

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 IN THE MATTER OF THE ADOPTION OF RULES } ADKT 435
4 FOR FORECLOSURE MEDIATION }

5
6 Public Comment Hearing : December 6, 2010

2010 NOV 32 AM 11: 12

RECEIVED
Las Vegas Drop Box
CLERK OF SUPREME COURT

7
8 PLEASE BE NOTIFIED THAT I DESIRE TO PARTICIPATE AND SPEAK AT THE HEARING

9 *Benjamin B. Childs*

10 BENJAMIN B. CHILDS, ESQ.
11 Nevada Bar No. 3946
12 318 S. Maryland Parkway
13 Las Vegas, Nevada 89101
14 (702) 251-0000
15 Fax 384 1119
16 ben@benchilds.com

FILED

DEC 03 2010

TRACIE W. LANDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

17 PUBLIC COMMENT

18 I am an attorney and have been an active mediator in the FMP program since November, 2009. I
19 was in the second wave of mediators who were trained and appointed. I'm submitting these comments
20 on behalf of myself and attorney Taylor Randolph (Nevada Bar # 10194), who has been a mediator in the
21 program since July, 2010.

22 These are our comments and concerns which we ask be addressed in the upcoming public
23 comments meeting.

- 24
25 1) Rule 2 (3)(c). The proposed additional rule expands control over mediators by allowing
26 the Administrator to discontinue assigning cases for 60 days.

27 This seems like a reasonable management tool for the Administrator to ensure the
28 integrity of the program to control mediators who do not comply with program
29 requirements or who are in need to supplemental training.
30
31
32

10-31532

1 2) Sentence added to Rule 4(2) defining conflicts that would disqualify mediators as
2 including "representation of homeowners or lenders at mediations".

3 We have a huge problem with this rule change. A time limit is neither specifically set
4 forth nor implied. Is representation of a party to a mediation within the past 12 calendar months
5 a disqualifying event? Six months? One Month? Ever?

6 The first concern is that the attorney/mediators were assured during training that being a
7 mediator was not to be viewed as a steady job or source of income. Given the monetary
8 compensation scheme of \$400 per mediation, most attorneys are sacrificing income by serving as
9 mediators. They did not quit their day jobs. Again during training, the attorneys were assured
10 that there would never be a prohibition on representing parties in mediations while also serving
11 as a mediator. However, the proposed amendment now prohibits those attorneys who became
12 mediators from practicing in this area of the law. These arguably are the people the FMP should
13 most want as mediators because they are the most informed, most motivated, and have the
14 highest ethical standards.

15 The additional language is directed squarely at attorneys who are mediators and whose
16 practice includes representation of homeowners or lenders in foreclosure mediations. The end
17 result of this rule, and perhaps this is the intended outcome, is that mediations will only
18 conducted by either non-attorney mediators (the vast majority of mediators are not attorneys) or
19 attorney mediators who do not practice in this area of the law. Unrepresented homeowners
20 participating in mediations taking place before non-attorney mediators will be faced with an
21 attorney from the bank whose ethical obligation is to their client, and the non-attorney mediator.

22 Secondly, contrast the proposed rule with the conflict rules for arbitrators in the District
23 Court Mandatory Arbitration Program. Arbitrators actually make findings of fact, conclusions
24 of law and issue decisions on cases. Yet the attorney/arbitrators are not prohibited from serving
25 on the Arbitration Panel because they represent clients in arbitrations. The same analogy applies
26 to short trial judges, municipal and justice court judges pro-tem judges, hearing masters, and
27 other temporary or non-elected judicial or quasi-judicial officer. Mediators expressly do not
28 make findings of fact, conclusions of law and do not issue decisions.

29 There is no basis for the prohibition of attorneys practicing in the area of law from
30 serving as mediators. Why this change is proposed has never been expressed at any mediation
31

1 training or roundtable discussion.

- 2
3 3) Rule 5(4)(c) clarifies that trusts, through their trustees, are eligible to participate.

4 We have no problem with the intent of the additional language, but using phrases
5 like "most trusts" and "settlor usually transfers" should be avoided in favor of more
6 specific language. Suggested wording would require the participant to be the trustee
7 providing that the current beneficiary of the trust would otherwise qualify to be a
8 participant and that the property is the primary residence of the beneficiary of the trust.
9 Without opening up another area of concern, the current beneficiary occupying the
10 property as a primary residence should be the determining factor. The settlor may have
11 died leaving the property, through the terms of the trust, to the surviving beneficiary and
12 therefore the title would remain in the trust's name. In other words, the settlor is
13 irrelevant, the status of the current beneficiary occupying the home as his/her primary
14 residence is what is important for purposes of eligibility to participate in the FMP.

- 15
16 4) Rule 5(new 7) Requires written stipulation to vacate the mediation when the trustee
17 records a rescission of Notice of Default.

18 This is a good provision intended to stop the practice of the lender interrupting the
19 mediation process by recording a rescission.

- 20
21 5) Rule 5(new 9)(c - d) Allows a participant to represent themselves. Representatives must
22 be qualified. Participants can give a power of attorney to someone to represent them,
23 providing that if the designated power of attorney receives compensation he/she has to be
24 qualified.

25 We think this rule is unnecessary and change will create a legal issue during
26 mediations. Questions concerning the verbiage of the power of attorney, the signatures,
27 legal adequacy issues will have to be evaluated by what will then, if the change to Rule 2
28 discussed above is adopted, have to be interpreted by a non-attorney mediator.

29
30 ///

1 6) Rule 6(2) Extends the time from 15 days to 30 days to request judicial review.

2 This procedural change should have little impact.

3
4 7) Rule 8(1) Requires documents be provided by the parties as “may be required by a
5 government program”.

6 This memorializes that the vast majority of lenders require a HAMP application
7 with supporting documents.

8 The Rule amendment should also require lenders to provide copies of mortgage
9 insurance policies to homeowners. Under the HAMP Guidelines, consent is required by
10 the mortgage insurer for a loan modification or a short sale, and homeowners have been
11 paying the mortgage insurance premium, and the mortgage insurance directly impacts the
12 financial impact on the homeowner of a loan modification or short sale.

13
14 8) Rule 10 (new 2) Requires setting a date when the homeowner will vacate when a home is
15 surrendered.

16 Rarely is there an outright surrender of the property to the lender. In fact, HAFA
17 regulations require that the property continue to be occupied and maintained by the
18 homeowner, so the utilities remain on and the landscaping is maintained.

19 We feel that this should remain an area of negotiation rather than be dictated by
20 the rules.

21
22 9) Rule 16 (new 2) Sets a fee schedule if a mediation is not completed.

23 This proposal makes the assumption that there is a difference between convening
24 and completing a mediation. The mediation process is completed when the parties
25 convene; whether they can reach an agreement, or not, is up to them. The mediator is
26 present solely as a facilitator; he/she has scheduled the meeting, arranged the meeting
27 room, assembled and reviewed documents, etc. If one party or the other does not want
28 to proceed, the mediator has still blocked out time for the mediation.

29 As to a fee schedule for mediations that are not completed, this is a bureaucratic
30 approach to an individual process. Presumptively there will be a schedule of tasks and a
31

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

value assigned to each task, regardless of the actual time involved with the task in an individual case.

This is a bad idea and unnecessarily complicates the mediator reporting. We don't know the percentage or actual number of mediations that are assigned to a mediator but are resolved before the mediation, so it's difficult to comment on this proposal. While some cost savings may be achieved depending on the number of mediations which are not completed and the amount of compensation for each task, mediators are already compensated a nominal amount.

10) Rule 16 (new 4) Refund policy to be created. No refunds if a mediator has been assigned.

This is reasonable.

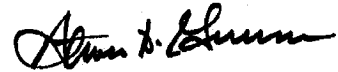
11) Comment regarding confidentiality, or lack thereof.

This court should be aware of how the confidentiality provisions of the mediation program are treated. Attached find an excerpt from a Petition for Judicial Review in 8th Judicial District Court case # A-10-621337-J, a publicly available pleading filed by Wells Fargo. Note on pages 8 and 9 in paragraphs 39 and 44 Wells Fargo discloses conversations that took place with the mediator in caucus.

This is an example of an attorney filing public documents about information exchanged during a caucus. Mediators are prohibited by the rules from testifying, as they should be, so these statements about what was said or information exchanged in caucus go unchallenged since the other party isn't present during a caucus session. This is very disturbing.


BENJAMIN B. CHILDS, ESQ.
Nevada Bar No. 3946

EXHIBIT 1



CLERK OF THE COURT

1 **PET**
2 GREGORY L. WILDE, ESQ.
3 Nevada Bar No. 4417
4 KEVIN S. SODERSTROM, ESQ.
5 Nevada Bar No. 10235
6 **WILDE & ASSOCIATES**
7 212 S. Jones Blvd.
8 Las Vegas NV 89107
9 Tel (702) 258-8200
10 Fax (702) 258-8787
11 Attorney for Petitioner

DISTRICT COURT

CLARK COUNTY, NEVADA

11 WELLS FARGO, as servicer for HSBC
12 BANK USA, NATIONAL ASSOCIATION
13 AS TRUSTEE FOR WELLS FARGO ASSET
14 SECURITIES CORPORATION,
15 MORTGAGE PASS-THROUGH
16 CERTIFICATES, SERIES 2007-14,

Petitioner,

vs.

17 ANDY C. ALVILLAR; LORRIE A.
18 ALVILLAR,

19 Respondents.

Case No. **A- 10- 621337- J**
Dept. No. **XI V**

**VERIFIED PETITION FOR JUDICIAL
REVIEW**

**Arbitration Exempt
(Title to Real Property)**

20 COMES NOW Petitioner WELLS FARGO, as servicer for HSBC BANK USA,
21 NATIONAL ASSOCIATION AS TRUSTEE FOR WELLS FARGO ASSET
22 SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES,
23 SERIES 2007-14 (hereinafter the "Petitioner" or "Lender"), by and through its counsel of
24 record, Gregory L. Wilde, Esq. of the law firm Wilde & Associates, and petitions this
25 Court pursuant to NRS 107, as amended by AB 149 (2009), for judicial review of the
26 mediation conducted.
27
28

WILDE & ASSOCIATES

212 S. Jones Blvd

Las Vegas NV 89107

Tel (702) 258-8200 Fax (702) 258-8787

WILDE & ASSOCIATES
212 S. Jones Blvd
Las Vegas NV 89107
Tel (702) 258-8200 Fax (702) 258-8787

1 31. On their two-page Foreclosure Mediation Program worksheet, the
2 Borrowers represented their monthly net income to be \$9,469.96 and their monthly
3 expenses to be \$9,210.75.

4 32. Similar to the workings of the HAMP program, the Lender's review
5 process involved a threshold housing debt to income (hereinafter "DTI") ratio.

6 33. Because the Borrowers' current regular monthly payment was already less
7 than the threshold DTI ratio (without even including the rental income), the current
8 payment is considered affordable under the DTI analysis.

9 34. The Borrowers also own a rental property in New Mexico, for which they
10 pay approximately \$1,046.00 per month, while receiving only \$300.00 per month in rental
11 income from that property. *See* Exhibit "H" attached hereto.

12 35. After the Borrowers had rejected the Lender's loan modification offer, the
13 Lender's representative offered to provide information about the Lender's short sale
14 application and review process.

15 36. Once again, mediator James Baker mischaracterized the Lender's position
16 in his Mediator's Statement with respect to the short sale discussions when he stated that
17 "the lender's rep stated that they did not want anything to impede their pursuit of a
18 certificate to complete the foreclosure". *See* Exhibit "F" attached hereto.

19 37. In fact, no representative of the Lender made such a statement to the
20 mediator.

21 38. However, the Lender's Counsel did explain that any attempts to complete a
22 short sale would depend on the Borrowers doing certain things outside of the mediation to
23 put themselves into a position to be able to complete a short sale and that the Lender was
24
25
26
27
28

WILDE & ASSOCIATES
212 S. Jones Blvd
Las Vegas NV 89107
Tel (702) 258-8200 Fax (702) 258-8787

1 not offering a moratorium to the Borrowers (who had already missed the past 14 regular
2 monthly payments) in the mediation for them to attempt a short sale. Therefore, the
3 Lender's representatives did not feel that it was appropriate for the Lender's Counsel to
4 sign an agreement regarding a possible, uncertain short sale.
5

6 39. Mediator James Baker further told the Lender's Counsel (in a separate
7 caucus with the Lender's Counsel) that in addition to wanting the Lender's Counsel to
8 sign a short sale agreement or face a bad faith finding, the agreement would have to be on
9 the mediator's terms, not the parties' terms.

10
11 40. The purpose of the mediation program is to encourage borrowers and
12 lenders to *exchange information* and proposals that *may* avoid foreclosure. FMR 1(2)

13 41. Consistent with the purpose of the mediation program, the Lender provided
14 information in the form of a detailed Realtor Short Sale Guide regarding the short sale
15 application and review process. A copy of the Realtor Short Sale Guide is attached hereto
16 as Exhibit "I".
17

18 42. The reporting of alleged deficiencies with respect to the Lender's document
19 production also shows mediator James Baker's bias and his efforts to hinder the Lender's
20 rights as a secured creditor.

21 43. In addition to forwarding copies of the Lender's documents to the mediator
22 prior to the mediation, the Lender's Counsel provided another set of the Lender's
23 documents to the mediator at the onset of the mediation. Mediator James Baker looked
24 through the Lender's documents and did not state that he felt that they were deficient in
25 any way.
26
27
28

1 44. Only shortly before the mediation ended did mediator James Baker state (in
2 a separate caucus with the Lender's Counsel) that he would be going back and scrutinizing
3 the Lender's document production again more closely later in the day.

4 45. In his Mediator's Statement, James Baker reported that the "sworn affidavit
5 signed by Martin Miranda verifying the authenticity of the single assignment provided
6 does not specify the capacity of the affiant, as required by the Nevada Amended Rules of
7 Foreclosure". *See* Exhibit "F" attached hereto.

8 46. Although he alleges that the rules were not complied with because of an
9 alleged failure to specify capacity, the mediator himself did not specify which rule had not
10 been complied with.

11 47. In fact, the notarized Certification page signed by Martin Miranda does list
12 his title with NDSC as "NMC", which is an abbreviated form of his title as a Nevada
13 Mediation Coordinator. *See* Exhibit "J" attached hereto.

14 48. In his Mediator's Statement, James Baker also reported that the "sworn
15 affidavit signed by John Kennerty verifying the authenticity of the note and deed of trust
16 does not identify or specify Mr. Kennerty's capacity, as required by the Nevada Amended
17 Rules of Foreclosure". *See* Exhibit "F" attached hereto.

18 49. Again, although he alleges that the rules were not complied with because of
19 an alleged failure to specify capacity, the mediator himself did not specify which rule had
20 not been complied with.

21 50. In fact, the notarized Certification page signed by John Kennerty does list
22 his title with the Lender as "VP of Loan Documentation". *See* Exhibit "K" attached
23 hereto.