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## Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota

Rebecca Hare†

“The home is the wellspring of personhood. It is where our identity takes root and blossoms, where as children, we imagine, play, and question . . . . When we try to understand ourselves, we often begin by considering the kind of home in which we were raised.”<sup>1</sup>

### Introduction

In *Evicted*, Matthew Desmond argues “[e]viction is a cause, not just a condition, of poverty.”<sup>2</sup> From court process, to policy, to its principal players, eviction is both rooted in and continues to perpetuate economic, social, and health inequalities among those experiencing poverty.<sup>3</sup> Individuals trying to navigate eviction often experience adverse effects on their employment as a result of taking time off to find a new place and moving their lives on a tight, predetermined schedule.<sup>4</sup> When families are uprooted by eviction, their children may experience disruption in their education, which can have long-term implications for their academic achievement.<sup>5</sup> School mobility among low-income children “introduces discontinuity in learning environments that can adversely affect learning, . . . disrupt[s] children’s instructional environments[,] . . . disrupt[s] children’s relationships with peers and teachers, and

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†. Rebecca Hare, M.L.I.S., J.D. Candidate, May 2020, University of Minnesota Law School. The author thanks Lawrence McDonough for his time discussing this article and for his contributions to landlord-tenant law in Minnesota; Dawn Zugay, Anna Rios, and Sandra Moberg-Walls for their time discussing eviction mediation practices; Prentiss Cox and Anna Barton for their thoughtful feedback throughout the writing process; and both Samuel Spaid and Eric Hauge for their collaboration and guidance in conducting the eviction studies of Brooklyn Park and St. Paul cited herein and for their continuing advocacy on behalf of tenants in Minnesota.

1. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 293 (2016).

2. *Id.* at 299.

3. *Id.*

4. Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 *SOC. PROBS.* 46, 49–50, 59 (2016).

5. Judy A. Temple & Arthur J. Reynolds, *School Mobility and Achievement: Longitudinal Findings from an Urban Cohort*, 37 *J. SCH. PSYCHOL.* 355, 357 (1999).

reduce[s] the stability and predictability of established patterns of activities . . . .”<sup>6</sup> Living in a constant state of stress due to housing insecurity can also result in negative health outcomes.<sup>7</sup> Even the threat of eviction has been found to contribute to depression, anxiety, poor health, elevated blood pressure, and unhealthy behaviors.<sup>8</sup>

Beyond the individual impacts of evictions, evictions hurt communities.<sup>9</sup> Community instability, job loss, education disruption, homelessness, and diversion of sheriff time impact communities where evictions take place.<sup>10</sup> Communities also end up bearing added costs of social services, homeless shelters, education, and healthcare to address these issues.<sup>11</sup> For these reasons, eviction prevention should concern everyone—private eviction has public costs.

Mediation may be used to improve outcomes in eviction cases, both to prevent eviction filings and to resolve eviction disputes.<sup>12</sup>

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6. *Id.*

7. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 296 (2015) (“Compared to those not evicted, mothers who were evicted in the previous year experienced more material hardship, were more likely to suffer from depression, reported worse health for themselves and their children, and reported more parenting stress.”).

8. Hugo Vásquez-Vera et al., *The Threat of Home Eviction and Its Effects on Health Through the Equity Lens*, 175 SOC. SCI. & MED. 199, 205 (2017).

9. Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV. 115, 117–18 (2016).

10. *Id.* at 118. A recent study investigating the link between eviction and homelessness found 22.4% of individuals staying at homeless shelters in Hennepin County from 2008-2016 had a corresponding eviction filing. ANDEE HOLDENER ET AL., *EVICTION AND HOMELESSNESS IN HENNEPIN COUNTY* 22, 24 (2018), <https://www.hennepin.us/-/media/hennepinus/your-government/projects-initiatives/end-homelessness/humphrey-report-eviction-homelessness-may-2018.pdf> [<https://perma.cc/YA64-S2U2>] (noting the findings only represent those who accessed county shelters—and does not include individuals who used shelters operated by churches or nonprofits or who chose to live with friends or family rather than enter a shelter).

11. THE GOVERNOR'S TASK FORCE ON HOUSING, MORE PLACES TO CALL HOME: INVESTING IN MINNESOTA'S FUTURE 30 (2018), [http://mn.gov/gov-stat/pdf/Housing%20Task%20Force%20Report\\_FINAL.pdf](http://mn.gov/gov-stat/pdf/Housing%20Task%20Force%20Report_FINAL.pdf) [<https://perma.cc/DXN2-HNHB>].

12. *E.g.*, Roger Moss, *Conflict Intervention Service: How an Innovative Mediation Program Prevents Evictions*, S.F. ATT'Y MAG., Fall 2018, at 22, 26, <https://blog.sfbar.org/2018/09/26/conflict-intervention-service-how-an-innovative-mediation-program-prevents-evictions/> [<https://perma.cc/2RGN-C5FT>]; Michelle Bruch, *Mediators Tackle Fast-Paced Evictions*, SOUTHWEST J. (Apr. 3, 2018), <http://www.southwestjournal.com/news/2018/04/mediators-tackle-fast-paced-evictions> [<https://perma.cc/J635-ECPX>].

Mediators act as neutral intermediaries who assist opposing parties in reaching a settlement.<sup>13</sup> Rather than participate in an adversarial eviction process with the goal of removing the tenant, mediation is a conflict resolution tool that can prevent eviction by allowing both parties to engage in negotiation of an agreement under the guidance of a trained neutral party.<sup>14</sup> However, the power imbalance between landlords and tenants creates obstacles to full participation in mediation.<sup>15</sup> Mediation will only perpetuate the social ills of eviction if it cannot overcome this power imbalance.<sup>16</sup> Barriers to full participation in mediation by both parties threaten the use and effectiveness of mediation,<sup>17</sup> and existing tenant protections under the law may be thwarted if tenants are unaware of their rights.<sup>18</sup>

This Note will evaluate mediation as an eviction prevention tool and provide recommendations to address power imbalance in eviction mediation. Part I of this Note will examine the state of eviction in Minnesota by reviewing empirical studies of evictions in the state. Part II will provide an overview of eviction mediation efforts in Minnesota. Part III will discuss issues of power and inequality in mediation. Part IV will outline recommendations to address the power imbalance in mediation between landlords and tenants in eviction disputes and recommend a statutory pre-filing mediation process. To create more equitable and successful mediated settlements in landlord-tenant disputes, Minnesota must 1) eliminate systemic obstacles to negotiation by limiting access to

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13. MINN. STAT. § 572.33, subd. 2 (2019) (defining a mediator as “a third party with no formal coercive power whose function is to promote and facilitate a voluntary settlement of a controversy identified in an agreement to mediate.”); MINN. GEN. R. PRAC. 114.02(a)(7) (2019) (“[In mediation] a neutral third party facilitates communication between parties to promote settlement.”).

14. *Mediation Services in Minnesota*, CMTY. MEDIATION MINN. <https://communitymediationmn.org/services/mediation> [<https://perma.cc/CXBG-SJCN>].

15. Claire Baylis & Robyn Carroll, *The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation*, 14 BOND L. REV. 285, 291–93 (2002); see also Carol J. King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*, 10 OHIO ST. J. ON DISP. RESOL. 65, 88–89 (1994) (stating that those unable to hire attorneys are at a great disadvantage and landlord-tenant cases involve inherent power imbalances).

16. Baylis & Carroll, *supra* note 15, at 291–93.

17. *Id.*

18. See Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 90–91 (1997) (arguing that the Harvard Mediation Program’s policy which does not allow mediators to substantively discuss the law with parties favors knowledgeable parties).

unlawful detainer records, 2) empower tenants to negotiate through access to pre-filing mediation, 3) incentivize landlords to mediate by instituting a notice requirement prior to eviction filing, 4) facilitate tenant access to existing tenant protections under the law within the mediation process, and 5) create a statutory eviction mediation process to ensure tenants receive equal opportunity to mediate.

### I. The State of Eviction in Minnesota

In 2017, over 16,000 eviction cases were filed in Minnesota courts.<sup>19</sup> The formal court process of eviction is governed by state law under Minnesota Statutes §§ 504B.281–.371. In addition to eviction actions, some landlords also use informal evictions.<sup>20</sup> A landlord may initiate an eviction action against a tenant on several grounds: nonpayment of rent,<sup>21</sup> holdover,<sup>22</sup> breach of lease,<sup>23</sup> or breach of the covenants set forth in Minnesota Statutes § 504B.171.<sup>24</sup> Eviction complaints are filed in state district court.<sup>25</sup> From there the eviction court process moves quickly, proceeding from court summons to a hearing within seven to fourteen days.<sup>26</sup> Due to the high volume of filings in Hennepin and Ramsey counties,<sup>27</sup> the district courts serving these counties have specialized housing court divisions to oversee eviction proceedings, which are presided over by referees who are subject to judicial review.<sup>28</sup>

Once an eviction action is filed, the eviction immediately places an unlawful detainer on the tenant's record, regardless of the merit of the filing, a favorable resolution for the tenant, or any later

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19. SAMUEL SPAID, HOME LINE, EVICTIONS IN GREATER MINNESOTA 2 (2018) [hereinafter GREATER MINNESOTA].

20. *Id.* at 4. However, the eviction studies discussed in this section apply to formal evictions.

21. MINN. STAT. § 504B.285, subd. 1(a)(2) (2019).

22. *Id.* subd. 1(a)(1) (permitting a landlord to commence an eviction action when a tenant remains in possession of rental property after termination of the tenancy).

23. *Id.* subd. 1(b).

24. MINN. STAT. § 504B.171 (2019) (prohibiting certain criminal and drug related activity).

25. MINN. STAT. § 504B.321 (2019).

26. *Id.*; Luke Grundman et al., *In Eviction Proceedings, Lawyers = Better Outcomes*, BENCH & B. (Feb. 5, 2019), <http://mnbenchbar.com/2019/02/in-eviction-proceedings-lawyers-better-outcomes/> [<https://perma.cc/5TTF-PQ4B>].

27. In 2017, over 16,000 evictions were filed in Minnesota, and nearly 8,000 occurred in Hennepin and Ramsey counties. GREATER MINNESOTA, *supra* note 19, at 2, app. 4–5.

28. MINN. GEN. R. PRAC. 601–12 (2019).

agreement between the parties.<sup>29</sup> Seeking to shed light on the human story of eviction, Dr. Brittany Lewis and the Center for Urban and Regional Affairs published in-depth research on the state of eviction in North Minneapolis, examining tenants' experiences with eviction and difficulties obtaining housing as a result of their eviction histories.<sup>30</sup> An unlawful detainer has a substantial negative effect on a tenant's ability to secure housing and impacts many tenants who were never subject to an eviction judgment.<sup>31</sup> The appearance of an unlawful detainer on a tenant screening report frequently results in denied applications for housing, contributing to homelessness and housing instability for tenants shut out of the housing market.<sup>32</sup> To improve one's ability to find new housing, a tenant may pursue expungement of the eviction filing.<sup>33</sup> Eviction expungement allows removal of unlawful detainer records from public access—and from tenant screening company databases.<sup>34</sup>

In 2016, the City of Minneapolis partnered with HOME Line and HousingLink to conduct a study of the city's evictions.<sup>35</sup> HOME Line has followed up on this study with similar in-depth reports on evictions in greater Minnesota,<sup>36</sup> the City of Brooklyn Park,<sup>37</sup> and the City of St. Paul.<sup>38</sup> Results from these studies provide data on

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29. Grundman, *supra* note 26; Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 *FORDHAM URB. L.J.* 661, 663, 667 (2018).

30. BRITTANY LEWIS, *THE ILLUSION OF CHOICE: EVICTIONS AND PROFIT IN NORTH MINNEAPOLIS* 6–12 (2019).

31. *Id.* at 7 (41 of the 68 tenants interviewed—60%—stated unlawful detainers were an obstacle to obtaining housing; 28 of the 48 tenants who were displaced due to eviction—58%—were homeless at the time of their interview); Franzese, *supra* note 29, at 663.

32. Franzese, *supra* note 29, at 663.

33. In Minnesota, there are both statutory and common law bases for expungement of eviction records. MINN. STAT. § 484.014 (2019); *State v. C.A.*, 304 N.W.2d 353, 358 (Minn. 1981) (holding courts may expunge eviction cases under their inherent authority power if “expungement will yield a benefit to the petitioner commensurate with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order.”).

34. MINN. STAT. § 504B.241, subd. 4 (2019).

35. MINNEAPOLIS INNOVATION TEAM, *EVICTIONS IN MINNEAPOLIS* (2016) [hereinafter *MINNEAPOLIS*].

36. GREATER MINNESOTA, *supra* note 19.

37. SAMUEL SPAID & REBECCA HARE, *HOME LINE, EVICTIONS IN BROOKLYN PARK* (2018) [hereinafter *BROOKLYN PARK*].

38. REBECCA HARE & SAMUEL SPAID, *HOME LINE, EVICTIONS IN SAINT PAUL* (2018) [hereinafter *SAINT PAUL*].

tenant displacement,<sup>39</sup> average amount owed, settlement rates,<sup>40</sup> and tenant appearances,<sup>41</sup> among other measures. Across the four studies, tenants were displaced in 53%–80% of cases;<sup>42</sup> at eviction filing, tenants owed \$1,500–\$2,000 on average;<sup>43</sup> tenants resolved their eviction case through settlement or by agreement in 30%–69% of cases;<sup>44</sup> and tenants appeared in court in 56%–67% of cases.<sup>45</sup>

HOME Line's eviction studies of Minneapolis and St. Paul offer insight into the eviction patterns of Hennepin and Ramsey counties, respectively, which combined accounted for nearly half of all evictions in Minnesota in 2017.<sup>46</sup> The eviction patterns in these two counties differ in significant ways from those in greater Minnesota. One key difference was higher settlement rates in the

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39. Tenant displacement rates reflect eviction actions resulting in a tenant's forced move, which include cases resulting in an eviction judgment, writ of recovery, or settlement with a move-out agreement. *E.g.*, BROOKLYN PARK, *supra* note 37, at 11.

40. *E.g.*, *id.* Settlement rates only reflect settlements in eviction actions where this information was entered into the court docket and do not reflect informal agreements occurring outside of the court process. *Id.* at 9 (explaining study methodology).

41. *E.g.*, *id.* at 14–15. Appearance rates—how often a party came for their scheduled court appearance—were calculated for both landlords and tenants.

42. Tenant displacement rates were 66% in Minneapolis, 53% in Brooklyn Park, 62% in St. Paul, and 80% in greater Minnesota. MINNEAPOLIS, *supra* note 35, at 8; BROOKLYN PARK, *supra* note 37, at 11; SAINT PAUL, *supra* note 38, at 10; GREATER MINNESOTA, *supra* note 19, at 9.

43. On average tenants owed <\$2000, or 2 months' rent in Minneapolis, \$1600, or 1.75 months' rent in Brooklyn Park, \$2000, or 2.25 months' rent in St. Paul, and \$1500, or 3 months' rent in greater Minnesota. This number reflects the landlord's alleged amount owed in the complaint, which includes approximately \$300 in court costs, so the actual amount of rent owed to the landlord is lower. MINNEAPOLIS, *supra* note 35, at 7; BROOKLYN PARK, *supra* note 37, at 9; SAINT PAUL, *supra* note 38, at 10; GREATER MINNESOTA, *supra* note 19, at 9.

44. In Minneapolis, 64% of cases were resolved by agreement at or before the hearing. MINNEAPOLIS, *supra* note 35, at 8 (out of 174 cases, 96 settled and 15 were resolved at or before a hearing without a court order). Both Brooklyn Park and St. Paul had 69% of cases resolve by agreement of the parties without a court order. BROOKLYN PARK, *supra* note 37, at 11 (out of 200 cases, 120 settled and 17 were resolved before a hearing); SAINT PAUL, *supra* note 38, at 11 (out of 200 cases, 130 settled and 7 were resolved before the hearing). In greater Minnesota, the number of cases resolved by agreement were much lower—only 32%. GREATER MINNESOTA, *supra* note 19, at 10 (out of 213 cases, 43 settled and 21 were resolved by the parties before a hearing).

45. Tenant appearance rates were 66% in Minneapolis, 62% in Brooklyn Park, 67% in St. Paul, and 56% in greater Minnesota. MINNEAPOLIS, *supra* note 35, at 11; BROOKLYN PARK, *supra* note 37, at 9; SAINT PAUL, *supra* note 38, at 10; GREATER MINNESOTA, *supra* note 19, at 9.

46. *See supra* note 27 and accompanying text.

metro area compared to greater Minnesota.<sup>47</sup> Looking only at cases where both parties appeared at the eviction hearing, settlement rates in Minneapolis, St. Paul, and Brooklyn Park are remarkably higher. In all three studies, when both parties appeared, settlement rates were above 80%,<sup>48</sup> compared to 38% in the greater Minnesota study.<sup>49</sup> One possible explanation is the emphasis placed on settlement at the eviction hearing in Hennepin and Ramsey counties.<sup>50</sup>

Other differences between greater Minnesota and the metro area offer another side of the story. The greater Minnesota report highlights the stark difference in eviction rates between Minneapolis and outstate Minnesota with rates of 3.3% and 1.6%, respectively.<sup>51</sup> According to the report, “[r]educing the metro county eviction rate to the Greater Minnesota eviction rate for that three-year time period would have reduced the number of evictions by 18,978—a 38% reduction in total evictions [sic] filings.”<sup>52</sup> Two notable differences between the greater Minnesota report and metro area studies contribute to understanding the lower number of filings outstate: a longer length of time prior to eviction filing<sup>53</sup> and a higher likelihood of displacement following eviction filing.<sup>54</sup>

47. See *supra* note 44 and accompanying text.

48. In the Minneapolis study, 83% of cases settled when both parties appeared. MINNEAPOLIS, *supra* note 35, at 11. Settlement rates were even higher in St. Paul where 89% of cases settled and in Brooklyn Park where 95% settled when both parties appeared. SAINT PAUL, *supra* note 38, at 14; BROOKLYN PARK, *supra* note 37, at 14.

49. GREATER MINNESOTA, *supra* note 19, at 13.

50. KATHERINE ZERWAS & PAUL BIRNBERG, HOME LINE, DUE PROCESS DENIED: HANDLING OF EVICTION CASES AT THE ANOKA AND DAKOTA COUNTY COURTS 13–14 (2011) [hereinafter DUE PROCESS DENIED], <https://homelinemn.org/wp-content/uploads/2018/12/Due-Process-Denied-Anoka-Dakota-Full-Draft-11-Corrected-1.pdf> [<https://perma.cc/G3M2-M4GZ>] (“Hennepin County employs mediators and has made a concerted effort to encourage settlement—not only using trained mediators, but having clerks and referees urging settlement, and employing a consistent approach to cases by the court.”); SECOND JUDICIAL DIST. OF MINN. HOUS. COURT, REPORT OF OPPORTUNITIES AND RECOMMENDATIONS 5–7 (2017).

51. GREATER MINNESOTA, *supra* note 19, at 6 (“The Eviction Rate was calculated by taking the number of evictions in a given area and dividing that number by the number of rental units in the same given area as reported by the American Community Survey.”).

52. GREATER MINNESOTA, *supra* note 19, at 6. *Id.*

53. In greater Minnesota, landlords filed for eviction when tenants were about 3 months behind in rent, compared to 1.75–2.25 months in the metro area studies. See *supra* note 43 and accompanying text.

54. Greater Minnesota had an 80% displacement rate following eviction filing, compared to 53–66% in the metro area studies. See *supra* note 42 and accompanying text.



One possible explanation for these differences could be that landlords and tenants are engaging in informal discussions prior to eviction filing and resolving the issue out of court through payment plans or move-out agreements, thereby diverting would-be eviction cases.<sup>55</sup> These informal discussions may be possible in part due to the greater likelihood of a more personal landlord-tenant relationship than is typical in the metro area, where a small number of landlords account for a sizeable percentage of overall eviction filings. Tenants with landlords who are accessible are likely in a better position to negotiate informal agreements to avoid eviction.

The theory posited for higher settlement rates in Hennepin and Ramsey (emphasis on settlement in the court process) and the theory explaining lower eviction rates in greater Minnesota (more negotiation is happening outside of court) are two sides of the same coin. Both theories tell different parts of the same story: negotiation between landlords and tenants can keep tenants out of court and in their homes. However, any strategy using these methods to reduce evictions must tackle the issues of low tenant appearance rates<sup>56</sup> and high settlement failure rates.<sup>57</sup> To address these issues, this Note proposes that a pre-filing mediation program that recognizes and mitigates power differentials between tenants and landlords would facilitate full participation by both parties in negotiating more successful negotiated agreements.

## II. Eviction Mediation Practices in Minnesota

Eviction mediation is not a new practice in Minnesota.<sup>58</sup> Metro area mediation organizations have been serving district courts in Hennepin and Ramsey counties for decades, staffing their housing

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55. A longer time prior to an eviction filing could indicate that discussions were occurring between landlords and tenants in greater Minnesota when tenants are behind on rent. The higher likelihood of displacement following an eviction filing supports this theory; the failure of informal discussions between the parties indicates that these cases were less likely to be resolved in the tenant's favor in court.

56. Tenant appearance rates were poor across all four studies, ranging from 56%–67%, and contributed to lower settlement rates and higher rates of displacement. *See* sources cited *supra* note 45.

57. A settlement was categorized as a failure if a writ of recovery was issued following entry of a settlement agreement. Settlement failure rates were 39% in Minneapolis and 27% in St. Paul compared to only 7% in greater Minnesota. *See* sources cited *supra* note 42.

58. Linda Mealey-Lohmann & Eduardo Wolle, *Pockets of Innovation in Minnesota's Alternative Dispute Resolution Journey*, 33 WM. MITCHELL L. REV. 441, 472–74 (2006).

calendars with trained volunteer mediators.<sup>59</sup> Many of these same organizations are also involved in pre-eviction filing mediation and partner with cities, landlords, and tenant advocacy organizations across the metro area.<sup>60</sup>

#### A. Court-integrated Mediation Services

The Fourth Judicial District Housing Court in Hennepin County contracts with the Conflict Resolution Center (CRC)<sup>61</sup> and Community Mediation and Restorative Services (CMRS) to staff volunteer mediators during the housing court calendar.<sup>62</sup> Mid-Minnesota Legal Aid (MMLA) and Volunteer Lawyers Network (VLN) also staff attorneys at housing court, who primarily provide tenants with brief legal advice and may engage in limited scope representation to advocate for tenants in court or settlement negotiation.<sup>63</sup> In 2017, CRC reported 190 housing court referrals,<sup>64</sup> and CMRS reported 140 housing court referrals,<sup>65</sup> with both

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59. Dawn Zugay, Volunteer Manager, Conflict Resolution Ctr., Remarks at Eviction Crisis: Mediator Training (Sept. 25, 2018); Telephone interview with Anna Rios, Hous. Project Manager, Dispute Resolution Ctr. (Nov. 15, 2018) (on file with author).

60. Rios, *supra* note 59; Telephone interview with Sandra Moberg Walls, Program Dir., Cmty. Mediation & Restorative Servs. (Nov. 16, 2018) (on file with author).

61. CRC has mediated over 10,000 eviction cases in over 25 years working in housing court. CONFLICT RESOLUTION CTR., ANNUAL REPORT 2017 (2017), <http://crcminnesota.org/wp-content/uploads/2018/08/annualreport2017.pdf> [<https://perma.cc/642B-HPFC>].

62. Conflict Resolution Ctr., FY19 Community Dispute Resolution Program Grant Application, 15 (2018) [hereinafter CRC Grant Application] (on file with author); Cmty. Mediation & Restorative Servs., Inc., FY19 Community Dispute Resolution Program Grant Application, 6 (2018) [hereinafter CMRS Grant Application] (on file with author).

63. LUKE GRUNDMAN & MURIA KRUGER, LEGAL REPRESENTATION IN EVICTIONS: COMPARATIVE STUDY 3–4 (2018), <https://www.minnpost.com/wp-content/uploads/2018/11/2018-Eviction-Representation-Results-Study-with-logos.pdf> [<https://perma.cc/2EEB-LJB8>].

64. CRC Grant Application, *supra* note 61, app. 1, at 19. In 2018, 84% of community housing mediations resulted in a mediated agreement and 73% of housing court mediations resulted in agreements. Email from Dawn Zugay, Program & Volunteer Manager, Conflict Resolution Ctr., to Rebecca Hare, author (Sept. 11, 2019).

65. CMRS reports that 60% of all their mediated cases resulted in an agreement in 2017. CMRS Grant Application, *supra* note 62, app. 1, at 22 (reporting 365 out of 611 mediated cases in 2017 resulted in agreements). However, note that this data represents all mediations and is not data specific to landlord-tenant mediated cases.

organizations averaging a combined total of 27.5 mediations in housing court per month.<sup>66</sup>

The Dispute Resolution Center (DRC) has been working in the Second Judicial District Housing Court in Ramsey County for over 20 years, reliably staffing volunteer mediators during the housing court calendar.<sup>67</sup> Mediators work alongside volunteer attorneys from VLN and Southern Minnesota Regional Legal Services (SMRLS) and Emergency Assistance workers, so tenants have access to the legal and financial resources they need to mediate effectively.<sup>68</sup> This arrangement “empowers both the landlord and tenant to talk with each other.”<sup>69</sup> Attorneys provide brief advice to prepare tenants to negotiate with an understanding of applicable law, and Emergency Assistance workers provide assurance to landlords that tenants will have funds available to fulfill their settlement obligations.<sup>70</sup> In 2017, DRC mediated 14 cases in housing court and 20 housing cases in the community.<sup>71</sup>

In 2017, the Second Judicial District Housing Court formed a workgroup to produce a report on recommendations for the court to improve access to legal, financial, and social services for tenants and landlords.<sup>72</sup> Priority recommendations related to mediation included 1) announcing that mediators are available at the beginning of first appearances, 2) encouraging attorney representation in mediation to avoid a power imbalance, 3) starting a pilot mediation program where the judge may order parties to mediate before or at their first appearance, and 4) encouraging pre-filing mediation.<sup>73</sup> DRC launched a pilot program in July 2018 to address the issues cited in this report with a special focus on increasing pre-filing mediation.<sup>74</sup>

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66. CRC Grant Application, *supra* note 62, app. 1, at 19; CMRS Grant Application, *supra* note 62, app. 1, at 22.

67. Rios, *supra* note 59.

68. *Id.*

69. *Id.*

70. *Id.*

71. Dispute Resolution Ctr., FY19 Community Dispute Resolution Program Grant Application, app. 1 (2018) [hereinafter “DRC Grant Application”]. DRC reports that 80% of their eviction mediations result in agreements. *Compare* Rios, *supra* note 59, with DRC Grant Application, *supra* note 71, app. 1 (reporting 90 of 192 all mediated cases in 2017—or 47%—resulted in an agreement).

72. SECOND JUDICIAL DIST. OF MINN. HOUS. COURT, *supra* note 50, at 2.

73. *Id.* at 5–7.

74. Rios, *supra* note 59.

*B. Pre-filing Eviction Mediation Programs*

Minnesota courts and mediation programs recognize the benefits of pre-filing mediation, with most programs offering mediation services prior to eviction filing “to avoid involvement in the courts and the devastating social costs of eviction on families.”<sup>75</sup> Outreach to landlords is a critical part of this process as well as communicating incentives for landlords to mediate.<sup>76</sup> To start pre-filing programs, mediation organizations cultivate relationships with cities, landlords, housing organizations, and courts and raise awareness of their services within the community.<sup>77</sup> For example, Aeon, a large affordable housing developer, has been working with several mediation programs to offer pre-filing mediation in its buildings throughout Hennepin, Ramsey, and Anoka counties.<sup>78</sup> Some companies, such as CommonBond Communities, have even created their own eviction prevention programs.<sup>79</sup>

CRC and CMRS began a joint pre-eviction filing mediation program in 2017 through a grant from the McKnight Foundation with a goal “to begin to change the dialogue [by] moving housing court mediations upstream to occur prior to an eviction filing.”<sup>80</sup> Through this intentional expansion into pre-filing mediation, the organizations were focused on preventing homelessness, and in the following year, expanded their partnership to include DRC and Mediation Services for Anoka County (MSAC).<sup>81</sup> CRC is working to expand its pre-filing program by reaching out directly to landlords and tenants to start mediation prior to eviction filing, leveraging its referral partnership with MMLA, and incorporating remote technology to reach more potential mediation participants throughout the state.<sup>82</sup>

CMRS offers mediation at any stage of conflict between tenants and landlords and has operated both eviction and pre-filing

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75. CRC Grant Application, *supra* note 62, at 15–16 (discussing a joint grant request with CMRS, DRC, and MSAC to provide pre-filing mediation services to tenants and landlords and a long-term strategy to expand housing mediation services statewide using remote technology).

76. Rios, *supra* note 59.

77. *Id.*; Moberg Walls, *supra* note 60.

78. Rios, *supra* note 59.

79. Alicia Cordes-Mayo, *Eviction Prevention: It's at the Heart of Our Work*, COMMONBOND CMTYS. (Oct. 16, 2018), <https://commonbond.org/eviction-prevention> [<https://perma.cc/3T2G-AQVZ>].

80. CRC Grant Application, *supra* note 62, at 16.

81. *Id.*

82. *Id.* at 15.

programs for over 20 years.<sup>83</sup> From 2017 to 2018, CMRS has increased their focus on pre-filing eviction and expanded from 4 to 55 pre-eviction filing referrals.<sup>84</sup> CMRS has built mediation relationships with over a dozen cities in Hennepin County and continues to develop relationships with individual large and small landlords as well as tenant organizations.<sup>85</sup> CMRS strives to “open up an area for both [landlords and tenants] to feel more approachable and to feel that everything is happening in good faith.”<sup>86</sup> To create this space, CMRS offers both traditional face-to-face mediation as well as telephonic and electronic mediation models.<sup>87</sup> The alternative models can diffuse anger, and private caucusing in face-to-face mediation can allow for reality-checking with both parties.<sup>88</sup> A unique aspect of CMRS’s model is its emphasis on follow-up after the parties have reached a mediated agreement.<sup>89</sup> By including follow-up as part of their process, they are able to support the tenant as they complete their payment plan and monitor the success of their mediated agreements.<sup>90</sup> CMRS has been able to achieve an incredible amount of success by linking tenants to resources through Emergency Assistance and other funding sources.<sup>91</sup> In 2018, only 3 of 210 pre-filing mediation cases involving referrals to financial resources resulted in evictions.<sup>92</sup>

Other eviction mediation programs in the state operating pre-filing mediation programs include MSAC, Rice County Dispute Resolution Program, Mediation and Conflict Solutions (MCS), which serves Rochester and southeastern Minnesota,<sup>93</sup> and Lakes & Prairies Community Action Partnership, which serves income-eligible residents of Clay and Wilkin counties.<sup>94</sup> In 2017, MSAC

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83. Moberg Walls, *supra* note 60.

84. CMRS Grant Application, *supra* note 62, at 5 (highlighting pre-filing mediation figures from Apr. 1, 2017 and Apr. 1, 2018, respectively).

85. *Id.* at 15 (“[I]n 2017 referrals came from 67 different referral sources (entities - not individuals) with participants from at least 85 cities.”); Moberg Walls, *supra* note 60.

86. Moberg Walls, *supra* note 60.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Mediation & Conflict Sols., FY19 Community Dispute Resolution Program Grant Application, 9 (2018) [hereinafter MCS Grant Application].

94. *Rental Registration, CITY OF MOORHEAD*, <http://www.cityofmoorhead.com/departments/planning-and-neighborhood->

mediated 8 landlord-tenant cases and has since expanded their housing mediation program to work directly with landlords to provide increased mediation services.<sup>95</sup> Lakes & Prairies' program also provides a variety of services, including financial assistance with rental costs, for families in crisis.<sup>96</sup>

### III. Issues of Power and Inequality in Mediation

Mediation advocates view mediation as an “opportunity to come up with decisions together” by “putting power back in the hands of people.”<sup>97</sup> Mediators do not pass judgment on a dispute; their role as a neutral arbiter is to aid both parties in reaching a consensual outcome.<sup>98</sup> Neutrality, self-determination, and consensual decision making are central tenets of the mediation process. Yet these values come into tension with one another when a power imbalance exists between the parties in dispute: “The ongoing difficulty, in both the theory and practice of mediation, is that there can be a contradiction between even-handedness and fairness: if the parties are treated in the same way, then power differentials are not addressed, leading to a lack of fairness in process and outcome.”<sup>99</sup> While mediation can be a tool of empowerment, it can perpetuate inequality if it is not implemented with conditions that empower both parties.<sup>100</sup>

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services/rental-registration [https://perma.cc/D3CQ-VM7C].

95. Mediation Servs. for Anoka County, FY19 Grant Application, Community Dispute Resolution Program, 9 (2018) [hereinafter MSAC Grant Application].

96. *Housing Stability*, LAKES & PRAIRIES CMTY. ACTION P'SHIP, [http://www.lakesandprairies.net/html/fcs\\_housing\\_programs.html](http://www.lakesandprairies.net/html/fcs_housing_programs.html) [https://perma.cc/6XNV-2G2K].

97. Rios, *supra* note 59.

98. MINN. GEN. R. PRAC. 114.02(a)(7) (2019) (“A mediator may not impose his or her own judgment on the issues for that of the parties.”). Depending on the jurisdiction, mediators may exert more influence and power over the parties in settlement; for example, in Massachusetts, mediators known as “Housing Specialists” have the “power to inspect housing units, call non-present witnesses for clarification, predict judicial outcomes, suggest settlement terms to the parties, and answer procedural/substantive questions of the litigants. John Pollock, *Recent Studies Compare Full Representation to Limited Assistance in Eviction Cases*, 42 HOUSING L. BULL. 72, 77 (2012). “Unless parties stood extremely firm in the ‘mediation’ sessions, the Housing Specialists came close to serving as adjudicators with inquisitorial powers.” *Id.* at 77 n.24.

99. Baylis & Carroll, *supra* note 15, at 293.

100. While power imbalances may affect both interaction between the parties and the parties' interaction with the mediator, this Note focuses on the former power dynamic. Baylis & Carroll, *supra* note 15, at 288.

The power dynamics of eviction present unique obstacles to equitable and, ultimately, successful settlements. Both before and after an eviction is filed, tenants occupy a position of low negotiating power.<sup>101</sup> Tenants are frequently intimidated by the threat of eviction from their home, loss of a public subsidy due to eviction,<sup>102</sup> or the risk of incurring the blackmark of eviction on their housing record.<sup>103</sup> When eviction is exercised at the option of a landlord, it places the tenant in a defensive position in an adversarial process that only intensifies these concerns over equal negotiation power. In a state that does not guarantee an attorney in eviction cases, tenants facing eviction also have a significant disadvantage in enforcing their rights in negotiations and in court.<sup>104</sup>

Under Minnesota General Rules of Practice 114.13(a)(2), mediators must be trained in power balancing.<sup>105</sup> Mediators employ numerous methods to reduce power imbalances, including private caucusing, managing expectations, and using a neutral setting.<sup>106</sup> These strategies can also be applied to mediation between landlords and tenants. For example, a mediator may meet with a tenant separately in a private caucus setting to develop realistic budgetary

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101. Franzese, *supra* note 29, at 672 (arguing the threat of an unlawful detainer on their record dissuades tenants from asserting their rights); Kim Barker & Jessica Silver-Greenberg, *On Tenant Blacklist, Errors and Renters with Little Recourse*, N.Y. TIMES (Aug. 16, 2016), <https://www.nytimes.com/2016/08/17/nyregion/new-york-housing-tenant-blacklist.html> [<https://perma.cc/5NLJ-9BFM>].

102. The agency is required to terminate the subsidy if the tenant was evicted “for serious violation of the lease” and may permissively terminate in other circumstances. 24 C.F.R. §§ 982.551–.553; *see also* LAWRENCE McDONOUGH, RESIDENTIAL EVICTION DEFENSE AND TENANT CLAIMS IN MINNESOTA, ch. VI.F.10.a. (6) (16th ed., Jan. 2019), [http://povertylaw.homestead.com/files/Reading/Residential\\_Eviction\\_Defense\\_in\\_Minnesota.htm](http://povertylaw.homestead.com/files/Reading/Residential_Eviction_Defense_in_Minnesota.htm) [<https://perma.cc/A9TX-872M>] (discussing subsidy termination cases in Minnesota).

103. Robert R. Stauffer, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239, 267 (1987) (“Where tenants are aware of the screening service, they may be inhibited from exercising their legal rights in the first place. They may refrain from taking legal action in response to illegal conduct by their landlords, and may go to great lengths to settle any conflict out of court, to prevent the landlord from filing the initial suit.”).

104. GRUNDMAN & KRUGER, *supra* note 63, at 1–2 (“Fully represented tenants win or settle their cases 96% of the time, clients receiving limited/brief services win or settle 83% of the time, and those without any legal services win or settle only 62% of the time . . . . Unrepresented tenants are between four and five times more likely than fully represented tenants to face the . . . abrupt, forced departure from their homes by sheriff deputies.”).

105. MINN. GEN. R. PRAC. 114.13(a)(2) (2019).

106. Baylis & Carroll, *supra* note 15, at 293–96 (offering an extensive list of both features of the mediation process and mediator interventions and strategies that can reduce power differentials).

goals to keep the tenant from agreeing to an impossible payment plan.<sup>107</sup> To equalize the inherent power imbalance, the mediator may also review the case for technical defects and privately caucus with the landlord to manage their expectations of success in court.<sup>108</sup> Pre-filing mediation also allows the parties to meet in a more neutral setting than court and engage in conflict resolution rather than the adversarial eviction process.<sup>109</sup>

However, despite the best efforts and intentions of mediators, inequality in the landlord-tenant relationship persists in mediation. Tenants face obstacles to effective negotiation when landlords have little incentive to negotiate outside of court. Instead, many landlords prefer operating in a system that allows them to process evictions quickly and conveniently<sup>110</sup> with a reasonable likelihood of a judgment in favor of the landlord's possession when the tenant does not appear for the eviction hearing.<sup>111</sup> The tenant's position of low negotiation power combined with lack of legal representation<sup>112</sup> raises additional concerns:

Unrepresented parties might not understand how mediation operates, how it fits into the overall litigation process, or its potential advantages or disadvantages when deciding whether or how to use mediation. Unrepresented parties might not be able to articulate or express their views or concerns during mediation . . . . Unrepresented parties might view the mediator as a court authority and feel pressured to settle . . . . Unrepresented parties also might not have enough factual or

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107. Zugay, *supra* note 59; Moberg Walls, *supra* note 60.

108. See sources cited *supra* note 107.

109. See sources cited *supra* note 107.

110. Bill Hudson, *Cameras Capture the Fast Pace of Minn. Housing Court*, WCCO (May 23, 2012), <https://minnesota.cbslocal.com/2012/05/23/cameras-capture-the-fast-pace-of-minn-housing-court> [<https://perma.cc/K3MC-MD85>].

111. MINNEAPOLIS, *supra* note 35, at 12 (76% resulted in court writs); GREATER MINNESOTA, *supra* note 19, at 14 (57% resulted in writs); BROOKLYN PARK, *supra* note 37, at 15 (45% resulted in writs); SAINT PAUL, *supra* note 38, at 15 (52% resulted in writs).

112. In all four studies, tenants had extremely low levels of representation. Comparatively, landlords had a significantly higher rate of representation, either by an attorney or power of authority. MINNEAPOLIS, *supra* note 35, at 12 (finding that 78% of landlords were represented by an attorney or power of authority, compared to only 2% of tenants); GREATER MINNESOTA, *supra* note 19, at 14 (finding that 60% of landlords were represented by an attorney or power of authority, compared to only 5% of tenants); BROOKLYN PARK, *supra* note 37, at 15–16 (finding that 92% of landlords were represented by an attorney or power of authority, compared to fewer than 1% of tenants); SAINT PAUL, *supra* note 38, at 15–16 (finding that 82% of landlords were represented by an attorney or power of authority, compared to only 5% of tenants).



legal information to evaluate the implications of settlement proposals in order to make a fully informed decision and, as a consequence, might accept a settlement that is unfair or does not adequately address their interests.<sup>113</sup>

While both housing attorneys and volunteer attorneys staff the housing court calendar to provide brief advice to tenants without representation, this advice may not always be sufficient to address these issues.

#### IV. Equalizing Power Imbalances in Mediation

Addressing power dynamics in mediation is essential to effective eviction prevention. For mediation to work effectively in landlord-tenant disputes, the eviction court process must eliminate systemic obstacles to negotiation, empower tenants to mediate, incentivize landlords to participate in mediation, and ensure the legal rights of tenants are protected in the mediation process.

##### *A. Unlawful Detainer Disclosure and Classification Reform: Eliminating Systemic Obstacles to Negotiation*

Landlords wield significant power over tenants with the threat of filing an eviction since the mere act of filing indiscriminately places an unlawful detainer on a tenant's record, regardless of the merit of the case.<sup>114</sup> For many, an unlawful detainer poses a nearly insurmountable barrier to future housing.<sup>115</sup> Limiting access to eviction records that inaccurately and unfairly allow a landlord to blackmark a tenant is essential to eliminating systemic obstacles to negotiation and empowering tenants to mediate. Eliminating this power imbalance on a systemic level could increase tenant participation in negotiation by improving confidence in the court process and providing incentive to settle in mediation to prevent the unlawful detainer designation. It could also reduce the use of meritless eviction filing as a retaliatory measure by landlords seeking to blackmark a particular tenant.

While the expungement process appears to solve this issue by providing an avenue to clear the housing records of unfairly blackmarked tenants, its benefits are limited. Expungement

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113. Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 424 (Feb. 2010).

114. MINN. STAT. § 484.014, subd. 1(2) (2019).

115. See *supra* note 31 and accompanying text.

operates on an individual, ad hoc basis and does not begin to reach all of the cases that would likely merit expungement if applied as a uniform rule. Tenants must be aware of the eviction on their record as well as the expungement process in order to commence expungement since the process must be initiated by the tenant.<sup>116</sup> Expungement also does not address the immediate entry of an unlawful detainer on the tenant's record,<sup>117</sup> and it does nothing to restore the lack of confidence in the court and the eviction process among tenants blackmarked before their case has been decided on its merits. For these reasons, restricting eviction record access by disposition is necessary to address the inefficacies of eviction expungement and eliminate obstacles to tenant participation in negotiation.

Other states already limit eviction reporting by statute. For example, in California, housing records may only be disclosed under specific circumstances to prevent the unfair impact on tenants who redeemed, prevailed, or settled their cases.<sup>118</sup> Bills have been proposed in both the Minnesota Senate and Minnesota House of Representatives to mandate expungement:

[I]f the defendant prevailed on the merits; [] if the court dismissed the plaintiff's complaint for any reason; [] if the parties to the action have agreed to an expungement; or [] upon motion of a defendant, if the case is settled and the defendant fulfills the terms of the settlement.<sup>119</sup>

The bills also classify certain eviction records as nonpublic data, so that "[a]n eviction action is not accessible to the public until the court enters a final judgment . . ."<sup>120</sup> Opponents of expanding eviction expungement argue that it prevents landlords from accessing information essential to their tenant screening process.<sup>121</sup> However, the types of cases encompassed by these recommendations are prime examples of cases where there is not

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116. MINN. STAT. § 484.014, subd. 2 (2019) ("The court may order expungement of an eviction case court file only upon motion of a defendant . . .").

117. Only 6% of unrepresented tenants leave court with their eviction expunged from their record, compared to 78% of represented tenants. Luke Grundman et al., *supra* note 26, at tbl. 5.

118. CAL. CIV. PROC. CODE § 1161.2 (2018).

119. H. F. 1511, 2019 Leg., 91st Sess. (Minn. 2019); S. F. 1751, 2019 Leg., 91st Sess. (Minn. 2019).

120. H. F. 1511; S. F. 1751.

121. *E.g.*, LEWIS, *supra* note 30, at 53.

significant public interest in the record. Prospective landlords have little interest in knowing about pending cases because the court has not determined whether there was merit to the eviction filing, and landlords have even less interest if the case was resolved in favor of the tenant. In the case of settlement, prospective landlords also have reduced interest because the parties negotiated an agreement and the merits of the case were never determined by a court. In addition, the argument against expanding expungement also ignores expungement's critical consideration of the *public's* interest in knowing about the record, not landlords' interests.<sup>122</sup> The broader public has little interest in eviction cases generally, and whatever interest the public has pales in comparison to the interests of justice that are advanced in expungement—enabling tenants to secure housing for themselves and their families.<sup>123</sup>

In addition to pursuing legislative measures to expand expungement, the Governor's Task Force on Housing has recommended that courts “[l]imit eviction reporting until a court judgment is rendered [by exploring] the viability of maintaining the confidentiality of Housing Court eviction filings until cases are determined on their merits.”<sup>124</sup> The Minnesota Supreme Court also has several avenues it could take to reduce the negative impact of indiscriminate unlawful detainer classifications. For example, the Court could revise their record retention schedule to designate no retention period for unlawful detainer actions dismissed or resolved in favor of the tenant defendant.<sup>125</sup> As another possibility, the Court could change the public access rules to eliminate access to pending unlawful detainer actions, eliminate the default entry of the unlawful detainer designation in eviction cases, and limit access to dismissed cases and those decided in favor of the tenant defendant in the eviction action.<sup>126</sup> Alternatively, the Court could also create

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122. MINN. STAT. § 484.014, subd. 2 (2019) (“The court may order expungement of an eviction case court file . . . if the court finds that the plaintiff's case is sufficiently without basis in fact or law . . . that expungement is clearly in the interests of justice and those interests are not outweighed by the public's interest in knowing about the record.”).

123. See *supra* note 122 and accompanying text.

124. GOVERNOR'S TASK FORCE ON HOUS., *supra* note 11, at 32.

125. See Minn. Dist. Ct. Record Retention Schedule 11(e) (2018), [http://www.mncourts.gov/mncourtsgov/media/scao\\_library/MN-District-Court-Record-Retention-Schedule.pdf](http://www.mncourts.gov/mncourtsgov/media/scao_library/MN-District-Court-Record-Retention-Schedule.pdf) [<https://perma.cc/6S9R-86W6>].

126. See MINN. R. PUB. ACCESS TO REC. OF THE JUDICIAL BRANCH 8, subd. 2(e) (2017) (limiting public access to pending criminal cases searched using a case party name); MINN. R. PUB. ACCESS TO REC. OF THE JUDICIAL BRANCH 8, subd. 2(g) (2017) (allowing remote access to unlawful detainer cases); MINN. R. PUB. ACCESS TO REC.

additional requirements for entities receiving bulk distribution of records under their access agreement.<sup>127</sup> The Court could require recipients of bulk eviction record data intended for distribution to report disposition information. This would require tenant screening companies to provide appropriate context for a tenant's eviction record and allow future landlords reviewing a tenant's rental application to evaluate the significance of an unlawful detainer on the basis of its disposition.

Restricting access to unlawful detainer information would improve tenants' ability to participate in mediation and increase the number of successful mediated agreements. When settlements do not appear as an unlawful detainer on their record, tenants are in a better position to negotiate and have incentive to reach an achievable agreement<sup>128</sup> to avoid an unlawful detainer designation being placed on their record.<sup>129</sup> Tenants would also have more freedom to negotiate move-out agreements; rather than agreeing to unrealistic payment plans, tenants would be able to negotiate a move-out with the knowledge they will not be prevented from obtaining new housing due to an unlawful detainer on their record.

*B. Notice and Pre-filing Mediation: Empowering Tenants  
and Incentivizing Landlords to Mediate Prior to  
Eviction*

Minnesota's eviction process moves very quickly, enticing landlords to use the court system in circumstances that would

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OF THE JUDICIAL BRANCH 8, subd. 3 (2017) (limiting bulk distribution of court records with remote access limitations under subd. 2).

127. MINN. R. PUB. ACCESS TO REC. OF THE JUDICIAL BRANCH 8, subd. 3(b) (2017).

128. Achievable payment plans are crucial to successful outcomes for tenants and landlords. A study examining settlements in Brooklyn Park eviction cases found that settlements were more likely to be successful when they involved smaller payments of money owed distributed over a longer period of time. SAMUEL SPAID, HOME LINE & REBECCA HARE, SETTLEMENT SUPPLEMENT TO "EVICCTIONS IN BROOKLYN PARK" (on file with HOME Line). Settlements where tenants agree to make high payments within a short period of time are not typically realistic and may reflect an agreement made between unequal parties. *Id.*

129. To achieve successful settlements and prevent a landlord from coercing a tenant into accepting an impossible payment plan, a mediator acting as a neutral party may try to manage expectations and reality check with both parties to ensure the agreement's terms are realistically achievable. Baylis & Carroll, *supra* note 15, at 293–96 (offering an extensive list of both features of the mediation process and mediator interventions and strategies that can reduce power differentials); Zugay, *supra* note 59; Moberg Walls, *supra* note 60. *But cf.* Stauffer, *supra* note 103, at 267 ("Where tenants are aware of the screening service, they may . . . go to great lengths to settle any conflict out of court, to prevent the landlord from filing the initial suit.").

otherwise be resolved outside of court through negotiation of a payment plan.<sup>130</sup> The majority of eviction actions are for nonpayment and many result in a payment plan settlement allowing the tenant to remain in their home.<sup>131</sup> Pre-filing mediation would simply provide the same opportunity to negotiate a payment plan without the tenant going to court to defend against an eviction. It would also prevent the issue of an unlawful detainer entry discussed above. Mediation prior to eviction filing encourages both parties to seek a resolution prior to initiating an adversarial court process and receive assistance from a neutral third party in reaching an agreement.<sup>132</sup> Including a notice requirement prior to eviction filing, and encouraging mediation during this time, is necessary to encourage landlord participation in mediation and ensure the opportunity to negotiate is extended equally to all tenants.<sup>133</sup>

Instituting a notice period prior to eviction filing would create a built-in timeframe to allow pre-filing mediation to take place. A notice requirement of fourteen days prior to eviction filing would inform the tenant of a potential eviction action and provide time for the parties to arrange mediation with a qualified neutral.<sup>134</sup> Because most eviction actions are brought on the grounds of nonpayment,<sup>135</sup> the notice requirement would provide an

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130. When both parties appeared, the vast majority of cases settled (83% in Minneapolis, 95% in Brooklyn Park, and 89% in St. Paul), and of those settlements, the majority resulted in payment plans (no data provided for Minneapolis, 86% in Brooklyn Park, and 60% in St. Paul). MINNEAPOLIS, *supra* note 35, at 8, 11; BROOKLYN PARK, *supra* note 37, at 11, 14; SAINT PAUL, *supra* note 38, at 11, 14.

131. See *supra* note 130 and accompanying text. Of payment plan settlements, the rate of successful settlements varied (i.e. a successful settlement was defined as one that did not result in the issuance of a writ of recovery) (31% in Minneapolis, 64% in Brooklyn Park, and 67% in St. Paul). MINNEAPOLIS, *supra* note 35, at 8; BROOKLYN PARK, *supra* note 37, at 11; SAINT PAUL, *supra* note 38, at 11.

132. Moberg Walls, *supra* note 60 (discussing how the mediator's role opens up a space where the both parties feel more approachable and that negotiating is happening in good faith); Rios, *supra* note 59 (discussing how pre-filing mediation empowers both parties to talk with each other).

133. On January 22, 2019, a bill was introduced in the Minnesota Senate that would require a fourteen-day notice period of a violation prior to filing an eviction. S. F. 338, 2019 Leg., 91st Sess. (Minn. 2019).

134. The State Court Administrator's Office publishes a list of qualified neutrals in Minnesota. MINN. STATEWIDE ADR-RULE 114 NEUTRALS ROSTER, <https://adrroster.courts.state.mn.us/>.

135. MINNEAPOLIS, *supra* note 35, at 9 (finding 164 cases were brought for nonpayment of 174 cases reviewed); GREATER MINNESOTA, *supra* note 19, at 11 (finding 190 cases were brought for nonpayment of 213 cases reviewed); BROOKLYN PARK, *supra* note 37, at 12 (finding 193 cases were brought for nonpayment of 200 cases reviewed); SAINT PAUL, *supra* note 38, at 12 (finding 188 cases were brought

opportunity to negotiate a payment plan outside of court.<sup>136</sup> However, if the parties were unable to achieve a mutually agreed result in mediation, the landlord would be able to initiate an eviction action after the time for mediation has passed.<sup>137</sup>

Having a notice period would also allow tenants time to secure financial resources. Tenants experiencing an adverse life event may not have the resources to agree to a payment plan in mediation without financial assistance from outside sources, such as Emergency Assistance. Tenants who apply for Emergency Assistance may frequently wait up to a month to receive funds to cover the cost of rent, which is often too late to prevent eviction.<sup>138</sup> Improving accessibility to emergency financial resources has been identified as a recommendation by the Governor's Task Force on Housing.<sup>139</sup> Initiatives in both Hennepin and Ramsey counties have recognized the importance of timely processing of Emergency Assistance applications and have created partnerships to improve this process.<sup>140</sup> Through these partnerships they are able to connect tenants to Emergency Assistance for a letter of guarantee on their behalf, so they have a better position from which to mediate an agreement.<sup>141</sup> In nonpayment cases, having a letter of guarantee provides assurance to a landlord that the rent owed by the tenant will be paid and eliminates the need for pursuing an eviction action.<sup>142</sup> The additional time allotted for pre-filing mediation would allow tenants time to secure these financial resources and allow both parties reach an agreement without resorting to an eviction action.

Pre-filing mediation could also improve the tenant's ability to make an achievable payment plan because the landlord would not

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for nonpayment of 200 cases reviewed).

136. *Contra* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 12 (1993) ("Mandatory mediation abridges American freedom because it is often outside the law, eliminates choice of procedure, removes equal protection before an adversary law, and is generally hidden from view.").

137. This fourteen-day mediation window would be similar to the existing law governing rent escrow actions that requires a fourteen-day notification period before a tenant may pursue a rent escrow action for repairs. MINN. STAT. § 504B.385 (2019).

138. Bruch, *supra* note 12.

139. GOVERNOR'S TASK FORCE ON HOUS., *supra* note 11, at 9.

140. LEWIS, *supra* note 30, at 13; SECOND JUDICIAL DIST. OF MINN. HOUS. COURT, *supra* note 50.

141. Rios, *supra* note 59; Rose McCullough, NorthPoint Health & Wellness Ctr., Remarks at Eviction Crisis: Mediator Training (Sept. 25, 2018).

142. *See supra* note 141.

be seeking recovery of their costs in pursuing an eviction action.<sup>143</sup> In filing an eviction, landlords bear the costs of “lost rent, vacancy and turnover costs, and legal fees.”<sup>144</sup> Pre-filing mediation could reduce these costs and serve the same role as settlement, which already occurs in the vast majority of cases where tenants appear at their eviction hearing.<sup>145</sup> Pre-filing mediation also offers landlords incentive to mediate to avoid the costs entailed in pursuing an eviction action in court and to recover rent that would otherwise be lost if the tenant were to vacate.<sup>146</sup>

Settlement trends in Hennepin and Ramsey counties—which account for half of all evictions filed in the state<sup>147</sup>—do not suggest that a move towards pre-filing mediation would result in increased tenant displacement. Settlement rates are high in both Hennepin and Ramsey counties,<sup>148</sup> likely because both courts encourage and facilitate settlement negotiation as part of their eviction hearing process.<sup>149</sup> Because nonpayment of rent is by far the most common reason for court-ordered evictions in these jurisdictions, settlements typically involve creating payment plans, while a smaller percentage include agreements by the tenant to vacate.<sup>150</sup> These trends, combined with strategies to mitigate power imbalance in negotiation, refute the argument that mediation would merely serve as another avenue for tenant displacement. Landlords who are already making payment settlements with tenants in court are unlikely to seek move-out settlements outside of it, particularly when tenants are motivated to arrange a payment plan. Landlords remain motivated to seek recovery of the unpaid rent, and

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143. Mediators may charge a reasonable fee for their services. MINN. GEN. R. PRAC. 114.11 (2019).

144. GOVERNOR’S TASK FORCE ON HOUS., *supra* note 124, at 30.

145. *See supra* note 130 and accompanying text.

146. Moberg Walls, *supra* note 60.

147. *See supra* note 27 and accompanying text.

148. *See supra* note 130 and accompanying text.

149. DUE PROCESS DENIED, *supra* note 50; SECOND JUDICIAL DIST. OF MINN. HOUS. COURT, *supra* note 50. Both courts include mediators in their housing court calendars to assist with mediating eviction settlements and are actively pursuing pre-filing mediation initiatives. *Id.*

150. *E.g.*, SAINT PAUL, *supra* note 38, at 11 (finding that 58% of cases settled resulted in payment plans while 38% resulted in move-out settlements). The results of the eviction study in Brooklyn Park are less typical because a majority of evictions in the city are filed by four property owners, that had an unusually high rate of payment plans. BROOKLYN PARK, *supra* note 37, at 11 (finding that 83% of cases settled resulted in payment plans while 13% resulted in move-out settlements); SAMUEL SPAID, HOME LINE & REBECCA HARE, FREQUENT FILERS SUPPLEMENT TO “EVICTIONS IN BROOKLYN PARK” 3, 5 (2018).

accomplishing that goal through mediation is even simpler than going through the court process.

Notice prior to an eviction filing, coupled with the option to mediate, would improve the likelihood of a tenant remaining in their home by offering an opportunity for both parties to communicate early on and negotiate a payment plan as an alternative to the eviction process. Mediation facilitated prior to eviction filing allows the tenant to negotiate from a better position than in the stressful and confusing throes of the eviction process. Pre-filing mediation also incentivizes participation in the mediation process by landlords seeking to resolve the matter quickly, recover rent due, and mitigate the costs of litigation. With a built-in opportunity for mediation during the notice period, landlords would be encouraged to resolve payment issues with their tenants through mediation at this first stage, rather than initiating eviction. For these reasons, notice and pre-filing mediation work hand-in-hand to promote mediation by empowering tenants and incentivizing landlords, resulting more likely in improved outcomes for both parties.

*C. Accessible Legal Information and Advice: Leveraging Existing Tenant Protections*

Mediation's central tenets of neutrality, self-determination, and informed consent come into tension when mediating parties lack information about their legal rights.<sup>151</sup> To avoid perpetuating the unequal negotiation power that already exists in the landlord-tenant relationship, governing law should be available to both parties during mediation. Mediators should be encouraged to inform tenants of their legal rights to ensure they are able to make informed decisions in mediation and come to an agreement that is truly consensual and not coerced. The argument that mediators have a duty to dismantle power imbalances to achieve true self-determination supports providing relevant legal information to tenants in eviction mediation.

The American Bar Association's Section of Dispute Resolution recognizes both an informative and evaluative role for mediators and expressly distinguishes mediation from the unauthorized practice of law.<sup>152</sup> Mediators may bring their knowledge of the

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151. Kurtzberg & Henikoff, *supra* note 18, at 113–14.

152. Resolution on Mediation and the Unauthorized Practice of Law, Am. Bar Ass'n Section of Dispute Resolution (Feb. 2, 2002),



subject matter into the mediation to manage expectations and help the parties reach an agreement.<sup>153</sup> However, mediators in Minnesota do not have a legal duty to provide parties with legal information about their rights.<sup>154</sup> Mediators may hesitate to provide legal information to mediating parties for fear of losing their appearance of neutrality—even though the principles of self-determination and informed consent require it.<sup>155</sup> However, this reticence is inconsistent with the mediator’s duty to ensure the parties “control . . . the outcome of the dispute” and as a result, enter into a truly consensual, self-determined outcome.<sup>156</sup> Without crucial legal information about their rights, tenants may end up in coerced agreements that lack their informed consent. The mediator’s duty to ensure self-determination and informed consent creates tension between this duty and the statute absolving them from this duty.

In Minnesota, tenants have robust rights and protections under state landlord-tenant law.<sup>157</sup> However, tenants without knowledge of landlord-tenant law are disadvantaged in mediation when they lack critical information that could be used as a negotiation tool.<sup>158</sup> Access to governing law is necessary to prevent a tenant from entering into a coerced agreement,<sup>159</sup> undermining the most fundamental principles of mediation:

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[https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/resolution2002.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/resolution2002.pdf) [<https://perma.cc/JU88-6NLL>].

153. MINN. GEN. R. PRAC. 114 app., advisory task force comment to 1997 amendment of Mediation R. (“The mediator may provide information about the process, raise issues, offer opinions about the strengths and weaknesses of a case, draft proposals, and help parties explore options.”).

154. MINN. STAT. § 572.35, subd. 1 (2019) (“[T]he mediator has no duty to protect [the parties’] interests or provide them with information about their legal rights . . .”).

155. Kurtzberg & Henikoff, *supra* note 18, at 82–84 (presenting concerns regarding the effect of providing legal information on a mediator’s perceived neutrality, and ultimately rejecting these concerns in favor of a mediation process focused on both the interests and rights of the parties).

156. Baylis & Carroll, *supra* note 15, at 293 (quoting Hilary Astor, *Rethinking Neutrality: A Theory to Inform Practice—Part 1*, 10 AUSTRALASIAN DISP. RESOL. J. 73, 73 (2000)) (“If neutrality is focused on ‘. . . what the mediator is doing to ensure that, to the maximum extent possible, the parties control the content and the outcome of the dispute[,] then ensuring that both parties can act free from pressure or coercion is imperative.”); accord Kurtzberg & Henikoff, *supra* note 18, at 113–14.

157. For an overview of the enumerated rights and responsibilities of tenants and landlords in residential landlord-tenant relationships in Minnesota see MINN. STAT. §§ 504B.281–.371 (2019).

158. See GRUNDMAN & KRUGER, *supra* note 104.

159. See MINN. GEN. R. PRAC. 114 app., Mediation R. 1 (2019) (“A mediator shall

Consensuality can only exist if both parties are making real and free choices based on effective participation in a mediation. In circumstances involving significant power differences the mediator must attempt to ensure that the participation of all parties is both genuine and active, and that any agreement formed is not based on coercion or pressure.<sup>160</sup>

Access to relevant legal information should be made available to tenants when the fourteen-day notice is given by the landlord to allow the tenant to prepare for the mediation. This same information should also be available to both parties for reference during mediation sessions. Contents of a pre-eviction notice should contain access points to relevant legal information, including the Minnesota Attorney General's Landlord Tenant Handbook,<sup>161</sup> which contains contact information for housing advocates and mediation services, and landlord-tenant fact sheets available on LawHelpMN.<sup>162</sup> It is not enough that this information is available online—it is not easily discovered by those unfamiliar with the legal process, and online resources are not accessible to those who lack internet access. These resources should be made accessible to parties both prior to and during all mediation sessions, and their use should be encouraged. Making this information accessible in a 'neutral' way can also help the mediator maintain their appearance of neutrality in the mediation by referencing specific content in the materials rather than raising the issue on their own.

Beyond access to legal information, legal advice from an attorney would level the playing field for tenants who are not as familiar with landlord-tenant law as their landlords. Studies of tenant representation in mediation have observed that tenants experience significantly better outcomes when represented by an attorney.<sup>163</sup> As discussed above, tenants experience better outcomes

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recognize that mediation is based on the principle of self-determination by the parties. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.”).

160. Baylis & Carroll, *supra* note 15, at 292.

161. MINN. ATT'Y GEN. KEITH ELLISON, LANDLORDS AND TENANTS: RIGHTS AND RESPONSIBILITIES 28, <https://www.ag.state.mn.us/brochures/pubLandlordTenants.pdf> [<https://perma.cc/ZR7M-YJNW>].

162. *Housing*, LAWHELPMN, <http://lawhelpmn.org/issues/housing> (last visited Oct. 28, 2019).

163. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 67–68 (2010) (“[W]hile 15% of tenants retained possession after pro se instruction

with legal representation; this is more than winning or losing a case, but keeping or being displaced from a home. The American Bar Association has adopted a resolution urging governments to provide a civil right to counsel in cases “where basic human needs are at stake, such as those involving shelter,” otherwise known as *Civil Gideon*.<sup>164</sup> *Civil Gideon* is necessary to guarantee tenants have adequate legal knowledge and ability to negotiate agreements.

In a pre-filing scenario, the tenant could either seek legal advice in advance of the mediation or find an attorney willing to limit the scope of representation to the mediation. In a court mediation setting, landlords are required to be represented by legal counsel if they are incorporated as a business,<sup>165</sup> which further diminishes the tenant’s negotiating power if they are unrepresented in the eviction action.<sup>166</sup> In a court mediation setting, attorneys can ensure tenants know and assert their rights by reviewing settlement agreements for tenants before they are entered before the court.<sup>167</sup> Attorney review of settlement agreements would empower tenants by providing them with an understanding of the legal merit of the case, possible defenses they have against an eviction, and suggestions for obtaining a more favorable settlement.<sup>168</sup> In each of these settings, legal advice and

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alone, when attorneys subsequently assisted the tenant in court-based mediation under limited representation agreements, the figure jumped to 58%.”); Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 *FORDHAM URB. L.J.* 381, 417 n.153 (2010).

164. TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE ABA HOUSE OF DELEGATES (Aug. 7, 2006), [<https://perma.cc/88JL-5TS5>] (“RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”).

165. *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992) (holding companies must be represented by an attorney). However, the Fourth District Housing Court in Hennepin County does not follow this guidance and allows corporations to appear without attorney representation by citing *MINN. GEN. R. PRAC. 603* and *Hinckley Square Assoc. v. Cervene*, 871 N.W.2d 426 (Minn. Ct. App. 2015). *MCDONOUGH*, *supra* note 102, at ch. VI.D.7.b.

166. Engler, *supra* note 163, at 68.

167. Tina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 *GEO. J. ON POVERTY L. & POL’Y* 181, 191 (2003) (“The attorneys who were negative about mediation because of the poor results obtained by *pro se* tenants believe that a dramatically different outcome would result if they could represent the client in the mediation session.”).

168. *Id.*; Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 *SEATTLE J. FOR SOC. JUST.*, 51, 78 (2010) (“The impact of expanded access to lawyers would likely be to increase the rates at which currently unrepresented

representation can reduce the power imbalance between the parties because the attorney-advocate can accurately assess the strength of their claim and assert the tenant's rights.

*D. Equal Opportunity to Mediate: Structuring the Eviction Mediation Process*

A statutory eviction mediation process is necessary to ensure the opportunity to mediate is available to all tenants. Without a statutory eviction mediation process, landlord participation in mediation prior to eviction filing is unlikely to increase if they can rely on the court process to serve their interests.<sup>169</sup> In addition to this, when mediation is offered at a landlord's discretion, there is the potential for discrimination. In eviction cases, a facially neutral reason for eviction, such as nonpayment of rent, can result in racially disparate outcomes.<sup>170</sup> Therefore to ensure there is equal opportunity for all tenants to participate in mediation, pre-filing mediation must be incorporated into the current eviction process.<sup>171</sup>

Though no states have a codified eviction mediation process, Minnesota's Farmer-Lender Mediation Act (FLMA)<sup>172</sup> provides a useful model for constructing a statutory mediation program that addresses power imbalances in negotiation. The FLMA protects farmers in financial crisis from their creditors by affording them the opportunity to negotiate debt issues through mediation.<sup>173</sup> Similarly, this model could protect tenants' interest in their homes

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people won their cases, because lawyers' understanding of procedure would reveal meritorious claims that are currently buried under unrepresented litigants' confusion about, and misunderstanding of, the formal legal process.”).

169. Clare Pastore, Gideon *Is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs*, 17 U.D.C. L. REV. 75, 109 (2014) (“The managing attorney [of the pre-eviction filing mediation pilot] . . . noted the difficulty of implementing innovations which challenge the landlord bar's predominant business model of minimizing court appearances and meetings.”).

170. Greenberg, Gershenson & Desmond, *supra* note 9, at 128, 134, 140–44 (finding Hispanic tenants with white landlords experienced higher eviction rates than similarly situated white tenants). Both intentional discriminatory motivation and implicit bias can influence whether a landlord chooses to negotiate with a tenant or file for eviction. *Id.* at 143–44.

171. Pastore, *supra* note 169, at 111, 128–29.

172. MINN. STAT. §§ 583.20–.32 (2019).

173. MINN. DEP'T OF AGRIC., FARMER-LENDER MEDIATION TASK FORCE REPORT, at 3 (2017), <https://www.leg.state.mn.us/docs/2017/mandated/170424.pdf> [<https://perma.cc/5BHB-TGWE>] (“The Farmer-Lender Mediation Act was passed by the Legislature and signed into law in 1986 to help address the financial crisis that Minnesota farmers were facing. The Farmer-Lender Mediation Act gives farmers the opportunity to renegotiate, restructure, or resolve farm debt through mediation.”).

by providing an opportunity for alternative dispute resolution prior to initiation of an eviction action. The goals of the FLMA also closely align with those of the eviction mediation process proposed in this Note: “to achieve open communication between parties in order to resolve differences, define the rights of the debtor and creditor, and produce agreements that are acceptable to all parties.”<sup>174</sup> The mediation process can reduce the power differential between the two parties—both in the case of farmer and creditor as well as tenant and landlord.

To address power inequality issues, elements of the FLMA could be adapted into an eviction mediation process that includes several of the recommendations discussed in this Note, including required notice to the tenant, mediation at the tenant’s option, and required provision of resources to assist the tenant with financial matters and advocacy. For example, the FLMA requires a creditor to send a mediation notice to the debtor prior to filing that gives the debtor fourteen days to request mediation after receiving the notice.<sup>175</sup> Similarly, in the landlord-tenant context, the notice would provide the tenant with knowledge of a pending action, allowing them to take affirmative steps to prevent eviction by accessing financial resources and legal assistance. The FLMA recognizes the value of these measures and further requires the debtor be provided with a financial analyst to assist them in preparing financial information for the initial mediation, as well as a list of farm advocates.<sup>176</sup> Both of these requirements would give tenants the resources necessary to negotiate with landlords in mediation and ideally remain in their homes.

An important aspect of the FLMA’s notice requirement is that while the opportunity to mediate is extended to all debtors, the FLMA places the decision to do so in the hands of the farmer.<sup>177</sup> Similarly, in the landlord-tenant context, there may be situations

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174. *Id.* at 4.

175. MINN. STAT. § 583.26, subd. 1(a) (2019) (“A creditor desiring to start a proceeding to enforce a debt against agricultural property . . . to terminate a contract for deed to purchase agricultural property . . . or to garnish, levy on, execute on, seize, or attach agricultural property, must serve an applicable mediation notice . . .”); MINN. STAT. § 583.26, subd. 2 (2019).

176. MINN. STAT. § 583.26, subd. 3 (2019) (noting the list of farm advocates is provided by the director of the University of Minnesota Agricultural Extension Service).

177. MINN. STAT. § 583.26, subd. 2 (2019) (“A debtor must file a mediation request form with the director by 14 days after receiving a mediation notice . . . . [A] debtor who fails to file a timely mediation request waives the right to mediation for that debt . . .”).

where a tenant does not want to mediate due to their personal relationship with the landlord, potentially due to a history of harassment, discrimination, or retaliatory behavior.<sup>178</sup> These situations are less likely to be an issue in the FLMA context and are a sufficient reason to reject a mandatory mediation rule. Another alternative to protecting tenants with personal relationships could be a statutory exception to mediation for certain circumstances.<sup>179</sup>

For these reasons, the FLMA offers a useful model to apply to eviction mediation. Informed by over 30 years of governing farm debt, FLMA's principles and goals can be applied to issues of power that plague tenants in eviction disputes. Creating a statutory mediation process is an important step to address these issues and ensure tenants stay in their homes.

### Conclusion

There are real costs to eviction—costs that are borne not only by landlords and tenants as parties to the action, but also their communities. Courts should not function as a de facto 'bill collector' for landlords, especially in circumstances that involve a person's home and may result in homelessness.<sup>180</sup> When a person misses a mortgage payment, the first step is not foreclosure.<sup>181</sup> Instead, a person in danger of losing their home is provided with notice of their

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178. Cf. Greenberg, Gershenson & Desmond, *supra* note 9, at 153, 153 n.252 (recommending mandatory mediation prior to eviction filing by pointing to the success of mandatory foreclosure mediation in New York).

179. *E.g.*, MINN. STAT. § 518.619 (2019) (providing an exception from mediation in custody and visitation cases when there is a history of abuse between the parties); Mass. S.J.C. Rule 1.18 URDR Rule 4(c)(i) (2019) (“[E]ach party shall be provided with an opportunity to terminate the dispute resolution services, upon motion to the court for good cause shown . . . .”); Mass. S.J.C. Rule 1.18 URDR Rule 4(c)(iii) (2019) (“[T]he court shall explicitly inform parties that, although they are required to participate, they are not required to settle the case while participating in dispute resolution services . . . .”).

180. Email from Luke Grundman, Managing Attorney, Hous. Unit, Mid-Minnesota Legal Aid, to Anna Lamb, Referee Mark Labine, and Referee Melissa Houghtaling (Mar. 18, 2018), *reprinted in* MINN. JUDICIAL BRANCH, JOINT PROPOSAL FOR HOUSING COURT RULE CHANGES FROM THE SECOND AND FOURTH JUDICIAL DISTRICT HOUSING COURTS 163 (2018), <http://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/Rule-603-Proposal-and-Related-Materials.pdf> [https://perma.cc/WY9Y-CX3J] (“Using housing court as the bill collector of first resort leads to unnecessary filings, more social resources (Court staff, mediators, Legal Aid), and long term damage to the tenant in the form of negative rental history reporting.”).

181. A mortgagee is required to inform a mortgagor of loss mitigation options available through the servicer before referring the loan to foreclosure and make the debtor aware of foreclosure prevention counseling resources. MINN. STAT. §§ 582.043, subd. 5, 580.021, subd. 2 (2019).

missed payment, payment plan options, and foreclosure prevention counseling.<sup>182</sup> Renters facing the eviction process merit these same dignities.

Reducing the forced displacement of tenants supports both individual dignity and community prosperity—and can be achieved through mediation. However, for mediation to be effective in preventing eviction, it must be a tool of empowerment. This is not possible in a system that prioritizes the convenience and expediency of eviction. Effective mediation requires time, opportunity, and equal access to the protection of the law. To be an effective alternative to the eviction process, both parties must be incentivized and empowered to mediate. With reform of unlawful detainer classification and disclosure, systemic obstacles to negotiation are dismantled and tenants gain incentive to mediate. Instituting a notice period prior to filing an eviction encourages both parties to participate in mediation to negotiate an agreement to allow tenants to remain in their homes and avoid an eviction filing. Finally, and most importantly, access to legal resources and representation are necessary for tenants to effectively represent themselves in mediation. A statutory eviction mediation process, modeled after the Farmer Lender Mediation Act, is necessary to ensure that the opportunity to mediate is extended to all tenants and that these strategies are incorporated into a comprehensive approach to reduce the power differential between landlords and tenants and achieve successful mediated agreements. Promoting successful mediation in eviction disputes enables both parties to negotiate mutually beneficial agreements, curtails ineffective and excessive use of the eviction process, and improves housing stability by preventing tenant displacement. By reducing this harmful displacement, we preserve homes, livelihoods, and communities.

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182. *See supra* note 181.