

DIVERGENT PATHS:

THE NEED FOR MORE UNIFORM STANDARDS AND PRACTICES IN NEW YORK STATE'S RESIDENTIAL FORECLOSURE CONFERENCE PROCESS

A STATEWIDE SURVEY OF PRACTICES AND PROCEDURES

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New Yorkers for Responsible Lending

About New Yorkers for Responsible Lending

NEW YORKERS FOR RESPONSIBLE LENDING (NYRL) is a statewide coalition that promotes access to **fair and affordable financial services** and the **preservation of assets** for all New Yorkers and their communities.

NYRL is dedicated to **fighting predatory practices** in the financial services industry, through policy reform, education and outreach, research and direct services.

NYRL members include community financial institutions, community-based organizations, affordable housing and foreclosure prevention groups, advocates for seniors, legal service organizations, and community reinvestment, fair lending, and consumer advocacy groups.

Established in 2000, NYRL has more than **160 member organizations** throughout New York State.



EXECUTIVE SUMMARY

New York has responded to the residential foreclosure crisis by implementing a pioneering settlement conference process administered by the court system, specifically designed to promote negotiation of affordable home-saving solutions.

These conferences present a remarkable opportunity for lenders and borrowers to meet face-to-face in a court-supervised settlement conference at which creative home-saving solutions can be forged. **They have allowed thousands of New York families to avert foreclosure,** while simultaneously sparing surrounding neighborhoods and communities the associated blight and declining real estate values and tax revenues that follow in the wake of foreclosure.

The courts, however, have not adopted strong uniform, statewide rules to ensure that settlement conferences are administered efficiently and fairly across the state. As a result, settlement conferences are far more successful in some communities, with a more meaningful negotiation process and less drain on judicial resources, than they are in others. Consequently, some homeowners are successfully preventing avoidable foreclosures, while homeowners in other regions are needlessly losing their homes to avoidable foreclosures.

This inconsistent implementation of the settlement conference law is leaving New York State with an uneven recovery from the foreclosure crisis, and is causing homeowners to encounter widely varying landscapes when they attend foreclosure settlement conferences.

This report offers a snapshot of the variations in settlement conference procedures employed across New York State and **recommends more consistent and vigorous enforcement of the settlement conference law.**

INTRODUCTION

With the onset of a recession in 2007, the entire country saw foreclosures rocket to rates not seen in decades. The reverberations of this foreclosure crisis are still felt today. Indeed, despite widespread reports about recovering real estate markets, large portions of New York remain mired in a residential foreclosure crisis. New foreclosure filings have remained at near historic highs for the past three years, and foreclosure cases currently represent approximately 30% of New York State's Unified Court System's Supreme Court total civil case load.¹

In response to the largest foreclosure crisis since the Great Depression, New York State enacted comprehensive measures designed to blunt the impact of foreclosures on both individual families and neighboring communities. Among those measures is New York's pioneering court-administered settlement conference program, which has been subsequently emulated by other states. The conferences provide homeowners, who have been sued in foreclosure, the opportunity to negotiate face-to-face with their lender. When successful, this can result in affordable loan modifications or other solutions that benefit lenders, borrowers, and the community at large. Lenders benefit because defaulted loans become performing assets; homeowners benefit because they can save their homes; and communities benefit because the destabilizing effects of foreclosures - blight, declining tax revenues and declining property values - are avoided.

Since their inception in 2009, court-supervised foreclosure settlement conferences have allowed thousands of New York homeowners to achieve settlements and loan modifications, thereby averting foreclosures and sparing New York's communities their adverse effects. However, many homes are still needlessly lost to foreclosure because of unproductive settlement conferences around the state. Due to the absence of the uniform, strong court rules that the settlement conference law directed the courts to implement, and the uneven implementation of the weak rule that was codified, the efficacy of these settlement conferences varies dramatically across the state.



*As of October 12, 2015, there were **89,365** foreclosure cases pending statewide, including **42,162** cases that had been filed in the previous twelve months.*

*Settlement conferences across the state could be handled more efficiently and with less drain on court resources if **stronger uniform procedures were adopted** and if some of the **best practices employed in some counties were adopted statewide.***

I. THE SETTLEMENT CONFERENCE LAW

The law mandating foreclosure settlement conferences - enacted by the legislature in 2008, amended in 2009, and codified in the New York Civil Practice Law and Rules at Rule 3408 - unequivocally expresses the legislature's desire to promote home-saving loan modifications and to prevent avoidable foreclosures. Settlement conferences are required in any residential foreclosure action involving a home loan for the purpose of:

*[D]etermining whether the parties can reach a mutually agreeable resolution to **help the defendant avoid losing his or her home**, and evaluating the potential for a resolution in which payment schedules or amounts may be modified, or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.²*

The settlement conference law, furthermore, imposes an affirmative duty of good faith negotiation at the settlement conferences and expresses a preference for loan modification settlements:

*Both the plaintiff and defendant **shall negotiate in good faith** to reach a mutually agreeable resolution, including a loan modification, if possible.³*

The law also imposes an obligation on the plaintiff to appear at settlement conferences with authority to settle:

*At any conference held pursuant to this section, the plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be **fully authorized to dispose of the case**.⁴*

The settlement conference law also explicitly directed the judiciary to adopt strong rules to enforce its requirements. It specifically required the judiciary to:

*[P]romulgate such additional rules as may be necessary to ensure the just and expeditious processing of all settlement conferences authorized hereunder. **Such court rules shall ensure, among other things, that each judge, judicial hearing officer or referee ... shall have the necessary authority and power to fulfill the mandates of this act.** This shall include, but not be limited to, ensuring that each party fulfills its legal obligation to negotiate in good faith and seeing that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner. **Such rules may include granting additional authority to sanction the egregious behavior of a counsel or party.**⁵*

The actual rule implemented by the judiciary pursuant to CPLR Rule 3408 at Section 202.12-a of the Uniform Rules for the New York State Trial Courts is not as strong as the law contemplated. Section 202.12-a omits any reference to the authority of the judges, referees and court attorneys presiding over settlement conferences to sanction violations of the statute, stating only that:

"The court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that the conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner."⁶

In the absence of the strong, statewide rule that the law contemplated, courts have interpreted their authority to enforce the settlement conference requirements differently. The end result is that the law is not enforced consistently across the state, with some lenders not being held accountable when they violate the requirements of the settlement conference law.

II. NYRL AND THE SURVEY METHODOLOGY

NYRL has various working groups that focus on particular consumer rights issues, including mortgage foreclosure. NYRL's Mortgage Working Group recently concluded a statewide survey of residential foreclosure settlement conference practices and procedures in every county in New York State. The survey reveals that in many key respects foreclosure settlement conference practices vary from one county to the next. This lack of uniformity harms New York's struggling homeowners by preventing some homeowners from accessing meaningful, productive, efficiently-administered settlement conferences created to increase their chances of saving their homes.

In August 2015, the NYRL Mortgage Working Group subcommittee developed and distributed an 85-question survey to a "county coordinator" for each of the 62 counties in New York State.⁷ The survey assessed several key aspects of the administration of settlement conferences across the state including the availability of civil legal service providers and housing counseling advocates for homeowners during the process, pre-settlement conference procedures, court staffing, and the structure of conferences. Upon receipt of all 62 completed responses at the end of September 2015, members of the NYRL Mortgage Working Group subcommittee reviewed the data, summarized the responses, and drafted this report. The text of the survey questions and a summary of responses is included as part of the Appendix to this report.⁸



For years, NYRL members have seen first-hand the devastation that predatory financial practices have generated for families and entire New York neighborhoods, and many of them are on the front lines working with distressed homeowners navigating New York's judicial foreclosure process.

III. FINDINGS

The NYRL survey reveals that in many key aspects foreclosure settlement conference practices vary from one county to the next. This lack of uniformity harms New York’s struggling homeowners by preventing some homeowners from accessing meaningful, productive, efficiently-administered settlement conferences created to increase their chances of saving their homes. Survey results also identify best practices that would improve the settlement conference process if adopted statewide. This section will summarize several key observations derived from this survey.

A. CIVIL LEGAL SERVICE PROVIDERS

Due to the geographic size and diversity of the state, each county is served by regionally-based non-profit free civil legal service providers. Some civil legal service providers cover one county. Other agencies in rural parts of the state are the only agency covering multiple counties—up to 16 counties in one instance.

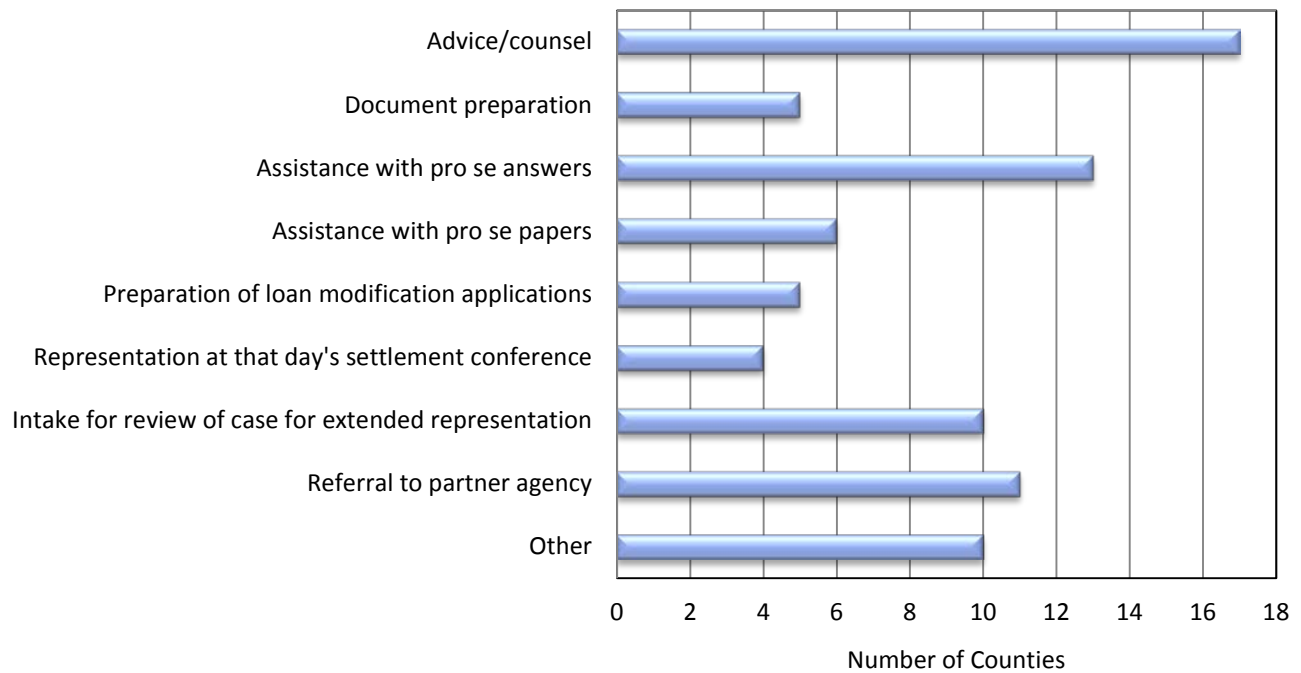
Approximately 84% of counties in the state are served by one or two civil legal service providers.⁹ By contrast, 5% of the counties - those located in the heavily populated regions of the state - are each served by more than five civil legal service providers.¹⁰

Each legal service agency exercises discretion when determining the level of representation it provides to homeowners facing foreclosure. This can range from representation for one day of settlement conferences to full representation throughout the duration of the foreclosure proceeding. The majority of legal service providers focus on providing ongoing representation during the settlement conference stage of the foreclosure action.

One common tool used by legal service providers to serve large numbers of homeowners in foreclosure is the legal clinic. The clinic setting provides an opportunity for attorneys to offer limited services to homeowners - such as providing basic legal information, an explanation of the foreclosure process, or assistance with preparation of pleadings for self-represented parties - without taking on full representation for defense of the foreclosure action. According to the survey responses, 29% of counties are served with some form of legal clinic offering a wide range of services, which are held in a variety of locations.¹¹

The survey found tremendous variation in key aspects of settlement conference practices, and these differences have a significant impact on settlement conference outcomes.

What services are delivered in a clinic setting?



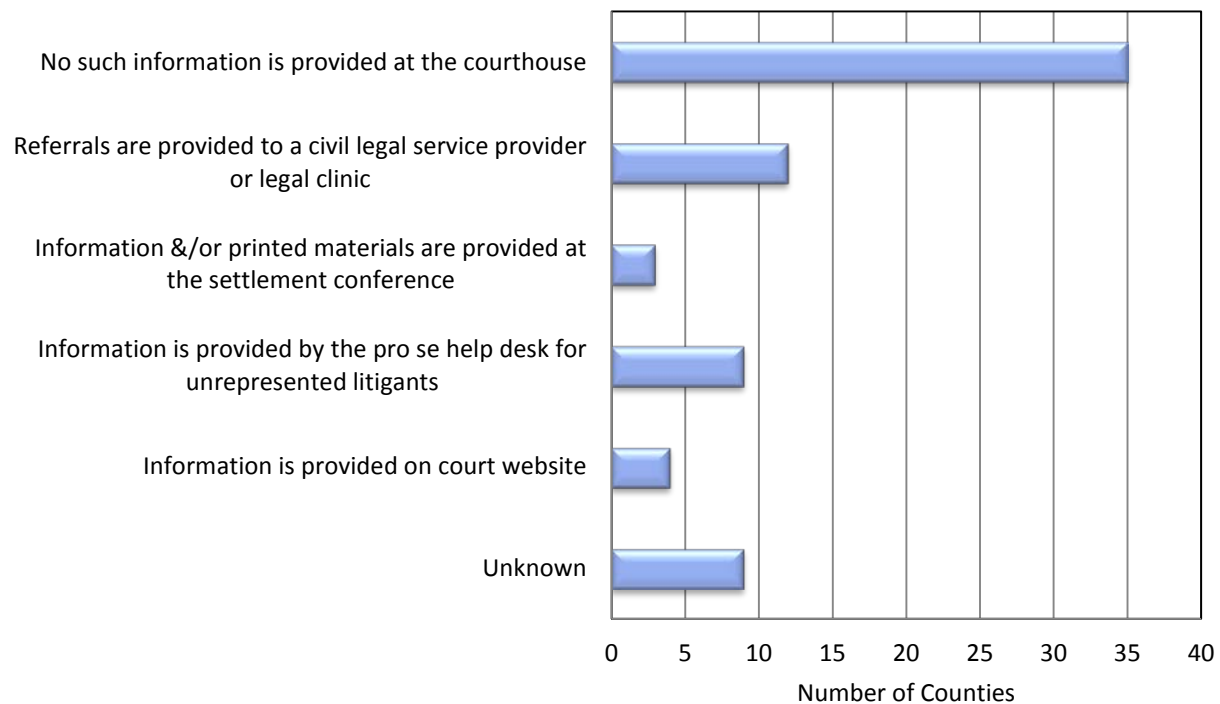
Where are legal clinics held?



Such limited brief service remains important because, notwithstanding the strides made in increasing the availability of free legal services to homeowners, demand for legal services still outstrips supply. Partnerships with the private bar and pro bono initiatives are thus an important resource in ensuring the smooth functioning of settlement conferences.¹² However, the survey revealed that only 16% of counties have the benefit of successful partnerships with the private bar, who offer free assistance to homeowners who would otherwise be unable to obtain representation from a legal service provider.¹³

In addition to assistance from the private bar, some local courts offer limited information to unrepresented borrowers to assist them in navigating the foreclosure process.¹⁴ However, **in over half of New York counties, courts provide no information about answering complaints *pro se*.**

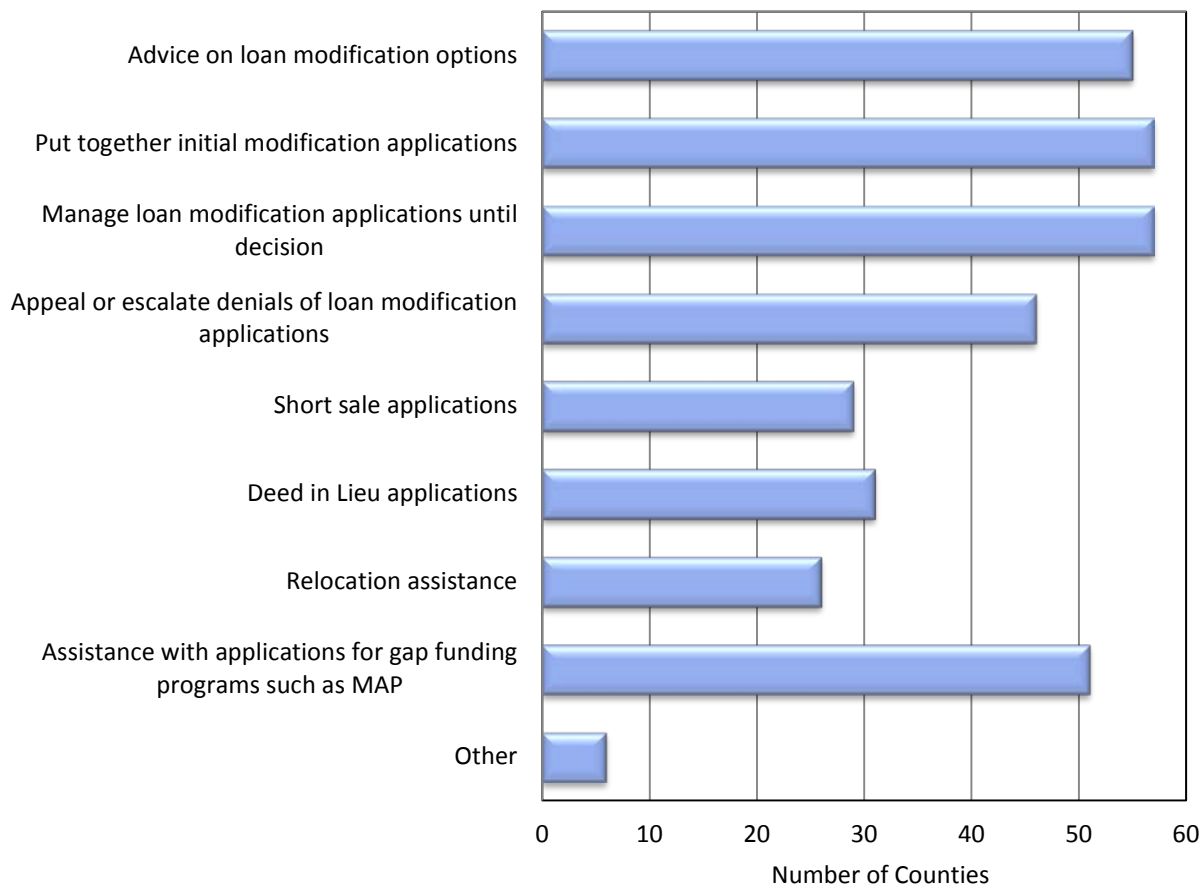
In which of the following ways does the Court provide information to Defendants about answering complaints *pro se*?



B. HOUSING COUNSELING AGENCIES

A majority of counties in the state (63%) have one or two housing counseling agencies serving homeowners in the county. However, as with legal services providers, the most heavily populated regions of the state offer more housing counseling services -- 6% of the counties have six or more housing counseling agencies serving the county.¹⁵ During the settlement conference process housing counselors provide a variety of services to support homeowners while they navigate the foreclosure process.¹⁶

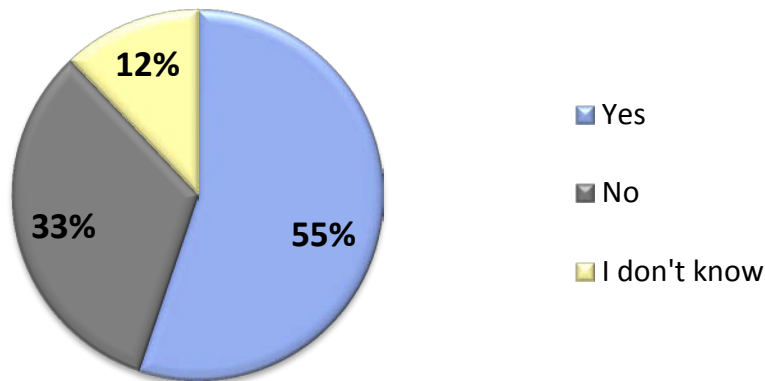
What services do housing counselors provide to homeowners during the settlement conference process?



Housing counselors provide critical services to homeowners facing foreclosure throughout New York. Homeowners, attorneys and courts rely upon the expertise of housing counselors to offer homeowners budget counseling and assistance submitting loss mitigation applications to lenders.

In many instances, housing counselors are allowed to appear at settlement conferences and speak on behalf of the homeowners to the mediator.¹⁷

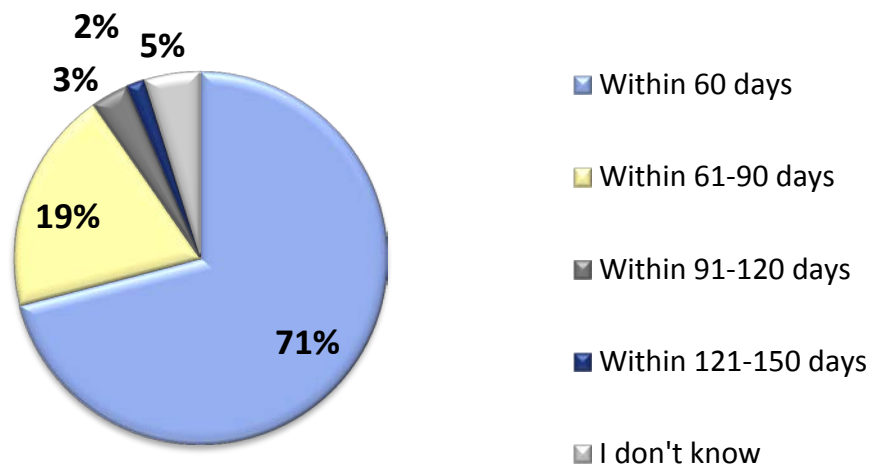
Do housing counselors ever attend settlement conferences and speak on behalf of the homeowners to the mediator?



C. PRE-SETTLEMENT CONFERENCE PROCEDURES

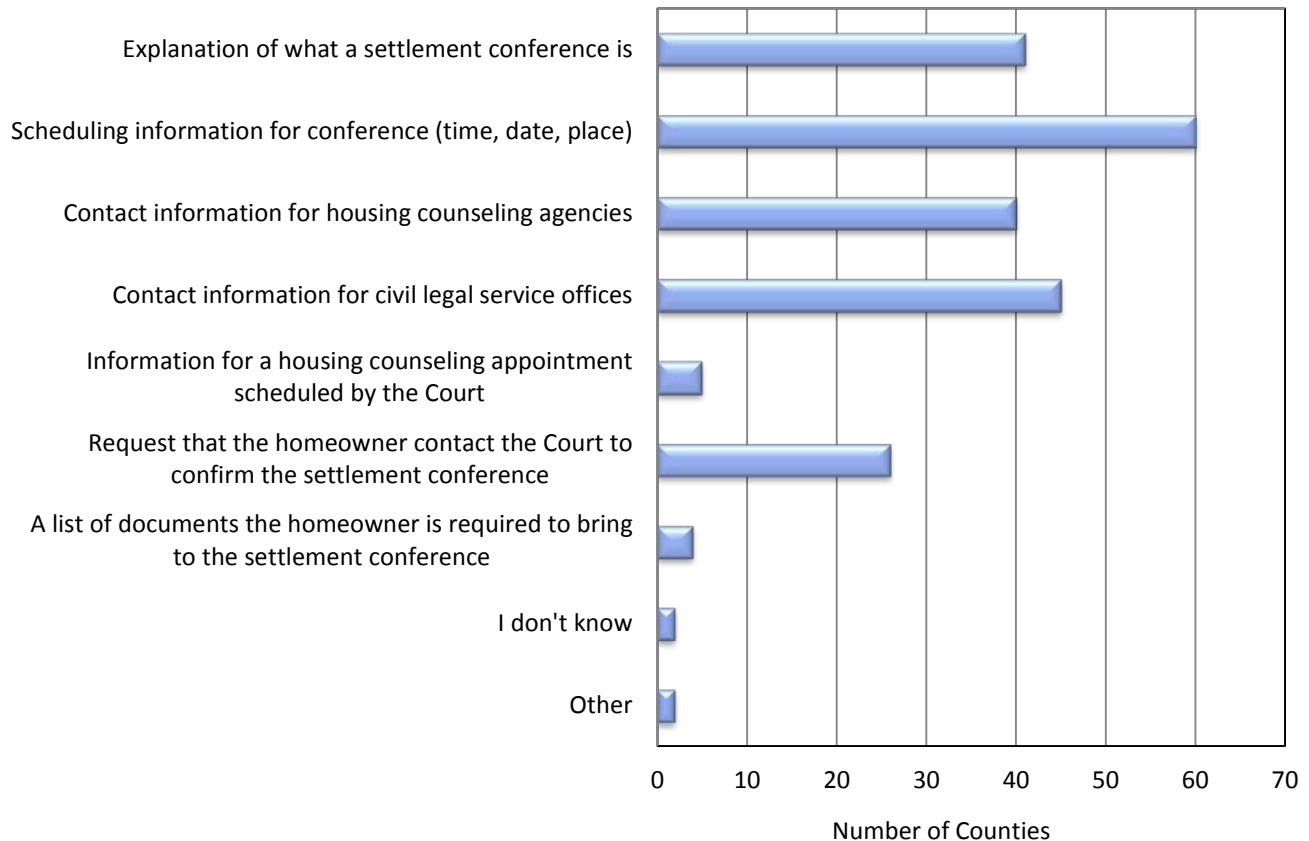
A Request for Judicial Intervention (“RJ”) must be filed with the court before a settlement conference can be scheduled. The first settlement conference is scheduled within 60 days after the RJ is filed in 70% of counties, and within 90 days for over 90% of the New York counties.¹⁸ While it is encouraging to see that conferences are being scheduled in a relatively timely manner, numerous counties reported significant delays in the scheduling of the first settlement conference.¹⁹ In some instances, a sizeable number of cases are still stuck in a “shadow docket”²⁰ because bank attorneys have failed to timely file the RJ with the court.²¹

After the RJ is filed, when is the first settlement conference typically held?



In all counties, the court sends a notice to the homeowner advising them of the time, date and place of the settlement conference. The remaining content of the notice is a matter of court discretion and varies by county. In over 40 counties, this notice also includes contact information for local housing counseling and civil legal service providers and a brief explanation of the settlement conference process, giving homeowners access to valuable information and resources.²²

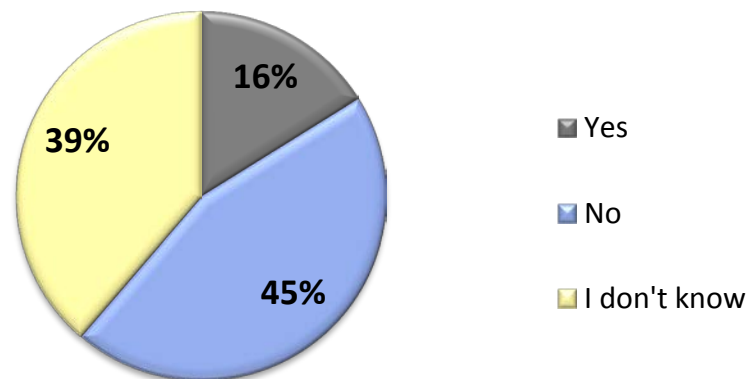
What information is in the notice that homeowners receive from the Court about scheduling a settlement conference?



In approximately half of the counties, courts provide civil legal service providers with a copy of the conference docket in advance so they can be better prepared to provide assistance.²³ Similarly, in one-third of the counties, the court also provides housing counseling agencies with the conference docket in advance.²⁴

In the vast majority of New York counties, the settlement conference process starts with the initial scheduling notice for the first settlement conference. However, in ten counties the Court has implemented an initial screening process prior to the first settlement conference.²⁵

Is there an initial screening process by the Court to determine eligibility for settlement conferences before the first conference?

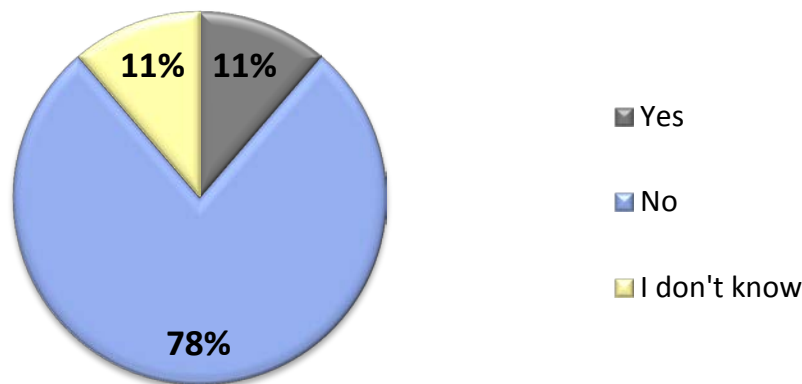


Nine out of these ten counties report that the screening process is used to confirm whether the property is the defendant's primary residence.²⁶ Under the settlement conference law, such conferences are required only in foreclosure actions if the home in foreclosure is a defendant's primary residence. In at least one county, however, the screening calendar is used to consider the defendant's income and whether the defendant was previously denied a work-out solution. These factors are not criteria for eligibility under either CPLR Rule 3408 or Uniform Rules 202.12-a, and by improperly considering these factors, the Court deprives eligible homeowners of their statutory right to a conference.²⁷

Settlement conferences, which often revolve around efforts to broker complex home-saving solutions such as federal loan modifications, require multiple conferences to achieve favorable outcomes. In many courts, settlement conferences are often scheduled on a "calendar," where the day's conferences are scheduled for the same time and the parties wait for their case to be called. In courts where such "calendars" are held, settlement conference "calendars" therefore may include cases in which the parties appear for the first time as well as repeat cases where the parties have previously appeared. When homeowners attend their first conference, they are unfamiliar with the process and typically have not connected with either housing counseling or civil legal service providers. Parties who have appeared previously are typically more familiar with the process and may even be represented by an attorney.

It can therefore be helpful to have a separate calendar for cases appearing in conference for the first time (so that the process can be explained to homeowners) and a separate calendar for the “repeat” cases so that resources are not wasted on basic explanations of the process and can be spent dealing with the complexities of resolving the foreclosure. Unfortunately, most New York counties do not have a separate calendar for first time conferences. Out of 62 responses, only seven counties reported a separate “first time” calendar.²⁸

Is there a separate calendar for first time settlement conferences?

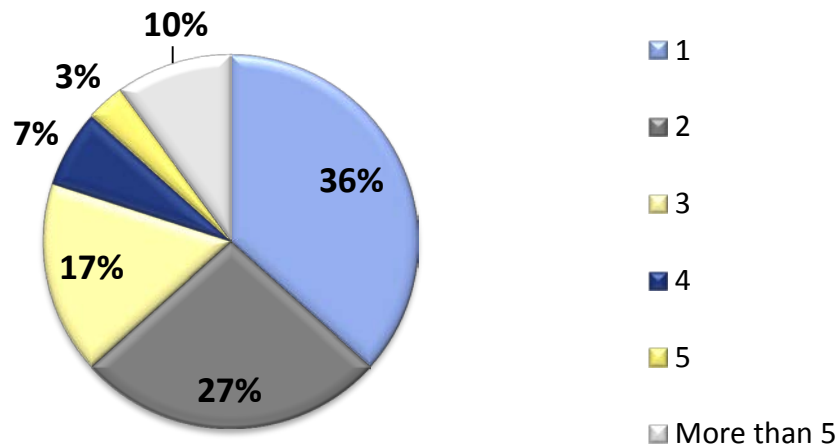


In five of these seven counties, there is an information session presented by local civil legal service providers prior to a first conference to explain the settlement conference process.²⁹

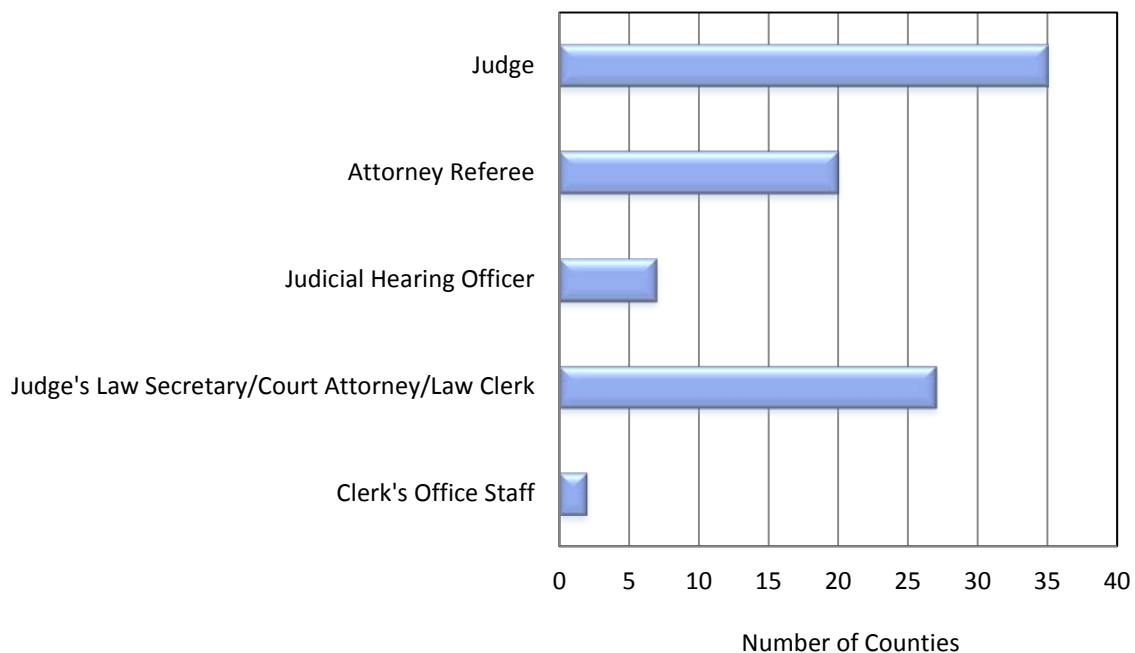
D. STAFFING OF SETTLEMENT CONFERENCES

One of the most obvious factors in how efficiently the settlement conference process is administered is the amount of court staff dedicated to handling settlement conferences. The number of dedicated mediators varies from one county to the next, but the majority of counties reported between one and three mediators staffed to handle settlement conferences.³⁰ The most common types of mediators were judges, court attorneys, and attorney referees.³¹

How many settlement conference mediators are in the county?



Who are the mediators that preside over the settlement conferences?



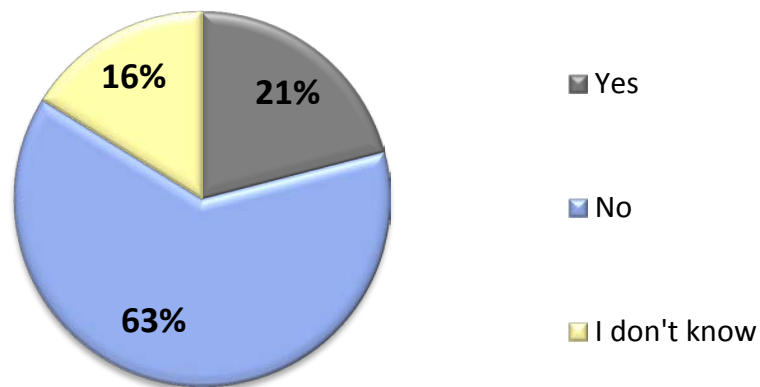
Seven counties reported that their mediators include a judicial hearing officer (who are usually retired judges),³² and another two counties reported that conferences are conducted by clerk's office staff.³³ Most counties reported that they did not have or were not aware of any court order delegating authority to non-judicial staff to conduct settlement conferences. Without this delegated authority, non-judicial staff lack the tools available to judges overseeing the settlement conference process, such as the ability to order a bank representative with settlement authority to appear at the next conference or to toll mortgage interest and foreclosure related fees when a bank fails to negotiate in good faith. Settlement conferences are likely to be more productive when the same mediator presides over successive conferences in a given case. While the majority of counties reported that cases are assigned to the same mediator at each conference, ten counties reported that cases are not guaranteed to appear before the same mediator.³⁴ One county reported that advocates are even unable to predict who will preside over conferences on any given day due until they arrive at the courthouse.³⁵

Settlement conference negotiations typically focus on efforts to negotiate affordable loan modifications under federal programs such as the Home Affordable Modification Program (also known as "HAMP"). Accordingly, it is important that judges and referees presiding over settlement conferences be familiar not only with the governing law but also with the constantly-evolving regulations governing mortgage loan modifications and loan servicing. Most advocates were not aware of whether their mediators had received any training on foreclosure issues.³⁶



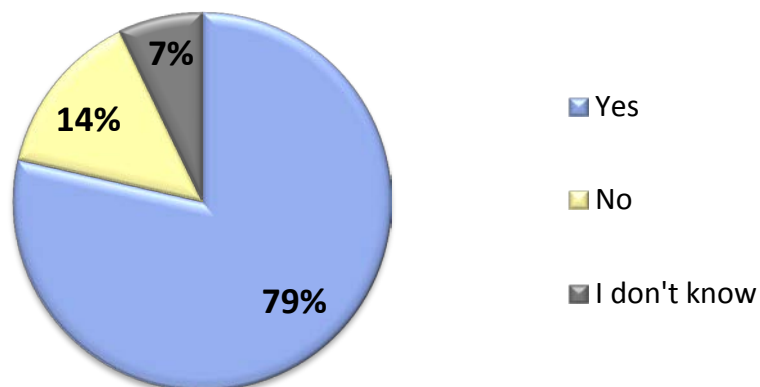
Foreclosure settlement conference processes can be improved when courts consult with advocates representing homeowners, but only fourteen counties reported that advocates meet with their court administration to discuss systemic issues relating to the settlement conference process.³⁷

Does the court administration ever meet with advocates to discuss systemic issues relating to the settlement conference process?



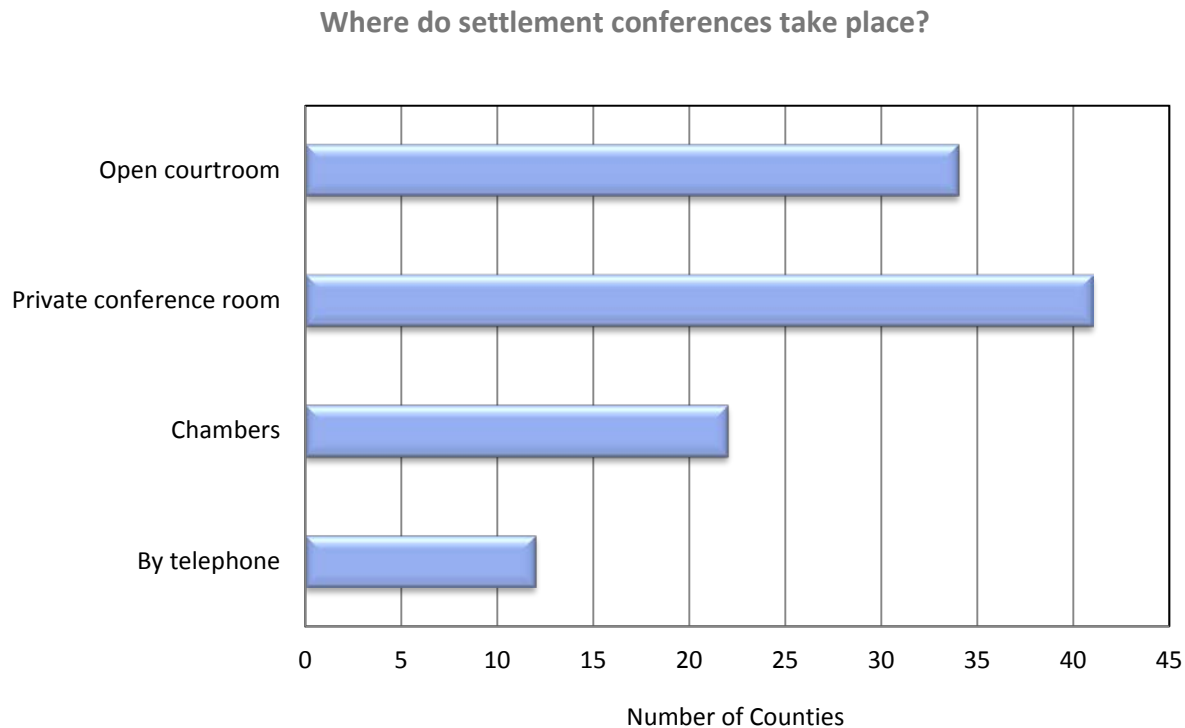
When such meetings do take place, improvement is seen: 78% of the counties reported that changes were implemented as a result of meetings with court administration.³⁸

If the court administration does meet with advocates, do you see any changes implemented?



E. STRUCTURE AND CONDUCT OF CONFERENCES

Conducting settlement conferences in a private confidential setting is important because homeowners are required to share highly private and confidential information about their personal finances as part of the negotiation process. Conducting such discussions in an open courtroom with dozens of other parties and attorneys present can be particularly humiliating and traumatic for struggling homeowners, especially those proceeding without counsel. However, 55% of the counties reported that settlement conferences may take place in an open courtroom that affords homeowners no privacy.³⁹



Additionally, missing a day of work in order to appear at settlement conferences can pose a severe hardship for many homeowners – particularly those who reside far from the courthouse. Only 43% of the counties, however, allow parties to attend settlement conferences by telephone.⁴⁰

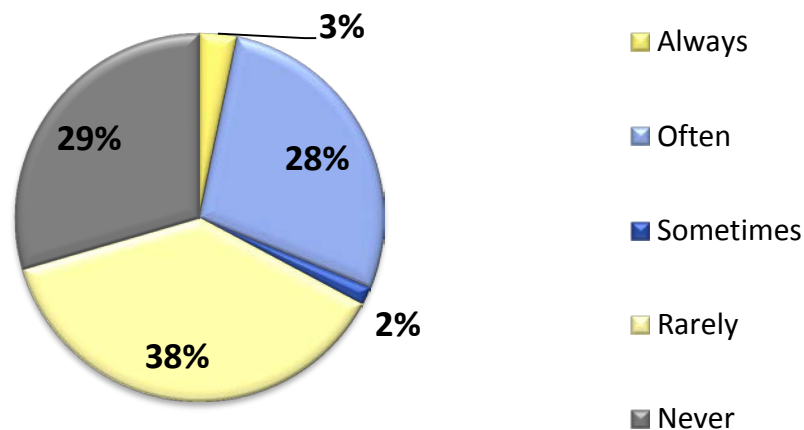
Practices across the state also vary with respect to maintaining a record of what transpires at each individual conference, which is key to ensuring productive conferences and accountability. In 55% of the counties, court reporters are never present to record the proceedings.⁴¹ Similarly, in one-third of the counties, at least one mediator never issues orders or otherwise memorializes the court's directives.⁴²

One of the most effective tools for reaching settlements is for the mediator to caucus separately with each party to candidly discuss the relative strengths and weaknesses of the parties' positions and encourage settlement. However, in 71% of counties, mediators **never** meet with one party at a time to discuss settlement, suggesting that this standard mediation technique is rarely used in foreclosure conferences.⁴³

Equally important in the context of settlement discussions is consideration of the merits of the parties' claims and defenses, which the settlement conference law specifically authorizes courts to do.⁴⁴ Shockingly, respondents reported that in 39% of the counties **mediators prohibit discussion of homeowners' defenses during settlement conferences**, and mediators discuss the strengths and weaknesses of the parties' respective positions in only 8% of the counties.⁴⁵

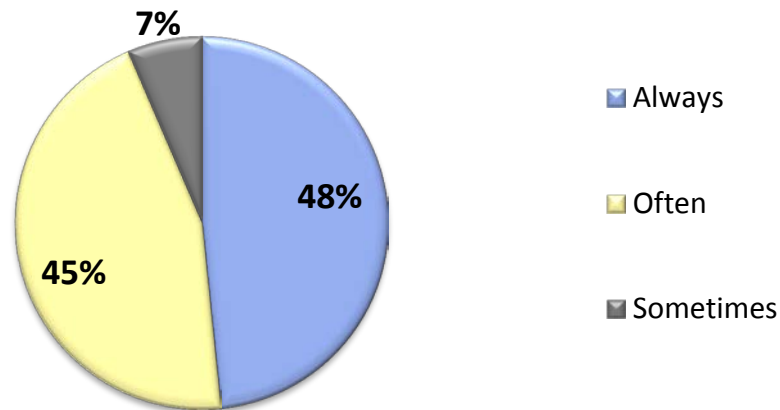
Although the settlement conference law unequivocally requires the parties or their lawyers to appear with authority to resolve the matter, respondents reported that the courts **rarely or never** enforce this requirement in two-thirds of the state's counties.⁴⁶

Does the Court enforce the requirement that plaintiffs appear with settlement authority?



Additionally, law firms representing foreclosing lenders often do not even have their own attorneys appear at conferences, instead appearing through “per diem” lawyers with no familiarity with the case. These “per diem” attorneys rarely have the required knowledge or authority to engage in meaningful negotiations. Respondents reported that “per diem” attorneys **often** or **always** appear at settlement conferences in over 90% of the counties.⁴⁷

How typical is it that you see per diem/local counsel appear at settlement conferences?



When lenders’ attorneys or “per diem” lawyers appear at settlement conferences without negotiating authority or required information, one particularly effective tool for the court is to order an authorized representative of the lender or its servicing agent to appear at the next conference. This can be to explain the reasons for denial of a loss mitigation application, to justify negotiating positions, or to reach a negotiated settlement with the help of the mediator. Despite the effectiveness of this technique to resolve foreclosures, respondents reported that courts **never** use this effective tool in 10% of the counties and **rarely** required appearance by an authorized lender’s representative in 49% of the state’s counties.⁴⁸

Practices across the state also vary with respect to how long cases remain in the settlement conference part after agreement is reached on a loan modification or other settlement. For instance, problems frequently arise after parties believe they have an agreement but before permanent modification documents are signed by all parties.⁴⁹ While it is thus optimal for a case to remain in settlement conference until the foreclosing plaintiffs have returned countersigned agreements, 42% of respondents reported that cases are released from settlement conferences upon the borrower’s acceptance of a permanent loan modification agreement **without** awaiting the lender’s countersignature on the settlement papers. Respondents also reported that practices vary even within the same courts, depending on whether defendants are represented by counsel or are self-represented.⁵⁰

F. OTHER PRACTICES

In an effort to make the settlement conference more effective, in seven counties the court has established a “servicer-specific calendar,” consolidating cases prosecuted by specific mortgage servicers, and in some instances requiring a representative of that servicer to be present.⁵¹ Only half of those counties reported that the servicer-specific part is more effective than the regular settlement conference process, with the other half reporting no difference in effectiveness.⁵²

In general, advocates find the settlement conferences an effective process.⁵³ However, some counties noted that the effectiveness is dependent on the mediator supervising the conference.⁵⁴ Other counties reported that conferences are not as effective for homeowners who are proceeding without legal representation.⁵⁵ Numerous counties reported that improvements could be made to increase the value of the conference process, such as granting additional authority to mediators, including authority to make determinations on compliance with the good faith requirement, a commitment from the mediator to ensure negotiations take place in good faith, zero tolerance for unreasonable delays by banks and their attorneys, a mandatory written record of each settlement conference, and efforts to make the process easier to navigate and more equitable for unrepresented homeowners.⁵⁶ These recommendations are discussed more fully in the following section.



In a testament to the general value of the settlement conference process, and in spite of the issues discussed in this report, the vast majority of respondents felt that the overall settlement conference process is effective.

IV. RECOMMENDATIONS

New York's settlement conferences represent the best opportunity for many struggling homeowners to achieve home-saving solutions. Not only does this process benefit New York's hard-working families at risk of foreclosure, it also allows mortgage loans to become performing assets and promotes neighborhood stabilization.

However, the legislature's intent is not being fully achieved due to the uneven enforcement of the settlement conference law throughout the state. NYRL's Mortgage Working Group offers these recommendations for statewide improvements to the administration of settlement conferences, so that all of New York's struggling homeowners can benefit equally. A homeowner's ability to save her home should not be determined by her zip code.

1. IMPLEMENT AND ENFORCE THE SETTLEMENT CONFERENCE PROCESS MORE UNIFORMLY AND CONSISTENTLY ACROSS THE STATE

Strengthen the Uniform Court Rules Governing Foreclosure Conferences: The existing uniform court rule (Section 202.12-a of the Uniform Rules for New York State Trial Courts) implementing the settlement conference law should be strengthened to ensure more uniformity in the conduct of settlement conferences and to be consistent with the settlement conference statute. The statute explicitly contemplated authorizing those conducting settlement conferences to ensure compliance with the settlement conference law's good faith negotiation requirement by affording relief when the statute is violated.

Create Uniform Procedures to Apply when Parties Fail to Negotiate in Good Faith: The rule should ensure uniform procedures for applications for relief when parties fail to negotiate in good faith, or fail to appear with the required settlement authority or information in violation of the law. The rule also should clarify the courts' authority to afford appropriate relief when the statute is violated, including mandating attendance by a representative with authority, compelling production of documents (including inputs upon which loan modification decisions have been made), and tolling or barring collection of interest and fees.

Adopt a Uniform Order of Reference: For courts in which settlement conferences are referred to referees or court attorneys, a uniform Order of Reference should be adopted which authorizes such personnel to make determinations concerning the parties' compliance with the requirements of the statute and which authorizes them to order appropriate relief to the parties without need for duplicative and wasteful motion practice or hearings.

Ensure that Parties Are Prepared to Negotiate by Enforcing Statutory Requirements: Courts should insist that parties appear at settlement conferences with required information needed for meaningful settlement negotiations and with the authority to resolve the case, as the law requires, and should bar appearances at conferences by "per diem" attorneys lacking familiarity with the case or authority to resolve the matter.

Allow Parties to Discuss Claims and Defenses: Courts should not prohibit discussions about the parties' claims and defenses, because the law contemplates such discussions and because parties in litigation are more likely to resolve cases when mediators assess the strengths and weaknesses of their claims and defenses.

As the results of this survey confirm, better and more uniform implementation of the settlement conference law and more vigorous enforcement of the law's requirements can improve the efficiency of the settlement conference process.

2. ADOPT COMMON SENSE PRACTICES TO ENSURE ACCOUNTABILITY AND EFFICIENCY IN ORDER TO EXPEDITE SETTLEMENT CONFERENCES AND COMPLIANCE WITH THE LAW'S REQUIREMENTS

Ensure Unrepresented Litigants Have Meaningful Access to the Justice System: Courts should pay special attention to the needs of unrepresented litigants navigating the settlement conference process and should ensure that the settlement conference process is accessible to those with limited English proficiency, as mandated by Section 217.2 of the Uniform Rules for the New York State Trial Courts. Courts should ensure that staff manning “help desks” and offices for the unrepresented are familiar with local resources for homeowners such as housing counseling and civil legal service providers, and should develop partnerships with pro bono programs and local civil legal service and housing counseling agencies to establish court-based clinics to provide assistance to unrepresented homeowners. Courts should also honor the statutory exemption from mandatory e-filing for residential foreclosure cases and not pressure unrepresented homeowners to consent to e-filing.

Create Separate Calendars: Setting up “first time” calendars at which the settlement conference process can be explained to homeowners who are not familiar with the process can result in homeowners who are better prepared for conferencing, and can allow follow-up conferences to be handled more efficiently.

Appoint One Mediator for a Case: Appointing one mediator to assess the parties’ behavior can ensure institutional memory and promote a greater likelihood of compliance with the good faith negotiation requirement.

Hold Conferences in Private Venues: Courts should conduct settlement conferences in venues conducive to frank and candid settlement negotiations and with sensitivity to the privacy interests of homeowners, who are required to discuss private financial matters as part of the settlement negotiation process.

Improve Record Keeping: Courts can dramatically improve the efficiency of the process by keeping a written record of settlement conferences and making this record available to all parties to ensure continuity between conferences.

Decrease Time Between Conferences: Shorter intervals between conferences motivates the parties to negotiate energetically, and courts should set realistic deadlines that are consistent with the mortgage servicing regulations issued by the Consumer Financial Protection Bureau.

Do Not Set Arbitrary Limits on the Number of Conferences: Courts should not encourage delaying tactics by banks or their counsel by setting arbitrary limits on settlement conference appearances. Such limits discourage lenders from fully engaging in the process, safe in the knowledge that the case will be released from conferences if the lender stalls long enough.

Adopt Uniform Orders and Directives: A uniform order or directive issued after each conference, which memorializes what transpired and specifies the required follow-up prior to the next conference, will eliminate wasteful disputes and deter tactics merely meant to delay the process further.

Treat Represented and Unrepresented Parties Equally: Parties who are unrepresented by counsel should receive the same treatment as those represented by counsel, and courts should insist on strict compliance with the statute’s requirements in every case. Whether or not demanded by a homeowner’s attorney, cases should not be released from settlement conferences until the settlement conference process has been exhausted and its requirements complied with. When cases are resolved through loan modifications, they should remain in the conference part until the lender has returned a countersigned agreement and until any outstanding issues, such as unreasonable attorney’s fees charged to borrowers, are resolved.

Seek Input from Local Advocates Working with Homeowners: Courts should work with local service providers and consult with advocates for homeowners about systemic issues and administrative procedures and practices, and should ensure that personnel administering settlement conferences and foreclosure actions receive training on applicable foreclosure law and loss mitigation options.

END NOTES

¹ See 2015 Report of the Chief Administrator of the Civil Courts Pursuant to Chapter 507 of the Laws of 2009 at pp. 3-4 (available at <http://www.nycourts.gov/publications/pdfs/2015ForeclosureReport.pdf>) (“OCA Report”).

² NY CPLR 3408(a) (emphasis added).

³ NY CPLR 3408(c) (emphasis added).

⁴ NY CPLR 3408(c) (emphasis added). The settlement conference law also specifies what information and documentation the parties are expected to bring to settlement conferences such as, for the lender, a payment history, an itemization of the amounts needed to “cure” and pay off the loan, and the mortgage and note, and for the homeowner, proof of current income, most recent tax return and property tax statements. CPLR 3408 (e).

⁵ Chapter 507 of Laws of NY 2009: § 10-a. 1 (emphasis added).

⁶ Uniform Rules for the New York State Trial Courts 202.12-a.

⁷ County coordinators were either civil legal service or housing counseling staff at agencies working with homeowners in every county of the state, who were charged with conferring with other service providers in their counties in order to provide the county-specific data called for by the survey.

⁸ The responses to the survey have been tabulated and summarized in this report and the Appendix, but are not repeated verbatim.

⁹ Appendix, Question 7.

¹⁰ *Id.*

¹¹ Appendix, Question 10 and 11.

¹² Appendix, Question 17.

¹³ Appendix, Question 12.

¹⁴ Appendix, Question 14.

¹⁵ Appendix, Question 15.

¹⁶ Appendix, Question 20.

¹⁷ Appendix, Question 18.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The phenomenon known as the “shadow docket” was detailed in a report issued by MFY Legal Services, Inc., “Justice Deceived: How Large Foreclosure Firms Subvert State Regulations Protecting Homeowners,” July 2011, available at <http://www.mfy.org/wp-content/uploads/MFY-White-Paper-JUSTICE-DECEIVED.pdf>.

²¹ Appendix, Question 82.

²² Appendix, Question 29.

²³ Appendix, Question 31.

²⁴ Appendix, Question 30.

²⁵ Appendix, Question 21.

²⁶ Appendix, Question 22.

²⁷ *Id.*

²⁸ Appendix, Question 24.

²⁹ Appendix, Question 25.

³⁰ Appendix, Question 33.

³¹ Appendix, Question 32.

³² Appendix, Question 32.

³³ Appendix, Question 32.

³⁴ Appendix, Question 34.

³⁵ *Id.*

³⁶ Appendix, Question 36.

³⁷ Appendix, Question 38.

³⁸ Appendix, Question 39.

³⁹ Appendix, Question 48.

⁴⁰ Appendix, Question 49. The settlement conference law explicitly provides that the court may permit a representative of the *plaintiff* to attend a settlement conference telephonically or by video-conference (NY CPLR 3408 (c)), but anomalously does not specify a reciprocal right for homeowner defendants.

⁴¹ Appendix, Question 52.

⁴² Appendix, Question 58.

⁴³ Appendix, Question 53.

⁴⁴ NY CPLR 3408 (a) (settlement conferences are for the purpose of settlement discussions “pertaining to the relative rights and obligations of the parties under the mortgage loan documents ... and for whatever other purposes the court deems appropriate”).

⁴⁵ Appendix, Question 67.

⁴⁶ Appendix, Question 54. The phenomenon of banks’ failure to appear at settlement conferences with statutorily required settlement authority and required information was detailed in an April 2014 report, Stalled Settlement Conferences: Banks Frustrate New York’s Foreclosure Settlement Conferences (JASA/Legal Services for the Elderly in Queens, Legal Services NYC, MFY Legal Services, Inc. (available at <http://nylawyer.nylj.com/adgifs/decisions14/050214report.pdf>).

⁴⁷ Appendix, Question 57.

⁴⁸ Appendix, Question 55.

⁴⁹ A prime example of this type of issue relates to service transfer of loans. Servicing rights are often transferred to a new mortgage servicer during the final stages of negotiations, and before a countersigned modification agreement has been returned to the homeowner by the servicer with whom the agreement was negotiated the new servicer denies the existence of any agreement and demands starting the process from scratch with a new loan modification application.

⁵⁰ Appendix, Question 74.

⁵¹ Appendix, Question 79.

⁵² Appendix, Question 80.

⁵³ Appendix, Question 84.

⁵⁴ *Id.* Note that respondents from only four counties reported that settlement conferences are not effective.

⁵⁵ Appendix, Question 84.

⁵⁶ Appendix, Question 84.

APPENDIX

INTRODUCTION: This Appendix contains a list of each question included in the “Survey on the Implementation and Efficiency of Settlement Conferences Pursuant to CPLR 3408” that was distributed to advocates in every county of New York State. After each question, the number of counties who provided a response to that question is indicated in brackets. The number of respondents who chose each answer is also noted in brackets. Note that some questions allowed respondents to select multiple answers.

In addition, the survey included multiple questions that invited open-ended responses. Similar responses were grouped together, with a number in brackets indicating the number of respondents who provided a similar response to that question. Responses that have been summarized are included in italics, to distinguish them from response options listed in the survey. Notes from the report authors are also included in italics.

Survey on the Implementation and Efficiency of Settlement Conference Pursuant to CPLR 3408

This survey will help members of the **New Yorkers for Responsible Lending** coalition assess the implementation and efficiency of the CPLR 3408 settlement conferences.

* Required

1. **What is your name? ***
2. **What is the name of your organization? ***
3. **What is your phone number? ***
4. **Please choose the position that best matches your job title. ***

Mark only one oval.

- Legal services attorney
- Housing counselor
- Paralegal
- Other:

5. For which county are you filling out this survey response? *

Mark only one oval.

<ul style="list-style-type: none"> ● Albany ● Allegany ● Bronx ● Broome ● Cattaraugus ● Cayuga ● Chautauqua ● Chemung ● Chenango ● Clinton ● Columbia ● Cortland ● Delaware ● Dutchess ● Erie ● Essex ● Franklin ● Fulton ● Genesee ● Greene ● Hamilton 	<ul style="list-style-type: none"> ● Herkimer ● Jefferson ● Kings ● Lewis ● Livingston ● Madison ● Monroe ● Montgomery ● Nassau ● New York ● Niagara ● Oneida ● Onondaga ● Ontario ● Orange ● Orleans ● Oswego ● Otsego ● Putnam ● Queens ● Rensselaer 	<ul style="list-style-type: none"> ● Richmond ● Rockland ● Saint Lawrence ● Saratoga ● Schenectady ● Schoharie ● Schuyler ● Seneca ● Steuben ● Suffolk ● Sullivan ● Tioga ● Tompkins ● Ulster ● Warren ● Washington ● Wayne ● Westchester ● Wyoming ● Yates
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6. With what other agencies did you consult in completing this survey, if any?

Mark only one oval.

- Consulted with 4-5 agencies [2]
- Consulted with 3 agencies [4]
- Consulted with 2 agencies [7]
- Consulted with 1 agencies [16]
- Consulted with 0 agencies [21]
- No answer [12]

LEGAL SERVICE PROVIDERS

This section will focus on legal service providers (i.e., organizations that provide legal counsel and/or legal representation). The following section, "Housing Counseling Agencies" will focus specifically on housing counseling agencies.

7. How many legal services agencies are available in your county to represent homeowners in the settlement conference process? * [62 counties responding]

Mark only one oval.

- 1--2 [52]
- 3--5 [7]
- More than 5 [3]

8. Which of the following describes how legal services attorneys in your county represent homeowners in the settlement conference process? [62 counties responding]

Check all that apply.

- Assigned counsel: represent for duration of settlement conference process [17]
- Assigned counsel: attorney for the day only [0]
- Attorneys exercise discretion and choose cases. Representation is for the duration of the settlement conference process. [55]
- Attorneys exercise discretion and choose cases. Representation is for the day only. [3]
- Other: [4]

[In addition, numerous counties noted that they provide full litigation representation for a limited number of cases. Other counties noted that they represent homeowners at servicer-specific settlement conference parts, or that mediators call them into conferences to listen and then provide legal advice & information to pro se defendants]

9. Do any legal services providers in your county provide services to homeowners facing foreclosure in a clinic setting? [62 counties responding]

A "clinic setting" is a setting in which an ongoing attorney--client relationship is not entered into, but attorneys provide short term advice or assistance.

Mark only one oval.

- Yes Skip to question 10. [18]
- No Skip to question 12. [44]

10. What services are delivered in the clinic setting? [18 counties responding]

Check all that apply.

- Advice/Counsel [17]
- Document preparation [5]
- Assistance with *pro se* answers [13]
- Assistance with other *pro se* papers (e.g., motions) [6]
- Preparation of modification applications [5]
- Settlement conference representation for the day only [4]
- Intake for review of case for extended representation [10]
- Referral to partner agency [11]
- Other: [10]

11. Where is the clinic held? [18 counties responding]

Check all that apply.

- At the courthouse immediately before, during, or after the settlement conferences are held [8]
- At the courthouse outside of settlement conference times [5]
- At the office of a legal services provider [5]
- At the office of an elected official [0]
- At the office of another non-profit organization [10]
- Other: [0]

12. Are private attorneys available *pro bono* (for example, through the local bar association) to represent homeowners in the settlement conference process? [62 counties responding]

Mark only one oval.

- Yes [10]
- No [39] Skip to question 14.
- I don't know [13] Skip to question 14.

13. If private attorneys are available *pro bono* to represent homeowners in the settlement conference process, how is representation carried out? [10 counties responding]

Check all that apply.

- Representation for the duration of the settlement conference process [5]
- Representation for the day only [2]
- Other: [3]

14. In which of the following ways does the Court provide information to Defendants about answering complaints *pro se*?

Check all that apply.

- Information is provided on the court website [4]
- Information is provided by the *pro se* help desk for unrepresented litigants [9]
- Information and/or printed materials are provided at the settlement conference [3]
- No such information is provided at the courthouse [35]
- Other:
 - *Unknown* [9]
 - *Referrals are provided to a legal agency or legal clinic* [12]

HOUSING COUNSELING AGENCIES

15. How many housing counseling agencies provide services to homeowners in your county? [62 counties responding]

Mark only one oval.

- 1--2 [39]
- 3--5 [17]
- 6 or more [4]
- I don't know [2]

16. Are services provided by housing counselors during the settlement conference process? [62 counties responding]

For example, services could range from assisting borrowers with an initial modification application while they are in the settlement conference process to accompanying borrowers to their settlement conference.

Mark only one oval.

- Yes [58]
- No [3] Skip to question 21.
- I don't know [1] Skip to question 21.

17. How are services provided by housing counselors during the settlement conference process? [58 counties responding]

Check all that apply.

- Services are provided independently of attorneys [21]
- Services are provided in conjunction with attorneys [3]
- I don't know
- Services are provided both independently of attorneys and in conjunction with attorneys [34]

18. Do housing counselors ever attend settlement conferences and speak on behalf of homeowners to the mediator? [58 counties responding]

Mark only one oval.

- Yes [32]
- No [19] Skip to question 20.
- I don't know [7] Skip to question 20.

19. If housing counselors do attend settlement conferences and speak on behalf of homeowners, under what circumstances do they do so? [32 counties responding]

Check all that apply.

- With *pro se* homeowners [30]
- On behalf of *pro se* homeowners, but homeowners are not present [10]
- With legal services or *pro bono* counsel, with homeowner present [23]
- With legal services or *pro bono* counsel, without homeowner present [14]
- Other: [0]

20. What services do housing counselors provide to homeowners during the settlement conference process? [58 counties responding]

Check all that apply.

- Advice on loan modification options [55]
- Put together initial modification applications [57]
- Manage loan modification applications until decision [57]
- Appeal or escalate denials of loan modification applications [46]
- Short sale applications [29]
- Deed in Lieu applications [31]
- Relocation assistance (e.g., finding housing, applying for relocation grants, etc.) [26]
- Assistance with applications to MAP or similar assistance programs [51]
- Other: [6]

BEFORE THE SETTLEMENT CONFERENCE

21. Is there an initial screening process by the Court to determine eligibility for settlement conferences before the first conference? [62 counties responding]

Mark only one oval.

- Yes [10]
- No [28] Skip to question 23.
- I don't know. [24] Skip to question 23.

22. If there is an initial screening by the Court to determine eligibility for settlement conferences before the first conference, what criteria does the Court consider? [10 counties responding]

Check all that apply.

- Whether the property is the defendant's primary residence [9]
- Income of defendant [1]
- Whether defendant was previously denied a work out solution such as a loan modification [1]
- I don't know [1]
- Other: [0]

23. Is there a shadow docket calendar? [62 counties responding]

The shadow docket refers to the foreclosure cases that have been commenced, but for which no Request for Judicial Intervention (RJI) has been filed. In the absence of an RJI, the court does not typically schedule a settlement conference. Some courts hold a special settlement conference calendar for cases on the shadow docket.

Mark only one oval.

- Yes [3]
- No [24]
- There used to be, but not any longer. [18]
- I don't know [17]
- Other: [0]

24. Is there a separate calendar for cases on for the first time? [62 counties responding]

Mark only one oval.

- Yes [7]
- No [48] Skip to question 27.
- I don't know [7] Skip to question 27.

25. If there is a separate calendar for cases on for the first time, is there an information session or other presentation provided to defendants to explain the settlement conference process? [7 counties responding]

Mark only one oval.

- Yes [5]
- No [2] Skip to question 27.
- I don't know [0] Skip to question 27.
- Other: [0]

26. If there is an information session to explain the settlement conference process, who makes the presentation? [5 counties responding]

Check all that apply.

- Local legal services provider [4]
- Housing counseling agency [0]
- Court staff [1]
- Plaintiff's counsel [0]
- Other: [0]

27. After a Request for Judicial Intervention (RJI) is filed, when is the first settlement conference typically held? [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Within 60 days [44]
- Within 61--90 days [12]
- Within 91--120 days [2]
- Within 121--150 days [1]
- After more than 150 days [0]
- I don't know. [3]
- Other: [0]

28. Who sends notice to homeowners advising them that a settlement conference has been scheduled? [62 counties responding]

Check all that apply.

- Court/Clerk's Office [60]
- Plaintiff's counsel [0]
- Other:[2]
 - *I don't know* [2]

29. What information is in the notice? [62 counties responding]

Check all that apply.

- Explanation of what a settlement conference is [41]
- Scheduling information for conference (time, date, place) [60]
- Contact information for housing counseling agencies [40]
- Contact information for legal services offices [45]
- Information for a housing counseling appointment scheduled by the Court [5]
- Request that homeowner contact the Court to confirm the settlement conference [26]
- A list of the documents the homeowner is required to bring to the settlement conference [4]
- Other: [4]
 - *I don't know* [2]
 - *Other* [2]

30. If the Court/Clerk's office provides housing counseling providers with copies of homeowner notices/dockets, how far in advance of the settlement conference are they typically provided? [62 counties responding]

Mark only one oval.

- 1--14 days [1]
- 15--30 days [6]
- 31--60 days [13]
- More than 60 days [1]
- I don't know [21]
- Housing counselors don't receive copies of notices/dockets [20]

31. If the Court/Clerk's office provides legal services providers with copies of homeowner notices/dockets, how far in advance of the settlement conference are they typically provided? [62 counties responding]

Mark only one oval.

- 1--14 days [9]
- 15--30 days [9]
- 31--60 days [10]
- More than 60 days [1]
- Legal services providers don't receive copies of notices/dockets [33]

COURT STAFFING OF SETTLEMENT CONFERENCES

32. Who are the mediators that preside over the settlement conferences? [62 counties responding]
(For example, if you have one judge as the mediator, but she occasionally delegates settlement conferences to her law secretary/clerk, the mediator is a “judge” for the purpose of the survey)

Check all that apply.

- Judge [35]
- Attorney Referee [20]
- Judicial Hearing Officer [7]
- Judge's Law Secretary/Court Attorney/Law Clerk [27]
- Clerk's Office Staff [2]
- Other: [0]

33. How many settlement conference mediators are in the county? [60 counties responding]

(For example, if you have one judge as the mediator, but she occasionally delegates settlement conferences to her law secretary/clerk, that is 1 mediator for the purpose of the survey)

Mark only one oval.

- 1 [22]
- 2 [16]
- 3 [10]
- 4 [4]
- 5 [2]
- More than 5 [6]

34. For any given case, which mediator presides over the conference? [62 counties responding]

Mark only one oval.

- We see the same mediator or his/her support staff at each conference [51]
- We see one of the few mediators who handle settlement conferences in the county [10]
- We see a member of staff assigned to the settlement conferences for the day, but this rotates and is not predictable [1]
- Other [0]

35. Is there a dedicated Settlement Conference Part in your county courthouse? [62 counties responding]

According to the Section 202.2(a) of the Uniform Rules, "A part of court is a designated unit of the court in which specified business of the court is to be conducted by a judge or a quasi-judicial officer."

Mark only one oval.

- Yes [26]
- No [30]
- I don't know [6]

36. Has the mediator received training on foreclosure issues? [62 counties responding]

Mark only one oval.

- Yes [18]
- No [4] Skip to question 38.
- I don't know [40] Skip to question 38.

37. If the mediator did receive training on foreclosure issues, who trained them? [18 counties responding]

Check all that apply.

- Court staff [4]
- Homeowner advocates [6]
- Plaintiff advocates [2]
- Local bar association [5]
- I don't know [8]
- Other: [2]

38. Does the court administration ever meet with advocates to discuss systemic issues relating to the settlement conference process? [62 counties responding]

Mark only one oval.

- Yes [14]
- No [41] Skip to question 40.
- I don't know [7] Skip to question 40.

39. If the court administration does meet with advocates to discuss systemic issues about the settlement conference process, do advocates see any changes implemented as a result of the meetings? [14 counties responding]

Mark only one oval.

- Yes [11]
- No [2]
- I don't know [1]

40. Is there a Court Order of Reference or other court order delegating authority to non-judicial staff to conduct settlement conferences? [62 counties responding]

Mark only one oval.

- Yes [1]
- No [23] Skip to question 42.
- I don't know [38] Skip to question 42.

- 41. If there is an order delegating authority to non-judicial staff to conduct settlement conferences, which areas does the Court Order address?** [1 county responding]

Check all that apply.

- Specifies powers and authority of mediator [0]
- Specifies the form of relief the mediator can grant [0]
- Specifies that mediators can make factual findings [0]
- Specifies that mediators can make findings regarding the duty to negotiate in good faith [0]
- Other [1]
 - *I don't know-the order is not available* [1]

STRUCTURE AND CONDUCT OF CONFERENCES

- 42. Assuming the parties are not in a trial plan, forbearance agreement, etc., what is the typical length of time between settlement conference adjournments?** [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Less than one month [3]
- 1--2 months [46]
- 3--5 months [3]
- More than 5 months [2]
- No typical length [7]
- Other: [1]
 - *Unknown* [1]

- 43. Does the court limit the number of conferences or length of time the case is in the settlement conference process?** [60 counties responding]

Mark only one oval.

- Yes [11]
- No [49] Skip to question 46.

- 44. If the court does limit the number of conferences or length of time the cases is in the settlement conference process, are the limits based on a formal policy or an informal limitation?** [12 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Formal policy applied consistently [0]
- Formal policy applied inconsistently [1]
- Informal limitation applied consistently [6]
- Informal limitation applied inconsistently [4]
- Other: [1]

- 45. If there is a limit on the number of conferences or length of time, is it based on the number of conferences or length of time?** [12 counties responding]

Mark only one oval.

- Number of Conferences [8]
- Length of Time [4]

- 46. What is the average number of settlement conferences in a given action in which a homeowner appears with an advocate?** [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- 1--3 [3]
- 4--6 [35]
- 7--10 [15]
- More than 10 [2]
- Other: [7]

47. In cases in which a homeowner appears with an advocate, what is the typical length of time that a case remains in the Settlement Conference process? [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- 1--3 months [0]
- 3--6 months [5]
- 6--12 months [38]
- 12--18 months [10]
- 18--24 months [1]
- More than 24 months [0]
- I don't know [4]
- Other [4]

48. Where do settlement conferences take place? [62 counties responding]

Check all that apply.

- Open courtroom [34]
- Private conference room [41]
- Chambers [22]
- By telephone [12]
- Other:

49. Are parties allowed to appear at the settlement conference by telephone? [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Yes [35]
- No [12] Skip to question 52.
- I don't know. [13] Skip to question 52.
- Other: [2]
 - *Plaintiff's side only* [2]

50. If settlement conferences take place by telephone, in what instances: [37 counties responding]

Check all that apply.

- Sua sponte [7]
- By court direction [18]
- Upon stipulation of both parties [8]
- Upon the request of one party [30]
- Other: [0]

51. If settlement conferences are held by telephone, who is permitted to appear by phone? [38 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Check all that apply.

- Plaintiff [27]
- Plaintiff's counsel [36]
- Defendant [22]
- Defendant's counsel [24]
- Housing counselor [14]
- Other: [3]
 - *Defendant has never requested* [3]

52. Is a court reporter present for settlement conferences? [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Always [15]
- Often [3]
- Sometimes [6]
- Rarely [4]
- Never [34]
- Other: [0]

53. Will a mediator ever meet with one party at a time to discuss potential settlement? [62 counties responding]

Mark only one oval.

- Yes [6]
- No [44]
- I don't know [12]

54. Does the court enforce the requirement that plaintiff appear with settlement authority? [61 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Always [2]
- Often [1]
- Sometimes [18]
- Rarely [23]
- Never [17]
- Other [0]

55. Does the mediator ever require a bank/servicer representative to appear for the conference? [61 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Always [0]
- Often [0]
- Sometimes [25]
- Rarely [30]
- Never [6] Skip to question 57.

56. If the mediator does require a bank/servicer representative to appear, how does the representative appear? [54 counties responding]

Check all that apply.

- In person [46]
- By telephone [24]
- Other:

57. How typical is it that you see per diem/local counsel? [62 counties responding]

Mark only one oval.

- Always [30]
- Often [28]
- Sometimes [4]
- Rarely [0]
- Never [0]

58. How does the mediator issue orders or otherwise memorialize its directives to the parties? [61 counties responding]

Check all that apply.

- Orders [26]
- Letters [24]
- Forms [11]
- The mediator does not issue orders or otherwise memorialize its directives [21]
- Other: [16]
 - *Verbal directive on the record* [3]
 - *Internal notes printed for each conference* [1]
 - Other [12]

[Approximately 30 counties indicated that their counties use more than one mechanism, including verbal directives. Numerous counties reported that the variety depends on the mediator--some use one type of mechanism, others use another or none at all.]

59. Does the mediator determine compliance with the duty to negotiate in good faith within the settlement conference process? [61 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Always [0]
- Often [5]
- Sometimes [9]
- Rarely [19]
- Never [16] Skip to question 61.
- I don't know [8] Skip to question 61.
- Other [4]

60. What form does the mediator's determination take? [37 counties responding]

Check all that apply.

- Order [10]
- Report & Recommendation [6]
- Verbal directive [30]
- Other: [3]

61. How do advocates request a determination of compliance with the duty to negotiate in good faith?
[61 counties responding]

Check all that apply.

- Informal applications [2]
- Evidentiary hearings [3]
- Oral applications [51]
- Formal motion practice [30]
- N/A: Court issues *sua sponte* determinations [12]
- Other:
 - *I don't know* [2]

62. Does someone other than the mediator make the determination of compliance with duty to negotiate in good faith? [62 counties responding]

Mark only one oval.

- No [30]
- Yes, back-up/supervising judge for the settlement conference process [2]
- Yes, IAS judge assigned to case [25]
- Other: [5]
 - Other [4]
 - *I don't know* [1]

63. Does your county have a back-up/supervising judge responsible for overseeing settlement conferences? [62 counties responding]

Mark only one oval.

- Yes [10]
- No [29] Skip to question 65.
- I don't know. [23] Skip to question 65.

64. What is the mechanism for accessing the back-up/supervising judge? [10 counties responding]

Check all that apply.

- Either party can request [5]
- Parties must stipulate [0]
- Mediator can request *sua sponte* [5]
- Mediator must approve request of a party [4]
- Other: [1]
 - *I don't know* [1]

65. Does an IAS judge play any role with respect to settlement conferences? [61 counties responding]

Mark only one oval.

- Yes [28]
- No [17] Skip to question 67.
- N/A. My mediator is an IAS judge. [16] Skip to question 67.

66. If the IAS judge does play a role with respect to settlement conferences, please explain how so [27 counties responding]:

- IAS Judge or their Law Clerk/Court Attorney is the settlement conference mediator [14]
- Case at impasse or escalated case will be conferenced by IAS Judge [2]
- Advocates can request a settlement conference before the judge [3]
- Hears good faith disputes, including but not limited to motions [8]
- Signs settlement conference orders [3]
- Gets involved to resolve legal disputes arising in settlement conferences not conferenced by a Judge [2]
- Conferences case after it is released from the settlement conference part [1]

67. What happens when Defendants try to raise substantive defenses, such as standing, in the context of a settlement conference? [62 counties responding]

Mark only one oval.

- Mediator allows discussion [15]
- Mediator does not allow discussion [24]
- Mediator discusses strengths and weaknesses of parties' respective positions [5]
- I don't know [15]
- Other: [3]

68. What happens when Defendants try to request permission to file a late Answer during a settlement conference? [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Mediator allows discussion [15]
- Mediator does not allow discussion [7]
- Mediator encourages parties to consent to service of a late Answer [4]
- I don't know [28]
- Other [8]
 - *Varies* [1]
 - *Plaintiff's counsel states it has no authority to discuss* [1]
 - *Motion or stipulation required* [5]
 - *Mediator allows limited discussion, but only formally dealt with on Motion* [1]

69. Does the mediator entertain settlement and options other than loan modifications or reinstatements? [62 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Always [15]
- Sometimes [26]
- Rarely [7]
- Never [0]
- I don't know [2]
- I have not tried since the rule changed. [7]
- Other: [5]

70. If no settlement is reached, what happens after a case is released from the settlement conference process? [61 counties responding]

Check all that apply.

- There is a scheduling order setting deadlines or scheduling motions or discovery [11]
- An IAS judge continues conferencing the case [6]
- The case is set for a status conference [4]
- A temporary stay is implemented by the mediator [7]
- A temporary stay is implemented on agreement of both parties [4]
- Other:[43]
 - *Pl file motions at its own pace* [36]
 - *Verbal directive for submission of motions* [2]
 - *Parties set deadlines for submission of motions, etc* [1]
 - *I don't know* [2]
 - *Other* [2]

[Although numerous counties selected more than one option, the vast majority of counties indicating that the next step is for Plaintiff to file motions at its own pace selected only that option.]

71. Is there a mechanism for parties to seek to be restored to the settlement conference process for any reason? [62 counties responding] e.g., change of circumstances, default at conference, improper release, etc.

Mark only one oval.

- Yes [45]
- No [5] Skip to question 74.
- I don't know [12]
- Neither I nor my colleagues have ever attempted to restore a case to the settlement conference. [0] Skip to question 74.

72. If it is possible to be restored to the settlement conference part, under which of the following circumstances is it possible? [45 counties responding]

Check all that apply.

- Improper release from settlement conference [25]
- Change of circumstances [34]
- Borrower has reasonable excuse for default at prior conference [32]
- Other: [7]

73. What are the available mechanisms to be restored to the settlement conference process in your county? [45 counties responding]

Check all that apply.

- Upon stipulation of both parties [23]
- Upon letter to the Court [35]
- Upon motion [28]
- I don't know [2]
- Other: [1]

74. If parties settle with a modification, at what point does the mediator typically mark the case settled? [61 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Once a trial modification is accepted [1]
- Once a permanent modification is accepted, but not yet counter-signed [25]
- Once a permanent modification is accepted and counter-signed [14]
- Once the parties stipulate to the release of the matter [13]
- Other: [8]
 - *Varies by mediator* [1]
 - *After Stipulation or Notice of Discontinuance* [1]
 - *Discontinuance of the action* [1]
 - *If represented, discontinued after modification counter-signed; if Defendant is not represented, varies* [1]
 - *After Permanent modification accepted & the parties stipulate to release* [1]
 - *Varies within county between whether a permanent modification has been countersigned or merely accepted by defendant* [3]

75. If a homeowner is denied a work out option, at which point does the mediator typically release the case from the settlement conferences? [60 counties responding]

Use the "Other" option to explain significant disparities among mediators in the same county ONLY.

Mark only one oval.

- Immediately [4]
- After internal appeal to the servicer is resolved [9]
- After escalation to outside agency (e.g., AG, GSE, HUD) is resolved [1]
- After all retention options have been exhausted (e.g., reapplication with change in circumstances, MAP application, etc.) [35]
- Other [11]
 - *After all retention & non-retention options have been tried [2]*
 - *Depends on each case-if non-retention options seems viable, mediator will keep in settlement conferences [3]*
 - *Varies by mediator [2]*
 - *Varies generally [3]*
 - *After all retentions options have been exhausted that involve only the parties to the action (e.g., not MAP) [1]*

76. How soon after a case is settled do Plaintiffs typically file discontinuance documents? [61 counties responding]

Mark only one oval.

- 0--150 days [46]
- Over 150 days [15]
- Never [0]

77. Do courts enforce the 3408 (g) requirement regarding filing of discontinuance documents within 150 days of settlement? [61 counties responding]

Mark only one oval.

- Yes [20]
- No [41] Skip to question 79.

78. If courts do enforce the 3408(g) requirement regarding filing of discontinuance documents within 150 days of settlement, how so? [17 counties responding]

- *By letter* [6]
- *Case is kept in the settlement conference part (consolidated on Fridays) until discontinued* [1]
- *The case is kept on a monthly calendar call until discontinued* [1]
- *Plaintiff's counsel must update court as to status of discontinuance of settled case when they appear on a different case* [1]
- *Case is restored to the settlement conference calendar if discontinuance is not filed within 60 days* [1]
- *Court schedules "status" appearances in the settlement conference part* [1]
- *Follow up demand by the judge to discontinue* [1]
- *It has not yet been an issue* [1]
- *It has not been an issue due to advocate's initiative* [1]
- *I don't know* [1]
- *N/A* [1]

OTHER

79. Is there a servicer- specific calendar day or time in the settlement conference process? [61 counties responding]

Mark only one oval.

- Yes [7]
- No [54] Skip to question 82.

80. Do you believe the servicer- specific part is more or less effective than the regular settlement conference part? [7 counties responding]

Mark only one oval.

- More effective [3]
- Less effective [0]
- About the same [3] Skip to question 82.
- I don't know [1] Skip to question 82.

81. If the servicer -specific part is more or less effective than the regular settlement conference part, please explain how so [3 counties responding. *Responses included the following:*]

- *The presence of an underwriter takes away the middle man, i.e. plaintiff's counsel.*
- *Access to high-level servicing contacts within the servicer.*
- *Access to different departments and individuals at the servicer who value settling the case.*
- *Documents can be sent to servicer directly with receipt confirmed.*
- *Homeowners/advocates can submit documents and receive missing document requests immediately, instead of waiting weeks for missing documents letter.*
- *Decisions are made more quickly.*
- *Increase in success when seeking to obtain waivers of requirements or other alternatives to achieve resolutions.*

82. Please describe any other issue faced by homeowners in the settlement conference process in your county. [34 counties responding. *Responses included:*]

- *No other issues* [6 counties]
- *Lack of assistance from organizations who can provide non-legal solutions to foreclosure, including loss-mitigation and /or refinance applications* [1 county]
- *There is no assistance for pro se homeowners (e.g., attorneys of the day, help desk, pro bono counsel, etc.)* [1 county]
- *Large shadow docket* [1 county]
- *Delays in filing RJL, causing delay in scheduling of first settlement conference, but not to the level of creating a shadow docket* [1 county]
- *Plaintiff's counsel lacks information about the case and /or does not have authority to settle (includes but not limited to per diem/local counsel)* [6 counties]
- *Lack of continuity in counsel appearing for Plaintiff* [1 county]
- *Homeowner required to submit duplicative applications* [3 counties]
- *Presence of factors that make a workout unfeasible (e.g., underwater property, income too high)* [2 counties]
- *Interest accrues on the mortgage during pendency of settlement conferences* [1 county]
- *Servicer attorney's fees (e.g., high, difficulty getting review of fees)* [4 counties]
- *Conference held in open courtroom (e.g., no privacy, intimidating to pro se borrowers, hard to hear, mediator on bench makes it difficult for disabled homeowners to participate)* [4 counties]
- *Arrival at courthouse confusing for homeowners (e.g., Court staff/personnel do not provide any direction to homeowners when they appear for a settlement conference; check-in process is unclear)* [1 county]
- *Language access (e.g., little or no signage in language other than English; problem getting interpreter for languages other than Spanish)* [3 counties]
- *No continuity of mediator* [1 county]

Question 82 continued:

- *Adjournments between conferences are too long (e.g., long adjournments between conferences; conferences adjourned indefinitely) [2 counties]*
- *Mediators treat pro se homeowners less favorably than represented homeowners (e.g., fewer conferences) [2 counties]*
- *Homeowners default at first conference and legal services has difficulty reaching defendants prior to first conference [3 counties]*
- *Cases released from settlement conferences prematurely and/or improperly (e.g., applications/appeals still pending; waiting for decision on MAP application; mediators release of “too many” conferences, mediators do not hold conferences to explore non-retention options; mediators make own judgment re likelihood of successful loss mitigation rather than await servicer’s loss mitigation decision; mediators implement own standards for release and are inconsistent within a single county) [2 counties]*
- *Delays in or failure of Court to refer defendants to legal services (e.g., Court inconsistently refers defendants to legal services court clinic; Court does not refer defendants to legal services until time to file an Answer has lapsed, for example, at the first settlement conference) [3 counties]*
- *No housing counseling service to assist homeowners with modification applications (e.g., housing counseling service only assists with budgets) [1 county]*
- *An heir to a deceased borrower who is the “defendant who resides in the property” is not afforded settlement conferences [1 county]*
- *Delays between the filing of the RJL and the first real conference are too long [1 county]*
- *Concerns regarding mediator (e.g, sits on same side of table as Plaintiff’s counsel, yells at homeowners; does extra-judicial research on potential title issues not raised by Plaintiff; some referees are more knowledgeable than others re modifications/policy/banking, etc.; inconsistent decisions among mediators in county) [4 counties]*
- *Insufficient legal services representation for defendants and no pro bono attorneys to assist [1 county]*
- *Court fails to advise defendants to consult with attorney about filing an Answer [1 county]*
- *Issues with Court’s settlement conference notice (e.g., notice is cramped; notice does not contain case caption, name of Plaintiff, or contact info for Plaintiff’s counsel) [2 counties]*
- *Court does not follow local rules [1 county]*
- *Court does not enforce 3408 (e.g., obligation to negotiate in good faith) [5 counties]*
- *Lack of mediator’s authority (e.g., no authority to enforce good faith requirement, HAMP rules or CFPB regulations; no mandate for servicers to offer modifications) [2 counties]*
- *Homeowners wait a long time day of conference to be seen (e.g. some homeowners leave before called because must go to work, pick up a child from school) [1 county]*
- *Issues with mandatory e-filing [1 county]*
- *Effects of delay are borne by homeowner (e.g., even if delays are result of servicer’s conduct, Court may release case from settlement conference in an effort to move case along) [1 county]*
- *Plaintiff’s counsel at other calendar calls, delaying start of settlement conference [1 county]*

Question 82 continued:

- *Difficult to obtain detailed reason for denial* [1 county]
- *Plaintiff engages in ex-parte communications with Court (e.g., summarizing history of case; informing court of “settlement” or modification)* [1 county]
- *Difficult to see IAS/supervising/backup judge* [2 counties]
- *Problematic servicer-specific part (e.g., defendants given unrealistic and rigid time frames; servicer representative makes oral determination at conference without written explanation and written appeals not considered)* [1 county]

83. Please describe any other issue faced by advocates in the settlement conference process in your county that has not been addressed in this survey. [28 counties responding]

- *Per diem/local counsel lack authority to settle case or knowledge about case (e.g., lack of authority to settle case, homeowners advocates waste time waiting for per diem counsel to arrive; lack of knowledge about case)* [6 counties]
- *Lack of authority to settle case, not necessarily restricted to per diem/local counsel* [1 county]
- *Insufficient competent counsel for defendants (e.g., lack of adequate counsel in county; “scammers” and private attorneys not doing their jobs)* [2 counties]
- *Plaintiff’s attorney’s fees are inflated* [1 county]
- *Plaintiff unprepared for conference (e.g., failure to bring written reinstatement & payoff letters to initial conference; failure to bring proof of ownership of note)* [2 counties]
- *Conferences are not on the record or otherwise memorialized* [2 counties]
- *Owners of manufactured homes are not entitled to the same foreclosure protections* [2 counties]
- *Rotating mediators for the same case* [1 county]
- *Homeowners don’t understand what happens after case released from settlement conferences* [1 county]
- *Lack of good faith determinations or enforcement of 3408(f) (e.g., even after formal motion practice)* [2 counties]
- *Plaintiff’s counsel does not comply with court directives and faces no consequences therefore* [1 county]
- *Mediators do not encourage Plaintiffs to accept late Answers* [1 county]
- *Mediator’s settlement conference calendar is not consolidated, making it difficult for advocates to cover in light of high homeowner default rate* [1 county]
- *Servicers contact borrowers directly* [1 county]
- *Unreasonable delay by servicers is accepted by Court* [1 county]
- *Mediator substitutes his/her judgment for advocate’s and suggests what advocate’s strategy should be* [1 county]
- *Long adjournments between conferences* [1 county]
- *Servicers claim not to have documents homeowner submitted* [1 county]

Question 83 continued:

- *Delays caused by Plaintiff's counsel on date of conference by checking-in late or leaving the Part for several hours after checking in* [2 counties]
- *Cases are improperly released (e.g., after improper denial)* [1 county]
- *Pressure put on advocates to move case out of the settlement conferences* [1 county]
- *Lack of pre-foreclosure loan modification resources in county* [1 county]
- *Court pressure to move cases out of settlement conferences* [1 county]
- *Mediator lacks power to impose remedies/no clear process to request relief in face of Plaintiff misconduct (e.g., issues a wrongful denial, causes significant delay in process, delays its review of modification application)* [2 counties]
- *Plaintiff's attorney's fees and costs: judges should ensure fees and costs are reasonable and actually incurred when a case is settled in the settlement conference process* [1 county]
- *Unknown (i.e., small county and infrequent appearance there)* [1 county]
- *No other issues* [3]

84. In your opinion, how effectively are settlement conferences used in your county? [57 counties responding]

- Very effective/Effective [34], for example:
 - *Court gives defendants time to go through modification process*
 - *Mediator has "little tolerance" when parties do not meet deadlines*
 - *Mediator makes decisions on whether Plaintiff has acted in good faith.*
 - *Court refers cases to legal services*
 - *Mediator issues directives for Plaintiff to make decision on application*
 - *Frequently favorable results, even for homeowners who were denied when they applied on their own prior to settlement conference process.*
 - *Servicers and their counsel are more responsive in settlement conferences than in negotiations outside of settlement conferences.*
 - *Mediators identify when servicer/Plaintiff's counsel is being unreasonable, evasive, or not complying with prior directives.*
 - *Conferences helpful to obtain modification in cases in which the servicer does not participate in any enforceable modification program*
 - *Conferences scheduled once a month*
 - *Mediators are knowledgeable about the substantive area*
 - *Mediation open to keeping case in conference until advocate satisfied with amount of Plaintiff's attorney's fees*
 - *Mediator pressures lenders/servicers to comply and move reviews along*
 - *Effective because IAS judge handles case from the start*
 - *"The process has saved many homes."*

Question 84 continued:

- Very effective/Effective [32], for example:
 - *“The referee is not necessarily pro-homeowner, but she is very pro-3408 in that she really believes in the underlying purpose of the statute and holds the parties to task in making the conferences meaningful.”*
 - *Mediator often directs banks to provide detailed explanation of decisions.*
 - *“If there's a chance at getting a loan modification, the conferences work like a charm by pausing the foreclosure process.”*
 - *Mediator's conference Orders contain deadlines*
- Depends on the mediator [3 counties], for example:
 - *Not all mediators “interested in holding the bank to the good faith negotiation standard”*
 - *Some mediators within a county appear disinterested in settlement conference process*
 - *Some mediators' conferences are more effective than others'*
- It depends/Mixed [9 counties], for example:
 - *Effective in giving additional time for application process to be completed; only partially effective when there are denials that could legitimately be challenged; and ineffective for reviewing attorney's fees and costs*
 - *Effective when advocate present; less effective for pro se homeowners*
 - *Effective as a way for legal services to contact homeowners who don't default*
- Room for improvement [7 counties], for example:
 - *Would be improved if more authority granted to mediators*
 - *Should be used more to pursue deeds in lieu and short sales*
 - *Unreasonable delays by servicers and plaintiff's counsel should not be tolerated*
 - *Court should have firm commitment to ensure good faith negotiations, whether by giving mediators authority to issue orders tolling interest or to have a supervising judge able to adjudicate good faith complaints*
 - *“[I]n some cases[,] the conferences are [m]ore show than substance”*
 - *Conferences are very difficult for pro se homeowners*
 - *No duplicative missing documents letters should be tolerated, as clients are harassed with such letters*
 - *Banks should be required to adhere to CFPB rules*
 - *Mediators should be able to make a determination as to whether parties negotiated in good faith*
 - *Absence of written record to show what happened at prior conferences is an issue*
 - *“There is room for improvement, but they are good to have.”*
 - *Plaintiff's counsel should be prepared.*

Question 84 continued:

- Not effective [4 counties], for example:
 - *Mediators are unwilling to keep cases in conferences to “fully explore settlement options”*
 - *Mediators are unwilling to keep cases in conferences to explore options other than loan modifications*
 - *Mediators are unwilling “to ensure that banks meaningfully participate”, which “renders conferences effectively useless in many cases.*

85. Are there settlement conference practices in your county that you would recommend be implemented by courts in other counties? If so, please explain. [33 counties responding]

- *Having one mediator assigned to a case, who oversees each conference* [4 counties]
- *Court does not permit counsel or bank representatives to appear by telephone* [1 county]
- *Court-based intake clinic in which mediators refer defendants to clinic* [1 county]
- *Waiver of homeowner’s appearance after first conference (although it should not be required if represented)* [1 county]
- *No official limit on number of conferences* [1 county]
- *Borrowers are given time (e.g., multiple conferences) to explore workout options* [1 county]
- *Helpful court staff in the settlement conference part* [1 county]
- *Close working relationship between housing counselors and legal services* [6 counties], for example
 - *Housing counselors assist pro se parties*
 - *Housing counselors prepare modification applications for defendants represented by legal services, freeing up legal services’ time to draft answers, appear in court, and file/respond to motions. Partnership allows legal services to represent most homeowners in county.*
- *Case kept in settlement conferences until modification fully executed and provided to defendant* [2 counties]
- *Mediator keeps case in settlement conferences after permanent modification is signed while exploration of whether plaintiff’s counsel is overcharging attorney’s fees.* [1 county]
- *Mediators refer problematic cases directly to legal services* [1 county]
- *Short adjournments between conference allows constant oversight of case until settlement or release* [2 counties]
- *Court staff call cases in order based on when both counsel present, which can expedite the docket* [1 county]
- *“First Time” conference process in which legal services and housing counselors make a presentation to pro se defendants on how to represent themselves in the process* [1 county]
- *Counsel submit pre-conference written reports to the Court 1 week in advance* [1 county]
- *Homeowners get a decision on merits of modification application, regardless of time* [1 county]

Question 85 continued:

- *Homeowner given time to correct missing documents [1 county]*
 - *Rather than being released for missing documents, the court gives short adjournment to complete what is needed and will mark the case "final for submission", giving the homeowner another chance while allowing Plaintiff's counsel to feel like they have made progress.*
- *Memorialization of settlement conferences/Signed Orders [2 county], for example:*
 - *Mediator issues summary and scheduling order at each conference signed by the IAS judge summarizing the events of the conference and the parties' obligations by the next conference. The Order requires all parties and counsel present to initial acknowledging their obligation to negotiate in good faith. Mediator can impose sanctions for violations of the Order.*
- *Multiple court staff are assigned to sit in the settlement conference part on a regular basis (e.g., 2-5 days per week) [1 county]*
- *Lack of clear procedures [1 county]*
- *Involvement of IAS Judge from beginning of case [1 county]*
- *Enforcement of 3408 [1 county]*
- *Good Faith motion practice [1 county]*
 - *The use of orders to show cause by the court to keep parties negotiating in good faith*
- *Mediator gives overview of process to defendant at the first conference [1 county]*
- *Strong Part Rules [1 county]*
- *Don't know [5]*

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