed analysts, experts, and practitioners as well as through additional research.

The mediator's role in enforcement and its effect on neutrality and confidentiality: Mediation confidentiality protection is provided by Massachusetts in M.G.L. ch.233 §23C, which classifies communications during mediation and the mediator's memoranda, work product, and case files as confidential material not subject to disclosure in judicial or administrative hearings. Presumably, in Massachusetts, foreclosure mediation material would be subject to this law unless otherwise stated. DC expressly provides that, with the exception of documents that must be recorded or publicly available, mediation statements/information are confidential and not available for public inspection, cannot be used for non-mediation purposes or for any legal

proceeding apart for actions to enforce its foreclosure mediation law unless that information can be obtained from non-mediation sources. Foreclosure mediation programs, like those in Washington and the District of Columbia, which call on the mediator to determine party compliance for the certification needed for foreclosure, may impinge upon mediation confidentiality.

The Washington mediator must provide a written certification to the department and to the parties which identifies participants, describes the outcome, indicates whether parties mediated in good faith, describes the NPV, and provides a copy of the NPV data. The concern arises that confidentiality may be compromised by the exposure of information about the nature of the party's participation by the mediator's certificate. Greater confidentiality protection would be achieved if the basis of the certification – the mediator's compliance determination – were recorded in confidential files, made known only to the parties and qualified program staff, and omitted from exposure in the mediation certificate.

Under the Washington statute, the lender may rebut the borrower's defense of the lender's violation of the good faith duty to mediate in litigation to block a foreclosure action. Again, confidentiality may be breached if the mediator were called upon to testify about the basis for the determination of the party's compliance with the good faith obligation.

The critical role that the mediator's compliance determination plays in authorizing the continuation of foreclosure transforms both the compliance determination and the mediator's potential testimony about that determination into relevant, material evidence that may be critical to a just adjudication of a legal challenge to the mediation outcome or to foreclosure. Efforts have been made to shield the mediator from involvement with litigation over mediation matters. In DC, "a Mediator cannot be sued or subpoenaed in any legal proceeding" (DC Municipal Regulations 26C c. 27). In Washington, the parties have to sign a waiver before the mediation is scheduled "stating that neither party may call the mediator as a live witness in any litigation pertaining to a foreclosure action between the parties" (RCW 61.24.163). Connecticut goes so far as to forbid use of the mediator's determination to appeal a foreclosure judgment.

Nonetheless, an unqualified bar to the admission of such evidence could create an injustice. Nevada confronts this eventuality by deeming mediation materials to be confidential and inadmissible to court proceedings except for judicial review of good faith determinations, enforcement of the mediation agreement, and the issuance of appropriate sanctions. Washington allows that the mediator's certification may be deemed admissible evidence, subject to court rules, in any litigation pertaining to a foreclosure action between the parties. The model Unified Mediation Act takes the tack that mediator communications about mediation matters, such as parties' good faith participation, are prohibited from disclosure in court with an exception carved out for an *in camera* examination of confidential mediation materials that provide evidence for the enforcement of a mediation agreement, evidence that is otherwise unavailable and the need for which outweighs the interest in maintaining confidentiality (Hoffman & Shemin, 2005, July 18).

Lightening the mediator's enforcement burden by making the mediator's duty to report on participation requirement tantamount to a ministerial task: Incursions into mediator neutrality

brought about by the mediator's monitoring duties are minimized when they are ministerial, even mechanical, rather than discretionary. The vagueness of New York's requirement that "both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible" (NY CPLR 3408) is an implicit invitation to the mediator to exercise discretion in recognizing and evaluating the relevance of various behaviors. Conversely, the participation requirements regarding documentation and attendance as in Washington lend themselves to assessment via check list on the Maine model. The Maine mediator reports on the foreclosure mediation by filling out a form (see Appendix A) that involves, in part, checking the appropriate items related to such matters as the applicable outcome alternative – e.g., final settlement, temporary agreement, no agreement, additional mediation needed (plus reason), no mediation because defendant was not owner, no mediation due to nonappearance of party/ party representative – and applicable agreement details – such as reinstatement of mortgage, repayment, principal forbearance, waive fees/penalties, loan modification – and so on.⁵ The mechanical, objective assessment of defined, specific actions that is involved in a check list format avoids the chilling effect on the mediator's effectiveness in facilitating collaborative problem-solving that could result from the mediator's exercise of discretion in monitoring compliance. Otherwise, "[i]f parties are worried about the mediator's evaluation of their participation, the flow of information may be stemmed" (Carter, 2002).

Lightening the mediator's burden by providing access to housing counseling: Foreclosures usually involve lenders – with institutional, informational, and economic power – and homeowners – with limited access to information, procedural knowledge, and financial support. The imbalance of power between homeowners and lending institutions can pressure mediators to modify their non-judgmental, non-advisory role and become more directive in an effort to offset the disparity. Access to housing counseling and legal assistance can do much to relieve this pressure.

Nevada addresses the challenge of unavailable counseling services by allocating a percentage of its mediation monies for such assistance. Philadelphia has a more ambitious approach: it not only ensures access to housing counseling by supplying financial support to housing counseling agencies, it also maximizes homeowner use of the counseling through mandates and homeowner document requirements. Once homeowners are notified about dispute resolution, Philadelphia requires them to contact a hotline for references to a housing counseling agency and to provide certification of that contact. Homeowners are further required to submit a loan work-out plan that they developed with the assistance of a housing counseling agency. Washington, too, mandates that homeowners avail themselves of housing or legal counsel by requiring that the homeowner go through a housing counselor or attorney to request mediation and by providing free foreclosure prevention counseling to homeowners. Washington funds this program through fees paid by lenders and servicers that conduct more than 250 foreclosures annually in the state. The positive impact of mandatory housing counseling on mediation outcomes is indicated by a reduced likelihood of foreclosure. Data indicates that homeowners in Philadelphia's Foreclosure Diversion Program who received housing counsel were 1.7 times more likely to avoid

⁵ Washington also uses a form for its mediator report, available at <http://www.commerce.wa.gov/DesktopModules/CTEDPublications/CTEDPublicationsView.aspx?tabID=0&ItemID=10236&Mid=846&wversion=Staging>

foreclosure than homeowners without help from a housing counselor (Walsh, 2012; The Reinvestment Fund, 2011).

Lightening the mediator's burden with changes in foreclosure law that aim to minimize foreclosures: Foreclosure laws that seek to reduce foreclosures can lighten the mediator's burden to monitor party compliance by way of certain foreclosure prerequisites and enforcement measures. Consider the recently passed modification of Massachusetts' foreclosure law, M.G.L. ch.244, in Chapter 194 of the Acts of 2012. For one, it requires the creditor to demonstrate its status as the current mortgage holder or the assignee, which has the potential to bolster both the exchange of documentation during foreclosure mediation as well as the legitimacy of the foreclosure process. In the case of "certain mortgage loans," this law, as modified, further requires the creditor to offer a loan modification based upon a specified outcome of a compliant analysis of the NPV and the ANR. As a result, by forcing the creditor to conduct an NPV analysis and to act upon it, a framework favorable to foreclosure mediation is created in that it incentivizes the creditor to consider foreclosure alternatives thereby increasing the likelihood of a mediation agreement. The enforcement of these requirements is achieved by making compliance a necessary condition for a foreclosure sale, that is to say, necessary for publication of the notice of sale.

Foreclosure mediation program funding

Funding to support foreclosure mediation directly impacts program viability as well as party participation. Inadequate funding may hamper access to dispute resolution services for eligible candidates. With \$60,000 in state HFA grants and some private funding, New Hampshire's foreclosure mediation program handled only 100 foreclosure cases during its first 18 months. Foreclosure mediation programs that depend on special funding are vulnerable when funding dries up: New Hampshire's program is currently defunct. The efficacy of New York's court-related settlement program is under threat since the state has not replaced expiring federal funding for housing counseling and attorney assistance to homeowners (Glaberson, 2012, February 23).

Legislative appropriations support some foreclosure dispute resolution programs: Connecticut appropriated \$5 million for its judicial foreclosure mediation program. Other programs are sustained through a combination of filing or recording fee surcharges and party fees. Nevada conditions participation in mediation upon the payment of a \$400 fee for mediator services to be shared equally between the mediating parties and demands an additional \$200 surcharge on filing of notice of default in land records, with \$45 going to the mediation program, \$150 to the general fund, and \$5 for legal services. Requiring some monetary contribution from the homeowner to the mediation process may heighten homeowner involvement and lessen the perception of mediator bias in favor of the party who pays the fees. The drawback to party fees, however, is that they may discourage dispute resolution participation, particularly on the part of financially strapped homeowners.

A past Massachusetts bill proposed a surcharge on the filing fee for foreclosure complaints filed under the Service members Civil Relief Act and a fee structure. However, there was no provision for start-up funding, which is essential for the proper design and launch of a successful state-wide mediation program of this magnitude. Reliance upon a fee structure for the start-up phase is

impractical since filing fees and/or party fees will take time to accumulate in an amount sufficient to design and launch a foreclosure mediation program. The difficulty in finding funding for foreclosure mediation program design, start-up, and implementation has contributed to the delay in establishing a foreclosure mediation program in Massachusetts. In a recent statement, the Massachusetts Banker's Association cited potential costs bankers might bear for mediation sessions as a reason for opposing the pending legislation.

A state appropriation to subsidize mediation may help avoid fee shifting. Fee-shifting – the transfer of the lender's mediation costs, including attorney fees, to the homeowner – may be detrimental to homeowner participation. The economic burden for mediation is thereby effectively placed upon the single party least able to afford it. New York forestalls fee-shifting with a prohibition against requiring payment from the other party for the party's costs of participating in a settlement conference.

Accountability of foreclosure mediation program

Research and evaluation of foreclosure mediation programs is critical to determine which program characteristics produce the best outcomes and which are less successful (Constantino & Merchant, 1996; Centers for Disease Control and Prevention, 2011). Although some research has been conducted, more rigorous and regular evaluation of foreclosure mediation programs is needed (Clark & Olmos, 2011, December).

Evaluation and reporting requirements are critical to generate information that will permit a performance-based assessment of the success of a foreclosure mediation program as well as the desirability of changes to the program and to the enabling statute (Walsh, 2012). The absence of reporting requirements for such programs is not uncommon. Neither Connecticut's nor New York's statutes incorporate such requirements. Maine and Washington though require an annual report on the program's performance.

Maine collects data on the number of homeowners who are notified about mediation, who attend mediation, and who receive legal counseling or legal assistance; and on mediation outcomes – such as the number of loans restructured, number of principal write-downs, interest rate reductions and number of homeowners who default on mortgages within a year after restructuring. Washington's annual report to the legislature contains statistics regarding the program's performance and outcomes (such as the number of borrowers referred, data concerning good faith participation and loan modifications or restructuring – e.g. the numbers of loans restructured or modified, the change in the borrower's monthly payment for principal and interest and the number of principal write-downs and interest rate reductions – and the number of defaults by participating borrowers within the year) as well as recommendations for changes to mediation statutes.

Delaware delegates data collection to a legal services organization for statistics on mediation program workouts that avoided the loss of the home, mediations that did not result in workout, workouts reached outside program that avoided loss of home, workouts reached outside of program that did not avoid loss of home, the number of homeowners who qualified for program or who failed to appear and did not reach a prior agreement with lender, the number of lenders who did not appear at mediation session and did not reach a prior agreement with homeowner.

Nevada has addressed the program evaluation issue by setting up a Court Advisory Committee to do the evaluation and having the mediation administrator track statistics and report them on-line.

Before conducting evaluation and data gathering, there must first be agreement on which data points and categories of data are to be collected so that programs are measured using the same indicators (Clark & Olmos, 2011, December). A set of indicators needs to be developed prior to data collection.

Clear guidelines that maintain participant confidentiality and also permit the collection of aggregate data to facilitate program evaluation help to minimize concerns about violating mediation confidentiality (Clark & Olmos, 2011, December). As data collection may expose proprietary information belonging to creditors or confidential personal situations of individuals and families affected by foreclosure, research and evaluation conducted according to the standards of an Institutional Review Board will ensure the protection of human subjects involved in the data collection.

Assessment is most effective when the design and implementation of data collection is based on a sound evaluation metric. A U.S. Department of Justice study recommended the evaluation of foreclosure mediation programs based on the following metrics (Clark & Olmos, 2011, December):

- Program characteristics
- Foreclosure rate
- Participation rate
- Outcomes
- Sustainability
- Administrative impact
- Access
- Availability of counseling and legal services

A uniform framework for foreclosure mediation evaluation is emerging. The U.S. Department of Justice study contains a preliminary evaluation chart for assessing foreclosure mediation programs, which a Massachusetts foreclosure mediation program may consult and customize to reflect its evaluation needs (Please see Appendices B and C).

The evaluation of the foreclosure mediation program that comports with the U.S. Department of Justice's recommendation establishes the following:

1. Program implementation and monitoring;
2. Program improvement and continuous development of an effective program model;
3. Accountability;
4. Short and medium-term impacts; and
5. Learning

At a minimum, the evaluation answers the following questions (Centers for Disease Control and Prevention, 2011):

- Process-driven questions

Is the program implemented efficiently and accountably? This question addresses, among other things, accountability in program implementation, user satisfaction, program administration efficiency, effectiveness, and responsiveness.

- Impact-driven questions

How has the program impacted borrowers/families, lenders, and the state in general (short-term impact)? This question refers to impact on families and individuals, institutions, and communities.

- Other questions

What are the lessons learned through the program? This would include identifying best practices, reflective thought, and innovations.

Finally, the U.S. Department of Justice also recommends supporting research and evaluation of state and local foreclosure mediation programs with funding and technical assistance (Clark & Olmos, 2011, December).

Design and administration of a foreclosure mediation program

A successful program is one that fulfills its mission, its overarching purpose or goal. The likelihood of success is maximized when the design of the program maps out a pathway to achieving that goal, and the implementation of the program proceeds accordingly (Doran, 1981; Institute on Conflict Resolution, 2001; Meyer, 2003). Such a pathway is spelled out by a design model that sets forth a program's goals, objectives, activities, outputs, outcomes, performance measures, and indicators of success. Thus, once the overarching goal of the program is identified, the objectives needed for the accomplishment of the program's mission are ascertained. Objectives prove more effective when they are specific – i.e., clear about the expectations, personnel, and activities involved; measurable – i.e. involve concrete criteria for measuring progress; attainable – i.e., realistic and achievable; relevant – i.e. supportive of and aligned with other goals; and time-bound – i.e. grounded in a time frame with deadlines (Doran, 1981; Meyer, 2003). Activities and strategies that will be instrumental in realizing these objectives are selected and undertaken. In order to know that the program is proceeding appropriately and to recognize that goals have been met, desired outcomes are specified, and indicators of success and performance measures are adopted and applied. The Massachusetts Agricultural Mediation Program is an example of this design model.

The Massachusetts Agricultural Mediation Program, designed and administered by MOPC/UMass Boston and sponsored by the U.S. Department of Agriculture (USDA) and the Commonwealth since 2002, was established to help prevent rural housing foreclosures, keep farms viable, and preserve farmland. The program objective involves providing mediation services for a specified minimum number of USDA adverse decisions and agricultural credit disputes. The activities undertaken by the program include mediation services and case management; maintenance and development of relationships with other service providers such as financial counseling and farm viability; management of the roster of mediators by, among other things, identifying qualified mediators, providing mediator training and continuing education opportunities, and monitoring mediator performance; and specified outreach and education to other agencies to increase referrals and to the stakeholder community to raise awareness of the

program. Enumerated outcomes consist of, e.g., increased capacity and infrastructure for agricultural mediation in the state and heightened visibility and support for the program by the USDA, legislators, and municipal officials. Outcome verification is provided through evaluation reports, participant feedback, etc.

The intricacies of the foreclosure process, the tendency of parties to avoid communication, and the high stakes involved present special challenges to devising an effective foreclosure mediation program. The design of a foreclosure mediation program that contains vigorous program policies and procedures can maximize participation of parties in foreclosure mediation, reduce delays to resolution/settlement, establish facts relevant to the foreclosure process, elicit cooperation for resolution/settlement, tailor mediation to the challenges posed by foreclosure disputes and provide for the responsible disbursement of public funding.

Foreclosure is a complex process demanding specialized knowledge and skill in collaborative problem-solving. The desired level of expertise is attained when mediation practitioners are qualified through a rigorous process and evaluated on the basis of their achievement of this level of expertise (Institute on Conflict Resolution, 2001; Constantino & Merchant, 1996). According to MOPC's experience qualifying and evaluating mediators for service on public contracts,⁶ qualification criteria for mediators to serve in a foreclosure mediation program may include the following: mediation training received (basic and advanced training and mentoring); documented training in ethical standards (e.g., those set out by the Supreme Judicial Court's Rules on Dispute Resolution); mediation experience (number of years of mediation experience and/or number of cases mediated during a specified period of time, experience mediating disputes in related areas such as landlord-tenant disputes or complex technical disputes); prior experience in foreclosure mediation; background or experience in relevant fields such as banking/credit/lending, accounting/finance, law, business management, counseling, real estate; work or volunteer experience in such related areas as civic activities, record keeping, negotiating contracts, and managing finances or businesses.

Suitable expert foreclosure mediators are those who have received specialized training. Specialized training is critical to delivering quality mediation (Institute on Conflict Resolution, 2001; Constantino & Merchant, 1996). Potential sources of training expertise may include experienced mediation practitioners, housing counselors, banking/credit/lending experts, accounting/finance experts, lawyers, business management experts, and real estate experts and others on mediating foreclosure cases as well as other individuals knowledgeable about identifying borrowers at risk of foreclosure and about recovery programs for case referral. According to MOPC's experience in rural home foreclosure cases, foreclosure mediators require the following basic skills/competencies:

- Ability to conduct an assessment of conflict and prepare each party to participate effectively in the mediation process.
- Ability to function as a neutral third party without showing bias towards any individual or group.

⁶ MOPC is authorized by its enabling statute to set standards for mediators working with the office. In this capacity, MOPC has designed and implemented several qualification processes for the selection of mediators to serve on court and public agency-sponsored program and projects.

- Possession and demonstration of strong communication skills including use of supportive listening and questioning techniques.
- Ability to create a supportive, safe environment when faced with people in conflict.
- Ability to assist parties in collaborative problem-solving, reality testing, and decision-making.
- Ability to assist parties in drafting durable and balanced agreements.
- Adherence to all ethical standards of mediation practice.
- Compliance with all terms/conditions of foreclosure mediation program.
- Completion of cases and required paperwork in a timely manner.
- Ability to provide case summaries, statistics and requested reports in a timely manner.
- Ability to provide information/referrals regarding foreclosure mediation program.

The successful implementation of state-wide mediation programs is enhanced by building on established rosters of qualified mediators. Existing state-wide dispute resolution infrastructure in Massachusetts has been utilized to recruit, train, and deploy both private and volunteer mediators to provide their services throughout the state. This type of arrangement currently exists in Massachusetts for the Parent Mediation Program, established in 2008 and sponsored by the MA Department of Revenue and administered by MOPC/UMass Boston in partnership with seven community mediation centers across the state.

Periodic evaluation of mediator performance ensures the delivery of high-quality mediation services (see Maryland Mediation and Conflict Resolution Office, 2009). Mediator performance can also be improved by providing opportunities for continuing education and establishing a community of reflective practice and mechanisms for the recognition of mediator achievements. Quality assurance is more readily achieved when it involves an integrated approach that builds on initiatives already undertaken by Massachusetts mediation programs and by foreclosure mediation programs in other states.

Successful mediation programs use an array of initiatives to educate both sides about mediation and its benefits. As the outreach practices of Massachusetts community mediation centers demonstrate, effective outreach and education may involve the availability via phone and email of foreclosure mediation program manager(s) and/or coordinators to answer questions from and provide information to parties and to conduct outreach about the program and associated services to local courts, housing authorities, local banks/lending institutions, real-estate businesses, legal/bar association, social service organizations, legal services organizations, schools/educational institutions, local non-profits/charitable institutions, religious organizations, local businesses, business/trade bureaus, local government institutions, Family Assistance Centers, and directly to families at local events, such as farmer markets (Massachusetts Office of Public Collaboration, 2013, January).

Additional outreach efforts that have been used by mediation programs, such as Massachusetts community mediation centers, to increase their visibility include designing, printing and distributing informational material and publications (Massachusetts Office of Public Collaboration, 2013, January).

The creation of clear guidelines that ensure the maintenance of participant confidentiality is a best practice. However, allowing reasonable disclosures of aggregate data to facilitate program evaluation is useful for assessing the implementation and impact of a foreclosure mediation program (Clark & Olmos, 2011, December). Measures taken by mediation programs (e.g., the Massachusetts Parenting Mediation Program) to protect confidentiality include eliminating identifying information and assigning a case tracking number during case intake for use throughout the mediation process as well as during program evaluation and research.

Recommendations for a state-wide foreclosure mediation program

The foreclosure crisis presents Massachusetts with a complicated problem for which there is no simple solution. Residential foreclosures tend to be lose-lose propositions. The borrower, along with his or her family, is deprived of their investment and their home while taking a hit on their credit rating. The borrower may also be among the millions of mortgagors who were victimized by dubious lending practices. Meanwhile, the lender, although instigating the foreclosure, faces financial loss through the diminished value of the mortgage debt and through foreclosure and property maintenance costs. The community and the state – the nation too – are negatively impacted as each foreclosed home not only increases the likelihood of neighborhood blight but also swells the inventory of unsold homes, dragging down the housing market and the economy with it. A multi-faceted, multi-pronged approach that is responsive to current difficulties while remaining forward-looking promises the greatest chance of success in meeting the foreclosure challenge of Massachusetts.

1. The complexity of foreclosure issues requires the state to undertake a multi-pronged approach to addressing the foreclosure crisis that includes the adoption of mediation as an important means of resolving foreclosure disputes between borrowers and lenders.

Massachusetts has proceeded thoughtfully in its efforts to rein in foreclosures, balancing the interest in curbing undue foreclosure delays with the need to mitigate the injury to foreclosed borrowers and to redress the injustice caused by unsound mortgages arising from dubious lending practices. The state's efforts to prevent foreclosures will be greatly enhanced were it to emulate the example of 26 other states to provide access to foreclosure mediation for all parties involving residential foreclosure across the state. "Well-structured foreclosure mediation programs that are designed to take advantage of available resources at the local, state, and federal levels can be valuable and even essential tools as jurisdictions around the country seek ways to combat the foreclosure crisis" (Clark & Olmos, 2011, December, p. 6). To that end, MOPC recommends that the state adopt foreclosure mediation provided by a state-sponsored foreclosure mediation program as a critically important tool in its toolbox of measures for handling foreclosures.

In turning to mediation, homeowners and lenders can expect to engage in a non-adversarial process that respects each party's interests and needs, addresses them in an even-handed way, and allows for the exploration of an array of foreclosure alternatives that could include but not be limited to loan modifications. Encouraging evidence for mediation's effectiveness in foreclosure cases has emerged out of foreclosure dispute resolution programs in Philadelphia and Connecticut (Walsh, 2012; Walsh, 2009).

2. All parties should find common ground in accepting mediation as a tool for collaborative problem-solving of the wicked problem that is foreclosure.

No single entity can resolve the foreclosure problem alone. Collaboration is required at all levels if satisfactory solutions are to be found. Common ground must be reached on the establishment of a foreclosure mediation program in Massachusetts. Further delay in the establishment of such a program prevents the state from reaping the full benefits of what appears to be a ripe moment to embrace the foreclosure mediation option on the table.

3. Implementation of a foreclosure mediation program should be undertaken by a neutral government entity and should be built on existing state-funded infrastructure.

Foreclosure is an adversarial process, and the assignment of a neutral entity to be involved with entry procedures, including the provision of notice, as well as with the administration, monitoring, and evaluation of the delivery of foreclosure mediation services would help to allay the suspicions and skepticism of parties about such a program. Hawaii offers an example where the burden of notice is shared by the lender and a neutral government body, viz. their commerce department. Massachusetts has a state office of dispute resolution that could act in this capacity.

Both borrowers and lenders may be unaware of the opportunities afforded by mediation or may harbor misconceptions about the process. Florida attributed the low success rate of its program in part to lender intransigence and the failure of borrower outreach to overcome borrower distrust (Assessment Workgroup for the Managed Mediation Program for Residential Mortgage Foreclosure Cases, 2009, December 28). Accordingly, the effectiveness of outreach and education efforts concerning foreclosure mediation would be enhanced if emanating from a neutral entity, and such efforts should be extended to both parties in the foreclosure action. Education outreach to borrowers should include access to housing counseling. The outreach conducted by Philadelphia's dispute resolution program – where workers visit program eligible properties – illustrates how adding personal contact to outreach conducted by the foreclosure mediation program can help yield high participation rates.

Massachusetts has existing state-wide mediation infrastructure in the form of community mediation centers that are particularly well-suited to providing mediation services, as well as conducting foreclosure mediation outreach, increasing accessibility, recruiting and training volunteer and private mediation practitioners and managing mediator rosters, conducting case coordination services and implementing mediator excellence programs. Enlisting the services of these centers as infrastructure in a foreclosure mediation program and leveraging their community ties on behalf of foreclosure mediation could do much to combat homeowner aversion to foreclosure-related initiatives and to promote homeowner participation in mediation.

4. Participation in foreclosure mediation by both creditors and borrowers should be maximized

Maximizing foreclosure mediation participation makes economic sense since it would increase the likelihood of foreclosure prevention while permitting economies of scale. Maximization efforts may include such initiatives as:

- Expanding access to mediation to parties in all residential foreclosures so as to accommodate changes in the foreclosure population, as demonstrated by the shift from a

predominance of mortgagors defaulting on inappropriate mortgages to those defaulting because of declining income;

- Adopting an entry procedure in which the election to mediate by either party to the foreclosure obligates the other party to participate in the foreclosure mediation process. Although maximum participation would be achieved with automatic mandatory mediation, an opt-in regime where the selection of mediation by either party triggers compulsory participation by the other party provides a reasonable compromise: it avoids the risk of minimal participation characteristic of completely voluntary mediation programs; it is consistent with the spirit of choice that infuses Massachusetts foreclosure law; it makes the choice to mediate available to both sides; and it allows settlement to remain voluntary;
- Devising initiatives to ensure that notice about the availability of mediation is actually effective.

5. Parties should be required to be prepared for mediation through, among other requirements, attending sessions with authority to make agreements and conducting a timely exchange and review of needed documents. Borrowers should also prepare for mediation by availing themselves of the assistance of housing counselors.

Settlement discussions are futile without the participation of disputing parties who have the authority to craft viable agreements. The media is replete with anecdotal accounts of mortgage servicers who ignore homeowner attempts to initiate discussions about addressing loan defaults and of homeowners who evade contact with their mortgage servicers in order to stymie the collection process (Brackey, 2011, January 10). Even-handedness demands that the requirement of settlement authority be applied to homeowner participants as well.

The foreclosure process rests on a number of mortgage-related facts, such as the identities of the parties to the mortgage, their obligations under the mortgage, the value and nature of the mortgaged property, and the sums of money involved – of the loan, of payments made and payments missed. The validity of the foreclosure process requires verification of these facts, which can be accomplished through foreclosure mediation demands for specified relevant documents from the lender and the homeowner. The greater the number of the necessary documents supplied by the parties, the more solid will be the foundation for resolving foreclosure issues: the legitimacy of the foreclosure claim can be tested and the likelihood of a viable alternative that will avoid re-default can be realistically assessed. Indeed, the very process of fulfilling the document requirement will increase party preparedness for mediation.

Data generated by dispute resolution programs that incorporate mandatory housing counseling show that the incidence of foreclosure is reduced when borrowers obtain housing counseling. To that end, the nexus between Massachusetts' network of community mediation centers and other community organizations, including housing assistance agencies, can be leveraged to supply borrowers facing foreclosure with the needed housing counseling.

6. Parties should be required to comply with program requirements in good faith, and failure to so comply should be attended by specified consequences.

Cooperation with the mediation process is a *sine qua non* of effective dispute resolution. Good faith participation is needed to protect parties against abusive and inappropriate behavior, to prevent “one party [from using] mediation as a club with which to abuse the other,” and to create the conditions of effective mediation – collaborative problem-solving, flexibility, recognizing other perspectives, and so on (Izumi & La Rue, 2003; Carter, 2002). In order to provide advance notice to parties about behaviors to be avoided, good faith participation needs to be defined and disfavored behaviors specified.

The consequences for violating the duty of good faith participation should be specified. Such consequences may include resumption or delay of the foreclosure process, compensation for losses to injured party by the non-compliant party, the imposition of fines, equating repeated good faith violations with a deceptive act governed by M.G.L. ch.93A §2(a), and so on. Some scholars argue that consequences which consist of rewards for compliance and compensation for loss due to non-compliance comport best with the voluntariness and mutuality embodied by mediation.

7. The integrity of the mediation process should be maintained as much as possible by protecting the confidentiality of the proceeding and relieving the mediator of policing duties.

The confidentiality afforded to mediation matters by Massachusetts statute should include foreclosure mediation. In the event that justice demands judicial review of mediation materials, confidentiality may still be preserved by an *in camera* examination of materials that constitute evidence about the enforcement of a mediation agreement.

Assigning mediators the task of reporting on parties’ good faith efforts may propel them out of their role as facilitators to fulfill “quasi-policing” duties to the detriment of their neutrality and of the preservation of confidentiality (Izumi & La Rue, 2003). Incursions into mediator neutrality brought about by monitoring duties are minimized when such duties are ministerial, even mechanical and based on objective criteria, rather than discretionary, and when foreclosure laws enforce the fulfillment of requirements that seek to minimize foreclosures.

8. Parties should be protected from being disadvantaged by participation in mediation, with such measures as statutory assurance that participation in mediation does not amount to a waiver of rights, instituting foreclosure stays and tolling interest charges and fees during the mediation period, and arranging for an amount of time for mediation that avoids undue delays in the foreclosure process.

Where a period set aside for mediation stays the progress of foreclosure, foreclosure remains blocked until mediation is completed. In the event that the foreclosure progress is not stayed during mediation, stalling tactics become a viable means of circumventing the mediation process, and a party’s motivation to engage in good faith mediation is diminished (Walsh, 2009). The accrual of interest and fees during the mediation period may discourage homeowner participation in mediation and should be suspended during the mediation period when foreclosure is stayed.

Foreclosure mediation is a process for addressing the interests of both sides of the foreclosure dispute and consequently benefits both lender and homeowner. Yet, the practice of fee-shifting places the economic burden of mediation on just one side – the homeowner – by transferring the

lender's mediation costs, including attorney fees, to the homeowner. Fairness is further offended when financial liability for a mutually beneficial process is passed on to the party least able to afford it. Fairness demands, then, that parties be responsible for their share of mediation's costs, and fee-shifting should consequently be forbidden.

The mediation period wherein foreclosure is suspended and interest charges and fees are tolled should be long enough for the parties to prepare for and participate in mediation but not so long as to unduly delay the foreclosure process.

9. Funding provided for the foreclosure mediation program should be sufficient to ensure the program's long-term sustainability.

A number of foreclosure mediation programs, like that in Nevada, are sustained by a combination of filing or recording fee surcharges and party fees. Some programs, e.g. Connecticut, depend upon appropriations alone. Massachusetts' particular circumstances should dictate the amount and sources of funding furnished in support of foreclosure mediation. By taking advantage of the community mediation center infrastructure in the state, start-up costs for the program would likely be lessened.

An initial state investment in foreclosure mediation program could help cover the costs of program design and help address the question of start-up funding that has caused significant delays in instituting a state-wide foreclosure mediation program in Massachusetts. An initial state appropriation would enable important foundational work like the recruitment of program staff, development of state-of-the art program policies, procedures, forms, and administrative and evaluation systems; contracting with existing state-wide mediation service-providers; establishing outreach and referral networks; training of mediators; and demonstrating benefits to all interests.

The payment of party fees may induce party commitment to participation. By the same token, such fees may depress mediation participation, particularly on the part of financially strapped homeowners. Yet, saddling one side with the obligation to pay fees while exempting the other side from that responsibility may encourage the belief that the mediator would be more receptive to the party paying the fees and so feed a perception of mediator bias.

In Massachusetts, for other types of cases, community mediation centers set sliding fee scales and/or establish funds designed to provide financial support to eligible parties for their participation in mediation. The establishment of a sliding fee scale for foreclosure mediation, which allows parties to be financially responsible according to their ability to pay, may preserve the perception of impartiality and even-handedness even as needy parties are accommodated. In addition, during a start-up phase, state funding could be used to subsidize the mediation fee costs for borrowers without shifting the costs to lenders in order to help encourage borrower and lender participation and promote education about the benefits of mediation. Funding from the state would help pilot-test the state-wide program until such time as a fee-based structure could cover all associated programmatic costs, particularly if the volume of mediations increases.

10. The foreclosure mediation program's performance should be assessed, and the results reported to the Legislature.

Data should be collected annually and the resulting statistics be reported to the Legislature. Reporting requirements are critical to generate information that will permit a performance-based assessment of the success of any foreclosure mediation program and of the desirability of changes to the program and to the enabling statute (Walsh, 2012). A set of indicators and an evaluation matrix for measuring the program's effectiveness needs to be developed prior to data collection. For a list of suggested indicators and an evaluation matrix for foreclosure mediation, see Appendices B and C.

Recommended programmatic features of an effective foreclosure mediation program:

11. The program should be designed and implemented according to a plan that maps out a pathway to achieving the program's overarching goal. Vigorous program policies and procedures should dictate implementation of the program.

The design of a foreclosure mediation program that sets out a program's goals, objectives, activities, outputs, outcomes, performance measures, and indicators of success and contains vigorous program policies and procedures can maximize participation, reduce delays, establish facts, elicit party cooperation, tailor mediation to foreclosure challenges and ensure responsible disbursement of public funding.

12. A highly trained roster of mediators should be established before the implementation of a foreclosure mediation program.

Suitable mediation practitioners must be identified and qualified through a rigorous process. These practitioners must receive specialized training from such established experts as experienced foreclosure mediators, housing counselors, banking/credit/lending experts, accounting/finance experts, lawyers, business management experts, and real estate experts and others on mediating foreclosure cases as well as identifying borrowers at risk of foreclosure and on recovery programs for case referral.

13. Mediator performance should be periodically evaluated to ensure the delivery of high-quality foreclosure mediation services.

An integrated approach to quality assurance, which builds on efforts that have already been undertaken in Massachusetts and foreclosure mediation programs in other states should be developed.

14. The foreclosure mediation program should take all necessary steps to conduct outreach to lenders and borrowers to educate them about mediation and associated benefits and to increase the utilization of mediation services.

Lenders may provide notice about foreclosure mediation services to the borrowers and the foreclosure mediation program administrator when embarking upon foreclosure proceedings. As part of the foreclosure mediation program's outreach initiatives, the administrator of the foreclosure mediation program can supplement the lender's notice about foreclosure and about the availability of foreclosure mediation with additional notice, contact, and process information, relevant forms to both lenders and borrowers. To make this a reality, the foreclosure mediation program will need assistance and collaboration from lenders and associations representing lenders (see NH foreclosure mediation was discontinued October 26, 2011). This collaboration would depend, in large part, on the interests and good faith of the lender and on the neutrality of

the foreclosure mediation program administrator (See recommendation on neutral program administration above).

Further outreach and education about foreclosure mediation can also be accomplished by means of an informative website that provides foreclosure mediation program information to parties, including the names and contact details of the program manager(s). If the website is equipped with a service request portal, parties will be able to make self-referrals to the program or seek additional information and assistance directly from program staff. The foreclosure mediation program can also conduct direct outreach about the program and associated services.

As part of the mediation intake and screening process, the foreclosure mediation program can coordinate services to borrowers by identifying overall borrower needs and referring borrowers and their families to the relevant assistance. For borrowers and their families navigating the difficult foreclosure process with its attendant stresses, referral to social services, legal services, financial/bankruptcy/mental health counseling services and other forms of assistance (food and fuel assistance, daycare subsidies, etc.) will promote holistic recovery. The foreclosure mediation program can also provide information about other assistance available to individuals who are veterans, have a disability or are elderly.

15. The foreclosure mediation program should have guidelines to ensure the maintenance of participant confidentiality, but also permit collection of data.

To ensure confidentiality, a case tracking number can be assigned during case intake that will be used throughout the mediation process, as well as during program evaluation and research.

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Appendices

Appendix A: Maine Foreclosure Mediation Form

SUPERIOR COURT

, ss.

Docket No.

DISTRICT COURT

Location:

Docket No.

Plaintiff

v.

Defendant

FORECLOSURE MEDIATOR'S REPORT

☐ Interim Report ☐ Final Report

Date of Mediation _____ Name of Mediator _____

1. COURT ACTION

A. FOR FINAL REPORTS (Check one only)

☐ Resolved, case settled, plaintiff's counsel to file motion to dismiss/stipulation of dismissal on or before _____. If no motion filed, case will be dismissed, with/without (circle) prejudice, on _____.

☐ Unresolved by mediation, scheduling order to issue

☐ Nonappearance of Defendant(s), scheduling order to issue

B. FOR INTERIM REPORTS (Check one only)

☐ Unresolved, additional mediation session requested

☐ Next mediation scheduled for _____

☐ Next mediation session to be requested by _____

_____ (designate person and date)

☐ Partially resolved, temporary agreement reached, see section (6).

☐ Unresolved, Report of Noncompliance filed with this report.

☐ Other _____

2. PARTICIPANTS (Provide full names)

☐ **Mortgagee/plaintiff** _____

☐ In person ☐ By telephone/video

☐ Mortgagee had authority to agree to a proposed settlement, loan modification or dismissal

☐ **Representative of mortgagee, such as a servicer** _____

☐ In person ☐ By telephone/video

☐ Mortgagee's representative had authority to agree to a proposed settlement, loan modification or dismissal

☐ **Mortgagee/plaintiff's counsel** _____

☐ **Mortgagor/defendant** _____

☐ **Mortgagor/defendant's counsel (if represented)** _____

☐ **Other (specify):** _____

3. PARTY AND/OR COUNSEL ACTION

(If any further action is required of parties or counsel, such as a party's need to file with the court and exchange with the other party certain information before the next mediation session, the mediator should indicate that here in detail, including setting deadlines for action)

4. MEDIATION OUTCOME (Check one only)

☐ **Final settlement agreement reached during mediation**

- ☐ Temporary agreement reached during mediation
 - ☐ Temporary agreement reached before mediation
 - ☐ Agreement on some issues, but mediation did not resolve the action
 - ☐ No agreement on any issues, mediation concluded
 - ☐ Additional mediation needed after the parties file with the court and exchange with each other more information
 - ☐ Additional mediation needed because _____(name) needs to be included in the mediation
 - ☐ Additional mediation needed for other reason
Specify reason: _____
 - ☐ Plaintiff/defendant (circle) needs time to consider proposed agreement
 - ☐ Mediation not held because defendant(s) was not owner-occupant
 - ☐ Mediation not held because plaintiff/defendant/plaintiff's counsel/defendant's counsel (circle) did not attend
 - ☐ Other, specify: _____
-

5. PROGRAM REPORTING

A. FDIC NPV WORKSHEET (Check one only)

- ☐ Worksheet Completed and Attached

NPV Outcome: ☐ Pass ☐ Fail

- ☐ Worksheet not completed for following reasons:

B. COMMUNITY RESOURCES (Check all that apply)

- ☐ Defendant attended informational session.
- ☐ Defendant received legal counseling or assistance.
- ☐ Defendant received assistance in preparing forms for mediation.
 - ☐ From attorney or legal services employee.
 - ☐ From housing counselor.
 - ☐ From financial counselor.

C. AGREEMENT DETAILS, IF APPLICABLE (Check all that apply)

- i. ☐ Reinstatement of the mortgage
- ii. ☐ Repayment/Forbearance plan
- iii. ☐ Extension agreement
- iv. ☐ Principal Forbearance
- v. ☐ Waive fees/penalties
- vi. ☐ Loan modification
 - ☐ Temporary modification
 - ☐ Permanent modification
 - ☐ Interest rate reduction
 - ☐ ARM to fixed rate
 - ☐ Amortization extended
 - ☐ Principal reduction

- vii. ☐ Shared appreciation mortgage (SAM)
- viii. ☐ Deed in lieu of foreclosure
- ix. ☐ Short sale
- x. ☐ Cash for keys
- xi. Other _____

**6. FOR TEMPORARY (TRIAL) LOAN MODIFICATION AGREEMENTS
(Check all that apply)**

- ☐ Temporary agreement period ends _____
- ☐ Parties agree that no dispositive motions will be filed until _____
- ☐ Parties agree to extend the period for mediation to _____
- ☐ If terms of temporary agreement complied with, then plaintiff's counsel shall file a motion to dismiss/stipulation of dismissal of the action by _____
UPON FILING OF THAT MOTION, THIS INTERIM MEDIATOR'S REPORT WILL BE DEEMED TO BE A FINAL MEDIATOR'S REPORT.
- ☐ If terms of temporary agreement are not complied with, then either party may file a motion to return the case to the regular docket with the court by _____
UPON FILING OF THAT MOTION, THIS INTERIM MEDIATOR'S REPORT WILL BE DEEMED TO BE A FINAL MEDIATOR'S REPORT.
- ☐ Other _____

7. BRIEF NARRATIVE OF ANY AGREEMENT(S) REACHED

SIGNATURE OF MEDIATOR

DATE

SIGNATURE OF PLAINTIFF

DATE

SIGNATURE OF PLAINTIFF'S COUNSEL

DATE

SIGNATURE(S) OF DEFENDANT (1)

DATE

SIGNATURE(S) OF DEFENDANT (2)

DATE

SIGNATURE OF DEFENDANT (1) COUNSEL

DATE

SIGNATURE OF DEFENDANT (2) COUNSEL

DATE

WHEN COMPLETE:

**FILE ORIGINAL WITH COURT
SEND OR HAND COPIES TO PARTIES
AND SEND COPY TO
THE FORECLOSURE DIVERSION PROGRAM,
P.O. BOX 4820, PORTLAND, ME 04112-4820**

Appendix B: Indicators of success⁷

Quantitative Indicators

1. Scope of services:
 - Number of information and referral inquiries
 - Number of intakes
 - Number of mediations
 - Number of mediation sessions
 - Number of free mediation sessions with number of hours
 - Number of sliding-scale mediation sessions with number of hours
 - Number of persons served (includes all services)
 - Number of pre-court cases/mediations
 - Number of mediators trained in advanced foreclosure mediation skills
 - Number of hours of community education conducted
 - Number of hours of community outreach
 - Number of agencies center partnered with to deliver services/conduct outreach
 - Number of outreach materials developed
 - Number of outreach events conducted
 - Number of individuals participating/exposed to outreach
 - Number of community locations/neighborhoods where mediation services were offered
 - Number of organizations, agencies and groups referring foreclosure cases
 - Categories of sources of case referral (self-referrals, lending institutions, courts, community organizations, civic groups, government agencies etc.)
2. Demographics
 - Age, race, gender, ethnicity, income and education of borrowers/families served
3. Dispute outcomes
 - Number of agreements/partial agreements
 - Number of intakes proceeding to mediation
 - Number of mediated agreements
 - Agreement rate/settlement rate
 - Rate of compliance with agreements/partial agreements
 - Number of foreclosures prevented
 - Number of loans modified
 - Number of families remaining in their homes
 - Number of graceful exits
 - Number of families referred to community services for provision of stabilization assistance

⁷ See Massachusetts Office of Public Collaboration, 2013, January.

- Loan repayments
 - Short-sales
 - Money recovered by lending institutions
4. Other outcomes
- Value of property taxes accrued to cities and towns
 - Number of foreclosed and abandoned homes reoccupied by tenants/new owners
 - Reduction in expenses in maintaining foreclosed homes

Qualitative Indicators

5. Quality mediation services:
- Compliance with standards for mediator training
 - Quality of advanced foreclosure mediation trainings
 - Follow-up assessments of mediator performance after the mediators are added to the roster.
 - Evaluation conducted regularly and documented, including party feedback, observation, self-reflection, peer and/or supervisor feedback
6. Clients served:
- Instituting systems to track demographics of clients
 - Implementing a variety of methods to reach out to underserved segments of the community
 - Reaching out to a variety of referral sources
7. Mediator diversity:
- Mediator roster parity with population demographics of region served
 - Increasing minority representation among mediators
 - Responsiveness to needs of potential minority clients
 - Gender balance
8. Community awareness:
- Increasing visibility and utilization of foreclosure mediation through a variety of methods and venues
 - Meetings with lending institutions/real-estate businesses
 - Participation in community events, professional forums
 - Using media including social media
 - Participating at local/regional events
 - Fairs
 - Conferences
 - Presentations and/or membership in community organizations
 - Chambers of commerce
 - Housing authorities
 - Human service organizations

- Cultural organizations
 - Providing passive information through brochures and fliers made available in a variety of venues: lending institutions, real-estate businesses, town halls, veteran's organizations, courts, colleges
 - Lender and borrower education and education of the public at large
 - Conducting workshops for various groups (e.g., see above)
 - Networking with lending institutions, real-estate businesses, town officials, clergy, consumer advocates, other dispute resolution service providers etc.

Appendix C: Evaluation Metrics⁸

Metrics	Measures	Computations	Data Sources
Program Characteristics	<ul style="list-style-type: none"> • Eligibility requirements • Opt-in/opt-out structure • Participation • Paperwork requirements • Compliance structure • Stabilization assistance • Referral to community services 	Qualitative assessment	<ul style="list-style-type: none"> • Case management software • Applicable rules • Borrowers/families questionnaire
Foreclosure Rate	<ul style="list-style-type: none"> • Total number of foreclosures (owner occupied, single family, etc.) • Total number properties (owner-occupied, single family, etc.) in jurisdiction 	$\text{Foreclosure rate} = \frac{\text{total number of foreclosures in jurisdiction}}{\text{total number of properties in jurisdiction}}$	<ul style="list-style-type: none"> • Case management databases • Borrowers/families questionnaire • Records at mediation program

⁸ See Clark & Olmos, 2011, December.

Participation Rate	<ul style="list-style-type: none"> • Total number of foreclosures • Foreclosures eligible for intervention • Total program participants 	<p>Participation Rate 1= Number participating in program/Foreclosures eligible for intervention</p> <p>Participation Rate 2 = Number participating in program/ Total number foreclosures</p>	<ul style="list-style-type: none"> • Borrowers/families questionnaire • Case management database • Records kept by mediation program
Outcomes	<ul style="list-style-type: none"> • Total program participants • Total stabilization assistance payments made • Total referrals to counseling and other community services • Total agreements reached • Type of agreement. • 3. Lost Home (liquidation) • Deed in lieu • Short sale • Graceful exit • Retained Home (non-liquidation) • Loan modification • Forbearance plan • Partial claim - reinstatement 	<p>Outcomes 1 = agreements reached/total program participants</p> <p>Outcomes 2 =liquidation agreements/ total agreements reached</p> <p>Outcome 3 = non-liquidation agreements/total agreements reached</p>	<ul style="list-style-type: none"> • Borrowers/families questionnaire • Lender representative questionnaire • Mediator debriefing forms • Case management database • City/county databases • Records at mediation program

Sustainability	<ul style="list-style-type: none"> • Number of participants who retained home • Number of participants who remained in home for defined period of time after case closed 	<p>Sustainability = resolutions for which subsequent foreclosures, sales, mortgages, or other liens have been filed/ total number of resolutions (using at least one year time period from date of initial resolution)</p>	<ul style="list-style-type: none"> • Borrowers/families questionnaire • Mediator debriefing forms • Case management database • City/county databases • Records at mediation program
Administrative Impact	<ul style="list-style-type: none"> • Number of times each case “touches” program • Number of days cases take until resolution (i.e., agreement or reentry into foreclosure process) • Number of days cases take until resolution • The amount of time assistance was received at housing network 	<p>Administrative Impact 1 = median days cases take until resolution (agreement or reentry into foreclosure process)</p> <p>Administrative impact 2 = median number times each case “touches” program</p> <p>Administrative impact 3 = median days foreclosure process without mediation intervention</p>	<ul style="list-style-type: none"> • Borrowers/families questionnaire • Mediator debriefing forms • Case management database • City/county databases • Records at mediation program

		Administrative impact 4 = administrative impact 1 / administrative impact 3	
Access	<ul style="list-style-type: none"> • Total program participants • Participants' race/ethnicity • Participants' income • Loan to value ratio • Delinquency 	Computations require a reasonably sophisticated set of statistical procedures including statistical controls for variables relevant to access/outcome (e.g., extent to which a loan exceeds the value of the property, degree of delinquency, level of income).	<ul style="list-style-type: none"> • Borrowers/families questionnaire • Mediator debriefing forms • Case management database • City/county databases • Records at mediation program
Representation/Counseling	<ul style="list-style-type: none"> • Total program participants • Participants assisted by counselors • Participants assisted by lawyers 	<p>Counseling rate = Participants assisted by counselors / total program participants</p> <p>Representation rate = Participants assisted by lawyers / total program participants</p>	<ul style="list-style-type: none"> • Borrowers/families questionnaire • Mediator debriefing forms • Case management database • City/county databases • Records at mediation program