Rule 3408. Mandatory settlement conference in residential foreclosure actions. (a) 1. Except as provided in paragraph two of this subdivision, in any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: (i) determining 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, including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or (ii) whatever other purposes the court deems appropriate.

2. (i) Paragraph one of this subdivision shall not apply to a home loan secured by a reverse mortgage where the default was triggered by the death of the last surviving borrower unless:

(A) the last surviving borrower's spouse, if any, is a resident of the property subject to foreclosure; or

(B) the last surviving borrower's successor in interest, who, by bequest or through intestacy, owns, or has a claim to the ownership of the property subject to foreclosure, and who was a resident of such property at the time of the death of such last surviving borrower.

(ii) The superintendent of financial services may promulgate such rules and regulations as he or she shall deem necessary to implement the provisions of this paragraph.

(b) At the initial conference held pursuant to this section, any defendant currently appearing pro se, shall be deemed to have made a motion to proceed as a poor person under section eleven hundred one of this chapter. The court shall determine whether such permission shall be

granted pursuant to standards set forth in section eleven hundred one of this chapter. If the court appoints defendant counsel pursuant to subdivision (a) of section eleven hundred two of this chapter, it shall adjourn the conference to a date certain for appearance of counsel and settlement discussions pursuant to subdivision (a) of this section, and otherwise shall proceed with the conference.

(c) At any conference held pursuant to this section, the plaintiff and the defendant shall appear in person or by counsel, and each party's representative at the conference shall be fully authorized to dispose of the case. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant. Where appropriate, the court may permit a representative of the plaintiff or the defendant to attend the settlement conference telephonically or by video-conference.

(d) Upon the filing of a request for judicial intervention in any action pursuant to this section, the court shall send either a copy of such request or the defendant's name, address and telephone number (if available) to a housing counseling agency or agencies on a list designated by the division of housing and community renewal for the judicial district in which the defendant resides. Such information shall be used by the designated housing counseling agency or agencies exclusively for the purpose of making the homeowner aware of housing counseling and foreclosure prevention services and options available to them.

(e) The court shall promptly send a notice to parties advising them of the time and place of the settlement conference, the purpose of the conference and the requirements of this section. The notice shall be in a form prescribed by the office of court administration, or, at the discretion of the office of court administration, the administrative judge of the judicial district in which the action is pending, and shall advise the parties of the documents that they shall bring to the conference.

1. For the plaintiff, such documents shall include, but are not limited to, (i) the payment history; (ii) an itemization of the amounts needed to cure and pay off the loan; (iii) the mortgage and note or copies of the same; (iv) standard application forms and a description of

loss mitigation options, if any, which may be available to the defendant; and (v) any other documentation required by the presiding judge. If the plaintiff is not the owner of the mortgage and note, the plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note. For cases in which the lender or its servicing agent has evaluated or is evaluating eligibility for home loan modification programs or other loss mitigation options, in addition to the documents listed above, the plaintiff shall bring a summary of the status of the lender's or servicing agent's evaluation for such modifications or other loss mitigation options, including, where applicable, a list of outstanding items required for the borrower to complete any modification application, an expected date of completion of the lender's or servicer agent's evaluation, and, if the modification(s) was denied, a denial letter or any other document explaining the reason(s) for denial and the data input fields and values used in the net present value evaluation. If the modification was denied on the basis of an investor restriction, the plaintiff shall bring the documentary evidence which provides the basis for the denial, such as a pooling and servicing agreement.

2. For the defendant, such documents shall include, but are not limited to, if applicable, information on current income tax returns, expenses, property taxes and previously submitted applications for loss mitigation; benefits information; rental agreements or proof of rental income; and any other documentation relevant to the proceeding required by the presiding judge.

(f) Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including but not limited to a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation, if possible. Compliance with the obligation to negotiate in good faith pursuant to this section shall be measured by the totality of the circumstances, including but not limited to the following factors:

1. Compliance with the requirements of this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the settlement conference process;

2. Compliance with applicable mortgage servicing laws, rules, regulations, investor directives, and loss mitigation standards or options concerning loan modifications, short sales, and deeds in lieu of foreclosure; and

3. Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the settlement conference with authority to fully dispose of the case, avoiding prosecution of foreclosure proceedings while loss mitigation applications are pending, and providing accurate information to the court and parties.

Neither of the parties' failure to make the offer or accept the offer made by the other party is sufficient to establish a failure to negotiate in good faith.

(g) The plaintiff must file a notice of discontinuance and vacatur of the lis pendens within ninety days after any settlement agreement or loan modification is fully executed.

(h) A party to a foreclosure action may not charge, impose, or otherwise require payment from the other party for any cost, including but not limited to attorneys' fees, for appearance at or participation in the settlement conference.

(i) The court may determine whether either party fails to comply with the duty to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to subdivisions (j) and (k) of this section, either on motion of any party or sua sponte on notice to the parties, in accordance with such procedures as may be established by the court or the office of court administration. A referee, judicial hearing officer, or other staff designated by the court to oversee the settlement conference process may hear and report findings of fact and conclusions of law, and may make reports and recommendations for relief to the court concerning any party's failure to negotiate in good faith pursuant to subdivision (f) of this section.

(j) Upon a finding by the court that the plaintiff failed to negotiate in good faith pursuant to subdivision (f) of this section, and order remedies pursuant to this subdivision and subdivision (k) of this

section the court shall, at a minimum, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the plaintiff, and where appropriate, the court may also impose one or more of the following:

1. Compel production of any documents requested by the court pursuant to subdivision (e) of this section or the court's designee during the settlement conference;

2. Impose a civil penalty payable to the state that is sufficient to deter repetition of the conduct and in an amount not to exceed twenty-five thousand dollars;

3. The court may award actual damages, fees, including attorney fees and expenses to the defendant as a result of plaintiff's failure to negotiate in good faith; or

4. Award any other relief that the court deems just and proper.

(k) Upon a finding by the court that the defendant failed to negotiate in good faith pursuant to subdivision (f) of this section, the court shall, at a minimum, remove the case from the conference calendar. In considering such a finding, the court shall take into account equitable factors including, but not limited to, whether the defendant was represented by counsel.

(l) At the first settlement conference held pursuant to this section, if the defendant has not filed an answer or made a pre-answer motion to dismiss, the court shall:

1. advise the defendant of the requirement to answer the complaint;

2. explain what is required to answer a complaint in court;

3. advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and

4. provide information about available resources for foreclosure prevention assistance.

At the first conference held pursuant to this section, the court shall also provide the defendant with a copy of the Consumer Bill of Rights provided for in section thirteen hundred three of the real property actions and proceedings law.

(m) A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule 320 of the civil practice law and rules, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer.

(n) Any motions submitted by the plaintiff or defendant shall be held in abeyance while the settlement conference process is ongoing, except for motions concerning compliance with this rule and its implementing rules.