

**Testimony of Ohio Mediation Association, an Interested Party  
Regarding HB 306  
To the Ohio House of Representatives  
Housing and Urban Revitalization Committee**

**Presented by  
Jay M. Patterson, J.D.  
Board Member, Immediate Past President**

The Ohio Mediation Association (OMA) is a statewide professional association consisting of professional mediators and other persons or entities that support the advancement of quality mediation as a means to improve quality of life for Ohioans.

As I private practitioner, I have mediated dozens of foreclosure mediations for several counties in Ohio.

OMA is pleased with the proposal to increase the use of mediation in response to the unprecedented foreclosure crisis in Ohio and is generally supportive of House Bill 306. OMA has worked with Representative Dolan regarding some of our thoughts and concerns about the Bill and we are pleased that some of those concerns have already been addressed in the current draft of the Bill. We appreciate Representative Dolan's willingness to consider and act upon our input.

I would like to take a few minutes to share with you just a couple of particular provisions of the current draft of the Bill that we find helpful and appropriate before turning my attention to some remaining concerns we have with the Bill.

One provision of the Bill that we support is found in Section 2308.05 (B). This provision gives discretion to the mediator to determine the number of sessions necessary to explore options and foster informed decisions by the parties. The language in this section will go a long way toward promoting full and meaningful mediation participation, in the most expeditious way. The parties will be on notice by this provision that fewer mediation sessions will likely be necessary if and when each party promptly begins to fully and meaningfully participate in the mediation process. This, in turn, will speed up the time frame in which parties will be able to make fully informed decisions regarding whether agreement in mediation is possible.

In addition, Section 2308.05 (B) respects the mediator as the “keeper of the process” by giving the mediator discretion to decide, under the circumstances of the case, whether or not it would be appropriate for the first session to be conducted by telephone. OMA fully supports this approach.

We are likewise pleased that the Bill, in Section 2303.201 (F) (1), contains a means to fund and support mediation in these cases. There are costs to any worthwhile endeavor and it seems appropriate for the parties to contribute to those costs in some way through the filing fee. I would note that even with payment of the filing fee, mediation is likely to save significant costs for the parties, as it is generally a much less expensive process, not to mention a frequently more satisfying process for the parties.

Those are a few of the provisions OMA finds helpful. However, some language remains in the Bill that is troublesome.

One such provision that is of concern to OMA is contained in proposed Section 2308.02 (D). This provision allows the court to appoint volunteer mediators to conduct the mediations. This provision creates substantial risk of substandard mediations by substandard mediators. Particularly in cases wherein parties do not have a choice of whether or not to mediate, it is incumbent upon the state of Ohio to assure quality mediation by utilizing professionals that are paid a living wage for their valuable work.

It is a common misperception that anyone with minimal training could easily help people reach a quality agreement likely to hold up over time. Quality mediation actually involves the execution of a distinct methodology that can only really be applied in, at least, a minimally competent way through hours of practical experience. The training requirements spelled out in Section 2308.02 (C) (1), (2) and (3) of the proposed Bill, while helpful, fall short of giving any reasonable expectation of consistent, competent mediation. It is virtually impossible for most people to do mediation even minimally competently after only taking a few hours of mediation training. I would further note that only twelve of the required training hours are true mediation training hours wherein methodology, technique, and best practices are discussed. The remaining training required by the Bill is focused almost exclusively on laws related to foreclosure and Ohio’s Mediation Act but not on actual mediation technique.

If it is thought that such an important societal interest will be served through a mandate for mediation, it will be critical to truly serve that societal interest by

fostering quality mediation, not just mediation for its own sake. People who are paid for their work are more serious about taking the time and effort to do the things that make one a better mediator such as continuing mediation education, membership in a professional mediation association, first getting experience and mentoring before holding oneself out as a mediator, etc. Paying for professional mediation will also provide an incentive for prospective mediators to do the things that make one a competent mediator thus helping to ensure mediation is done well and that the parties have trust and respect for mediation as a legitimate conflict resolution process. Conversely, utilizing volunteer mediators provides no such incentive and will likely lead to substandard mediation and ultimately significant dissatisfaction with mediation and the mediation mandate.

Therefore, we believe any mandatory mediation program worth doing should not allow volunteer mediation. As such, we suggest that the language of Section 2308.02 (D) be changed to state, "The court may appoint only mediators who require a fee to conduct mediations and who meet the court's training and experience requirements." We would suggest leaving in place the existing second sentence of this Subsection that reads, "The court shall pay any costs of mediation from the residential foreclosure mediation fund the county treasurer establishes pursuant to division (F) of section 2303.201 of the Revised Code." This makes clear to courts that might say mediation is unaffordable to them that the means for funding quality mediation is provided in the Bill itself and will not require the court to pay for mediation without a means to fund it. This approach suggested by OMA would also leave it in the discretion of the Court to determine the amount of the fee to be paid to the mediator and with agreement by the mediator.

I would note in passing that although insuring that mediators are paid for their important professional work is a significant step in fostering the use of quality mediation, even more needs to be done in the long run to ensure that disputants have trust and confidence in the mediation process and are thus more likely to meaningfully use mediation in all sectors of society, including and beyond foreclosure cases. Mediation will never truly realize its full potential to resolve disputes and improve quality of life until the general public develops a wider level of trust and respect for mediation as a legitimate process. That level of trust will not be established until the accoutrements of a profession are developed. Having enforceable professional standards with teeth is one of the most important accoutrements of any profession. Perhaps a topic of discussion for another day is the critical need to require licensure for mediators to help build that necessary level of trust and to assure wide use of quality mediation services

throughout Ohio. After all, even hair stylists and barbers are required to have a license. We believe consumers of mediation deserve no less confidence inducing measures than is the case for those seeking a haircut.

A final concern regarding HB 306 is the language contained in Section 2308.05 (D). This provision states, "No person shall represent a party at a mediation session unless that person has authority to fully negotiate on behalf of that party." This provision appears to be there to help foster meaningful participation in mediation. While OMA certainly supports the idea that authority to enter into an agreement is critical to meaningful negotiations, we believe this provision might be a bit ambiguous and, without a correction or clarification, could lead to attempts by parties to circumvent the requirement in Section 2308.02 (A) and 2308.03 (A) (1) that the actual parties participate in mediation. OMA worries that Section 2308.05 (D) could be interpreted to allow mediation to proceed with *only* the advocates attendance or participation and without the attendance of the real parties in interest.

We support the use of advocates in mediation to help the parties make informed, rational decisions that the parties believe are in their best interest. However, the parties who, in the end, must live with the outcome must still make the actual decisions. Therefore, the statement that the person representing a party must have full authority to negotiate on behalf of the party seems, perhaps, a bit of a misnomer. If the actual party attends and participates in mediation with the help of the advocate, it would still be that party making the decisions about whether or not to enter into an agreement, not the advocate who is not the real party in interest.

One way to avoid confusion would be to simply remove Subsection 2308.05 (D) from the Bill and instead simply rely on existing law contained in Section 2710.09 which states, "An attorney or other individual designated by a party may accompany the party to and participate in a mediation." Another way to avoid confusion would be to simply make reference to Section 2308.02 (A) and 2308.03 (A) (1) in Section 2308.05 (D) by stating language such as, "subject to the requirement contained in 2308.02 (A) and 2308.03 (A), any person who represents a party attending mediation may fully participate in mediation along with the party in interest."

Thank you for the opportunity to present testimony on this important legislation. We want you to know that OMA stands ready to be a resource for any matter related to HB 306 or any other matter related to mediation.