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Via Facsimile (775) 684-1601 and U.S. Mail

Tracie K. Lindeman
Clerk of the Supreme Court
Nevada Supreme Court
201 S. Carson Street
Carson City, Nevada 89701

ADKT 0435

Re: **Proposed Amendments to Foreclosure Mediation Program Rules (Revised Draft 10-21-10)**

Dear Ms. Lindeman:

The following is submitted in response to the Supreme Court's invitation for written comments on the above referenced proposed rule amendments. In accordance with the directions announced by Chief Justice Parraguirre at the December 6, 2010, public hearing on the proposed amendments, I will address only the proposed amendments themselves and not respond to other issues concerning the existing rules or the many other issues raised at the public hearing that went beyond the proposed amendments. I feel compelled to note, however, that some of the extraneous testimony at the public hearing seriously mischaracterized matters. Such testimony should not be considered by the court. Finally, although my firm represents several national and regional banks, my responses should be deemed to be my own and not attributed to any particular client of Ballard Spahr LLP.

Rule 4(2) Those representing borrowers or lenders should not be mediators

This is an important change. Representation of delinquent borrowers has become a cottage industry with lawyers and non-lawyers competing for clients through television, radio and print media advertising, as well as by direct solicitation of clients. Although I have not personally witnessed such an event, many lawyers and non-lawyers promote so-called foreclosure mediation workshops for delinquent borrowers as a marketing tool, and make inflammatory comments about various lenders as a technique to attract clients. While these may be permissible activities in their own context, those who do such things cannot thereafter be fair to the lenders who must appear before them. While I grant that in a theoretical context the same person could represent borrowers and/or lenders, and then subsequently act as a mediator without having any bias wash over between the various roles, in the real world, moving between the roles, at a minimum, creates the appearance of a conflict that undermines the credibility of what, by its very nature, is a very subjective process with great leeway permitted to individual mediators. I cannot conceive a borrower, if given a chance, agreeing to let me be the mediator on their case if they know that my primary clients are lenders.

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Likewise, I cannot conceive my lender clients continuing to have me represent them if, when acting as a mediator, I consistently found lenders in bad faith in anything but the most egregious situations.

Under the real world circumstances in which this program operates, which, I submit is very different from the Court Annexed Arbitration or Short Trial Program, acting as both an advocate and as a mediator makes real the likelihood of actual bias and makes the appearance of bias almost inevitable.

Further, as noted by a speaker at the public hearing, there are currently more than 300 mediators participating in the Foreclosure Mediation Program. Excluding those who wish to act in more than one capacity will not reduce the supply of available mediators to an unworkable extent.

Rule 5(4)(c) Title of Record held by a Trust
Rule 5(7) Rescission of Notice of Default and Election to Sell
Rule 5(9)(c) and (d) Self-Representation/Power of Attorney to Representative

Proposed Rule 5(4)(c) creates confusion through both its structure and its language. The introductory section is inclusionary, followed by subsections (a) and (b), which are both exclusionary. New subsection (c) is again inclusionary, making it structurally similar to a double negative.

Further, the language of 5(4)(c) has the potential to create substantial confusion through the introduction of a party with the title of "trustee," which holds an interest in alignment with the borrower. In the remainder of the rules the term "trustee" refers to the trustee of the deed of trust, which holds an interest aligned with the lender. The proposed language provides an explanation of the terms trustor and settlor in the context of the specific language of the proposed rule, but the distinction between the two trustees referenced in the rules as a whole is not clear, and will not be distinguishable by a layperson (or attorney, for that matter) who has not had the benefit of estate planning training, in addition to a good working knowledge of the roles of the parties to a loan transaction.

Proposed Rule 5(7) establishes a method for cancelling a mediation in the event a notice of default is rescinded. However, the language makes it unclear whether the 10 day period is meant to require that the agreement to withdraw from the program be filed 10 days prior to the mediation so that the program has adequate time to process the request and inform the parties, or whether a new procedural requirement is being imposed upon the trustee requiring it to obtain an agreement from the borrower to cancel the mediation within 10 days of filing, no matter when the notice of default is rescinded. If it is meant to require that a lender, who has already rescinded its notice of default and thus cannot proceed, obtain an agreement in such short order or be required to mediate and potentially be subject to sanctions for not attending and providing mediation documents and representation, then this new requirement creates unnecessary burden and cost and provides no additional protection to the borrower.

The amendments proposed to Sections (5)(9)(c) and (d) are appropriate and provide additional clarification as to the parties which are qualified to assist borrowers in the mediation process.

Rule (6)(2) Time for Filing Petition for Judicial Review

Although this adds additional time to the process at the expense of the lenders, the need for consistency with timelines in other District Court proceedings justifies the change.

Rule (8)(1) Documents

In line 5 of the amendment the word "other" is stricken and "additional" is substituted. The use of the word "other" has already been perceived by some mediators as opening the door for them to make far-reaching demands for documents that go beyond the bounds set forth in the statute. The substitution of the word "additional" in this context will serve as a validation of this practice. Such a varied interpretation will add greatly to the cost and administrative burden placed on lenders in order to satisfy the "additional" document requirements which could be instituted by each individual mediator, and will add nothing to promoting resolutions. Replacing "additional" with the word "required" makes more sense and provides consistency throughout the program, and gives the lenders the ability to provide the information which is actually required within the time frames set forth.

Rule 10(2) Temporary Agreements

The current language proposed for Rule 10(2) is unclear, and should be reexamined. As written, the rule creates a significant possibility that many borrowers will be required to vacate their homes prematurely as a term of such agreements, thus adding to the hardship on the borrowers, imposing a negative impact on neighborhoods, and creating a potential increased liability for lenders. If an agreement to vacate the property is entered, especially in the case of cash for keys, the lender may prefer that the borrower remain in the property until the foreclosure sale is concluded. Implying that the cash for keys payment must be made prior to a trustee's petition for a certificate would make such an offer by the lender unlikely because a lender will be hesitant to agree to advance the cash for keys payment months prior to the borrower being required to vacate the property and the completion of the foreclosure proceeding.

I appreciate the opportunity to participate in the discussion regarding the revisions to these rules.

Respectfully submitted,

Bill Curran

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