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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:

Thank you for allowing me to address the Court at the public hearing on December 6, 2010. I now offer the following additional comments regarding proposed amendments to the Foreclosure Mediation Rules, including my responses to some of the questions raised by Justice Hardesty and other justices at the hearing.

Due process for mediators:

Justice Hardesty raised the ponderous question whether mediators enjoy due process rights when facing possible suspension. Whether or not they do, the public's interest in assuring an unbiased process is best served by guaranteeing that a mediator be given notice and an opportunity to be heard regarding any potential suspension.

The Program Manager currently asserts the right to discontinue case assignments to mediators in her sole discretion. This practice runs counter to Foreclosure Mediation Rule (FMR) 3(2)'s requirement that assignments be made randomly. But the Program interprets the "random selection" requirement to apply only to those mediators who are "eligible" for assignments. The Program Manager determines who is eligible and does not notify mediators when they are determined to be ineligible for case assignments.

She does so based on information she receives from third parties and without allowing the mediator any opportunity to defend himself or herself. Adoption of proposed Rule 2(3)(c) would legitimate this process. But the Program Manager is not infallible. The information she receives may be incorrect, may be incomplete, or may be subject to misinterpretation. Further, the Program Manager's opinion as to what constitutes "good cause" for suspension should be subject to challenge. Unless the mediator is given an opportunity to answer the charges against him or her, there is no way for the public to be assured that the complaint against the mediator is legitimate.

Given the existence of the partnership between the Foreclosure Mediation Program and the

United Trustees Association as disclosed at the December 6 hearing, there is a real danger that mediators will be suspended simply because the lending community is not satisfied with their determinations. Indeed unbiased mediators could be suspended simply for failing to favor beneficiaries.

Early termination of mediations.

Justice Hardesty expressed his displeasure with the apparent reluctance of some mediators to terminate mediation sessions as soon as it appears that the beneficiary is not in compliance with one or more of its obligations under the law. I believe there are three reasons for this reluctance.

First, such early termination is against program procedures and guidelines. The Program tells mediators that the "better practice" is to proceed with the mediation in this situation.

Second, early termination is usually not a satisfactory result for homeowner, since the consequences to the beneficiary are negligible and the costs to the homeowner are significant. Even if the pending foreclosure is stopped, the trustee is free to record a new notice of default, setting the whole process in motion again. This forces the homeowner to pay another $200 and often incur additional attorney's fees to get the beneficiary back to the bargaining table. While this does delay the foreclosure, which may work to the homeowner's advantage, delay also extends the anxiety of the homeowner looking for certainty. Also, the mere fact that the mediator "checks the box" indicating that the beneficiary, for example, has not provided the required documents, does not necessarily stop the pending foreclosure. The Program Manager still decides in her sole discretion whether to permit the foreclosure to proceed. If she decides to permit the foreclosure, there is little the homeowner can do since the homeowner is usually not aware of the decision until it is too late to file a petition for judicial review.

The legislative scheme avoids this problem altogether. If the beneficiary does not comply with its statutory obligations, the foreclosure cannot proceed because none of the three conditions under which the Mediation Administrator may issue a certificate occurs. See, NRS 107.086(3), (6), (7). Meanwhile the mediator submits the mandatory petition and recommendation concerning the imposition of sanctions, setting in motion the process by which the district court can impose sanctions against the beneficiary and/or its representative, including in appropriate cases a judicially imposed loan modification. NRS 107.086(5). Unfortunately, the legislative scheme is not being followed.

Third, mediators know that reporting beneficiary non-compliance may lead to lending community dissatisfaction and consequent withholding of future assignments.

The solution to the problem is simple. The Program should not impose on mediators "procedures and guidelines" that conflict with the law. Mediators should comply with the applicable statute by preparing and submitting the required petitions in all cases where the statute

calls for them to do so. The Mediation Administrator should comply with the rules by assigning cases to mediators randomly.

Authority of beneficiaries' representatives.

What authority must a beneficiary's representative possess?

The clear language of NRS 107.086(4) requires that any beneficiary representative have "authority to negotiate a loan modification." The Foreclosure Mediation Rules set forth a different standard: "the authority to negotiate and modify the loan." FMR 5(8)(a). A previous version of the rules set forth a third standard: "authority to modify the loan." Former FMR 5(7)(a),(b), as adopted November 4, 2009. Consistent with the old rule, the Foreclosure Mediation Program tells the public the beneficiary representative must have "authority to modify the terms of the loan." See, Foreclosure Mediation Program Fact Sheet, September 28, 2010. The Mediation Scheduling Notice that mediators must use states that the beneficiary's representative must have the "authority to modify the underlying loan." The Program tells mediators the beneficiary representative must have "authority to negotiate options" and "authority to resolve the case." The Program's draft revised "Introduction Letter" dated October 26, 2010, states that "full authority to modify the loan or negotiate alternatives" is required. The conflict between the statute, the rules, the forms, and program requirements has led to considerable confusion.

In my own experience, it is very rare for a beneficiary's representative actually to possess the statutorily required "authority to negotiate a loan modification," especially as the phrase should be understood in the context of mediation. Mediation, after all, is a process necessarily involving the "opportunity . . . to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired." Code of Conduct for Supreme Court Settlement Judges, Order adopted by Nevada Supreme Court, March 10, 2006. Beneficiaries' representatives rarely if ever possess authority to engage in such a process.

On the other hand, beneficiaries' representatives commonly have "authority to modify the loan" on limited terms in limited circumstances determined by application of an undisclosed mathematical formula contained on proprietary software maintained on the loan servicer's computers. Such representatives also have "authority to negotiate" in that they can discuss collateral matters such as the date and location of the mediation, what documents are to be provided, whether a mediation session should be continued, etc., and therefore possess may meet the requirement of FMR 5(8)(a), but they do not possess "authority to negotiate a loan modification" as required by statute.

Most mediators are not familiar with the standard set forth in the relevant statute but seem to

assume that "authority to modify the loan" is sufficient. Further, the lending community has become quite creative in parsing the authority requirement. At the recent mediation involving my clients, the loan servicer's attorney explained that she had "full authority" on behalf of her client by virtue of the fact that any document she signed at the mediation would bind her client. She further explained that if she exercised her authority by agreeing to modify the loan she would be fired. The same lawyer told me she had participated as beneficiary's counsel in approximately 700 mediations, with the mediators apparently accepting that she had the required authority.

The solution I propose is to amend the first sentence of Rule 5(8)(a) to bring it into conformity with the statute as follows:

> All beneficiaries of a deed of trust sought to be foreclosed against an eligible participant who has timely delivered an Election of Mediation shall participate in the Foreclosure Mediation Program, be represented at all times during a mediation by a person or persons who have the authority to negotiate ~~and modify the loan secured by the deed of trust sought to be foreclosed~~ a loan modification on behalf of the beneficiary of the deed of trust.

If there are to be program requirements, procedures, and guidelines beyond the rules, they should also be brought into conformity with the language of the statute, as should the Program approved forms.

Training for mediators.

The Program currently provides a two-hour training program for prospective mediators. Absent from the curriculum is any discussion or analysis of NRS 107.086, an understanding of which in my opinion is essential to service as a foreclosure mediator.

Also, even though the mediators are subject to certain provisions of the Nevada Code of Judicial Conduct, there is no discussion of those provisions. Since many of the new mediators are not lawyers, there is a serious danger that they are unaware of the various ethical considerations that go into serving in a judicial capacity.

There is also no discussion of the mediator's important role in recommending sanctions in appropriate cases as required by NRS 107.086(5).

I suggest that a new curriculum be developed that includes at least the following topics, not necessarily in this order:

1. The nature of real property security transactions.

2. How the mortgage lending industry works.
3. The current foreclosure crisis in the State of Nevada.
4. Thorough discussion and analysis of NRS 107.086, including its Legislative history.
5. Examination and discussion of the provisions of the Nevada Code of Judicial Conduct that apply to mediators.
6. Conflict and conflict resolution; the nature of mediation; effective mediation techniques; identifying common interests; getting to "yes."
7. Loan modification possibilities, including principal reduction, interest rate modification, forbearance, etc.
8. Determining how and when a loan modification can benefit both parties.
9. The mediator's role in crafting recommendations for sanctions, including loan modifications in appropriate cases.

Success of the Foreclosure Mediation Program.

As I stated at the December 6 hearing, I considered the Foreclosure Mediation Program a failure. I would like to take this opportunity to explain the reasons for my opinion.

The 2009 Legislature enacted the Foreclosure Mediation Law in response to an extraordinary crisis facing the citizens of Nevada. The purpose of the law is to keep Nevadans in their homes. It was guesstimated that the law would save 17,700 homes from foreclosure. 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).

Nearly 18 months later, only a small fraction of this number of homes have been saved.

Ms. Campbell cites program statistics indicating that 89% of mediations result in the homeowner remaining in the home, but these statistics are seriously misleading. They do not distinguish between temporary and permanent solutions. By all accounts, the vast majority of loan modification agreements reached as a result of mediations are for temporary, 3-month trial periods after which the beneficiary may elect to proceed with foreclosure if it chooses. In those cases where the homeowner remains in the home following mediation because of beneficiary non-compliance with the statutory requirements, the trustee is free to reinitiate the foreclosure process the very next day. Both of these solutions are only temporary.

The program has not released statistics showing the number of permanent loan modifications that have been achieved as a result of the program, either in the form of voluntary agreements or as a result of orders imposing sanctions as authorized by Subsection 5 the Foreclosure Mediation Law. This is the statistic by which the success of the program should be measured but it is not available.

The reason for the program's failure is simple. The law is not being followed. NRS 107.086(5) creates important remedies for homeowners that are critical to the success of the statutory scheme. The Foreclosure Mediation Program, acting in the name of this Court, has effectively repealed Subsection 5.

The Program will succeed only when this Court takes action to assure that the law be followed. The first step is to reject proposed Rule 2(3)(c).

Respectfully submitted,

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