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Ms. Tracie K. Lindeman,
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV 89701

Re: Comments on Proposed Rule Changes – ADKT No. 435

Dear Ms. Lindeman:

I have the following comments to the proposed revisions to the Rules regarding the Foreclosure Mediation Program (the "FMP"):

1. **Rule 4(2)**: I am concerned that this rule change is too broad and will have several negative results to the FMP. First, many attorneys who are mediators do so out of a strong sense of public duty. It is clear that at the rate of compensation being paid to the mediators at $400 per mediation, attorneys are not typically acting as mediators as their primary source of income. This proposed rule change will require many attorney-mediators to make a choice to either act as a mediator or represent parties at mediations. From a purely economic point of view, many attorney-mediators will choose to represent parties at mediations because it is more lucrative; thereby removing a large number of qualified attorney-mediators from the pool of mediators.

Second, this broad restriction appears atypical in the ADR/mediation world. While each mediator or arbitrator must abide by the Code of Judicial Conduct, I am not aware of any other mediation or arbitration program that imposes such a broad (and unnecessary) restriction on mediators/arbitrators. Certainly Supreme Court Settlement Judges are able to represent parties at settlement conferences where they are not also acting as the Settlement Judge (and assuming no other conflict of interest exists). Court appointed arbitrators are permitted to represent clients at arbitrations.

I have heard that this rule change was strongly promoted by lenders who voiced concerns that attorneys who represent lenders in mediations should not be permitted to act as mediators due to a potential conflict of interest. I would submit that the existing rules of professional conduct covering attorneys, and the marketplace in general, should resolve this concern without requiring such a broad restriction. If a lender believes that its attorney has a conflict of interest

by acting as a mediator in a mediation in which that lender is a party, the lender is free to request the mediator to recuse himself/herself and/or to file a complaint with the State Bar of Nevada. That lender is also free to not retain that particular attorney in the future. Also, for lenders to argue that having mediators who represent borrowers in other mediations could create a bias in favor of borrowers is equally as unpersuasive. To take this argument to its logical conclusion, the FMP would have to determine that a particular mediator does not represent borrowers in other contexts, which is equally as unnecessary.

For the reasons set forth above, I would recommend deleting this proposed revision.

2. **Rule 5 (4)(c)**: While I understand the substantive reason for this new section, it needs to be clarified in order to avoid some practical issues. I would recommend requiring a Trustee of a Trust to sign a form at the time the Election to Mediate form is completed, attesting under oath (and under the penalty of perjury) to the essential information regarding the Trust, such as the name and address of the Trustee, the date of the Trust, a statement that the Trust is in full force and effect and that the Trust is the record title owner of the residence. This will avoid requiring the mediator to request documentation to "look behind" the Trust in order to make his or her own determination as to these issues, which takes additional time. Further, as many mediators are not attorneys, they may not necessarily know how to interpret the Trust documents. I would also recommend inserting the words "and not the Settlor" in the second sentence of subparagraph (c), so that it reads as follows: "The grantor or persons who hold title of record of an owner-occupied residence is a trust, in which case the trustee of such trust **(and not the Settlor)** shall be the eligible participant."

3. **Rule 5(7)**: While I understand that this proposed revision is attempting to avoid the situation where a lender rescinds the Notice of Default ("NOD") in order to stop a mediation, I am not certain it makes sense to require the mediation to continue when a NOD no longer exists (and, therefore, the foreclosure process itself has been stopped). As I understand it, a primary goal of the FMP is to bring the parties together and require a lender to mediate with a borrower in an attempt to resolve a pending foreclosure. If the foreclosure process has been stopped, the mediation should not continue as this extends the purpose of the FMP beyond the scope of a pending foreclosure. The borrower is no longer at immediate risk of losing his or her home because the foreclosure process is no longer pending. If a lender elects to file a new NOD in the future, the borrower can elect mediation again, so the borrower is not prejudiced (other than the fact that the borrower has already paid the $200 fee). In order to avoid requiring a borrower to pay another $200, fee if and when the lender files a new NOD, I would require the lender in that situation to pay the entire $400 fee if a borrower subsequently elects mediation.

4. **Rule 5(9)(d)**: I am concerned that this may be a difficult rule to enforce, and may require a mediator to spend additional time to determine whether compensation has been paid. I would recommend requiring the person named in the power of attorney to attest, in writing and under oath (under penalty of perjury), that no compensation of any kind has been or will be charged to the borrower in connection with the mediation.

5. **Rule 10(2)**: This proposed revision makes sense but may not be practical in the context of the mediations. In my experience, most borrowers will agree to vacate the residence either on

the date of a foreclosure sale or within a certain period of time after a foreclosure sale. As we don't know the date of a foreclosure sale at the time of the mediation, I would recommend revising this section to allow the parties to insert this type of time frame based on the date of the foreclosure sale instead of a date certain.

6. **Rule 16**: I am extremely troubled by the concept of creating a fee schedule that could reduce the $400 fee, and would strongly recommend against it, unless the $400 ceiling is removed and mediators can request additional compensation above $400 in certain circumstances. Also, as drafted, once a mediator has been assigned to a case, the mediation fee is non-refundable (see Rule 16(4)), yet a mediator may have his or her fee reduced if the mediation is cancelled or for some other reason prior to the mediation taking place. In that instance, where does the remaining portion of the (non-refundable) fee go? As you know, it takes mediators a significant amount of time to schedule and prepare for a mediation. Mediators often spend many additional hours speaking with the parties in an attempt to resolve issues. This revision could act as an economic disincentive to mediators to resolve mediations prior to the actual mediation out of a concern for having the fee reduced. There are relatively few cases where a mediation is cancelled (and the mediator is paid the $400 fee) in comparison to the number of cases where the mediators are expending significant hours for a $400 fee.

As a mediator who has been actively involved in the FMP since the "first wave" of mediators was appointed, I am a strong advocate of the FMP. I trust that the Court will view my comments and recommendations in the positive light in which they are intended.

Please do not hesitate to contact me if you wish to discuss any of these comments.

Very truly yours,

JACKIER GOULD, PC

Dean J. Gould

DJG/lmg
cc: Ms. Verise Campbell
Ms. Sandra Reed-Bottino

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