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# A Tightrope Over Both Your Houses: Ensuring Party Participation and Preserving Mediation's Core Values in Foreclosure Mediation

Heather Scheiwe Kulp\*

## I. INTRODUCTION

### A. *The Foreclosure Crisis*

The headlines blister with news about the latest number of homes lost to foreclosure. In 2010, 2.9 million homes received foreclosure filings—a 35.7% increase from 2009 to 2010.<sup>1</sup> The foreclosure crisis only accelerated from there; in 2012, 9.5 million homes were at risk of default and 4 million homes had been in foreclosure since the crisis began in 2007.<sup>2</sup> A 2011 estimate predicted foreclosures would peak in 2013, but the effects—depressed housing prices, distressed neighborhoods, and downtrodden families—linger long after.<sup>3</sup>

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1. Corbett B. Daly, *Home Foreclosures in 2010 Top 1 Million this Year*, REUTERS (Jan. 13, 2011), <http://www.reuters.com/article/2011/01/13/us-usa-housing-foreclosures-idUSTRE70C0YD20110113>; Jon Prior, *3.8m Homes to Receive Foreclosure Filing in 2010*, HOUSING WIRE, June 9, 2010, <http://www.housingwire.com/articles/8044-realtytrac-38m-homes-receive-foreclosure-filing-2010>.

2. Nick Carey, *Americans Brace for Next Foreclosure Wave*, REUTERS (Apr. 4, 2012), <http://www.reuters.com/article/2012/04/04/us-foreclosure-idUSBRE83319E20120404>; Jessica Silver-Greenberg, *Despite Aid, Borrowers Still Face Foreclosure*, N.Y. TIMES, Feb. 22, 2013, at B1.

3. Joe Weisenthal, *Michelle Meyer: Home Prices will Continue to Plunge, and 2012 will be the Worst Year for Foreclosures in History*, BUSINESS INSIDER (Dec. 3, 2011), [http://articles.businessinsider.com/2011-12-03/markets/30471154\\_1\\_foreclosure-process-home-prices-housing-crisis](http://articles.businessinsider.com/2011-12-03/markets/30471154_1_foreclosure-process-home-prices-housing-crisis).

The foreclosure crisis certainly impacts the housing market, but localities are starting to understand that home loss touches every resident, regardless of the resident's homeownership status. Borrowers whose homes are foreclosed upon face years of drastically lowered credit scores, which greatly reduce the likelihood they will ever obtain a loan.<sup>4</sup> Neighborhoods with only a few foreclosures decreased housing values and increased the likelihood that more homes in the neighborhood would go into foreclosure.<sup>5</sup> Abandoned homes may entice drug dealers and other criminal enterprises to settle in a neighborhood.<sup>6</sup> Cities often increase property taxes to account for the estimated \$30,000 it costs to secure and maintain foreclosed homes.<sup>7</sup> Banks in areas with even moderate rates of foreclosure pull back available resources, further limiting the number of people—including stable middle- to upper-middle class families—who qualify for loans.<sup>8</sup> Home loss and decreased access to home ownership send communities into an economic tailspin. States need solutions to help these localities.

Early in the crisis, which first struck in 2007, states experimented with advising borrowers, hoping education would remedy, slow, or at least decrease the impact of the foreclosure crisis on local communities. In early 2008, NeighborWorks America, a congressionally created affordable housing and community development organization, gave grants to thirty-one state housing departments to train housing counselors in foreclosure mitigation.<sup>9</sup> In 2008, the hard-hit state of Arizona appropriated \$275,000 for at-risk borrower pre-foreclosure outreach and education.<sup>10</sup> To help communities buy back foreclosed homes and revamp them into affordable housing, Boston Community Capital, a non-profit community development financial institution, began Aura Mortgage Advisors to educate borrowers

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4. Les Christie, *How Foreclosures Impacts Your Credit Score*, CNN (Apr. 22, 2010), [http://money.cnn.com/2010/04/22/real\\_estate/foreclosure\\_credit\\_score/index.htm](http://money.cnn.com/2010/04/22/real_estate/foreclosure_credit_score/index.htm).

5. WILLIAM C. APGAR, MARK DUDA, & ROCHELLE NAWROCKI GOREY, *The Municipal Cost of Foreclosure: A Chicago Case Study*, HOMEOWNERSHIP PRESERVATION FOUNDATION, 55 (2005), <http://www.nw.org/network/neighborworksProgs/foreclosureresolutionsOLD/documents/2005Apgar-DudaStudy-FullVersion.pdf>.

6. *Id.* at 11.

7. *Id.* at 12, app. A.

8. Jody Shenn & John Gittelsohn, *Home Buying Gets Tougher as Lenders Restrict FHA Loans*, BLOOMBERG (Nov. 17, 2010), <http://www.bloomberg.com/news/2010-11-17/home-ownership-gets-harder-for-americans-as-lenders-restrict-fha-mortgages.html>.

9. NEIGHBORWORKS AMERICA, National Foreclosure Mitigation Counseling Program Location of Awardees and Projected Sub-grantees, (2008), [http://www.nw.org/network/nfmcp/documents/ProjectedRevised\\_LocationofNFMCAwardeesandSubGrantees.pdf](http://www.nw.org/network/nfmcp/documents/ProjectedRevised_LocationofNFMCAwardeesandSubGrantees.pdf).

10. *Foreclosures Affect Everyone*, DISTRICT 5 NEWSLETTER (Councilman Claude Mattox, Phoenix, AZ), June 2008, <http://phoenix.gov/district5/news/mc/d5June08.html> (last visited Aug. 17, 2012).

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and finance the purchase of foreclosed homes in late 2008.<sup>11</sup> Even with innovative responses, however, the problem did not abate. Cities, counties, and states sought a more comprehensive way to resolve the foreclosure crisis: foreclosure mediation.

### B. *Mediation to Mitigate the Crisis*

Mediation, a process by which a neutral third party facilitates discussion between parties about their conflict and their options for resolution,<sup>12</sup> appealed to those looking to manage the foray.<sup>13</sup> States and municipalities noticed how well mediation worked to manage other large-scale crises.<sup>14</sup> They also recognized that courts have successfully used mediation to reduce caseloads and help litigants reach their own resolutions for decades.<sup>15</sup>

Why has mediation been successful in those contexts? Qualities that distinguish the mediation process from other dispute resolution processes, set forth particularly well in the Model Standards of Conduct for Mediators, lend support to resolving these conflicts in a mutually satisfactory way.<sup>16</sup> Mediation, a voluntary and confidential discussion between disputants facilitated by a competent and neutral person, gathers invested parties to

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11. *Foreclosure Relief*, BOSTON COMMUNITY CAPITAL, <http://www.bostoncommunitycapital.org/what/foreclosure-relief> (last updated 2011).

12. Though processes vary, basic mediation includes: (1) describing the process, (2) telling the story from each party's perspective, (3) exchanging information, (4) identifying the issues, (5) bargaining and generating options, and (6) reaching an agreement. Jennifer Stepp, *How Does the Mediation Process Work?*, MEDIATE.COM (Feb. 2003), <http://www.mediate.com/articles/steppJ.cfm> (last visited Aug. 17, 2012).

13. See, e.g., Gerald Lebovits & Lucero Ramirez Hidalgo, *Alternative Dispute Resolution in Real Estate Matters: The New York Experience*, 11 CARDOZO J. CONFLICT RESOL. 437 (2010) (discussing the benefits of mediation for real estate situations, particularly foreclosures).

14. See, e.g., Joyce Hoelting, *Lessons Learned from 22 Years of Debt Mediation*, FED. RESERVE BANK OF MINNEAPOLIS (May 1, 2009), [http://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=4193](http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4193) (discussing the farm-lender mediation program begun during the 1980s farm crisis); Susan Zuckerman, *Mediation Program Helps Miss. and La. Rebuild After Katrina and Rita*, 61 (3) DISPUTE RESOLUTION JOURNAL 1 (2006), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_004328](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004328) (outlining the insurance mediation program initiated after Hurricane Katrina).

15. See an extensive database of state and federal court mediation programs at COURT ADR ACROSS THE U.S., <http://courtdr.org/court-adr-across-the-us/> (last visited June 3, 2014).

16. MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf) [hereinafter MODEL STANDARDS].

focus on one matter for a discrete period of time.<sup>17</sup> The mediator assists the parties in articulating their own needs and interests, and then works with them to develop a consensus that meets some or all of those needs.<sup>18</sup> A competent, impartial mediator helps balance power dynamics between parties and promotes equal communication.<sup>19</sup> The discussion is not limited to issues relevant in a court proceeding, so the mediator can also address emotions that may arise in a conflict, recognizing them and addressing the deeper issues to which they may point.<sup>20</sup> As a confidential process, mediation also promotes open, candid communication about a problem and its potential solutions.<sup>21</sup> Mediation provides parties with the ability to determine their own outcome, rather than have a court or other administrative body decide the dispute for them.<sup>22</sup>

These characteristics make mediation a promising process to mitigate the foreclosure crisis. Mediation offers an opportunity for personal communication between a lender representative—a servicer<sup>23</sup>—and a borrower. In mediation, the borrowers and servicers can explore options for settlement, including options for the borrower to retain his or her home. The neutral can help balance power dynamics between a large corporation and a single borrower by asking questions that an adjudicator cannot. A trained, impartial person can also acknowledge and work with emotions that may arise—anger, frustration, sorrow, etc.—whereas those emotions would be irrelevant in court. Finally, mediation is confidential; borrowers may not want their financial information public, and servicers may not want their offers to set precedent for other agreements.

Perhaps these benefits, coupled with the foreclosure crisis's place in the political limelight, are why foreclosure mediation programs are developing

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17. Michael Leathes, *Stop Shoveling Smoke! Give Users a Classic Definition of Mediation*, MEDIATE.COM (Sept. 2011), <http://www.mediate.com/articles/LeathesM3.cfm>.

18. *Frequently Asked Questions About Mediation*, ALLIANCE FOR EDUCATION IN DISPUTE RESOLUTION, [http://www.ilr.cornell.edu/alliance/resources/basics/Mediation\\_FAQ.htm](http://www.ilr.cornell.edu/alliance/resources/basics/Mediation_FAQ.htm) (last updated Oct. 12, 2005).

19. MODEL STANDARDS, *supra* note 16, at 4, 5.

20. Melinda S. Gehris, *Good Mediators Don't Ignore Emotion*, 46 NEW HAMPSHIRE BAR J. 28 (2005).

21. MODEL STANDARDS, *supra* note 16, at 6; Lawrence Freedman, *Confidentiality: A Closer Look*, in CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE (1985).

22. MODEL STANDARDS, *supra* note 16, at 3-4.

23. Throughout this article, I will use the term "servicer" to indicate a representative for the lender's interests. Sometimes, the representative is the original lender. Often, though, the original lender has sold the mortgage loan one or more times to other entities and/or has hired an entity to service the loan while the lender still holds the actual loan. Thus, the title "servicer" is more appropriate than "bank" or "lender" to indicate the party that will appear to represent the interests of those who own the loan debt. I will also use "borrower" to indicate a representative for the person or persons who received the mortgage loan.

at a much more rapid rate than other court- or government-approved mediation program. Since 2007, over twenty-five states, counties, or municipalities adopted a form of foreclosure mediation as part of the state's judicial<sup>24</sup> or non-judicial<sup>25</sup> foreclosure process.<sup>26</sup> While program structures, goals, and outcomes differ greatly, such general enthusiasm about mediation is refreshing, especially for longtime advocates who struggle to ignite interest in mediation programs as a pathway to justice for low-income individuals.<sup>27</sup> However, there is tension between foreclosure mediation program administrators' desires to ensure equal bargaining and worthwhile party participation, and the established role of the mediator.

The purpose of this article is to describe and analyze current efforts to address the nation's foreclosure crisis through the use of mediation, and to offer guidance concerning mediation program design elements that will best satisfy competing goals. In Part I, I describe the foreclosure crisis and current mediation programs. I highlight a particular tension between mediation's core values of confidentiality and self-determination and one foreclosure dispute resolution program's focus on holding parties accountable for undesirable behavior. In Part II, I describe three levels of accountability in current foreclosure mediation programs, from objective to subjective: attendance of specified parties, exchange of documentation, and participation in good faith. These contrast with the priorities and rules under which court-connected mediation has historically operated. Part III explores the inherent conflict between mediation's traditional values and foreclosure mediation programs that hold parties accountable for following a particular standard. Part IV proposes practical dispute system design elements that

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24. Some states require foreclosures to be filed in state court. Judicial foreclosure states that have developed local or statewide foreclosure mediation include: Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Maine, Maryland, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Wisconsin and Vermont.

25. Some states do not require foreclosures to be filed in state court. Instead, the foreclosure notice is sent directly to the borrower, then a sale of the property is scheduled. Usually, there is no government interaction in the process until the foreclosure sale is completed. Non-judicial foreclosure states that have developed local or statewide foreclosure mediation include: Arizona, the District of Columbia, Hawaii, Iowa, Massachusetts, Nevada, Rhode Island and Washington.

26. See Heather Scheiwe Kulp, *Foreclosure Dispute Resolution Program Models State-by-State*, RESOLUTION SYSTEMS INSTITUTE, [http://www.aboutsi.org/pfimages/ForeclosureMediationProgramModels\\_September2012.pdf](http://www.aboutsi.org/pfimages/ForeclosureMediationProgramModels_September2012.pdf) (last updated Sept. 19, 2012) [hereinafter *Models*].

27. See, e.g., Susan M. Yates, *Accessing Justice through Mediation: Pathways for Poor and Low-Income Disputants*, CENTER FOR ANALYSIS OF COURT ADR SYSTEMS, <http://courtdr.org/files/AccessingJustice.pdf> (last visited June 3, 2014).

will balance the benefits of accountability with the core values that make mediation a meaningful, effective dispute resolution method.

## II. MEDIATION AS A RESPONSE TO THE FORECLOSURE CRISIS

### A. *Mediation's Core Values and Recent Foreclosure Mediation Case Law*

Some states have codified mediation's core principles, including confidentiality,<sup>28</sup> by adopting the Uniform Mediation Act (UMA).<sup>29</sup> While the Model Standards mandates that mediators "maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law,"<sup>30</sup> the UMA further restricts disclosure of mediation communications, either to an adjudicative body (privileged communication)<sup>31</sup> or to anyone outside of mediation (confidential communication).<sup>32</sup> As in the Model Standards, mediation communications are confidential to the degree the parties agree to or as dictated by state law,<sup>33</sup> but the UMA also dictates that a mediator cannot disclose mediation communications to any authoritative body that may render a decision about the dispute with very limited exceptions.<sup>34</sup>

Of particular relevance to the foreclosure mediation context, the UMA prohibits mediators from making "a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation."<sup>35</sup> The mediator may only

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28. Uniform Mediation Act, §§ 7-8, available at [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf) (last revised 2003) [hereinafter UMA].

29. Eleven states have adopted the UMA, drafted in 2001 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association Section of Dispute Resolution as a standard for mediation practice in state courts. David A. Hoffman, *Introduction: Uniform Mediation Act Symposium Issue*, 61 J. DISP. RES. 1, 1 (2003), available at <http://bostonlawcollaborative.com/blc/61-BLC/version/default/part/AttachmentData/data/2005-07-intro-uma-symposium.pdf?branch=main&language=default>. The Act has been adopted in District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Mediation+Act> (last visited June 3, 2014).

30. MODEL STANDARDS, *supra* note 16, at 6.

31. UMA, *supra* note 28, at §§ 4-7.

32. UMA, *supra* note 28, at § 8.

33. UMA, *supra* note 28, at § 8.

34. UMA, *supra* note 28, at §§ 4(a), 7(a). Exceptions are enumerated in § 6.

35. UMA, *supra* note 28, at § 7(a).

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report attendance, whether a mediation session occurred, and whether a settlement was reached, but not the terms of the settlement.<sup>36</sup>

Some states did not adopt the UMA, but rather created their own mediation standards or had the court create mediation standards.<sup>37</sup> Even in states without codified mediator standards, some mediation programs, including foreclosure mediation programs,<sup>38</sup> have adopted the Model Standards. Most mediators operate under a general understanding and acceptance of these principles.

While many of the accepted mediation principles, including confidentiality, complement and enhance a process by which servicers and borrowers meet to discuss resolutions to foreclosure, those responding to the foreclosure crisis sometimes overlook such principles in the interest of responding to legitimate concerns about the foreclosure crisis. As a consequence, some stakeholders have insisted on goals that conflict with mediation's core principles and jeopardize the integrity of the mediation process.<sup>39</sup>

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36. UMA, *supra* note 28, at § 7(b)(1); Florida's Supreme Court clarified its mediation reporting requirement after foreclosures mediators were reporting that parties "reached impasse with a plan of action." The clarification was to remove such a reporting option and allowing mediators to indicate only that there was an agreement or no agreement. Supreme Court of Florida, *In Re: Guidance Concerning Managed Mediation Programs for Residential Mortgage Foreclosure Cases*, Admin. Order No. AOSC10-57, 4 (2010), <http://www.floridasupremecourt.org/clerk/adminorders/2010/AOSC10-57.pdf>.

37. *See, e.g.*, CODE OF CONDUCT FOR MAINE JUDICIAL BRANCH ADR NEUTRALS (2001), available at [http://www.courts.state.me.us/court\\_info/adr/pdf/code\\_of\\_conduct.pdf](http://www.courts.state.me.us/court_info/adr/pdf/code_of_conduct.pdf); *Cassel v. Superior Ct.*, 51 Cal.4th 113 (Cal. 2011). A discussion of the varying state principles around mediation confidentiality can be found in Richard C. Reuben & Nancy H. Rogers, *Choppy Waters for a Movement Toward Uniform Confidentiality Privilege*, 5 DISP. RESOL. MAG. 2 (1998).

38. *See generally* MODEL STANDARDS, *supra* note 16; *see, e.g.*, Order Amending Foreclosure Mediation Rules, ADKT 435, NEV. S.C.R. 4(2) (2012) (explaining revised requirement that Nevada Foreclosure Mediation Program mediators comply with the Model Standards).

39. Many states or localities that have instituted foreclosure mediation programs have little or no experience with mediation. For instance, Iowa offers some mediation programs in some localities, but has no statewide office or programs. *See generally* Paul C. Gomez et al., *Evaluation of the Iowa Alternative Dispute Resolution Programs*, NAT'L CENTER FOR STATE COURTS (1998). Yet, Iowa was the first state to consider mediation as a way to assist the court's foreclosure docket. Bob Brammer, *Miller Organizes Mortgage Foreclosure Project to Prevent Flood of Foreclosures*, IOWA DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL (Sept. 11, 2007), [http://www.iowa.gov/government/ag/latest\\_news/releases/sept\\_2007/Foreclosure\\_Hotline.html](http://www.iowa.gov/government/ag/latest_news/releases/sept_2007/Foreclosure_Hotline.html). Some states with foreclosure mediation, including California and Florida, have extensive court-connected mediation programs and supplemented existing programs with additional rules and staff to support adding foreclosure mediation. *See, e.g.*, *Civil ADR / Alternative Dispute Resolution Options*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, [http://www.sdcourt.ca.gov/portal/page?\\_pageid=55,1555034&\\_dad=portal&\\_schema=PORTAL](http://www.sdcourt.ca.gov/portal/page?_pageid=55,1555034&_dad=portal&_schema=PORTAL)



In 2009, Nevada's legislature passed Assembly Bill 149, which created a statewide foreclosure mediation program to "address the foreclosure crisis head-on with the hope of keeping Nevada families in their homes."<sup>40</sup> Two months into the program, there were 1,171 mediation requests.<sup>41</sup> Also, two months into the program, the Supreme Court was already exploring changes to the rules, prompted by Assemblywoman Barbara Buckley reporting that servicers were participating in "bad faith."<sup>42</sup>

Under the original program rules, the mediators could stop a mediation if they believed a party was acting in bad faith, but they could not issue a report to any entity about the quality of mediation participation.<sup>43</sup> This was consistent with Nevada's Rules Governing Alternative Dispute Resolution, which state that all oral or written communication in a mediation, other than an agreement, is confidential and a mediator cannot disclose those communications in a subsequent proceeding.<sup>44</sup> But at the prompting of borrower advocates, including Assemblywoman Buckley, the Supreme Court changed the rule. In 2010, the mediator gained the ability to report a servicer's bad faith participation to the court and to make a recommendation for sanctions to the judge.<sup>45</sup> The Supreme Court also changed the confidentiality provision to allow for this reporting and to allow the use of any other documents or communication in mediation in a review of bad faith participation.<sup>46</sup> While the parties could request that the judge adjudicate the

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(last visited June 3, 2014); *What ADR Options are Available?*, SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA, <https://apps2.alameda.courts.ca.gov/adr/Default.aspx> (last visited June 3, 2014); Earnestine Reshard, *Florida Mediation & Arbitration Programs: A Compendium*, FLORIDA DISPUTE RESOLUTION CENTER (2009-10), <http://www.flcourts.org/core/fileparse.php/254/urlt/09-10FYDRCCompendium.pdf>.

40. STATE OF NEVADA FORECLOSURE MEDIATION PROGRAM, <http://foreclosure.nevadajudiciary.us/> (last visited June 3, 2014).

41. Buck Wargo, *Nevada's Top Court Considers Rule Changes for Foreclosure Mediation*, LAS VEGAS SUN (Sept. 18, 2009), <http://www.lasvegassun.com/news/2009/sep/18/foreclosure-mediation/>.

42. *Id.* Bad faith and good faith participation are difficult to define, as will be discussed later. It is often a subjective standard, meaning a person other than the parties must determine whether someone is participating in good faith. This threatens the neutrality of the mediator, as the mediator becomes more of a judge than a neutral.

43. *Id.*

44. Order Adopting Rules Governing Alternative Dispute Resolution and Nevada Mediation Rules and Amending the Nevada Arbitration Rules and Nevada Short Trial Rules, § C, R. 11(A) (March 3, 2005), <http://www.leg.state.nv.us/CourtRules/RGADR.html>.

45. Nev. Assemb. Bill 149(1)(5) (2009) (amended 2011), available at [http://www.leg.state.nv.us/75th2009/Bills/AB/AB149\\_EN.pdf](http://www.leg.state.nv.us/75th2009/Bills/AB/AB149_EN.pdf).

46. Nevada Supreme Court Order Adopting Foreclosure Mediation Rules R. 18 (amended Sept. 1, 2013), available at <http://www.leg.state.nv.us/CourtRules/FMR.html>.

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issue of bad faith participation, the new rules stop short of allowing the parties to make a record from the mediation for this purpose.<sup>47</sup>

In 2011, the Nevada Supreme Court took mediator reporting even further. On July 7, 2011, the Court decided three cases about practices within the Nevada Mortgage Foreclosure Mediation Program.<sup>48</sup> The cases involved borrowers who had exercised their right to request that a judge adjudicate the issue of a servicer's bad faith participation. In each case, the judge did not find the servicer's actions<sup>49</sup> rose to the level of bad faith.<sup>50</sup> On appeal, the Court found the servicer's actions did constitute bad faith,<sup>51</sup> but the Court's decision went even further. Not only did the Court implicitly affirm that mediators may report on specific party behavior or communication that supports bad faith participation, but it also *mandated* that mediators recommend sanctions for those behaviors.<sup>52</sup> The Court now requires judges to take the mediator's report as conclusive evidence of bad faith participation and sanction parties accordingly.<sup>53</sup>

Of course, mediation program administrators want to encourage party attendance and full participation; a mediation program with only one party or limited negotiation is no program at all.<sup>54</sup> However, the requirement that judges must now comply with mediators, while in the interest of keeping

47. Austin Kilgore, *Nevada Court Extends, Modifies Foreclosure Mediation Program*, HOUSING WIRE (May 7, 2010), <http://www.housingwire.com/2010/05/07/nevada-court-extends-modifies-foreclosure-mediation-program>.

48. *Leyva v. Nat'l Default Serv. Corp.*, 255 P.3d 1275 (Nev. 2011) [hereinafter *Leyva*]; *Pasillas v. HSBC Bank USA*, 255 P.3d 1281 (Nev. 2011) [hereinafter *Pasillas*]; *Redmon v. HomeQ Serv., Inc.*, No. 56358 (Jul. 7, 2011).

49. In *Leyva*, Wells Fargo, the servicer representative that appeared at mediation, did not submit copies of mortgage assignments, though Wells Fargo was not the original mortgage holder. *Leyva*, *supra* note 48, at \*3-4. In *Pasillas*, the servicer representative stated at mediation that it was not counsel for HSBC (the case's named beneficiary of the mortgage note), which had erroneously been named trustee, but was counsel for American Home Mortgage Servicing, Inc., which was responsible for the case. *Pasillas*, *supra* note 48, at \*5. The mediator's report also stated that the mortgage note was missing two pages and that the servicer had not conducted a complete appraisal. *Id.*

50. *Leyva*, *supra* note 48, at \*4 (referring to the appellate court's decision that Wells Fargo should not be sanctioned because it provided all essential documents); *Pasillas*, *supra* note 48, at \*5 (referring to the appellate court's decision that respondents had "met the burden to show cause why sanctions should not lie").

51. *Leyva*, *supra* note 48, at \*14; *Pasillas*, *supra* note 48, at \*8, 13.

52. *Pasillas*, *supra* note 48, at \*7, 11.

53. *Id.* at \*12, n. 10.

54. Adrienne L. Krikorian & Jeffrey A. Tidus, *The Benefits of Active Party Participation in Mediation*, MEDATE.COM (Feb. 2002), <http://www.mediate.com/articles/krikorian1.cfm>.

parties accountable to the mediation program's requirement, breaches the very core principles of mediation. First, it jeopardizes the candor that confidential mediations are supposed to promote. If a party believes the mediator will report what is said or done during the mediation, the party will be less likely to be candid about emotions, needs, and possible compromises. Second, the reporting requirement and judicial compliance turns the mediator into a non-neutral party. The more determinations the mediator must make, the more the mediator looks and acts like a judge and the more mediation becomes an adjudicatory process. Especially when the parties know the mediator's word will be used to penalize them later, the parties will not be forthcoming about potential options for resolution. Unfortunately, a decision that intends to further the goals of the foreclosure mediation program—to ensure party participation in the process—actually degrades mediation's core values and jeopardizes the very outcomes it seeks to achieve.

*B. Challenges in Implementing Mediation in the Foreclosure Context: Confidentiality and Accountability in Mediator Reports*

As the Nevada cases demonstrate, a primary challenge in designing foreclosure mediation programs is ensuring that both parties participate in good faith in a voluntary, confidential process with a trained neutral.<sup>55</sup> There is an “inherent dissonance” between holding parties accountable for good faith participation and preserving confidentiality, as Professor Kristen Blankley recognized prior to the inception of foreclosure mediation programs.<sup>56</sup> A mediation program that best incentivizes parties to work out solutions will find balanced ways to achieve these seemingly conflicting goals.<sup>57</sup> This article provides some guidance regarding program design elements that can provide such balance.

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55. See John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 78 (2002) (noting that without a “good faith” standard of some sort, participants may just “go through the motions” during the mediation or may try to take advantage of lesser-situated opponents) [hereinafter Lande]; see generally, *Focus on Confidentiality in Mediation*, 5 DISP. RESOL. MAG. 2 (1998), available at [http://www.americanbar.org/publications/dispute\\_resolution\\_magazine\\_home/dispute\\_magazine\\_wi n98.html](http://www.americanbar.org/publications/dispute_resolution_magazine_home/dispute_magazine_wi n98.html) [hereinafter *Focus*].

56. Kristen Blankley, *Confidentiality or Control: Which will Prevail as Confidentiality and “Good Faith” Negotiation Statutes Collide in Court-Annexed Mediations?*, AMERICAN BAR ASSOCIATION (Nov. 30, 2004), <http://www.abanet.org/dispute/essay/confidentialitycontrol.pdf>.

57. Alon Cohen, *Walk the Talk*, CENTER FOR AMERICAN PROGRESS (2010), [http://cdn.americanprogress.org/wp-content/uploads/issues/2010/11/pdf/walk\\_the\\_talk.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2010/11/pdf/walk_the_talk.pdf) [hereinafter *Walk the Talk*].

Mediation advocates, far before foreclosure mediation developed, have grappled with how to hold parties publicly accountable in a process that is otherwise private.<sup>58</sup> Attorney, arbitrator, and mediator Larry R. Rute thoroughly reviewed state cases and ethics opinions regarding confidentiality and good faith requirements, aptly highlighting the problems with either the court or the mediator defining and reporting on bad faith participation.<sup>59</sup> He concluded that improved “skill by the mediator and trust by the parties” might help to resolve conflicts.<sup>60</sup> Jeffrey W. Stempel similarly asserts that courts and mediators must rely on the assumption that parties want to mediate in good faith.<sup>61</sup> Yet, Susan Schultz concludes that a requirement to determine bad faith behavior in mediation is nothing but “bad news with alarming consequences.”<sup>62</sup> While both mediator skill and party trust are important aspects of mediation, they do not guarantee a mediation session will balance confidentiality with the interest in good faith participation.

Foreclosure mediation programs cannot rely solely on voluntary compliance to ensure fair processes.<sup>63</sup> However, particular dynamics with the larger foreclosure crisis<sup>64</sup> and borrower/servicer relationships<sup>65</sup> lead courts, borrower advocates, and even mediation advocates to call for program accountability measures<sup>66</sup> that sometimes violate one or more core

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58. See, e.g., *Focus*, *supra* note 55.

59. See generally Larry R. Rute, *The Evolution of Commercial Mediation in the Midwest: Best Practices, Confidentiality and Good Faith*, 79-JAN J. KAN. B.A. 24 (2010).

60. *Id.* at 29.

61. Jeffrey W. Stempel, *Feeding the Right Wolf: A Niebuhrian Perspective on the Opportunities and Limits of Mindful Core Concerns Dispute Resolution*, 10 NEV. L.J. 472 (2010).

62. Susan Schultz, *Bad Faith Mediation; Bad News for Mediators*, TEX. MEDIATOR (Winter 2009).

63. See generally Geoffrey Walsh, *State and Local Foreclosure Mediation Programs: Can They Save Homes?*, NATIONAL CONSUMER LAW CENTER (Sept. 2009), [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-state-mediation-programs.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf) [hereinafter Walsh].

64. See, e.g., Julie Haviv, *U.S. Home Foreclosure Mediation in Jeopardy*, REUTERS (Sept. 23, 2009), <http://www.reuters.com/article/idUSN2340194220090923>.

65. *Faces of the Home Foreclosure Crisis*, WALL ST. J., <http://online.wsj.com/article/SB10001424052748704610904576031632838153532.html> (last updated Dec. 29, 2010).

66. See, e.g., Gretchen Morgenson, *A Mortgage Nightmare's Happy Ending*, N.Y. TIMES, (Dec. 25, 2010), [http://www.nytimes.com/2010/12/26/business/26mod.html?pagewanted=1&\\_r=1&ref=foreclosures](http://www.nytimes.com/2010/12/26/business/26mod.html?pagewanted=1&_r=1&ref=foreclosures) (citing Kurt Eggert, a professor at Chapman University School of Law); Walsh, *supra* note 63, at V, VII.

mediation values, if not mediation laws outright. Thus, greater attention to foreclosure mediation's goals and subsequent program design, especially per the role of the mediator, is needed.

Though analysis of the foreclosure crisis,<sup>67</sup> and articles about foreclosure mediation,<sup>68</sup> are prolific, few scholars have explored how foreclosure mediation's goals interact with mediation's core principles, especially in light of the inherent dissonance between party behavioral accountability and confidentiality.<sup>69</sup> Many programs cite more than one goal.<sup>70</sup> Some seek to help borrowers and keep them in their homes.<sup>71</sup> Others want to provide a forum for servicers and borrowers to meet face-to-face and discuss options, regardless of outcomes.<sup>72</sup> Still others aim to ease the burden on overloaded court dockets by having other professionals—housing

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67. See, e.g., *Times Topics: Foreclosures (2012 Robosigning and Mortgage Servicing Settlement)*, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/subjects/f/foreclosures/index.html?scp=1-spot&sq=foreclosure&st=cse> (last visited June 4, 2014).

68. See, e.g., Grace B. Pazdan, *How Foreclosure Mediation Legislation Can Keep Vermonters in their Homes (and Money in the Pockets of Mortgage Holders)*, 36-SPG VT. B.J. 24 (Spring 2010) (summarizing the Vermont foreclosure mediation program and advocating that foreclosure mediation financially helps homeowners and lenders and criticizing the legislature's decision to cut lender penalties for non-compliance with the mediation program); Stephen F.J. Ornstein, Matthew S. Yoon, & John P. Holahan, *Florida Foreclosure Mediation Program*, 64 CONSUMER FIN. L.Q. REP. 86 (Spring 2010) (outlining procedures for foreclosure mediation program); Madhawa Palihapitiya & Kaila Eisenkraft, *A Study for the Design and Administration of the a Successful Foreclosure Mediation Program in Massachusetts*, MASS. OFFICE PUB. COLLAB. (Feb. 2013), [http://cdn.umb.edu/images/mopc/Foreclosure\\_mediation\\_program\\_study\\_FINAL.pdf](http://cdn.umb.edu/images/mopc/Foreclosure_mediation_program_study_FINAL.pdf).

69. See, e.g., Shana H. Khader, *Mediating Mediations: Protecting the Homeowner's Right to Self-Determination in Foreclosure Mediation Programs*, 44 COLUM. J. L. & SOC. PROBS. 109 (2010) (clarifying the difference between official mediation and judicial settlement conferences in the foreclosure context, examining the power dynamic present in most foreclosure mediations, and identifying how foreclosure mediation programs can protect the homeowner's right to self-determination through legal consultation and document exchange safeguards).

70. See, e.g., Supreme Court of Nevada, *About the Program*, STATE OF NEVADA, <http://foreclosure.nevadajudiciary.us/index.php/about-program> (last visited June 4, 2014) (stating Nevada's goals are "to help keep families in their homes . . . and to provide] an opportunity for homeowners and lenders to discuss alternatives to foreclosure.").

71. See, e.g., Press Release from Anne Milgram, N.J. Att'y Gen., *Statewide Mortgage Foreclosure Mediation Program Launched* (Jan. 9, 2009), <http://www.nj.gov/oag/newsreleases09/pr20090109a.html> (last visited June 4, 2014). This goal is an interesting one for the mediation community to address, since mediation processes traditionally do not assist only one party or aim for a particular outcome. While this "tension" is prevalent in the foreclosure context and worth exploring, the scope of this paper does not cover this question.

72. See, e.g., State of Connecticut Judicial Branch, *Attorney Frequently Asked Questions, FORECLOSURE MEDIATION PROGRAM*, [http://www.jud.state.ct.us/foreclosure/attorney\\_qs.htm](http://www.jud.state.ct.us/foreclosure/attorney_qs.htm) (last visited June 4, 2014); S.C. of Fla. Admin. Order No. AOSC09-54, 2 (Dec. 28, 2009), Final Report and Recommendations on Residential Mortgage Foreclosure Cases, S.C. of Florida Admin. Order No. AOSC09-54, 2 (Dec. 28, 2009), available at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf>.

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counselors, attorneys, and mediators—assist the court.<sup>73</sup> Some policy makers cite the “deleterious effects” continued foreclosures will have on the state economy because they inspire so many state programs.<sup>74</sup> And some borrower advocates involved in program creation explicitly say the mediations are meant to hold servicers accountable for “bad” practices.<sup>75</sup>

Below, I contrast these foreclosure mediation<sup>76</sup> goals and accountability measures—some of which are new to the mediation world—with the priorities and rules under which court-connected mediation historically operates.

### III. COURT-CONNECTED FORECLOSURE MEDIATION PROGRAM MEASURES OF ACCOUNTABILITY

#### A. *Party Participants and Foreclosure Mediation Goals*

Foreclosure mediation program structures vary greatly from state to state and within each city.<sup>77</sup> Generally, a foreclosure mediation program consists of a program manager that schedules and organizes the mediation session, neutrals that facilitate discussion,<sup>78</sup> and mediation participants. In

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73. See Greg Allen, *Mediation Courts May Ease Foreclosure Backlog*, NATIONAL PUBLIC RADIO (Apr. 6, 2009), <http://www.npr.org/templates/story/story.php?storyId=102795312&ft=1&f=102795312>.

74. S.B. 1137 § 1(d), 2007-2008 Leg. (Ca. 2008), available at [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_1101-1150/sb\\_1137\\_bill\\_20100924\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1101-1150/sb_1137_bill_20100924_chaptered.pdf).

75. See, e.g., Wendy Innes & Andrew White, *CT Foreclosure Filings Up, Many Stuck in Mediation*, HARTFORD GUARDIAN (May 29, 2010), <http://www.thehartfordguardian.com/?p=4808>. Mediation as punishment denigrates the mediation process and threatens core assumptions like impartiality and self-determination. See MODEL STANDARDS, *supra* note 16, at 3,4.

76. To illustrate the use of the principles of “authority,” “accountability,” “participation,” and “good faith” in the mortgage foreclosure context, I cite state programs that use the term “mediation” or that the federal government has included under the umbrella of “foreclosure mediation,” though to traditional court-connected mediation personnel, the program may not conform to a traditional mediation format. See, e.g., U.S. Department of House and Urban Development & Department of Justice, *Emerging Strategies for Effective Foreclosure Mediation Programs* 7 (Nov. 2010).

77. For a description of all programs in existence as of July 19, 2011, see Models, *supra* note 26.

78. The people that serve as mediators vary among programs. Some have an extensive list of paid mediators from which to draw. Others operate solely with volunteers. Some programs require mediators to have extensive mediation experience before practicing in the foreclosure context. Other programs require no special training for mediators. Some programs specifically cite mediator ethical guidelines to be followed during the process. Others require mediators to violate the very professional guidelines to which the mediators must adhere.

all programs, participants include the borrower and a representative for the servicer. The representative may be an attorney for the servicer, an employee of the servicer's mediation or loss mitigation department, a servicer employee with greater responsibilities, or some combination of the three. Other participants may be housing counselors and attorneys to assist borrowers in preparing for, and participating in, the process.<sup>79</sup>

These participants have a variety of goals, both stated and unstated, that drive their desire to uphold or reject certain accountability measures. Borrower advocates want mediation programs to create protective measures barring sophisticated parties from using the confidential process to abuse less sophisticated litigants.<sup>80</sup> Banks want to hold borrowers accountable for the contracts they signed.<sup>81</sup> Investors want to hold banks accountable for returning the most possible on their mortgage-backed securities.<sup>82</sup> Borrowers want to hold banks accountable for good communication practices, including communications about their loans and potential modification options.<sup>83</sup> Borrower advocates want to hold banks accountable for proving ownership of the mortgage debt<sup>84</sup> and providing transparent loan modification processes, specifically, HAMP.<sup>85</sup> And courts or government agencies in twenty-six states (at time of this writing), attempting to ameliorate the effects of the foreclosure crisis, believe that foreclosure mediation programs can heed these demands.<sup>86</sup>

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79. See Resolution Systems Institute, *Foreclosure Mediation Funding Executive Summary*, RESOLUTION SYSTEMS INSTITUTE (Jan. 26, 2011), <http://courtdr.org/files/ForeclosureMediationFundingExecSummary.pdf> (highlighting that almost half of programs require borrowers meet with a housing counselor before mediation and few programs provide an attorney to borrowers).

80. Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 597–603 (2001); Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 604 (1997) [hereinafter Kovach].

81. Yesner & Boss, *Homeowners Turn to Mediators for Relief*, P.L. BLOG (June 4, 2010), <http://www.yesnerboss.com/2010/06/homeowners-turn-to-mediation-for-relief.html>.

82. Al Yoon & Jeff Mason, *Investors, White House Press Banks over Mortgages*, REUTERS (Oct. 19, 2010), <http://www.reuters.com/article/idUSTRE69I54T20101019>.

83. Jacob Adelman, *Homeowners Say Loan Modifications, Balky Banks, Led Them to Foreclosure*, ASSOCIATED PRESS (Nov. 7, 2010), [http://www.cleveland.com/nation/index.ssf/2010/11/homeowners\\_say\\_loan\\_modificati.html](http://www.cleveland.com/nation/index.ssf/2010/11/homeowners_say_loan_modificati.html).

84. Jason Hidalgo, *Real Estate: Foreclosure Fraud Law Takes Effect on Saturday*, RENO GAZETTE J. (Sept. 30, 2011), <http://dcmetro-homemarket.com/bankownedhouses/354/real-estate-foreclosure-fraud-law-takes-effect-on-saturday-reno-gazette/>.

85. AMI SHAH & KATIE GOTTSCHALL-DONOHUE, SERVICER ACCOUNTABILITY INITIATIVE FINAL REPORT: DECEMBER 2009 – SEPTEMBER 2010, HOUSING ACTION ILL. 1 (2010), available at [http://www.housingactionil.org/downloads/SAI\\_FINAL\\_REPORT.pdf](http://www.housingactionil.org/downloads/SAI_FINAL_REPORT.pdf) [hereinafter SHAH].

86. See generally Models, *supra* note 26.

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A recent federal government report highlights “strategies that promote successful outcomes” in foreclosure mediation programs. The report promotes including “accountability measures” in foreclosure mediation program rules.<sup>87</sup> The report cites three programs—Maine, Rhode Island, and Vermont—that provide means to hold parties accountable to participating in the mediation process to some degree. Other programs not mentioned in the report also have means for holding parties accountable.<sup>88</sup> The types of actions holding parties accountable lie on a continuum, from most objective (Element 1) to most subjective (Element 3).

#### Element 1a Accountability: Attendance

Most foreclosure mediation programs have some requirement that both servicer counsel and borrower attend the mediation, whether or not they speak during the session. Attendance may mean physical presence in a mediation room, or in some cases, one or both sides may attend telephonically or through video conference.<sup>89</sup>

In Florida’s First, Eleventh, and Nineteenth Circuits, the mediator is responsible for reporting the attendance of both the borrower and the servicer’s representative (an attorney). The administrative orders allow the court to impose sanctions if the servicer does not appear for the mediation. Options for sanctions are a fine or dismissal of the case.<sup>90</sup> The Maine

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87. U.S. DEP’T OF HOUSING & URBAN DEV. & DEP’T OF JUSTICE, EMERGING STRATEGIES FOR EFFECTIVE FORECLOSURE MEDIATION PROGRAMS 7 (2010), *available at* <http://www.justice.gov/atj/effective-mediation-prog-strategies.pdf>.

88. Administrative Order Establishing Foreclosure Mediation Pilot Project, Administrative Order No. 2009-00001, No. D-0101-CV-77-52749, N.M. First Jud. Dist. Ct. (2009), *available at* [https://www.nclc.org/images/pdf/foreclosure\\_mortgage/foreclosure\\_med\\_prog\\_by\\_state/nm\\_admin\\_order.pdf](https://www.nclc.org/images/pdf/foreclosure_mortgage/foreclosure_med_prog_by_state/nm_admin_order.pdf) (sanctions in New Mexico); S.B. 651, 26th Leg. § 667-L(b) (Haw. 2011), *available at* [http://www.capitol.hawaii.gov/session2011/Bills/SB651\\_CD1\\_PDF](http://www.capitol.hawaii.gov/session2011/Bills/SB651_CD1_PDF) (sanctions in Hawaii include fines and a stay of foreclosure); H.B. 1362, 62nd Leg., Reg. Sess., Sec. 7 (11) (Wash. 2011), *available at* <http://apps.leg.wa.gov/documents/billdocs/2011-12/PDF/Bills/House%20Bills/1362-S2.pdf> (Washington State’s foreclosure mediation program allows borrowers to use a mediator’s certificate of non-compliance by the servicer as a defense to the foreclosure).

89. *See, e.g.*, S.B. 651, 26th Leg. § 667-L(b) (Haw. 2011), *available at* [http://www.capitol.hawaii.gov/session2011/Bills/SB651\\_CD1\\_PDF](http://www.capitol.hawaii.gov/session2011/Bills/SB651_CD1_PDF) (describing how Hawaii allows a servicer representative to attend telephonically after receiving permission from the mediator and the borrower).

90. *See, e.g.*, Amended Administrative Order Governing Mandatory Circuit Court Mediation for Owner-Occupied Residential Mortgage Foreclosures, 2009-02-01, 4 (Fla. Cir. Ct. 2009), *available at* <http://ninja9.org/adminorders/orders/2009-02-01%20-%20amended%20residential%20foreclosure%20to%20mediation%20orange%20county.pdf>.



foreclosure mediation statute allows the court more flexibility. The judge may determine “appropriate sanctions” for a party’s non-attendance.<sup>91</sup> At least one Vermont court has sanctioned a servicer for not appearing for mediation by ordering the servicer to participate and tolling all fees incurred on the mortgage debt after the order for mediation was issued.<sup>92</sup>

Element 1b Accountability: Attendance with Authority<sup>93</sup>

Nevada requires a somewhat higher level of accountability. There, a party not only must attend, but also must have the authority to modify the loan. The servicer, rather than the mediator, files a certificate of compliance with mediation, stating that the servicer attended and participated in good faith. The mediator must report if the servicer does not have a representative authorized to modify the loan available during the mediation.<sup>94</sup>

Element 2 Accountability: Document Exchange

Managing document exchange is at the heart of making the foreclosure mediation process efficient and effective, as most discussions between a borrower and servicer eventually explore the option of a loan modification. Without proper documents from the borrower, the servicer cannot evaluate a borrower for a loan modification.<sup>95</sup> Some courts require the servicer to submit documents proving the servicer has the right to foreclose on the mortgage debt or other documents that may assist the mediation process.<sup>96</sup> Most foreclosure mediation programs require one or both parties to send documents relevant to a loan modification to the other prior to the mediation session. Some will not conduct mediation before the servicer reviews loan modification documents and issues a written decision.

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91. ME. REV. STAT. ANN. tit. 14, § 6321-A (2009).

92. *Citibank v. Mumley*, No. S1087-09 CnC, 2011 WL 8472914 (Vt. Super. Ct. Sept. 1, 2011).

93. Because attendance with authority is a different requirement than simply having a representative attend mediation, I separate these types of attendance. See, e.g., James R. Madison, *Everything You Need to Know About Authority to Settle a Mediation*, 63 DISP. RESOL. J. 20 (2008).

94. NEV. SUP. CT. FORECLOSURE MEDIATION R. (2009), available at [http://www.nevadajudiciary.us/images/foreclosure/adkt435\\_amendedrules.pdf](http://www.nevadajudiciary.us/images/foreclosure/adkt435_amendedrules.pdf).

95. Thomas B. Scheffey, *Young Solo Helps Family Avoid Foreclosure Through Mediation*, CONN. L. TRIB., Apr. 6, 2011, <http://www.cjdonlinesq.com/connecticut-foreclosure-mediation-attorney.html>.

96. See, e.g., *McLean v. JP Morgan Chase Bank Nat’l Ass’n.*, 79 So. 3d 170 (Fla. Dist. Ct. App. 2012) (reversing the decision to grant summary judgment to Chase and ordering Chase to submit proper documentation of its ability to foreclose); Diane C. Lade, *Foreclosure Crisis: Lenders Holding Back Critical Information at Mediations*, SUN SENTINEL, Mar. 3, 2011, [http://articles.sun-sentinel.com/2011-03-03/business/fl-mediation-documents-20110302\\_1\\_mediations-margery-golant-foreclosure-defense-attorneys](http://articles.sun-sentinel.com/2011-03-03/business/fl-mediation-documents-20110302_1_mediations-margery-golant-foreclosure-defense-attorneys).

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For example, both Providence, Rhode Island's and Vermont's<sup>97</sup> programs require servicers to provide written documentation for the reasons a loan modification was denied. In Vermont, the borrower must make a good faith effort to provide any information required by the Home Affordable Modification Program (HAMP)<sup>98</sup> to the mediator at least 20 days prior to mediation.<sup>99</sup> Similarly, the servicer must share with the borrower and the mediator what modification options the servicer is considering and the reasons for certain determinations.<sup>100</sup> If the servicer states that an investor agreement, called a pooling and servicing agreement, prohibits modification, the servicer must produce a copy of the agreement.<sup>101</sup> Importantly, all exchanged documents shall be confidential and shall not be included in the mediator's report.<sup>102</sup> There is no mechanism for the mediator to report good faith participation.

In Providence, the Conciliation Coordinator<sup>103</sup> must file a Certificate of Compliance after determining whether both parties participated in the Conciliation Conference and cooperated in the process.<sup>104</sup> The Certificate includes an explanation of how both parties made a "good faith effort" to reach an agreement.<sup>105</sup> To describe this effort, the Conciliation Coordinator collects information about the efforts of both parties from the parties themselves.<sup>106</sup>

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97. VT. STAT. ANN. tit. 12, § 4632 (2009).

98. Under HAMP, lenders are required to solicit eligible borrowers who are more than thirty-one days past due on their mortgage for a loan modification. SHAH, *supra* note 85. Eligible borrowers are homeowners who took out their primary residence's current mortgage on or before January 1, 2009, who are experiencing financial hardship, who owe less than \$729,750 on their current mortgage, and who have current mortgage payments at least 32% of gross income. *See Home Affordable Modification Program, MAKING HOME AFFORDABLE*, <http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx> (last updated May 28, 2013) (click on "Eligibility" bar).

99. VT. STAT. ANN. tit. 12 § 4633(b) (2009).

100. *Id.* at § 4633(a)(1).

101. *Id.* at § 4633(a)(3).

102. *Id.*

103. The third party in Providence's Conciliation Conferences is a HUD counselor not bound by professional mediation rules. CITY OF PROVIDENCE, FORECLOSURE CONCILIATION REQUIREMENT, DUTIES OF PARTICIPANTS, APPLYING THE ORDINANCE, MODEL CERTIFICATIONS 4 (2009), available at <http://cityof.providenceri.com/efile/230>.

104. *Id.*

105. *Id.*

106. *Id.* at 5.

## Element 3 Accountability: Good Faith Participation

In Maine's program, the court has the authority to assess costs and fees to either party failing to make a good faith effort in mediation sessions.<sup>107</sup> The requirement for parties to participate in good faith comes from Maine's Court Alternative Dispute Resolution Service Rule: "Each party and their attorney . . . shall make a good faith effort to mediate all disputed issues."<sup>108</sup> The party, through the court (or through a Non-Compliance Report), may motion for sanctions if anyone violates any part of the Rule, including the "good faith effort" requirement.<sup>109</sup> In some types of cases, e.g., landlord/tenant, the court must hold a hearing to determine if the parties mediated in good faith before hearing the merits of the case, regardless of whether the parties allege bad faith.<sup>110</sup> In foreclosure cases, as part of the mediation report, the mediator "may notify the court if, in the mediator's opinion, either party failed to negotiate in good faith."<sup>111</sup> Maine has not adopted the Uniform Mediation Act, which would bar the mediator from making such reports.<sup>112</sup>

Interestingly, Washington has adopted the Uniform Mediation Act and its foreclosure mediation law still requires the mediator to report to the Department of Commerce whether the parties participated in good faith.<sup>113</sup> This report features a series of boxes the mediator can check to indicate what action of the borrower or servicer constituted a failure to mediate in good faith. Actions include lack of timely or accurate provision of documents, failure to timely appear, representation without authority to make a binding decision, and failure to pay a fee. Mediators may report all of these objective actions under the UMA. The Washington mediator's report also allows the mediator to include an attachment that describes "additional details of the mediation session."<sup>114</sup> This descriptive paragraph would

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107. ME. REV. STAT. ANN. tit. 14, § 6321-A(12) (2009).

108. ME. R. CIV. P. 92(b)(5)(E).

109. ME. REV. STAT. ANN. tit. 14, § 6321-A(12) (2009).

110. *Id.* at § 6004-A (2007).

111. *Id.* at § 6321-A(13) (2009).

112. However, the Reporter's Notes states that the privilege rule was based on the UMA. ME. R. EVID. 514 advisory committee note (2009).

113. H.B. 1362, 62nd Leg., Reg. Sess. Sec. 7(9)(d) (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/House/1362-S2.SL.pdf>.

114. State of Washington Department of Commerce, Foreclosure Mediation Report, available at <http://qa.commerce.wa.gov/Documents/Foreclosure%20Cert%20of%20Mediation%20form.xls>

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almost inevitably include subjective determinations from the mediator that would violate the state's UMA law.<sup>115</sup>

#### IV. ACCOUNTABILITY MEASURES AND CORE MEDIATION PRINCIPLES

##### A. *Balancing Values*

Throughout these varied practices, the same thread of questions remains: for what, and to whom, does the program want the participants to be accountable? Showing up? Prompt communication before and during the mediation? Fair participation in the process? Polite treatment of the other side? Exploring every possible option?

It seems like courts' and legislatures' vigor around accountability stems mainly from frustration, and sometimes anger, with the radical increase in foreclosures and the subsequent debacles related to the increase.<sup>116</sup> Servicers had to rapidly ramp up foreclosure processes, increasing stress on the near-collapsed banks' recently stabilized resources.<sup>117</sup> People facing foreclosure often feel confused or deceived, because of complicated bank loans or subprime mortgage scams.<sup>118</sup> Some borrower advocates call for "holding servicers' feet to the fire" and the "imposition of significant obligations" on the servicers to correct the perceived deception.<sup>119</sup> Some even call for the states to use their police power to enforce these obligations in mediations.<sup>120</sup>

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115. WASH. REV. CODE § 7.07.060 (2005), available at <http://apps.leg.wa.gov/RCW/default.aspx?cite=7.07.060>.

116. See, e.g., *U.S. Home Foreclosure Mediation in Jeopardy*, REUTERS, Sept. 23, 2009, <http://www.reuters.com/article/idUSN2340194220090923>.

117. See Nelson D. Schwartz, *Voices of Foreclosure Speak Daily About Desperation and Misery*, N.Y. TIMES, Nov. 16, 2010, B1, available at [http://www.nytimes.com/2010/11/16/business/economy/16foreclose.html?\\_r=1&ref=mortgages](http://www.nytimes.com/2010/11/16/business/economy/16foreclose.html?_r=1&ref=mortgages).

118. *Faces of the Home-Foreclosure Crisis*, WALL ST. J., Dec. 29, 2010, <http://online.wsj.com/article/SB10001424052748704610904576031632838153532.html>.

119. See, e.g., Gretchen Morgenson, *A Mortgage Nightmare's Happy Ending*, N.Y. TIMES, Dec. 26, 2010, at BU1, available at [http://www.nytimes.com/2010/12/26/business/26mod.html?pagewanted=1&\\_r=1&ref=foreclosures](http://www.nytimes.com/2010/12/26/business/26mod.html?pagewanted=1&_r=1&ref=foreclosures) (citing Kurt Eggert, a professor at Chapman University School of Law); Walsh, *supra* note 63, at V).

120. See, e.g., Expressing the sense of the House of Representatives that the States should enact a temporary moratorium on residential mortgage foreclosures, H.R. Res. 181, 111th Cong. (1st Sess. 2009), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.RES.181:#> (recommending states use their police power to stop foreclosures, since the foreclosure crisis creates a state of emergency in some areas).

Emotional reactions to perceived injustice are often the catalyst for policy change. But this anger should not lead to knee-jerk program design—policy in action—that foregoes the basic principles of mediation, even if those principles are sometimes held in tension. In some cases, the desire for methods to mitigate foreclosure has turned mediation into a non-neutral space. Mediators sometimes make judgments about the parties, which not only threatens the confidentiality of the mediation, but also changes the mediator’s role from a third party neutral to an adjudicator. Some programs have even articulated “continuing mediation” as one of the sanctions for bad faith participation in mediations.<sup>121</sup> Contrary to what some housing advocates believe, requiring the mediator to report about party behavior may discourage, rather than encourage, parties from fully disclosing settlement options.<sup>122</sup>

Still, advocates for those who enter the court system without a sophisticated understanding of the process make good points about mediation needing protective measures to bar sophisticated parties from using an unregulated process to abuse pro se litigants.<sup>123</sup> Others rightly point out that borrowers can use mediation to draw out the foreclosure process.<sup>124</sup> Programs cannot rely solely on voluntary compliance with their accountability measures to result in fair processes.<sup>125</sup>

How can foreclosure mediation programs ensure equal bargaining and worthwhile party participation without negatively altering the role of the mediator and thus, undermining the benefits of mediation? A program must respond to these needs in a way that encourage balanced, self-determined solutions.<sup>126</sup> A description of tensions programs face and suggestions of balanced solutions are below.

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121. See Mortgage Foreclosure Mediation R. (Ill. Cir. Ct. 2010) (draft) (on file with author).

122. The National Consumer Law Center advocates that, to “increase homeowner participation” in the mediation process, courts should: “3. Stay all foreclosure proceedings until a mediator or court determines that the servicer has complied in good faith with all participation obligations; 4. Provide for direct court supervision over the enforcement of servicer obligations to mediate, including the imposition of sanctions when necessary. Sanctions must include dismissal of judicial foreclosure actions and orders barring non-judicial proceedings.” Walsh, *supra* note 63, at vii.

123. Weston, *supra* note 80, at 597–603; Kovach, *supra* note 80, at 604.

124. Kenneth R. Gosselin, *Distressed Homeowners in Mediation Get Reprieve from Foreclosure Litigation*, HARTFORD COURANT, June 9, 2011, [http://articles.courant.com/2011-06-09/business/hc-foreclosure-bill-0610-20110609\\_1\\_mediation-program-foreclosure-proceedings-bank-lobbyists](http://articles.courant.com/2011-06-09/business/hc-foreclosure-bill-0610-20110609_1_mediation-program-foreclosure-proceedings-bank-lobbyists).

125. Walsh, *supra* note 63, at v.

126. *Walk the Talk*, *supra* note 57.

## Element 1 Accountability: Attendance

Having both parties attend mediation is an obvious prerequisite to working out an agreement. Attendance can mean a variety of things. Some programs require servicer executives to be present for the mediation, while others allow all servicer representatives, including counsel, to participate telephonically.<sup>127</sup> Some programs hold an initial conference with a mediator or judge in which only the borrower must be present.<sup>128</sup> In these conferences, a judge or mediator reviews a borrower's case to determine whether it is appropriate to send to mediation. Only then can a borrower schedule a meeting with the servicer.

In most foreclosure mediation programs, if parties do not attend, the case can get dismissed or remanded for the judge to make a determination, or the judge can sanction the party who did not attend.<sup>129</sup> Although the Federal Housing Finance Agency, Fannie Mae, Freddie Mac, and the Federal Housing Authority already require servicers to pursue loss mitigation with borrowers, a mediator can observe people participating in a process in furtherance of loss mitigation and report on that attendance, which the UMA permits.<sup>130</sup> Then, the court or other program administrator can hold people accountable for their attendance.

Some problems with attendance requirements occur when parties have unexpected life events that threaten their attendance. Cars break down, snowstorms prevent safe travel, babysitters cancel, other clients require immediate attention. Both parties face these events: borrowers and servicers. Dismissing a case for one missed mediation seems like a punishment too great for the crime. Yet, every missed mediation increases

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127. Compare e.g., Administrative Order No. 10-18: Residential Mortgage Foreclosure Mandatory Mediation Program (Ill. Cir. Ct. 2010), available at <http://www.willcountycourts.com/images/stories/WillCounty/mediationadminorder.pdf>, with U.S. BANKRUPTCY COURT DISTRICT OF NEW JERSEY, LOSS MITIGATION PROGRAM AND PROCEDURES VIII(B) (2011), available at [http://www.njb.uscourts.gov/sites/default/files/downloads/2011\\_07\\_29\\_Loss\\_Mitigation\\_Program\\_and\\_Procedures\\_7-28-11.pdf](http://www.njb.uscourts.gov/sites/default/files/downloads/2011_07_29_Loss_Mitigation_Program_and_Procedures_7-28-11.pdf).

128. See, e.g., MCLEAN COUNTY CIRCUIT COURT, RESIDENTIAL MORTGAGE FORECLOSURE MANDATORY MEDIATION PROGRAM RULES 3(I), available at <http://www.mcleancountyil.gov/documentcenter/view/1691>.

129. Brett Goodman, *Can a Court Impose Sanctions for Failing to Appear at Court-Ordered Mediation?*, MEDIATE.COM, June 2011, <http://www.mediate.com/articles/GoodmanBb120110605.cfm>.

130. UMA § 7(b).

administration costs and delays the negotiation and settlement of a foreclosure case, sometimes by months.

Not only do the parties need to attend the mediation, but the *right* parties need to attend a mediation for any agreement to result. If a party does not have the authority to settle, the mediation is nothing more than a discussion about what could be.<sup>131</sup> In the foreclosure mediation context, counsel or loss mitigation personnel, who may not know much about the specific foreclosure case, represent servicers. Attorneys often have “settlement authority” from their clients up to a certain dollar amount. In the foreclosure context, this could mean that the servicer has only authorized the servicer’s attorney to make one or two alternative offers to foreclosure. This frustrates mediation processes that seek to explore “all [available] options.”<sup>132</sup> It also frustrates a borrower who educated herself about potential resolution options and planned for how she could meet each. It even frustrates the servicer’s attorney, who may not know any more about the situation than the two pages of authorization paperwork her client gave her. Some programs require that the parties with full settlement authority attend to avoid having mediation participants with little knowledge of their client or what the client can do.<sup>133</sup>

Having servicers present seems like it would alleviate much anxiety in the process. Yet, requiring a servicer with full settlement authority to attend would be challenging. Servicers with greater authority are often hundreds, if not thousands, of miles from the bank that made the loan. Even the servicer employees who do attend by phone are often only able to speak about a limited scope of options. They have to refer a mediation session to another division to discuss a different option.<sup>134</sup> With foreclosure mediation programs springing up around the country, this would mean that servicers would have to employ thousands more representatives to travel to each mediation. Programs already have trouble getting enough mediators and legal aid attorneys. The administrative nightmare that could ensue would extend the foreclosure process far beyond the already-long 438 day average.<sup>135</sup>

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131. Madison, *supra* note 93.

132. Walsh, *supra* note 63, at 19.

133. See, e.g., C.P. CUYOGA COUNTY, FORECLOSURE MEDIATION CASE MANAGEMENT DIRECTIVE III(b)(i) (2008), *available at* [http://cp.cuyahogacounty.us/internet/CourtDocs/Fore\\_Med\\_CMD.pdf](http://cp.cuyahogacounty.us/internet/CourtDocs/Fore_Med_CMD.pdf).

134. For instance, one department may deal with HAMP and one may manage in-house modifications.

135. This number represents the number of days between a homeowner defaulting on a loan and a homeowner being evicted from the home. *Lengthening Limbo*, N.Y. TIMES, June 1, 2010, *available at* <http://www.nytimes.com/imagepages/2010/06/01/business/01nopayGrfx.html?ref=business>. This timeline is shorter or longer depending on the state, the circuit, and the number of foreclosures in the

Ensuring the appearance of responsible parties is difficult because of mortgage-backed securities.<sup>136</sup> During the real estate boom of the mid-2000s, banks sold mortgages to pooling agents (government and private). Then, the agent bundled the mortgages into securitized interests. Investors purchased the bundles and received an agent-backed security guaranteeing the investor a share of all principal and interest payments made in return. So, if a home in one of these mortgage-backed security pools goes into foreclosure, the investors have some authority to make demands for payment. Requiring all investors in a mortgage to come to the mediation table would be like requiring all stockholders of a large company to vote at every stockholder meeting.

Some mediation advocates claim that letting a responsible party send a lawyer instead of appearing in person compromises the ability to explore all options in mediation. However, it may be better to settle for a representative with limited authority with access to people with greater authority than to make demands for persons with authority who may not add much to the mediation session.

#### Element 2 Accountability: Documentation Exchange

Requiring both parties to have documents ready for the mediation is a worthwhile prerequisite. Document review and exchange constitutes much of the mediation time before servicers can consider a loan modification. Indeed, borrowers not having the correct or updated documentation or servicers not processing submitted applications in time cause mediations to roll over into a second session or beyond.<sup>137</sup> However, there are two major reasons against program administrators making bad faith judgments if

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area. See, e.g., New Hampshire, Foreclosure Timeline, Help for New Hampshire Homeowners, <http://www.homehelpnh.org/understanding-your-situation/the-foreclosure-process/> (last visited June 2, 2014), compare with Cleveland, The Foreclosure Timeline, The Federal Reserve Bank of Cleveland, Dec. 12, 2009, [http://www.clevelandfed.org/Forefront/2009/12/ff\\_20091216\\_08.cfm](http://www.clevelandfed.org/Forefront/2009/12/ff_20091216_08.cfm). For an extensive discussion on timelines and how they impact foreclosures, see Amy Crews Cutts & William A. Merrill, *Interventions in Mortgage Default: Policies and Practices to Prevent Home Loss and Lower Costs*, Freddie Mac Working Paper #08-01(2008), available at [http://www.freddiemac.com/news/pdf/interventions\\_in\\_mortgage\\_default.pdf](http://www.freddiemac.com/news/pdf/interventions_in_mortgage_default.pdf). Note that this resource does not account for how mediations lengthen or shorten foreclosure timelines.

136. Mortgage-Backed Securities, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/answers/mortgagesecurities.htm> (last visited June 2, 2014).

137. *Walk the Talk*, *supra* note 57, at 15.



parties fail to submit a certain list of documents prior to the mediation or bring them to the mediation.<sup>138</sup>

First, borrowers and servicers frequently lose or misplace documents.<sup>139</sup> The reasons could be as simple as dealing with a mass of paperwork or as complicated as not having the educational background to understand what bank paperwork is important. While losing the paperwork intentionally may be grounds for sanctions, parties should not always face sanctions.<sup>140</sup> Borrowers already express hesitation at turning over paperwork in a process they are not sure is confidential.<sup>141</sup> Sanctions would discourage the parties from participating at all if they feared they did not have the right paperwork.<sup>142</sup> Sanctions would also stall parties from working on a main goal of mediation: improved communication. Facilitating clear communication about paperwork is a primary, positive outcome of foreclosure mediation.

Second, servicers' attorneys have repeatedly emphasized that they cannot get their clients to provide a standardized list of documents needed for loan modifications, even modifications that are federally-managed, like HAMP.<sup>143</sup> Because servicers change their qualification criteria frequently, and each servicer has its own loan modification programs, a consistent list would be nearly impossible. Additionally, a borrower's circumstances may lead to different document requests; for example, a self-employed person must submit different documentation than someone with a direct deposit from an employer. Thus, the program would have to create its own list, which would be neither complete nor sufficient for what the servicers actually need. Such endeavors would waste precious mediation time.

Some advocates want to, and some courts do, require servicers to provide borrowers with written documentation of how the servicers calculate net present value, what the pooling and servicing agreement says, or what

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138. Nevada's program allows for a finding of bad faith if either party does not provide necessary documents. *See, e.g.*, Supreme Court of Nevada, *Questions*, STATE OF NEVADA, <http://foreclosure.nevadajudiciary.us/index.php/questions> (last visited June 8, 2014).

139. *See, e.g.*, SHAH, *supra* note 85, at 11.

140. Alon Cohen, *Clearing the Foreclosure Crisis: Foreclosure Mediation Can Reduce Uncertainty*, Center for Am. Progress, Oct. 25, 2010, <http://americanprogress.org/issues/housing/news/2010/10/25/8565/clearing-the-foreclosure-crisis-foreclosure-mediation-can-reduce-uncertainty/>.

141. *See* Kimberly Miller, *Foreclosure Mediation Suffers from Lack of Information, Preparation*, ORLANDO SENTINEL, Jan. 4, 2011, [http://articles.orlandosentinel.com/2011-01-04/news/os-foreclosures-mediation-report-20110103\\_1\\_alternative-dispute-resolution-rules-foreclosure-mediation-mediation-program](http://articles.orlandosentinel.com/2011-01-04/news/os-foreclosures-mediation-report-20110103_1_alternative-dispute-resolution-rules-foreclosure-mediation-mediation-program).

142. *Walk the Talk*, *supra* note 57, at 16.

143. Meeting with Anonymous Lenders' Attorneys (2010) (on file with author).

formulation(s) the servicer uses to consider loan modifications.<sup>144</sup> These requirements would certainly make the foreclosure and modification process more transparent, which is one of the goals of mediation. However, for some of these documents, like the pooling and servicing agreement, the servicer must request the investors to authorize those disclosures. Such authorization would be on a case-by-case basis, thus extending the foreclosure process even further. In many instances, the borrower would neither understand what the pooling and servicing agreement is, nor how it would help her case (and in most instances, having the document would not help her case).

Further, the mediator should not be in a position to explain, let alone evaluate, any paperwork.<sup>145</sup> This practice morphs mediation, which preserves the role of a third party as the neutral, into arbitration, which involves a third party as an adjudicator.<sup>146</sup>

The mediator also should not report her opinion about the loan modification process.<sup>147</sup> A mediation is not about deciding right and wrong, but about parties exploring options for a self-determined resolution.<sup>148</sup> Thus, the mediator can help facilitate explanation (by asking questions), but should not be advising the borrower or reviewing paperwork for its completeness. If program managers determine it is more important to explore whether mortgage procedures were correct than to settle the case at hand, the program should direct parties to an adjudicative process first.<sup>149</sup>

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144. See, e.g., ME. REV. STAT. ANN. tit. 14, § 6321-A(13) (2009) (requiring the mediator's report to include the outcome of the Net Present Value worksheet); Walsh, *supra* note 63, at Vi; see also Katie Buitrago, *New Bill Could Improve Accuracy and Fairness of Foreclosure Process*, WOODSTOCK INSTITUTE, Dec. 1, 2010, <http://www.woodstockinst.org/blog/2010/new-bill-could-improve-accuracy-and-fairness-foreclosure-process> [hereinafter *New Bill*].

145. *Contra* Walsh, *supra* note 63, at 11.

146. Jacqueline M. Nolan-Haley, *Mediation: The 'New Arbitration'* 17 HARV. NEGOT. L. REV. 61 (2012), available at <http://www.hnlr.org/wp-content/uploads/2012/09/61-96.pdf>.

147. *Contra* Walsh, *supra* note 63, at 11;

An Act To Preserve Home Ownership and Stabilize the Economy by Preventing Unnecessary Foreclosures, H.P. 994, L.D. 1418, 124th Leg., §§ 3, 13 (Me. 2009) (amending Me. Rev. Stat. Ann. tit. 14, § 6321-A (2009)).

148. MODEL STANDARDS, *supra* note 16.

149. See *infra* Part V (discussing how a program can check for homeowner defenses and still maintain a mediation program's core values).

### Element 3 Accountability: Good Faith Participation

In 2009, the National Consumer Law Center published a report that, among other reforms, called for accountability measures to ensure consumer protection from bad bank behavior in foreclosure mediation programs. The recommendation was to have the mediator report on bad behavior and recommend punishment for the bank.<sup>150</sup> While this may seem extreme to long-time mediators, the *Nevada* case indicates that these roles may become more and more common for mediators. But, as Blankley, Stempel, and Lande, among others, have pointed out, a mediator being responsible for ensuring good faith participation and for upholding core mediation principles creates inherent dissonance.<sup>151</sup> In effect, the requirements create more than inherent dissonance; they quite simply degrade the fabric of confidentiality, neutrality, and self-determination that renders mediation a beneficial alternative to traditional conflict resolution settings.

#### B. Confidentiality

Some programs have created a “certificate of compliance” for mediators to report whether the parties operated in good faith throughout the mediation process.<sup>152</sup> If program rules state the value of all parties participating in good faith, the program will need a mechanism to enforce such provisions. Values without teeth do not operate as values at all.

Confidentiality is also often prescribed in a local rule,<sup>153</sup> state statute,<sup>154</sup> or professional standard.<sup>155</sup> It is also preserved in the Uniform Mediation Act (UMA) and thus, applies in states that have adopted the UMA.<sup>156</sup> A

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150. Walsh, *supra* note 63..

151. Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AMER. ACAD. MATRIMONIAL LAW. 69 (2001), available at <http://www.aaml.org/sites/default/files/the%20road%20from%20voluntary-mediation.pdf>.

152. See, e.g., STATE OF OREGON, FORECLOSURE AVOIDANCE MEDIATION PROGRAM CERTIFICATE OF COMPLIANCE (2012), available at [http://www.doj.state.or.us/consumer/pdf/foreclosure\\_mediation\\_certificate\\_of\\_compliance.pdf](http://www.doj.state.or.us/consumer/pdf/foreclosure_mediation_certificate_of_compliance.pdf).

153. MO. SUP. CT. R. 17.06.

154. 710 ILL. COMP. STAT. 35/8 (2004) (confidentiality); 710 ILL. COMP. STAT. 35/7 (2004) (prohibiting mediator reports); 710 ILL. COMP. STAT. 35/4(a) (2004) (stating that a mediation communication is privileged and undiscoverable; a party may refuse to disclose and may prevent others from disclosing communications).

155. Model Standards, *supra* note 16; CENTER FOR DISPUTE SETTLEMENT & THE INSTITUTE OF JUDICIAL ADMINISTRATION, NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992), available at <http://courtdadr.org/files/NationalStandardsADR.pdf> [hereinafter NATIONAL STANDARDS].

156. UMA § 7.

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mediator's commitment to confidentiality means that the mediator, with a few exceptions,<sup>157</sup> cannot report any communications made during the course of mediation. This includes reporting anything about bad faith/good faith participation in the mediation, even if the report is to the court.<sup>158</sup> Confidentiality of the proceeding guarantees that all parties involved have a safe place to explore options, without risk of exposing themselves to legal liability for their statements or questions. In a few states, mediators may face reprimands or de-certification for breaches of confidentiality, including breaches for the purpose of reporting bad faith negotiating.<sup>159</sup>

### C. Neutrality

Another reason that tasking mediators with bad faith/good faith analysis is unethical is because it requires mediators to make subjective determinations about the mediation and the parties therein. Like confidentiality, neutrality is a core ethical value of mediation.<sup>160</sup> It is necessary to promote confidence and trust, so the mediator may promote honest dialogue and party self-determination.<sup>161</sup> If lawyers and parties think the mediator may make a subjective determination about their behavior, the lawyers and parties may not be forthcoming in the mediation, which jeopardizes the whole process.<sup>162</sup>

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157. UMA § 8.

158. UMA at Reporter's Notes.

159. Florida Mediator Ethics Advis. Comm., Op. FL-1992-95-GV (1992); Tenn. S.C. Alt. Disp. Resol. Comm., *In re: James R. Finney* (Nov. 2, 2006), available at [http://www.tncourts.gov/sites/default/files/rule\\_31\\_mediator\\_adrc\\_grievance\\_decision\\_11-2-06.pdf](http://www.tncourts.gov/sites/default/files/rule_31_mediator_adrc_grievance_decision_11-2-06.pdf).

160. Model Standards, *supra* note 16, at 5.

161. *State v. Williams*, 877 A.2d 1258, 1266 (N.J. 2005). It is important to recognize that “[i]f mediation confidentiality is important, the appearance of mediator impartiality is imperative. A mediator, although neutral, often takes an active role in promoting candid dialogue . . . To perform that function, a mediator must be able to instill the trust and confidence of the participants in the mediation process. That confidence is insured if the participants trust that information conveyed to the mediator will remain in confidence. Neutrality is the essence of the mediation process. . . . Thus, courts should be especially wary of mediator testimony because no matter how carefully presented, [it] will inevitably be characterized so as to favor one side or the other.” (Citations omitted; internal quotation marks omitted).

162. Indeed, servicer attorneys in Nevada have called mediators “biased” because they use “extreme enforcement of the rules” by finding servicers in bad faith for not wanting to reduce principal on a loan. Doug McMurdo, *Lenders' Conduct in Foreclosure Program Angers Justices*, LAS VEGAS REV. J., Apr. 5, 2011, available at <http://www.lvrj.com/news/lenders-conduct-in-foreclosure-program-angers-justices-119291304.html?ref=304>.

Few mediators are trained to make judgments that may have legal consequences, let alone judgments as vague as what constitutes good faith participation.<sup>163</sup> Not even judges agree on what good faith participation means, calling it an “intangible and abstract quality with no technical meaning or statutory definition.”<sup>164</sup>

Some may think that creating a definition for good faith may be worthwhile. However, a definition of good faith, other than a description of a specific action (like not appearing at a mediation), is elusive.<sup>165</sup> More intangible qualities, like fairness, appear in attempted definitions. Defining good faith would only lead to a mediator having to make more subjective judgments. This could allow mediator bias to influence judgments, further eroding the neutrality of mediation. Additionally, mediators may be bound by other ethical rules (e.g., attorney ethics) that prohibit them from making such judgments.<sup>166</sup>

Requiring or permitting disclosures about bad faith conduct would be particularly inadvisable for states that have adopted the UMA, for the court rule would be in direct conflict with state law.<sup>167</sup> The Nevada Foreclosure Mediation program administrators considered this when creating their own mediator guidelines and roundly rejected any requirement of “good faith” evaluation.<sup>168</sup> But, after political pressure to give the program more teeth, the program administrators not only allowed mediator reports of bad behavior, but the court also ruled that judges must follow the mediator’s suggestion of sanctions.<sup>169</sup> Even more inappropriate than making a subjective determination about what good faith participation means is making a subjective determination about sanctions for a party.<sup>170</sup> This is directly contrary to the quality that distinguishes a mediator from a judge: both are impartial, but only a mediator is neutral as to the outcome. By

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163. Carol L. Izumi & Homer C. LaRue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 71 (2003).

164. *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259 (Sup. Ct. 1954).

165. Some scholars have created lists of behaviors that would fall under a good faith/bad faith definition. *See, e.g., Kovach, supra* note 80, at 622–23.

166. *See, e.g., MODEL RULES OF PROF’L CONDUCT* R. 2.4 (1983).

167. *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs*, A.B.A. SEC. DISP. RESOL. 4 (Aug. 7, 2004), available at [www.abanet.org/dispute/draftres2.doc](http://www.abanet.org/dispute/draftres2.doc) [hereinafter *Resolution on Good Faith*]; *see e.g., WASH. REV. CODE* § 7.07.060 (2005), available at <http://apps.leg.wa.gov/RCW/default.aspx?cite=7.07.060.7.07.060>.

168. *Walk the Talk, supra* note 57, at n.20.

169. *Walk the Talk, supra* note 57, at 13.

170. *Contra Walk the Talk, supra* note 57, at 13.

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essentially issuing an order for sanctions, the mediator has become a non-neutral adjudicator.

Requiring mediators to report on good faith/bad faith also jeopardizes the role of the judiciary.<sup>171</sup> If mediators must share their good faith/bad faith evaluations with the trial court, even the most unbiased trial court will form a view of the parties before the court hears the merits of the case. Even worse, the mediator's judgment is based on a subjective standard. The mediator has heard no evidence in the case nor knows the history of other motions the parties may have made. Furthermore, the party to the mediation who gets reported for bad faith has little recourse for the impact the report may have. The party may not challenge the report, and it is not subject to the rules of evidence.<sup>172</sup> Ultimately, the mediator's opinion could, and at least in Nevada does, decide the outcome of the case—the exact opposite of a mediator's role.<sup>173</sup>

#### D. Party Self-Determination<sup>174</sup>

Another, less obvious, consequence of requiring mediators to report on the good faith participation of the parties is that parties may feel pressure to settle, even if settlement is not in their best interest. Mediation programs are supposed to generate multiple options to resolve a case. However, some servicers are coming to the negotiating table with only a “take it or leave it” offer, an offer which may represent the full extent of their authority.<sup>175</sup> In an effort to force servicers to negotiate more, some housing advocates want programs to mandate and document the analysis of all possible alternatives to foreclosure in each mediation.<sup>176</sup> But, even with the best of court

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171. This is specifically what the National Standards hoped to address. See NATIONAL STANDARDS, *supra* note 155, at § 12.1 & Commentary.

172. See, e.g., N.J. REV. STAT. § 2A:23C-7 (2004); ILL. SUP. CT. R. 99 (2001).

173. NATIONAL STANDARDS, *supra* note 155, at 12.2; Society of Professionals in Dispute Resolution, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 18 (1991).

174. For an excellent exploration of the power dynamic and self-determination principles in tension in foreclosure mediations, see Shana H. Khader, *Mediating Mediations: Protecting the Homeowner's Right to Self-Determination in Foreclosure Mediation Programs*, 44 COLUM. J.L. & SOC. PROBS. 109, 129 (2010), available at <http://www.columbia.edu/cu/jlsp/pdf/Fall%202010/Khader.JLSP.44.1.pdf>.

175. Walsh, *supra* note 63, at 12; see also E-mail from Tina Cooper, Dir. of Cook Cnty. Foreclosure Mediation Program, to Heather Scheiwe Kulp, Staff Attorney, Resolution Sys. Inst. (Dec. 10, 2010) (on file with author).

176. Walsh, *supra* note 63, at 19; see also *New Bill*, *supra* note 144.

intentions, the parties, through exploring options, may understand “good faith participation” to mean “negotiat[ing] to the death.” As the United States District Court for the Southern District of New York has recognized in overturning a servicer’s sanction for not conducting a full “risk analysis” in preparation for mediation, it is not always in the best interest of parties to keep negotiating, let alone to settle.<sup>177</sup> Indeed, forcing negotiations threatens core values of mediation: party empowerment and self-determination.<sup>178</sup> Parties deserve to have a clear, simple behavioral guideline to follow in mediation because most parties do want to comply with the court’s order to mediate.<sup>179</sup> Therefore, courts should not create policies that people may misinterpret as coercing parties into settlement.<sup>180</sup>

#### V. RECOMMENDATIONS FOR PROGRAM DESIGN TO PRESERVE CONFIDENTIALITY AND ENSURE ACCOUNTABILITY IN FORECLOSURE MEDIATION

Foreclosure mediation program designers should look to the core values of mediation—which have existed long before the foreclosure crisis—when seeking to hold servicers and borrowers accountable and to protect the confidentiality and neutrality of the mediation process. Quality dispute resolution system design can ensure accountability and protect the core values that make mediation a powerful, effective resolution process.<sup>181</sup>

##### *Element 1 Accountability: Attendance*

##### ***May Be the Responsibility of the Mediator***

Mediators do not violate any ethical rules, laws, or best practices in the dispute resolution field by indicating whether or not a party attended mediation. It is an objective measure of party accountability for the process.

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177. Jeffrey A. Wurst & Daniel L. McAuliffe, *Southern District Establishes Standards for “Good Faith” Participation in Court-Ordered Mediation*, 9 ABF J. 59, 59-60 (July/Aug. 2011).

178. Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement In Mandatory Mediation*, REV. LITIG. 1, 2 (2004).

179. See *Good Faith Participation in Mediation: Recent Decisions in New York and California*, BUS. LITIG. REP. (Quinn Emanuel, Los Angeles, C.A.), Jan. 10, 2012, available at <http://www.quinnemanuel.com/media/247355/qe%20january%202012%20newsletter.pdf>.

180. Alon Cohen & Andrew Jakobovics, *Now We’re Talking*, Center for American Progress (2010), available at [http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/foreclosure\\_mediation.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/foreclosure_mediation.pdf) [hereinafter *Now We’re Talking*]; *Walk the Talk*, *supra* note 57, at 10.

181. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 75–76 (2002).

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Thus, the mediator may fulfill Element 1a Accountability. But, the challenges indicated above with assuring attendance, and attendance of someone who has authority to settle, are best addressed with the following provisions.

1. Make mediation mandatory so people have an expectation interest in attending, and support outreach programs that inform as many participants as possible about the program and its potential benefits.<sup>182</sup> Most current foreclosure mediation programs are optional, meaning borrowers have to request mediation. About one percent of borrowers in foreclosure in these states opt in to mediation.<sup>183</sup> Some people are just giving up their homes. But, this low opt-in number also likely reflects both the difficulty in getting people to sign up for new programs and the lack of public education about the mediation process. The low opt in rate also shows the benefits of automatic programs, where borrowers in foreclosure are scheduled for mediation when the foreclosure is filed, that result in over fifty percent participation.<sup>184</sup> In comparison to the mere threats of a mediator's report, automatic programs seem to be more effective in ensuring broader attendance.

2. Allow for scheduling flexibility. While administrative costs increase with every missed mediation, few programs experience "no-shows" regularly. Allowing parties to reschedule one mediation apiece leaves room so that unforeseen circumstances will not jeopardize the process. Administrators must ensure that parties know they must call within a reasonable time before the mediation to reschedule.

3. Create an official opportunity for parties to work together prior to mediation. This could occur at a court hearing or at a pre-mediation conference. Parties may exchange documents, educate one another, and start negotiating before the mediation. Preparatory activities can make the actual mediation more effective.

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182. *Now We're Talking*, *supra* note 180, at 1-2; *Walk the Talk*, *supra* note 57, at 10-11.

183. Alon Cohen, *The Latest Mortgage Mediation Lesson: Maryland's Experience Points the Way Forward*, CENTER FOR AMERICAN PROGRESS (Jan. 19, 2011), [http://www.americanprogress.org/issues/housing/news/2011/01/19/8946/the-latest-mortgage-mediation\\_lesson.html](http://www.americanprogress.org/issues/housing/news/2011/01/19/8946/the-latest-mortgage-mediation_lesson.html) [hereinafter *Latest*].

184. *Latest*, *supra* note 183; *Now We're Talking*, *supra* note 180; Anthony Klan, *States Try to Force Mortgage Workouts*, WALL ST. J., Dec. 31, 2010, available at <http://online.wsj.com/article/SB10001424052748704543004576051843140821936.html>.



4. Provide means for electronic participation.<sup>185</sup> Most servicers have established call centers where servicer employees with modification authority sit with the borrower data on a computer screen in front of them. If programs create environments conducive to this electronic participation, they can ensure people with greater authority are present.

5. Ensure the location for the mediations can accommodate program designs that both maintain confidentiality (i.e., are not too close to other mediators or courtrooms) and allow electronic connectivity to phone and to online chat services or other forms of communication with their clients. This may require mediations to occur in courthouses, arbitration centers, community meeting halls, houses of worship, or government buildings with wireless internet and multiple phone lines. Along with confidentiality, stakeholders should consider ADA accessibility and the appearance of neutrality in choosing the location.

6. Ensure that programs have clear mediator reporting forms that give information about who was present at the mediation. The fewer open-ended questions on the reporting form, the lower the possibility that the mediator will share subjective interpretations of the mediation.<sup>186</sup>

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185. Some legal questions remain about whether telephonic appearance constitutes appearance. A 2008 Wisconsin trial court sanctioned an insurance company, whose representative appeared by phone in a non-foreclosure mediation, for breaching a court order. *See Lee v. Geico Indem. Co.*, 776 N.W.2d 622 (Wis. 2009), available at <http://www.wisbar.org/res/capp/2009/2008ap003125.htm>. The state statute required: "Each corporate party or other legal entity which is a party shall appear by an individual *other than the attorney*, which individual shall have full authority to negotiate in this matter . . ." WIS. STAT. § 802.12 (1993) (emphasis added). In the foreclosure mediation context, no statutes as yet require a representative other than an attorney to appear. A lender representative (attorney) is almost always physically present in the mediation and has access to a lender phone bank to discuss options. Courts could avoid conflicting with other state rulings regarding appearance at mediation by including in the standard foreclosure mediation court order an allowance for phone participation.

186. These exceptions are limited:

- (1) in an agreement evidenced by a record signed by all parties to the agreement;
- (2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;
- (3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- (4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
- (5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
- (6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or
- (7)

7. Rely on the judge's determination of standing so that mediators can avoid making an initial legal inquiry, such as whether the servicer has authority to foreclose on the home.<sup>187</sup> Judges often determine who has the right to bring the case, and who is responsible for defending the case; judges are far better suited than mediators to make this determination.<sup>188</sup> Mediators retain the ability to question whether all parties necessary to settle a case are present.

8. Ensure that a clear rule about what is confidential is in the mediation agreement and both parties sign it, including the parties with authority to settle. Make electronic signatures possible if that would assist in ensuring the authorized person is able to participate. While an agreement reflecting the rule may not be necessary (if a rule is in place, parties must follow it regardless of an agreement), the act of signing an agreement reminds parties of their commitment to attend and, if the mediation results in a settlement, to do what is required by the settlement. People are more likely to fulfill an agreement they sign.<sup>189</sup>

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sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party . . . (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: (1) a court proceeding involving a felony [or misdemeanor]; or (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation. (c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2). (d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

UMA, *supra* note 28, at § 6.

187. Walsh, *supra* note 63, at 18.

188. Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079, 2094–111 (1993).

189. Carol M. Werner et al., *Commitment, Behavior, and Attitude Change: An Analysis of Voluntary Recycling*, 15 J. ENVTL. PSYCHOL. 197 (1996) (finding that those who signed a contract to commit to recycling were more likely to participate, and likely to participate more than once, in a recycling program than those who simply agreed verbally in person to participate).

9. Let the court decide what to do with information on the mediation form rather than have mediators recommend a particular course of action. The court should determine whether it wants to find bad faith if necessary parties do not appear after the one allowable, excused rescheduling. If the court wants to find bad faith for necessary parties not appearing, then it should make that determination, not the mediator.<sup>190</sup>

*Element 2 Accountability: Document Exchange*

***Should Be Responsibility of Non-mediator  
Mediator May Have Limited Responsibility***

In non-foreclosure mediations, it is common for the court or the mediator to require some document exchange in preparation for the negotiation process. This is simply due diligence. The challenge in foreclosure situations is that each loan and each modification option has a different set of documents required for an application, and each borrower has a different set of circumstances that may require different documents. So, even if programs create a standardized list of the most commonly requested documents, it would not be sufficient for most loan modification applications or borrower circumstances. Rather than coming up with an incomplete list to be exchanged before or during mediation and to be used in evaluations of party participation, the program process should support open communication about document exchange before, during, and after mediation sessions.

1. Work with servicers to improve the communication systems available to borrowers prior to and during the foreclosure process.<sup>191</sup> Per the \$26 billion settlement in 2012 between forty-nine states' attorneys general and five major banks, servicers should designate a contact person for each borrower so the borrower can make phone calls and e-mails to one person and be assured of reaching someone who can communicate about

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190. Lande, *supra* note 55, at 84–85; David S. Winston, *Participation Standards in Mandatory Mediation Statutes: "You Can Lead a Horse to Water. . . ."* 11 OHIO ST. J. ON DISP. RESOL. 187, 201 (1996).

191. SHAH, *supra* note 85, at 4, 15.

his or her case.<sup>192</sup> This would relieve some of the initial frustrations in the mediation process that stunt open communication between borrower and servicer and lead to what some see as bad faith communication.

2. Courts or government agencies could require servicers, prior to mediation, to provide proof that: (1) the servicer is the entity responsible for enforcing the mortgage, and (2) the borrower is actually delinquent on the mortgage. These two showings are the basic requirements for property cases that, in the deluge of foreclosure cases, are sometimes ignored.<sup>193</sup> This gap leads housing advocates to call for documentation of these two showings in mediation. The court makes these determinations, not the mediator or the mediation administrator.<sup>194</sup> Though potentially onerous, these two threshold legal questions should be decided prior to any mediation.

3. Use housing counselors to make document preparation less burdensome for borrowers<sup>195</sup> and more complete for servicers. Housing counselors can also explain the concepts that confuse the borrowers, leading to more educated borrowers going into the mediation. Housing counselors can also help borrowers gather paperwork needed for a HAMP loan modification. Perhaps most importantly, they can help borrowers assess what amount of money they can afford to put toward housing costs.

4. Require a pre-mediation session without the mediator to discuss documents needed for that particular case. This could be done by phone, if necessary. Although this will not resolve all document questions, it will help the official mediation process retain its character as a forum for discussing options. Pre-mediation sessions should not

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192. Nelson D. Schwartz, *Some Doubt a Settlement Will End Mortgage Ills*, N.Y. TIMES, Feb. 20, 2012, at B1, available at [http://www.nytimes.com/2012/02/21/business/some-doubt-a-settlement-will-end-mortgage-ills.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/21/business/some-doubt-a-settlement-will-end-mortgage-ills.html?pagewanted=all&_r=0).

193. See Thomas J. Sheeran, *Ohio Case Might Add to Lender Problems*, ASSOC. PRESS, Nov. 16, 2007, available at <http://www.ohio.com/news/nation/ohio-case-might-add-to-lender-problems-1.70387>. This is an exception rather than the norm.

194. *Contra* Walsh, *supra* note 63, at VII.

195. Thomas Grillo, *Mayor Calls for Mediation Before Foreclosure*, BOSTON HERALD, Dec. 10, 2010, [http://bostonherald.com/business/real\\_estate/2010/12/mayor\\_calls\\_mediation\\_foreclosure](http://bostonherald.com/business/real_estate/2010/12/mayor_calls_mediation_foreclosure).

include an evaluation of whether the case is “good” for mediation; this should happen prior to a pre-mediation session.<sup>196</sup>

5. Create document exchange requirements flexible enough to allow modification for legitimate hardships or confusion on the part of either party.

6. Create an educational sheet defining foreclosure language and describing some of the different loan modification options. Parties may reference this sheet in mediation. Programs should ensure that the information referenced in the sheet comes from a neutral, reliable source.

7. Have the governing entity, not the mediator, review compliance with a requirement that the servicer provide a reason for a loan modification denial.<sup>197</sup> The mediator should not be in the position to judge any document exchange as sufficient or insufficient, or to evaluate document accuracy.<sup>198</sup>

### *Element 3 Accountability: Good Faith Participation*

#### ***Should Never Be Responsibility of Mediator***

Courts and the UMA are clear; mediation programs deem lack of attendance, lack of settlement authority, and lack of providing the required pre-mediation paperwork to be bad faith.<sup>199</sup> So, how can foreclosure mediation programs increase the likelihood that parties will willingly participate in the process and also preserve the role of the mediator?

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196. This would greatly slow down the process and result in far fewer mediations occurring. *See, e.g., Now We're Talking*, *supra* note 180; *See Walk the Talk*, *supra* note 57, at 19.

197. *See, e.g.,* Maryland's Foreclosure Mediation Program, which requires lenders to evaluate the loan modification application and provide a response in writing prior to proceeding to any mediation. Maryland's Foreclosure Mediation, MARYLAND, THE HOPE INITIATIVE, <http://mdhope.dhcd.maryland.gov/ForeclosureMediation/Pages/default.aspx> (last visited June 6, 2014).

198. Steve Kanigher, *In Nevada, a Fight over Foreclosure Paperwork*, LAS VEGAS SUN, Oct. 25, 2010, <http://www.lasvegassun.com/news/2010/oct/25/fighting-over-foreclosure-paperwork/> (citing a mediator who rejects the speculation that mediators should review documents and reiterating that document review is the realm of the judge, not the mediator).

199. Lande, *supra* note 55, at 86; *Hunt v. Woods*, 1996 WL 8037 (6th Cir. 1996); *Nick v. Morgan's Foods*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), *aff'd* 270 F.3d 590 (8th Cir. 2001); *In re Acceptance Insurance Co.*, 33 S.W.3d 443 (Tex. Ct. App. 2000); *Graham v. Baker*, 447 N.W.2d 397 (Iowa 1989); *Decker v. Lindsay*, 824 S.W.2d 247 (Tex. Ct. App. 1992).

Thoughtful program design, monitoring, and evaluation will put into place a structure to support voluntary good faith participation without requiring the mediator to jeopardize his neutrality.

1. Involve all organizational stakeholder groups in the creation of mediation programs.<sup>200</sup> This will lessen the likelihood that one party will be resentful of the process, and thus less likely to participate willingly. This also mitigates, as much as possible, one party's resentment over having to go to a program in which they have no say. It also helps court administrators, judges, bank employees, servicer attorneys, legal aid attorneys, housing advocates, and borrowers build rapport before they enter tense situations.<sup>201</sup>
2. Rely on the judge's or other authority figure's determination that the servicer foreclosed properly<sup>202</sup> instead of relying on the mediator to make such findings herself.<sup>203</sup> This inquiry is different than whether the servicer participates in the mediation in good faith, and it is proper only for the courts to decide.
3. Ensure the judge or government agency educates parties about expectations in mediation—good faith, self-determination, and confidentiality—at the beginning of the court process and when the case is referred to mediation. In Connecticut, this occurs in the judge's order.<sup>204</sup> The judge can also ensure the parties receive oral instruction about expectations in mediation at any court appearance. The mediator should also clearly explain the process and good faith participation expectations to parties at the beginning of the first mediation session. Clearly identified goals for the mediation will set those goals in the parties' minds and will give the mediator a reference point should the mediation head in a "bad faith" direction.<sup>205</sup>

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200. *Resolution on Good Faith*, *supra* note 167, at 4.

201. *Id.* at 4-5.

202. *See, e.g.*, U.S. Bank Nat'l Assn. v. Mathon, No. 2007-30481, 2010 WL 4910164, at \*5 (N.Y. Sup. Ct. Dec. 1, 2010).

203. *Contra, e.g.*, U.S. Bank Nat'l Assn. v. Mathon, No. 2007-30481, 2010 WL 4910164, at \*5 (N.Y. Sup. Ct. Dec. 1, 2010).

204. Uniform Foreclosure Mediation Standing Orders, STATE OF CONN. SUP. CT. (2010), available at [http://www.jud.ct.gov/external/super/Standorders/Civil/FMP\\_010510.pdf](http://www.jud.ct.gov/external/super/Standorders/Civil/FMP_010510.pdf).

205. *See id.*

4. Explain during referral (judge) and at the beginning of mediation (mediator) that there is no pressure to settle and that if the mediation does not result in a settlement, the parties have the right to go before the judge. This relieves parties from feeling like they have to consider every option (at risk of being judged to be in bad faith) and empowers them to decline options that do not make sense. Negotiation is about considering options that meet needs, not considering a laundry list of options.<sup>206</sup>

5. Do not force parties to talk about specific options; trust the mediator's skill to help parties make their own determination about what is in their best interest to discuss. In the interest of exploring many loan modification options, some courts want to require mediators to report on whether the servicer considered options in good faith. However, because confidentiality protects the mediation process from disclosure, the court cannot force the parties to communicate about specific options. Neither can mediators, who are neutral, require parties to consider particular options. A mediator can ask questions to get the servicer and borrower thinking about what a court might require: proof that a borrower applied for HAMP, explanation of a denial, documentation to support a denial, etc. A mediator can also ask questions of the borrower to see if they understand an explanation about the denial.<sup>207</sup>

6. Train mediators to ask probing, yet unbiased, questions. Training also helps mediators level the playing field to avoid abuse and to check their own prejudices at the door.<sup>208</sup> Mediators should also be trained in loan modification language and options, so they can ask questions that may help the parties discuss more serious alternatives to foreclosure.<sup>209</sup>

7. Build in accountability measures (i.e., pro bono counsel) for the borrowers and counsel for the servicer in the mediation room. While mediators can help guide the process of mediation, they cannot and should not replace counsel as the guard against misconduct, especially if

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206. *Walk the Talk*, *supra* note 57, at 10, 12.

207. Some programs, like Vermont's, require lenders to provide a written reason for denying a loan modification. This decision should be the realm of the courts; if the courts require production of such a document, it should be done in a housing counseling session or in formal court proceedings. *See, e.g.*, SHAH, *supra* note 85, at 12. The mediator should not require any party to produce any documentation, as the mediation is not an official discovery process. *See, e.g.*, SHAH, *supra* note 85, at 12. The mediator should not require any party to produce any documentation, as the mediation is not an official discovery process.

208. *Walk the Talk*, *supra* note 57, at 12.

209. *See* Walsh, *supra* note 63, at 19.

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the mediators are attorneys themselves.<sup>210</sup> Parties or their attorneys should be the ones to report misconduct to the court.<sup>211</sup> In the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct, attorneys have an ethical obligation to report the misconduct of other attorneys.<sup>212</sup> Many states do not expressly require reporting, but allow it and privilege it.<sup>213</sup> To have this type of accountability, though, programs need to supply pro bono counsel to self-represented borrowers.<sup>214</sup>

8. Ensure program administrators review each mediation session with the mediator and discuss any issues that arose. Because this conversation is between two people from the same dispute resolution program, the conversation is still confidential in most states. The benefit: it allows mediators to vent about frustrations and decreases the temptation to report “bad” behavior to the court. Also, this process assists with better program development; if the program identifies problems, consider how to design the system differently to counter negative participation.<sup>215</sup>

9. Be wary of using subjective terms to describe behavior. Some suggest the court or legislature define what “good faith” means.<sup>216</sup> However, defining “good faith,” which would likely involve more

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210. MODEL RULES OF PROF'L CONDUCT R. 2.4 (1983).

211. NATIONAL STANDARDS, *supra* note 155, at 12.3.

212. MODEL CODE OF PROF'L RESPONSIBILITY DR 1-103(A) (1980); MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (1983).

213. *See, e.g.*, San Diego Cnty. Bar Ass'n Legal Ethics Comm., Ethics Op. 1992-2 (1992), available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion92-2> (California); Colo. Bar Ass'n Ethics Comm., Op. 64 Duty of Attorney to Report an Ethical Violation (1983) (rev. 1996), available at [http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion\\_64\\_2011.pdf](http://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_64_2011.pdf) (Colorado); State Bar of Ariz. Ethics Comm., Op. 90-13 (Oct. 16, 1990), available at [http://www.azbar.org/Media/\\_Ethics/90-13.pdf](http://www.azbar.org/Media/_Ethics/90-13.pdf) (Arizona, *discussing* Illinois case).

214. Increasingly, program advocates believe that having representation for the homeowners is necessary for program success. John Schwartz, *Judges Berate Bank Lawyers in Foreclosure*, N.Y. TIMES, Jan. 11, 2011, at A1, available at <http://www.nytimes.com/2011/01/11/business/11lawyers.html?pagewanted=all>.

215. Lande, *supra* note 55, at 76.

216. *A Homeowner's Guide to Foreclosure Mediation*, NW. JUSTICE PROJECT (Oct. 2011), available at <http://www.walawhelp.com/documents/4993016212EN.pdf?stateabbrev=WA/> (enumerating what it means for both sides to participate in good faith); Jesse D. Stewart, *Maine's Foreclosure Mediation Program: What Should Constitute a Good Faith Effort to Mediate?*, 64 ME. L. REV. 249 (2011) (recommending that Maine's foreclosure mediation program “empower[]



subjective terminology like “reasonable” or “congenial,” seems as productive as allowing mediators to make subjective determinations about what “good faith” means. Indeed, only one of twenty-three jurisdictions that listed “good faith” requirements in mediation statutes actually defined what “good faith” means.<sup>217</sup> Sanctions, like laws, are meant to change specific bad behavior and promote specific good behavior. Therefore, only clear, objective criteria should be used to sanction bad behavior in mediations. If anyone is to determine what is sanctionable, it should be the courts, not mediators.<sup>218</sup>

10. Do not call the process mediation or call the neutrals mediators if the neutral is reporting on bad faith participation.<sup>219</sup> The Providence and Philadelphia programs called the process conciliation to avoid the connotations that come with mediation. However, programs must decide if reporting on bad faith is a higher priority than using actual mediators and conducting professional mediation sessions.

11. Develop a monitoring system to track satisfaction with the mediation process from parties and the mediator. This will help programs flag any reoccurring feedback and make adjustments in the process as needed.

12. Conduct a thorough evaluation of the program’s operations, including whether the chosen process is preserving the core values of mediation.

## VI. CONCLUSION

Mediation program developers perform a balancing act. They must determine the goals of the program and the public policies governing it, weigh the interests of its stakeholders, and comply with various statutory, administrative, and professional standards. As the foreclosure mediation context demonstrates, these factors often conflict.

Mediation confidentiality and neutrality are sometimes at odds with measures meant to hold parties accountable for participating fairly in the

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mediators and judges to carefully monitor the mortgagee’s good faith at mediation based on clear, predictable, and realistic criteria” such as how the NPV is conducted and what documents are exchanged).

217. Lande, *supra* note 55, at 80.

218. *Resolution on Good Faith*, *supra* note 167, at 2.

219. *Walk the Talk*, *supra* note 57, at 11.

mediation process. The need for courts to ensure just processes may mean they do not interfere with much of the mediation process. In the midst of these seemingly incompatible characteristics, however, courts can develop foreclosure mediation programs that serve borrowers, servicers, and the justice system well. Specifically, foreclosure mediation developers should carefully consider how the program's mediator reporting requirements might conflict with mediator ethical rules.

First, courts can hold parties accountable for attending the mediation. Attendance is the basic requirement for borrowers and servicers to communicate about alternatives to foreclosure. Without a mechanism to enforce attendance, foreclosure mediation programs lose their primary strength: communication between two parties in conflict, facilitated by a skilled third-party neutral. However, courts, not mediators, should determine what sanctions are appropriate for non-attendance. Mediators should allow exceptions for unforeseen circumstances in the event of urgent changes to the parties' schedules.

Second, courts can monitor document exchange as part of a pre-mediation or post-mediation court process. However, even if mediation serves as a forum for document exchange, the courts cannot review what is exchanged. Mediators are most effective when they can ask questions about the documents presented, rather than serving as a go-between for document exchange. To prepare for the mediation, courts can require a pre-mediation conference where parties communicate about what documents they must bring before considering alternatives to foreclosure. Conference facilitators should ask questions about documents and facilitate both parties' greater understanding of the foreclosure and any alternative process, including mediation.

Third, foreclosure mediation program developers should ensure they are familiar with mediator ethical guidelines. Some provisions strictly prohibit mediators from reporting on a party's level of participation in the mediation process. Even if the state's guidelines do not prohibit such reporting, developers should weigh whether preserving confidentiality and neutrality for all mediations or reporting a few rogue parties is more important to the program. Good faith is a difficult concept to define, let alone objectively judge.

Fourth, by monitoring the overall program, courts can determine if there are ongoing issues that need to be addressed. Effective monitoring requires receiving input from all participants, including mediators and parties. Having regular mediator meetings adds an additional layer of program monitoring beyond written survey forms. Once there is sufficient data, a

more thorough evaluation could demonstrate how the program is working relative to its stated goals and values.

Foreclosure mediation development requires a thoughtful group of people to determine the best way to balance competing goals. Once begun, programs must also subject themselves to rigorous evaluation. Monitoring, collecting data, and evaluating the process will keep the initially set out values in check. Only by involving interested parties at all stages of program development will foreclosure mediation programs ensure the core values of the mediation process serve to relieve the foreclosure crisis.