Promoting Access to Justice: Applying Lessons Learned from Foreclosure Mediation

By Jennifer Shack and Hanna Kaufman

When the number of foreclosures in the United States swelled to record levels in the first decade of this century, many struggling homeowners were unable to keep their homes because of poor communication with their lenders. There were problems on both sides: many lenders did not have designated contacts whom homeowners could work with, gave out contradictory and inconsistent information, and even lost some homeowners' documents. Many homeowners, on the other hand, did not understand the process, did not provide needed documentation, or missed important deadlines.

ADR was called upon to help. Across the country, foreclosure mediation programs sprang up to help these homeowners get access to justice. These programs all helped homeowners, but their effectiveness varied.

Resolution Systems Institute (RSI), the Chicago-based nonprofit organization where we both work, has spent years analyzing what works in foreclosure mediation. Prior to being asked to develop and administer three foreclosure mediation programs in Illinois, RSI researched all the foreclosure mediation programs in the country to identify best practices. In 2015, RSI published a comprehensive evaluation of our three programs along with three others in Illinois.[1] The fact that six programs with different designs in one state were collecting similar data provided an opportunity for comparisons that otherwise couldn't have been possible. We could see where changes needed to be made and what was working in one program that could be implemented in the others.

Through these efforts, particularly the evaluation, RSI has identified four program design elements that have helped foreclosure mediation programs meet their common goals of increasing borrower understanding, facilitating communication among parties, and keeping parties accountable throughout the process. These are: (1) simple entry requirements for borrowers; (2) an ongoing focus on keeping cases moving forward; (3) provision of financial counseling and legal services to borrowers; and (4) continual monitoring of program performance and use of monitoring data to improve program functioning.

This article discusses these four design elements in detail so that courts and program administrators can learn from our research, improve existing programs, and increase access to justice. We also discuss how these same program design principles could help alleviate another looming crisis — student loan debt.

Keep Barriers to Entry Low

Our first finding, in short: programs in the 2015 study that used a simple entry process had a larger impact on foreclosures, helping more homeowners in their counties facing foreclosure retain their homes.

Two of the six Illinois foreclosure mediation programs were one-step entry programs. That is, homeowners had to do only one thing to participate: appear for a pre-mediation session that had been scheduled for them. The other four programs required at least two steps for participation, which led to significantly different participation rates. (See the "Percent of Foreclosures" graphic below for comparisons of participation and home retention rates.)

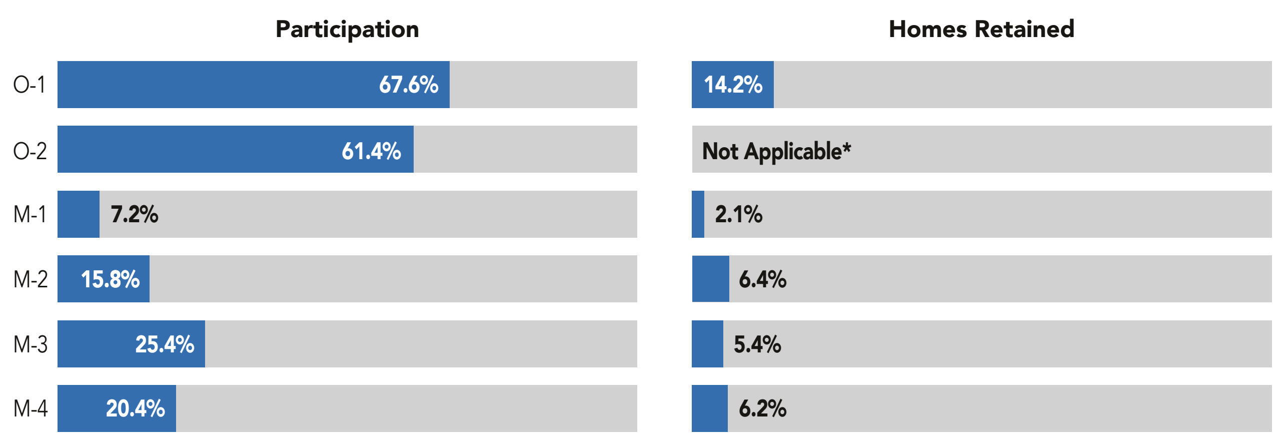
In the one-step entry programs, the participation rates were 61% and 68% of all foreclosure filings. In the four multi-step entry programs, the participation rates were much lower, ranging from 7% to 25%. The difference cannot be attributed to better outreach because neither of the one-step entry programs conducted any. In fact, in all the programs, homeowners involved almost always said they learned of the opportunity to participate from materials they received with the service of process.

In stark contrast to the one-step entry programs, one program (which we called M-1) required significant effort to get in. First, the homeowner had to call to register for an informational session. Then he or she had to attend the hour-long session at the courthouse in the evening. Finally, the homeowner had to call to schedule a separate housing counseling session. Only after that session was the homeowner officially participating in the program. This program had a 7% participation rate.

In another multi-step entry program (M-2), which had the second-lowest participation rate of eligible homeowners, 16%, homeowners were required to file an extensive financial questionnaire with the court clerk. The data show that 23% of homeowners who submitted a request for mediation did not follow up with the required financial questionnaire.

Getting a large percentage of homeowners to participate in a program, of course, leads to a larger pool of homeowners who might keep their homes, which means the program can help more eligible homeowners (that is, have a higher retention rate). The outcomes of the first one-step entry program (O-1) are instructive. Because 68% of eligible homeowners participated in the program, the relatively meager 21% of program participants who saved their homes translated to a robust 14% of homes saved for all eligible homeowners facing foreclosure. (The other one-step entry program, O-2, had not been operating long enough at the time of the evaluation to have outcomes to analyze.) The multi-step entry programs had much lower retention rates for all eligible foreclosures, ranging from 2% to 6%. This indicates that programs that cast a wider net may

Percent of Foreclosures



** No cases had been completed by the end of the evaluation period.*

well have a higher impact, even when a program, such as O-1, has a low percentage of participants who are able to retain their homes.

Although we think outreach by the programs themselves was not a factor in participation rates, participation rates may have been affected by the message homeowners received with their summons. Both one-step entry programs and one of the multi-step programs (M-3) told the homeowners they were required to contact the program or attend a pre-mediation session, while the other three multi-step programs all said the homeowners had the opportunity to participate. As noted above, the one-step entry programs had much higher participation rates than the other programs. The multi-step program with mandatory language, M-3, had 5% more homeowners contacting the program than the highest multi-step program with voluntary language.

The key lesson here is that people designing ADR programs for disputes similar to those involving mortgage foreclosure should make entry to those programs as easy as possible.

Keep the Focus on Moving Cases Forward

In processes for which disputants have responsibilities for gathering, sharing, and reviewing large numbers of financial documents, sometimes repeatedly, ensuring accountability is essential to moving the process forward. Attention to efficiency is even more important in debt cases, where the longer a case goes without resolution, the larger the debt becomes. For these reasons, foreclosure mediation programs have tried to focus on moving cases forward by imposing strict deadlines and, in some programs, requiring one or both parties to report on the status of their actions. While such requirements may appear helpful, RSI has found that programs need to review the requirements regularly to ensure they do not backfire by discouraging people from participating at all or delaying progress once they get started. In two programs, efforts to move the case forward by making the parties accountable led to lower rates of both entry and completion.

In M-1, some stakeholders wanted strict and short deadlines so that the cases would move forward swiftly. The court agreed, setting deadlines for homeowners to complete their loan modification packet and lenders to review that packet that were both shorter and less flexible than those in other programs. The data showed that cases did progress through this mediation program with rigid deadlines more quickly than in any other program, but it also showed that this program had the greatest number of cases returned to court because the parties missed a deadline, which lengthened the overall time for reaching resolution.

Similar problems arose in M-2, the program in which the homeowners were required to complete an extensive financial questionnaire to enter the program. The judges wanted to use the questionnaire as a way to evaluate the lenders' assertion that the homeowner had not provided requested financial information. The requirement may have helped the judges do that, but it also seemed to have been a high hurdle for homeowners.

Both programs' approaches highlight another important lesson: to avoid unintended consequences, programs must regularly evaluate how well cases are moving forward. In fact, both programs changed their rules, aiming to strike a better balance between encouraging participation and program completion by using communication tools to ensure that parties were accomplishing their tasks. M-1 lengthened its deadlines, and both M-1 and M-2 adopted a plaintiff's checklist to accomplish the same goal as the homeowner's financial questionnaire. One item on the plaintiff's checklist requires the lender to report that it has received the homeowner's loan modification packet.

Provide Outside Help to Self-Represented Litigants

Before a foreclosure case can go to mediation, the homeowner generally has to have submitted a loan modification packet to the lender, and the lender has to have reviewed it. This process is challenging: homeowners need to know what documents the lender requires and in what form they must be submitted. Not surprisingly, help at this stage makes a difference: a study by the Urban Institute, a Washington, DC-based think tank that carries out economic and social policy research, found that homeowners who worked with housing counselors were almost three times more likely to get a modification than those who didn't and were 70% less likely to redefault on their modified loans.[2]

In the foreclosure mediation programs RSI evaluated, the evidence that housing counseling adds value to the mediation process is less clear because in programs with sufficient data, all the homeowners attended housing counseling before mediation. However, in the programs in which housing counseling was provided as a separate pre-mediation service, the homeowners almost universally indicated they were receiving a valuable benefit that helped them figure out their options and the steps they needed to take to obtain their goal.

This data points to another lesson: self-represented borrowers need outside help in navigating complicated debt issues.

Monitor the Program

All the lessons RSI has learned, as well as other findings that led to program changes, have come through careful monitoring of the foreclosure mediation programs. By monitoring such factors as the percentage of homeowners who progressed from contacting the program to entering it and then completing it, the time cases took to move from step to step in each program, and the number of home retentions, we had the data to figure out how different aspects of the programs were affecting their effectiveness and efficiency.

The monitoring data provided M-1, the program with short timelines, the evidence that it needed to make significant changes to the program and the rules to give the parties time to complete the mediation process. It helped another program, M-3, determine that the homeowners were having problems with the entry process and make changes to address them. It led M-4, a program that initially served only those who wanted to keep their homes, to assess whether it could handle the additional caseload to allow other homeowners to participate in the program.

Although more information is necessary, initial data since the programs made their changes indicate that keeping tabs on program outcomes is leading to more robust and effective programs. Our experience here highlights another lesson learned: if they want to be able to make timely and appropriate adjustments to their processes, effective programs must constantly monitor those processes.

Applying the Lessons to Student Loans

With one in four student loan borrowers in distress, another debt crisis is looming. This time, instead of waiting for the crisis to crest, the ADR field should start thinking now about how its systems can help.

For that, we should begin with what we know and what we've learned from similar situations. Mortgage foreclosure and student loan debt cases are similar in several important ways. They both involve a loan with a long-term debt repayment schedule, require an exchange of detailed financial documents before modifications can be discussed, and have opposing parties with very different resources. The lender's side encompasses a variety of parties, including servicers, lenders, banks, and government agencies.[3] The borrower is usually on his or her own, self-represented in legal proceedings. These similarities alone indicate that those developing programs for the student loan debt crisis would be wise to revisit the lessons learned from foreclosure.

Lesson #1: Make entry to programs as easy as possible. Here, as in foreclosure cases, borrowers' access to clear, timely information about and support in navigating discussions with their lenders is critical, and programs that provide these benefits should strive to engage with the broadest pool of borrowers possible.

Lesson #2: Continuously evaluate how well cases are moving forward. As ADR program designers think about how to ensure accountability for parties to a student loan debt dispute, answering certain questions can be helpful. Do the deadlines under consideration give parties enough time to do all that is required of them? What kind of support will the parties have in meeting those deadlines? If a checklist must be submitted, who has to fill it out, and what are that party's other responsibilities at this stage in the process? How can the checklist be both comprehensive and simple to complete?

Lesson #3: Provide self-represented borrowers with outside help in navigating complicated debt issues. Agencies seeking to help student loan borrowers are starting to take notice of this need. The Center for Excellence in Financial Counseling at the University of Missouri-St. Louis (CEFC) has created the first program of its kind in the nation to assist borrowers who are at risk of defaulting on student loan debts. CEFC provides struggling borrowers with credit counselors who are trained in the nuances of distressed student loans, as well as lawyers knowledgeable about the legal issues surrounding student loans. These credit counseling and legal services have been found to increase borrowers' understanding of their situations and of different programs that could help them manage their loan repayments.

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Ultimately, more than half the participants in this program were able to obtain a less costly repayment plan for their student loans.

Ideally, mediation would be the next step, helping borrowers and lenders discuss the borrower's ability to repay the loan and possible repayment options that take this into account. Even if the mediation does not lead to a repayment agreement, it could facilitate communication between the borrower and lender and give the borrower an opportunity to talk directly with a lender representative, two benefits that homeowners in foreclosure mediation have frequently cited.

Lesson #4: Monitor your program. RSI has always advocated for careful program monitoring, and our experience has proved the importance of such oversight, allowing appropriate changes to increase programs' efficiency and effectiveness. At least one agency seeking to help distressed student loan borrowers agrees: the creators of the CEFC program, recognizing the value of continuous monitoring and professional, third-party evaluation and learning from data as they go, are now in their third incarnation of the program.

Conclusion

Elements from successful foreclosure mediation programs can help us improve access to justice for homeowners facing foreclosure, which is generally what these programs were created to do in the first place. These same elements can help us get ahead of the looming student loan crisis by designing effective mediation programs now with systems that can reach and help a generation struggling under the huge burdens of their college debts. ■

Endnotes

1 Resolution Systems Institute, Six Programs, Six Models: An Evaluation of the Foreclosure Mediation Programs Funded by the Office of the Illinois Attorney General (2015).

2 Kenneth M. Temkin, et al., National Foreclosure Mitigation Counseling Program Evaluation Final Report, Rounds 3 Through 5, 39, The Urban Institute (2014).

3 We are using "lender" to denote either the lender, the servicer, or the bank.