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November 24, 2010

Honorable Judge Hardesty
Nevada Supreme Court
201 South Carson Street
Carson City , NV 89701

ADKT0435

Dear Judge Hardesty:

My wife and I will be enjoying our annual Mexican vacation when the Foreclosure Mediation Rules Hearing is scheduled. I have, in haste, written out my suggestions for rule changes. They go far beyond what is proposed. I would like the opportunity to discuss my suggestions with you, along with the continued problems I have encountered. I will return to my office on December 13, 2010.

Rule 1(4) Comment to subsection 4. Most of the people who provide documents have no idea what NRCP 6(a) and 6(e) provides. It would be simpler if the rule was eliminated and a number of calender days were used for deadlines.

Rule 4(2) The new sentence in subsection 2 is not clear. If a mediator has represented a homeowner at a mediation where the lender is Wells Fargo, does that disqualify the mediator from ever mediating any other foreclosures where Wells Fargo is the lender?

Rule 5(3) A sentence should be added that requires the lender to file a document with the county recorder which indicates the notice of default is no longer effective if a "deal" is made which reinstates the loan. This would help two things. First, it would help the borrowers credit report. Second, it would make it clear that if the loan goes into default again, the process would have to start anew and a foreclosure mediation could again be requested. I am informed that the lenders attempt

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to use the notice of default which caused the foreclosure mediation if there is another default after a modification is agreed to. Lenders attempt to bypass a second mediation.

Rule 5(5) The 10 days to send the required documents to the borrower should be 10 calendar days. More importantly several problems have frequently occurred with this rule. First, the borrowers fill out the Financial Statements and the Housing Affordability Worksheets and send them in to the Administrator. However, these documents never arrive at the loan modification department which needs this information to make the decisions on a loan modification. Also, according to the lenders, sending them in first generally makes them stale by the time of the mediation.

Second, the lender always wants to see two years tax returns, last two months bank statements, last two paychecks stubs or 6 months financial statement for those self-employed. These documents should be produced 30 calendar days prior to the mediation. The lender should be required to provide an name and address where these documents will reach the person with "authority" to modify the loan.

Third, most lenders want to test whether the borrower qualifies for a HAMP modification. The necessary forms, including the tax authorization, and hardship letter should be required to be delivered to the borrower in the right department at least 30 days before the mediation.

Fourth, the lenders are sending their documents to the mediators by facsimile or e-mail. Some of the documents contain "personal information." Also, the Mediation Administrator uses the same delivery systems. The use of e-mail and facsimile without encryption software to send personal information violates Chapter 603A of the Nevada Revised Statutes.

Rule 5(6) This rule should be changed to require all of the financial information described above and a complete HAMP application to be sent to the Trustee, preferably 30 calendar days before the mediation. The current rule makes their production optional despite these documents

being necessary for a loan modification.

Rule 5(9) This rule is totally ignored. The lenders or trustees sends an attorney to the mediation. That attorney has absolutely no authority. The attorney must always consult with someone by phone who then makes the decision. If a mediator requires the person with authority to personally appear, the lenders usually respond that if personal presence is required, then the borrower will pay for the person with authority's airfare, lodging and wages by way of a principle increase.

Also, I have not had nor heard of the original documents being provided at a mediation. I have never seen a proper certification of a copy of the required documents. Should you wish, I will provide you with copies of the attempts I have received. "Robo" signing is apparently being utilized. I even had an attorney at Pite Duncan law firm attempt to certify the documents. The custodians of records for the lender should be the required certifier and present an affidavit that conforms to Daugherty v. Walbash Life Insurance Co., 87 Nev. 32 at page 38.

Along the same lines, there is the "pool loan" problem. The lender providing the documents should be required to state, under oath, if the loan is a "pool loan" and what the consequences of any modification of the pool loan is. This is because generally the loan servicer must buy, at full price, any pool loan it modifies causing the servicers to refuse to modify the loan.

Rule 11 Somewhere in this rule the name, address and phone number of the person making the certification must be required to be set forth in a legible printed format.

Rule 6 The problem with judicial review is that many lenders only participate in the mediation program because they must. They know, particularly in Washoe County, there will be no penalty for their failure to participate in good faith. Therefore, the district courts must somehow spurred on to grant sanctions in the appropriate cases.

One possible solution is to have, as NRS contemplates, the mediator make a recommendation for sanctions. The recommendation would have to be carefully crafted to avoid modifying an existing contract and would have to be phrased as sanctions for failure to negotiate or participate in good faith and not as a loan modification. This could be difficult to implement.

In Washoe County, Judge Flanagan holds evidentiary hearings where the lenders attempt to recreate what occurred at the mediation. These recreations distort what actually occurred at the mediation. Yet, Judge Flanagan will not allow a mediator to testify. Attempts to recreate what occurred at a mediation should not be allowed. The mediators findings should prevail unless they are very wrong.

There is another more fundamental problem with judicial review. The homeowners are generally in default because they have no funds. How can they afford an attorney to help them defend a finding of bad faith by a mediator? Limiting the evidence to the mediators findings at a judicial review could solve this problem.

Rule 8 This rule should require the loan servicer to disclose, under oath, if the loan is a "pool loan" and what the pooling agreement required if the servicer modifies the loan. See also Rule 5(9) above.

Rule 8 (2) The homeowner should be required to provide what are currently optional documents (bank statements, tax returns, pay stubs) 30 days before the mediation to an address where the person with "authority" to modify the loan will receive them. This will prevent mediation's where the person with authority claims the documents were not received by them and therefore they cannot act until they have been reviewed. Some persona with authority claim it takes up to two weeks for such a review.

Rule 8 (6) Requiring a recording would be costly but would prevent the lenders from distorting

what occurred at a mediation during a judicial review. I do not believe a recording is the answer.

Rule 10 (1) This rule might be modified where the temporary agreement fails, generally because of unapproved HAMP applications, and allow the mediation to recommence or a new mediation demanded. Allowing a judicial review that Rule 10(3) provides does not solve deed in lieu or waiver of deficiency problems which generally arise after a failed modification.

Rule 16 The lenders are assessing their fees by including them in the principle of the loan. Several have threatened to add to the principle the "person with authority's" wages and cost of travel if the mediator does not allow their participation by phone. Lenders should not be allowed to do this.

Rule 18 For the reasons set forth above, a judicial review is a problem. Some way must be created which requires significant sanctions to be imposed. The sanctions could be conditional upon an appropriate modification of the loan. Also, the sanctions should cover the winning parties attorney fees to give an incentive for attorneys to represent homeowners.

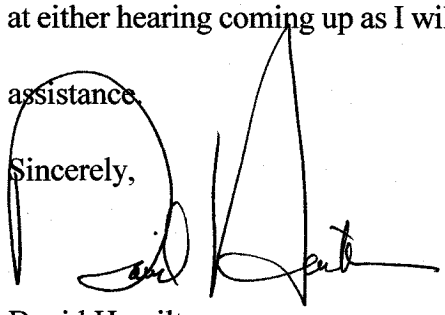
A couple of other problems also need to be addressed.

1. NRS 603A prevents documents being sent by facsimile or e-mail attachments unless encrypted as they contain personal information.

2. Generally parties take appeals from judicial review. According to Marquis & Aurbach v. District Court, 122 Nev. 1147, 146 P.3d 1130 (2006) a writ of mandamus is the proper vehicle.

I hope the information I have provided helps with changing the rules. Again, I can not appear at either hearing coming up as I will be out of the country. Please let me know if I can be of further assistance.

Sincerely,



David Hamilton
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