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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

November 30, 2010

Supreme Court of Nevada
201 S. Carson Street, Suite 250
Carson City, Nevada 89701

Re: Rules for Foreclosure Mediations, ADKT No. 435

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF NEVADA:

I represent Mr. and Mrs. Grant Weise, Nevadans in danger of losing their home to foreclosure. They have elected mediation under the Foreclosure Mediation Law, AB 149 (2009 Leg.), now codified as NRS 107.086.

On behalf of my clients, I respectfully offer my comments to the following proposed Foreclosure Mediation Rule (FMR) currently under consideration by the Court. I further request an opportunity to participate in the hearing scheduled for December 6, 2010.

> **Pending proposed FMR 2(3)(c) :** For good cause the Administrator may temporarily discontinue assigning mediation cases to a mediator for a maximum of 60 days.

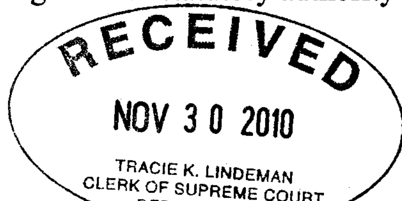
Comments:

I urge the court to reject this proposed rule.

If adopted, the rule would significantly interfere with my clients' ability to assert rights granted them by the Foreclosure Mediation Law. Among other things the law entitles homeowners who elect mediation, such as my clients, to obtain judicially imposed sanctions, including loan modifications in appropriate cases, based on mediators' recommendations against beneficiaries who fail to comply with their statutory obligations. NRS 107.086(5). But the proposed rule would enable the Mediation Administrator to enforce program requirements, guidelines, and procedures designed to frustrate the efforts of homeowners who would seek of sanctions against beneficiaries.

As this Court itself acknowledges, the purpose of proposed Rule 2(3)(c) is to "expand controls over mediators who do not comply with program requirements." Supreme Court News Release, November 10, 2010, http://www.nevadajudiciary.us/index.php/foreclosuremediation.

Acting without statutory authority the FMP Division has created program requirements,



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guidelines, and procedures that are only sporadically in writing, are not available to the public, and often conflict with the law. In creating and enforcing them, the FMP Division acts on the advice of the Foreclosure Mediation Program's attorneys at Fennemore Craig, a law firm that boasts a 125-year attorney-client relationship with major lender Wells Fargo. This assures that the program requirements consistently favor beneficiaries over homeowners like my clients. Indeed these program requirements, guidelines, and procedures appear designed to assure that district courts not impose sanctions against beneficiaries even when such sanctions are appropriate. For example:

- Mediators are prohibited from recommending sanctions against beneficiaries, even though it is their statutory duty to do so in certain cases. NRS 107.086(5).

- The Mediation Administrator asserts the right to discontinue assignments to mediators who recommend sanctions against a beneficiary, even though FMR 3(2) requires that case assignments be made "randomly." Adoption of the proposed rule would tend to legitimate this process and enable the Mediation Administrator to control the mediation process for the benefit of Wells Fargo and other lenders by threatening to suspend any mediator who would recommend sanctions against a beneficiary.

- The law requires mediators to "prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or [its] representative" in certain situations. NRS 107.086(5). The Legislature intended for the Mediation Administrator to file such petitions and recommendations with the district court.[1] Program procedures dictate that the Mediation Administrator return any such petitions and recommendations to the mediator unfiled. The Mediation Administrator then instructs the Program Manager to advise the parties that such mediator's petitions and recommendations are "not valid Foreclosure Mediation Program Documents and should be ignored."

- Mediators are required to shred their notes regarding mediation cases. The lack of evidence of what occurred at the mediation session works to the advantage of the beneficiary since the homeowner bears the burden of proof when seeking sanctions. Moreover NRS 199.220 prohibits the destruction of evidence with the intent to prevent its production in court.

- Mediators are prohibited from testifying in court about mediation sessions. This impedes

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[1] See, Minutes of Assembly Committee on Ways and Means, (Nev., April 27, 2009), Page 10: "If the mediation occurred, but the lender did not participate in good faith, a recommendation by the mediator would be presented to the mediation administrator *who would file the report with the district court* [emphasis added], . . ."

the homeowner's ability to obtain sanctions, since the mediator is normally the only unbiased person with first-hand knowledge of what occurred at the mediation and is therefore a critical witness for a homeowner seeking sanctions in the district court. NRS 199.230 prohibits anyone from attempting to prevent another from appearing as a witness in court with the intent to obstruct the course of justice.

- Under current program procedures, the Program Manager determines in her discretion based on the Mediator's Statement whether to issue a certificate allowing a foreclosure to proceed. However the law imposes a mandatory duty on the Mediation Administrator to issue such certificates in only three situations none of which involves the exercise of discretion. See, NRS 107.086(3), (6), and (7). Since the Program Manager does not normally make her determination until after the deadline for filing a petition for judicial review, and since she does not advise the parties of her decision, there is no practical means by which a homeowner can challenge the Program Manager's determination that the foreclosure may proceed.

Additional factors that combine with program requirements to frustrate the efforts of homeowner participants in the Foreclosure Mediation Program include the following:

- According to the public comments of one district judge, judges statewide have decided not to order loan modifications as sanctions.

- FMR 6(1) can be read to impose an obligation on the homeowner to prove "bad faith" as a prerequisite to obtaining sanctions, even though the Foreclosure Mediation Law contains no such requirement. Instead, sanctions can be imposed if the beneficiary fails to comply with any of several statutory duties, one of which is the duty to participate in the mediation in good faith. NRS 107.086(4), (5).

- FMR 8(6) prohibits homeowners from recording the mediation session for purposes of making a record for judicial review, increasing the difficulty homeowners face in proving what occurred at the mediation session.

- FMR 6(5) provides for *de novo* review in the district court. This is contrary to the legislative intent that the process be the same as the district court review of recommendations the district court receives from masters and discovery commissioners. Minutes of the Meeting of the Assembly Ways and Means Committee, 75th Leg. (Nev., April 27, 2009), Page 10. It is difficult to imagine that the Legislature would require mediators to make recommendations to the district court unless the Legislature intended the court to consider such recommendations. *De novo* review further decreases the likelihood that a homeowner will be able to obtain sanctions. Without a transcript of the mediation session, without the mediator's testimony, without access to the mediator's

notes, and without the benefit of the mediator's recommendation, it is extremely difficult for a homeowner to convince the district court to impose sanctions against a beneficiary even when such sanctions are appropriate.

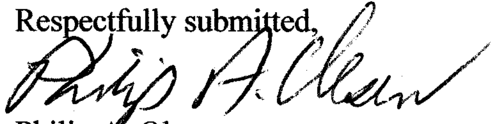
Program statistics show that in 1131 cases completed during the first year of the Foreclosure Mediation Program (approximately 72% of the cases not resulting in agreements), mediators have found that the beneficiary failed to participate in the mediation process in good faith or otherwise failed to comply with the Foreclosure Mediation Law. Supreme Court News Release, July 23, 2010. In all of these cases the law required the mediators to "prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or [its] representative" (NRS 107.086(5)), but unpublished program requirements prohibited them from doing so. As a result homeowners have succeeded in obtaining sanctions in only a very small number of these cases.

Expanding the Mediation Administrator's control over mediators would only serve to frustrate the purpose of the Foreclosure Mediation Law, which is to "assist troubled homeowners." Minutes of the Joint Meeting of the Assembly Committee on Commerce and Labor and the Senate Committee on Commerce and Labor, 75th Leg. (Nev., Feb. 11, 2009), Page 3. There is no legal authority for the Mediation Administrator to control mediators. Mediators are independent contractors who perform their services "without subjection to the supervision or control of the other contracting party, except as to the results of the work, and not as to the means by which the services are accomplished." NRS 284.173(2). Nor does the Foreclosure Mediation Law confer on the Mediation Administrator the right to control mediators. By statute, the Mediation Administrator's powers are purely ministerial, limited to receiving documents from parties, assigning cases to mediators, scheduling matters for mediation, issuing certificates, and collecting and disbursing fees. NRS 107.086(3), (6), (7), and (8)(e). This Court, not the Mediation Administrator, is the ultimate authority on matters such as the validity of documents submitted by mediators, whether a particular foreclosure may proceed, and the interpretation of the Foreclosure Mediation Law.

Mediators are charged with the responsibility of making important judicial determinations, such as whether a particular beneficiary has participated in the mediation in good faith. NRS 107.086(5). In making their determinations, mediators are subject to certain provisions of the Nevada Code of Judicial Conduct, including the requirements that they make their decisions "according to the law and facts" and not allow their decision making to be subject to "inappropriate outside influence." FMR 4(1); Nevada Code of Judicial Conduct, Rule 2.4, comment 1. In making their decisions, mediators should not be subject to the control of an entity that acts in response to influence of lawyers who represent a major lender. "An independent, fair and impartial judiciary is indispensable to our system of justice." Preamble, Nevada Code of Judicial Conduct.

Adoption of proposed Rule 2(3)(c) would work to the detriment of my clients and other Nevada homeowners, defeat the Legislative intent of the Foreclosure Mediation Law, and undermine the public's confidence in the judiciary of the State of Nevada.

Respectfully submitted,



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Clerk of the Supreme Court of Nevada
201 S. Carson Street, Suite 250
Carson City, Nevada 89701

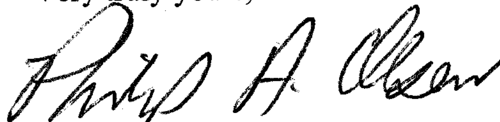
Re: Rules for Foreclosure Mediations, ADKT No. 435

Dear Ms. Lindeman:

In accordance with the Court's Order Scheduling Public Hearing filed November 9, 2010, I am submitting an original and eight copies of my comments to the proposed rule changes currently under consideration by the Court.

I further request an opportunity to participate in the hearing scheduled for December 6, 2010.

Very truly yours,



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