Student Spotlight:
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**Optimizing the Success of Foreclosure Mediation Programs**

**Introduction**

In the next four years, nine million homeowners could lose their homes to foreclosure.¹ People walk away from their homes every day, losing hard-earned investments without knowing how to alleviate their financial problems. One big reason for home loss could be lack of communication. According to local judges in one county, 80 percent of homeowners who are at risk of foreclosure have not made any efforts to mitigate their mortgage troubles with their lenders.²

The response to the foreclosure crisis has been multi-layered and varied across jurisdictions. In nearly half the states, homeowners can combat impending foreclosures by participating in a foreclosure mediation session with their mortgage lender and an impartial third-party mediator. Foreclosure mediation can alleviate numerous issues that homeowners face in attempting to fend off foreclosure.

Foreclosure mediation facilitates communication between borrowers and lenders, a step in the foreclosure process that has been increasingly elusive as the financial crisis has grown. It can avoid unnecessary and frustrating delays in the foreclosure process. Foreclosure mediation

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¹ Andrew Jakabovics & Alon Cohen, *It’s Time We Talked: Mandatory Mediation in the Foreclosure Process* at 1, CENTER FOR AMERICAN PROGRESS (2009).
² *Id.*
has the ability to act as a check on foreclosures that might have been robo-filed or misplaced in the system.

These benefits and others make foreclosure mediation an essential part of every community troubled by mounting foreclosures. However, the programs can be improved in nearly every jurisdiction. Foreclosure mediation programs need to reach more people and need to reduce the power imbalance that exists between lenders and homeowners. The programs should be available to more subsets of homeowners, and mandated for all homeowners once programs have become established.

This paper addresses the problems homeowners face in dealing with foreclosures and how foreclosure mediation can help alleviate these problems. It will break down the differences in foreclosure mediation programs across states, based on what entities run the programs, what types of outreach are used to inform homeowners about the programs, who is required to attend the mediation, who is eligible to participate, the cost of programs for homeowners, and other issues in play in the process. Next, the paper argues for best practices: mandatory mediation, aggressive outreach, physical presence of lenders with authority, allowing any homeowner to be eligible, and making the mediations free to homeowners. Finally, the paper addresses the future of foreclosure mediation and how to optimize its success.

Challenges people face in dealing with foreclosures

The United States could see 2.25 million foreclosures in 2010.\(^3\) Nearly 330,000 homeowners received a foreclosure notice in October.\(^4\) Once homeowners receive a foreclosure

notice stating that the lender intends to take possession of their home, multiple obstacles stand in their way to achieve a favorable resolution. One common problem for homeowners attempting to avoid foreclosure is the difficulty of successfully wading through a nightmare of paperwork that banks require to be processed. Numerous documents need to be completed to modify loans, but are often misplaced or lost at some point in the process. Also, homeowners often do not understand the loan modification procedure and have difficulties complying with the document requests from the federal programs.5

Once the paperwork is sent to the bank more potential problems arise. Banks and mortgage companies are in charge of processing the paperwork and operate out of massive call centers that are often inefficient.6 Lenders have had problems keeping up with the loan modification requests, with reports of delays of four to five months in responding to them.7 Additionally, some of the loan modifications fail to reduce homeowners’ monthly payments, and these modifications are likely to fail.8

Another challenging problem homeowners facing foreclosure must overcome is the dual-track system many banks use. Bank departments handle loan modifications and foreclosures separately. This separate setup leads to myriad miscommunication. Often, a homeowner working with a bank on a loan modification will come home to find a foreclosure notice in her mailbox, resulting in frustration and anger.9 As Oregon Senator Jeff Merkley said at a recent Senate

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8 Bauer, supra note 5.
Banking, Housing, and Urban Affairs Committee hearing, “Homeowners are completely confused and stressed by these foreclosure notices.”

Another big problem homeowners face in trying to avoid foreclosure is the possibility of banks fraudulently auto-signing documents without formal approval. For example, in Florida a law firm has had to withdraw from some of its foreclosure cases because of allegations of fraudulent and sloppy documentation. This discovery regarding a firm which once managed one-fifth of all foreclosures in the state of Florida has placed a hold on foreclosure mediations in the Tampa Bay area.

In response to this concern, attorneys general from every state have joined to investigate whether banks used false documents and signatures to push through hundreds of thousands of foreclosures. In a foreclosure case in Florida, a GMAC employee said in a deposition that his team of 13 people signed about 10,000 documents a month without verifying them. The banks momentarily stopped processing foreclosures after news of this lawsuit in early October, but a few weeks later Bank of America and Ally Financial resumed active foreclosures in the 23 states with judicial foreclosure proceedings.

How Foreclosure Mediation Can Help

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10 Id.
13 Id.
Foreclosure mediation can assuage and sometimes solve all of the aforementioned problems that come with dealing with foreclosure. Most importantly, the foreclosure mediation process gives both sides at least one chance to meet to ensure the foreclosure is progressing legally. It also provides an opportunity to discuss settlements that could halt or speed up the foreclosure if needed.\textsuperscript{15}

In a foreclosure mediation, a homeowner meets face-to-face with a representative from the bank that controls their mortgage and discusses options for remedying the problem. The options for resolution of the foreclosure include coming to a settlement to stay in the home, or defining steps to take that will streamline the process of foreclosure to make it less stressful for them, called “graceful exits” in the foreclosure mediation environment.\textsuperscript{16}

Just as in traditional mediation sessions, in foreclosure mediations it is crucial that the mediator is impartial and objective throughout the process.\textsuperscript{17} The nature of foreclosure mediations means that banks are required to appear for mediations for numerous cases. Because of that, it is possible the mediator and the bank’s representative know each other from previous mediations and might have a friendly relationship. Because of this potential issue, mediators should be wary of appearing biased and might want to make this issue transparent to the homeowner throughout the mediation about the existence of a previous working relationship in the room.

Foreclosure mediation enjoys a high rate of success in some states. States with fully developed programs, such as Connecticut and Nevada, are reporting settlement rates near 75

\begin{footnotesize}
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\item[16] \textit{Id.}, at 9.
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percent. Settlement in this case means that the homeowner is either able to stay in her home or set up a graceful exit that takes into account family situations.\textsuperscript{18} Foreclosure mediation can also accomplish something as simple as helping homeowners put a face to their lenders’ names and informs them so they are able to take steps to begin mending the distrust that the homeowner might feel in the relationship.\textsuperscript{19} The more communication between the parties, the better the result can be for both sides.

Foreclosure mediation benefits more than just homeowners. Lenders also have something to gain from coming to an agreement that avoids foreclosure and keeps the borrower in her home.\textsuperscript{20} A study at Valparaiso University found that investors lost approximately $4.72 billion in the month of July, 2009, or more than 64 percent of the balance of the original loans made to homeowners.\textsuperscript{21} This sample size explains why one lenders’ attorney says that her clients “don’t want even one more property in inventory” and do not want to manage properties if possible, making them more amicable to the mediation process.\textsuperscript{22}

The role of the foreclosure mediator is to help educate the homeowners on their options when facing foreclosure and “translate” confusing terms and statements the bank makes. As in mediation generally, foreclosure mediators should facilitate discussion and reframe and reflect statements from each side to make sure that the lines of communication between the parties remain clear. In some cases, mediators might help the homeowners navigate the paperwork

\begin{thebibliography}{9}
\bibitem{18} Id.
\bibitem{21} Id. at 434.
\bibitem{22} \textit{Mediation Rising: States Depend on ADR to Help Clean Up the Mortgage Mess, Alternatives to the High Cost of Litigation}, 27 ALTERNATIVES TO HIGH COST LITIG. 57 (2009).
\end{thebibliography}
process and assist the banks in explaining the risks of foreclosure as well as the benefits of loan modification.

Special training for mediators conducted by foreclosure experts can ensure that foreclosure mediators keep the mediation on topic and productive. In her opening statement, the mediator often emphasizes to the parties the need for sensible, sustainable modifications, or a graceful exit, steering the parties away from a modification that seems unlikely to last. More than one mediation session will likely be needed, so the mediator needs to be patient and explain available alternatives in the event the proper paperwork is missing.

Foreclosure mediation can also serve to better inform homeowners about the available federal loan modification programs, such as the programs within the Making Home Affordable program: Home Affordable Refinancing Program (HARP) and Home Affordable Modification Program (HAMP). Going through the details of the program can help ensure that the applications for modification are complete.

Recent reports have shown that when homeowners qualify for HAMP, 90 percent of them are still able to make their more affordable mortgage payments nine months later. Advocates for foreclosure mediation have recognized this benefit. John Rao, an attorney from the National Consumer Law Center who has been involved in foreclosure mediations, spoke at an October panel in Rhode Island about the effectiveness of foreclosure proceedings. He said, “The advantage of mediation programs is that they generally require that each of the participating parties designate a person having authority to resolve the matter. While these programs do not

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24 Id. at 15.
compel a servicer to provide a loan modification, they ensure that homeowners have a fair opportunity for consideration of their HAMP applications.”

**History of Foreclosure Mediation**

The history of foreclosure mediation is relatively short compared to the practice of mediation generally. Foreclosure mediation programs are a fairly new phenomenon. As a response to the ballooning financial crisis in 2008, programs were introduced in several jurisdictions. Connecticut, the city of Philadelphia, and New York all started programs in the first half of 2008. In Ohio, programs in Cuyahoga, Franklin, and Montgomery counties also began in 2008. By mid-2009, nine states offered foreclosure mediation.

In 2010, foreclosure mediation programs have experienced exponential growth. States are continuing to develop programs as of late 2010. In January, New Hampshire launched a free voluntary mediation program for homeowners. In April, Cook County in the city of Chicago launched a Mortgage Foreclosure Mediation Program that is working in conjunction with state and local organizations and legal aid groups to provide free services. Legislation to start foreclosure mediation has been proposed and is pending in Texas, Washington, Minnesota, and Arizona.

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28 Jakabovics & Cohen, supra note 1 at 7.


30 Jakabovics & Cohen, supra note 1 at 1.


Design of foreclosure mediation programs across states

As of late 2010, 25 states either have a foreclosure mediation program in place or are working in the legislature to develop one.\textsuperscript{34} The design of the program can ultimately decide whether it becomes successful. States are putting varying amounts of resources into foreclosure mediation programs – some states employ a thorough, dedicated system and others only a halfhearted effort. What follows is an analysis of choices in foreclosure mediation program design. Homeowners are held to different standards and have different obligations in each of the programs, making it unfair to judge foreclosure mediation as a whole entity. States and cities can learn from the best practices currently ongoing in the country and should adopt what they can from them as costs permit.

1) Who runs the program?

Entities that manage the foreclosure mediation program are different in different states. Some programs are run through state court systems, and other programs are managed by non-profit groups in a partnership with the state. Twenty-three states are “judicial foreclosure states,” or states where foreclosures move through the courts.\textsuperscript{35} Foreclosures in non-judicial foreclosure states are governed by state statutes and are processed without intervention from the court.\textsuperscript{36}

In the states with judicial foreclosure, the process can be long and costly for homeowners, sometimes taking anywhere from nine to 18 months to complete a full judicial foreclosure.\textsuperscript{37} But

\begin{itemize}
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Cohen, supra note 15.
\item \textsuperscript{36} Eileen Pruett & Jacqueline C. Hagerott, The Economic Crisis: How Mediation Works in Judicial and Non-Judicial Foreclosure States, (Feb. 12, 2010).
\item \textsuperscript{37} Mediation Rising, supra note 22 at 61.
\end{itemize}
the courts have ability to institute foreclosure mediation programs to speed up the process. In non-judicial foreclosure states, the process is much quicker, but has the potential to be unconscionable if not reviewed by the courts. Florida uses private nonprofit dispute resolution agencies to run foreclosure mediation programs.38

2) What outreach is used?

Most states use outreach to inform homeowners in danger of foreclosure about the availability of their foreclosure mediation services. The amount of outreach informing homeowners of the availability of foreclosure is often correlated with the success of the program. In Delaware, as in several other states, when lenders send out foreclosure notices they are required to include a flyer that informs homeowners of the right to mediate as well as a hotline number that homeowners can call to get more information about mediation.39 A flyer might not have much impact on driving homeowners to use foreclosure mediation, though. In one county in Florida, the president of the agency running the foreclosure mediation program said, “People are so overwhelmed when they get those papers that I don’t even know if they read the letter long enough to understand it.”40

Some states employ more aggressive strategies to inform homeowners of their programs. In Philadelphia, the non-profit agency ACORN facilitates the city’s foreclosure mediation program. ACORN uses heavy outreach, going door-to-door to inform residents about the

program, which has resulted in a 75 percent participation rate.\textsuperscript{41} Legal aid groups in Jefferson County in Kentucky have received a grant to fund door-to-door outreach to educate homeowners on their foreclosure mediation program.\textsuperscript{42}

If initial outreach is not successful, some states make a further effort to connect with homeowners at a later time. In some counties in Florida, upon receiving foreclosure notices the program manager at the nonprofit center that runs the foreclosure mediation program will attempt to contact homeowners to inform them of their services.\textsuperscript{43} In the pilot programs currently being used in Indiana, court staff might contact homeowners who have not responded to an initial 30-day notice.\textsuperscript{44}

3) Is there an attendance requirement?

Many of the foreclosure mediation programs are voluntary for homeowners facing foreclosure and they must initiate the mediation. However, two of the programs thought to be among the best in the country make mediation mandatory for every foreclosure that takes place. In 2008, Connecticut started the first statewide unified court foreclosure mediation program in the country with the help of $5 million in funding. Early results from its program had 75 percent of the mediations reaching a settlement between lender and homeowner, with 62 percent of the mediations reaching an agreement for the homeowner to stay in her home.\textsuperscript{45} Connecticut began as a voluntary opt-in program then moved to a mandatory program in June 2009. The

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Kay, \textit{supra} note 38 at 14.
Connecticut court manager said that people in the state now understand “this is a program you can’t afford not to fund.”

The city of Philadelphia is another place where mandatory mediation has worked. Philadelphia requires a face-to-face mediation between lender and borrower before any foreclosure can proceed, resulting in more than 12,000 cases going through mediation in two years. About 30 percent of those cases have ended positively, with the homeowner keeping her home. The success in the Philadelphia program is a product of a collaborative effort between lawyers, the parties in the mediation, housing counselors, and the court, according to a local attorney involved in the program. A local judge in Philadelphia feels that the key to the program is the face-to-face encounters between lenders and homeowners so homeowners can hear an in-person explanation of foreclosure mediation and ask questions before the process begins. In New Jersey, foreclosure mediation is mandatory if the homeowner contests the bank’s foreclosure notice, but can also be requested if the homeowner does not contest the foreclosure.

The lender’s authority is another key component in a foreclosure mediation. In Delaware, as well as in most states with foreclosure mediation programs, the bank’s representative at the mediation must have authority to modify terms of a loan. In Delaware and other states the representative need only be available by phone.

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48 Id.
50 Id.
for the bank must be present. In Cuyahoga County in Cleveland, however, a person with
decision-making authority must represent the bank in person. A decision-maker from the bank
must also appear in person in Vermont. Some states do not require attendance in any form.
Massachusetts’ new foreclosure mediation program, instituted in 2010, does not require the
lender to appear for the mediation, only requiring the availability by phone of a representative
with authority to modify a loan. In Oregon, neither party has to be physically present for the
mediation to take place.

4) Who is eligible to use foreclosure mediation services?

Not every homeowner in danger of losing her home is eligible to utilize foreclosure
mediation. Several states, including Indiana and Florida, allow homeowners to receive
foreclosure mediation services only if the home in danger of being foreclosed upon is their
primary residence. Owners of vacation homes, rental properties, and commercial buildings do
not qualify for mediation in those states. Also, in most states, in order to be eligible for
mediation the homeowner cannot have defaulted on a previous loan modification. In contrast,
in Lucas County in Toledo, owners of some rental properties may qualify for mediation. In
Cook County in Illinois, the homeowner may use mediation for a home, condo or apartment
building with four or fewer units.

Several procedural hurdles much be cleared before qualifying to use foreclosure
mediation services in many jurisdictions. In New Mexico’s First Judicial District Court,

53 State Foreclosure Laws, supra note 43.
54 Id.
55 Id.
1, 2010).
57 Id.
58 State Foreclosure Laws, supra note 43.
59 Id.
homeowners must request mediation within 60 days of receiving the foreclosure notice from their bank. Many jurisdictions, including the aforementioned New Mexico district, prevent homeowners from utilizing their mediation services if they have not completed the requisite paperwork with the bank when they first receive their foreclosure notice.  

5) What is the cost of participation?

The majority of state and local mediation programs, such as the programs in California, Connecticut, Delaware, Jefferson County in Kentucky, Massachusetts, New Jersey, New Mexico, and New York are available at no cost to homeowners and lenders. In those states the costs involved in mediation are appropriated by the legislature or covered by the county or state court systems.

There are some exceptions, though, where homeowners have to pay a fee up front just for the chance to talk with their lender in a foreclosure mediation setting. In Maryland, the borrower must submit a $50 fee along with a request for mediation, although the fee can be waived for low-income borrowers. In Iowa, the Attorney General’s Office has partnered with Iowa Mediation Service, a non-profit organization, to offer mediations at a cost of $50 per hour for each party. In Nevada, the parties must split a $400 fee in order to be eligible for mediation. In contrast, in some other jurisdictions, the lender bears the cost of mediation. In Maine,

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61 State Foreclosure Laws, supra note 43.
62 Id.
64 State Foreclosure Laws, supra note 43.
Indiana, and in some Florida counties, the lender is charged fees for the mediation when a foreclosure complaint is filed.65

6) What other issues are in play?

A variety of other components make up foreclosure mediation programs across states. One variable is the use of a housing counselor before mediation. Some jurisdictions require homeowners to meet with housing counselors before entering mediation, and others make it an optional part of the process. In Jefferson County in Kentucky, before mediation borrowers must first discuss their financial situation with housing counselors and receive assistance with formulating a proposal for a new payment plan they can show to the lenders at the mediation.66 In New Jersey, the state appropriated $12 million for housing counselors to work with homeowners before mediation to prepare for the meetings with lenders.67 In Cook County in Illinois, the borrower must have an initial consultation with a housing counselor before entering mediation.68 In Indiana, the foreclosure notice provides contact information for housing counselors but makes the use of one optional.69

Some states, such as Maine, require a “good faith” effort by both sides during the mediation. Mediators must certify the session was completed in good faith and the court can impose sanctions if parties fail to comply.70 What constitutes a good faith effort by the parties is unclear.

65 Id.
66 State Foreclosure Laws, supra note 43.
67 Mediation Rising, supra note 22 at 57.
68 State Foreclosure Laws, supra note 43.
69 Id.
70 Id.
Improving the foreclosure mediation process is another objective states have focused on. For example, Maryland emphasizes providing legal representation for homeowners in a foreclosure mediation. Nearly 1,000 lawyers in the state have been trained on the finer points of foreclosure law through the Foreclosure Prevention Pro Bono Project, a project created to assist homeowners. The lawyers have been offering guidance to homeowners at workshops, as well as taking on cases directly.\(^71\)

**Foreclosure Mediation Controversies and Complaints**

Just as there are problems in avoiding foreclosures, problems are evident involving a proposed solution, foreclosure mediation programs. Throughout the country, charges of biased, ineffective and underutilized programs abound. Foreclosure mediation has also been criticized for not helping enough homeowners stay in their homes.

One problem some have with the development of foreclosure mediation is that it sometimes frustrates homeowners who think going to mediation adds a new layer of what is seemingly bureaucracy into the process for them to wade through.\(^72\) Another issue that is troubling for some involved is that homeowners and banks will sometimes agree on a temporary settlement, only to have the agreement go sour and cause a repeat of the entire process in a few months’ time.\(^73\)

Other issues with foreclosure mediation programs center around the lack of awareness of the programs, as well as problems with parties often not showing up to scheduled mediations.


\(^72\) Jakabovics & Cohen, *supra* note 1 at 4.

\(^73\) Wagner, *supra* note 20 at 437.
The Franklin County Foreclosure Mediation Program averages about a 50 percent homeowner attendance rate, meaning it’s just as likely to waste a mediator’s and bank’s attorney time as it is to discuss an agreement. Officials in Maryland, as an example, are concerned that the services they are offering are not being utilized enough since their program started in July. A lawyer who has attended foreclosure mediations in Maryland said, “Mediation just isn’t as needed as people say. It is a noble concept, but whether or not it is doable, in reality, is a separate matter.” This attorney reflects a growing sentiment among some lawyers about frustration with foreclosure mediation.

Another problem is that in some settings, lenders are favored. Hints of bias come from some state court systems. In Nevada, an attorney filed a complaint against District Court Judge Donald Mosley after Mosley said he would refuse to modify a homeowner’s loans or interest as a sanction against lenders, despite state rules that allow judges to do so when lenders do not make a “valid” effort to renegotiate mortgages. Mosley stated that he declined to modify loans because it would be too much of a burden on his chambers. Despite allegations that Mosley was favoring lenders over homeowners in foreclosure disputes before his court, the district judge who cleared Mosley, Arthur Ritchie, stated that “no proof of bias has been shown” in dismissing the charges.

In foreclosure mediation, even the mediators themselves can sometimes become tangled up in controversy. For example, the statute governing Nevada’s foreclosure mediation program allows mediators to recommend sanctions for banks that are not prepared for mediations and fail to bring proper paperwork. However, former mediators say while working in the program they

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recommended sanctions for banks that were not prepared to negotiate, but the sanctions were not followed and the mediators were not asked back to work in the program.\textsuperscript{76} The Nevada courts recently asked for feedback on how its foreclosure mediation program could be improved, but indicated that forthcoming changes would likely be in the mediator’s role and to increase the cost of mediation for participants, rather than addressing the judges’ role in recommending sanctions.\textsuperscript{77}

**Recommendations for Foreclosure Mediation Programs**

The success rates of foreclosure mediation programs in some cities and states show that when best practices are implemented and utilized by the programs, a large amount of homeowners will benefit. Based on research of federal and state programs, what follows is a summary of the most important features a foreclosure mediation program should implement in order to offer the most benefit. Cost concerns will likely prohibit jurisdictions from implementing every one of these suggestions, but states should try to use as many of them as possible in order to have the best chance at running a successful foreclosure mediation program.

1) Run the programs through the courts and make them mandatory

Foreclosure mediation programs are most effective when they are mandatory in every foreclosure proceeding, based on the results in Connecticut and Philadelphia. Another way to think of the programs besides mandatory is “automatic,” meaning that for every foreclosure,


mediation will automatically be scheduled.\textsuperscript{78} The programs have a more stable foundation and are better legitimized when they are run by the state or local court system rather than filtered through a non-profit group that might not be as organized or have as many resources. The programs should preferably be unified throughout the state, rather than designed on a county-by-county basis, but either model could work.

The federal government should take an active role toward making this happen. The Center for American Progress argues that Congress should fund state foreclosure mediation programs as well as issue guidance to states that community development grants should be used for mandatory foreclosure mediation programs.\textsuperscript{79} Who is running the mediation can also be central to the program’s success. For example, Connecticut has found it useful to hire mediators who devote their work full time to foreclosure-specific mediations, because of the intricacies involved in foreclosure law.\textsuperscript{80}

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\item[2)] Employ an aggressive outreach program
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Another key component that should be implemented in mediation programs is a strong, sustained outreach effort targeted at those in danger of losing their homes. Door-to-door outreach is ideal, but if not enough bodies are available to conduct this sort of outreach, newspaper and radio advertisements are another option to inform the public. Ads are more effective than a notice of a phone hotline because many people do not read everything that comes in their mail, and in fact might avoid mail that appears to deal with their foreclosure. Another outreach idea is to mail information on a postcard.

\begin{footnotes}
\item[78] Cohen, \textit{supra} note 23 at 4.
\item[79] Jakabovics & Cohen, \textit{supra} note 1 at 4.
\item[80] Kay, \textit{supra} note 45 at 15.
\end{footnotes}
Targeted outreach can be key to optimizing the success of foreclosure mediation programs. It is important for homeowners to understand exactly what foreclosure mediation, as well as mediation in general, is. Ohio has specified to homeowners that mediation does not include any hidden or ongoing fees, unlike the various debt relief programs seen in advertisements, some of which might be scams.\textsuperscript{81}

Another form of outreach to homeowners is conducted through the agents of the courts themselves: judges who support foreclosure mediation. The Supreme Court of Pennsylvania recently asked other jurisdictions in the state to follow Philadelphia’s lead and develop foreclosure mediation programs. Pennsylvania Supreme Court Chief Justice Ronald Castille stated in a note to the rest of the justices, “Reports indicate that the foreclosure rate will get worse before it gets better.” The Chief Justice invited other court leaders in the state to come to a summit on foreclosure mediation in October.\textsuperscript{82}

Taking the lead from the Supreme Court of Pennsylvania, courts with successful mediation programs in states like in Ohio and Connecticut should invite officials from other states to come observe and learn about their foreclosure mediation programs, and share tips on how to run the program successfully.

3) Require lenders with authority to be physically present

Once the mediation begins, the most successful outcomes will occur when a lender who is authorized to make decisions on the home loan is physically present at the mediation with the borrower. Among a number of groups who have studied the foreclosure mediation movement, the National Consumer Law Center (NCLC) has offered recommendations to improve the

\textsuperscript{81} Paddock, \textit{supra} note 17.
performance of foreclosure mediation programs, primarily suggesting that the lender should have more responsibility and accountability in the process. The NCLC suggests that courts require lenders to negotiate in good faith and assign sanctions to them if the lenders do not comply. The group also wants lenders to provide homeowners with relevant information in the mediation such as their payment history, present value of the home and affordable loan modifications.

Requiring lenders with authority to be present would go a long way toward solving problems with the dual-track system that many banks use, because it would force the two departments, loan modification and foreclosure, to talk about an account and decide how to proceed with it before attending a mediation.

4) Any home should be eligible

The ideal program should contain a requirement that jurisdictions need to provide access to mediation for any homeowner who is in danger of losing a home, even if the mortgage is on a rental property or a second residence. However, homeowners who are struggling to make payments on a residence that they rent out or only live in part-time need help too. They should not be denied assistance when the resources are readily available. Also, housing counselors should be available for homeowners to consult, but should not be a mandatory precursor.

5) The programs should be free to homeowners

Foreclosure mediation programs should be free to homeowners. Charging fees to participate in foreclosure mediation sessions will defeat the important goal of making the

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84 Id.
85 Interview with Peter Swire, former Special Assistant to the President for Economic Policy, in Columbus, Ohio (Nov. 30, 2010).
programs open to as many people as possible. Especially since programs in many states are free, it is evident the programs can be run without contributions from homeowners.

The programs have a lot of kinks to work out when they first begin holding foreclosure mediations, and so it is unfair to charge homeowners for them when the end result is unknown based on extraneous factors like the bank’s efforts in negotiating a loan modification. Also, when the reason for the mediation is that a family is struggling to pay its mortgage, it seems counterintuitive to charge them when even in the most successful foreclosure mediation jurisdictions participants have just a 30 percent rate of staying in their home. If programs need to charge lenders to stay afloat that is immaterial because the mediation will still save them massive amounts of money.

### Future of Foreclosure Mediation

One question worth pondering is whether foreclosure mediation should exist when the financial crisis subsides. Foreclosure mediation programs were formulated as temporary provisions to help homeowners during a challenging and difficult time for the country. But with the crisis not looking as if it will end any time soon, the programs will need further assistance from the state to continue. Many of the foreclosure mediation programs are receiving temporary funding, if any funding at all, and they will only be extended if the results can justify the spending. Some states might want the programs to be more effective before they extend them. For example, in Iowa, legislation that requires lenders to inform borrowers about a foreclosure mediation program expires in July 2011.  

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86 Bauer, supra note 5.
Some jurisdictions are noting the urgency of the foreclosure crisis and are acting appropriately to institute foreclosure mediation provisions so people have a better opportunity to fight to stay in their homes. In November, the Washington, D.C. Council approved an emergency measure that requires mortgage lenders to offer a mediation with homeowners before foreclosure. The homeowner has to elect for mediation, after which the parties have 90 days to come to an agreement.\textsuperscript{87} Other states could follow D.C.’s lead and act to meet the need for foreclosure mediation.

The federal government can potentially play a big part in improving foreclosure mediation programs by enacting bills that would make programs uniform and mandatory across the country. Several attempts have been made to start foreclosure mediation programs nationwide. Federal legislation is pending in the U.S. House of Representatives that would help provide uniformity in foreclosure mediation programs across the country, a bill called the Preventing Homeowners from Foreclosure Act of 2010. The bill would authorize the Secretary of Housing and Urban Development to provide grants for state and local governments to develop foreclosure mediation programs.\textsuperscript{88} The bill was referred to the House Committee on Financial Services in July and it is pending there. The proposed program would require states to refer homeowners in danger of losing their home to foreclosure to an attorney or housing counselor. It also would implement an outreach program to raise homeowner awareness of foreclosure mediation programs.

In 2009 two foreclosure mediation bills were introduced and are also still pending: the Foreclosure Mandatory Mediation Act of 2009,\textsuperscript{89} and the Preserving Homes and Communities


\textsuperscript{88} H.R. 5754, 11\textsuperscript{th} Cong. (2010).

\textsuperscript{89} S. 2912, Bill Summary & Status, available at http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.02912:.
Act of 2009, a bill that would provide grants for state and local communities to create foreclosure mediation programs. Both bills are in the Senate Committee on Banking, Housing, and Urban Affairs.⁹⁰

Many foreclosure mediation programs are temporary provisions and will need to be extended through action by the state legislature. Extending the programs provides an optimal opportunity to tweak them and make them as effective as possible. One central problem that the programs likely cannot help is the still-growing number of foreclosures in numerous states, including Ohio. The increasing number further underscores the importance of making sure that the programs available can be best utilized so the number of foreclosure can be combated in other ways.

In the event that Congress does not pass any of the pending legislation on foreclosure mediation, the attorneys general in the 50 states can spur foreclosure mediation programs in another way. The AGs can use their investigation of the banks to effectuate a more uniform foreclosure mediation process. The attorneys general can negotiate a consent decree with the states on foreclosure practices. In the consent decree, the AGs should include a mandatory mediation provision that requires lenders with authority to be present at the mediation.⁹¹ This idea will accomplish the goal of making mediation an essential part of the process in avoiding foreclosure. The AGs are moving toward an agreement between the banks and states, and talks have been positive, but the process will continue on for several months and there is still time to implement foreclosure mediation into the agreement.⁹²

The outlook is bright for the future of foreclosure mediation because the banks are bringing a more responsive attitude into the mediations. One Franklin County foreclosure

⁹⁰ S. 1731, Bill Summary & Status, available at http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s1731:.
⁹¹ Interview with Peter Swire, supra note 85.
⁹² Rothacker, supra note 9.
mediator, Shirley Cochran, said the biggest difference she has seen in foreclosure mediations since she started participating 2 ½ years ago is that the banks are taking the process more seriously now than at the beginning of the time period.  

When the mediation program first started, Cochran noticed that many banks were not making a true, sustained effort to negotiate with homeowners and some of the sessions were a waste of time for both sides as well as the mediator. Now, banks are feeling harsh financial effects from taking on so many foreclosed homes. The banks are not interested in taking on new foreclosures if possible and are taking a good faith attitude in negotiating new loan modifications.

**Conclusion**

Because of the variety of strategies and tactics used in foreclosure mediation programs throughout states, it is too harsh and shortsighted to label foreclosure mediation programs ineffective. Foreclosure mediation provides valuable benefits to both homeowners and banks and should be more widely implemented in a universal manner across the country. Participation in foreclosure mediation is a viable, attractive alternative to the regular foreclosure process a homeowner must go through, and the mediation results show the ability of the programs to be effective for both sides long-term.

The most important features of foreclosure mediation programs that jurisdictions should adopt are: (1) the rules should require as much face-to-face contact as possible between lenders and homeowners in the initial mediation and subsequent sessions, and (2) once mediation programs have been initiated and developed, jurisdictions should make the transition to

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93 Interview with Shirley Cochran, mediator, Franklin County, in Columbus, Ohio (Oct. 28, 2010).
94 Id.
mandatory mediation. States interested in implementing foreclosure mediation need to examine the policies that have worked elsewhere and continue to develop their programs in order to ensure success. Even if only minor improvements are made to some of them, the programs are valuable.