

By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

Taking a Relational Approach to Mediation in Foreclosures

Your home is part of your family. It is a familiar place where you can feel protected and comfortable with family and friends. Your home helped create many fond memories, and is an important part of your life. So what happens if your home is about to be taken away from you due to foreclosure?

Dealing with foreclosures can be very stressful. Often it involves lawyers, litigation, and possible trial hearings. It is common to feel helpless, angry, or hopeless when trying to save your home. There has to be a better way to handle these cases.

Governor Martin O'Malley has designed a prevention program to reduce the number of foreclosure cases in the state of Maryland. O'Malley wants to use mediation as a way to make sure that lenders are doing their part to renegotiate terms. Laura Smitherman of the Baltimore Sun writes that he "plans to introduce legislation requiring mediation in foreclosure cases when the General Assembly convenes in January."¹

It may come as a surprise to some that mediation techniques are not all the same. Some types of mediation are very directive. This type of mediation can lead to a number of problems in a situation such as a foreclosure dispute. One problem could be that one client proposes a solution that is satisfactory to the mediator, but doesn't sit well with one the other client and the mediator pushes for settlement; this is problematic for a variety of reasons, including a poor outcome but also a bad taste about the mediation process left in the mouths of the participants, not to mention questionable practices involving the lack of party self-determination. Another problem could be that lenders could feel that the government is encouraging mediation because they are on the side of the homeowner. This makes the confrontation between the lender and homeowner more adversarial. A

third problem could be ambitious mediators who want to capitalize on the mortgage crisis for financial gain, and focus on high settlement rates instead of a strong mediation process. These problems can all be avoided.

The best way to avoid these problems is by using transformative mediation, which focuses on the quality of the dialogue rather than on forcing or getting parties to settle and allows the clients to feel empowered, which encourages them to create their own solutions. Transformative mediation allows for clear communication between the clients, even when the problem or the power is not evenly distributed.

The goal of a transformative mediator is to listen to, and then actively reflect back what each client has said so that they can find and focus on the key issues of the dispute and the barriers, including venting their frustration and hopelessness. In the case of foreclosures, while financing is going to be an issue, the feelings of the clients are paramount for providing clues to other aspects of the conflict. These other aspects may when acknowledged may often lead to ways the conflicts can be solved or relieved. By allowing clients to take control of their own conflict rather than feeling helpless, citizens and financial institutions might find solutions that no court could fashion or that the parties, without intervention, could have come with on their own. But a mediator who only values settlement as the goal of the mediation may miss these opportunities for a satisfactory process for all parties. Taking a relational approach to these mediations will provide a better process for better outcomes.

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