

IF YOU BUILD IT WILL THEY COME? FORECLOSURE MEDIATION IN FRANKLIN COUNTY, OHIO

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I. INTRODUCTION

The Franklin County Foreclosure Mediation Project (Project) is a collaborative, proactive effort to address the foreclosure crisis in Franklin County (Columbus), Ohio. The Supreme Court of Ohio reports the county's current population as 1,163,414.¹ Foreclosure filings in Franklin County increased from 8,928 in 2007² to 9,649 in 2010.³ This article presents a detailed review of the project development, implementation, and assessment of the Supreme Court of Ohio Foreclosure Mediation Program Model (Supreme Court Model).⁴

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¹ THE SUPREME COURT OF OHIO, 2010 OHIO COURTS STATISTICAL REPORT 126 (2010), available at <http://www.sconet.state.oh.us/publications/annrep/10OCS/2010OCS.pdf>.

² THE SUPREME COURT OF OHIO, OHIO COURTS SUMMARY (2007), available at <http://www.sconet.state.oh.us/Publications/annrep/07OCS/2007OCS.pdf>.

³ THE SUPREME COURT OF OHIO, *supra* note 1.

⁴ See *Foreclosure Mediation Program Model Overview*, THE SUP. CT. OF OHIO, <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/overview.asp> (last visited Mar. 1, 2012); *Foreclosure Mediation Resources*, THE SUP. CT. OF OHIO, <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/> (last visited Mar. 1, 2012)

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II. PROJECT DEVELOPMENT—SUPREME COURT MODEL STEP ONE: BUILDING A FORECLOSURE MEDIATION PROGRAM

*“If you build it [they] will come”*⁵

The notion of developing a foreclosure mediation program for Franklin County presented itself much like actor Kevin Costner’s vision of a baseball field in the middle of a cornfield. A small group of stakeholders began planning for the Project in the spring of 2008.⁶ Their purpose was to examine ways to address the foreclosure crisis.⁷ The Franklin County Municipal Court (Municipal Court) Dispute Resolution Department manager and mediators working in the several mediation programs in central Ohio met with representatives of five Housing and Urban Development (HUD) approved counseling agencies that serve Franklin County. The agencies are:

1. Columbus Housing Partnership,
2. Columbus Urban League,
3. Consumer Credit Counseling Services,
4. Homes on the Hill, and
5. Mid-Ohio Regional Planning Commission.⁸

The purpose of this group (the Work Group) was to explore the use of mediation before a foreclosure case was filed in the Franklin County Court of Common Pleas (Common Pleas Court). The Work Group added representatives from additional organizations. As discussions to design and implement a pre-filing mediation project continued, the Common Pleas Court, Franklin County Treasurer Ed Leonard, and Franklin County Prosecutor Ron O’Brien asked the Work Group to consider developing a foreclosure mediation program for mediation services in both pre-filing and post-filing foreclosure actions. The Work Group approached the Project with focus and commitment. The Work Group articulated goals

(presenting the nine-step approach advocated by the late Chief Justice Thomas Moyer and identifying step one as “Building a Foreclosure Mediation Program”).

⁵ FIELD OF DREAMS (Universal Studios, 1989).

⁶ THE SUPREME COURT OF OHIO, FORECLOSURE MEDIATION PROGRAM MODEL 3 (2008), available at <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/foreclosureMediation.pdf> [hereinafter SUPREME COURT MODEL].

⁷ *Id.*

⁸ See HUD Approved Housing Counseling Agencies, U.S. DEP’T OF HOUSING AND URB. DEV., <http://www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm?searchstate=OH&filterLng=&filterSvc=&filterMultiState=&searchName=&searchCity=Columbus&searchZip=&searchService=&searchLang=&searchAffiliation=&webListAction=Search> (last visited Feb. 17, 2012).

and objectives for the Project, reached consensus about using a facilitative mediation process, and began to develop forms and procedures to expedite referrals and requests for mediation. On August 19, 2008, the Municipal Court Dispute Resolution Department presented a proposal (Project Proposal) to the Common Pleas Court, the county treasurer, and the county prosecutor.⁹ The Project Proposal was accepted with an official start date of January 1, 2009, although it began accepting referrals for pre-filing mediation and referrals from the judges sitting on the Common Pleas Court as early as November 2008. This author facilitated conversations among judges of the Common Pleas Court, the county treasurer, and the county prosecutor to develop the Project goal and objectives set forth in the Project Proposal.

The Project goal was to “plan, develop and implement a program to provide mediation services for lenders/servicers and citizens who face foreclosure in Franklin County.”¹⁰ The Project objectives included:

1. Provide mediation services for borrowers and lenders after foreclosure action is filed in the Common Pleas Court.
2. Provide mediation services for borrowers and lenders when borrowers are delinquent or face other difficulties in paying their mortgages, but before a foreclosure action is filed.
3. Evaluate the Project. Assess party satisfaction with mediation; and describe and evaluate mediation outcomes in terms of benefits to Common Pleas Court, borrowers, and lenders.¹¹

Project development also involved establishing parameters for the number of cases that the Project would accept for mediation.¹² To quantify the number of mediations that the Project could handle, the Project Proposal relied on the following information.¹³ In 2007, the Common Pleas Court reported 18,165 new civil case filings; 8,928 were new

⁹ Franklin Cnty. Mun. Court Small Claims Div. and Dispute Resolution Dep’t, Proposal to the Franklin County Court of Common Pleas, Franklin County Commissioners, Franklin County Treasurer, Ed Leonard and Franklin County Prosecutor, Ron O’Brien, 1–2 (on file with the Capital University Law Review).

¹⁰ *Id.* at 1.

¹¹ *Id.*

¹² *Id.* at 1–2.

¹³ *Id.* at 3.

foreclosure case filings.¹⁴ In other words, new foreclosure actions were 49% of all new civil case filings. In addition, this author estimated that borrowers filed answers in approximately 10% (892) of new foreclosure cases in 2007. Based on experiences in the Municipal Court Mediation Programs, this author believed that the Project could accept at least 1,000 foreclosure cases for mediation each year, or approximately 18% of new foreclosure filings.

A. Project Funding

The Project began with a grant from the Franklin County Treasurer, Ed Leonard, and the Franklin County Prosecutor, Ron O'Brien.¹⁵ Grant funds from these county officials became available with the passage of H.B. 562.¹⁶ Grant funding included \$540,000 for the two-year Project, \$415,000 for rescue loan funding, \$500,000 for HUD-approved counseling agencies, and \$440,000 for mortgage fraud prosecutions.¹⁷ In addition, the county treasurer developed and implemented the County's Homeowner Helpline (Helpline).¹⁸ The Helpline encompasses a range of services that assist the borrowers facing foreclosure.¹⁹

B. Public Awareness and Education

The Helpline provides many services that assisted the Project in establishing public awareness of the Project and other resources available to the public. The Helpline also identified the kinds of information that

¹⁴ THE SUPREME COURT OF OHIO, *supra* note **Error! Bookmark not defined.**, at 34, 54. The Ohio Supreme Court numbers include both residential and commercial foreclosures.

¹⁵ See Eileen Pruett, *Request for Qualifications* (Oct. 30, 2008) (on file with the Capital University Law Review); Matt Burns, *County Unveils Foreclosure Assistance Program*, COLUMBUS BUS. FIRST (Oct. 8, 2008, 12:02 PM), <http://www.bizjournals.com/columbus/stories/2008/10/06/daily19.html>.

¹⁶ See Franklin Cnty. Homeowner Helpline, *What is Homeowner Helpline?*, FRANKLIN COUNTY, <http://www.franklincountyohio.gov/commissioners/homeowner-helpline/what-is-homeowner-helpline.cfm> (last visited Feb. 10, 2012).

¹⁷ Burns, *supra* note 15.

¹⁸ Franklin Cnty. Homeowner Helpline, *supra* note 16.

¹⁹ *Id.*

would be helpful to borrowers and provided opportunities for borrower education.²⁰ Resources available through the Helpline include:

1. Screening and referral for specialized foreclosure assistance for borrowers through *HandsOn* Central Ohio, a telephone and web-based central information referral service.²¹ Borrowers can obtain several types of assistance when they call *HandsOn* Central Ohio, such as:
 - a. Direct referral to a HUD-approved counseling agency;
 - b. Screening for eligibility for Save the Dream Ohio participation in one of the programs supported by the Ohio Housing Finance Authority (OHFA), The Legal Aid Society of Columbus, and the Columbus Bar Association Lawyer Referral Service; and
 - c. Referral to the Treasurer's Homeowner Helpline web page and special programming offered there, such as the Monthly Foreclosure Seminar and an email "hotline" for borrowers to ask questions.²²
2. Public awareness and education through the Homeowner Helpline,²³ and a Monthly Foreclosure Seminar co-sponsored with the HUD-approved counseling agencies and The Legal Aid Society of Columbus;²⁴
3. Support for HUD-approved counseling agencies through monthly Task Force meetings.

²⁰ Franklin Cnty. Homeowner Helpline, *Homepage*, FRANKLIN COUNTY, <http://www.franklincountyohio.gov/commissioners/homeowner-helpline/index.cfm> (last visited Feb. 7, 2012).

²¹ *About Us*, HANDSON CENT. OHIO, <http://www.handsoncentralohio.org/> (last visited Feb. 10, 2012). Borrowers can contact this service by dialing Franklin County's central information and referral telephone number 2-1-1. *Id.*

²² E-mails from Toni Lipsey, Call Center Manager, HandsOn Central Ohio, to Capital University Law Review (Feb. 17–22, 2012) (on file with the Capital University Law Review).

²³ Franklin Cnty. Homeowner Helpline, *supra* note 16.

²⁴ Franklin Cnty. Homeowner Helpline, *Monthly Foreclosure Seminar*, FRANKLIN COUNTY, <http://www.franklincountyohio.gov/commissioners/homeowner-helpline/monthly-foreclosure-seminar.cfm> (last visited Feb. 20, 2012).

C. Project Requirements

Three documents set the parameters for Project procedures and operation. These documents are the 2008–2011 Intergovernmental Agreement for the Funding and Provision of Foreclosure Mediation Services (Intergovernmental Agreement),²⁵ the Common Pleas Court's Standing Order and Entry (Administrative Order),²⁶ and the individual judge's Order for Mediation (Order).²⁷

Under the terms of the Intergovernmental Agreement, the Project's obligations include the following:

1. The Municipal Court provides a site for the Project;
2. The Project accepts referrals from several agencies;
3. The Project develops the Request for Mediation and Extension of Time to Answer²⁸ that the Franklin County Clerk of Courts sends with the complaint and summons;
4. The Project accepts the borrowers' Request for Mediation (RFM); The Project files the RFM with the Common Pleas Court clerk; and
5. The Project meets specific requirements for data collection and analysis.

The Project is responsible for data collection and assessment of the following information about referrals to mediation:

- Number of referrals received by total, pre-filing, and post-filing, and broken down by referring HUD-approved counseling agency;
- Number of RFMs generated by filing of foreclosure cases;
- Number of mediation referrals generated by *sua sponte* motion of the Common Pleas Court;
- Number of mediation referrals generated by borrower motion;
- Number of borrowers deemed suitable candidates for mediation;

²⁵ Intergovernmental Agreement for the Funding and Provision of Foreclosure Mediation Services, Oct. 17, 2008 [hereinafter Intergovernmental Agreement].

²⁶ See SUPREME COURT MODEL, *supra* note 6, at 99.

²⁷ See *id.* at 97.

²⁸ FRANKLIN CNTY. FORECLOSURE MEDIATION PROJECT, REQUEST FOR FORECLOSURE MEDIATION AND EXTENSION OF TIME TO ANSWER (2009), available at <http://www.supremecourt.ohio.gov/JCS/disputeResolution/foreclosure/news/MediationRequest.pdf>.

- Number of borrowers deemed not suitable candidates for mediation;
- Number of notices sent to borrowers for mediation;
- Number of mediations scheduled, held, and cancelled, as well as the reason for cancellation; and
- Number of referrals and mediations held sorted by lender/servicer and its law firm.

In addition, the Project is responsible for data collection and analysis of the following information about mediation outcomes:

- Reinstatement;
- Loan modification;
- Forbearance;
- Agreement before mediation;
- Short sale/Deed in lieu of foreclosure;
- Agreed judgment entry;
- Did not meet mediation criteria;
- No resolution;
- Bankruptcy;
- One or more parties did not attend the mediation;
- Partial agreement;
- Negotiations are continuing; and
- Mediation held, but unknown outcome.²⁹

The Administrative Order provides that borrowers may submit a Request for Mediation and Extension of Time to Answer to the Project.³⁰ This submission results in a 120-day extension of time to the answer period to allow mediation before the answer date.³¹ The Order also requires the Project to file an appropriate mediation report concerning the progress and resolution of each case.³² This report may be filed at the conclusion of the mediation services or prior to that completion, if applicable.³³

Orders from the individual judges require the Project to notify the parties of the mediation date, and requires all parties attend in person with authority to settle.³⁴ These Orders give the Project discretion to allow

²⁹ Intergovernmental Agreement, *supra* note 25, at 1–4.

³⁰ See FRANKLIN CNTY. FORECLOSURE MEDIATION PROJECT, *supra* note 28.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ SUPREME COURT MODEL, *supra* note 6, at 97.

attendance by telephone.³⁵ Some of the judges' individual Orders stay the case in regard to dispositive motions;³⁶ others will stay the case completely.³⁷ Even when the court Orders are not specific about the status of the case, most judges do not rule on motions while the case is in mediation.

D. Project Development

In developing the Project, the Commons Pleas Court and funders relied on the knowledge of the Project administrator and the Municipal Court's contract mediators to construct the Project so that it would be accountable to all stakeholders. Stakeholders directly involved with mediation include borrowers, attorneys for the parties, mediators, the Common Pleas Court, and ancillary services for borrowers, such as HUD-approved counseling agencies.³⁸

The Project defines mediation as "a way for people to resolve problems without filing a lawsuit or going before a judge. The mediator is a neutral third party who helps resolve their differences through negotiation."³⁹ The Project's mediation services are facilitative and maintain the core values of mediation—confidentiality, party self-determination, mediator neutrality, and "do no harm."⁴⁰ The Project staff and mediators adhere to the Model Standards of Conduct for Mediators in all aspects of mediation services and Project operation.

³⁵ *Id.*

³⁶ *E.g.*, Judge Patrick Sheeran, Decision and Entry Granting Defendant's Request for Foreclosure Mediation and Extension of Time to Answer (Nov. 7, 2011) (on file with the Capital University Law Review).

³⁷ *See* SUPREME COURT MODEL, *supra* note 6, at 62 (providing counties with proposed local rules that allow for a complete stay of the case, including discovery if the parties agree to a stay and the agreement is "approved by the judge").

³⁸ Intergovernmental Agreement, *supra* note 25, at 1.

³⁹ FRANKLIN CNTY. MUN. COURT MEDIATION PROGRAM, WHAT IS MEDIATION? (2012), available at http://www.fcmcclerk.com/dept/court/files/FCMC_Small_Claims_Mediation_Brochure.pdf. *See also* OHIO REV. CODE ANN. § 2710.01(A) (West 2012) ("'Mediation' means any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.").

⁴⁰ *See, e.g.*, AM. ARB. ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS 2 (2005), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf (describing the core values of mediation).

The Project utilizes the goals and objectives set forth in the Ohio Supreme Court's Mediation Checklist.⁴¹ The judges of the Common Pleas Court told the Project administrator that they were committed to defining "success" in mediation very broadly.⁴² In addition, this author has observed that getting the parties "to the table" can lead to a positive outcome (success) even when the only outcome is that the parties identify appropriate contacts and clarify next steps in the process, such as borrowers providing additional or new information to the lender. Borrowers may also gain an understanding of the foreclosure process—a roadmap of how the case will proceed if they do not reach an agreement in mediation. In addition, parties appreciate the opportunity to participate in a process in a neutral setting where they can talk about their issues and concerns.

The Project adopted a staffing model based on mediation services provided by the Municipal Court. The Project pays contract mediators a flat fee for each mediation they conduct.⁴³ There is a reduced fee paid if the mediation session cancels within forty-eight hours of the scheduled mediation.⁴⁴ The Project allows two hours for each mediation session, though some are shorter and others are longer.

There are ten contract mediators in the Project. The Project used a Request for Qualifications process to select the mediators. The Project followed the Supreme Court of Ohio checklist to require a minimum of twelve hours of basic mediation training, two hours of foreclosure

⁴¹ Jacqueline C. Hagerott, *Foreclosure Mediation: Responding to the Current Crisis*, 40 CAP. U. L. REV. 908–32 (2012).

⁴² In the author's experience, the Common Pleas Court judges involved in Project development were very clear about their intent to make access to mediation as easy as possible for borrowers. One of the methods to reach this goal was to allow mediation before an answer was required under the Ohio Rules of Civil Procedure. Compare Sheeran, *supra* note 36 (twenty-eight days from the end of mediation to answer), with OHIO R. CIV. P. 12(A) (twenty-eight days from service of summons and complaint to answer). The judges also allowed for mediation in a more neutral setting than if they had to come to the Common Pleas Court. The parties recognized the value of a face-to-face meeting that provided all parties an opportunity to be heard. Therefore, despite the Project's use of the Ohio Supreme Court's Mediation Checklist, the Project's definition of "success" is significantly different from the definition contained in the checklist. See generally Hagerott, *supra* note 41.

⁴³ Intergovernmental Agreement, *supra* note 25, at 2.

⁴⁴ Cf. Pruett, *supra* note 15, at 2.

mediation training, and Uniform Mediation Act training.⁴⁵ The Project selected mediators based on experience, training, and their commitment to the facilitative mediation model. Two have more than twenty years of mediation experience, three have more than eight years of mediation experience, four have more than four years of experience, and two have three years of experience.⁴⁶ Two of the mediators are attorneys and two have business backgrounds.⁴⁷ The remaining mediators include a retired teacher, a former project manager for the Department of Defense, a retired paralegal, a retired personnel manager, a pastor, and a substance abuse counselor. Several began their mediation careers as volunteers for the Municipal Court Mediation Programs.⁴⁸ Each of the mediators has taken more than twenty hours of mediation training; most have more than forty hours.⁴⁹ Four mediators have Certificates in Mediation from Capital University Law School.⁵⁰

III. PROJECT OPERATION—SUPREME COURT MODEL STEPS TWO THROUGH EIGHT

A. *Steps Two Through Four: Informing Borrowers About Mediation*

As soon as the foreclosure complaint is filed with the clerk of courts, the county treasurer sends a Foreclosure Alert Postcard to the borrowers to alert them that mediation is available.⁵¹ The postcard also recommends that borrowers contact an attorney.⁵² When the clerk of courts issues service, the complaint and summons, the RFM, and a brightly colored Foreclosure Mediation Flyer (Flyer), are all in the packet mailed to the defendant(s).⁵³ The Flyer encourages borrowers to call the Franklin County Services information number, 2-1-1, for assistance in scheduling

⁴⁵ See Jacqueline Hagerott et al., *How Do I Know the Mediator Is Qualified?, Foreclosure Mediation in Ohio: What You Need to Know*, THE SUP. CT. OF OHIO, <http://www.sconet.state.oh.us/JCS/disputeResolution/foreclosure/FAQ.asp> (last updated July 27, 2010).

⁴⁶ See Franklin Cnty. Foreclosure Mediation Project, *Mediator Roster* (2012) (on file with the Capital University Law Review).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Foreclosure Mediation Resources*, *supra* note 4.

⁵² See SUPREME COURT MODEL, *supra* note 6, at 67–70.

⁵³ *Foreclosure Mediation Services*, *supra* note 4.

an appointment with a housing counselor.⁵⁴ The Flyer also publicizes a free Foreclosure Information Seminar held monthly at the Legal Aid Society of Columbus.⁵⁵ Further, the Flyer promotes mediation with a question and answer section that asks, “Why Mediation?” and “What Do You Need to Do?”⁵⁶

B. Step Five: Processing the Request for Mediation

When the Project receives the RFM, a copy is filed with the clerk of courts; the clerk docket the RFM, and a copy is mailed to plaintiff’s counsel. The assigned judge reviews the request and issues an Order that is filed and sent to all parties. After the judge’s Order is filed, the Project schedules the mediation. The Project files a Notice of Scheduled Mediation and mails copies to all parties.⁵⁷ Mediations are usually scheduled for thirty to forty-five days after the Order is received.

The RFM must be submitted to the Project within twenty-eight days.⁵⁸ There are additional ways that a foreclosure case can get mediation services from the Project. If the RFM is submitted after the twenty-eight day limit, the borrower may file a Motion to Request Mediation with the Common Pleas Court.⁵⁹ If the borrower wants to request mediation after judgment, that form is available from The Legal Aid Society of Columbus.⁶⁰ Attorneys may file a Motion to Request Mediation for their clients and judges of the Common Pleas Court may order a case to mediation *sua sponte*.⁶¹

⁵⁴ Franklin Cnty. Homeowner Helpline, *Franklin County Foreclosure Program Homeowner Helpline Insert*, FRANKLIN COUNTY, <http://www.sconet.state.oh.us/JCS/dispute/Resolution/foreclosure/news/HHInsert.pdf> (last visited Mar. 7, 2012).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See SUPREME COURT MODEL, *supra* note 6, at 19.

⁵⁸ *Id.* at 18.

⁵⁹ *Id.* at 58–59 (noting the procedure under proposed local rules that allows a party to move the court for mediation). See also LEGAL AID SOC’Y OF COLUMBUS, FORECLOSURE: MOTION FOR MEDIATION (2010), available at <http://www.franklincountyohio.gov/commissioners/homeowner-helpline/assets/pdf/pro-se-mediation-packet.pdf>.

⁶⁰ LEGAL AID SOC’Y OF COLUMBUS, *supra* note 59.

⁶¹ See SUPREME COURT MODEL, *supra* note 6, at 58–59.

C. Step Six and Step Seven: Collecting Information and Screening the Case for Mediation

The Project requires the parties to handle the initial exchange of information. The RFM requires that the borrowers schedule an appointment to work with a HUD approved counseling agency.⁶² The counseling agency can help borrowers complete the necessary paperwork and send it to the lender and its attorney.⁶³ In some cases, borrowers continued conversations with their lenders and the counseling agency staff helped confirm the status of the mortgage and the options that have been offered. This author believes that it is the borrower's responsibility to exchange information directly with the lender and its attorney. The Project does not have sufficient resources for staff or mediators to receive and transmit the borrower's information to the plaintiff's attorney. This approach is problematic if borrowers do not prepare their documentation or do not work with the counseling agencies or do not submit the documentation in a timely manner. Yet these issues do not seem to lead to mediation outcomes that are significantly lower than mediation programs that do provide document exchange services.

Although the Project has discretion to reject any case for mediation, removal from mediation is not an action the Project is likely to take. If a party does not want to participate in mediation, mechanisms exist to remove the case from mediation. Because the Project operates as an "opt-in" process, most parties are willing to participate in mediation. Any judge

⁶² FRANKLIN CNTY. FORECLOSURE MEDIATION PROJECT, *supra* note 28. The RFM says,

To participate in mediation, you must first schedule an appointment with a HUD Approved Housing Counseling Agency. When you meet with the HUD approved counseling agency they will help you prepare the financial information you need for mediation. They can also help you examine your options. Services of the HUD Approved Counseling Agencies in Franklin County are free, no matter what your income is.

Id.

⁶³ See, e.g., *Default/Foreclosure Prevention*, MID-OHIO REGIONAL PLAN. COMMISSION, http://www.morpc.org/housing/homeownership/foreclosure_prevention.asp (last visited Mar. 8, 2012).

can review the RFM or a motion to remove a case from mediation and take the case out of mediation. Judges have rejected very few cases.⁶⁴

D. Step Eight: Schedule Mediation

The Project schedules mediations, generates files, and sends the Notice of Scheduled Mediation to all parties and counsel.⁶⁵ The Project sends notices to parties and attorneys because counsel listed on the clerk of courts' docket may not be counsel of record or may have withdrawn. The Project schedules mediation sessions for about forty-five days after receipt of the judge's Order.

E. Step Nine: Mediation Session(s) Takes Place

The mediator engages the parties and counsel in a facilitative mediation pursuant to the Uniform Mediation Act (UMA).⁶⁶ The mediator explains the Agreement to Mediate (or Agreement) at the beginning of the session and asks the parties to read and sign it.⁶⁷ This Agreement informs the parties that any agreements made in mediation are between the parties.⁶⁸ It emphasizes the impartiality of the mediator, and the fact that the mediator cannot make decisions, give legal advice to either party, or have a conflict of interest.⁶⁹ The Agreement to Mediate contains a statement about the fact that the mediator or any party may withdraw from mediation at any time.⁷⁰ The Agreement to Mediate describes all aspects of confidentiality of mediation communications and the privilege that applies to mediation communications.⁷¹ The Agreement to Mediate also

⁶⁴ Elizabeth Gibson, *Foreclosure Mediation Can Help*, COLUMBUS DISPATCH, May 15, 2011, at A1. In 2009, the judges found eighty-seven cases not suitable for mediation compared to 1,836 cases referred to mediation. *Id.*

⁶⁵ See *Foreclosure Mediation Resources*, *supra* note 4.

⁶⁶ OHIO REV. CODE ANN. § 2710.01(A) (West 2012). See also Hagerott, *supra* note 41, at 917 (“[T]he role of the mediator is to facilitate the process. If one party is represented and the other is not, this can be very challenging for the mediator.”). *Id.*

⁶⁷ See, e.g., SUPREME COURT MODEL, *supra* note 6, at 16, 61.

⁶⁸ FRANKLIN CNTY. COURT OF COMMON PLEAS, AGREEMENT TO MEDIATE 1 (2009).

⁶⁹ *Id.* at 1–2.

⁷⁰ *Id.* at 2.

⁷¹ *Id.* See also OHIO REV. CODE ANN. §§ 2710.03–2710.07 (West 2012). The UMA is primarily a privilege statute. See *id.* It sets forth evidentiary privileges for the mediator, the parties, and non-party participants. *Id.*

addresses mediator reporting requirements articulated in the UMA as exceptions to the privilege.⁷²

F. Step Ten: Outcome Report

The parties and counsel agree to and sign the mediation outcome report the mediator prepares at the end of each mediation session.⁷³ The Project files the report with the clerk of courts.

G. Step Eleven: Quality Assessment—Qualitative and Quantitative Assessment

At the beginning of the Project, all parties and the mediators completed exit surveys similar to those described in Step Eleven of the Supreme Court Model.⁷⁴ The purpose of the surveys was to obtain information to inform the Program about parties' perceptions of the fairness in mediation, mediator neutrality, and the overall experience with mediation. Out of twenty-six surveys from borrowers and their support persons and attorneys, twenty-four were satisfied or very satisfied with mediation, and two were neither satisfied nor dissatisfied.⁷⁵ Out of twenty-three surveys from lenders or their attorneys, twenty were satisfied or very satisfied, and three were neither satisfied nor dissatisfied.⁷⁶

IV. POLICY CONSIDERATIONS

Adhering to the core values of mediation—confidentiality, party self-determination, mediator impartiality, and the concept of “do no harm”—is essential to the integrity of the Project.⁷⁷ Maintaining core values in foreclosure mediation presents a number of challenges.

⁷² Compare FRANKLIN CNTY. COURT OF COMMON PLEAS, *supra* note 68, with OHIO REV. CODE ANN. § 2710.05. Each party leaves with a copy of the signed agreement and the Project will send the agreement to the court if asked.

⁷³ Mediation Outcome Report, Franklin County Foreclosure Mediation Project (June 30, 2010) (on file with author).

⁷⁴ SUPREME COURT MODEL, *supra* note 6, at 20, 141–43.

⁷⁵ Franklin Cnty. Foreclosure Mediation Project, Borrower Survey Results (Jan. 11, 2012) (on file with the Capital University Law Review).

⁷⁶ *Id.*

⁷⁷ See Carol L. Izumi & Homer C. La Rue, *Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 84–85 (2003) (discussing the effect of a narrow exception to confidentiality on the mediator's integrity and efficacy).

A. Confidentiality

Best practices and the UMA clearly encourage confidentiality to protect the parties and the mediator.⁷⁸ Among stakeholders, there may be different interests in the value of confidentiality. As the mediation goes forward, the interests of parties and attorneys may change. For the mediator, confidentiality is essential for a meaningful mediation process.⁷⁹

At the beginning of mediation, confidentiality encourages honest discussion of the issues and allows parties to explore a range of options that might not be available in direct negotiation. Discussion of confidentiality is a significant component of the introduction and explanation of the Agreement to Mediate.⁸⁰ Project mediators obtain agreements about confidentiality of the mediation discussion as part of the explanation they give about mediation at the beginning of the session. The terms of the Agreement to Mediate include an agreement that the parties and the mediator will not disclose mediation communications outside of the mediation.⁸¹ Parties may agree that some mediation communications will not be confidential. Typically, information to be reported to the court is, by agreement of the parties, not confidential or privileged.⁸² Mediation communications typically described in the Agreement include steps the parties will take to execute the Agreement and a description of the expected outcome, such as loan modification, deed in lieu of foreclosure, short sale, or an agreed judgment entry.⁸³ Contingency plans for contact among the parties are often helpful. Communications excluded from an Agreement are typically sensitive information about the borrower's financial or personal circumstances and specific information about the terms of a workout.⁸⁴

Although most mediation participants understand how confidentiality contributes to meaningful mediation discussions, there have been situations where counsel has argued that mediated agreements (not confidential) or confidential and privileged mediation communications should be available

⁷⁸ See, e.g., OHIO REV. CODE ANN. § 2710.07 (West 2012).

⁷⁹ Izumi & La Rue, *supra* note 77.

⁸⁰ FRANKLIN CNTY. COURT OF COMMON PLEAS, *supra* note 68.

⁸¹ *Id.*

⁸² *Id.* at 2.

⁸³ *Id.* at 3–6.

⁸⁴ E-mail from Melanie McCort, Foreclosure Mediation Coordinator, Franklin Cnty. Foreclosure Mediation Project, to the Capital University Law Review (Mar. 1, 2012, 09:30 EST) (on file with the Capital University Law School Law Review).

to the judge to decide motions. For example, when one borrower used the language of the agreement to support a motion claiming that the lender/servicer had breached the agreement, the lender/servicer claimed privilege and breach of confidentiality.⁸⁵ The Common Pleas Court addressed this argument in a decision that upheld the appropriateness of using statements in the Agreement to demonstrate a breach of the Agreement.⁸⁶ In another case where there was no resolution in mediation, the borrower's attorney filed a Motion to Request a Second Mediation; the attorney summarized the mediation discussions in the memorandum in support of the motion. The Plaintiff filed a motion to strike relying on both the confidentiality and privilege under the UMA. Although there was no formal ruling from the judge, the case was dismissed after a status conference.⁸⁷

Another confidentiality concern arose in proposed additions to the Mediation Outcome Report, which requires some detail about the facts of the agreement or non-agreement by the parties.⁸⁸ The Project added an "other" category to the Outcome Report. If the parties agree, the mediator can add additional information for the Common Pleas Court.⁸⁹

The Common Pleas Court staff attorneys asked the Project to consider a status report that included more information about how the case would proceed and what actions were needed.⁹⁰ The proposed report required detailed information about the case status. It also would have provided borrowers with the Common Pleas Court standard for parties that proceed without representation. After review of the proposed report, the Project decided that it would disclose more information than the UMA allows. It looked more like an agreed entry that attorneys would file and the Project believed that preparing the document would put mediators at risk of the unauthorized practice of law.⁹¹ Several of the judges have added the

⁸⁵ BAC Home Loans Serv., L.P. v. Wood, No. 09-CVE-10-15710, at 5–7 (Franklin Cnty. Ct. C.P. Apr. 26, 2010).

⁸⁶ *Id.* at 13.

⁸⁷ Fed. Home Loan Mortg. v. Uhlenhake, No. 09-CVE-006969 (Franklin Cnty. Ct. C.P. May 7, 2010).

⁸⁸ Mediation Outcome Report, Franklin County Foreclosure Mediation Project (June 30, 2010) (on file with author).

⁸⁹ *Id.*

⁹⁰ E-mail from Melanie McCort, *supra* note 84.

⁹¹ See OHIO RULES OF PROF'L CONDUCT R. 5.5.

language of the Common Pleas Court standard for parties that proceed without representation to their Orders.

As a matter of policy, perhaps confidentiality about the status of negotiations or the parties' positions at the end of mediation is more interesting to those who draft the forms and read the UMA. In foreclosure mediation, the lenders and their attorneys may have an interest in not disclosing the terms of an Agreement. However, experience suggests that parties, particularly when they are pro se, routinely discuss everything said in mediation with individuals who did not participate in mediation.⁹²

B. Self-Determination

Party self-determination in mediation includes the ability of the parties to make informed decisions.⁹³ For lenders, this relates to ensuring that they operate with complete financial information and knowledge about the borrowers' current financial situation. The lenders need a forum where they can operate in accordance with regulatory, legal, and institutional constraints. For borrowers, this amounts to ensuring that they understand potential options, lenders' criteria for loan modifications, and terms of any offer from the lenders. Problems arise in the mediation process when borrowers do not understand details about how the foreclosure process works, what alternative workouts may be available, or why lenders request new or additional information. Other barriers to resolution include the failure of borrowers to file (or locate their filed) tax returns or additional liens on the property, and the lender/servicer not receiving updated information because it is mailed to the wrong department or the lender's attorney fails to forward it or forwards it to the wrong department. Unless

⁹² The author's experience with confidentiality in mediation spans more than thirty years. See also Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 CAP. U. L. REV. 181 (1981) (Eileen Friedman n  Eileen Pruett). For examples of a case in which the party was represented and a case in which the party was pro se, see *supra* notes 85, 87.

⁹³ AM. ARB. ASS'N ET AL., *supra* note 40, at 2.

Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Id.

every party has accurate information, there is little chance of an informed decision leading to a positive outcome.

Mediators, lenders, and borrowers all worry about the inability of parties to obtain and understand the best information about their situations. Borrowers are the most likely to approach mediation with little understanding of the process or accurate, current information to discuss their options. Further, some lenders are more willing to present a range of workout options. For example, additional options are reviewed and considered if the first option does not work. If borrowers do not know to ask about other options, they will not be successful. Mediators may know about alternatives, and suggesting a review of those alternatives might make the mediation go more smoothly. However, because of their duty to remain impartial, mediators cannot do this. This lack of information may seriously compromise borrowers' ability to make informed decisions. Safeguards built into the Project to ameliorate this lack of information include the requirement to meet with counseling agencies, the Mediation Preparation Program, and referral of borrowers to sources for legal aid and advice.⁹⁴ Project mediators try to keep cases moving with follow-up emails and status calls to help the parties move toward resolution.

The need for this extended contact among the parties and the mediators may be different from those mediation programs that have pre-mediation conferences or rely on mediators for case development. Based on the financial constraints placed on the Project, this manner of follow-up seems to lead to similar mediation outcomes as those reported in other foreclosure mediation programs.

Representation after mediation may be critical even if there is agreement before, at, or after mediation because borrowers may be unpleasantly surprised by details that were not enumerated in the discussions or workout documents. Sometimes important details are in the loan modification documents but the borrowers' review may miss them. Sometimes there are documents missing and the borrower will not know to ask about them. Continuing contact with the housing counselors may also help borrowers make better decisions; however, the advice of counsel is the best way to ensure that borrowers arrive at informed decisions.⁹⁵ From

⁹⁴ See Jim Weiker, *Law Students Help Ease Foreclosure Worries*, COLUMBUS DISPATCH, Mar. 14, 2011, at A1.

⁹⁵ See Franklin Cnty. Foreclosure Mediation Project, *supra* note 75. Comments by borrowers routinely indicated that "understanding" the foreclosure and mediation process
(continued)

the beginning of the Project until the end of 2010, only 13% of borrowers were represented by counsel. Access to attorneys, even for the limited purpose of mediation representation, or consultation, would go a long way toward addressing these concerns.⁹⁶

C. Mediator Neutrality/Impartiality

Impartiality is at the heart of the mediation process.⁹⁷ Foreclosure mediation presents many challenges to mediator impartiality. Power imbalances caused by lack of information or understanding, and counsel or borrowers' highly emotional states are primary causes for potential breach of impartiality. Pro se litigants often attend mediation with the hope or expectation that the mediator's role is to help them or advocate on their behalf.

Without safeguards to mediator impartiality, mediation may not be the best response to the foreclosure crisis. A process that gives more control to the impartial third party might better serve courts. Settlement conferences may meet this need. A hybrid approach might be for mediators to work within the court, rather than in an outside agency or as independent contractors. However, the impartiality issues raised by working with pro se borrowers may be present in any process that attempts to engage the parties in productive negotiations.

The Project works with mediators to look at mediator impartiality from a number of perspectives. It is helpful to describe the mediator's role as mediating with impartiality, or without bias.⁹⁸ The Project mediators engage in the helpful behaviors the Supreme Court of Ohio describes to maintain their impartiality and freedom from bias.⁹⁹ In foreclosure mediation, the subject matter, especially in terms of the various programs and options for workouts, is vast and complex.¹⁰⁰ In addition to the Foreclosure Mediation Training provided by the Supreme Court of Ohio, the Project provides mediators with enough information about foreclosure

was the Project's primary benefit, while comments by borrowers' attorneys demonstrate an existing facility with the decision-making process. *Id.*

⁹⁶ *See id.*; OHIO RULES OF PROF'L CONDUCT R. 1.2(c).

⁹⁷ AM. ARB. ASS'N ET AL., *supra* note 40, at 3. *Accord* Izumi & La Rue, *supra* note 77.

⁹⁸ AM. ARB. ASS'N ET AL., *supra* note 40, at 3. *See also* THE SUPREME COURT OF OHIO, FORECLOSURE MEDIATION IN OHIO 1–2 (2010), available at <http://www.sconet.state.oh.us/JCS/disputeResolution/foreclosure/FAQ.doc>.

⁹⁹ THE SUPREME COURT OF OHIO, *supra* note 98, at 2.

¹⁰⁰ *Id.* at 11–14.

and workout options so that they can mediate effectively, but not so much that they breach neutrality. Frequent updates about changes in loan modification programs, new forms or procedures, and helpful information from other mediators and programs are also available to the mediators.

The Project mediators walk a fine line. They must ensure that the parties engage in meaningful negotiations. If they use effective questioning techniques, they may lead the parties to a discussion that explores options. They use their own knowledge about the foreclosure process and the various workout options, but they must avoid the appearance of giving legal advice. To deal with these issues, mediators employ a variety of strategies. In addition to using questions to help develop discussions about options, they also use questions to elicit party goals and objectives as well as realistic assessments of the borrower's current financial situation and the options the borrower would like to explore. Mediators can help the parties clarify the facts, details of the lenders' offers, and steps the borrowers must take to obtain the desired results. There is often a need for borrowers and the lenders, or their attorneys, to discuss worst-case scenarios if there will not be a successful workout. Mediators can facilitate that discussion as well. Finally, mediators work diligently to make sure there is balance not only in the mediation discussions but also in the agreements. It is critical that both parties understand them.

The fact that the Project mediators do not initiate contact with borrowers, coordinate mediation preparation, or schedule the sessions may help the mediators remain impartial. The mediators do, however, develop relationships with lenders' counsel who appear frequently for mediation. They must take care to avoid favoritism toward people they work with every day. The experience and integrity that the Project mediators bring to their work is also invaluable in meeting the challenges of neutrality.

D. Do No Harm

The essential question to pose here is whether parties leave mediation in the same or better position than when they entered mediation. In the year before the Project began, defendants filed answers in about 10% of foreclosure cases.¹⁰¹ Requests for Mediation are filed in 20% of

¹⁰¹ THE SUPREME COURT OF OHIO, 2009 OHIO COURTS STATISTICAL REPORT 54 (2009), available at <http://www.sconet.state.oh.us/Publications/annrep/09OCS/2009OCS.pdf>. The Supreme Court of Ohio does not track answers filed, but the total number of default cases
(continued)

foreclosure cases. The fact that twice as many borrowers have the opportunity to use the services of the Project and avoid a very quick disposition of their cases via default judgment suggests that mediation may do more than prevent harm. The mediation outcomes and case dispositions reported below support the fact that a majority of borrowers who request mediation are better off at the end of their case.

V. PRACTICAL CONSIDERATIONS

Several additional aspects of foreclosure mediation programs merit discussion, including screening and staffing, mediator responsibilities, maintaining core values, feedback and grievance procedures, pro se litigants, and quantitative and qualitative project assessment.

A. *Screening and Staffing and Mediator Responsibilities*

This author originally planned to have staff serve as screeners for financial information and other factors that might affect a borrower's suitability for mediation. That task required either the borrower or the HUD-approved counseling agency to fax or email the documents to the Project. Pursuant to the Supreme Court Model, parties expected that staff would review the information, make an assessment about mediation, and forward the documents to the plaintiff's lawyer if appropriate.¹⁰² Original staffing for the Project was for a coordinator and one full-time support staff. At this level of staffing, two things became apparent:

1. The coordinator could not gather the important documents and use them as criteria for including or excluding cases for mediation. In addition, there were space constraints for storing documents; confusion could result with the Project receiving various versions of documents and there was potential for hard copies of sensitive information being disclosed to staff, or even the public.
2. Because the Intergovernmental Agreement gave the Project authority to screen and schedule mediations,¹⁰³ there was no need for the Common Pleas Court to confirm the decision of the Project to mediate a given case. In addition, the support staff could not maintain files that included all of the financials.

relative to the total number of terminations in Franklin County, when corrected to include other terminations and dismissals, approaches 10%. *Id.*

¹⁰² SUPREME COURT MODEL, *supra* note 6, at 18.

¹⁰³ Intergovernmental Agreement, *supra* note 25, at 2.

The decision to accept most cases for mediation made sense based on this author's experience as well as the Municipal Court's experience with court-referred mediation. Almost all cases benefit from mediation. Comparisons of mediation outcomes with final case dispositions show that almost any mediation outcome can lead to a positive disposition of the case.¹⁰⁴

Staffing levels increased over time to include three full-time support staff responsible for processing the RFMs, scheduling the mediations, and sending notices to the parties.¹⁰⁵ Both of these steps require the Project to file documents with the Clerk of Courts.¹⁰⁶ The staff responds to requests to reschedule mediation sessions and other inquiries from borrowers, attorneys, and the public. The staff also files the Mediation Outcome Reports with the Clerk of Courts.¹⁰⁷

The Project also made a decision not to require the mediators to serve as the exchange mechanism for financial documents. Their rate of pay is significantly lower than most other contract mediators in the state.¹⁰⁸ Mediators in the Municipal Court do not do case development.¹⁰⁹ Municipal Court mediators are not responsible for follow-up that may include one or more additional mediation sessions, follow-up emails, and telephone calls.¹¹⁰ Even though Project mediators handle those tasks, the Project does not compensate them for these services.¹¹¹

¹⁰⁴ *Infra* Section VI.

¹⁰⁵ SUPREME COURT MODEL, *supra* note 6, at 18–20.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* In the fall of 2011, the Clerk of Courts implemented an e-filing system that reduced the number of “paper filings” significantly. See Franklin Cnty. Clerk of Courts, *Mandatory Dates for E-Filing Additional Civil Case Types*, FRANKLIN COUNTY (Oct. 24, 2011), http://www.franklincountyohio.gov/clerk/docs/E_file_docs/Civil_Case_types.pdf.

¹⁰⁸ Compare Intergovernmental Agreement, *supra* note 25, at 2 (\$100 per mediation, no matter how long), with Franklin Cnty. Court of Common Pleas, *Domestic Relations Mediation Program*, FRANKLIN COUNTY, <http://www.fccourts.org/drj/drmed.html> (last visited Mar. 4, 2012) (contract mediators “usual[ly] charge . . . between \$80 to \$100 dollars per hour”).

¹⁰⁹ Interview with Colleen Rosshirt, Mediation Coordinator, Franklin County Municipal Court (Feb. 15, 2012).

¹¹⁰ *Id.*

¹¹¹ Intergovernmental Agreement, *supra* note 25, at 2.

B. Feedback and Grievance Procedures

The Project did not formalize a feedback and grievance process before beginning mediations. Perhaps this oversight occurred because of the Municipal Court Mediation Program's experience that there are very few complaints about mediators or the mediation process.¹¹² Rather than use the grievance process in the Ohio Supreme Court's Mediation Checklist,¹¹³ the Project has developed informal processes to address party and mediator feedback on a case by case basis. Parties, attorneys, and mediators present their concerns to the Project coordinator and the Project administrator who follow-up to address and resolve them. None of the concerns expressed have constituted anything like a formal grievance. Most feedback from attorneys, parties, mediators, and Project partners has been very positive.¹¹⁴

The Project has seen four instances where plaintiffs' attorneys came to the Project administrator to discuss perceived breaches of neutrality by a mediator. To avoid an appearance of impropriety and maintain credibility of the Project among the plaintiffs' law firms, the Project changed mediator assignments.¹¹⁵

Although the following feedback does not fall into the grievance category, concerns have been expressed about other Project procedures.

- Plaintiffs' attorneys and borrowers express concerns about rescheduling or scheduling second sessions for mediation. The Project has established a policy that each party may reschedule once and that if a party or counsel presents information about a serious conflict, such as a medical emergency, the mediation may be rescheduled a second time. Participation in the mediation by telephone is also an option, though not one the Project promotes. Scheduling second sessions or status reports is sometimes an issue. Some parties feel that because mediation is "voluntary" they can control returning the case to the active docket. This is not an issue when the judge who orders the case to mediation places a stay on the case or specifically gives the mediation program the discretion to keep the case in mediation. The Project believes the Common

¹¹² Interview with Colleen Rosshirt, *supra* note 109.

¹¹³ See Hagerott, *supra* note 41, at 914–16.

¹¹⁴ See Franklin Cnty. Foreclosure Mediation Project, *supra* note 75.

¹¹⁵ One law firm requested reassignment of all four mediators. In the interest of maintaining good relationships with the law firm, all of the mediators agreed that reassignment was the best option. These four mediators have had no difficulty with other law firms.

Pleas Court's intent is for the case to stay in the mediation process as long as parties are making progress toward resolution. Under the UMA, courts can order parties to mediation.¹¹⁶ The parties do not have to participate when they come to the session and any agreement must be voluntary.¹¹⁷

- Mediators' concerns include the following:
 1. Availability and meaningful participation by parties in mediation. Sometimes when lender representatives are expected to be available, they are unable to participate in mediation because they cannot be contacted by telephone. At least one lender developed a queue system that placed the mediation call on hold for up to forty-five minutes. Mediators were sometimes asked to call again when volume was not so heavy. Each mediation session is scheduled for two hours, but it is frustrating and unproductive for everyone if the mediation cannot be conducted at all, or if the mediator "held" the parties and counsel with a "hope" that the mediation could go forward.¹¹⁸
 2. Lender/servicer representatives are unable to participate in mediation because there are difficulties with the information gathering process. These difficulties include the following:
 - Information has not been submitted or exchanged;¹¹⁹
 - Information has been submitted, but not reviewed;¹²⁰

¹¹⁶ OHIO REV. CODE ANN. § 2710.02 (West 2012).

¹¹⁷ See, e.g., FRANKLIN CNTY. COURT OF COMMON PLEAS, *supra* note 68.

¹¹⁸ Interview with Melanie J. McCort, Foreclosure Mediation Coordinator, Franklin County Foreclosure Mediation Project (Apr. 12, 2010) (on file with author). This problem has decreased as the Project moves forward. *Id.* There are, however, still a number of situations where the borrower submits the financial information before the lender/servicer has a chance to review it, or before the lender/servicer is prepared to review the information in the mediation. *Id.* Delays in reviewing financial documents can lead to second mediation sessions, second status updates to the court, or both. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* Many of the large lender/servicer institutions have substantial backlogs, and borrowers cannot obtain review of their financial information before mediation. See, e.g., Paul Kiel, *No Penalties for Mortgage Company with Worst Loan Mod Backlog*, PROPUBLICA (May 28, 2010, 12:53 PM), <http://www.propublica.org/article/saxon-mortgage-of-morgan-stanley-has-loan-mod-backlog> (describing Saxon Mortgage Servicing's average six-month backlog in reviewing documents submitted by borrowers).

- Information is lost;¹²¹ and therefore,
- Updates are required before negotiations can go forward.¹²²

These issues often result in the need for follow-up status calls or additional mediation sessions, usually conducted by the mediators.¹²³

3. Mediators find mediations difficult to manage when attorneys are unprepared for mediation. This occurs with both plaintiff and defense counsel. Of particular concern are mediations where an out-of-town law firm will send local counsel who do not have a case file, who know little or nothing about foreclosure or foreclosure mediation, and who serve as a placeholder while the attorney of record participates by telephone and the lender/servicer is on speakerphone with the attorney.¹²⁴ Barriers to negotiation include lack of information, different understanding of the same information, or misunderstandings that arise because the parties are looking at different information. All of these factors contribute to the information based issues mediators face.

C. Pro Se Litigants

Borrowers who are not represented by an attorney in mediation are at a significant disadvantage. Although the Helpline makes efforts to work with The Legal Aid Society of Columbus to help borrowers obtain legal

¹²¹ See Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home*, 52 ARIZ. L. REV. 727, 773 (2010) (describing allegations of lost paperwork).

¹²² This is a persistent problem observed by the Project staff. Delays in processing financial information results in the need for updated financial information, frequently during mediation.

¹²³ Some mediators report that they have more than one mediation session in only about 25% of their cases. The number of cases with extensive follow-up through status calls or e-mails has increased significantly. Cases can stay in mediation for up to six months. If this is a situation that negatively impacts case dispositions, it is not reflected in the case disposition discussion that follows.

¹²⁴ Most law firms have responded to this issue by sending their own counsel or using local counsel who can effectively communicate with the lender/servicer representative and negotiate effectively.

assistance, there are not enough resources. The vast majority of borrowers participate in mediation without the help of an attorney.¹²⁵

D. Quantitative and Qualitative Project Assessment

To capture the information required by the Intergovernmental Agreement,¹²⁶ the Project relies on an Excel spreadsheet to record and report the information about mediation participation and outcomes. As a practical matter, capturing this information requires a great deal of time. There is no interface between the Project's outcome data and the clerk's information about case dispositions. Although data collection for this article required more than one hundred hours of compiling and reporting, this author is convinced that the resulting assessment adds to the important data and analyses needed in this area.

VI. PROJECT ASSESSMENT

Some data from cases referred to mediation during the Project is available. Mediation outcomes and case dispositions for 1,210 cases referred to mediation between November 8, 2008 and December 31, 2009 are summarized below. Final case dispositions are current as of February 6, 2012.

The Project does not purport to present a research study. There is no control group, there was no effort to obtain a random sample, and there is no statistical analysis of any data. Further, review of this information cannot confirm the Project's "success."¹²⁷ However, the Project staff believes that the comparisons provide information that supports the conclusion that the Project is meeting its objectives.

For purposes of this assessment, mediation outcome is defined as the final status of the case, based on the mediated agreement or other outcome at the time the Project closes its mediation file and sends an Outcome Report to the Common Pleas Court.¹²⁸ To examine mediation outcomes in

¹²⁵ NABANITA PAL, FACING FORECLOSURE ALONE: THE CONTINUING CRISIS IN LEGAL REPRESENTATION 4 (2011) (describing the rates of representation in mediations, including those conducted by the Franklin County Foreclosure Mediation Project).

¹²⁶ Intergovernmental Agreement, *supra* note 25, at 2–3.

¹²⁷ See, e.g., Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 80–82 (2004) (explaining that social scientists who conduct research about court-connected mediation programs are reluctant to describe outcomes as successes or as failures).

¹²⁸ Mediation Outcome Report, *supra* note 88, at 1.

terms of case dispositions, mediation outcomes are divided into three categories:

1. *Positive mediation outcomes included agreements for:*

- Loan reinstatement;
- Loan modification;
- Forbearance agreement;
- Short sale/deed in lieu;
- Agreed judgment entry; and
- Agreement outside of mediation.

2. *Potentially positive mediation outcomes included the following outcomes:*

- Partial agreement;
- Continuing negotiations; and
- Declaration of bankruptcy.

3. *Negative mediation outcomes included:*

- No resolution;
- One or more parties did not appear; and
- Mediation cancelled by parties.

Final case dispositions are divided into the following six categories:

1. Case dismissed with or without prejudice;
2. Agreed judgment entry;
3. Judgment, but property has not been sold;
4. Judgment and property sold at sheriff's sale;
5. Case stayed because of bankruptcy stay; and
6. Case remains open.

Comparisons of outcome with dispositions follow.

Mediation Outcomes	Total Cases	Case Disposition											
		Dismissed	Agreed Judgment	Judgment No Sale	Resulted in Sheriff's Sale	Case Stayed for Bankruptcy	Case Open						
Reinstatement	17	70.59%	12	0.00%	0	11.76%	2	17.65%	3	0.00%	0	0.00%	0
Loan Modification	182	87.36%	159	0.00%	0	3.30%	6	4.95%	9	3.85%	7	0.55%	1
Forbearance Agreement	126	71.43%	90	0.79%	1	10.32%	13	16.67%	21	0.79%	1	0.00%	0
Short Sale/Deed in Lieu	51	62.75%	32	0.00%	0	0.00%	0	33.33%	17	3.92%	2	0.00%	0
Agreed Judgment Entry	9	11.11%	1	0.00%	0	0.00%	0	88.89%	8	0.00%	0	0.00%	0
Agreement Outside of Mediation	192	90.63%	174	0.00%	0	3.65%	7	5.21%	10	0.52%	1	0.00%	0
Partial Agreement	11	54.55%	6	0.00%	0	18.18%	2	27.27%	3	0.00%	0	0.00%	0
Continuing Negotiations	164	50.61%	83	0.00%	0	11.59%	19	33.54%	55	3.66%	6	0.61%	1
Bankruptcy Declared	50	26.00%	13	0.00%	0	14.00%	7	42.00%	21	16.00%	8	2.00%	1
No Resolution	269	34.20%	92	0.37%	1	18.59%	50	40.52%	109	5.58%	15	0.74%	2
One party or more did not appear	98	29.59%	29	0.00%	0	14.29%	14	54.08%	53	2.04%	2	0.00%	0
Mediation Cancelled by Parties	41	36.59%	15	2.44%	1	12.20%	5	41.46%	17	4.88%	2	2.44%	1
Totals	1210		706		3		125		326		44		6

Additional Outcomes	
Total Cases that Did Not Meet Project Criteria*	55
Total No Sale Case that Have Not Had Case Activity After 1/1/11	45
Total Cases Where Redemption Was Exercised*	1

*Not included in total cases.

VII. DISCUSSION

Mediated cases with positive mediation outcomes generally proceeded to dispositions consistent with the outcomes. Fifty-eight percent (706 cases) resulted in dismissals. Only 27% (326 cases) resulted in sheriff's sale. Although this author thought that the agreements for reinstatement would lead to dismissals with prejudice, there were no reinstatements dismissed with prejudice. The Project had concerns that agreements for forbearance, short sale, or deed in lieu of foreclosure (177 cases) were more likely to result in judgments, but 69% (122 cases) resulted in dismissal. In the nine cases where the mediation outcome was agreed judgment entry, eight went to sale. However, even in a category where sale is expected, one case was dismissed.

Agreement Outside of Mediation includes cases dismissed before the mediation could be scheduled or before the first mediation session was held. These cases, not surprisingly, have an almost 91% dismissal rate. Among the cases that ended mediation with a partial agreement, 55% (6 cases) resulted in dismissal. Partial agreements are not common in civil mediation; it is not surprising that there are not of lot of these mediation outcomes among the 2009 foreclosure mediation cases.¹²⁹

The Project ultimately stopped using the "continuing negotiations" category because it confused the court. Yet even in those cases more than 50% were dismissed. This author expected that number would be higher. In civil cases, parties may leave mediation with "homework" that must be completed before the case is resolved,¹³⁰ but very few Franklin County Municipal Court mediated cases require second sessions, or result in summary judgments after mediation.¹³¹ This may be due to the fact that there are many fewer issues to be resolved in a civil mediation in the Municipal Court.

Initially this author considered bankruptcy a "negative outcome" in mediation. The fact that 42% of these cases went to sale supports that conclusion. However, 26% of the cases in bankruptcy resulted in dismissals. Similarly, the fact that sixteen (32%) of the bankruptcy cases are open, stayed or in a "judgment no activity status" suggest that

¹²⁹ *Id.* (there were none in 2009).

¹³⁰ *Id.* For example, a party may need to consult with a party or non-party who was unavailable for mediation; where a payment plan will be the outcome, one or more parties may need additional information before committing to the details of the plan.

¹³¹ See Annual Report for Judge and Magistrate Referred Cases: Mediation, Franklin County Municipal Court Mediation Program (June 30, 2010) (on file with author).

significant options for workout remain. Of the 269 cases that left mediation in a “no resolution” status, 34% resulted in dismissal. This case disposition supports the value of mediation in terms of helping borrowers and lenders improve communication by participating in mediation. Although 40% of the cases resulted in sheriff’s sale, the mediation process may have prepared the borrowers to know what to expect in that process. More than 19% of these cases have not had action on the judgment or are still open; the parties may still be examining options for a workout.

In 139 cases where the parties requested mediation or were referred to mediation by a judge there was no mediation because one or more parties did not attend or participate in mediation. Most of these cases proceeded to sale, but more than 30% resulted in dismissal. This result is consistent with results in the Franklin County Municipal Court Mediation Program.¹³² It appears that receiving a notice of scheduled mediation in a civil case has an effect on bringing the case to the attorney’s attention.

Court records do not report specific reasons for dismissal. There were positive outcomes in only 47% (577 cases) of the 1210 cases referred to mediation. However, 709 cases (59%) were dismissed or resolved with an agreed judgment entry. Only 12% (68 cases) with a positive outcome resulted in a sheriff’s sale. Among the cases with a negative mediation outcome (408 cases), 44% (179 cases) resulted in sale.

VIII. WHAT DOES THE FUTURE HOLD?

Foreclosure filings in Franklin County peaked in 2010, and have decreased over the past two years.¹³³ Although there is a perception that case filings will increase dramatically in 2012, there is no way to know.¹³⁴ It would be, at this time, conjecture to say that the increases will be due to lenders catching up with the paperwork, lenders feeling that they can put

¹³² See *id.*

¹³³ Compare THE SUPREME COURT OF OHIO, OHIO COURTS STATISTICAL REPORT 52 (2009), available at <http://www.supremecourt.ohio.gov/Publications/annrep/09OCS/2009OCS.pdf> (showing 9,499 new foreclosure filings in 2009), with THE SUPREME COURT OF OHIO, *supra* note 1, at 50 (showing 9,649 new foreclosure filings in 2010); *Ohio Foreclosure Filings Drop 16 Percent in 2011*, THE SUP. CT. OF OHIO (Mar. 14, 2012), http://www.supremecourt.ohio.gov/PIO/news/2012/foreclosureStats_031412.asp (follow “View complete county-by-county foreclosure data for the last five years” hyperlink).

¹³⁴ See David Streitfeld, *Backlog of Cases Gives a Reprieve on Foreclosures*, N.Y. TIMES, June 19, 2011, at A1.

more houses into the real estate market, or case processing issues being resolved.¹³⁵

The Project is still very busy. Cases are staying in mediation longer. In addition, the judges are now sending cases back to the Project for additional mediation after the first mediation has been completed. These conditions continue to result in a full caseload for the Project.

IX. CONCLUSION

Foreclosure usually results from life changing events including: loss of a job, illness or death of a spouse, or divorce. Using mediation to achieve quick resolution in foreclosure litigation should help people move on with their lives. The pervasive mediation goals include:

- Bringing parties together to examine the facts of each unique situation;
- Examining options for resolution that will benefit all parties; and
- Developing satisfactory outcomes for all involved have been met in the Project.

The effect of these process steps cannot be measured, but the positive mediation outcomes and case dispositions support the added value of mediation in foreclosure cases. Borrowers come to a neutral, non-threatening environment where the mediator listens to them and assures that both sides hear each other. The parties reach a level of understanding they did not have before mediation. This author observed that borrowers appear to be less stressed after mediation. They often express appreciation for the opportunity to participate in mediation. Counsel for lenders' appreciate that mediation can help meet their client's goal of keeping people in their homes.

Franklin County is, indeed, a place where building a foreclosure mediation program resulted in a service where people did come.

¹³⁵ *Id.*