

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADOPTION  
OF RULES FOR FORECLOSURE  
MEDIATION

ADKT 0435

**FILED**

MAY 16 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER SCHEDULING PUBLIC HEARING

On June 30, 2009, this court adopted rules in order to implement the foreclosure mediation program established by Assembly Bill 149. This court has determined that it is necessary to consider amendments to the rules. The proposed amendments are attached as Exhibit A.

The Nevada Supreme Court will conduct a public hearing on the proposed amendments. The hearing will be held on Monday, July 9, 2012, at 3:00 p.m. in the Nevada Supreme Court Courtroom, 201 S. Carson Street, Carson City, Nevada. The hearing will be videoconferenced to the Nevada Supreme Court Courtroom in the Regional Justice Center in Las Vegas, Nevada.

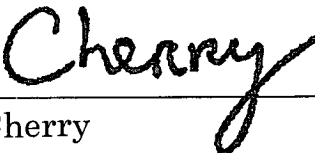
Further, this court invites written comment from the bench, bar and public regarding the proposed rule amendments. An original and 8 copies of written comments are to be submitted to: Tracie K. Lindeman, Clerk of the Supreme Court, 201 South Carson Street, Carson City, Nevada 89701 by 5:00 p.m., July 3, 2012. Persons interested in

participating in the hearing must notify the Clerk no later than July 3, 2012.

**Hearing date:** July 9, 2012, at 3:00 p.m.  
Supreme Court Courtroom  
201 S. Carson Street  
Carson City, Nevada

**Comment deadline:** July 3, 2012, at 5:00 p.m.  
Supreme Court Clerk's Office  
201 South Carson Street  
Carson City, Nevada 89701

DATED this 16<sup>th</sup> day of May, 2012.

  
\_\_\_\_\_, C.J.  
Cherry

cc: All District Court Judges  
Connie Akridge, President, State Bar of Nevada  
Kimberly Farmer, Executive Director, State Bar of Nevada  
Board of Governors, State Bar of Nevada  
Clark County Bar Association  
Washoe County Bar Association  
First Judicial District Bar Association  
Nevada Justice Association  
Legal Aid Center of Southern Nevada  
Nevada Legal Services  
Washoe Legal Services  
Volunteer Attorneys for Rural Nevadans  
Nevada Association of Counties  
Nevada Bankers Association  
Nevada Land Title Association  
Nevada Association of Realtors  
Administrative Office of the Courts  
Verise Campbell, Mediation Administrator

# ADKT 435 Exhibit A

## May 15, 2012 Proposed Mediation Rule Changes

### Table of Contents

#### Rule Changes

Rule 3 (1).....	2
Rule 3 (5)(c).....	3
Rule 4 (2).....	3
Rule 4 (3)-(6).....	4
Rule 8 (1), (2)(a).....	6
Rule 8 (5).....	7
Rule 9 (2), (3).....	8
Rule 10 (1)(a).....	9
Rule 11.....	10-15
Rule 12 (1).....	15
Rule 13 (2), (4).....	16
Rule 14.....	16-17
Rule 15.....	17
Rule 16 (2), (2)(a), (2)(b).....	18
Rule 18 (1), (2).....	19
Rule 19(1).....	19
Rule 21 (1), (2), (3).....	20
Rule 23.....	22-23
Rule 24.....	23
Rule 25.....	23

#### Attachments

A. Statement in Support of Proposed Amendment FMP Rule 11(7)(f).....	24
B. Statement Against Proposed Amendments FMP Rules 11(7)(f) & 11(12).....	25
C. Statement in Support of Proposed Amendment FMP Rule 11(12).....	28

## I. SCOPE OF RULES

### Rule 1. The Foreclosure Mediation Program.

1. *Authority and scope.* Pursuant to the jurisdictional authority provided by Chapter 107 of the Nevada Revised Statutes and the Nevada Supreme Court's inherent power to create rules for the efficient administration of justice, these rules are enacted to apply to the mediation of any owner-occupied residential foreclosure arising from the recording of a notice of default and election to sell on or after July 1, 2009.

2. *Purpose.* The purpose of these rules is to provide for the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures which shall take place within 135 days following actual receipt by the Administrator, or designee, of the mediation fee and required documentation provided on behalf of the lender. The State of Nevada Foreclosure Mediation Program (hereafter referred to as the Foreclosure Mediation Program) encourages deed of trust beneficiaries (lenders) and homeowners (borrowers) to exchange information and proposals that may avoid foreclosure.

3. *Availability of program.* Subject to limited exceptions set forth in Rule 8.5 hereafter, the Foreclosure Mediation Program is mandatory when the grantor or person who holds title of record of an owner-occupied residence timely requests mediation.

4. *Time.* For purposes of calculating time under these rules, 6(a) and 6(e) of the Nevada Rules of Civil Procedure (NRCPP) shall apply. These rules, as amended, apply to all mediations that have not yet been conducted by the mediator.

5. *Recording.* The mediation session(s) shall not be recorded.

### Rule 2. Mediation Administrator and Designee.

1. *Appointment.* The Foreclosure Mediation Program Administrator (Administrator) shall be appointed by the Nevada Supreme Court (Court). The Administrator for the Foreclosure Mediation Program (Program) is the Administrative Office of the Courts (AOC).

2. *Authority.* The Administrator may appoint a Foreclosure Mediation Program Manager and support staff to assist in carrying out the goals and objectives of the Foreclosure Mediation Program. When the efficient administration of the program warrants, the Administrator may enter into contracts with third parties for training and other mediation-related services.

3. *Foreclosure Mediation Program Manager.* The Foreclosure Mediation Program Manager (FMP Manager) is the “designee” for the Administrator under these rules. In addition to his or her general duties, the FMP Manager shall:

(a) Ensure all program-approved forms are in compliance with these rules. The FMP Manager may reject any program-approved form substantially altered by a borrower, lender, trustee, or mediator and require resubmission on the appropriate program-approved form;

(b) Receive all affidavits and issue all certificates as may be required herein; and

(c) Take any action necessary to correct “clerical errors” in the Certificate arising from oversight or omission for which the mediator or FMP staff is responsible.

### **Rule 3. Presiding Mediator.**

1. *Authority.* A foreclosure mediation must be conducted by either a senior judge, Supreme Court settlement conference judge, or other person designated by the Supreme Court. The presiding mediator shall have all requisite authority to conduct the foreclosure mediation. The mediator shall schedule each mediation to ~~commence~~ *conclude* within 45 90 days of receipt of the assignment and shall notify the Administrator, or designee, of the outcome of each mediation.

2. *Assignment of presiding mediator.* No later than 10 days after receipt of the Election for Mediation, and the fees from both parties pursuant to Rules 5 and 8.2 herein, the Administrator or designee shall randomly select and assign from the applicable geographic area a mediator to preside over the mediation. The assigned mediator will have 2 business days after receiving the assignment to determine and notify the Administrator or designee of a conflict requiring his or her recusal. Upon such notification, the Administrator or designee shall immediately and randomly select another mediator to conduct the mediation. The Administrator or designee may direct a mediator to cluster several mediations for a lender. Upon final selection of a mediator, the Administrator, or designee, shall send notice of the assignment to the parties.

3. *Panel of mediators.* The Administrator or designee shall maintain a list of mediators by geographic area available to hear foreclosure mediations. The list shall include all senior judges, Supreme Court settlement conference judges, and other persons who are appointed by the Court to serve as presiding mediators in the Foreclosure Mediation Program and are qualified pursuant to subsection 4 herein.

4. *Mediator qualifications.*

(a) Mediators must meet the following minimum qualifications:

(1) Be licensed to practice law in the State of Nevada; or

(2) Be an experienced mediator. For purposes of this subsection, an experienced mediator shall mean an individual who has participated in a mediation training program consisting of at least 40 hours of classroom and role playing and has conducted 10 mediations as a co-mediator or sole mediator.

(b) Additionally, all mediators must participate in a ~~training~~ *approved annual continuing education* program of at least 4 hours *and* consisting of education in ~~mortgages~~, deeds of trust, promissory notes, loan modifications, Nevada foreclosure laws, and such other topics as determined necessary by the Court.

(c) The Court, for good cause shown, may waive the minimum requirements set forth herein.

5. *Appointment of mediators.*

(a) The Administrator or designee shall solicit and provide the Court with the names and qualifications of persons who have applied to become mediators. The Court shall approve, deny, or continue the applicant's request to serve as a mediator. The term of appointment shall be 1 year.

(b) The list of Court-approved mediators shall be maintained by the Administrator.

(c) *The Court-approved mediator must sign a FMP Mediator Code of Conduct annually or as needed.*

**Rule 4. Mediator Conduct, Disqualification, Recusal, Suspension and Termination**

1. Any mediator appointed pursuant to these rules is subject to Canon 1, Canon 2, Rules 2.1 through 2.9, 2.11, and 2.13 through 2.16; and Canon 3, Rules 3.1, 3.3, 3.5, 3.6, and 3.9 of the Nevada Code of Judicial Conduct as adopted or amended by the Supreme Court of Nevada.

2. *Any mediator appointed pursuant to these rules is subject to the Model Standards of conduct for Mediators as revised and adopted in 2005 by the American Arbitration Association, American Bar Association and Association of Conflict Resolution.*

3. *Any mediator appointed pursuant to these rules is subject to the State Nevada Foreclosure Mediation Program Mediator Code of Conduct as adopted or*

*amended by the Supreme Court of Nevada and shall be required to sign the code of Conduct before undertaking any assignments as a mediator.*

*4. Any mediator appointed pursuant to these rules must follow the Foreclosure Mediation statutes, Program Rules, and Nevada Supreme Court decisions interpreting same.*

*5. To the extent the model codes or cannons conflict with Nevada statutes, rules, or Nevada Supreme Court decisions, the statutes, rules, and Nevada Supreme Court decisions control.*

6. ~~2.~~ A mediator who has a personal or past or present significant professional relationship with any of the parties or a financial interest in the matter of the mediation shall immediately recuse himself or herself as a mediator in the particular case. Any mediator who has received material concerning a party that is designated confidential ~~under Rules 11.8 and/or 11.9~~ may not undertake representation adverse to that party in connection with a mediation under this program for a period of 90 days after the mediation, unless the party providing the confidential material waives this rule. In no event may a mediator, at any time, use confidential information provided to him or her as a mediator ~~under Rules 11.8 and/or 11.9~~ in the later representation of a party to a mediation.

7. ~~3.~~ Mediators serve at the pleasure of the Court and the Court may suspend or revoke the appointment of a mediator at any time. The suspension or revocation is effective immediately. The FMP Manager has authority to take any action necessary to accommodate the parties affected by such action(s).

8. ~~4.~~ The Administrator or designee may suspend or terminate a mediator from the program without cause at any time and may recommend to the court revocation or suspension of the appointment. Any suspension of a mediator by the Administrator or designee is limited to a maximum of 60 days.

#### **Rule 5. Fees for Presiding Mediators.**

1. Mediators shall be compensated in the amount of \$400, with \$200 of the fee to be paid by the owner-occupant (as defined in Rule 7), and \$200 to be paid by the lender, unless otherwise stipulated. Each party must pay its respective \$200 fee at the entry point into the Foreclosure Mediation Program. Payment by the grantor or person who holds title of record must occur by cashier check or money order made payable to the "State of Nevada Foreclosure Mediation Program," or, when available, electronic payment, or from an attorney's trust account and be made payable to the "State of Nevada Foreclosure Mediation Program."

2. An assigned mediator who recuses from participation at any time may not be compensated.



3. If a grantor makes payment directly to a trustee, the trustee shall immediately forward the payment, whether made in cash, by check, cashier's check, or money order, to the Administrator, or designee, together with the beneficiary of the deed of trust's payment of fees. However, if the payment to the trustee is made payable to the trustee, the trustee shall immediately deposit the funds in its account and submit the payment to the Administrator, or designee, together with the beneficiary of the deed of trust's portion of the fees.

4. For those limited situations where a refund may be appropriate, the Administrator shall establish refund policies and procedures.

#### **Rule 6. Deposits; Failure to Pay.**

If a party to a mediation fails to pay the \$200 toward the mediator's fee, the mediation may be terminated and relief awarded to the nondefaulting party, as may be deemed appropriate.

## **II. PARTICIPATION IN THE FORECLOSURE MEDIATION PROGRAM**

#### **Rule 7. Eligibility for the Foreclosure Mediation Program.**

1. The program applies to any grantor or person (homeowner) who holds the title of record and is the owner-occupant of a residence as to which a notice of default and election to sell has been recorded on or after July 1, 2009. For purposes of these rules, an owner-occupant includes the trustee of a revocable or irrevocable trust if the trustor or a beneficiary of that trust resides in the residence at the time of the recordation of the notice of default and election to sell. In such event, the trustee of the trust or his authorized representative shall represent the owner-occupant at the mediation and must execute all documents and forms required of owner-occupants by these rules.

2. "*Owner-occupied housing*" means housing that is occupied by an owner as his or her primary residence. This term does not include any time-share or other property regulated under NRS Chapter 119A, and/or a foreclosure initiated by a homeowner's association under NRS Chapter 116.

3. A Certificate from the Administrator or designee must be recorded prior to a trustee's sale being conducted on any owner-occupied housing. The Certificate may be requested by the trustee and, if requested, may be issued by the Administrator or designee on any residential property for which a request for mediation was not filed. However, there is no requirement that a Certificate be issued and recorded prior to a trustee's sale being conducted on any type of property

other than owner-occupied housing. Any program issued certificate is considered confidential until recorded.

### **Rule 8. Notice of Default and Election to Mediate.**

1. Any trustee or other person presenting a notice of default and election to sell for recording in the Office of a County Recorder shall, not later than 10 days from presenting the Notice of Default for filing, send by certified or registered mail, return receipt requested, to the grantor or person who holds title of record of an owner-occupied residence, in addition to the documents required to be sent to the homeowner under NRS 107.080, 2 copies of the Election of Mediation and instructions, on a form provided by the Administrator or designee with the information indicated on the form to be provided by the trustee filled in. *Along with the Notice of Default, ~~the~~ trustee must also provide the grantor with ~~one copy of the following forms: (i) a Financial Statement; and (ii) a Housing Affordability Worksheet,~~ a list of documents that may be required for mediation, which forms ~~have list has~~ been pre-approved by the Administrator, or designee, of the Program.* In addition, the trustee must also provide the grantor with two envelopes: one preaddressed to the Administrator, or designee, and the other pre-addressed to the trustee.

2. The mediation process under these rules shall be initiated by the preparation and delivery of an Election of Mediation by a grantor or person who holds title of record of an owner-occupied residence on "forms" provided by the Administrator or designee and payment of the fee required by Rule 5 herein.

(a) The eligible participant shall, not later than 30 days after the service upon him or her in the manner required by NRS 107.080 of the notice of default and election to sell, complete the Election/Waiver of Mediation Form *and deliver it, along with the fee required under Rule 5, to the Administrator.* ~~If the eligible participant elects to mediate through the Program, they must also complete and submit the Financial Statement and the Housing Affordability Worksheet. The eligible participant must deliver these documents to the Administrator or designee together with the fees required under Rule 5, within the 30 day period.~~

(b) The eligible participant shall also mail a copy of the Election/Waiver of Mediation to the trustee, by certified or registered mail, return receipt requested.

(c) As soon as the Administrator or designee receives an Election/Waiver of Mediation from an eligible participant, the Administrator or designee will notify the trustee of the receipt, including whether any fees were paid by the participant.

(d) The trustee shall, within 10 days of notice of the receipt of the Election of Mediation, deposit with the Administrator, or designee, the signed Election of

Mediation, if the trustee has received a copy; a copy of the trustee's Information on a form provided by the Administrator or designee including the name and address of the beneficiary of the deed of trust; a copy of the recorded Notice of Default; and the fees required in Rule 5 herein, including any fees received from the grantor. Any delay by the trustee in providing the required documents and information to the Administrator or designee, shall extend the time for mediation set forth in Rule 1.2.

3. If grantors or persons who hold the title of record have timely elected to participate in the program and the trustee presents a Rescission of a Notice of Default and Election to Sell for recording in the Office of a County Recorder, the lender must obtain the written agreement of grantors or persons who hold title of record to stop the mediation from proceeding. The lender shall, within ten 10 days of the recording of the Rescission, deposit with the Administrator, or designee, the signed agreement between the lender and grantors or persons who hold title of record to withdraw from the Foreclosure Mediation Program process together with a copy of the recorded rescission. Should the Administrator not receive the signed agreement within the time provided, the mediation process will continue as provided herein.

4. Failure by any eligible participant to timely deliver an Election of Mediation to the Administrator or designee or to attend and participate at a mediation scheduled under these rules shall result in the Administrator issuing a certificate stating no mediation is required, and that a foreclosure sale may be noticed according to law.

5. *In its regular communication with the homeowner, the program shall advise the homeowner to contact the program immediately if the homeowner files for bankruptcy after electing into the program. The program shall also advise the homeowner that if a mediation is scheduled and held, and must be canceled due to the filing of a bankruptcy, and the homeowner failed to notify the program, the homeowner shall be responsible for the \$400.00 mediation fees in the event a second mediation is requested by the homeowner.*

6. ~~5~~. All grantors or persons who hold the title of record who have timely elected to participate in the program may do so and are herein referenced as the eligible participants, except where:

(a) The grantor or the person who holds title of record has previously surrendered the real property that is the subject of the foreclosure proceedings, as evidenced by a letter signed by the grantor or the person who holds title of record confirming the surrender or delivery of the keys to the property to the trustee, the beneficiary of the deed of trust, or the mortgagee, or an authorized agent of any of these recipients; or

(b) A petition in bankruptcy under Chapters 7, 11, 12, or 13 of Title 11 of the United States Code has been filed with respect to the grantor or the person who holds title of record on or after July 1, 2009, and the bankruptcy court has not entered an order closing or dismissing the case, or granting relief from the automatic stay of the foreclosure.

**Rationale for Change: A homeowner's financially sensitive information does not need to be sent to the program administration and needs only to be sent to the beneficiary of the deed of trust at a later time to avoid staleness.**

### **Rule 9. Option for Inclusion.**

1. For any owner-occupied property located in Nevada where a Notice of Default is recorded prior to July 1, 2009, the grantor or person who holds the title of record (eligible participant) and the beneficiary of the deed of trust may agree in writing to enter the Foreclosure Mediation Program governed by NRS Chapter 107 and these rules. Notice and a copy of the option for inclusion letter signed by both parties must be provided to the Administrator or designee.

*2. For any owner-occupied property located in Nevada where a Notice of Default is recorded and the homeowner has failed to elect within the timeframe pursuant to Rule 8, the homeowner and beneficiary of the deed of trust may agree in writing to enter the Foreclosure Mediation Program.*

~~3. 2. If the Administrator or designee in his or her discretion accepts the option for inclusion letter for mediation, he or she will notify the parties of the option for inclusion who shall, within 10 days, forward the fees required in Rule 5 herein to the Administrator or designee. Upon acceptance of the written stipulation and receipt of the required fees, the Administrator or designee shall appoint a mediator and the mediation process shall be conducted consistent with these rules.~~

**Rationale for Change: Rule 9 currently only applies to the homeowners who had a Notice of Default filed prior to 7/1/2009. This change would be beneficial for both parties because both parties are willing and wanting to go to mediation and they would still have to comply with the rest of the rules of the program.**

### **Rule 10. Representation**

1. Both parties to a mediation should appear in person. However, a party may be represented by another person, subject to certain limitations, as follows:

(a) Beneficiary (lender). 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, *as well as negotiate all other alternatives to foreclosure*. A beneficiary or its representative shall be physically present, or, if approved by the mediator in advance, and for good cause shown, may participate in the mediation by phone. In addition to the documents required in Rule 11 herein, the beneficiary must bring to the mediation the original or a certified copy of the deed of trust, the mortgage note, and each assignment of the deed of trust and each *assignment and* endorsement of the mortgage note.

(b) Eligible Participant (borrower). A borrower may also request that a representative accompany him or her and/or appear for him or her at the mediation. However, the borrower's representative must be either (i) an attorney who is licensed to practice law in Nevada, and/or (ii) a person who is licensed to provide services as described in NRS Chapter 645F.310, or (iii) a U.S. Department of Housing and Urban Development (HUD) approved housing counselor employed by HUD certified Housing Counseling Agencies. The mediator may request that the borrower's representative provide proof of these requirements.

(c) An eligible participant may represent him or herself. In any circumstance where the eligible participant retains representation, his or her representative must meet the qualifications provided in Rule 10.1(a) and (b).

(d) An eligible participant may give power of attorney to someone else to represent them in mediation. If an eligible participant gives a power of attorney to someone to represent them in mediation and if that person is receiving any form of compensation, including commissions or fees associated with the sale or transfer of the property, then they must meet the qualifications provided in Rule 10.1(a) and (b).

**Rationale for Change:** These changes seek to provide more clarity on the necessary authority of the representative appearing on behalf of the beneficiary.

### III. REQUIRED MEDIATION DOCUMENTS

#### Rule 11. Documents to Be Presented for the Mediation.

~~1. The parties shall provide to the mediator, and exchange with the other party the required documents using the most expeditious method available, at least 10 days prior to the mediation. The mediator may request additional documents or~~

~~estimates, which may be required by the lender for a party to participate in a government program. These documents at a minimum shall include the following, as outlined in Rules 11.2, 11.3 and 11.4:~~

~~2. The homeowner shall prepare and submit to the mediator and exchange with the lender the following documents:~~

~~(a) Financial Statement Form~~

~~(b) Housing Affordability Form~~

~~(c) Confidential Proposal document to resolve the foreclosure as provided in Rule 11.9.~~

*1. Immediately, or as soon as practicable after the mediator receives an assignment from the Administrator, the mediator shall either set an exchange of documents conference, or speak separately with each party, to ascertain whether the beneficiary of the deed of trust needs any information from the homeowner in order to make a final decision about a loan modification, short sale, or other alternative to foreclosure.*

*2. If the beneficiary of the deed of trust indicates that documents are required to determine eligibility for a loan modification, short sale, or other alternative to foreclosure, it shall prepare a list of the documents required and send it to both the mediator and homeowner via regular mail, or if agreed upon by the parties, electronic mail delivery. The list should indicate specifications concerning the documents such as timeframe or scope, and shall be submitted to the mediator and the homeowner within 5 days of the document conference or call.*

*3. The homeowner shall use his or her best effort to submit the required documents in his or her possession to the mediator and beneficiary of the deed of trust within 15 days. The homeowner should also begin the process to obtain required documents not in his or her possession.*

*4. Upon receipt of the homeowner's initial submission of documents, the beneficiary of the deed of trust shall have 15 days to send a written request for additional or corrected documents to both the mediator and the homeowner. The request shall be sent via regular, or if agreed upon by the parties, electronic mail delivery. If the beneficiary of the deed of trust fails to request additional and/or corrected documents from the homeowner, it will be estopped from claiming that the review of any option was not possible. Refusal to proceed with the modification or other alternative to foreclosure, based on lack of documentation will be considered failure to participate in good faith.*

5. *The homeowner shall then have 15 days from the date the letter is received, to submit the additional or corrected documents to the mediator and the beneficiary of the deed of trust, as well as any required documents which were not in their possession at the time of initial document submission, if obtained. Once the homeowner supplies additional and/or corrected documents, documentation will be deemed complete, and the beneficiary will be estopped from claiming that the review of any option was not possible. Failure to review the specific loan for a modification, or other alternative to foreclosure, will be considered failure to participate in good faith.*

6. *Within 5 days of receipt of the additional or corrected documents, the beneficiary of the deed of trust may request clarification regarding submitted documents and/or identification of inadequacies in previously requested and submitted documents. The homeowner will have 5 days to provide the beneficiary of the deed of trust with clarification and/or cure identified inadequacies. Once the homeowner supplies clarification and/or cures identified inadequacies, documentation will be deemed complete, and the beneficiary will be estopped from claiming that the review of any option was not possible. Failure to review the specific loan for a modification, or other alternative to foreclosure, will be considered failure to participate in good faith.*

7. ~~3.~~ *The trustee or beneficiary of the deed of trust must prepare and submit, at least 10 days prior to the mediation, the following documents to the mediator and the homeowner:*

~~(a) The original or a certified copy of the deed of trust, the mortgage note, and each assignment of the deed of trust and each endorsement of the mortgage note that satisfies the requirements provided in Rule 11.4 or 11.5.~~

(a) *The original mortgage note or a certified copy of the mortgage note together with each assignment or endorsement of said note, the original or a certified copy of the deed of trust and a certified copy of each assignment of the deed of trust.*

(b) *The original or certified copy, if one was utilized, of any document utilized to assign or endorse the mortgage note or the deed of trust.*

(c) *If the beneficiary of the deed of trust is represented by a third party at the mediation, the third party must produce the original or certified copy of the agreement, or relevant portion thereof, which authorizes the third party to represent the beneficiary at the mediation and authorizes the third party to negotiate a loan modification on behalf of the beneficiary of the deed of trust.*

(d) *While photocopies of the original or certified copy will be allowed for document exchange prior to mediation, the original or certified copy must be*

*presented at the mediation. All documents presented at mediation must satisfy the requirements provided in Rule 11.10 and Rule 11.11.*

*(e) ~~(b)~~ Appraisal and/or Brokers Price Opinion (BPO) not more than 60 days old (prior to the date of mediation) that satisfies the requirements provided in Rule 11.6 12 and/or 11.7 13. The homeowner, if he or she so chooses, may bring his or her own Appraisal and/or BPO obtained at his or her own expense.*

*~~(e) Evaluative Methodology used to determine eligibility or no eligibility of the homeowner for a loan modification as provided in Rule 11.8.~~*

*~~(d) Confidential Proposal document to resolve the foreclosure as provided in Rule 11.9.~~*

*(f) Except where the beneficiary of the deed of trust is the originator of the loan and there have been no assignments, the beneficiary of the deed of trust shall disclose to the homeowner the amount which it paid for the assignment. The beneficiary of the deed of trust shall also disclose a good faith estimate of any potential deficiency judgment on the note pursuant to NRS 40.451 et seq.*

*8. At the mediation the beneficiary of the deed of trust shall provide:*

*(a) Calculations showing whether the borrower qualified for Home Affordable Modification Program (hereinafter "HAMP") and any other modification programs available. The beneficiary of the deed of trust shall specifically state whether it is willing to consider any principal reduction.*

*(b) The Net Present Value (NPV) test and the Evaluative Methodology (the beneficiary of the deed of trust's own formula, if adopted, or if none, the FDIC mod in a box formula) used to evaluate whether it is more beneficial to the beneficiary of the deed of trust to foreclose or modify the loan which is the subject of the mediation.*

*(c) The specific results utilizing the NPV test and the Evaluative Methodology in the homeowner's present case.*

*(d) If applicable, relevant portions of the pooling and service agreements and power of attorney documents as provided in Rule 11.6(a).*

*(e) If applicable, why the beneficiary of the deed of trust refuses to allow a loan modification.*

*(f) If the beneficiary of the deed of trust refuses to allow a loan modification, they must bring the following:*



(1) *Short sale timelines, terms and conditions, which are more particularly set forth in paragraph 12 below.*

(2) *The timeline and documents necessary to effectuate a deed in lieu of foreclosure if one is agreed upon.*

(3) *Any amounts that would be paid to the homeowner in order to effectuate a voluntary move out date and the date of such a move, if the homeowner and beneficiary decide on this option.*

(4) *Any terms necessary for other alternatives to foreclosure.*

9. *Both the homeowner and the beneficiary of the deed of trust must prepare and exchange with the mediator the Confidential Proposal document to resolve the foreclosure.*

10.4. The requirement for a certified copy of the original mortgage note, deed of trust, each assignment of the deed of trust and each *assignment and* endorsement of the mortgage note, power of attorney, or other documents required by these rules is only satisfied when the mediator receives a statement under oath signed before a notary public pursuant to the provisions of NRS 240.1655(2), which includes:

(a) The name, address, capacity, and authority of the person making the certification;

(b) The person making the certification on behalf of the beneficiary is in actual possession of the original mortgage note, deed of trust, and each assignment *and any endorsement* of the mortgage note and *assignment of* deed of trust; and

(c) The attached copy of the mortgage note, deed of trust, and each assignment *and any endorsement* of the mortgage note and deed of trust are a true and correct copy of the original mortgage note, deed of trust, and assignment of the deed of trust in the possession of the person making the certification.

(d) The certification shall contain the original signature of the certifying party and the original seal and signature of the notary public. Each certified document must contain a separate certification.

11.5. In the event of the loss or destruction of the original mortgage note, deed of trust, or assignment of the mortgage note or deed of trust, the mediator shall recognize a judicial order entered pursuant to NRS 104.3309 providing for the enforcement of a lost, destroyed, or stolen instrument.

12.6. The beneficiary of the deed of trust or its representative shall produce an appraisal done no more than 60 days before the commencement date of the mediation with respect to the real property that is the subject of the notice of default and shall prepare an estimate of the "short sale" value of the residence that it may be willing to consider as a part of the negotiation if loan modification is not agreed upon, *and shall submit any conditions that must be met in order for a short sale to be approved. The beneficiary of the deed of trust must also be able to negotiate the following: (i) the listing price, (ii) the date by which the property will be listed for sale, (iii) a period of time in which the property will be marketed, (iv) a specified period in which the beneficiary of the deed of trust has to determine whether to accept an offer to purchase the property, and (v) the maximum length of time escrow may last in order to complete the sale. All short sale agreements must state whether the deficiency is waived. All appraisals or BPOs must be performed by a third party, independent appraiser.*

*(a) If the grantor fails to meet conditions within the period allowed by the conditions, the beneficiary of the deed of trust may submit a request to the Mediation Administrator to issue a certificate to foreclose, unless such failure to close escrow is a result of the action or inaction of the beneficiary of the deed of trust.*

*(b) If the grantor or the person who holds the title of record believes that the beneficiary of the deed of trust failed to comply with the guidelines of the agreement for the sale, or that escrow did not close because of the action or inaction of the beneficiary of the deed of trust, the grantor or the person who holds the title of record may file a petition for judicial review pursuant to Rule 21.*

13.7. The mediator may, ~~at his or her discretion,~~ accept a Broker's Price Opinion letter (BPO) in addition to or in lieu of the appraisal described in this rule. In that case, the BPO must comply with the provisions of NRS 645.2515.

~~14.8. The beneficiary of the deed of trust shall, under confidential cover, provide to the mediator the evaluative methodology used in determining the eligibility or noneligibility of the grantor or the person who holds the title of record for a loan modification.~~

~~15.9. Both parties to the mediation shall prepare and submit to the mediator in writing under confidential cover a nonbinding proposal for resolving the foreclosure.~~

**Rationale for Change:** This amendment clarifies the process in which the documents are exchanged and clarifies that the confidential proposal goes only to the mediator. It also clarifies that the beneficiary of the deed of trust must have full authority to consider all alternatives to foreclosure.

## IV. MEDIATION PROCEDURES

### Rule 12. Location of Mediation.

1. The presiding mediator shall designate the date, time, and place for the mediation after coordinating with the parties and then shall notify the parties in writing and forward a copy of the Mediation Scheduling Notice to the Administrator, or designee. *When coordinating with the parties, the mediator shall contact the parties, via phone call or regular mail, to ascertain whether counsel has been retained. If counsel has been retained, the mediator shall coordinate with their schedule as well.*

2. Upon request from the presiding mediator, the Program Administrator or designee shall assist in determining a suitable location for the mediation.

**Rationale for Change:** Sometimes a party retains counsel later in the process. Counsel's schedule should be considered when setting a mediation as well.

### Rule 13. Calendaring.

1. Unless otherwise stipulated by the parties and approved by the presiding mediator, or for good cause shown, a mediation will be calendared to conclude within 135 days following actual receipt by the Administrator, or designee, of the mediation fee and required documentation provided on behalf of the lender. Upon the completion of the mediation, the mediator shall prepare the Mediator's Statement in accordance with Rule 17 herein.

2. *Immediately, or as soon as practicable after the mediator receives an assignment from the Administrator, the mediator shall either set an exchange of documents conference, or speak separately with each party, to request the list of documents that are required for the beneficiary of the deed of trust to make a final decision about a loan modification, short sale, or other alternatives to foreclosure. The mediation shall be scheduled to conclude within 90 days of mediator assignment.*

3. ~~2.~~ Mediators shall schedule each mediation for a minimum of 4 hours. Unless extended by the presiding mediator, the parties will be allowed up to 4 hours to present and conclude the mediation.

4. ~~3.~~ The mediator may conduct more than one mediation in a day, but in no case shall the mediator conduct more than ~~3~~ 2 mediations in a day without express written approval by the Administrator or designee. Mediations shall take place between the hours of 8 a.m. and 5 p.m. Pacific Standard Time (PST), Monday through Friday (excluding legal holidays), unless otherwise agreed upon to by the parties.

#### Rule 14. Continuances.

1. ~~No request for a continuance of a mediation scheduled in the Foreclosure Mediation Program may be granted, except upon a showing of extraordinary circumstances, or upon a written agreement of the parties and the mediator. Notice of such agreement shall be provided by facsimile, electronic mail, and/or regular mail.~~

2. *Prior to the mediation convening, A request for a continuance must be in writing and served on the presiding mediator and opposing party. Continuance of a mediation may be granted upon a showing of extraordinary circumstances or upon a written agreement of the parties. The request must set forth the extraordinary circumstances with particularity. A ruling by the presiding mediator granting a continuance must state the nature of the extraordinary circumstances and provide at least 3 dates within the ensuing 10 days when the parties can conduct the mediation. The presiding mediator will then calendar the case for mediation on one of the specified dates and provide the Administrator, or designee, with notice of the new mediation date and the reasons for the granting of the continuance. Conflicts in the schedule of counsel shall not constitute extraordinary circumstances. When the continuance is the result of agreement of the parties, the continuance may be granted for up to 30 days. Notice of such agreement shall be provided by facsimile, electronic mail, and/or regular mail.*

3. *Once a mediation is convened, if a mediator believes a continuance of the mediation is necessary and the parties agree at the mediation that a continuance is necessary in order to achieve a meaningful result, a continued mediation may be scheduled within 30 days. One additional continuance may be permitted following that 30 day period for no more than 15 days.*

4. *The Program should not withhold the distribution of new assignments to a mediator for lack of resolution of existing cases when the cases were continued pursuant to this rule.*

**Rationale for Change: When parties are working in good faith to a resolution of a foreclosure, they should be permitted additional time when a mediator or the parties deem it useful.**

## Rule 15. Settlement/Resolution Before Mediation.

In the event the foreclosure issues are resolved before the scheduled mediation, the parties, must, ~~no~~ not later than 2 business days prior to the scheduled mediation date, advise the mediator of their settlement. *The parties shall send to the mediator a copy of the settlement agreement to attach to the mediator's statement. If the matter has not been settled in writing and signed by both parties, the parties shall attend the mediation so that the record may be memorialized.* Any settlement will not result in the refund of fees.

**Rationale for Change:** Confusion will be eliminated by ensuring that settlement agreements are attached to the mediator's statement.

## Rule 16. Temporary Agreements or Agreements to Relinquish; Expiration Date

1. The parties may enter into a temporary modification agreement to modify any term(s) of the loan agreement as a result of mediation under these rules. Temporary agreements include those where the owner-occupant agrees to retain the home or relinquish the home after a measurable time frame. The temporary agreement must be in writing and signed by the parties. The temporary agreement must also include an "expiration date." The expiration date is a date certain, and upon which the parties shall have complied with their obligations under the agreement.

2. Any agreement to relinquish the home must include a date or measureable time frame ~~for the borrower to vacate the premises (e.g., "Vacate 10 days after the foreclosure sale")~~ *on which the certificate will issue.* The date or measurable time frame, so identified shall be herein referenced as the "~~Vacate Date~~" "*Certificate Issuance Date.*" The Administrator may issue the certificate on the day following the ~~vacate date certificate issuance date.~~ Nothing herein prevents a party from invoking Rule 21.

(a) "*Vacate Date*" shall be defined as the date, agreed upon by the parties, by which the homeowner will leave the premises.

(b) "*Certificate Issuance Date*" shall be defined as the date on which the program will issue a certificate.

3. If either party to a temporary modification agreement described in this rule fails to fulfill the obligations of that agreement, the aggrieved party may file a petition for judicial review as set forth in Rule 21 herein. The petition must be filed within 30 days following the expiration date of the temporary modification agreement, and regardless of whether the mediation has been concluded.

**Rationale for Change:** There has been confusion with the term “vacate date” and the substitution and the use of the term “certificate issuance date” clarifies the term.

**Rule 17. Mediator’s Statement.**

Within 10 days after the conclusion of the mediation, the mediator must file with the Administrator, or designee, on the form provided by the Administrator, or designee, the original Mediator’s Statement. The Mediator’s Statement must include a true and correct copy of any agreement, including a temporary agreement, entered into between the parties during mediation. A copy of the Mediator’s Statement and agreement must be served on all parties, at the conclusion of mediation or by regular mail, email or facsimile. A courtesy copy must be provided to the trustee by regular mail, email or facsimile.

**Rule 18. Interpreter Services.**

1. Any party requiring interpreter services is responsible for contacting, ~~scheduling, and ensuring an interpreter is present for the mediation~~ *the Foreclosure Mediation Program staff to schedule an interpreter at least twenty-one (21) days prior to the mediation.* The interpreter’s compensation is the responsibility of the ~~party requesting the service~~ *Program.*

2. The Administrator or designee shall maintain a list of interpreters qualified to interpret in mediations. ~~The list must be made available to the presiding mediator and parties.~~ *The Administrator or designee is responsible for assigning the interpreter prior to the scheduled mediation and notifying the presiding mediator of the selection.*

**Rationale for Change:** The Department of Justice recently provided policy guidance that court annexed programs must provide interpreter services free of charge. This change ensures that the Foreclosure Mediation Program is in compliance with the Department of Justice mandate.

**Rule 19. Confidentiality.**

1. All documents and discussions presented during the mediation shall be deemed confidential and inadmissible in any subsequent actions or proceedings, *except* in an action for judicial review according to these rules *and any subsequent appeal.* In that case, non-privileged evidence submitted for mediation is discoverable, *with the exception of confidential information such as social security number, account numbers, and tax ID numbers pursuant to the redaction statute.* ~~to the extent that it is relevant to a determination of bad faith, enforceability of~~

~~agreements made between parties within the Program, including temporary agreements, and appropriate sanctions pursuant to NRS Chapter 107, as amended.~~

2. Nothing contained herein shall prevent the disclosure of such limited information by the mediator or parties as required by NRS Chapter 107.

**Rationale for Change:** The additional language now tracks the statute specifically and promotes greater clarity to participants in the program.

#### **Rule 20. Facsimiles.**

A facsimile of the Administrator, or designee's signature for purposes of filing Foreclosure Mediation Program documents with the County Recorder, may be accepted as an original.

#### **Rule 21. *Issuance of Certificates and* Petition for Judicial Review.**

1. *Upon the conclusion of the mediation, and upon the decision as to whether a Certificate shall issue, the Program shall notify, in writing, both the homeowner and the beneficiary of the deed of trust of the final outcome of the proceeding. The Program shall notify both participants of their right to file petition for judicial review as well as the provisions of the rule governing said petitions. If a temporary agreement is reached, the Program shall advise both parties that if either party fails to fulfill the obligations of that agreement, the aggrieved party may file a Petition for Judicial Review within 30 days of the expiration date of the temporary modification agreement or date of breach of a condition in the agreement.*

2. ~~1.~~ A party to the mediation may file a petition for judicial review with the district court in the county where the notice of default was properly recorded. A hearing shall be held, to the extent that the court deems necessary, for the limited purposes of determining ~~bad faith~~ *the beneficiary of the deed of trust's compliance in attending the mediation, having the authority or access to a person with the authority required by subsection 4, bringing to the mediation each document required by subsection 4, and participating in the mediation in good faith, compliance with the rules of the Program, enforcing agreements made between the parties within the Program, including temporary agreements, and determining appropriate sanctions pursuant to NRS Chapter 107 as amended.*

3. ~~2.~~ All such petitions shall be filed within 30 days of the date that the party to mediation received the ~~Mediator's Statement~~ *notification of the issuance or non-issuance of a certificate. The Mediator's Statement notification of the issuance or non-issuance of a certificate* shall be reviewed by the district court within 60 days of the service of the petition in accordance with the Nevada Rules of Civil Procedure, NRS Chapter 107, and any local rule or administrative order adopted by a judicial district to adjudicate such petitions.

4. ~~3.~~ Petitions for judicial review shall be served on any party and/or person appearing at the mediation on behalf of a party, by certified or registered mail, return receipt requested.

5. ~~4.~~ A petition for judicial review that names the Administrator as a respondent must be served upon the Administrator at the Administrative Office of the Courts, 201 South Carson Street, Carson City, Nevada 89701, by certified or registered mail, return receipt requested.

6. ~~5.~~ Proceedings in the district court on a petition for judicial review shall be conducted de novo.

7. ~~6.~~ Upon receipt of notice of the filing of a petition for judicial review by the Administrator, and until final resolution of that action, the Administrator, or designee, shall refrain from taking any action which will adversely affect any party to the mediation.

8. ~~7.~~ The District Court Clerk shall provide to the Administrator or designee a copy of any Petition for Judicial Review and disposition thereof filed in accordance with these rules, within 10 days of the filing of such pleading or disposition. Also, the District Court Clerk may provide electronic access to these records for the Administrator or designee.

**Rationale for Change:** Since the program is deciding whether a Certificate should issue, the Program should notify the homeowner and the beneficiary of the deed of trust of their decision and the options that exist. This notification will also assist the parties where a temporary agreement has been reached, to endure that the parties know their rights to Petition for Judicial Review following a failed temporary modification agreement. The additional language now tracks the statute specifically and promotes greater clarity to participants in the program.

**Rule 22. Advisory Committee on the Foreclosure Mediation Program.**

1. There is hereby created the Advisory Committee on the Foreclosure Mediation Program. The Committee, which shall be appointed by the Nevada Supreme Court, shall consist of:

(a) The Foreclosure Mediation Program Manager, who shall serve as the Committee's chair;



(b) Two persons who serve as mediators in the Foreclosure Mediation Program;

(c) One person who is a representative of an organization or association that conducts business as a title company or serves as a trustee on deeds of trust;

(d) Two persons who regularly conduct residential mortgage lending in the State of Nevada;

(e) Two persons who have previously participated in the Foreclosure Mediation Program as owner-occupants of a residence;

(f) Two persons who are attorneys licensed in the State of Nevada and who regularly represent lenders in the Foreclosure Mediation Program;

(g) Two persons who are attorneys licensed in the State of Nevada and who regularly represent owner-occupants in the Foreclosure Mediation Program;

and

(h) Two persons who are licensed real estate agents in the State of Nevada.

2. Each appointed members serves a term of 1 year. Members may be reappointed for additional terms of 1 year in the same manner as the original appointments. Any vacancy occurring in the membership of the Committee must be filled in the same manner as the original appointment no later than 30 days after the vacancy occurs.

3. The Committee shall meet at least once every 2 months and may meet at such further times as deemed necessary by the Chair.

4. A majority of the members of the Committee constitutes a quorum for the transaction of business, and a majority of those members present at any meeting is sufficient for any office action by the Committee.

5. The Committee shall:

(a) Study the Foreclosure Mediation Program rules and make such recommendations to the Nevada Supreme Court as it deems appropriate;

(b) Evaluate the effectiveness, operation, policies and practices of the Foreclosure Mediation Program and make such recommendations to the Nevada Supreme Court as it deems appropriate; and

(c) Identify state and federal programs related to the foreclosure of residences in Nevada, the modification of residential home loans or the resolution of mortgage foreclosures and make such recommendations to the Foreclosure

Mediation Program and its mediators and participants as the Committee deems appropriate.

***Proposed Rule 23. Post-Mediation Procedures.***

1. *If a beneficiary of the deed of trust rescinds a Notice of Default after a Certificate has been issued by the Program, that Certificate shall be rendered null and void. The Notice of Rescission shall contain the certificate number for the rescinded notice of default.*

2. *The Program will notify mediators of any Petition for Judicial Review. Mediators shall retain mediation files for no more than 90 days if no Petition for Judicial Review has been filed. If a Petition for Judicial Review is filed, the mediator shall retain the mediation documents for no more than 120 days. Once the documents are eligible for disposal, the documents must be disposed in a commercially reasonable manner.*

**Rationale:** There are trustees who have obtained certificates from the program who then, for some reason rescind the notice of default. A few of these certificates have later been filed on subsequently filed Notice of Defaults, which is improper.

***Proposed Rule 24. Failure to Participate in Good Faith.***

1. *Failure to participate in good faith includes but is not limited to:*

- (a) Refusal to proceed with the modification or other alternative to foreclosure based on homeowners failure to obtain documentation when the documents were not requested within the prescribed time frame.*
- (b) Refusal to proceed with the modification or other alternative to foreclosure based on incorrect documentation when corrected documentation was not requested within the prescribed time frame.*
- (c) Failure to review the specific loan subject to mediation for a modification, including but not limited to HAMP, Hardest Hit Fund Programs, Attorney General Settlement Programs, and any other program in existence at the time of the mediation when the homeowner meets the program requirements.*
- (d) More than a de minimus change, cancellation, or refusal to comply with the agreement reached at mediation.*

**Rationale for Change:** The additional language promotes greater clarity to mediators and participants in the program.

***Proposed Rule 25. Other Programs***

*After establishing the representative for the beneficiary of the deed of trust has the documents and the authority, the mediator shall discuss with parties whether borrower qualifies for HAMP, Hardest Hit Funds, Attorney General Settlement Programs, and any other program in existence at the time of the mediation when the homeowner meets the program requirements.*

## Attachment A

### Statement in Support of Proposed Amendment FMP Rule 11(7)(f):

The information regarding what the current lender/beneficiary paid for the note is both relevant and material. The homeowner cannot make an informed decision regarding whether to modify or exit without knowing all material facts up front. Without this information, the homeowner is forced to make a blind decision as to the offer, without knowing all material facts. Moreover, beneficiaries require thorough knowledge of every last detail of homeowner's financial lives in order to make decisions related to these proceedings, but refuse any reciprocity which would allow homeowners to make informed decisions.

This proposed amendment would also be in line with the intent of AB 273, as set forth in the January 05, 2012 Statement of Intent Concerning AB273 by Assembly Majority Leader Marcus Conklin, who was the primary sponsor of the Bill. For example: "Pursuant to NRS40.451, the maximum amount of indebtedness is limited to the amount of consideration paid by the lien holder. By limiting the maximum amount of indebtedness to the amount of consideration paid by the lien holder, it has always been the law that deficiency judgments are not meant to be profit centers."

This proposed amendment would be also in accord with the decision by Judge Flanagan in Kuhl v. Carrington Mortgage Services, CV11-00325, Second Judicial District Court. The Kuhl decision reasons that just because it isn't currently required by the (FMP) rules, doesn't mean the disclosure isn't required to satisfy good faith. Indeed, Flanagan ruled that where an exit strategy decision is concerned, homeowners are entitled to this information. This proposed rule would codify the Kuhl decision and significantly strengthen the effectiveness and efficiency of the FMP.

There are additional reasons for requiring the disclosure: (1) If a lender/representative cannot provide this information, it is an indication they are not the real party in interest, as the RPI would know this info; and (2) if a lender paid significantly less than the note's value, but refuses to discuss any principle reduction, this factor should be considered in determining whether it has negotiated in good faith.

## Attachment B

### Statement Against FMP Proposed Rule Changes III, Rule 11(7)(f) & 12:

#### Amount paid for note

The argument in favor of this rule relies on the assumption that NRS 40.451 states that a lender may not collect more than it paid for a given loan, and that if the lender purchased a loan at a discount, it should be forced to consider options that include negotiating based on the acquisition costs of the loan. This argument is misplaced and would effectively render well-founded principles of contract law moot.

This rule attempts to circumvent the appeal process by incorporating District Judge Patrick Flannigan's opinion from *Kuhl v. Carrington Mortgage, et. al.* interpreting the language of NRS 40.451. The argument that the lender should be forced to disclose the amount paid for a given loan has not been adopted by other district courts in Nevada, and has been presented in numerous appeals to the Supreme Court. At this time, incorporating such a rule will function as a ruling by the Supreme Court as an interpretation of NRS 40.451 without adequate briefing by all interested parties on a procedurally proper appeal.

Additionally, the Supreme Court, in *In re Volkes* (unpublished order issued 2/24/12) has stated that

"[w]ith respect to [the argument presented in this proposed rule], we question counsel's attempt to equate "lien" with "debt." Regardless of what NRS 40.451 says about the lienholder's "lien," the statute does not affect the amount of "debt" the lienholder is entitled to collect. Because appellants' promissory note is a negotiable instrument, its transfer is governed by Article 3 of Nevada's UCC. *Levva*, 127 Nev. at , 255 P.3d at 1279-81. Under Article 3, "transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument." NRS 104.3203(2). Counsel's proffered application of NRS 40.451 appears to contradict not only Article 3, but also well-founded principles of contract law. *See, e.g.*, 29 Richard A. Lord, *Williston on Contracts* § 74:10 (4th ed. 2003) ("Generally, all contract rights may be assigned . . ."); *Restatement (Second) of Contracts* § 317(2) (1979) (same); 9 John E. Murray, Jr., *Corbin on Contracts* § 48.1 (rev. ed. 2007) ("It is no defense to an obligor that the assignee gave no consideration.").

Furthermore, it may be unreasonable to expect a lender to be able to adequately determine the amount it paid for a given loan. Loans are generally not bought and sold individually; therefore making it is difficult to assign a dollar amount to any particular loan.

Loan modifications, and the mediation program, have been established to help homeowners experiencing a financial hardship work with their lender. This rule will not provide any further assurance that the homeowner is negotiating with the correct party, and will not advance the objective of helping homeowners suffering financial hardship.

#### Short Sale:

The intent of AB149 was to help struggling homeowner stay in their homes through loan modification. The proposed rule falls outside the scope of the intent of the legislation. Additionally, the rule includes language with regard to appraisals that trivializes the ethical duties of an appraiser, and attempts to circumvent the traditional appeal process.

The rule also introduces strictures that lenders may be unable to comply with due to external parties to the mediation. In particular, the rule proposes that the lender must provide concrete timelines for a short sale. Unfortunately, these timelines vary, and are directly impacted by the conduct of parties that are not present at the mediation including, but not limited to, realtors, brokers, appraisers, title insurers, escrow companies and other lienholders. The Program has no authority to monitor the services of these parties. Failure on the part of any one of these external parties may result in a court holding that the beneficiary failed to participate in good faith.

Short sales also require a Title Insurance Carrier to review the title in order to issue a commitment for a policy of title insurance on the transaction. In the proposed rule, a lender is required to commit to a short sale process, when it will not have the information necessary to determine if the sale can be insured with good title to the new owner. The cost associated with a title search on every property in the mediation program, when the vast majority of homeowners are looking to save their homes (in line with the intent of AB149), is an inefficient use of funds.

It is also likely that this rule will greatly expand the default timeline. In requiring a lender to commit to certain concrete timeframes, this rule will function as a requirement that the lender provide additional time, well beyond the now-prescribed 90 days, prior to exercising its right to foreclose after an unsuccessful mediation. This was not contemplated by the Legislature. On this basis, short sales should be handled outside the mediation process.

The final sentence of the proposed rule also presents as an end-around to a proper appeal. Several attorneys have presented the argument that the beneficiary's use of a wholly-owned subsidiary appraisal company is an inherent

conflict of interest. At this time the issue is pending before several district courts, and will ultimately be appealed to the Supreme Court. This rule should be appealed and adequately briefed before inclusion.

Furthermore, the proposed language trivializes the ethical responsibilities of a licensed appraiser. An appraiser is bound to provide honest appraisals despite the appraiser's employer. This rule assumes that appraisers who work for wholly-owned subsidiaries of beneficiaries will abandon their ethical duties and provide inaccurate appraisals which will somehow help the beneficiary. It is unlikely that this behavior has occurred, and if it has, the real estate profession is self-governed, and should handle such claims. There is no basis for inclusion of this rule at this time.

## Attachment C

### Statement in Support of Proposed Amendment FMP Rule 11(12):

#### Change to Rule 11: Inclusion of Short Sale during Mediation

Specific Benefits of expanding FMP to allow for the inclusion of Short Sales-

##### Benefits to Borrower:

- 1) The borrower has the opportunity to explore an additional alternative to foreclosure.
- 2) By requiring the beneficiary to set a listing price, the borrower has the opportunity to assess whether or not the lender is being realistic on their pricing before agreeing to a short sale.
- 3) By requiring the beneficiary to set specific timeframes, the borrower can be better prepared for the actual date they must vacate the home.
- 4) By requiring the beneficiary to state whether the deficiency is waived. The borrower would be able to make an informed decision as to whether or not the short sale is the best course of action at the time of mediation. Currently, the borrower discovers if the deficiency is being waived at the end of the short sale process.

##### Benefits to the Beneficiary/Lender/Service-

- 1) One complaint by Service's regarding short sales, is having offers submitted that are too low. By allowing the lender to set the list price, offers received should be within their guidelines.
- 2) By agreeing to a short sale, the beneficiary is able to receive a net payoff based on current market value, without having to incur the expenses and risk associated with foreclosing on the property and taking it back as an REO asset.

##### Benefits to the FMP and the community

- 1) By including short sales as part of the FMP, the program can ensure Nevada Borrowers have access to various alternatives to foreclosure.
- 2) The long term damages associated with a short sale are typically minimal when compared to the damage of a foreclosure. With Nevada leading the nation in the highest number of foreclosures still on the market, Nevada as a whole will benefit since these borrowers will be able to re-enter the market place as buyers sooner than had they gone through an actual foreclosure.
- 3) By requiring all appraisals or BPOs to be performed by a third party, independent appraiser, the FMP can guarantee that the third party,



appraiser was unbiased and did not have a conflict of interest when determining the property's value.

Benefits to all parties –

- 1) What will probably be the most significant benefit of allowing the FMP to incorporate Short Sales will be a significant reduction in the time it typically takes to complete a short sale. Please see the following timeline summary for further explanation:

Timeline Summary-

Although the number of steps may vary slightly from lender to lender, a typical short sale will typically include up to 11 steps which can take 120 - 180 days to process.

Since the recommended change to Rule 11 would require the Beneficiary to address the majority of these steps at mediation, the total short sale could be reduced to a 3 to 4 step process. This could potentially reduce the total short sale to a 60-90 day process. Since this is the same timeframe most lenders require for a trial modification period, adopting the recommended changes to rule 11 would not cause any delay in the beneficiary's timeline in obtaining their certificate.

The following is a summarized list of the 11 steps in a typical short sale:

Please note:

The steps that are *Italicized and in Underlined* would be eliminated or minimized if the FMP were to include Short Sales at mediation as outlined in the proposed rule 11 change.

- Step 1: Submission and Review of the Short Sale Package - 30 to 45 days
- Step 2: Ordering, processing, and review of the BPO - 7 to 10 days
- Step 3: Negotiator Assigned to file - 7 to 10 days
- Step 4: Negotiator review of offer - 7 days
- Step 5: Sales Price Negotiated
- Step 6: Payoff to Jr. Liens
- Step 7: Closing Costs
- Step 8: Borrower Contribution
- Step 9: Investor Review
- Step 10: Approval Letter Issued – Escrow Period and Deficiency addressed
- Step 11: Final Approval Letter received, Escrow opened, and transaction closed.  
30 to 60 days