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# THERE'S NO PLACE LIKE HOME: APPLYING DISPUTE SYSTEMS DESIGN THEORY TO CREATE A FORECLOSURE MEDIATION SYSTEM

Andrea Kupfer Schneider\* & Natalie C. Fleury\*\*

In partnership with the City of Milwaukee, Marquette University Law School designed and now operates a voluntary mediation program to deal with the foreclosure crisis. The creation of the Marquette Foreclosure Mediation Program (MFMP) is a case study in dispute system design. Because MFMP is unlike other foreclosure mediation programs—in that it is was designed in conjunction with and is now operated by a law school—the design structure and results analysis are unique and can provide important insights for foreclosure programs around the country.

This Article uses a dispute system design (DSD) framework to analyze the MFMP. After providing a brief history of the foreclosure crisis in Milwaukee, and the process design of MFMP, the Article then utilizes DSD to analyze MFMP on several different factors. The Article examines participation in the design, the suitability of mediation for this crisis, results thus far, and lessons in permeability and sustainability. Finally, we draw lessons for other designers—dispute system professionals, courts, and legislatures—in how to effectively manage this type of program.

## I. THE FORECLOSURE CRISIS IN MILWAUKEE AND THE CITY'S RESPONSE

### A. *The Crisis*

By 2008, the effect of the foreclosure crisis on neighborhoods was also becoming glaringly apparent in the city, and leaders were increasingly concerned that the vacant homes would become magnets for crime, contribute to blight in neighborhoods, and drain the city's resources.<sup>1</sup> Board-ups of vacant homes had increased by 50 percent from 2005, and fires in and police calls to vacant homes had doubled.<sup>2</sup> Two out of three foreclosed homes had open

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<sup>1</sup> MILWAUKEE FORECLOSURE P'SHIP INITIATIVE, CITY OF MILWAUKEE, REPORT OF FINAL RECOMMENDATIONS 19 (2009), available at <http://www.mkedcd.org/milwaukeestrong/MFPI Report.pdf>.

<sup>2</sup> *Id.* at 4.

(unresolved) building code violations, and the average length of time a servicer held a home prior to resale was six months.<sup>3</sup> In addition to the drain on neighbors' patience and city resources, the large number of foreclosed homes was depressing resale values throughout the city.<sup>4</sup> In the City of Milwaukee foreclosed homes have been selling at or near half of their assessed values, and for much less in central city neighborhoods.<sup>5</sup>

Milwaukee was not immune to the national meltdown of the housing market.<sup>6</sup> In 2009, one in every sixty-five homes in Milwaukee County was the subject of a foreclosure action.<sup>7</sup>

As in other parts of the country, the factors leading to the foreclosure crisis started well before the market fell apart. Beginning in 2000, increasing home valuations, low mortgage rates, and the availability of new mortgage products began a refinancing and buying frenzy.<sup>8</sup> Many of the loans that were originated—both purchase money mortgages and refinances—were categorized

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> For a dramatic illustration of the economic crisis, see an interactive map of unemployment rates by county from January 2007 to November 2010. Latoya Egwuekwe, *The Decline: The Geography of a Recession*, LATOYAEGWUEKWE.COM, <http://www.latoaegwuekwe.com/geographyofarecession.html> (last updated Jan. 12, 2011). According to the U.S. Census Bureau, Milwaukee, Wisconsin is the twenty-sixth largest city in the United States, with a population of 605,013. *Table 1, Annual Estimates of the Resident Population for Incorporated Places over 100,000, Ranked by July 1, 2009 Population: April 1, 2000 to July 1, 2009*, U.S. CENSUS BUREAU (Sept. 2010), <http://www.census.gov/popest/cities/SUB-EST2009.html>. The population in Milwaukee County has risen to approximately 960,000 from 940,000 in 2000. *State and County QuickFacts: Milwaukee County, Wisconsin*, U.S. CENSUS BUREAU (Nov. 4, 2010), <http://quickfacts.census.gov/qfd/states/55/55079.html> [hereinafter *Milwaukee County QuickFacts*]. The most recent census data report that there are 5,654,774 people in Wisconsin. *State and County QuickFacts: Wisconsin*, U.S. CENSUS BUREAU (Nov. 4, 2010), <http://quickfacts.census.gov/qfd/states/55000.html> [hereinafter *Wisconsin QuickFacts*]. There are 6,214.6 persons per square mile in the City of Milwaukee, compared to an average of 98.8 persons per square mile across the state, and just over 10 percent of the population of the entire state resides in the city. *State and County QuickFacts: Milwaukee (City), Wisconsin*, U.S. CENSUS BUREAU (July 8, 2009), <http://quickfacts.census.gov/qfd/states/55/5553000.html> (displaying persons per square mile and the population of the City of Milwaukee as 573,358); *Wisconsin QuickFacts, supra* (displaying persons per square mile and the population of Wisconsin as 5,654,774). According to the 2000 Census, the most recent year for which the data was reported, 52.6 percent of Milwaukee County residents owned their homes. *Milwaukee County QuickFacts, supra*. In 2001, there were 1,719 foreclosure filings in Milwaukee County. *Community Indicators*, CTR. FOR CMTY. & ECON. DEV., [http://www.uwex.edu/ces/cced/economies/communityindicators/Indicators\\_Links.cfm](http://www.uwex.edu/ces/cced/economies/communityindicators/Indicators_Links.cfm) (follow "Fourth Quarter 2009 Data for 71 Counties with supplemental 2000-2009 data" hyperlink). Trends show a slight but steady increase, on average 2,617 filings per year until 2006, at which point the number increased to 3,181, a 44 percent increase. *Id.* Then things really started to deteriorate. In 2008, there were 5,335 unduplicated foreclosures in the county, and 6,323 in 2009. *Id.*

<sup>7</sup> *Community Indicators*, CTR. FOR CMTY. & ECON. DEV., [http://www.uwex.edu/ces/cced/economies/communityindicators/Indicators\\_Links.cfm](http://www.uwex.edu/ces/cced/economies/communityindicators/Indicators_Links.cfm) (follow "Fourth Quarter 2009 Data for 71 Counties with supplemental 2000-2009 data" hyperlink).

<sup>8</sup> FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 5 (Jan. 27, 2011), available at [http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic\\_final\\_report\\_chapter1.pdf](http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_chapter1.pdf).

as high cost or subprime. According to the U.S. Department of Housing and Urban Development, subprime loans are typically used for people with “blemished or limited credit histories.”<sup>9</sup> The loans typically have a higher interest rate than so-called “prime loans” to alleviate any increased credit risk.<sup>10</sup> Subprime loans are significantly more prevalent in black neighborhoods than in white neighborhoods, and were also more common in low-income neighborhoods.<sup>11</sup> This was especially true in Milwaukee’s inner city, where, in 2005, 57 percent of loans issued within the Community Development Block Grant Area met this definition.<sup>12</sup> In Milwaukee’s poorest zip code, 78 percent of all home loans were categorized as high cost or subprime.<sup>13</sup> While the percentage of high risk lending was pronounced in the inner city, it was also quite prevalent throughout other parts of the City, where 37% percent of mortgages issued in 2005 were classified as subprime or high interest rate loans, as were 22% of loans issued in the Milwaukee County suburbs.<sup>14</sup>

As the depth of the foreclosure problem became apparent, community groups began working together to attempt to stem the bleeding. Housing counseling agencies, staff from the Legal Aid Society of Milwaukee (Legal Aid), and representatives from local, state and federal government agencies were looking for solutions, but a coordinated response was difficult to develop. One problem was how the loans themselves were now held. Rather than being owned by local banks, with local interests, loans were “securitized,” that is bundled and sold as investments.<sup>15</sup> The fractured ownership and complex interests of the numerous parties, once these loans had been securitized, made decision making regarding modifications extremely difficult.<sup>16</sup> Second, although Wisconsin is a judicial foreclosure state, which requires any foreclo-

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<sup>9</sup> *Subprime Lending*, U.S. DEP’T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/fheo/lending/subprime.cfm> (last visited Mar. 14, 2011).

<sup>10</sup> *Id.*

<sup>11</sup> *Subprime Lending Report: Unequal Burden; Income and Racial Disparities in Subprime Lending*, U.S. DEP’T OF HOUS. & URBAN DEV. (Jan. 20, 2009), <http://archives.hud.gov/reports/subprime/subprime.cfm>. According to the report,

Subprime Loans are Three Times More Likely in Low-Income Neighborhoods than in High-Income Neighborhoods . . . Subprime Loans are Five Times More Likely in Black Neighborhoods than in White Neighborhoods . . . [and] Homeowners in High-Income Black Neighborhoods Are Twice as Likely as Homeowners in Low-Income White Neighborhoods to have Subprime Loans.

<sup>12</sup> JOHN PAWASARAT & LOIS M. QUINN, LEGAL ACTION OF WISCONSIN REPORT ON MORTGAGE LENDING PRACTICES IN MILWAUKEE COUNTY: PART TWO 6 (2007), available at <http://www.badgerlaw.net/Data/DocumentLibrary/Documents/1185833173.42/>.

<sup>13</sup> LOIS M. QUINN, NEW INDICATORS OF NEIGHBORHOOD NEED IN ZIPCODE 53206, at 3 (2007), available at <http://www4.uwm.edu/eti/2007/53206N.pdf>; see also MILWAUKEE FORECLOSURE P’SHIP INITIATIVE, *supra* note 1, at 3 (“In the Milwaukee area, sub-prime and high-cost lending was concentrated in Milwaukee’s central city, disproportionately impacting the City’s poor and minority families.”).

<sup>14</sup> PAWASARAT & QUINN, *supra* note 12, at 11.

<sup>15</sup> See O Max Gardner III, *Mortgage Securitization, Servicing, and Consumer Bankruptcy*, L. TRENDS & NEWS BUS. L. (Am. Bar Ass’n, Chicago, IL), Sept. 2005, [http://www.americanbar.org/content/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/mortgagesecuritization.html](http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/mortgagesecuritization.html).

<sup>16</sup> See Stephen Gandel, *Homeowners Ask: Hey, Washington, a Little Help?*, TIME (Oct. 16, 2008), available at <http://www.time.com/time/business/article/0,8599,1850932,00.html>.

sure action to be processed through the court system, in reality, the process is fairly mechanical and plaintiff-focused. Slowing this process down was not an easy accomplishment.

*B. The Creation of the Foreclosure Partnership Initiative*

In response to the foreclosure crisis in Milwaukee County, Mayor Tom Barrett convened the Milwaukee Foreclosure Partnership Initiative (MFPI).<sup>17</sup> The MFPI was created in September 2008 to help coordinate work that was already taking place in the community and to develop additional strategies for addressing the impact of foreclosures on the city.<sup>18</sup> The MFPI Steering Committee made up of representatives from neighborhood associations, servicers, realty companies, local and federal government agencies, and faith based organizations.<sup>19</sup> The mayor also established three workgroups: the Prevention Workgroup, focusing on pre-purchase education and consumer protection;<sup>20</sup> the Intervention Workgroup, which developed strategies and identified resources to assist homeowners in foreclosure;<sup>21</sup> and the Stabilization Workgroup, focusing on developing mechanisms to help stabilize neighborhoods.<sup>22</sup> It was the Intervention Group that suggested a mediation program<sup>23</sup>.

<sup>17</sup> MILWAUKEE FORECLOSURE PARTNERSHIP INITIATIVE, *supra* note 1, at 7.

<sup>18</sup> *Id.* The goal of the MFPI was to “[c]reate a formal partnership that will formulate and implement coordinated policies and programs that effectively address the impact of the recent surge in mortgage foreclosures on our community as well as identify long term strategies and best practices that will prevent similar issues in the future.” Steven Mahan, Keynote Presentation at Housing Outlook 2010 Conference: Continued Crisis or Recovery?: Milwaukee Foreclosure Partnership Initiative (MFPI) & Neighborhood Stabilization Program (NSP) (June 11, 2009) (presentation available at <http://www.bus.wisc.edu/realestate/conferences/housing2009/>).

<sup>19</sup> The Steering Committee Members were as follows (in alphabetical order): Sheila Ashley, U.S. Department of Housing and Urban Development; Richard Becker, Marshall & Ilsley Servicer; Jenny Dandridge, Federal Deposit Insurance Corporation; Alderman Joe Davis Sr., City of Milwaukee, 2nd District Alderman; Ricardo Diaz, United Community Center; Catey Doyle, Legal Society of Milwaukee; Demaris Edmond, Shorewest Realtors; Shirley Ellis, Office of Congresswoman Gwendolyn Moore; Fong Her, Hmong American Peace Academy; Charlotte John-Gomez, Layton Boulevard West Neighbors; Leo Ries, Local Initiatives Support Corporation-Milwaukee; Antonio Riley, Wisconsin Housing and Economic Development Authority; Mike Ruzicka, Greater Milwaukee Association of Realtors; Bethany Sanchez, Metropolitan Milwaukee Fair Housing Council; Deloris Sims, Legacy Servicer; Pastor Bobby Sinclair, Mt. Hermon Missionary Baptist Church; Katie Topinka, Office of Senator Herb Kohl; Mac Weddle, Northcott Neighborhood House; and Marcus White, Greater Milwaukee Foundation. MILWAUKEE FORECLOSURE PARTNERSHIP INITIATIVE, *supra* note 1, at 2.

<sup>20</sup> *Id.* at 2, 7.

<sup>21</sup> *Id.* at 2, 7-8.

<sup>22</sup> *Id.* at 2, 8.

<sup>23</sup> The Intervention Group recommended that the city take the following steps to stem the tide of foreclosures: operate a centralized hotline to connect homeowners with an established local counseling agency; increase foreclosure counseling capacity by expanding the ranks of Milwaukee’s non-profit counseling agencies; offer a rescue refinance loan product for eligible homeowners; and, most importantly for us, launch a court-based mediation program to reduce the number of homeowners losing their homes to foreclosure. *Id.* at 13-16.

### C. *The Structure of the Marquette Foreclosure Mediation Program*

The MFMP process benefited from experience in other jurisdictions, particularly Ohio and Philadelphia, so we were able to borrow some pieces and tailor other pieces to the needs of our particularly court system and foreclosure climate. It became clear early on that this needed to be an expedited process; lenders' counsel in particular did not want a mediation program to delay the processing of foreclosure cases through the courts. The design committee wanted a process that was easily accessible, with very little information required up front, and a process for notifying as many homeowners as possible that mediation is an available alternative. The judges were not ready to mandate mediation in all foreclosure cases, and given the volume of foreclosures in Milwaukee County, a mandatory system would have been extraordinarily expensive and almost impossible to administer.

The result is rather simple and very effective. Chief Judge Jeffrey Kremers signed Chief Judge Directive 09-14 on July 10, 2009.<sup>24</sup> The directive states: "in all foreclosure actions filed after the effective date of this order (July 22, 2009), the plaintiff shall attach to the summons and complaint served on the defendant/homeowner the attached forms."<sup>25</sup> The forms are the Notice of Mediation and the Mediation Request form, three pages total, printed on pink paper. This approach ensures that every homeowner facing a judicial foreclosure in Milwaukee County learns about the mediation option. On average, between 17 and 20 percent of the homeowners that receive a foreclosure summons and complaint request mediation through the program each month.

#### 1. *Application*

The application is very simple, and was designed so that homeowners did not need to research any information to complete the form. The homeowner's name, address, phone number, name of lender, and court case number (which is on the foreclosure notice) are all requested. The form asks if the property is the primary residence, then asks if the homeowner is interested in remaining in the property or would like to discuss other options. The application requests the monthly income from all sources, asks whether there is any expectation the income will change, and asks for a general description of the reason for the missed payments. The form then asks for information on the court case, all of which is included in the summons and complaint: date the action was filed, whether or not a judgment has been entered, if there is a sheriff's sale scheduled, and any other information that may be relevant. The homeowner is then required to sign the application to certify he is the owner of the property and that he is currently residing in the property. Applications can be submitted by mail, e-mail, or fax; we do not take applications over the phone.

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<sup>24</sup> *Foreclosure Mediation Program Headlines Summer 2009 Chief Judge Directives*, MESSENGER (Milwaukee), Fall 2009, at 22, available at [http://www.milwbar.org/PDF/messenger\\_2009\\_Fall.pdf](http://www.milwbar.org/PDF/messenger_2009_Fall.pdf).

<sup>25</sup> Foreclosure Procedures, Chief Judge Directive 09-14 (Wis. Dist. 1st July 10, 2009), available at [http://www.milwaukeecounty.org/ImageLibrary/Groups/cntyCourts/documents/0914\\_Foreclosure\\_Procedures.pdf](http://www.milwaukeecounty.org/ImageLibrary/Groups/cntyCourts/documents/0914_Foreclosure_Procedures.pdf).

Once the application is received, a case is opened in our database, and we generate an acknowledgement letter, sent to both the homeowner and to the local lenders' counsel, with a copy to the judge assigned to the case. It indicates that mediation has been requested, asks the lenders if they agree to participate, and provides the homeowner with a checklist of documents to gather while he await the lenders' response. The acknowledgement letter also tells the homeowners that he can seek legal representation if he so chooses, and provides the phone number for the various legal resources. These resources include Legal Aid, which has a staff attorney available to answer questions, represent homeowners in mediation, or provide referrals to a roster of attorneys who are available to represent homeowners facing foreclosure.

In the interest of an expedited process, lenders' counsel is asked to respond to the request within seven days. Once the lender responds, the homeowner is sent an acceptance letter, notifying him that the case has been accepted for mediation, and instructing him to contact his assigned housing counselor to set up an appointment to go over his financial information. This is the point at which both parties are asked to pay the one hundred dollar fee for the mediation session, and the lender is provided with a financial questionnaire to be completed before the mediation session. The judge in the case receives a copy of this letter as well.

## 2. *Housing Counseling*

At this point, the process burden shifts to the homeowner, though we will follow up with him by phone at least twice before closing a case for failure to proceed.<sup>26</sup> Once the homeowner meets with the housing counselor and pays the fees, the mediation session is scheduled. The housing counselor is asked to forward the completed financial package to our office (typically via e-mail or fax) at least ten days prior to the mediation to allow time for the local lenders' counsel to forward the information to the servicer.<sup>27</sup>

As the gatekeepers for their clients, varying lenders' counsel have placed certain restrictions on scheduling. Some have wanted at least three weeks' notice for a mediation session, and others only needed a week. Some have cancelled a mediation session if the financials were not in-hand at least seven days before the mediation, and others have proceeded if financials were provided the day before. Depending on the type of loan, there can be a thirty-day period required once the financials have been received before the mediation can be held. All these factors require careful attention, and we have attempted to build a certain amount of consistency into the scheduling process to avoid frequent cancellations and delays. (For example, the program has standard start times for mediation sessions: ten o'clock in the morning, one o'clock in the afternoon, and three o'clock in the afternoon.)

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<sup>26</sup> Should the homeowner fail to follow through with the housing counseling appointment and/or the fee payment, the case is closed, a letter is sent to the homeowner indicating the reason the case was closed, and the judge and lenders' counsel are copied on the letter.

<sup>27</sup> This aspirational goal is not always met, however increased staff will allow the files to be reviewed for completeness farther in advance of the mediation.

### 3. *Mediation Sessions*

The mediation sessions are typically between one and two hours long. The homeowner(s), lenders' counsel, and mediator appear in person, and the servicer appears by phone. Servicers can be located anywhere in the country, so the timing of the session may be dictated by time zone considerations as well. Contrary to some theoretical concerns about not having all parties present at the mediation, we have found that there is a real advantage to having the servicer appear by phone. Although the servicers are seated in their offices, they have access to all the computerized records and programs needed to evaluate a homeowner's loan situation. Quite often the servicer is entering data into a program to determine eligibility for a loan modification during the mediation session and can work through different options more effectively.

Housing counselors sometimes attend the mediation sessions to support the homeowners, and can be valuable advocates because of their familiarity with the homeowner's financial situation. Legal Aid has hired a foreclosure outreach attorney to represent homeowners in the foreclosure mediation process, and information regarding legal resources is included on the Notice of the Availability of Mediation and in the acknowledgement letter sent to the homeowners after the case is opened. Legal Aid has also compiled a roster of attorneys willing to assist homeowners in foreclosure for reduced or sliding scale fees, so a homeowner who does not meet the Legal Aid income requirements is provided with a referral for a private bar attorney. Nonetheless, to date, the majority of homeowners are attending the sessions without legal counsel, and Legal Aid continues to take steps to increase their visibility as an available resource for homeowners facing foreclosure.

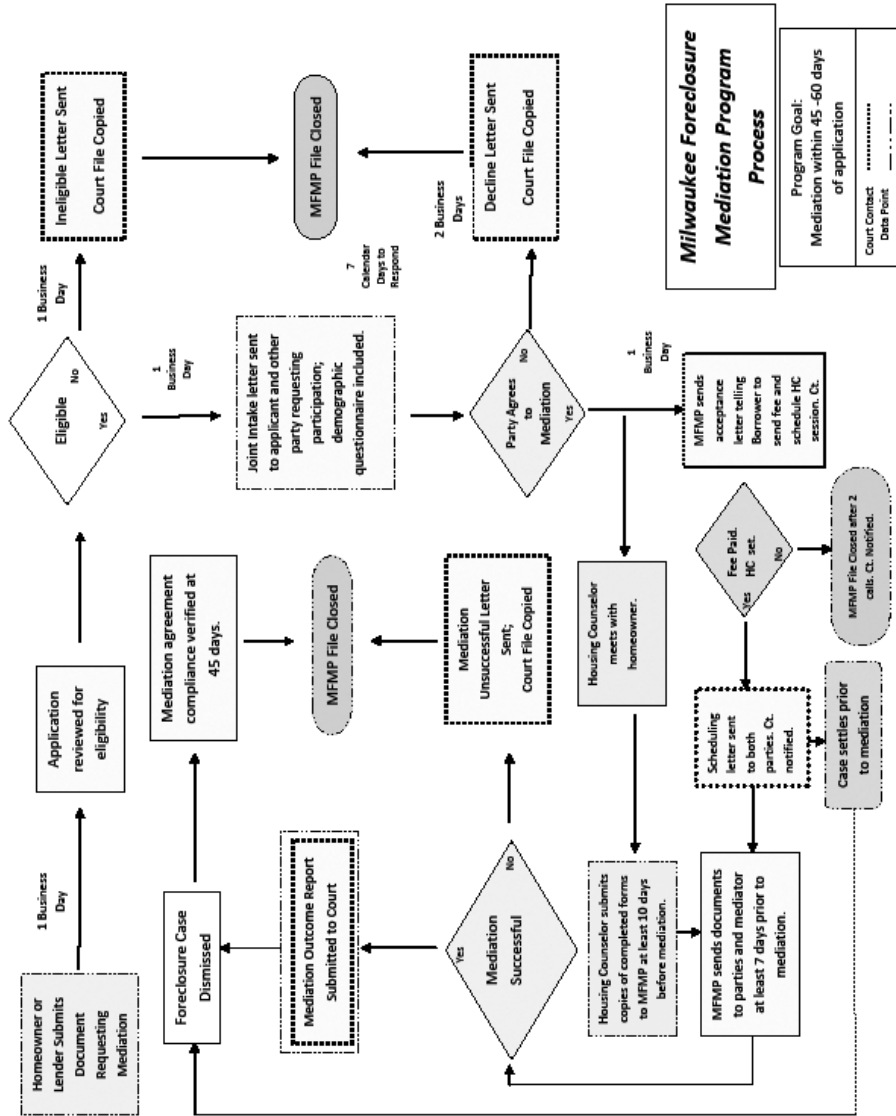
The mediation session ends with the completion of the Agreement Resulting from Mediation (the Agreement) or the Agreement to Continue Mediation. Each party leaves the mediation with a copy of the Agreement, which is in a format that allows the general understanding of any loan modification provisions to be codified prior to the servicer sending out any necessary paperwork. The Agreement has been used in subsequent proceedings in a few cases where the loan modification the homeowner received was not consistent with the information in the Agreement itself. The Agreement itself is not sent to the court; an outcome report listing the general outcome (no agreement, loan modification, forbearance, etc.) is submitted directly to the court, and the Agreement is kept in the case file.

When a final agreement (or no agreement) is reached in the mediation session, the outcome is entered in the database, and the file is closed. The following flowchart illustrates the process of the MFMP.<sup>28</sup>

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<sup>28</sup> *Milwaukee Foreclosure Mediation Program Process Flowchart*, MARQ. U. L. SCH., <http://law.marquette.edu/foreclosure/images/process-flowchart.pdf> (last visited Mar. 14, 2011).





## II. DISPUTE SYSTEM DESIGN AS APPLIED

To analyze the progress of the MFMP, we chose to use a DSD structure. This section introduces DSD, the evolution of DSD in the past twenty years, and then how this might apply in the foreclosure mediation program context.

### A. *Dispute System Design: Principles and Theories*

The theories behind DSD are an amalgam of conflict theory, organizational behavior, and alternative dispute resolution. First popularized in the book, *Getting Disputes Resolved*<sup>29</sup> in 1988, DSD presents a practical and thoughtful approach to organization disputes. Grounded in the authors' hands-on experience in resolving disputes in the coal industry, this first writing on DSD argues that disputes in the workplace often are resolved based on power and rights rather than interests. When organizations continue to focus on power-based solutions or rights-based solutions, they miss the opportunity to save money, find better solutions, and better engage their stakeholders. An effective dispute resolution system, the authors argue, would require disputants to move up a disputing pyramid—that is resolving most disputes by using interests, then relying on rights, then moving to assertions of power only for the most intransigent and difficult disputes.<sup>30</sup>

This focus on interests versus power or rights is an interesting concept when applied to foreclosure since what we are discussing is a move from power and rights—where banks could foreclose without many hurdles—to interests—where a foreclosure mediation program recognizes that banks might not have an interest in ownership *per se* and that other solutions could make sense.

The second generation of DSD, primarily highlighted by Cathy Constantino and Christina Sickles-Merchant's book, *Designing Conflict Management Systems*,<sup>31</sup> more specifically discusses how ADR methods can be brought into an organization. The book also examines *how* these new systems were developed, noting that some organizational leaders had used rights-based mechanisms to impose interest-based processes upon stakeholders.<sup>32</sup> DSD initiatives themselves should proceed as follows:

1. Develop guidelines for whether ADR is appropriate
2. Tailor the ADR process to the particular problem

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<sup>29</sup> See generally WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988).

<sup>30</sup> They outlined six key principles that would help design an interests-oriented dispute resolution system:

1. Put the focus on interests.
2. Build in "loop-backs" to negotiation.
3. Provide low-cost rights and power backups [to any interest-based process].
4. Build in consultation before, feedback after [the dispute system].
5. Arrange procedures in a low-to-high-cost sequence.
6. Provide the necessary motivation, skills, and resources [for the participants and organization].

*Id.* at 42.

<sup>31</sup> See generally CATHY A. COSTANTINO & CHRISTINA SICKLES-MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996).

<sup>32</sup> *Id.* at 52.

3. Build in preventive methods of ADR
4. Make sure that disputants have the necessary knowledge and skill to choose and use ADR
5. Create ADR systems that are simple to use and easy to access and that resolve disputes early, at the lower organizational level, with the least bureaucracy
6. Allow disputants to retain maximum control over choice of ADR method and selection of neutral wherever possible<sup>33</sup>

Now in the “next generation” phase of dispute system design, commentators have coalesced around several factors that highlight the best systems:

1. Multiple process options for parties, including rights-based and interest-based processes
2. Ability for parties to “loop back” and “loop forward” between [these options]
3. Substantial stakeholder involvement in the system’s design
4. Participation that is voluntary, confidential and assisted by impartial third party neutrals
5. System transparency and accountability
6. Education and training of stakeholders on the use of available process options<sup>34</sup>.

Throughout the development of DSD in a variety of contexts, several consistent themes emerge and we will use these to examine the foreclosure mediation program. DSD theorists consistently focus on providing interest-based dispute resolution options in addition to rights-based options with the ability for stakeholders to choose and move among them.<sup>35</sup> We will spend most of this Article outlining how mediation has added to the foreclosure system. Second, DSD theorists argue that stakeholders must have the necessary skills, knowledge, resources, and motivation to participate in these processes.<sup>36</sup> We note some of the challenges in this area and work done to provide appropriate stakeholder resources.

Finally, DSD theorists examine what qualities usually distinguish effective systems: stakeholders have participated in designing them, the systems are fluid and flexible, and the system is transparent and accountable.<sup>37</sup> Systems are measured for impact terms of efficiency, effectiveness, and satisfaction that organizations can use to gauge their success. We will use these factors throughout the rest of this Article to discuss the quality control of the MFMP.

### B. Participation

One of the key factors in the success of MFMP was the careful attention given to participants around the table as the mediation program was being designed. The working group at any given time consisted of representatives from Legal Aid, the law school, lenders’ counsel, housing counselors, consumer groups, bankruptcy attorneys, and the mayor’s office.<sup>38</sup> As the program

<sup>33</sup> *Id.* at 120-21.

<sup>34</sup> Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 128 (2009).

<sup>35</sup> *Id.* at 144.

<sup>36</sup> *See id.* at 131-32.

<sup>37</sup> *Id.* at 128.

<sup>38</sup> *Milwaukee Foreclosure Mediation Program Marks First Anniversary*, THIRD BRANCH (Supreme Court of Wis., Madison, Wis.), Spring 2010, at 13, available at <http://www.wicourts.gov/news/thirdbranch/docs/spring10.pdf>.

details were filled in, the courts were also involved as decisions were made about how best to proceed within the legal framework of a judicial foreclosure process.<sup>39</sup> Although a few members of the working group came and went, a core group stayed the course through the design and implementation process. Each member of the group had an equal voice, and all participants' viewpoints were heard and discussed.

The importance of this participation cannot be underestimated. First, in terms of establishing the program, the support of the court system and judges was required. This remains a voluntary program run through the judiciary and is based on a local directive signed by the chief judge, rather than a legislative mandate.<sup>40</sup> The judges were included throughout the design process, and were given a number of options for the process implementation. One option was to proceed under already existing law. Wisconsin Statute § 802.12 allows any judge in any civil proceeding to order the parties to select a settlement alternative and is often seen as an opportunity for judges to order cases into mediation.<sup>41</sup> The chief judge did not see this as a workable option for Milwaukee County, and opted instead to sign a local order establishing the mediation program.

The support of the housing counseling agencies and consumer groups was also important. Housing counselors, in particular, serve as the frontline for financial counseling for many homeowners.<sup>42</sup> Coordinating with the housing counselors regarding the challenges of working with homeowners to troubleshoot such issues in the design process was a key factor in developing a sustainable program.

On the other side of the process, the importance of the lenders' counsel to the development of the program cannot be overstated. Having lenders' counsel

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<sup>39</sup> Conversations with the county clerk's office led to the generous offer of free office space and space for mediations at the courthouse.

<sup>40</sup> See, e.g., Foreclosure Procedures, Chief Judge Directive 09-14 (Wis. Dist. 1st July 10, 2009), available at [http://www.milwaukeecounty.org/ImageLibrary/Groups/cntyCourts/documents/0914\\_Foreclosure\\_Procedures.pdf](http://www.milwaukeecounty.org/ImageLibrary/Groups/cntyCourts/documents/0914_Foreclosure_Procedures.pdf).

<sup>41</sup> WIS. STAT. ANN. § 802.12(2) (West Supp. 2010) states:

(2)(a) A judge may, with or without a motion having been filed, upon determining that an action or proceeding is an appropriate one in which to invoke a settlement alternative, order the parties to select a settlement alternative as a means to attempt settlement. An order under this paragraph may include a requirement that the parties participate personally in the settlement alternative. Any party aggrieved by an order under this paragraph shall be afforded a hearing to show cause why the order should be vacated or modified. Unless all of the parties consent, an order under this paragraph shall not delay the setting of the trial date, discovery proceedings, trial or other matters addressed in the scheduling order or conference.

(b) The parties shall inform the judge of the settlement alternative they select and the person they select to provide the settlement alternative. If the parties cannot agree on a settlement alternative, the judge shall specify the least costly settlement alternative that the judge believes is likely to bring the parties together in settlement, except that unless all of the parties consent, the judge may not order the parties to attempt settlement through binding arbitration, nonbinding arbitration or summary jury trial or through more than one of the following: binding arbitration, early neutral evaluation, focus group, mediation, mini-trial, moderated settlement conference, non-binding arbitration, summary jury trial.

<sup>42</sup> Stephanie Armour, *Housing Counselors Take Front Line of Crisis*, USA TODAY, Jan. 8, 2011, at 3B, available at [http://www.usatoday.com/printedition/money/20091015/counseling15\\_st.art.htm](http://www.usatoday.com/printedition/money/20091015/counseling15_st.art.htm).

at the table to provide key information in terms of what information is needed—and when—was imperative. Lenders' input on everything from the timing of the notice to the qualifications of the mediators, was crucial in ensuring that lenders would agree to participate in the process. Further, lenders' counsel provided the key insight that the program would need to run concurrent with pending foreclosure actions, without any mandatory stay being implemented, or else the lenders would not be willing to engage in the process. In addition, lenders' counsel needed to vouchsafe for the neutrality of this program to their clients, who were often tired of being blamed for the entire economic turndown.

Throughout the design process, the issue of communication between homeowner and lender cropped up repeatedly. Lenders' counsel would state that homeowners refused to answer the phone or open mail. Representatives for the homeowners would counter that a borrower could never get a live person on the phone and, even if the homeowner did find someone to send in the supporting documentation for a loan modification, the documents were often lost.

The involvement of key groups in the design phase gave credibility to the entire program for all different levels of participants. It is unclear whether other programs around the country have included all groups in the design of the program.<sup>43</sup> Particularly when the foreclosure program has been established through political means—either by the legislature or others trying to garner popular support by fighting for the “little guy”—the design of the program lacks the viewpoint of the lender.<sup>44</sup> The importance of a truly neutral program

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<sup>43</sup> The Philadelphia Residential Mortgage Foreclosure Diversion Pilot Program, started in 2008, mandates a judicial mediation for homeowners whose homes are in foreclosure. *Philadelphia Court of Common Pleas Judge Annette Rizzo to be Honored by the Pennsylvania Bar Foundation*, PA. B. ASS'N (May 26, 2009), <http://www.pabar.org/public/news%20releases/pr052609.asp>. The homeowner first meets with a housing counselor then a conciliation conference is held with the homeowner, housing counselor, volunteer lawyer for the homeowner, and the representative from the lender. *Id.* Then:

At the conclusion of the conference, a court order is handed down stating the resolution that has been reached. Options include forbearance, a stay of sale, settlement of the entire action, loan modification, loan reinstatement and payment plans. In some cases, the parties agree to a “graceful exit” when, despite everyone’s best efforts, the homeowner cannot remain in the house. Rather than enduring a sheriff’s sale, the lender and homeowner agree to a date to exit the property, and, in many cases, the lender provides funds to help the homeowner find an alternative living situation.

*Id.* As of November 2010, there were 360 pro bono lawyers trained to offer services to homeowners. Heather Scheiwe Kulp, *Foreclosure Mediation Program Models*, A.B.A. (Nov. 12, 2010), <http://www.abanet.org/dispute/mediation/resources.html>.

<sup>44</sup> The Nevada legislature passed a bill in May 2009 establishing the Foreclosure Mediation Program and making non-judicial mediation available for a homeowner before the lender foreclosed on the house. Kulp, *supra* note 43. The homeowner must request mediation, and when the request is received by the lender, the lender is required to participate or provide a representative. STATE OF NEV. FORECLOSURE MEDIATION PROGRAM, FACT SHEET 1 (2010), available at <http://www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-start-down/1937/>. The cost of the mediation is shared equally between the lender and the homeowner. *See id.* (requiring both homeowner and lender to pay \$200 fee). Once the mediation process has begun the foreclosure proceedings cannot continue until the mediation is complete. *Id.*

cannot be understated. And, if the program is seen as too one-sided and too much favoring the homeowners, the mediated solutions will arguably be less robust. In our case, as well, we do not believe that we would have the very high acceptance rate for this voluntary mediation program if we did not have the design buy-in of lenders' counsel.

Finally, the participation of both the state and city lawyers was very helpful. Since the city and the state are key sources of funds, we obviously wanted their opinion and approval. But more importantly, the joint work demonstrated that this program had the backing of both political parties (the mayor was a Democrat and the state attorney general was a Republican) and that the program was designed to meet the needs of the biggest city in the state as well as the different needs of homeowners living outside of city of Milwaukee. This bipartisan and bi-geographic entity support has given even more credibility to the program.

### C. *Suitability*

The next element of dispute system design is to examine whether the process selected is actually suitable for the problem it is designed to address. Many commentators have already written about the advantages of mediation as a general process and even as applied to foreclosure.<sup>45</sup>

#### 1. *Advantages of Foreclosure Mediations*

One of the key advantages to mediation is that it allows the parties to tell their stories to a neutral party, which gives them an opportunity to be heard.<sup>46</sup> In a foreclosure context, this need to be heard is even more pressing when the homeowner has tried repeatedly to reach the servicer, to no avail.<sup>47</sup> The stories are as varied as the individuals—job loss, medical issues, mental health concerns, bad financial decisions, divorce, the loss of a parent or a spouse, or a combination of any or all of the above. Whatever caused the homeowners to fall behind on mortgage payments, mediation gives them the opportunity to show they are not simply shirking their financial obligations.

In an MFMP foreclosure mediation, either the lender or the lenders' counsel is always present with a lender or lender representative appearing by phone.<sup>48</sup> Thus, during the mediation session, the homeowner knows that the servicer is paying attention and hearing his case. Even when a settlement cannot be worked out, the results of our satisfaction surveys show that homeowners appreciate the opportunity to tell the mediator and someone from the

<sup>45</sup> See, e.g., CARRIE MENKEL-MEADOW ET AL., *MEDIATION: PRACTICE, POLICY, AND ETHICS* 127 (2006); Robert A. Merring, *Spotlight on ADR—Part II: The Mortgage Foreclosure Crisis; Can We Talk?*, *ORANGE COUNTY LAW.*, Jan. 2010, at 13-15.

<sup>46</sup> Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 *AM. BANKR. INST. L. REV.* 427, 427-28 (2009).

<sup>47</sup> Bob Tedeschi, *State Programs Help Homeowners*, *N.Y. TIMES*, July 12, 2009, at RE6, available at <http://www.nytimes.com/2009/07/12/realestate/12mort.html>.

<sup>48</sup> Milwaukee Foreclosure Mediation Program, *Attorney Frequently Asked Questions*, *MARQ. U. L. SCH.*, <http://law.marquette.edu/foreclosure/lender-faqs.html> (last visited Mar. 14, 2011).

servicer the story of how they ended up in foreclosure. The mediation setting differs markedly from previous attempts by the homeowner to reach the mortgagor, which typically has been marathon sessions of voicemail prompts, disconnected calls, and discussions with departments that each have a different understanding of the status of the foreclosure case and who often tell the homeowner that the documents the homeowner submitted were lost or are now out of date.

Homeowners also often leave the mediation session with a much better understanding of the mortgage foreclosure process. Often homeowners believe that they will be losing their home immediately, and panic because they do not know where to go or what to do. In actuality, Wisconsin has one of the longest judicial foreclosure processes in the country, due in large part to the importance of agriculture on the state's economy.<sup>49</sup> The foreclosure laws in Wisconsin were designed to give farmers time to plant, harvest, and sell a crop in order to make up for any past due amounts on a farm mortgage.<sup>50</sup> The redemption period—the time between entering the judgment of foreclosure and the sheriff's sale—can be up to twelve months if the creditor is seeking the difference between the amount due on the mortgage and the property's selling price at the sheriff's sale, known as a deficiency judgment.<sup>51</sup> Even in those cases where the homeowner will not be able to stay in the home, mediation is beneficial because the homeowner understands the actual timeframe for the foreclosure process and learns that he will often have six months or more to relocate.

Over the past year of the program it has become clear that lenders and lenders' counsel themselves are developing key listening skills. Although at first, hearing the stories may have been uncomfortable or seen as wasted time, lenders and lenders' counsel have learned the benefit of listening. Because of the repeat nature of the foreclosure program and the limited number of local counsel that regularly participate in the mediation, these participants have seen for themselves how effectively the process works when homeowners feel heard. Not surprisingly, the in-person experiences of the lenders' counsel are far more persuasive than any academic literature telling participants about the importance of storytelling in mediation.

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<sup>49</sup> See Dehlia Seim, *Mortgage Foreclosures: Saving the Family Farm*, BUSINESSNORTH.COM (Aug. 4, 2009), <http://www.businessnorth.com/businesslaw.asp?RID=3084>.

<sup>50</sup> See JOSEPH A. RANNEY, TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM 89 (1999). Ranney details the history: "[F]armers and their supporters . . . persuaded the legislature to pass a law allowing debtors six months to respond to foreclosure complaints and requiring creditors to wait at least six months after judgment before conducting a foreclosure sale." *Id.* In *Von Baumbach v. Bade*, the court sided with the farmers about the passage of the above law, extending the time to pay mortgages, recognizing the extreme difficulty they were going through:

Although such changes are, in general, exceedingly unwise and unjust, yet if from sudden and unlooked for reverses or misfortune, or any other cause, the existing remedies become so stringent in all or a particular class of actions, that great and extensive sacrifices of property will ensure, without benefit to the creditor, or relief to the debtor, a relaxation of the remedies becomes a positive duty which the state owes to its citizens.

*Von Baumbach v. Bade*, 9 Wis. 559, 583 (1859).

<sup>51</sup> In our experience, lenders are not seeking deficiency judgments at this point in the foreclosure crisis.

A second advantage to mediation in the foreclosure context is that open lines of communication often lead to settlement prior to the mediation session. Once the homeowner and servicer are exchanging information in a controlled setting that provides some accountability for where the information actually goes, a fair number of the cases are settled prior to the mediation session. This occurrence is nothing new to mediation enthusiasts,<sup>52</sup> but did come as somewhat of a surprise in the early days of the program when a number of mediations came off of the calendar because the parties had reached an agreement directly.

## 2. Criticisms of Foreclosure Mediations

Notwithstanding the benefits of mediation, there are concerns about using mediation in the midst of this foreclosure crisis. The critiques are primarily focused on legal defenses, power imbalances, and the enforcement of mediation agreements.<sup>53</sup> First, some subset of the mortgages in foreclosure were mortgages that resulted from predatory loan schemes, against which homeowners may have legal defenses.<sup>54</sup> Some consumer advocates worry that consumers who should not need to mediate will actually reach a settlement rather than being freed from their illegal mortgages. In the mediation process, might these homeowners end up making agreements to continue paying mortgages from which they could have escaped?

In designing the process for MFMP, we identified several different points where those potentially problematic mortgages can be identified. Further, homeowners are made aware of the availability of legal resources through several written documents, including the Notice of Availability of Mediation attached to the summons and complaint, the language included in the acknowledgement letter at the time a case is opened, and at other stages of the process.<sup>55</sup> At the application stage, the homeowner's information is reviewed by program staff, and any unusual circumstances or extremely high interest rates are flagged. Staff members then discuss whether the situation warrants a referral to Legal Aid for further review of any potential defenses.

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<sup>52</sup> See MENKEL-MEADOW ET AL., *supra* note 45, at 123.

<sup>53</sup> See GEOFF WALSH, NAT'L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: UPDATES AND NEW DEVELOPMENTS 10, 13 (2010), available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-state-mediation-programs-update.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf).

<sup>54</sup> See U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. DEP'T OF TREASURY, RECOMMENDATIONS TO CURB PREDATORY HOME MORTGAGE LENDING 13 (2000), available at <http://archives.hud.gov/reports/treasrpt.pdf> (describing growth of predatory subprime loan schemes).

<sup>55</sup> The notice specifically states:

The Milwaukee Justice Center in Room G-9 of the Milwaukee County Courthouse has forms available to help you respond to the Summons, and its staff or volunteers can help you with the process of filing a response. Call (414) 278-2910 for information about the Center's hours of operation. If you need additional legal assistance . . . [c]ontact the Foreclosure Attorney Intake and Referral Specialist at (414) 727-5373 for assistance with referral to an attorney.

Milwaukee Foreclosure Mediation Program, *Mediation Request Form*, MARQ. U. L. SCH., <http://law.marquette.edu/foreclosure/images/MFMP-Notice-Request.pdf> (last visited Mar. 14, 2011).



Another opportunity for flagging a mortgage with potential problems occurs when the homeowner sits down with the housing counselors to review the financial situation. Given their extensive knowledge of the housing market, mortgages, and neighborhood demographics, the housing counselors are particularly well-situated to note if an individual mortgage is out of the ordinary or potentially troublesome. The housing counselors have been encouraged to refer such cases to Legal Aid as well. Finally, the mediator reviews the file and may suggest consulting with legal counsel as an option before proceeding with any mediation agreement.

Another concern about mediation in the foreclosure context is the belief that the lender does not really intend to “mediate,” or that the discussions that take place during the session are not truly in good faith.<sup>56</sup> As discussed above, the mediation of foreclosure processes differs in some ways from other typical court-annexed mediation systems. A good portion of the mediations are focused on each party educating the other—the homeowner is educating the servicer about the situation that led to the arrearage, and the servicer is educating the homeowner about the guidelines that govern loan modifications, forbearance agreements, and repayment plans. The opportunity for a significant amount of back and forth negotiation is somewhat limited. Typically the servicer has one package to offer once the financial situation is clarified and the homeowner must choose to take it or leave it. Critics characterize the mediation as one-sided and lacking in good faith because the lender offers one option (based on the homeowner’s financial situation) and does not really bargain back and forth with the homeowner.<sup>57</sup> In other words, if the “option creation” stage of mediation is really a “take-it-or-leave-it” stage in which the homeowner is presented with the choice of taking the lenders’ proposal or losing their house to foreclosure in a court proceeding, critics wonder whether this process is really mediation.<sup>58</sup> This question is at the heart of the definition of mediation and not one to be dismissed lightly. Does mediation require a genuine give and take? Does mediation require that both parties be willing to move?

To frame this discussion, it is useful to turn to a standardized definition of mediation. According to the preamble to the Model Standards of Conduct for Mediators, “[m]ediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”<sup>59</sup> The standards go on to state that “[m]ediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and

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<sup>56</sup> Robert Benjamin, “*Mediation Is a Gamble*”: A Sobering Review and Critique of Mortgage Mediation Programs, *MEDIATE.COM* (Nov. 2010), [http://www.mediate.com/articles/benjamin51\\_foreclosure\\_mediation.cfm](http://www.mediate.com/articles/benjamin51_foreclosure_mediation.cfm).

<sup>57</sup> See WALSH, *supra* note 53, at 4.

<sup>58</sup> Benjamin, *supra* note 56.

<sup>59</sup> AM. BAR ASS’N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf).

assess possible solutions, and reach mutually satisfactory agreements, when desired.”<sup>60</sup>

The MFMP is a process in which a third party facilitates communication. Communication is one of the key benefits of participation in the foreclosure mediation program. The primary question then becomes one of negotiation and the voluntary aspect of the decision making. In the authors’ opinions, the lack of negotiation over the result would definitely be a cause for concern if it meant that homeowners were not benefitting from this process or if they were not feeling heard and left the session feeling that the process was unjust. As the participant survey results discussed in a later section illustrate, that has not been the case.

Further, a central purpose of mediation highlighted in the preamble of the Model Standards comes into play during the foreclosure mediation process when the servicer, having heard the homeowner’s story, takes the opportunity to educate the homeowner about the various restrictions placed on them by governmental entities, investors, and other parties. This is particularly true when it comes to the much-touted Making Home Affordable Program, better known as HAMP.<sup>61</sup> Many of the sessions mediated by one author consist of an exhaustive review of the homeowner’s financial package and a detailed explanation of why the homeowner’s particular situation qualifies (or does not qualify) for a HAMP modification. Should the homeowner not qualify under HAMP, the servicer then walks them through an analysis of any in-house modification programs that apply. If no such modification programs are available, the servicer takes the time to explain why such programs are not an option. Homeowners leave the mediation with a better understanding that their financial situation, by and large, dictates what type of package the servicer can or cannot offer. As the surveys indicate, regardless of outcome, homeowners prefer the opportunity to attempt any solution with the servicer, rather than rely on the courts’ solutions or trying to work something out with the servicers on their own.

#### D. *Process Accountability*

Accountability is an important measure under DSD for maintaining credibility with the stakeholders and for ensuring a quality process.<sup>62</sup> For purposes of reviewing the MFMP program, we have divided accountability into two areas—process and results—so that we can ensure programmatic integrity from both angles. For our purposes in this review, process accountability requires answering three questions: (1) Are the mediators perceived as impartial? (2) Do the homeowners need representation in the mediation? (3) Is MFMP being used evenly across demographic lines?

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<sup>60</sup> *Id.*

<sup>61</sup> See generally *Home Affordable Modification Program (HAMP)*, MAKING HOME AFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx> (last visited Mar. 14, 2011).

<sup>62</sup> Smith & Martinez, *supra* note 34, at 132-33.

### 1. Mediator Impartiality

Mediator neutrality or impartiality is crucial to the success of a mediation program.<sup>63</sup> For courts, consumers, servicers, and our funders to support MFMP, this neutrality is paramount. Interestingly, the worry about neutrality came from all sides of the table in the design of this process. First, we worried that our mediators, including our chief mediator, would have much more in common with the lenders' attorneys. The mediators are lawyers, are likely to have represented servicers rather than servicer consumers, and are more socially and economically similar to the lenders than the borrowers. Would the mediator empathize with and work more easily with the lender? Previous servicing work could also present a conflict of interest (and, in fact, one law firm in particular from which we have several volunteer mediators has designed an effective conflict-of-interest letter for its servicer clients and the mediation participants to take care of this particular issue). But as we moved forward in designing the process, our second worry about neutrality came from the lenders, who were concerned that the general negative perception of lenders and pressure from very pro-consumer groups involved in the system design would sway the mediator toward the consumer.<sup>64</sup>

We are delighted to report that mediator neutrality has been overwhelmingly verified in post-mediation session surveys. Borrowers state that the mediators are neutral in 91.6 percent of the cases, with 98.2 percent of lenders' attorneys agreeing that the mediator was neutral. Further, 99.1 percent of the borrowers would recommend the assigned mediator to others in foreclosure, and 100 percent of the lenders' attorneys would recommend the mediator from their sessions.

### 2. Homeowner Representation

The next issue in process accountability is whether the homeowners need representation. Although no specific study has been done to determine how many people facing foreclosure retain an attorney, it is estimated that between 90 percent and 97 percent of homeowners facing foreclosure in Milwaukee County represent themselves and the majority of foreclosures are granted through default judgment, with no answer being filed by the defendant.<sup>65</sup> In March of 2008, the Legal Aid Society of Milwaukee was awarded funding for three years to hire several attorneys to assist low-income homebuyers facing foreclosure.<sup>66</sup> However, this development addressed only low-income home-

<sup>63</sup> *Id.* at 128.

<sup>64</sup> This issue is illustrated by one of the author's participation in a discussion of the logo originally developed for the program. The original logo, designed by a City of Milwaukee employee, included the tag line "You want to save your home. We want to help." This tag line was perceived by lenders' counsel as biased in favor of the homeowner. It was reworked and now states, "You want solutions. We want to help." *Milwaukee Foreclosure Mediation Program*, MARQ. U. L. SCH., <http://law.marquette.edu/foreclosure/> (last visited Mar. 14, 2011).

<sup>65</sup> For more information, see MELANCA CLARK & MAGGIE BARRON, BRENNAN CTR. FOR JUSTICE, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 12-17 (2009), available at [http://brennan.3cdn.net/a5bf8a685cd0885f72\\_s8m6bevkv.pdf](http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkv.pdf).

<sup>66</sup> *Legal Aid Society Wins Grant for Foreclosure Program*, BUS. J. (Mar. 14, 2008), <http://www.bizjournals.com/milwaukee/stories/2008/03/10/daily50.html>.

owners and addressed neither the larger problem of servicers' reluctance to modify mortgages, nor the inefficient processes that hampered efforts at modification when the servicers were actually willing to do so.<sup>67</sup>

At most mediation sessions, the lender is represented by counsel (in person) and the servicer participates over the phone to discuss and approve the settlement. Homeowners are not precluded from having their own representation, and can arrange mediation representation through Legal Aid. Nonetheless, the vast majority of homeowners go through the mediation process without representation. As such, an ongoing concern would be that the lack of representation results in different or biased agreements against the homeowner. One advantage of having the bulk of all sessions mediated by the chief mediator is that we have a good sense of what is going on and what types of settlements are being worked out. From our anecdotal perspective, the type of settlement and the options being offered to homeowners do not vary based on legal representation. It is still too early to determine if homeowner representation has a significant impact on the outcome of the mediations.<sup>68</sup> The determining factor has been and continues to be financial resources. In the future, we will be reporting on outcome data related not only to representation, but to demographic variables as well.

### 3. *Use Across Demographic Lines*

Finally, our last concern regarding the process is to ensure that all affected populations in the city are taking equal advantage of the mediation process. Because this program has been created to help the City of Milwaukee first, we want to confirm that the neighborhoods most affected by foreclosures are requesting mediation at the same rate as less affected neighborhoods. We also want to ensure that the rate of requests for mediation does not differ by education level, income level, or the gender of the head of household. Because the program has only been in operation for one year, we have not yet been able to test the demographics of the users, but expect that this type of review will be forthcoming in the future.

## E. *Results Accountability*

The next section discusses two types of data from the first year: our programmatic and outcome results through July 13, 2010, and results from participant survey data through May 2010.

### 1. *MFMP Applications*

As of June 30, 2010, the MFMP had processed 1,127 applications for foreclosure mediation. The vast majority of the applications were from homeowners in Milwaukee and Waukesha Counties, two counties that make up over 26

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<sup>67</sup> See *id.* (describing the grant).

<sup>68</sup> As Legal Aid's efforts in the second year of operations will likely lead to an increase in the number of homeowners represented at mediations, the authors expect there will be enough difference between year one and year two data to examine this issue in a subsequent article.

percent of the foreclosure filings in the state.<sup>69</sup> According to data tracked by the Milwaukee Foreclosure Mediation Program, 5 percent of the applications were ineligible, and the rest were handled through the process described above.

Given the voluntary nature of the program, one question was whether lenders would agree to participate without being compelled to do so. Lenders are agreeing to mediation in more than 75 percent of the cases. As of the date the statistics were compiled, 7 percent of the cases were awaiting lender response, and 65 percent of the cases had been accepted to mediation—a total of 677 cases in almost one year.

As one would expect, a number of the cases do not reach the mediation stage. Approximately 175 cases were withdrawn prior to mediation, either cancelled because of a pending bankruptcy,<sup>70</sup> cancelled because the homeowner did not pay the fee or meet with a housing counselor, or withdrawn by the homeowner for various other reasons. Another group of cases settled prior to the mediation session through direct loss mitigation efforts or a pre-mediation settlement—at least 71 cases to date—and these are explained further below.

There are accepted cases in the queue: those that have been scheduled for an upcoming date (9 percent of accepted cases), those waiting for borrower action (20 percent), and those waiting to be scheduled (3 percent). As of June 30, 2010, 210 cases have been mediated (20 percent of the total applications).

## 2. MFMP Settlement Results

Those cases that settle prior to mediation fall into two main categories. Once the exchange of information is facilitated, the lender and homeowner often engage in direct discussions prior to the mediation session. This is characterized as direct loss mitigation; at the time the mediation session is cancelled, the parties are engaged in direct negotiations, but have not reached a final settlement. The lenders' counsel is the party that often notifies the MFMP that the lender wants the session taken off the calendar, so the MFMP follows up directly with the homeowner to verify that the negotiations are moving forward before cancelling the session.

The second category is pre-mediation settlement. The homeowner and the lender reach a specific settlement agreement, which is, in most cases, a loan modification. The case is then taken off the calendar and the legal case is dismissed.

## 3. MFMP Mediation Results

Given that the majority of the foreclosure cases moving through the court system at this point are the result of job loss or another economic setback,<sup>71</sup> the

<sup>69</sup> *Community Indicators*, CTR. FOR CMTY. & ECON. DEV., [http://www.uwex.edu/ces/cced/economies/communityindicators/Indicators\\_Links.cfm](http://www.uwex.edu/ces/cced/economies/communityindicators/Indicators_Links.cfm) (follow "Fourth Quarter 2009 Data for 71 Counties with supplemental 2000-2009 data" hyperlink). The MFMP began accepting applications for Waukesha County in January 2010.

<sup>70</sup> At present, MFMP is not mediating any case in which the homeowner is also proceeding through a bankruptcy. We are currently in discussions with the bankruptcy judges, at their request, to change this part of our process and to make those cases eligible for mediation.

<sup>71</sup> See generally JOHN PAWASARAT & LOIS M. QUINN, LEGAL ACTION OF WISCONSIN REPORT ON MILWAUKEE'S HOUSING CRISIS: FORECLOSURES, EVICTIONS, AND SUBPRIME

outcome of the mediation sessions is directly correlated to the financial resources of the homeowner. The outcomes are also contingent on a complete and up-to-date financial package. Therefore, while our statistics indicate that 24 percent of the mediations reach no agreement, in the vast majority of the cases it is because the homeowner simply does not have the income to qualify for a loan modification program. These cases are still appropriate for mediation, however, because the homeowner has the opportunity to learn more about the foreclosure process, hears the specific reason for the loan modification denial, and has the opportunity to express any needs or interests related to the transition out of the home. One author mediated a case where the homeowner was able to work through emotions related to the loss of a home that had been in the family for three generations. Another case involved a pregnant mother of three who was concerned she would be out on the street with a new baby and three other children. Through the mediation session she learned that she would not have to vacate the house for at least six months, setting her mind at ease and making her feel somewhat more in control of her life.

The other main reason that a mediation session does not always result in a mediated settlement agreement is that financial information often needs to be updated to meet loan modification program requirements, and the lender will not agree to participate in another mediation session. Those cases, though they do not reach specific resolution, do result in ongoing direct negotiations. We have recently modified our Agreement Resulting from Mediation to be able to better track these results because approximately 14 percent of the mediated cases fall into that category. In the cases where the lender will agree to another mediation session, approximately 5 percent of mediated cases, the Agreement to Continue Mediation is completed and the case is set for another session.

Mediation sessions are leading to retention agreements in approximately 42 percent of the cases. These settlements include loan forbearance agreements,<sup>72</sup> trial loan modifications, permanent loan modifications and contingent agreements.<sup>73</sup> The MFMP will be following up on these cases to determine whether or not the settlement agreements last over the long term.

The MFMP also characterizes transition results under a number of different categories. “Friendly foreclosure” refers to cases in which the homeowner agrees to the shorter redemption period or indicates he will be ready to vacate the property in a shorter timeframe. This result occurs in about 6 percent of the mediations. Only one case so far has resulted in an approved short sale, and one other case outcome is characterized as a “relinquishment” because the homeowner agreed to vacate immediately.

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LENDING (2007), available at <http://www.uwm.edu/eti/2007/LAWHousingReport.pdf> (describing economic factors causing housing crisis).

<sup>72</sup> The monthly payment amount is reduced for a set period of time. This solution typically comes into play when there is a short-term setback or the homeowner will have an increase in income in a short period of time.

<sup>73</sup> In a contingent agreement, the homeowner needs to provide additional information documenting income or expenses or needs to complete a particular form before the agreement can be finalized.

#### 4. *Preliminary Satisfaction Survey Results*

In order to gather as much satisfaction data as possible, surveys are administered immediately after the mediation session is concluded. The mediator hands out the surveys, and then leaves the room to go make copies of relevant documents. Surveys are administered regardless of the outcome of the session, except for cases in which there are agreements to continue mediation. In such cases, the survey is administered at the end of the subsequent session.

The survey instruments have undergone two major revisions, and focus primarily on process satisfaction, outcome satisfaction and mediator performance. Based on the analysis of the first set of surveys, there was no statistically significant difference in the survey answers of the borrowers based on gender, disability, primary language, marital status, educational level, or race. Within each survey question, the demographic subgroups were statistically identical.

##### a. *Process Satisfaction*

The main process question asks how participants feel about their experience with mediation. The overall satisfaction levels with the MFMP mediation process across all three respondent types (borrower, lenders' counsel, and borrower's counsel) tops out at 94.9 percent. Borrowers expressed high levels of satisfaction with their experience in mediation (93.8 percent were satisfied). Lenders' counsel indicate a 100 percent satisfaction rate with their experiences in mediation, as do borrowers' attorneys, though that is a very small representative sample at this time.

The participants also overwhelmingly recommend mediation for foreclosure cases: 99.5 percent of all respondents would recommend mediation; 100 percent of borrowers and borrowers' attorneys recommend the process for foreclosures; and lenders' attorneys are just slightly more conservative, as 96.6 percent would recommend the process for foreclosure cases.

There are two additional process questions: (1) Did you feel you had an opportunity to help decide the outcome of the dispute? (2) Did the mediation session help you understand the other party's views better?

Borrower's attorneys reported the process definitely provided the opportunity for the homeowner to help decide the outcome 57.1 percent of the time, and 42.9 percent indicated they had some input; however, at no point did they indicate they thought their views were ignored. Lenders' attorneys were more critical. They indicated their views were ignored in 6.5 percent of cases, which is consistent with the lower likelihood of recommending mediation in general.<sup>74</sup> Borrowers also indicated that they were allowed to help decide: 76.3 percent responded that they were "definitely" allowed to help decide and 23.8 percent had "some input" in the decision.

As discussed above, the question addressing whether the process helps the parties understand the other party's views is directly related to the basic belief that mediation allows for participants to understand the other's perspective. Borrowers report that the process achieves that goal in 92.4 percent of the ses-

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<sup>74</sup> While the survey process is anonymous, it is our sense that those responses come from the small percentage of lenders' counsel that are least likely to recommend mediation to their clients.

sions. Lenders' attorneys are slightly less likely to believe so, as 90.9 percent reported achieving that goal. Interestingly, borrowers' attorneys were much more likely to indicate that the process *did not* help them understand the other party's views better (57.1 percent). Again, this is a small sample size, and we will be interested to see if this percentage holds true with the second year surveys.

*b. Mediator Performance*

Belief in mediator neutrality is less robust than the general satisfaction with the process, but is it still fairly high. Based on the survey results, 98.2 percent of lenders' attorneys, 91.6 percent of borrower's, and 90.9 percent of borrowers' attorneys reported that the mediator was neutral. As for lack of neutrality, only 4.2 percent of borrowers and 1.8 percent of lenders' attorneys reported that the mediator was biased in some way. Borrowers' attorneys again provided some interesting feedback—none of the responses indicated a sense of bias, but 9.1 percent reported no opinion (it is always a surprise when attorneys indicate no opinion).

The likelihood that the borrower's attorney would recommend a specific mediator mirrors their sense of neutrality—90.9 percent. Lenders' attorneys seem very pleased with the mediators, and would recommend them 100 percent of the time, and homeowners are pretty close to completely satisfied, with 99.1 percent recommending the mediator from their session to others in foreclosure.

*c. Outcome Satisfaction*

Of course, satisfaction with the outcome is a key aspect of program success. Because the surveys are administered in person at the end of the session, the survey data is gathered immediately after the outcome of the mediation is decided, so, as with most programs, an essential question is how closely satisfaction data correlates with outcome. Based on the survey data gathered throughout the first year, there is no statistically significant relationship between degree of satisfaction (“Overall, how do you feel about your experience with mediation?”) and whether the parties reached agreement or not.

As part of the analysis, we ran an ANOVA on differences in mean satisfaction scores between two groups: respondents that reported full agreement and respondents that reported either partial or no agreement. Among all respondents together, the difference in means is statistically significant (1.33 for full agreement and 1.56 for partial or no agreement). However, when borrowers, borrowers' attorneys, and lenders' attorneys were tested separately, the significant difference fell apart. It may be artifact of the ANOVA test's sensitivity to sample size, and it may be that those reaching full agreement have a higher satisfaction level, but we have been unable to prove it with statistical tests on this group of surveys. It also became clear that the understanding of full, partial, and no agreement differed among groups, and this led to a change in the Agreement Resulting from Mediation form, which should clarify that result moving forward and allow us to test more effectively in the future.

That being said, both borrowers and borrowers' counsel were more reserved in the degree of satisfaction with the outcome than the lenders. Lend-



ers' attorneys were more likely to feel that the outcome of the mediation was fair (98.2 percent) than the borrowers (83.8 percent) or the borrowers' attorneys (72.7 percent). Lenders' attorneys appear to have great security in the fairness of the mediation, but the level of satisfaction for borrowers is gratifying when one considers that it is regardless of outcome.

#### *E. Fluidity*

One of the key elements of success in dispute system design according to theorists is the ability of a process to adjust and change—to be a fluid process.<sup>75</sup> Already in the first year, the program has shifted several elements, which will be addressed below. These include the timing of payments to the program, how and when to calendar initial mediation sessions, the need for a second mediation, adjusting the time frame for meeting with the housing counselor, and, perhaps most importantly, adjusting to the fact that our volume is almost twice what we first expected when designing the program.

The program began accepting applications on July 22, 2009, and we had our first mediation on September 11, 2009. In the beginning, homeowners and lenders were not required to pay the one hundred dollar filing fee until the actual mediation session. In addition, we did not require verification that the homeowner had met with the housing counselor prior to scheduling the mediation session. In the first four months of operation, numerous mediation sessions were taken off the calendar because the homeowner had failed to schedule an appointment with the housing counselor, and the lender would not mediate without a completed financial package. Not only did this impact the calendar, it also impacted the program's operating budget—no mediation session for the parties meant no fee for the program. In February, we implemented a process change. At the time the case is accepted to mediation, the homeowner is notified that they must (1) schedule an appointment with their assigned housing counselor and (2) pay the one hundred dollar fee *before* the case will be scheduled for mediation. As a result of this simple change, the incidence of cancelled mediations was drastically reduced, and fee revenues increased significantly, which enabled us to budget more appropriately for future needs.

As previously discussed, the meeting with the housing counselor is a key aspect of the success of the program. Throughout the first year of the program, there were discussions about how to best achieve the housing counseling component without unduly burdening any one agency, ensuring quality financial packages, providing the housing counseling agencies with the necessary information for their reporting requirements, and maintaining collaborative working relationships. A number of different processes were tried, including referring the homeowner to a housing counselor at the time the case was opened (before the lender indicated acceptance). This model proved too unwieldy, and although the homeowners likely benefitted from the appointments even if their cases did not proceed to mediation, the housing counselors, already stretched to the maximum, could not justify the appointments with homeowners if the case did not proceed to mediation. This was another factor in the process change in February—now only accepted cases are referred to the housing counselors.

<sup>75</sup> COSTANTINO & MERCHANT, *supra* note 31, at xvi.

Additional funding from other sources has also allowed the Milwaukee agencies to add much needed staff, further bolstering this important resource for homeowners.

Another ongoing challenge has been the high number of cases that require an additional session, or where the first mediation cannot result in a final agreement but the lender refuses to participate in a second session. This situation arises when a financial package is incomplete, or when the information in the package has aged beyond the criteria required by the applicable modification program. In most cases, for example, pay stubs must be from the most recent pay period, there must be a current utility bill, and the hardship letter and other forms cannot be more than 30-60 days old, depending on the program. Depending on the date of the mediation session, homeowners are often required to send updated information before the lender will conduct any sort of modification review. The willingness to participate in multiple sessions varies widely from servicer to servicer, and also depends on the willingness of an individual within a mediation or loss mitigation department to mediate again. In response, MFMP offers the option of second sessions convened by teleconference, and we are increasing staff in order to conduct more detailed reviews of files for upcoming mediation sessions to be certain the information is as up-to-date as possible. In cases in which the servicer will not participate in a second session, the MFMP reports back to the court that direct negotiations are continuing and sets a date to follow up with the homeowner to learn the status of the negotiations. In most of those cases, the lenders' counsel agrees to be the conduit for the required information, providing the homeowner with a direct contact to follow up on receipt of information and the status of the modification review.

As a final note regarding fluidity, it is worth noting that the MFMP model was established based on the assumption that we would process applications for approximately 10 percent of the foreclosure filings in Milwaukee County. We staffed based on those assumptions, hiring a full-time chief mediator and a mediation program coordinator. We have consistently been receiving applications from 17-20 percent of homeowners served with a foreclosure summons and complaint. As such, many of the "extras" we hoped to implement in the first year, such as welcome calls to all the homeowners or calls ten days prior to the mediation session to verify complete financial packages, have been difficult to implement. Additional administrative support staff were hired in March, and we will be hiring another support staff person in August. The MFMP could not have maintained its current volume without the help of various law students, both interns and pro bono students. These students help the MFMP fulfill its educational mandate while keeping our proverbial head above water.

#### *F. Permeability*

Permeability means the extent to which a new design system permeates into the fabric of the existing organization, potentially affecting other aspects of the organization. For our purposes, permeability of the MFMP can be seen in three different areas: (1) expansion into other counties, (2) expansion to handle a variety of cases, and (3) application of the MFMP design model to other mediation programs.

First, the MFMP has now become the model of foreclosure mediation for the state, and, with the assistance of one of the authors, has been replicated in more than ten counties.<sup>76</sup> This expansion is county-by-county and primarily driven by the judges in each courthouse as they look for a way to address the foreclosure crisis in their regions.

The second example of permeability in the court system is that the MFMP is now expanding to handle different types of cases than originally planned. Originally, the MFMP was limited in its design to handle only owner-occupied properties with no more than four units, and where the homeowner was not going through bankruptcy as well. At the bankruptcy judges' request, we are now working out a system for homeowners in bankruptcy to be able to take advantage of the MFMP and at least mediate their mortgage issues. This process will require several more steps to add in the referral from the bankruptcy judge, notifying the judge of the mediation, and then notifying the judge when the mediation is complete. This push to add bankruptcy cases to the MFMP caseload is a clear sign that the courts have recognized the service provided by mediation and the suitability of this process for all sorts of cases where parties are in economic crisis. We imagine that using mediation for bankruptcy cases where there is foreclosure might also lead to more mediation of bankruptcy cases in general as judges, lawyers, and trustees all become more familiar with mediation.<sup>77</sup> It may also be that other foreclosure cases are mediated that do not currently fall under the MFMP's purview, such as multi-residential or business properties. Again, as lenders and their counsel become more aware and more comfortable, we expect that counsel might suggest mediation using outside mediators.

A final example of permeability is that some of the design lessons from the MFMP are now being used to redesign the family court mediation program for Milwaukee County. Although certain steps are clearly different (e.g., working with the housing counselor), some other steps are being integrated into the family court mediation reform project. These steps include ideas on outreach to users of mediation (i.e., how to reach those who are going through divorce), outreach to family lawyers in the same way that we focused on lender counsel education, thinking carefully about the steps that are necessary prior to mediation, such as financial or emotional or parenting counseling, and ensuring consistency of quality in the mediator roster for the family court. Although the MFMP is not the impetus for family court mediation reform, the lessons of the design and the successes that the program has had provide some key insights for the designers of the family court mediation reform, including the authors.

### G. Sustainability

Another element in examining the effectiveness of a DSD is whether the system is sustainable over time. When organizations design employee or customer programs to deal with conflicts, the organization wants to ensure that sufficient resources, training, and personnel have been designated for the pro-

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<sup>76</sup> *Two More Counties Launch Foreclosure Mediation Programs*, WIS. COURT SYS., <http://www.wicourts.gov/news/thirdbranch/current/foreclosure.htm> (last modified Aug. 11, 2010).

<sup>77</sup> *But see* Welsh, *supra* note 46, at 444-53 (stating concerns with bankruptcy mediation).

gram so that it can maintain itself over time. Most of these programs established in companies, universities, or even international organizations are planned to be part of the organization going forward for an unlimited amount of time. Other types of dispute systems are more short-term. For example, the September 11 Fund or even the newly established BP Fund were designed so that each victim is compensated, and then the program is ended after a certain predetermined date.<sup>78</sup> Not surprisingly, the concerns of designing long-term programs versus short-term programs are different due to funding, hiring, structure, and exit strategy.

As we have seen with recent mass tort claims, the hiring of a prominent special master, like Kenneth Feinberg, serves to assure affected claimants that the process will work. In more long-term situations, the organization hiring the ombudsperson or mediators for the internal dispute system will be less concerned with name recognition and more concerned with typical hiring issues like fit, salary, and competence. For a long-term dispute system, funding or hiring will be built into the organization's budget. Training of participants will occur throughout the organization and will likely become a regular part of how new hires are oriented to the company. In mass tort situations, publicity and training for participants are based much more on public media, targeted outlets, and politicians who represent the affected population and outreach.<sup>79</sup> The structure of the dispute system is, in long-term situations, built to be part of the larger organization often matching already existing lines of communication as well as cultural or internal working assumptions. Designers of a single-issue, short-term structure are less concerned with fitting the cultural expectations of the company in order to be sustainable.

With MFMP, we face a myriad of issues that do not cleanly fall into the long-term or short-term categories in terms of sustainability. On one hand, we expect that the rates of foreclosures will drop as the economy improves, and, even more saliently, we expect that our funding will end within three years. (Of course, either of these assumptions could be wrong.) Based on those assumptions, however, the MFMP has some key features that show no plan for sustainability: the budget has not been built into any organization's—neither the court's nor the law school's nor the state's budget. We have relied on the model of a chief mediator to perform the vast majority of mediations, rather than, for example, training a cohort of internal mediators capable of sustaining the program over time. Our outreach has also been similar to the mass tort situation in that we are relying on public media, politicians, and consumer groups to reach the targeted audience and to bring affected homeowners into our program.

On the other hand, some parts of the design clearly pay attention to sustainability over time or at least for the amount of time that there is funding and

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<sup>78</sup> Kenneth R. Feinberg, *9/11 Fund: Once Was Enough*, WASH. POST, Sept. 11, 2008, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/10/AR2008091002721.html>; *Kenneth Feinberg*, N.Y. TIMES, [http://topics.nytimes.com/topics/reference/timestopics/people/f/kenneth\\_r\\_feinberg/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/f/kenneth_r_feinberg/index.html) (last updated Nov. 24, 2010).

<sup>79</sup> See generally Ken Petty & Bob Manlowe, *Cutting Edge Approaches for Managing Mass Tort Litigation in the New Millennium*, 55 FDCC Q. 435 (2005), available at <http://www.thefederation.org/documents/Vol55No4.pdf>.

a need for the program. Our investment in technology, office space, and personnel are all sustainable, should funding continue. Further, budget considerations related to the fee structure assist at least some aspects of possibly sustaining the program into a third year. Our outreach to other counties in the state demonstrates that the sustainability of the program might also be in programmatic expansion in other parts of the state.

### III. LESSONS GOING FORWARD

This writing of this Article has given us the opportunity to pause and take a look back at the first year of operations for the MFMP and to review what lessons we learned in the design process. Although we do not hope to be faced with the economic crisis that required the design of a foreclosure mediation program in the future, we do hope that the lessons gleaned will help us and others working in the dispute resolution community moving forward in this and other related design areas.

A first key lesson, an obvious but important one, is that stakeholders really matter. A conflict resolution program cannot be a process that only includes part of the group affected, or only the part that agrees with the need for the program, or only those who are funding the program, or even only those who contribute at meetings. While the conversations were often frustrating or the details often seemed unimportant (should the notice be on pink or purple paper and why?) and the meetings often ran later than hoped *and* without all of the impacted stakeholders, we know that the MFMP would not be nearly so successful without this input. As the program got up and running, and we ran into the inevitable snags—fees not being paid, lack of response to our letters, longer lag time in between meetings with housing counselors, need for additional mediations, and more—we needed to be able to turn to our original design team for ideas and help to smooth out these bumps. Having the stakeholders at the table from the outset provided two crucial items. We were able to learn from each of the stakeholders so that the *content* of the process itself was better than it would have been without them. Additionally, the *buy-in*, and therefore the participation, in the program would also not have been so high without all the stakeholders at the table. As we mentioned earlier in the Article, including all stakeholders at the design phase has not been necessarily done in other programs across the country, and we remain quite confident that this participation is crucial to MFMP's success.

A second lesson is in the fluidity and flexibility of whatever dispute system is designed. Whatever plan or timeline is established for a dispute resolution program to operate, one needs to remember that contingencies arise even when everyone might have the best intentions. Phones go down, computer hook-ups fail, calls are not returned, and e-mails are lost. Although some of these can be fixed (we expect that most technological problems are finally solved, for example, now that MFMP is housed in the law school building), other events arise even as we continue to have a caseload above expectations. Stakeholders and funders need to be prepared for the inevitable contingencies and delays that occur. For an academic institution, this program has been much

like a clinic, where the school calendar does not map neatly onto the caseload and staffing needs of the program.<sup>80</sup>

Another lesson is in the recognition that comparatively huge financial problems like the foreclosure crisis facing the city need analogous resources devoted toward alleviating these problems. Both the limited funding through grants and the traditionally lean staffing model often used at academic institutions means programmatic trade-offs. One author of this Article spent her sabbatical working on the implementation of the program rather than writing about it (one could legitimately question her overoptimistic belief that her role in designing would be magically complete with the first mediation session!). The other author found herself running the program on behalf of the law school at the expense of other dispute resolution programming that had been contemplated. The ongoing need to hire additional staff (rather than recognizing that and budgeting for that at the outset) meant that the program continually operated in “catch-up” mode rather than having the ability to be pro-active at least at the outset.

The final lesson, however, has made this effort all worth it. The opportunity to put years of writing and work in the field to use to help out the city, state, and court system was an honor and unique opportunity for the law school. Both professors and students witnessed law school teachings put to work and had a rewarding impact in their own backyard.<sup>81</sup> It also has given us, as designers, far greater insight into the local government and local community than we would have had without this collaboration. Most importantly, mediation has worked in exactly the way that we theorized. The communication between the parties is vastly improved through the program than it would be otherwise. Parties have control over the outcomes, not perfectly, but again, much more so than they would have in the alternatives. And the program provides for efficient solutions as the city continues to struggle with foreclosures. Moving forward, we have to map student availability and interest with the needs and opportunities presented by the program. But we have witnessed the putting of theory into practice in a wonderful way while recognizing that we would have all preferred that this particular need not exist.

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<sup>80</sup> There is no breathing room to catch up over the summer, and we expect that in the next few years of the program our planning for the use of students will continue to improve.

<sup>81</sup> In fact, the Milwaukee Bar Association awarded the law school and the MFMP the “Lawyer of the Year” award in 2009 for its work in the city.