

## MEMORANDUM

**TO:** Chief Justice Mark E. Recktenwald  
Supreme Court of Hawai'i

**FROM:** Committee on Initiatives to Enhance Civil Justice<sup>1</sup>  
Hawai'i Access to Justice Commission

**SUBJECT:** Residential Foreclosure Mediation Initiative

**DATE:** December 22, 2010

### Summary

The Committee on Initiatives to Enhance Civil Justice ("Committee") of the Hawai'i Access to Justice Commission ("Commission") strongly recommends that the Hawai'i Supreme Court retain, improve and expand the Judiciary's residential foreclosure mediation program.

The goal of the foreclosure mediation program is to utilize early alternative dispute resolution to facilitate agreements involving loan modification or other loss mitigation in order to avoid foreclosure as well as unnecessary litigation and expense. The Supreme Court created a foreclosure mediation program based on a 2009 Commission recommendation, although the recommended process was substantially altered and only a one-year pilot project in the Third Circuit Court was implemented. The Third Circuit has reported somewhat disappointing results in the pilot project, but adds that modifications of the program may increase its utilization. Also, the results of the pilot project appear to be more positive than the report indicates.

The Committee believes that full implementation of the 2009 Commission-approved Foreclosure Mediation Protocol in all judicial circuits would greatly increase participation by borrowers as well as the number of agreed outcomes. Because the foreclosure rate in Hawaii has exponentially increased since the Commission's initial foreclosure mediation recommendation, increasing the

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<sup>1</sup> Due to your request for input by December 22, 2010, prior to the next Hawai'i Access to Justice Commission meeting, the Committee was authorized to submit its recommendations directly to you.

availability and effectiveness of this proven alternative dispute resolution mechanism in foreclosure cases is urgently needed.<sup>2</sup>

## **1. Hawai'i is in the Midst of a Catastrophic Foreclosure Crisis**

In January 2007, the Honolulu Advertiser reported that one of every 10,710 households in Hawai'i entered some stage of foreclosure in the prior month, giving Hawaii the 43<sup>rd</sup> lowest foreclosure rate in the country. In December 2008, just before the Commission made its foreclosure mediation recommendation to the Supreme Court, the Honolulu Advertiser reported that Hawai'i's November 2008 foreclosure rate – one filing per 1,272 households – was worse than 22 other states. In October 2010, the Honolulu Star Advertiser reported that one home in 317 received a foreclosure filing, and that Hawai'i had the *9th worst* foreclosure rate in the United States. The full brunt of the national foreclosure crisis may have arrived late in Hawai'i, but it has done so with a vengeance and the crisis is unlikely to end any time soon. Thus, the need for facilitating loss mitigation to avoid the unnecessary loss of homes has never been greater.

## **2. Third Circuit Foreclosure Mediation Pilot Project**

In early 2009, the Commission forwarded to the Hawai'i Supreme Court a recommendation that the Hawai'i State Judiciary establish a foreclosure mediation program as well as a proposed Foreclosure Mediation Protocol ("Protocol") to implement the program, which is attached.<sup>3</sup> On May 12, 2009, the Supreme Court filed an Order establishing a Committee to Review the Foreclosure Mediation Protocol, consisting of former First Circuit Judge Karen Blondin and four lender/collector representatives. Based on the recommendations of this committee, the Supreme Court implemented a scaled-back one-year pilot project in the Third Circuit Court (the Foreclosure Mediation Pilot Project, or "Pilot Project") that differed in many ways from the Commission recommendation and Protocol.

By Order dated September 29, 2009 ("Order"),<sup>4</sup> which is attached, the Hawai'i Supreme Court established the Pilot Project in the Third Circuit Court, effective November 1, 2009 to October 31, 2010 (later expanded to January 30, 2011). The Supreme Court ordered that a prescribed Foreclosure Mediation

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<sup>2</sup> The Judiciary can only make mediation available in judicial foreclosures. Ensuring the availability of foreclosure mediation in non-judicial foreclosures would require enactment of appropriate legislation.

<sup>3</sup> This is believed to be the final version of the Protocol as approved by the Commission. However, this needs to be verified.

<sup>4</sup> Order Establishing Foreclosure Mediation Pilot Project in the Third Circuit Court of the State of Hawai'i, filed September 29, 2009.

Notice ("Notice") and Foreclosure Mediation Request ("Request") be served with the complaint and summons in every Third Circuit foreclosure case. The form provides information about the program and instructions on how to request mediation. Only borrowers who occupy the property as their primary residence are eligible to participate in the Pilot Project.

Borrowers wishing to request mediation must complete a Request and file it in court, then mail or deliver filed-stamped copies to the plaintiff's attorney and the designated judge within 15 days after service of the Notice. Within ten days after the Request is filed, the plaintiff must schedule a conference with the judge, at which time the judge may order the parties to participate in mediation.

The Third Circuit Court was ordered to submit a report about the Pilot Project within 60 days after the termination of the project, including the number of foreclosure mediation requests filed, the number of cases in which mediation was ordered, and the disposition of each such case. The Third Circuit Court submitted its report on November 10, 2010 ("Report"), which is attached.

The key differences between the Commission-approved Protocol and Pilot Project are described in the following table:

	<b>Pilot Project</b>	<b>Commission Protocol</b>
<b>Availability of foreclosure mediation</b>	Third Circuit only	All judicial circuits
<b>Content of notice</b>	-Information about program -How to request mediation	-Information about program -How to request mediation -General information about foreclosure, mediation and loss mitigation options -No cost or modest fee
<b>Action required by borrower</b>	Within 15 days: -File completed mediation request in court -Mail/deliver file-stamped copies to judge and lender's attorney	File a request within 20 days
<b>Right to mediate?</b>	No Court decides whether to order mediation after conference	Yes Upon receipt of mediation request, court issues order setting deadlines
<b>Parties required to provide relevant information prior to mediation?</b>	No	Yes Parties must provide each other and mediator with completed court questionnaire

<b>Lender representative with authority to settle required to participate?</b>	No	Yes Lender or servicer representative with settlement authority must attend or be available by telephone during mediation
<b>Follow up to mediation</b>	None stated	If mediation successful, agreed terms are placed on the record, action is dismissed
<b>Utilize community mediation centers?</b>	No	Yes
<b>Responsible for training and assigning mediators</b>	Hawai'i County Corporation Counsel	Community Mediation Centers
<b>Mediator training</b>	One day	Basic mediation training and specialized mortgage, foreclosure, loss mitigation training

### **3. Third Circuit Court Report**

The Report describes the growing number of foreclosures as well as the extreme difficulties homeowners face trying to make mortgage payments in light of widespread unemployment and depressed real estate values. Report at 1-2. Although the Pilot Project was well publicized and the courts received many calls from borrowers inquiring about the program, the Report suggests that the program has been underutilized.

The Report also notes the degree to which borrowers are intimidated and overwhelmed by the foreclosure process as well as the circumstances that led them there. Report at 2. The Committee notes that requiring borrowers to file papers in court and then serve "file-stamped" copies may reinforce borrowers' fears and discourage them from utilizing the mediation program.

Particularly surprising and disturbing is the fact that, according to the Report, not all law firms attached the required Notice and Request forms to complaints, though the Third Circuit Court notified attorneys known to represent plaintiffs in foreclosure cases of the need to attach these forms (and provided them with the Order and required forms). Report at 3. In fact, failure by plaintiffs' attorneys to provide the required forms – a sanctionable violation of the Order – ensured that nearly 50% of the borrowers could not have submitted the required mediation request form. *Id.* Widespread noncompliance by lenders' attorneys was not anticipated by the Commission in its recommended Protocol.

Further discussion of the Report's findings as well as some important qualifications regarding its conclusions are set forth in Section 4 below.

Regarding continuation of the mediation program, the Report states:

Given the small number of cases which resulted in a successful mediation (1), we do not recommend an extension of the program as it is presently structured, at this time. However, modifications to the program may increase the utilization of the mediation program – such as holding a mandatory conference in all foreclosure cases involving owner-occupants of real property; to determine whether mediation is appropriate. (Emphasis added)

Report at 7.

#### **4. Qualifications Regarding the Report's Conclusions**

Some of the Report's conclusions do not appear to be consistent with the described data. Others are impossible to fully assess without additional information. The following are some examples:

(1) Borrowers filed a request for mediation in 29% of the cases in which they received notice of the right to request mediation. The Report states that a "very small percentage" of the 200 tracked cases sought mediation.<sup>5</sup> Report at 7. However, the Report also states that of the 200 cases tracked, plaintiffs' lawyers in at least 90 (and possibly 94) cases failed to attach the Notice and Request to the complaint and summons as required by the Order. Report at 3. Therefore, the "universe" of cases examined in the Report should have been at most 110 cases. With that correction, the reported 32 mediation requests represent 29% of the 110 cases in which the mediation notice was or could have been given. This is not a very small percentage.

(2) The Report understates the percentage of mediated foreclosure cases. The Report states that only 5% of the foreclosure cases have been mediated through the Pilot Project. Report at 4. However, this percentage is based on the 200 tracked cases, including at least 90 cases in which borrowers did not receive the required foreclosure mediation notice and request forms. Based instead on the 110 cases in which the borrower may have had notice, 9% of the cases were mediated. Equally important, as more fully discussed below, only 1/3 of the filed mediation requests resulted in mediation.

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<sup>5</sup> The Report indicates that 32 mediation requests were filed in 200 cases. Report at 5. Arguably, 16% is not a "very small percentage."

(3) If cases involving unqualified borrowers were eliminated, the percentage of eligible borrowers who received the Notice and requested mediation would be even higher. The Report states that due to incomplete data the percentage of tracked cases which would qualify for the Pilot Project could not be determined. Report at 4. This information was unavailable because several foreclosure law firms failed to respond to information requests from court staff. *Id.* Thus, it is not known how many of the 110 foreclosure cases in which proper notice was or may have been given involved ineligible borrowers. Eliminating them would correspondingly increase the percentage of cases in which eligible borrowers who received the notice also requested mediation. Similarly, the percentage of mediated foreclosure cases would increase if only eligible borrowers are considered.

(4) The Report does not explain why mediation was denied or determined to be unnecessary in 62% of the cases in which mediation was requested and a conference held. The Report states that of the 26 cases in which mediation requests were filed and a conference held,<sup>6</sup> mediation was denied in 13 cases and determined to be not necessary in 3 cases. Report at 5. The Report does not provide any information regarding the criteria that were used to deny the mediation request or to decide that mediation was not necessary.<sup>7</sup> However, the percentage of cases in which these determinations were made sounds high and raises questions as to the advisability of this approach as compared to simply ordering mediation when requested by eligible borrowers, as the Commission originally recommended in the 2009 Protocol.

(5) An agreement was reached in 63% of the completed mediations. The Report states that out of the ten cases that went through the mediation process, five reached an agreement between the parties. Report at 4. In fact, only eight cases had actually gone through the mediation process, with two still pending. *Id.* at 5. Thus, mediation allowed the parties to reach an agreement in about 2/3 of the cases completed in the Pilot Project.

(6) The Report does not provide information needed to assess the outcomes in most cases where mediation resulted in an agreement. The Report states “[t]here has been just one case which was mediated successfully where the borrowers were able to meet the agreement terms, and the case was subsequently dismissed.” Report at 7. Of the five cases in which mediations resulted in agreements, the Report indicates that one was dismissed and one was foreclosed. Report at 5. However, as to the other three, it states only “Agreement Reached, Borrower Not Meeting Agreement, Unresolved.” *Id.* No explanation is provided as to what this means. Instead, it is implied that the

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<sup>6</sup> The Report indicates that no mediation conference had yet been held in six cases. Report at 5.

<sup>7</sup> The Committee has learned that in at least one instance mediation was denied because the borrower did not have any income.

agreements reached in mediation failed. This does not seem like a fair characterization, at least in the absence of additional information, *e.g.*, what “not meeting agreement” means and whether a positive resolution is still possible. Without that, the implication that only 20% of the mediated agreements are successful seems unwarranted.

### **RECOMMENDATIONS**

The Committee respectfully recommends that the Hawai'i Supreme Court:

1. Enter an order fully implementing the Foreclosure Mediation Protocol approved by the Hawai'i Access to Justice Commission in 2009, establishing the foreclosure mediation program in all judicial circuits with no set termination date.

2. Add to the Supreme Court order implementing the Foreclosure Mediation Protocol provisions that will help ensure full compliance by plaintiffs' attorneys in foreclosure cases, in particular a requirement that they file certification that the Notice and Request forms were served with the complaint and summons. Failure to file such certification should preclude proceeding with the action. Where non-compliance appears to be willful or in the case of repeated failures, courts should impose sanctions on offending attorneys.

3. Make foreclosure mediation available upon request to owner-occupant defendants in foreclosure actions that were filed prior to the effective date of the expanded foreclosure mediation program and to owner-occupant plaintiffs in new and pending actions involving mortgage-related claims.

Attachments:

Foreclosure Mediation Protocol  
Order Establishing Foreclosure Mediation Pilot Project  
Foreclosure Mediation Pilot Project Report

cc: Hon. Daniel R. Foley, Chair  
Hawai'i Access to Justice Commission





## FORECLOSURE MEDIATION PROTOCOL

### 1. Purpose

The purpose of the Foreclosure Mediation Protocol ("Protocol") is to establish a court-based mediation program to reduce the time, expense and potential losses in residential foreclosure cases. This will benefit lenders and homeowners alike and reduce the burden on the courts resulting from the high number of foreclosure cases.

### 2. Applicability

The Foreclosure Mediation Protocol ("Protocol") shall apply to all foreclosure actions filed in the State of Hawai'i that involve residential real property.

### 3. Process

a. In every residential foreclosure action, the plaintiff(s) shall attach to the front of the complaint and summons served upon each defendant the prescribed notice form ("Foreclosure Mediation Notice") described in Section 4, advising the defendant of the availability of mediation, providing a foreclosure mediation request form, and directing the defendant to notify the court as instructed within 20 days if interested in mediation.

b. Upon receiving notification that a defendant is interested in mediation, the Court shall issue an order setting mediation deadlines including a status conference at which the Court shall order the parties into

mediation, and a date 30 days from the status conference by which the mediator shall report to the Court on the progress of the mediation.

c. Unless a responsive pleading has already been filed, upon receipt of a request for mediation, the deadline for filing an answer (or other responsive pleading) shall be suspended and no motion may be filed pending the outcome of the mediation.

d. The defendant requesting mediation shall provide to the plaintiff and mediator a completed court questionnaire providing information regarding his or her financial ability to make "affordable" mortgage payments, based on affordability guidelines established by the federal government.

e. The lender (or servicer) shall provide to the defendant(s) and mediator a completed court questionnaire providing specified information relating to the loan.

f. The defendant shall attend the scheduled mediation session and a lender or servicer representative with authority to settle shall also be present or available by telephone throughout the mediation session.

g. If the mediation is successful, the mediator shall document the terms agreed to by the parties, which shall be placed on the record and the action shall be dismissed without prejudice by the Court.

h. If the mediation is unsuccessful, the action shall be returned to active status by the Court.

4. **Foreclosure Mediation Notice**

The Foreclosure Mediation Notice referred to in Section 3 shall be obtained from the Court. The Foreclosure Mediation Notice shall:

- (1) State that a foreclosure action has been filed against the defendant and that mediation is available at no cost or for a nominal fee;
- (2) Provide information regarding foreclosure, mediation, and options that may be available for resolving the matter and avoiding foreclosure, including without limitation loan modification, a short sale, or a deed in lieu of foreclosure;
- (3) State where and how to request mediation, and include a detachable "Foreclosure Mediation Request" that the defendant may use for this purpose;
- (4) State that mediation must be requested within 20 days after the defendant receives the Foreclosure Mediation Notice;
- (5) Recommend that the defendant consult with a HUD-certified housing counselor and an attorney to help prepare for the mediation, and provide information on where to obtain such counseling;
- (6) State that notwithstanding the Foreclosure Mediation Notice, the defendant is still required to comply with the

requirements of the Rules of Court (except as stated in Section 3.c);

- (7) State that by agreeing to mediation, the defendant is subject to the Court's jurisdiction, but does not waive any defenses to personal jurisdiction or service of process; and
- (8) State that the defendant has a right to bring to the mediation session an attorney and such other person(s) as the mediator may allow.

**5. Mediators**

a. The foreclosure mediators shall not be compensated. It is anticipated that existing community mediation centers will oversee the training and assignment of mediators to foreclosure cases.

b. Attorneys are best equipped to serve as foreclosure mediators, but non-attorneys, including paralegals, shall also be encouraged to act as foreclosure mediators. The Court shall take steps to encourage Hawai'i attorneys to consider fulfilling their professional obligation to provide at least 50 hours of *pro bono* services per year (pursuant to Rule 6.1 of the Hawai'i Rules of Professional Conduct) by serving as mediators in foreclosure cases or helping to train mediators.

c. Foreclosure mediators shall receive basic mediation training as well as specialized foreclosure training regarding mortgage loans, loan modification options, and other ways to settle foreclosure cases.