
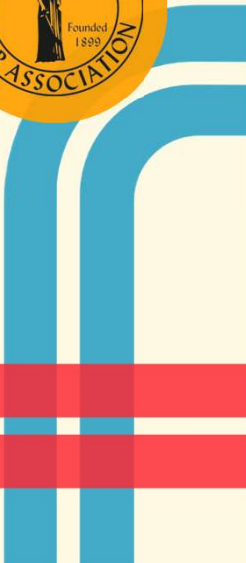


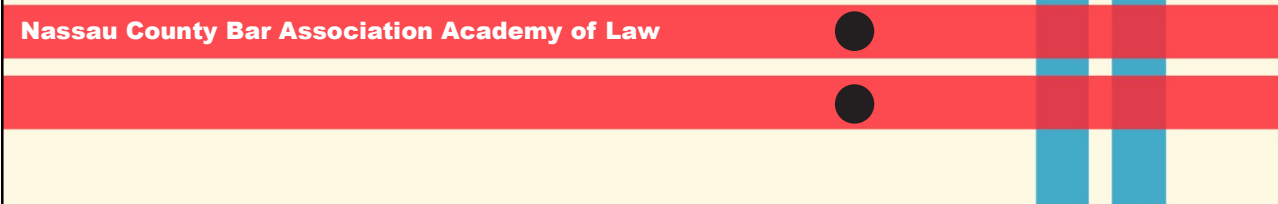
RESIDENTIAL MORTGAGE FORECLOSURE PROCESS IN NEW YORK


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Nassau County Bar Association

Nassau County Bar Association Academy of Law





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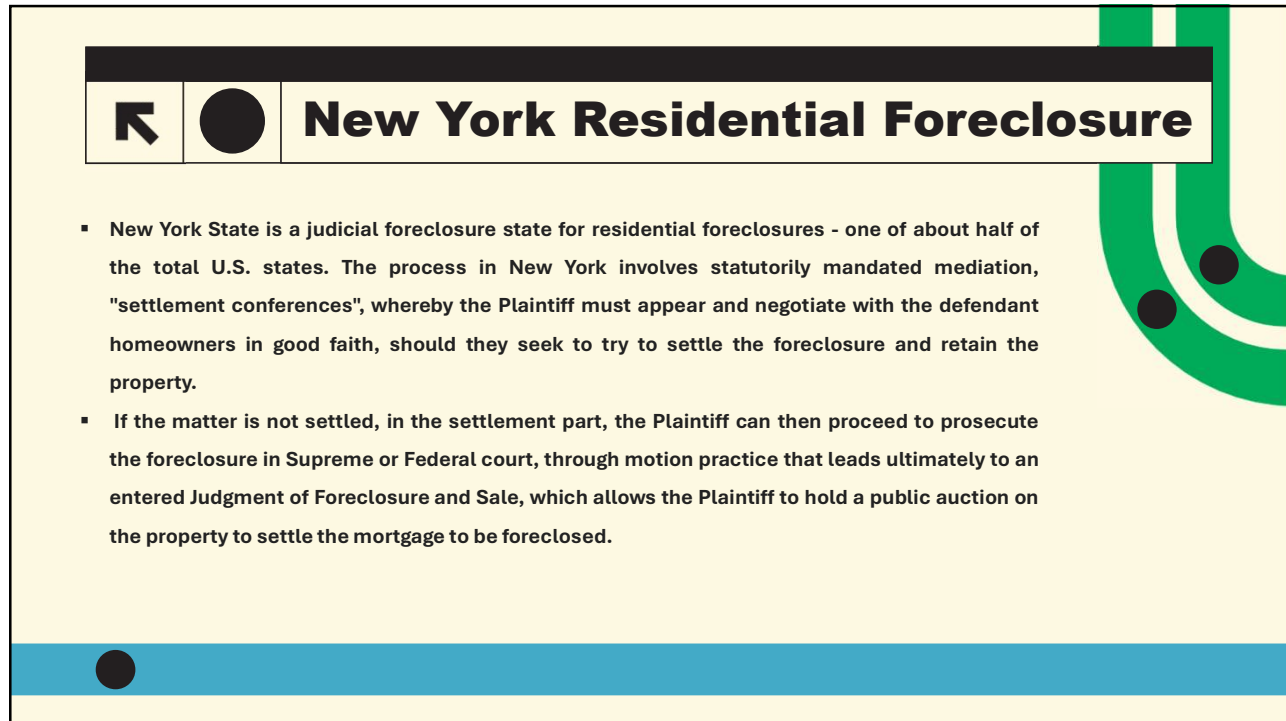



Foreclosure: a term simplified:

- Foreclosure is a legal process that forces the sale of a home to cover a debt.
- Foreclosure is when a lender uses a legal process to force the sale of a property (like a home) to cover a debt.
- This can happen when someone takes out a mortgage to buy a home and then stops making payments (defaults on the mortgage).
- Residential mortgage foreclosure is the remedy a bank/lender has when the borrower on the mortgage stops making payments (goes into default).
- A tax lien foreclosure is when taxing municipalities do not receive tax payments, and then seek to foreclose on the property to satisfy their tax lien judgments. The process is similar but also distinct from residential mortgage foreclosure. There are different procedures for tax lien foreclosures in different NY counties throughout the state.

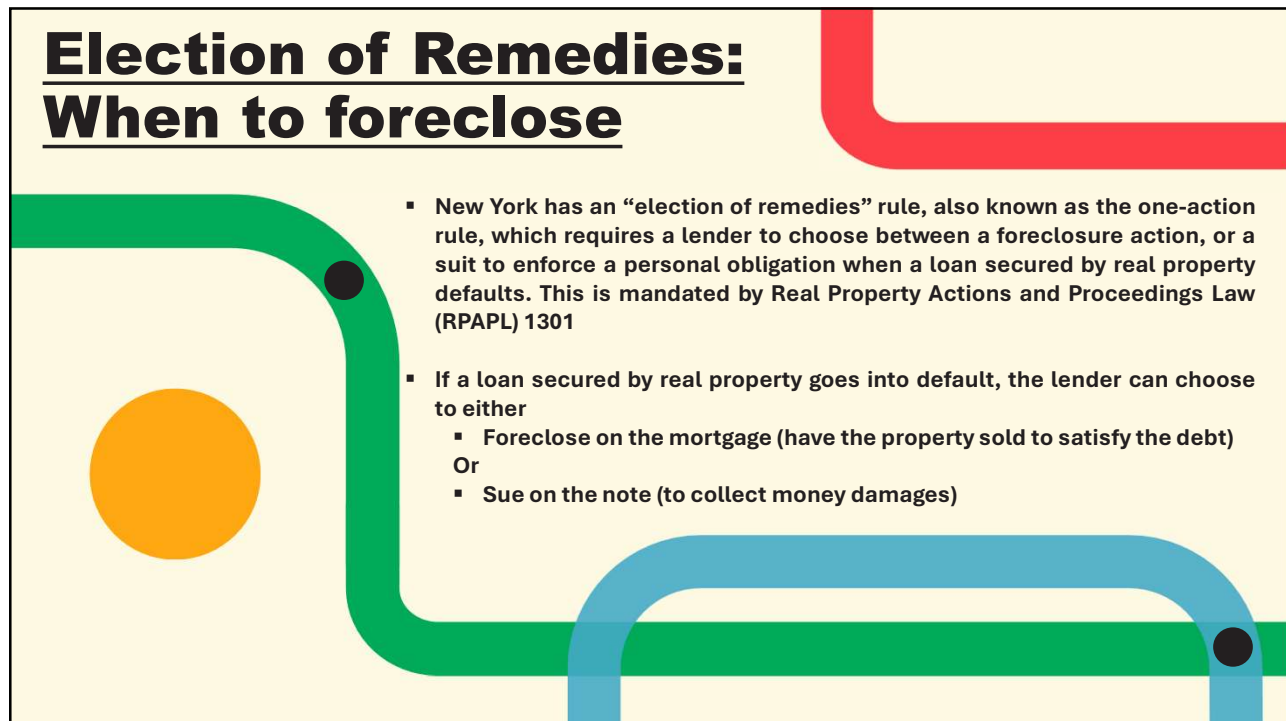
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New York Residential Foreclosure

- New York State is a judicial foreclosure state for residential foreclosures - one of about half of the total U.S. states. The process in New York involves statutorily mandated mediation, "settlement conferences", whereby the Plaintiff must appear and negotiate with the defendant homeowners in good faith, should they seek to try to settle the foreclosure and retain the property.
- If the matter is not settled, in the settlement part, the Plaintiff can then proceed to prosecute the foreclosure in Supreme or Federal court, through motion practice that leads ultimately to an entered Judgment of Foreclosure and Sale, which allows the Plaintiff to hold a public auction on the property to settle the mortgage to be foreclosed.

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Election of Remedies: When to foreclose

- New York has an "election of remedies" rule, also known as the one-action rule, which requires a lender to choose between a foreclosure action, or a suit to enforce a personal obligation when a loan secured by real property defaults. This is mandated by Real Property Actions and Proceedings Law (RPAPL) 1301
- If a loan secured by real property goes into default, the lender can choose to either
 - Foreclose on the mortgage (have the property sold to satisfy the debt)
 - Or
 - Sue on the note (to collect money damages)

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Six-year Statute of Limitations

- New York has a six-year statute of limitations (SOL) on foreclosure actions
- The six-year SOL begins when the lender accelerates the debt (starts the foreclosure action and calls the entire debt due and owing)
- Acceleration is the commencement of the foreclosure action against the borrower
- The lender/Plaintiff cannot file a new action on the same default after the six-year period has elapsed
- A lender/Plaintiff's voluntary discontinuance (due to reinstatement, loan modification, or law firm/lender decision), can keep the six-year SOL running

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- The SOL bars recovery of only installments (monthly mortgage payments) that became due more than six-years prior to the commencement of the action
- Recovery of payments due within the six-year period is permitted—thus a Plaintiff can commence an action which has not yet been commenced, despite being on a default older than six years old, if they seek only to collect the payments due within the six-years of acceleration (commencement of the foreclosure action)
- The SOL can be tolled by the Court as a punitive measure against Plaintiffs who do not act in good faith in foreclosure settlement conferences

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FAPA

Foreclosure Abuse Prevention Act (2022)

- The Foreclosure Abuse Prevention Act (FAPA) was signed into law by Gov. Kathy Hochul in 2022 and was legislatively intended to prevent lenders/Plaintiffs from extending the statute of limitations through unilateral actions (related to stopping and starting the acceleration of the debt, to extend the ability to prosecute the foreclosure and collect on the debt outside the six-year period)
- FAPA has been heavily litigated since it was enacted
- New York courts have issued differing opinions about whether the statute applies retroactively to cases prior to its enactment and whether retroactive application is unconstitutional

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Foreclosures are complex causes of action

- **Residential foreclosures span Supreme, Federal and District Court**

Most residential foreclosure actions are brought in Supreme Court of the County where the property to be foreclosed is located.

Some foreclosures are brought in Federal court through diversity jurisdiction (lender is from out of state and the amount in controversy is over the required amount of \$75,000.00)

- **Residential foreclosures are often intertwined with other causes of action, including:**
 - bankruptcy,
 - consumer debt,
 - matrimonial,
 - family,
 - Surrogate/probate,
 - and other real estate issues, including title issues or issues with prior recordings of mortgages against the property or satisfactions of those mortgages.

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Path to Foreclosure Commencement in New York

Borrower stops making mortgage payments

Lender retains New York foreclosure counsel

**90 day pre-foreclosure notice is sent –
RPAPL 1304**

**Foreclosure counsel files summons & complaint
and lis pendens against the property to be foreclosed**

**Service is commenced upon all borrowers,
residents/tenants, and subordinate mortgages/junior lienholders**

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RPAPL 1303- required prior notices:

New York's Real Property Actions and Proceedings Law (RPAPL 1303) The foreclosing party in a mortgage foreclosure action, involving residential property, shall provide notice to:

- (a) Any mortgagor if the action relates to an owner-occupied one-to-four family dwelling; and**
- (b) Any tenant of a dwelling unit**

RPAPL 1303 prescribes specific language that must be used in a notice that has to be delivered with the foreclosure summons and complaint

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RPAPL 1304- required prior notices:

New York's Real Property Actions and Proceedings Law (RPAPL 1304) requires lenders to send borrowers written notices at least 90 days before initiating a foreclosure action



- **The statute prescribes specific language and size 14 font, which must be used by the lender in their pre-foreclosure notice**
- **The notice must state that the loan is in default, and include the days in default and the amount of the default**
- **The notice must also be sent to reverse mortgage borrowers in default**
- **The notice states in plain language that there is free help available**

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RPAPL 1304- REQUIRED NOTICE LANGUAGE (CONT.)



- **Borrower stops making payments**
 - **After borrower misses 3 months or 90 days of payments, the lender sends a requisite 90-day pre-foreclosure notice, pursuant to RPAPL 1304**
 - **Under RPAPL 1306, the notice must be filed with the NYS Department of Financial Services within three days of mailing the 90 day pre-foreclosure notice**
 - **If the notices are not sent, or the proof of filing is not available or states a date outside of the three day period, the lender may not be able to successfully bring a foreclosure action.**

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		<h2 data-bbox="483 323 1292 369">Foreclosure summons & complaint</h2>
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- **After the borrower's default in payments and the sending of the required notices, the lender can commence the foreclosure action**
- **For the Plaintiff to prove a prima facie case for a mortgage foreclosure, the Plaintiff must establish:**
 - **1- the mortgage**
 - **2-the unpaid note**
 - **3- evidence of default**
- **If the homeowner defendant raises certain defenses, additional proof may need to be submitted by the Plaintiff to prove their prima facie case.**

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		<h2 data-bbox="526 1241 1300 1283">Next up after the summons & complaint: RJI</h2>
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- **After service of the summons & complaint is completed on all necessary parties, the lender/Plaintiff's firm will file a Request for Judicial Intervention (RJI), advising the Court that it is a residential foreclosure action and that the Court must schedule a mandatory settlement conference, pursuant to CPLR 3408**
- **Some counties have "bulk conference" days for lender/mortgage servicers. If the RJI is filed in these counties, it may be added to a bulk conference calendar date, which is a date set by the Court in advance for all cases from one Plaintiff/lender/servicer**

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		<h2>CPLR 3408 – PURPOSE AND SCOPE OF CONFERENCE</h2>
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- **3408 applies to residential home loans- eligibility for the conference part depends on if the borrower resides at the property to be foreclosed.**
- **The Court shall hold a mandatory conference within sixty days after the date when proof of service (Affidavit of Service) is filed with the County Clerk ... “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, 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, and for whatever purposes the court deems appropriate”**

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		CPLR 3408 – DOCUMENTS TO BRING TO CONFERENCE
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- 3408 provides the following as to what the parties must do and bring to the conference appearance:
 - (e) the Court shall promptly send a notice to the parties advising them of the time and the 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... [and it] shall advise the parties of the documents they should bring to the conference.
 - For the **Plaintiff**, such documents should include, but are not limited to, payment history, an itemization of the amounts needed to cure and pay off the loan, and the mortgage and note.
 - For the **Defendant**, such documents should include, but are not limited to, proof of current income such as the most recent two pay stubs, most recent tax return, and most recent property tax statements.

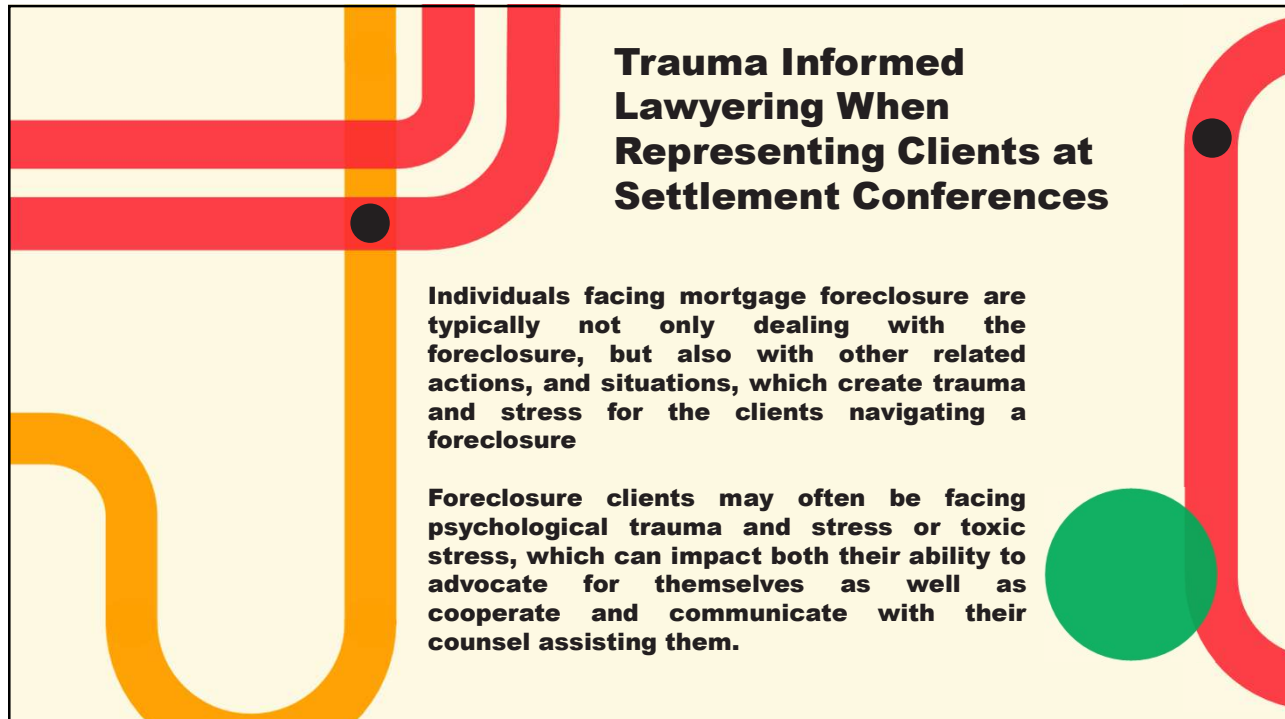
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		CPLR 3408 – GOOD FAITH NEGOTIATION STANDARD
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3408 (f) Requires “both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.

This is interpreted to mean that both sides must comply with court deadlines, provide all information requested, and work together to determine if resolution is available

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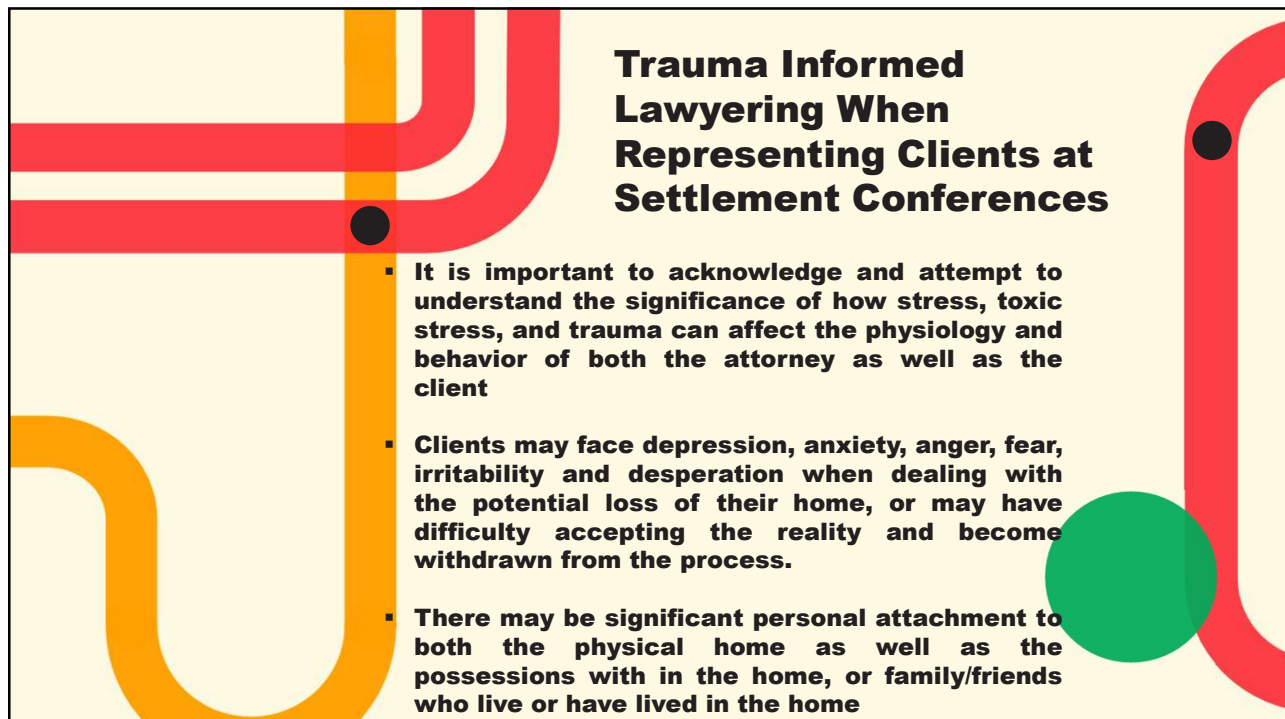


Trauma Informed Lawyering When Representing Clients at Settlement Conferences

Individuals facing mortgage foreclosure are typically not only dealing with the foreclosure, but also with other related actions, and situations, which create trauma and stress for the clients navigating a foreclosure

Foreclosure clients may often be facing psychological trauma and stress or toxic stress, which can impact both their ability to advocate for themselves as well as cooperate and communicate with their counsel assisting them.

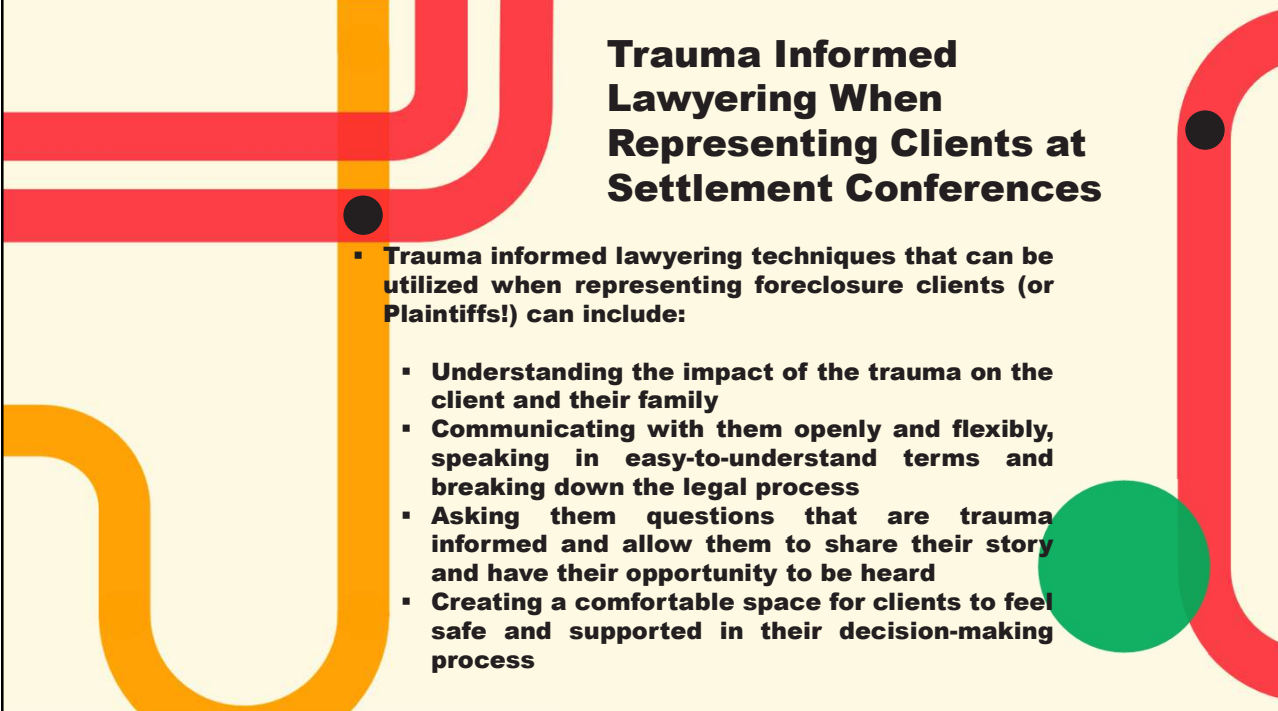
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Trauma Informed Lawyering When Representing Clients at Settlement Conferences

- It is important to acknowledge and attempt to understand the significance of how stress, toxic stress, and trauma can affect the physiology and behavior of both the attorney as well as the client
- Clients may face depression, anxiety, anger, fear, irritability and desperation when dealing with the potential loss of their home, or may have difficulty accepting the reality and become withdrawn from the process.
- There may be significant personal attachment to both the physical home as well as the possessions with in the home, or family/friends who live or have lived in the home

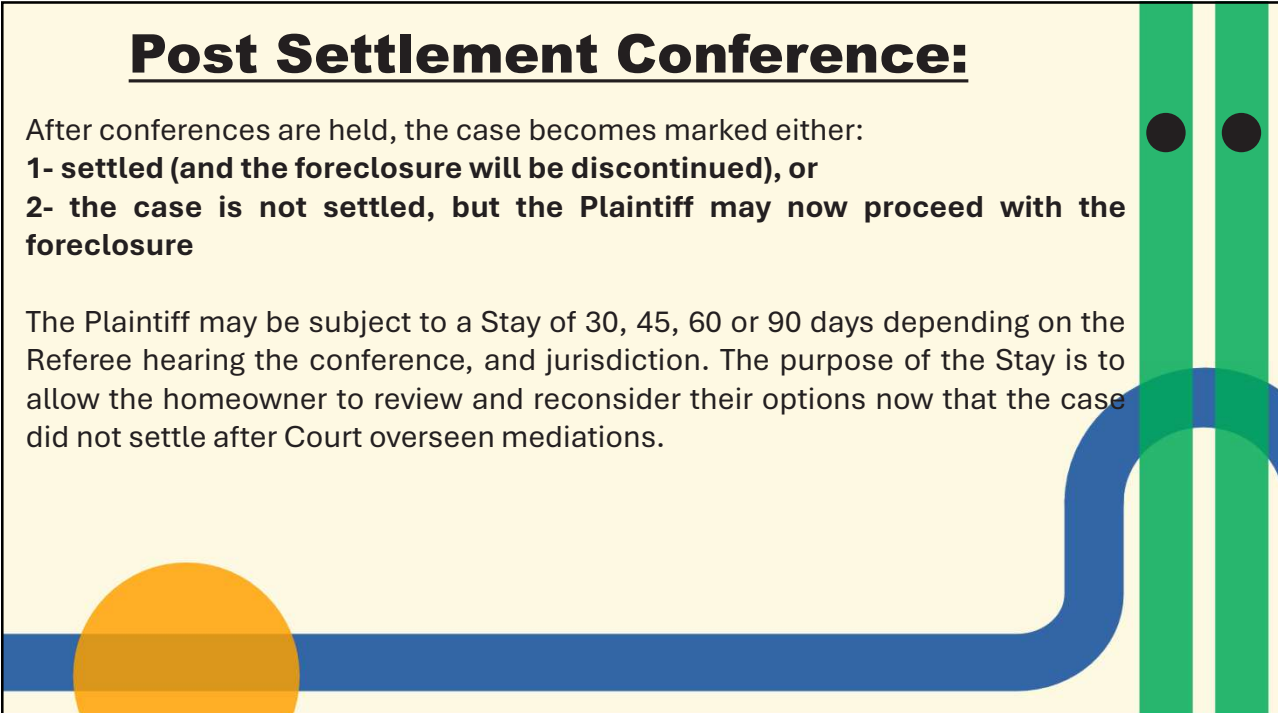
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Trauma Informed Lawyering When Representing Clients at Settlement Conferences

- **Trauma informed lawyering techniques that can be utilized when representing foreclosure clients (or Plaintiffs!) can include:**
 - **Understanding the impact of the trauma on the client and their family**
 - **Communicating with them openly and flexibly, speaking in easy-to-understand terms and breaking down the legal process**
 - **Asking them questions that are trauma informed and allow them to share their story and have their opportunity to be heard**
 - **Creating a comfortable space for clients to feel safe and supported in their decision-making process**

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Post Settlement Conference:

After conferences are held, the case becomes marked either:

- 1- settled (and the foreclosure will be discontinued), or**
- 2- the case is not settled, but the Plaintiff may now proceed with the foreclosure**

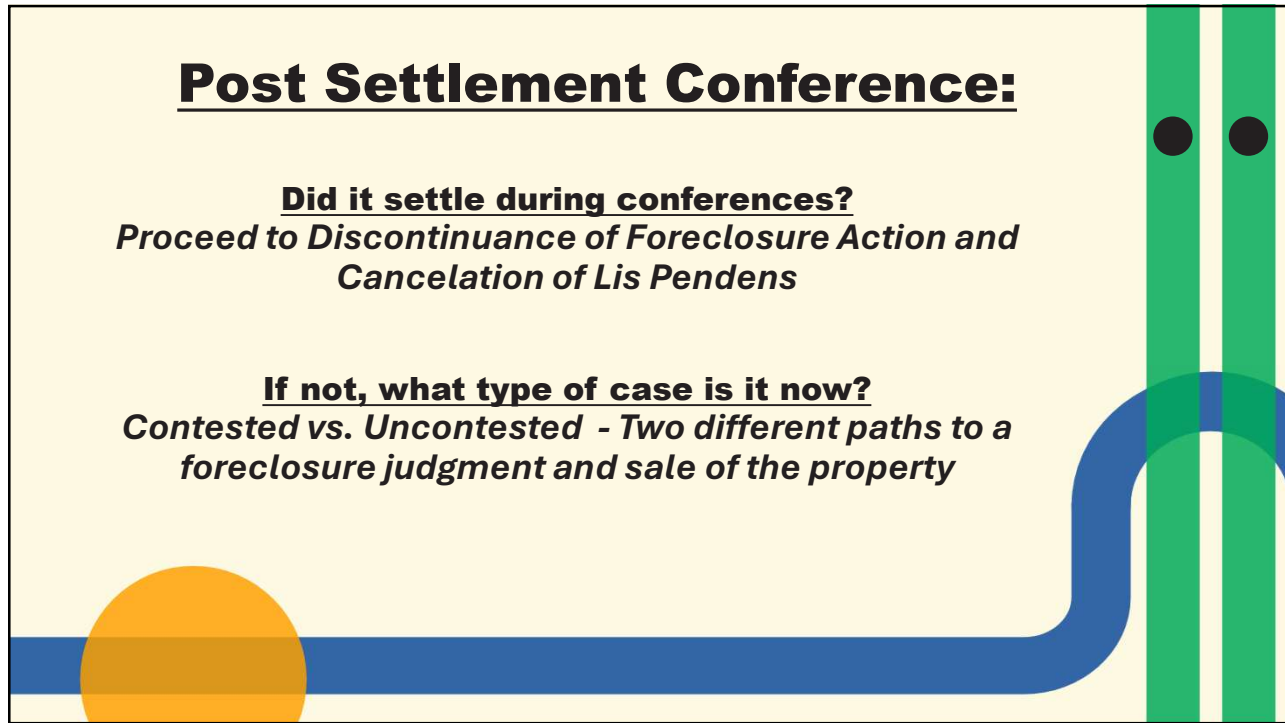
The Plaintiff may be subject to a Stay of 30, 45, 60 or 90 days depending on the Referee hearing the conference, and jurisdiction. The purpose of the Stay is to allow the homeowner to review and reconsider their options now that the case did not settle after Court overseen mediations.

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Post Settlement Conference:

Did it settle during conferences?
Proceed to Discontinuance of Foreclosure Action and Cancellation of Lis Pendens

If not, what type of case is it now?
Contested vs. Uncontested - Two different paths to a foreclosure judgment and sale of the property



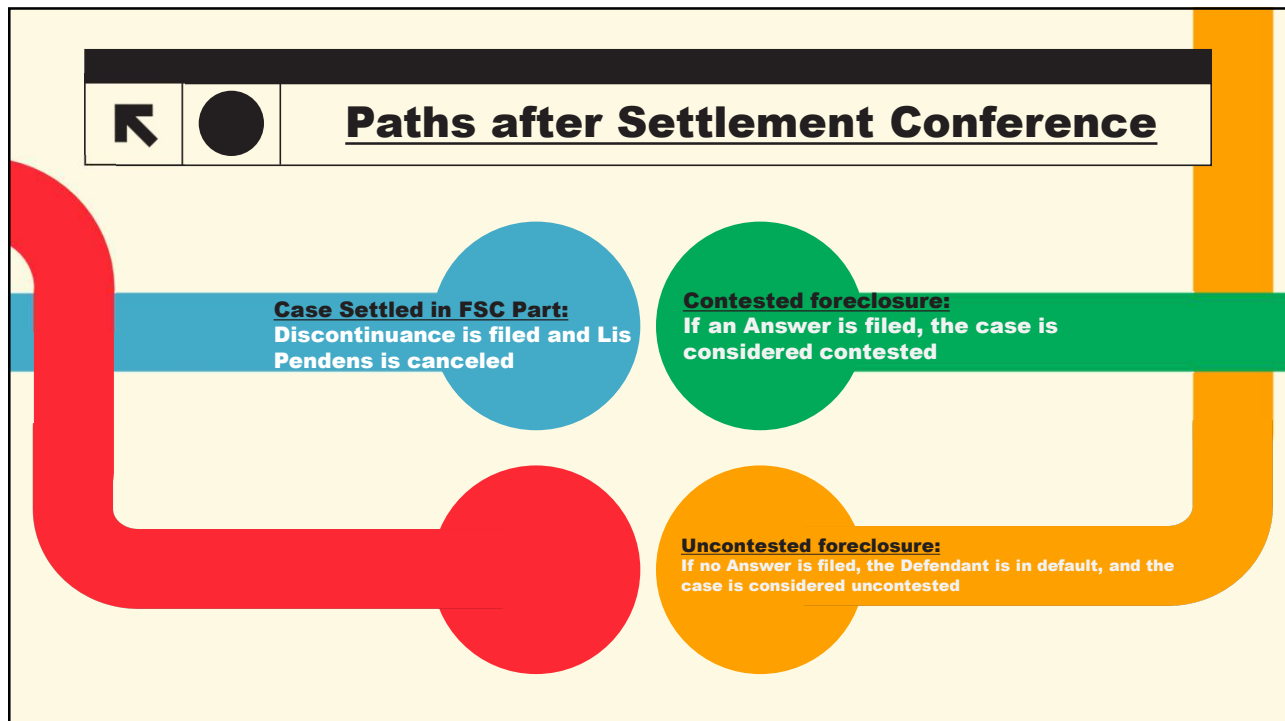
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↖ ● Paths after Settlement Conference

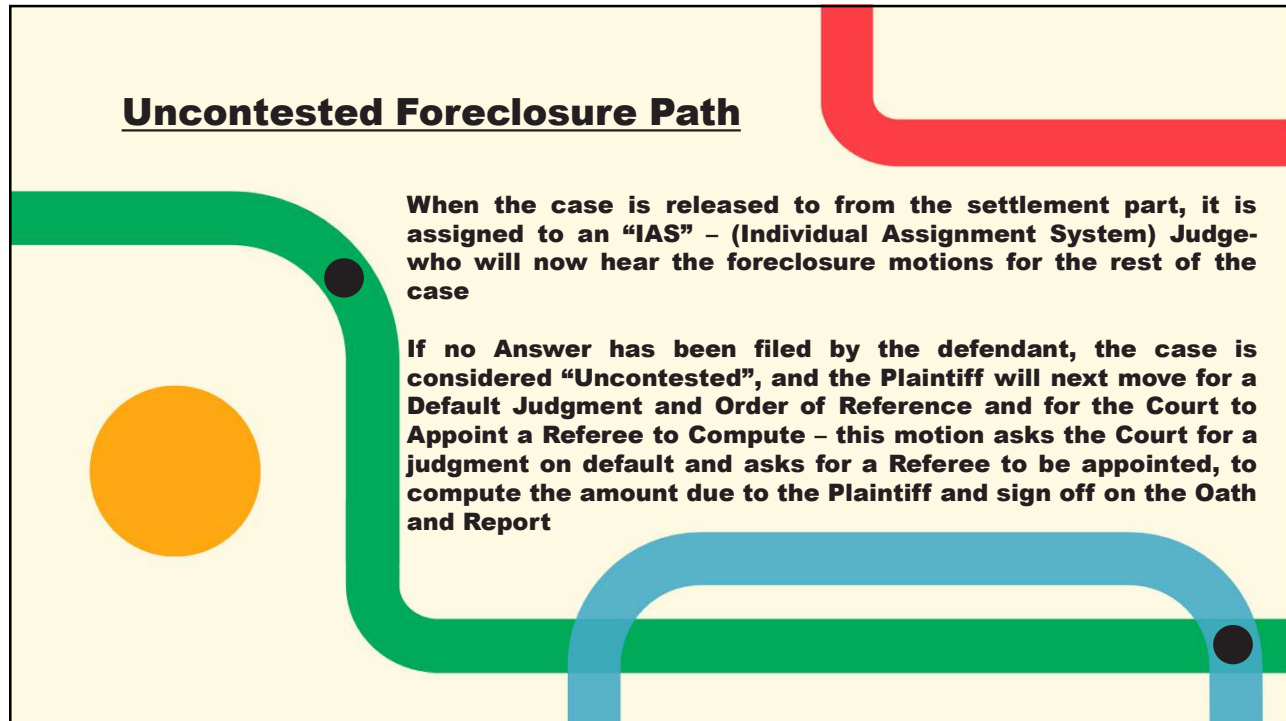
Case Settled in FSC Part:
Discontinuance is filed and Lis Pendens is canceled

Contested foreclosure:
If an Answer is filed, the case is considered contested

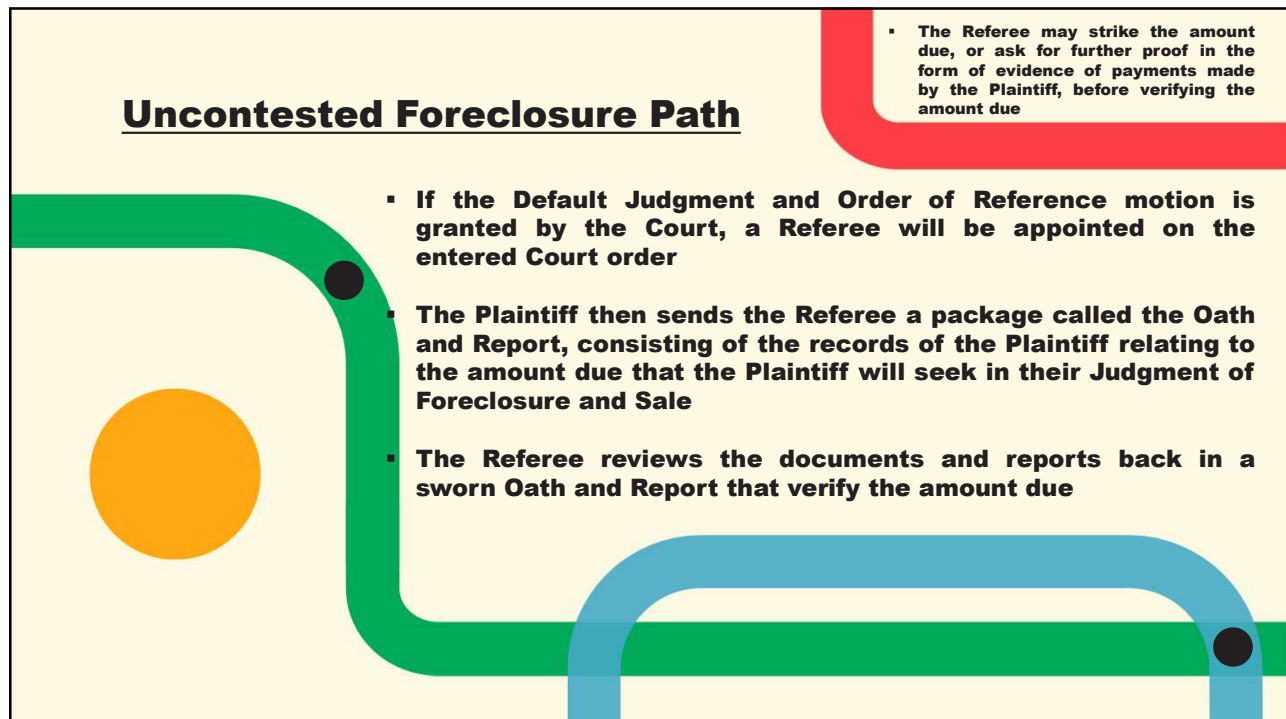
Uncontested foreclosure:
If no Answer is filed, the Defendant is in default, and the case is considered uncontested



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Sale Canceled (!)

- A defendant may file an **Order to Show Cause (OTSC)** to ask the Court to stay a foreclosure sale on an emergency basis, within days before the sale or even on the morning of the foreclosure sale date.
- The OTSC is heard before an emergency Judge, and a determination is made as to whether the sale will be stayed.
- The Plaintiff's OTSC must specifically ask to have the Sale canceled by Temporary Restraining Order (TRO) to stop the Sale from being held

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Sale Canceled (!)

- If the OTSC is granted, the Referee cannot hold the sale; it is postponed and an adjourn date is given for Plaintiff to respond to Defendant's OTSC motion papers.
- Once the OTSC is fully considered by the Judge, the Judge will either deny the OTSC and allow the Plaintiff to proceed with sale, or depending the legal arguments presented, may have the Plaintiff's motions vacated etc. and have to go backwards in the foreclosure action to prove their case, particularly if prior motion practice was uncontested (defendant did not oppose OOR or JFS)

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Sale Canceled (!)

- If an OTSC is denied with enough time before the sale day, a defendant may still file a Bankruptcy to automatically trigger a cancellation of the foreclosure sale. This cancels the sale until the Bankruptcy is either confirmed or dismissed.
- If the Bankruptcy is dismissed, the Plaintiff must request the Court to set a new sale date, advertise, and hold another foreclosure sale.
- Bankruptcy proceedings eventually are considered to be “abusive filings” if the filer is only filing to thwart a foreclosure sale. Eventually, a Bankruptcy filing, if not converted into an actual case, will not even trigger an automatic stay of the sale if the filer has filed too many times within the specified period

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Post-Sale:

Surplus Monies

Landlord Tenant Cause of Action

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Surplus Monies Action (Post-Sale)

- If the property is sold for more than is owed to satisfy the Plaintiff bank's mortgage, the funds are considered "surplus monies" after the foreclosure sale
- These surplus monies are held by the County where the property was sold, and are disbursed to parties with an interest in or liens against the property, in priority order
- In the Referee's Report of Sale, the amount of surplus monies is recorded in addition to the sale price of the property
- All defendants seeking surplus monies (including the prior homeowners) must make a motion for surplus monies and file it with the Court, along with their proof of claim for the funds (homeowner, junior lienholder mortgages, tax liens, creditor judgments, etc).
- Should the property sell for less than what is owed to the Plaintiff, they may elect to seek a deficiency judgment against the borrower for the difference in the amount owed vs. the amount recovered through the foreclosure sale process. This remedy is not available if the defendant has filed and entered bankruptcy, as they can no longer be personally liable for the debt.

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From record owner to holdover tenant :

What happens if the homeowner must be evicted after the foreclosure sale?

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Landlord Tenant Action

- If a prior homeowner, now holdover tenant, will not relinquish physical occupation of the property after foreclosure sale, the purchaser may have to commence a landlord-tenant action in District Court, to evict the holdover tenant
- Briefly, this process involves serving an eviction notice to the residents of the property after the foreclosure sale, filing the action in District court, motion practice, and court appearances. If the Court appearances do not result in any successful settlement, the tenant is eventually given 14 days to vacate the premises, before they are evicted by law enforcement.
- Working with the purchaser of a foreclosed property to attempt to have a mutually agreeable and amicable vacatur of the property by the holdover tenants can be done but it can also be a contested and litigated situation - there can also occasionally be settlements entered into by the parties whereby vacating the property will happen by a date certain, sometimes even with cash incentives for the holdover tenants to vacate before they have to go through the eviction process in Court.

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**NCBA Mortgage
Foreclosure Assistance
Project Contact
Information:**



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→ for clients, or foreclosure related questions

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→ for information about volunteer opportunities

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