Mediation or Facilitation? Policy Issues
Alan White, Reporter

The Uniform Mediation Act ("UMA") has been adopted in 12 states: District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. Seven of these states, the District of Columbia, Hawaii, Idaho, New Jersey, Ohio, Vermont and Washington also have existing foreclosure mediation programs. To the reporter's knowledge, administrators and participants in foreclosure mediation in these seven jurisdictions have not addressed whether and how to apply their Uniform Mediation Act to the foreclosure mediation program.

The primary goal of the UMA is to preserve confidentiality of mediation discussions. To balance the party autonomy and communication privilege, the UMA also addresses the integrity and impartiality of the process by requiring mediators to disclose conflicts of interest. The UMA's conflict of interest provisions are completely consistent with foreclosure facilitation and readily applicable. The policy challenge is how and whether to extend confidentiality and privilege protections to foreclosure facilitation, while also permitting necessary judicial oversight.

Section 7 of the UMA prohibits mediators, with limited exceptions, to make any reports to a court or agency except to report whether a session was held and whether an agreement was reached. Section 304 of the draft Act, modeled on existing foreclosure mediation programs, requires the facilitation agency to determine whether facilitation should continue or has reached an impasse, such that foreclosure should proceed. That section also contemplates that the parties may ask a court to stop or permit foreclosure for cause, and that cause could presumably include the parties' compliance with the rules and procedures of the facilitation program. Professor Nancy Rogers, the Reporter for the UMA, has highlighted several important policy questions that should be addressed in our Article 3.

1. **Is foreclosure diversion (facilitation) a privileged mediation before a third-party neutral with no record; or is it a special master-type proceeding (perhaps under the state equivalent of FRCP 53), where the facilitator can hold a kind of pretrial settlement conference, on the record?**

A mediator governed by the UMA must keep all mediation communications confidential, may not report on the mediation except for very basic outcomes such as attendance and whether a settlement was reached, and is not empowered to impose sanctions, to delay or to accelerate foreclosure, or otherwise to twist arms. A mediator cannot report that a party failed to negotiate in good faith or to have full settlement authority, but could report that a party failed to attend. On the other hand, a special master or similar court-appointed officer may hold on-the-record discussions, report to the court on the proceedings, and can impel the parties to settle in a variety of ways, including the potential imposition of sanctions or simply

controlling the litigation process. Article 3 of the Act does not explicitly elect on or the other of these models, but as now drafted it would not be consistent with a pure mediation model. Under Section 304 of the Act, the facilitator must report whether the parties have reached an impasse, and either party may ask the agency or a court to shorten or extend the facilitation period, a request that would probably require disclosure of information that would be privileged in a UMA mediation. ..

2. **Should nearly all communications in the facilitation meetings be confidential and privileged, as they would be under the Uniform Mediation Act**?

The advantages of confidential mediation are that the parties can more freely discuss settlement alternatives, that mortgage servicers in particular might be less reluctant to make offers that would otherwise set precedent for other homeowners, and confidentiality will encourage candor and informality.

Some homeowners and mediators in existing foreclosure mediation programs oppose the confidential mediation model because they believe servicers will often try to wait out the process, failing to provide information and timely decisions on loss mitigation in the hopes that they can proceed with foreclosure, and that confidentiality prevents mediators from reporting violations to the court, recommending sanctions or recommending continuation of the mediation/facilitation process.

3. **Regardless of the form of facilitation/mediation process, what does the Drafting Committee intend with respect to the imposition of sanctions?**

The current draft in Section 601 provides for dismissal or injunction of a foreclosure action or sale on the basis of material violations, including violations of Article 3. In addition, Section 304 provides that a homeowner can request an extension of the 90-day facilitation period for cause, presumably including failure of the servicer to provide information or comply with facilitation program rules. Likewise the creditor or servicer may request termination of the facilitation process based on homeowner violations.

Homeowner advocates in states with existing programs have sought, and sometimes obtained, further sanctions for, e.g. servicers repeatedly attending mediation sessions without required documents or without having evaluated loss mitigation applications. Those sanctions have included, inter alia, the tolling of interest on the mortgage loan and payment of attorneys' fees.

Professor Rogers points out that sanctions should not be imposed without due process, and therefore cannot be based on hearsay evidence of what transpired during facilitation. Moreover, allowing a facilitator to testify about parties' noncompliance violates the goal of preserving confidentiality of the process. Even

with an objective standard that limits sanctions to violations of facilitation agency rules (such as not providing documents), evidentiary problems will arise.

4. Regardless of what the Drafting Committee decides with regard to the fundamental question of whether or not to adopt a mediation/special master/'hybrid' approach to the process, how shall we address existing state statutes that do use mediation and, in 12 states, have adopted the Uniform Mediation Act?

Given that the UMA is a product of the Uniform Law Commission it seems appropriate for our Act to make clear whether and to what extent the facilitation process in Article 3 is or is not governed by the UMA. Certainly we could incorporate the requirement of UMA Section 9 that facilitators disclose conflicts of interest, although that could be regarded by administrators of existing programs as adding burdens. Depending on how we answer questions 1 and 2, the Act should be drafted to be clear as to which portions if any of the UMA do or do not apply to foreclosure facilitation under Article 3.

5. Given the variety in approaches in existing state foreclosure mediation programs, what degree of uniformity should we seek in the Act?

The present draft is skeletal, calling only for the establishment of a program, some time frames for notices and completion of the facilitation process, and for foreclosure to be put on hold for a reasonable time while whatever process the state establishes runs its course. Although we were not able to complete the drafting of model best practices and rules, our current approach is to include those, once they are drafted, as optional for states, so that states with existing programs can enact Article 3 without having to rewrite their program rules, while states creating new programs will have a ready-made template for their rules.