

**Before the
Senate Finance and Financial Institutions Committee
Ohio Senate
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**Interested Party Testimony
SB 197**

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Serving the Common Pleas Courts of
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About the testifier

I am a mediator. I grew up in Urbana, Ohio, where I remember watching my mother mediate playground disputes at school and in my neighborhood. Several years after obtaining an undergraduate degree in psychology from Cornell University in upstate New York, I returned to Ohio to attend law school at Ohio State. There, under Nancy Roger's tutelage, I found my calling in mediation. For the past 18 years, I have built a career as a court mediator in Ohio. Beginning as a volunteer during my first year at Ohio State College of Law, continuing as a volunteer with a community-based mediation center in Columbus, and launching into fulltime paid mediator work managing the family mediation program at the Domestic Relations and Juvenile courts of Franklin County, then Clark County, then the General Civil /DR and Juvenile Divisions in Champaign County, and finally now running a multi-county civil court mediation program for rural south central Ohio.

Mediation Services of South Central Ohio was begun six years ago at the initiative of Judge William Jan Corzine through a grant from the Supreme Court of Ohio as part of its project to institutionalize mediation in the Courts of Ohio. The program is now fully funded through add-on filing fees assessed in cases filed in the Common Pleas Courts of the participating counties. I mediate a variety of case types, including commercial business contract cases, worker's comp appeals, construction cases, imminent domain cases, personal injury cases, contested wills and adult guardianships, divorce and custody cases, employment cases, real estate boundaries and easements, and, of course, foreclosure cases.

Over the last year, the rate of referral of foreclosure cases has dramatically increased. Currently, foreclosure cases comprise an estimated 20-25% of my caseload. I wish to make one point to this Committee:

The role of the housing counselor in preparing defendant homeowners for foreclosure mediation is critical and MUST be preserved to protect the integrity of the process and enhance the likelihood of a successful outcome.

Role of the Mediator in Foreclosure Mediation

A foreclosure mediator's job is to ensure that the parties have an opportunity for a meaningful negotiation. A meaningful negotiation includes (a) an exploration of the possibility of modifying the terms of the loan to allow the borrower to remain in the home, or (b) arranging for an orderly departure of the borrower from the property in the event that the parties determine no loan modification is possible, or (c) a return of the entire matter to the court for further adversarial proceedings when no agreement dispositive of the litigation is reached between the parties.

In convening the mediation effort, the foreclosure mediator also has an ethical requirement to remain impartial throughout the mediation process. Mediators are guardians of process. Mediators do not advocate for either party, but remain neutral. Instead, we advocate for the integrity of the process. Our job is to empower the parties to make their own decisions. Meeting this standard of practice requires the mediator ensure that the parties have the information they need to make informed decisions, and that the parties have adequate capacity to articulate their positions and concerns. This is where the housing counselor's job is critical:

Housing Counselors Help Homeowners to Review Their Income And Expenses And Understand/Evaluate The Options And Alternatives to Foreclosure Likely To Be Offered By The Lender.

Often the Defendant homeowner arrives at the first mediation session unprepared for mediation. They have not provided the documents requested by their lenders. They may report receiving conflicting messages and being confused by the dunning and demands for payment that continue even after the foreclosure action has begun. They do not understand their lenders actions, which might include refusal to accept payments, and they are feeling hopeless. The housing counselor may be the first person they have spoken with openly about their predicament. They can be feeling shame and desperation.

The completion of practical tasks like completing financial forms and answering personal questions may seem monumental to them. They do not trust the lender, may have provided similar information at other times, and cannot comprehend why they are being asked to provide the same or similar information yet again.

The housing counselor has seen and is familiar with the financial information packets used by lenders. The can offer the homeowner a dispassionate examination of their situation, assistance in gathering the documents needed by the lender to evaluate the loan for various modification programs and answer a myriad of questions to prepare the homeowner for a meaningful negotiation.

The housing counselor can also review the known modification programs offered by a particular lender, or can help the homeowner read and understand the various work out options that lenders commonly offer in foreclosure situations. All this assistance is provided well in advance of a mediation session so that by the time the parties are scheduled for mediation, the homeowner has had time to understand and reflect on the reality of their personal financial circumstances, and

deliberate over their options. They have run the numbers and seen in black and white what's possible/probable.

Housing Counselors Help Build and Support the Homeowner's Capacity to Negotiate Successfully By Providing Emotional Support

Conflict theory teaches that one's ability to think clearly and objectively can be distorted when in the midst of protracted conflict. This is especially true when human emotion is triggered. Few experiences are more emotionally impacting than the threat of losing one's home. A homeowner on the verge of losing their home is often feeling desperate and panicked. They are vulnerable to fraudulent schemes of unreliable companies looking to exploit them for a quick buck. The early intervention of a housing counselor is important to keep the homeowner focused and rationale in their approach to negotiating with their lender. The housing counselor helps them to self-assess and face reality if saving their home is not likely. On the other hand, if saving their home is possible, the housing counselor can help them make that determination and remind them of the importance of cooperating with the lender when that relationship may have degenerated into frustration and hostility. The housing counselor can help the homeowner complete the necessary paperwork and submit it timely. If a mediation session has been scheduled, they can help them prepare for mediation and present themselves after having deliberated about their workout options, emotionally composed and ready to ask appropriate questions of the lender.

Sometimes a home foreclosure is a matter-of-fact proceeding, but more often than not, homeowners describe it as a deeply emotional even anguishing experience. Someone in the throes of having their home foreclosed upon needs assistance in assessing the reality of their circumstances, understanding their options, and deciding the best course of action in light of the circumstances. The mediator, whose job it is to provide a neutral setting for the parties' discussion, is not the appropriate person to handhold and/or advocate for an inarticulate homeowner who is overwhelmed, unprepared, and in tears at a mediation session.

In such situations, the mediator must consider a defendant's capacity and whether the mediation should go forward without some accommodation. In foreclosures cases the defendant often has no lawyer and no funds to hire a lawyer. Rather than terminate the mediation effort because the defendant's capacity is diminished, the mediator is likely to muddle through the process inefficiently. The plaintiff and/or their attorney feel frustrated and put upon trying to explain things to their distressed and distrustful opponents. The mediator is constantly deflecting the defendant's need to find someone whose counsel they can rely on, and the roles of all participants other than the defendant are distorted sometimes beyond recognition. The mediation is much more likely to eventually fail or be terminated by the mediator, a loathsome outcome when the mediator is painfully aware of how much more likely the process would flow toward resolution if the homeowner had been better prepared and followed-up between-sessions with the active support of a housing counselor.

The Lender Deserves the Enhanced Cooperation, Clarity and Consideration Provided by a Successful Mediation

Lenders may appreciate the convening of the mediation effort for the simple reason that their own independent efforts to obtain needed information from the homeowner may have been unsuccessful and lead to compounded misunderstandings and frustrations in the relationship between the lender and the borrower. The relationship and quality of communication may have so deteriorated over the weeks and months leading up to the mediation, that the lender is pleased to finally have a forum for obtaining clarity about the resources and intentions of the homeowner. If the homeowner has no resources or inadequate resources, the lender deserves the chance to know so finally and proceed to negotiate arrangements for an orderly departure by the homeowner or return to the court for a ruling on their motion for default or summary judgment. If adequate resources do exist, then the matter can be processed for modification terms and the foreclosure action dismissed. The work of the housing counselor with the homeowner can bring early clarity and lead to the homeowner's cooperation – an efficient outcome that should appeal to the lender's business interest.

The Use of Housing Counselors Builds In Efficiencies as Foreclosure Caseloads Continue to Grow

One final consideration is the growing need for efficiency as the numbers of foreclosures increase. Efficiency demands that parties attend the very first mediation session having exchanged information and prepared to engage in meaningful negotiations. The defendant needs to have provided accurate and complete information to the lender, and the lender needs time to process the information if the first mediation session is to be productive. The result of defendant's lack of preparation means the mediation session time must be used to prompt and prod the homeowner into understanding and action, causing unacceptable losses in efficiencies that cannot be made up. Repeated delays and difficulties increase the likelihood that the mediation effort will stall and eventually fail. The use of housing counselors builds efficiencies into the process.

Conclusion

We want parties to use mediation to modify mortgage loans successfully thereby preserving defendants' homes and restoring plaintiffs' nonperforming loans. Efficiency, justice, public policy concerns, and mediation ethics require that the parties attend mediation READY to engage in a meaningful negotiation, so that they have the best opportunity for a successful outcome. The defendant in a home foreclosure has diminished capacity and NEEDS support and assistance in order to be heard adequately in the mediation. The mediator cannot ethically provide the level of support, assistance and counseling the defendant needs, nor can the plaintiff or plaintiff's counsel be expected to support and assist the defendant. The support and assistance so desperately needed by defendant homeowners can be provided with excellence by a knowledgeable housing counselor whose proper role it is to do so. If the foreclosure mediation process is to have the best opportunity to succeed, then the housing counselor's role in the process is essential.