RSI

MEMORANDUM

TO: Mortgage Foreclosure Committee of the Uniform Law Commission

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SUBJECT: Mortgage Foreclosure Committee Meeting Re: Dispute Resolution

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Below is a list of questions related to the creation and operation of a foreclosure alternative dispute resolution (ADR) program. These questions highlight primary issues foreclosure ADR practitioners have encountered since programs first developed in 2007.

The questions are phrased neutrally to allow the Committee to explore what best meets the Uniform Law Commission's goals. RSI believes that consideration of these questions provides a solid basis for structuring statutory language about ADR used in foreclosure matters.

Below each question are perspectives from various stakeholders, policy issues, and legal questions for further consideration. The perspectives do not reflect individual or collective personal beliefs. Rather, these questions and considerations stem from a two-year study of all foreclosure dispute resolution programs in existence. While they do not represent the full spectrum of opinions about what constitutes a "good" foreclosure ADR program, they do highlight the complex nature of making decisions about program characteristics and requirements. It is challenging to balance the interests of all stakeholders while pursuing intended goals. But, as ADR has proven in other contexts—farm-lender crisis, school shootings, natural disasters—an appropriate DR process can greatly speed resolution and community recovery after a crisis.

Note that while many programs are called mediation, many ADR approaches are being used. In this memo, "mediation" refers to a range of ADR processes used to address foreclosure matters, most of which are adapted from, do not exactly replicate, formal mediation.

This document has six sections: jurisdiction, ADR process, participation, preparation, procedure and outcomes. Together, these sections highlight issues raised at all stages of a foreclosure ADR program, from filing and notice to monitoring and evaluation. The final section is a compilation of sample documents, rules, and materials related to various points foreclosure ADR processes.

Thank you for this opportunity to share with the Committee. Do not hesitate to contact me with any questions.

Regards,
Heather Scheiwe Kulp
Staff Attorney at Resolution Systems Institute

QUESTIONS & CONSIDERATIONS

JURISDICTION

Is a uniform statute most useful as a state-wide statute or as a model that could be used within local governance structures?

- States may not pass a state-wide law created outside of the state, as property is considered a local issue.
- Some courts or other local entities have, and would create, local programs even if a state's legislature is opposed to modifying its current foreclosure practice. Offering the statute as a model that local jurisdictions could adopt would allow for greater proliferation of foreclosure ADR while preserving a state's interest in not creating a blanket program.

How would a statue apply to both judicial and non-judicial foreclosure states?

- States often have one primary mode of foreclosure. However, most non-judicial states offer the servicers the option of filing a foreclosure in the judicial setting. Judicial foreclosure is the preferred method in only one non-judicial state currently—Hawaii—because the servicers want to avoid the mandatory mediation component of Hawaii's non-judicial foreclosure process. Otherwise, servicers prefer non-judicial foreclosure.
- The process for foreclosing on a residential property varies considerably by state, with one of the most significant differences being whether foreclosures are processed through the court system. Will it be possible to create a uniform law that takes into account the variances that states want to preserve?
- The timeline for foreclosing is significantly different between non-judicial and judicial foreclosure states and even among judicial or non-judicial foreclosure states. States may have an interest in preserving their particular timeline, so is it possible to create a statute that describes the process without a timeline, or suggests a timeline? Or is the interest in a common timeline strong enough to codify a timeline?
- Servicers in non-judicial states prefer the shorter timeframe and are hesitant to develop a process that would lengthen that time.
- But, servicers in non-judicial states have also shifted foreclosure filings to the judicial *process to avoid an ADR program.*

CHOICE OF ADR PROCESS

Is the most appropriate dispute resolution process mediation and should the statute call the process mediation?

- To create an appropriate dispute resolution process, stakeholders must first identify the goals of the process, then determine what type of resolution mechanism will best achieve those goals.
- To most professional mediators, mediation is considered a process whereby a neutral individual assists parties in negotiating their own resolution of a dispute. Mediation is

defined by confidential communications, neutrality of the mediator, and voluntary resolution of any issues.

- In some states, mediation is defined by statute or court rule, so if the uniform law included the word "mediation," the term might not mean the same thing in every state.
- In some states, statutes bar mediators from doing certain things, like reporting party behavior or communication to an administrative agency or the court (*see, e.g.,* states that have adopted the Uniform Mediation Act: DC, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington). So, if the statute requires certain things of the mediators, it may conflict with existing state law.
- Even if there is not a statute or law defining the process, many mediators follow the Model Standards of Conduct for Mediation (promulgated by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution), which outlines a number of principles that form the basis of mediation practice. Some mediation programs have adopted these principles as their own code; thus, this statute may conflict with general principles many mediators follow, especially regarding mediator reporting, neutrality, and confidentiality (see *supra* Procedure).
- Some foreclosure dispute resolution programs have worked around mediation statutes and regulations by not calling the foreclosure dispute resolution process "mediation." Philadelphia termed its process "conciliation," Hawaii calls it "dispute resolution," Indiana uses "facilitators" instead of mediators.

PARTICIPATION

What notice of the ADR process should be required?

- All states have some sort of notice requirement that the home is in foreclosure and a sale has been scheduled, but not all states require notice of delinquency prior to the notice of foreclosure.
- Borrower advocates are using lack of proper notice as a defense to the foreclosure action.
- Is the purpose of a notice requirement to garner the highest borrower engagement, to fulfill a due process obligation, or to fulfill some other purpose?
- Many borrowers stop reading mail when they are in crisis, so they may not read the notice that their home is in foreclosure, even if it's from a third party (e.g., the court, a government administrative agency, a community mediation program).

What types of outreach garner the highest borrower engagement in foreclosure ADR?

- Notice of ADR availability sent by the servicer garners an even lower participation rate than notice from a third party.
- Phone notification results in a slightly higher rate of participation, but takes a lot of time. Borrowers also may stop answering their phone or change their phone numbers during crisis.
- Outreach materials need to be in simple, non-legal language that borrowers can understand without an attorney.

- Outreach materials should articulate a clear process for requesting or participating in ADR.
- Most programs include contact information for support services in outreach materials.
- The most successful outreach has been door-to-door contacts from community members. See, e.g., the door knocking campaigns in Philadelphia, Maryland, and Cook County, Illinois.
- The next most successful outreach has been face-to-face events where servicers, housing counselors, and legal services attorneys meet with many borrowers in one day.

Should the statute include language about opt-in and opt-out, or only recommend opt-out?

- Many studies have demonstrated that people are more likely to engage in programs that are opt-out (i.e., everyone is enrolled and if they do not want to participate, they must do something to indicate thus) than those that are opt-in (i.e., if people want to participate, they must do something to indicate thus).
- Some foreclosure ADR programs have changed from opt-in to opt-out since beginning (e.g., Connecticut, Indiana).
- Foreclosure ADR programs that are opt-out have an average participation rate of 70%.
- Foreclosure ADR programs that are opt-in have a variety of participation rates, but all are under 50%.
- Some states or localities do not have the resources to manage an opt-out program, without further resources. For instance, Cook County (Chicago) Mortgage Foreclosure Mediation Program has enough resources to mediate 90 cases per week, but there were over 50,000 residential foreclosure filings in 2010. Cook County's mediation program could not manage all 50,000 of those filings, or even half of those filings. So, in the absence of additional funding resources, creating an opt-out requirement would cripple a high-volume foreclosure state or locality.

Should a statute require that participants have authority to settle, and what type of authority should be required?

- Because the purpose of mediation is to explore options and, if agreed to by both parties, come to a resolution, it is important to have a person who can agree to a resolution involved.
- Even if the term "authority to settle" were to be included in a statute, each servicer interprets this term differently. Some servicers state that they have given their attorney the authority needed. Others will have a representative on the phone or in the room, but that representative will have authority up to a certain limit or authority only for a certain type of agreement.
- Often, a person will full authority to sign any agreement reached at the table is one of a small group of servicer executives. It would be incredibly difficult to get one of those few executives involved in all individual ADR sessions.
- Often, a mortgage has been bundled and sold to an investor or group of investors. Those investors have an agreement with the servicer (often called a Pooling and

Servicing Agreement) that outlines the agreements the investor allows its servicer to negotiate.

- Most servicers prefer/require any borrower listed on the mortgage and/or title to be present and to sign an agreement, if one is made. Some ADR programs, though, allow one borrower to represent the interests of all.
- Different servicer representatives may have different agreements for which they can settle. For instance, one department may send a representative who has authority to settle on a loan modification. But, if the mediation moves in the direction of a short sale, that person must redirect to a different servicer representative who has authority to settle on a short sale.

PREPARATION

What proof should be required to proceed with a foreclosure, such that the servicer would then be eligible/subject to an ADR process?

- Courts have some requirements of proof, but not all follow these requirements consistently nor have capacity to review all such documents before granting a judgment.
- Some courts have reviewed such requirements of proof and found them lacking. After several cases in which standing to foreclose was in question, New York State Chief Judge Jonathan Lippman required servicers' attorneys to file an affidavit stating that they know their clients' documents are true.
- In addition to demonstrating standing, this slowed down the foreclosure process considerably in New York. Many servicers withdrew their cases and are recently refilling them.
- Some foreclosure ADR programs require servicers to submit all or some of the following documents to prove standing to foreclose on and negotiate the mortgage: the original mortgage note, all assignments of the mortgage, the Pooling and Servicing Agreement, the mortgage title, the payment history on the loan, the amount of arrears and fees assessed, and others.
- Servicers argue that the production of some, if not all, of these documents does not impact standing or further the purpose of finding alternatives to foreclosure. In fact, they argue, requiring these documents increases costs for the borrower, as costs for any billable time is tacked onto the total costs and fees associated with the mortgage.

What documents, if any, must be exchanged beforehand, and to whom should they go?

- Any documents required to be submitted before or during ADR should further the ADR process' purpose. If a document production does not impact the ADR, programs should consider whether requiring the document actually hinders or delays the ADR process.
- Some foreclosure ADR programs require borrowers to submit documents prior to ADR and will not allow the ADR process to go forward if the documents are not submitted.
- Servicers need a complete, up-to-date loan modification application before they can review and make a decision about a loan modification, so documents are key to increasing alternatives to foreclosure.

- The variety and details of documents each servicer requires varies by loan type, by servicer, and sometimes by investor or borrower. So, a single packet of documents a program may require is rarely sufficient to complete a loan modification packet with all, even most, servicers involved in foreclosure ADR.
- Thus, some foreclosure ADR programs spend the first one to three mediation sessions on this document exchange process before they can discuss options. Mediators have become more used to this—that the first session is not usually a mediation of options—but some mediators see it as a waste of their skill to simply discuss what documents are still needed.
- Because of the complexity of documents for a loan modification, some programs find it helpful to provide support for borrower in gathering and completing documents. Programs must consider resources available to provide such support and compare that to the benefit of borrowers having such assistance.

PROCEDURE

Who should be responsible for monitoring and reporting on parties' compliance with ADR process requirements (e.g., document exchange, attendance, communication between sessions, etc.)? How should this role be articulated in the statute, if at all?

- Some argue that mediators are in the best position to oversee some programs' requirements of document exchange or good faith negotiations and that there should be an exception to confidentiality for this kind of oversight.
- In judicial foreclosure states, the court is the ultimate overseer, so the question is how many of the ADR program's requirements should the courts oversee. For example, should the court see all documents exchanged? Should the court have a hearing on eligibility for a loan modification before mediation? Should the court have a hearing on non-compliance with program requirements after the mediation is completed?
- In non-judicial foreclosure states, the Record of Deeds or a government agency is often responsible for overseeing that parties meet program requirements
- Many programs are using some sort of Certificate of Compliance, issued by an ADR program administrator, a neutral, or a government agency to demonstrate that the ADR requirements were met. This Certificate is filed with the Recorder of Deeds (non-judicial) or the court (judicial), but its contents differ considerably by state, depending on the ADR reporting regulations in each state.

Should the statute provide that sanctions be available for certain behaviors? What should those behaviors be? Who should decide on whether that behavior has occurred? Who should decide on the sanctions themselves?

- The Nevada Foreclosure Mediation Program (NFMP) requires mediators to recommend *that parties be sanctioned if they have not produced documents. Recent NFMP statistics* show that servicers are compliant 64% of the time with document requirements; the NFMP has the strictest document requirement of any program in the country. A recent series of court cases (*see, e.g., Pasillas v. HSBC Bank*, 255 P.3d 1281 (Nv. 2011)) held

that judges must honor the determination of the mediator and issue the sanctions the mediator recommends.

- Some foreclosure ADR program personnel believe this result to be a good one, that is, that mediators are the only people to see bad behavior in action and therefore, should be the ones making a determination about how to sanction that behavior. Such programs believe that if mediators are not the ones monitoring behavior, the mediation process will be less effective.
- Others, especially many mediators, believe this result renders mediators as judges. They believe requiring a mediator to monitor and report on behavior threatens mediator neutrality and discourages parties from making self-determined choices (which the Model Standards of Conduct for Mediators suggests is one of the core differences between mediation and adjudication). It shifts mediation to a more adjudicative process. Plus, parties are less likely to explore options if they believe their conduct in ADR may be judged and reported at any time.
- Mediators are more comfortable with objective determinations than subjective ones. Objective determinations include whether the parties appeared for ADR and whether the ADR process ended in an agreement, in next steps, or at an impasse. Such reports are allowed under the Uniform Mediation Act.
- Mediators have little to no experience recommending sanctions, let alone determining what those sanctions should be.

What time frames should the statute set for ADR to proceed?

- Time frames should allow for documents to be prepared and exchanged and for the servicer to review the documents and make a determination on a loan modification, ideally before ADR. Otherwise, the ADR session focuses on document exchange and not on generating options. Document exchange and review usually takes between 60 and 90 days.
- Servicers do not want to extend timelines to foreclosure, as they receive pressure from their clients to clear the backlog quickly.
- But, servicers also do not want to be landlords, so they have an interest in keeping people in the houses.
- The sooner in the foreclosure process loan modification applications are reviewed, the more likely a retention option will be.
- But, speeding up the process too much may not allow for borrowers to understand their options and make informed decisions about what options to pursue.

When in the course of default should the ADR process be (i.e., before or after foreclosure is filed)? Should the foreclosure process continue parallel to ADR, or should the foreclosure halt until the ADR process is completed?

- The media has reported stories in which a borrower was negotiating a modification with one servicer department while a different servicer department sold the home.
- Servicers and courts have an interest in decreasing the backlog in cases.

- Negotiations may not be completed before the foreclosure goes through, especially in non-judicial foreclosure states.
- If foreclosure is allowed to run parallel to ADR, servicers have an incentive to stall ADR.
- If foreclosure is not allowed to run parallel to ADR, borrowers have an incentive to stall the ADR.

Should the statute detail what calculations (e.g., Net Present Value, debt-to-income ratio, etc.) should be required to be used and/or disclosed in the ADR process to determine whether a loan modification is feasible?

- There is a public policy interest in having an open and transparent process, especially between two parties who have a contract with one another.
- Financial information may help parties involved evaluate their positions and decide what is best for them.
- Complicated calculations may confuse parties involved and not help them decide what is best.
- Most servicers have their own Net Present Value test, which evaluates whether the borrower qualifies for a loan modification based on income, expenses, and value of the home.
- But, many of these NPV tests are proprietary, and the servicer does not disclose them.
- The FDIC and FHA have their own NPV tests that some programs (Washington) require the servicers use, even though these tests are not the actual tests the servicer will use to evaluate the borrower for a loan modification.
- Garnering the calculations and the tests themselves takes additional time that may increase the ADR timeline.

What is good faith mediation, and should that be a requirement?

- Good faith is a subjective term that requires some evaluation on behalf of the person determining whether a party participates in good faith.
- Some programs try to define good faith through objective means: appearing for mediation and bringing the required documents.
- Others do not define good faith and allow mediators to make that determination themselves. This leads to a wide span of determinations and has increased litigation around ADR programs (*see, e.g.,* Nevada). The decisions in these cases have created more certainty around the definition of good faith, but the litigation itself has taken more time for the borrowers, thus decreasing further their chance of receiving a loan modification.
- Because good faith often depends on behavior or communication in mediation, and because mediation communications are privileged and confidential in many programs, requiring mediators to report may actually be in conflict with state laws.

Should the statute address the minimum qualifications of neutrals?

- A statute may articulate the background required of a mediator, including educational or experiential background.
- A statute may also address training requirements, though this could belong in a regulation or procedural section. Training of foreclosure mediators varies considerably, but all include at least a basic mediation skills training and a few hours of training in basic foreclosure concepts and law.

OUTCOMES

Should a statute determine whether multiple mediation sessions should be available? Should the statute require the parties to perform any tasks between mediation sessions?

- Very rarely does a mediation session end in a full agreement in the first session.
- Multiple sessions allow for work to be done in between sessions.
- Multiple sessions extend the timeline.
- Multiple sessions make it more likely that loan modification documents will grow stale and a new document exchange will be required.
- Multiple sessions allow people to think about and discuss their options with others, become educated, and make more thoughtful decisions.

Should a statute address such questions as: who decides when mediation is done, who prepares the mediation agreement, what options are available, and how programs should track and report their outcomes?

BEST PRACTICES & MODEL MATERIALS

- **Non-judicial statute**
  - Oregon's Senate Bill 1552 is a good model for non-judicial foreclosure mediation, though the final provision, which states that an emergency situation is the justification for creating a mediation program, is problematic because it presupposes that mediation could not be created otherwise.
- **Judicial statute**
  - Connecticut's Act Concerning Foreclosure Mediation is excellent.
- **Court rule**
  - Florida's Administrative Order, with amendments and guidance, is probably the best example of a court's foreclosure mediation rule. The Florida statewide program did not work for reasons beyond this rule.
- **City ordinance**
  - The D.C. ordinance is the most robust, though Providence, Rhode Island, and Springfield, Massachusetts, have also passed ordinances. Regulations were added to flesh out the D.C. ordinance.
- **Overall model**
  - Ohio offers all of its counties this free resource, which describes the steps for creating a foreclosure mediation program that is both based on best practices and tailored toward a specific locale. Here's a pdf book version of the resource.
- **Outreach materials:**
  - This site describes Maryland's extensive outreach, including hotlines, mailing campaigns, and door-to-door outreach.
  - Philadelphia has excellent outreach materials that outreach workers use when visiting homes that have received a foreclosure notice. These materials are available upon request.
- **Notice**
  - Experience shows that any notice of availability of mediation sent out by the servicers garners a far lower response rate than a notice sent out by a neutral third party, like the court or another government agency.
  - Borrowers see notices sent out by a non-recognizable third party as fraudulent, so these notices garner a lower response rate than a notice sent out by a respectable third party, like the court or another government agency.
  - The simpler the language, the more people respond. So, an invitation to request mediation should not be combined with other notices or warnings.
  - Connecticut's notice reflects these best practices.
- **Lender documentation of right to foreclose**
  - Nevada requires the trustee to provide the Program with the Notice of Default, the original or certified copy of the deed of trust (note), each assignment, each endorsement, appraisal and/or a broker's price opinion, the evaluative

methodology used to determine eligibility for a loan modification, and a proposal for how to resolve the foreclosure.
    - Along with these documents, D.C. requires the lender to sign an affidavit affirming the right to foreclose.
- **Borrower financial packet**
    - D.C. requires borrowers to complete a Loss Mitigation Packet along with a request for mediation.
    - McLean County, Illinois, invites borrowers to visit the court self-help center, where they can receive assistance identifying the forms the program requests and completing the financial packet.
- **Borrower educational material**
    - Connecticut's mediators give borrowers information about the foreclosure process in a pre-foreclosure meeting. I can obtain any educational material used there if interested.
- **Borrower screening and referral tool**
    - Washington state requires borrowers to receive a screening and referral from a housing counselor or attorney before starting mediation. The screening tool used is here.
    - McLean County, Illinois, has volunteer attorneys screen borrowers for loan modification eligibility before borrowers proceed to mediation. The form used is here.
- **Mediator guidelines and training requirements**
    - Washington State describes expectations of its mediators, in addition to a basic 30-hour mediation training and additional foreclosure mediation training, here.
- **Process outline**
    - Cook County, Illinois, has a flow-chart that shows the steps from first contact with a foreclosure hotline through filing an agreement with the court. Available upon request.
- **NPV and other analysis requirements**
    - Hawaii's non-judicial foreclosure mediation program requires, "A dispute resolution process conducted pursuant to this part shall use the calculations, assumptions, and forms established by the Federal Deposit Insurance Corporation Loan Modification Program Guide as set out on the Federal Deposit Insurance Corporation's publicly accessible website or a different program or process if agreed to by both parties and the neutral."
- **Agreement form with multiple retention and relinquishment options**
    - Cook County, Illinois, has a robust agreement form that allows for multiple options and provisions that parties may fill in. I can provide it upon request.
- **Evaluation forms**
    - Connecticut is developing a robust tracking and evaluation computer system for their program.
    - Cook County, Illinois, has very good evaluation forms that I can provide upon request.