RESOLVED, That the American Bar Association supports federal, state or territorial legislation, regulations, or court rules that promote the use of mediation to assist in resolving disputes that could lead to foreclosure of mortgages on residential real property, and foreclosure cases that are already pending in federal, state or territorial courts and promote access to pro bono or low cost counsel or other advocates for parties who would otherwise be unrepresented in the mediation process.
The American Bar Association (ABA) has consistently promoted the utilization of alternative dispute resolution processes, such as mediation, to resolve disputes (See, e.g., Report No. 112, approved by the ABA House of Delegates in February 1997; Report No. 114, approved in August 1989; and Report 305, approved in August 1995). In the last year, an all time record number of foreclosures of mortgages on residential real property were filed. Mediation is a process that can foster an open and effective channel of communication between homeowner-mortgagors and lenders to help find mutually acceptable and equitable solutions to pending foreclosure cases, as well as situations that could lead to foreclosure of mortgages on residential real property.

Mediation is a confidential and informal process in which an impartial third party assists two or more disputants to negotiate and resolve their dispute. The mediator may meet jointly with the parties and also privately in individual caucus sessions. A mediator generally has no power to impose a binding decision on the disputants. When a settlement between or among the parties is reached, it is reduced to writing and is binding as a contract, or may be converted into a judicial order, if circumstances allow.

This recommendation supports the creation by legislation, regulation, or court rule of mediation services for the parties in a foreclosure situation prior to the initiation of foreclosure proceedings, or while such proceedings are pending in court and before a foreclosure sale. Such mediations can be conducted in many ways, such as (1) under the auspices of an existing state or federal court mediation program, (2) in a mediation program created by legislation, by regulation, or newly created court rule to deal with foreclosure cases, or (3) in private mediation.

Foreclosures of mortgages on residential real property are destabilizing property values as well as disrupting the social fabric of families, neighborhoods, communities and cities. Nationally, as housing prices continue to drop and unemployment stays high, the number of foreclosures is likely to increase in the next few years. The use of mediation to resolve pending foreclosure actions has resulted in homeowner-mortgagors staying in their homes and afforded lenders the opportunity to avoid foreclosure costs and reduced the number of non-performing loans in their portfolio.

Foreclosure mediation utilizes a neutral third party to assist lenders and defaulting homeowner-mortgagors to reach a satisfactory resolution to their mortgage problem. A neutral third party (mediator) works with the parties to a mortgage, with or without attorneys, to resolve the mortgage problem by mutual agreement. Because the homeowner is often at a disadvantage in terms of understanding law and process and because the mortgagor usually will have legal representation, fairness requires that the homeowner be given access to pro-bono or low cost counsel or another advocate. For example, a pilot project in Philadelphia has over 200 volunteer attorneys assist homeowners in the resolution of mortgage foreclosure complaints. These attorneys are aided by housing counselors who do initial intake and help the homeowners prepare for a conference called to resolve the issue. Mediation can occur at various times throughout the
foreclosure process such as before it reaches court, prior to default judgment, or before foreclosure sale.

This recommendation does not discuss the use of arbitration for residential foreclosure issues. Unlike an arbitrator, a mediator, as a neutral third party, has no authority to impose a solution or make a decision. During the mediation, the parties fully retain the right to make decisions about settling or not settling after a full discussion of their options. The mediator does not give legal or financial advice to either side.

Mediation allows the homeowner-mortgagor and lender determine if a mutually acceptable agreement that is equitable and sustainable is possible. Many mortgage issues can be resolved through good communication between the borrower and the lender/servicer. Lenders/servicers are and have been willing to discuss flexible solutions. Mediation provides the informal environment needed to help the participants negotiate more efficiently and have the conversations that, without a mediator, might be tense, difficult, or non-existent.

Many states have responded to the explosion of foreclosure cases by instituting foreclosure mediation programs. At the time this report is being filed, statewide foreclosure mediation programs already exist in Arizona, Connecticut, Florida, Indiana, Iowa, Maine, Michigan, Nevada, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Wisconsin. The structure and genesis of these programs vary; some have been created by legislation and others have been established by the state court systems.

For example, in December 2007, the Supreme Court of Ohio began creating the first statewide court mediation foreclosure program. The program now provides mediation services in Ohio common plea courts for mortgagees and lenders in all 88 counties. In 2008, the Ohio Revised Code was amended to specify that in an action for the foreclosure of a mortgage, the court may at any stage in the action require the mortgagor and the mortgagee to participate in mediation as the court considers appropriate and may include a stipulation that requires the mortgagor and the mortgagee to appear at the mediation in person. To date, Ohio counties have reported that 62-77% of mediated foreclosure cases have settled. The program has been strongly supported by the lenders, the Ohio Governor, Attorney General, and others, and has become a model for other state's programs.

In July 2008, Connecticut passed legislation that required the chief court administrator to establish a foreclosure mediation program in each judicial district. The legislation mandated that homeowners facing mortgage foreclosure on primary residences may request mediation at no charge to them. The goal of the program is to put homeowners in direct contact with their lender to enable them to re-negotiate their mortgages by refinancing or restructuring their debt.

In New Jersey, legislation was passed that allocated $60 million in state and federal funds to support foreclosure prevention programs. New Jersey expects to handle as many as 60,000 foreclosure cases in 2009, and is planning approximately 16,000 mediation cases between homeowners and lenders. The foreclosure mediation program includes court referred mediation which is available free of charge to homeowners who have filed an answer and are contesting the
foreclosure as well as to homeowners who fail to make a formal appearance and whose cases are uncontested.

Programs such as these have enabled courts to manage and reduce crowded dockets and have kept families in their homes by providing more timely and cost effective resolutions. This is due in part to the fact that mediation allows parties to create practical agreements that include conditions and terms, such as adjusting the interest rate or the principal, extending the repayment period, or modifying the loan terms, that may be restricted in litigation. Also, many homeowners cannot afford to hire an attorney to contest a foreclosure action. Many homeowners simply move out of their homes without contesting foreclosure filings. Mediation programs put homeowners in direct contact with the lender, enabling them to work out a mutually acceptable solution with or without the assistance of an attorney.

Mediation foreclosure programs provide further cost and time savings. The use of pre-suit mediation in particular enables either or both parties to save on attorney’s fees, filing fees, court costs, appraisal fees, title commitments, asset preservation expenses on vacated properties, and other costs. Homeowners save the hidden cost of increased rates for future borrowing by preserving their credit rating through a mediated settlement with no foreclosure filing in the public record. Lenders save the opportunity cost of having non-performing loans on their books by more quickly converting a problem loan into a workout with a homeowner who can pay timely.

Mediation during a pending foreclosure also has important opportunities for savings. The average foreclosure sale time for a property is nine months. A fast resolution helps homeowners save on attorney fees and litigation costs as well as the collapse of property value. Homeowners also save the social cost of moving out, and disrupting their family and their children’s education.

In conclusion, this recommendation supports the creation by legislation, regulation, or court rule of mediation services for homeowners in a foreclosure situation prior to the initiation of foreclosure proceedings, or while such proceedings are pending and before a foreclosure sale. The use of mediation services to resolve foreclosure actions will help courts to manage the explosion of foreclosure cases, afford lenders the opportunity to avoid foreclosure costs and non-performing loans, and enable homeowner-mortgagors to work directly with lenders to find equitable resolutions that enable them remain in their homes.

Respectfully submitted,

Lela P. Love, Chair
Section of Dispute Resolution
August 2009
GENERAL INFORMATION FORM

Submitting Entities: Section of Dispute Resolution

Submitted by: Lela P. Love, Section Chair

Summary of recommendation

It is recommended that the American Bar Association support the creation by legislation, regulation, or court rule of mediation services for homeowners in a foreclosure situation prior to the initiation of foreclosure proceedings, or while such proceedings are pending in court and before a foreclosure sale.

1. Approval of submitting entities

The Council of the Section of Dispute Resolution approved the recommendation on June 25, 2009 by electronic vote.

2. Has this or a similar recommendation been submitted to the House or Board previously?

No.

3. What existing policies are relevant to this recommendation and how would they be affected by its adoption?

The American Bar Association has consistently promoted the greater use of alternative dispute resolution, such as mediation, to resolve disputes. The proposed resolution is generally consistent with and would build upon the following existing ABA resolutions:

- 1989 – urging the use of alternative dispute resolution techniques as a necessary and welcome component of the justice system in the United States so long as every disputant’s constitutional and other legal rights and remedies are protected.

- 1995 – urging district courts to make available a variety of alternative dispute resolution techniques, procedures and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation.

- 1997 – supporting the creation of state or federal legislation, regulation, or court rules that utilize systems of alternative dispute resolution such as mediation.

4. What urgency exists which requires action at this meeting of the House?

In the last year a record number of residential foreclosures have been filed across the country. Nationally, as housing prices continue to drop and unemployment stays high, the number of foreclosures is likely to grow rather than decline in the next few years. Mediation is a process
that can foster an open and effective channel of communication between homeowner-mortgagors and lenders to help find mutually acceptable and equitable solutions to pending foreclosure cases and disputes that could lead to foreclosure of mortgages on residential real property.

5. **Status of legislation**

None

6. **Cost to Association?**

None

7. **Disclosure of Interest?**

None

8. **Referrals**

Simultaneous with this submission, referral is being made to all other ABA Sections and Divisions.

9. **Contact persons**

Lela P. Love, Section Chair

10. **Contact persons (who will present the report to the House)**

James J. Alfini, Section Delegate

Pamela Enslen, Section Delegate
EXECUTIVE SUMMARY

1. Summary of Recommendation: The American Bar Association should support the creation by legislation, regulation, or court rule of mediation services for homeowners in a foreclosure situation prior to the initiation of foreclosure proceedings, or while such proceedings are pending in court and before a foreclosure sale.

2. Summary of the issue which the Recommendation addresses: In the last year, an all time record number of foreclosures of mortgages on residential real property were filed. Nationally, as housing prices continue to drop and unemployment stays high, the number of foreclosures is likely to increase in the coming years. Tens of millions of homeowners across the United States have seen the value of their homes significantly decrease in value. Foreclosures have destabilized property values and the credit market, as well as disrupted the social fabric of families, neighborhoods, communities and cities across the country.

3. How the proposed recommendation would address the issue: The proposed recommendation will enable the ABA to support and encourage the creation of state and federal legislative and court programs that utilize mediation to help resolve pending foreclosure cases of mortgages of residential real property, as well as pre-suit situations that might lead to foreclosure. The use of mediation services to resolve foreclosure actions will help courts to manage the explosion of foreclosure cases, afford lenders the opportunity to avoid foreclosure costs and non-performing loans, and enable homeowner-mortgagors to work directly with lenders to find equitable resolutions that enable them remain in their homes.

4. No minority views have been identified in opposition.