

An Insider's Guide to Mediation under Washington's New Foreclosure Fairness Act

CYBER-GRAHAMS

The Washington State Foreclosure Fairness Act took effect on July 22, 2011. The following week the state Department of Commerce approved about 200 mediators to conduct mediations under the Act. Who are they? How were they selected? What do they know about residential real estate foreclosures? How will they decide whether the parties are mediating in good faith? What will happen in the mediation?

The following provides an inside perspective on these issues from Graham & Dunn attorney Estera Gordon, an approved foreclosure mediator who has participated in developing foreclosure mediation forms and procedures, and presented at the King County foreclosure mediation training.

* * *

By [Estera Gordon](#)
August 18, 2011

The Foreclosure Fairness Act (FAA) allows homeowners at risk of foreclosure to require their lenders to mediate about foreclosure issues, including reinstatement, loan modification, debt restructuring, and other workout arrangements.^[1]

On Friday, July 22, 2011, the day the FFA became effective, I was at the King County Dispute Resolution Center for Day 3 of my training as a Washington State Foreclosure Mediator. By the end of the day, the Washington State Department of Commerce ("DOC") had received at least 30 mediation referrals. The approved mediator list was posted and DOC began assigning mediations the following week. Mediation notices are going out, and the first mediations will probably take place in late August or early September.

The FFA makes the lender's failure to participate in good faith in the mediation a defense to foreclosure.^[2] Another possible defense is the lender's refusal to agree to a loan modification that has a net present value higher than the net present value of the anticipated recovery from the foreclosure.^[3] These defenses will hinge on the mediator's post-mediation certification.



[Marisa Velling Lindell](#) Marisa's real property valuation litigation practice includes representation of individuals, businesses and public agencies in all aspects of condemnation and relocation actions as well as representation of individuals and businesses regarding boundary disputes and landlord-tenant issues, contract and construction disputes, restrictive covenants, land use, and zoning issues. She also counsels and represents financial institutions and financial services companies in connection with commercial collection actions and lenders' rights litigation.



[Estera Gordon](#), an attorney with Graham & Dunn's Litigation Team, provides legal analysis and writing for complex trial and appellate matters. She is also a trained and experienced mediator and arbitrator.

Who are the foreclosure mediators?

A large majority of the approved foreclosure mediators are employees or volunteers of non-profit community-based dispute resolution centers (DRCs).[4] About half are attorneys with substantial mediation experience. Some, like me, are both. There are also a few retired judges and a few housing counselors.

How were the foreclosure mediators selected?

The DOC worked with the DRCs and other mediation organizations to identify qualified mediators[5] who had (a) at least 200 hours of mediation experience or (b) at least 60 hours of mediation experience and 40 hours of mediation training. About 250 potential foreclosure mediators and DRC personnel[6] were chosen to attend a three-day training program.

Attendees at the two-day statewide training in late June 2011 submitted applications for approval as foreclosure mediators. The applications required us to document our mediation training and experience, and provide detailed background information and references. In July, Day 3 experiential trainings were hosted by DRCs around the state.

DOC reviewed the applications, verified training attendance, and checked references. In addition to the 200 or so approved mediators, there are about 25 “conditional co-mediators.” These are less experienced mediators who will not be assigned mediations initially, but may co-mediate with an approved mediator.[7]

What do they know about residential real estate foreclosures?

Given the wide variety of backgrounds among the approved foreclosure mediators, it's hard to generalize. In selecting the initial panel of approved mediators, DOC emphasized mediation training and experience (process expertise) over subject matter expertise. In addition, some of us have a background in commercial law, real estate, consumer law, or collections. But we all spent an intense two days learning about foreclosures and alternatives to foreclosure, including the loan modification and net present value calculations required under various federal programs. We should all understand the concepts behind those programs and be able to facilitate productive discussions about all the issues involved.

How will they decide whether the parties are mediating in good faith?

DRC mediators usually define good faith as consisting of four components:

- willingness to speak openly about the situation;
- willingness to listen and try to understand the other party's perspective;
- some flexibility about possible solutions; and
- a commitment to keep any agreements made in the mediation.

Although I don't usually use the term “good faith,” I (and all the DRC mediators I know) ask the parties before the mediation begins if they will agree to approach the mediation this way.

Since most of the approved foreclosure mediators are DRC mediators, these four components will likely form the baseline for the mediator's good faith certification. In addition, the FAA says that violation of the duty of good faith “may include” (a) failure to timely participate in mediation without good cause; (b) the lender's failure to timely provide required documents; (c) the borrower's failure to timely provide required documents; (d) failure to pay the required mediation fee; (e) failure to designate a representative with adequate settlement authority; and (f) the lender's request that the borrower waive future claims as a condition of loan modification.[8]

The FFA requires the lender (or authorized agent), the borrower, and the mediator to meet in person for the mediation session, but it allows the lender's representative with settlement

authority to attend by phone or video conference.^[9] The statute is unclear whether telephone or video participation by a representative with settlement authority is instead of or in addition to participation in person by someone on the lender's behalf. I think most mediators will expect the lender to send someone to mediate in person, and failing to do so may put the mediator's good faith certification at risk.

What will happen at the mediation?

The FFA requires the mediating parties to "address the issues of foreclosure" that may enable them to reach resolution, including "reinstatement, modification of the loan, restructuring of the debt, or some other workout plan." The mediator is required to make sure that the parties consider: (a) the borrower's economic circumstances; (b) the net present value of payments under a modified loan versus the anticipated recovery after foreclosure; (c) loan modification and net present value calculations established by the FDIC or other applicable federal programs; and (d) other applicable loss mitigation guidelines for federally insured loans.^[10]

While the FFA prescribes the content of the mediation, it does not adopt any particular mediation process. The DRC-hosted third day of training focused on mediation process. Through role-plays and group discussions, we had the opportunity to practice mediation in a residential foreclosure setting and reach some consensus about anticipated mediation issues and challenges under the FFA. We also have a fairly active online discussion group. Nonetheless, different mediators will conduct the mediations differently, depending on their individual background and mediation style. DOC is intentionally leaving process details to the individual mediators, relying on a pool of experienced mediators to apply their own style to develop their own foreclosure mediation process.

DRC mediators are likely to emphasize face-to-face discussion and negotiation. The process will probably begin with an opening statement by the mediator, describing the mediation process, good faith, and the mediator's role. This will be followed by statements by the borrower, then the lender, describing the situation from their perspective and identifying their mediation goals. The mediator uses these statements to help the parties focus their discussion, discuss the issues, explore options, and negotiate towards resolution. The mediator may meet individually with each party, but most of the mediation will take place with the parties in the same room, communicating and negotiating directly with each other.

Attorney mediators who come from a commercial litigation background will probably conduct the mediation differently. They are more likely to rely on private conversations with each party separately to elicit that party's perspective and generate proposals, which the mediator will communicate to the other party. This is known as a "shuttle" style. The mediator might not make an opening statement to the parties jointly, relying instead on individual or joint pre-mediation communications.

If a housing counselor or attorney refers a borrower to foreclosure mediation,^[11] DOC will assign an approved foreclosure mediator based on location and availability. DOC will notify the lender, borrower, deed of trust trustee, and referring housing counselor or attorney of the referral, and identify the assigned mediator.^[12] The mediator must schedule the mediation to take place within 45 days (unless the parties agree in writing to an extension), and provide written notice.^[13]

Many of the mediations, especially at the outset, will have two mediators. DOC has expressed a preference for co-mediation, and some DRCs are requiring their mediators to co-mediate, at least at the outset. For DRC mediators, co-mediation is familiar and comfortable, and should not significantly impact the individual mediation. Over time, though, co-mediation should result in a more uniform mediation process and greater consensus on best practices. The assigned mediator (or the DRC through which they mediate) will choose the co-mediator.^[14]

Based on Nevada's foreclosure mediation experience, most foreclosure mediations will take one to three hours. The mediation will end when the parties reach a resolution or conclude that they cannot do so. At the end of the mediation, the mediator will write up (or assist the parties in writing up) the basic terms of any resolution. After the mediation, the mediator will provide the FFA-required certification on a standardized DOC form.[15]

One last thought.

Mediation is, by definition, a flexible, organic, process that allows the mediator to accommodate the parties' individual needs and preferences. Mediators are used to adapting their process to fit the parties and their circumstances. That skill will be in full play for all of us as we learn from our own experience and party feedback, and develop our own preferred foreclosure mediation process within the FFA's unique parameters. While the lack of predictability may be frustrating at the outset, the result over the long term should be a mediation foreclosure program that works for lenders and borrowers in general, and for each party individually.

[1] FFA §7(7)

[2] FFA §7(11)(a)

[3] FFA §7(11)(c)

[4] RCW ch. 7.75 is the enabling act for DRCs.

[5] FFA §10(1) requires all foreclosure mediators to be either (a) attorneys, (b) housing counselors, (c) DRC employees or volunteers, or (d) retired judges.

[6] DRCs will administer the foreclosure mediations assigned to their non-attorney employees and volunteers and other foreclosure mediators (attorneys, housing counselors, retired judges) who have elected to participate through the DRCs.

[7] DRCs routinely use a co-mediation model (two mediators working together, often as part of a mediation training or practicum program). DOC has expressed a preference for co-mediation in foreclosure mediations as well.

[8] FFA §7(8)

[9] FFA §7(6)

[10] FFA §7(7)

[11] FFA §7(1)-(2)

[12] FFA §7(3)

[13] FFA §7(4)-(5)

[14] Co-mediation will not increase the parties' fees, which may not exceed \$400 (\$200 per party) for a one to three hour mediation. Additional fees may be authorized by DOC for mediations that take longer. FFA §7(14)

[15] FFA §7(9); the "certification of mediation form" is available on the DOC website at

<http://www.commerce.wa.gov/site/1367/default.aspx>.

If you should have any questions or wish to discuss issues specific to condemnation, please contact any of the following members of the Graham and Dunn Condemnation Team:

Marisa V. Lindell (206.340.9639 or mlindell@grahamdunn.com),
Jeffrey A. Beaver (206.340.9652 or jbeaver@grahamdunn.com),
Matthew R. Hansen (206.340.9595 or mhansen@grahamdunn.com),
Zachary R. Hiatt (206.340.9635 or zhiatt@grahamdunn.com),
or Larry J. Smith (206.340.9645 or lsmith@grahamdunn.com).

If you would like to talk about mediation under the FFA, please contact Estera Gordon (206.340.9630 or egordon@grahamdunn.com).