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July 2, 2012

Tracie K. Lindeman
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV 89701

Re: Rules for Foreclosure Mediations, ADKT No. 435

Dear Ms. Lindemann:

This letter is in response to the Supreme Court's invitation to the public to submit written comments regarding proposed changes to the Foreclosure Mediation Rules.

In addition, I request an opportunity to participate in the public hearing on July 9, 2012.

Participation of servicers in foreclosure mediations:

The Foreclosure Mediation Law requires the deed of trust beneficiary to attend the mediation and participate in good faith. NRS 107.086(5). Contrary to the clear provisions of the statute, servicers, not beneficiaries, attend many, if not most, mediations.[1] This is problematic because of the conflict between interests of the beneficiary in avoiding foreclosure and the interests of the servicer who stands to earn fees from the foreclosure.[2]

According to the legislative history, NRS 107.086 was intended to address the difficulty homeowners experience in contacting the beneficiaries of their loans in order to discuss alternatives to foreclosure. As then Assembly Speaker Buckley explained to the Legislature, the

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[1] Unfortunately, statistics on servicer participation in mediations are unavailable. While participants are required to sign in at the mediations, the sign-in sheet currently in use does not require lenders' representatives to identify their employers. Nor are lenders' attorneys required to identify who their client is.

[2] Thompson, Diane E., *Foreclosing Incentives: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. Law Rev. 755 (2011); *See also,* Brief of Amicus Curiae State of Nevada, filed on December 9, 2011, in *Wells Fargo Bank v. Renslow,* Case No. 58283, pg. 2 et seq., under the heading "The Invisible Incentives: The Financial Interests of Servicers Such as Wells Fargo Conflict with the Interests of Investors, Stakeholders, and their Customers."

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complexities of the lending business can impede negotiations even when loan modification is in the interest of both parties. In some cases the loans have been sold so many times that it is not clear who the beneficiary is. This means that it is often impossible to find a decision maker with the authority to make rational case-by-case decisions regarding loan modifications.

To address this problem, Speaker Buckley assured the Legislature, "We are going to clarify the language to make it absolutely clear that the lenders, and not the intermediaries, are the ones required to come to the mediation."[3] However, there is no such clarifying language either in the Foreclosure Mediation Law or the Foreclosure Mediation Rules.

I therefore propose that the Court adopt a rule making clear that the beneficiary, not an intermediary, must come to the mediation, as follows:

Proposed new FMR 10(1)(e).

> ***Any representative of the beneficiary who appears at the mediation session must be either an employee of the beneficiary or an attorney whose client is the beneficiary.***

Procedure for Obtaining Sanctions against Beneficiaries:

Under NRS 107.086(5), whenever the beneficiary fails to comply with one of the four obligations imposed on it by this section, "the mediator shall prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or [its] representative." *See Pasillas v. HSBC Bank USA,* 255 P.3d 1281, 1284, 127 Nev. Adv. Op. 39 (2011).

However the current Foreclosure Mediation Rules make no provisions for such petitions and recommendations.

Under the current rules, a homeowner seeking sanctions must file a petition for judicial review under FMR 21 even when the mediator has determined that the beneficiary failed to participate in the mediation in good faith or otherwise failed to comply with the statute. At the hearing on such a petition, the district court must determine what transpired at the mediation. *Pasillas, supra.* It is often difficult for homeowners to obtain sanctions, in part because of the requirements that the court review the mediator's determination *de novo* (FMR 21(5)), the prohibition against homeowners recording the mediation session (FMR 1(5)), the Program's

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[3] 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), page 12.

assertion that mediators may not testify at such hearings (*see* FMP Mediator Statement form), and because the homeowner bears the burden of proof at the hearing on the homeowners' petition for judicial review. Also, some district courts read FMR 21(1) to impose on the homeowner the burden of proving "bad faith" in order to obtain sanctions. The statute contains no such requirement but instead requires the beneficiary to demonstrate "good faith" in order to obtain a certificate permitting the foreclosure to proceed. NRS 107.086(7).

The legislature intended that the district court's review of mediators' petitions and recommendations would be no different than district court review of recommendations from masters and discovery commissioners.[4] Under such procedures, a party dissatisfied with the recommendation may file objections with the court, which may then hold a hearing to determine whether to adopt the recommendation.[5] Thus the burden should be on the party objecting to the recommendation to file his objections and convince the court that the recommendation ought not to be adopted, not on the party seeking to obtain sanctions in accordance with the mediator's determination.

Statistics published by the Administrative Office of the Courts reveal that the beneficiary failed to comply with one or more of its obligations under the statute in 6397[6] or 42% of cases mediated through the end of 2011. In all of these cases, "the district court is required to impose appropriate sanctions." *Leyva v. National Default Servicing Corp.* 255 P.3d 1275, 1278, 127 Nev. Adv. Op. 40 (July 7, 2011), citing *Pasillas, supra,* 255 P.3d at 1284. It is unknown, however, how many of these cases actually resulted in sanctions, as the Administrative Office of the Courts has not published this information, but it is believed that actual sanctions are quite rare.

I therefore propose the following amendment in order to bring the rules into conformity with the legislative intent:

Proposed amendment to FMR 17.

Rule 17. ~~Mediator's Statement.~~

~~Within 10 days after the conclusion of the mediation, the mediator must file with the~~

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[4] Meeting of the Assembly Ways and Means Committee, 75th Leg. (Nev., April 27, 2009), testimony of then Chief Justice Hardesty.

[5] See, e.g., NRCP 16.1(d), NRCP 53(e).

[6] *See* http://foreclosure.nevadajudiciary.us/index.php/statistics, Program statistics through December 31, 2011.

~~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 the mediation or by regular mail, email or facsimile. A courtesy copy must be provided to the trustee by regular mail, email or facsimile.~~

Mediator's Statements and Petitions and Recommendations for Sanctions.

1. Within 10 days after the conclusion of the mediation, the mediator shall submit to the Mediation Administrator and serve upon all parties either:

a. A statement that the parties reached an agreement resolving the foreclosure;

b. A statement that the grantor or the person who holds the title of record failed to attend the mediation and a recommendation pursuant to NRS 107.086(6) that the matter be terminated;

c. A statement that the parties, while participating in good faith, were unable to reach an agreement to resolve the foreclosure; or,

d. A petition and recommendation pursuant to NRS 107.086(5) concerning the imposition of sanctions against the beneficiary or his representative.

2. Upon receipt of a statement pursuant to Rule 17(1)(a) that the parties reached an agreement resolving the foreclosure, the Mediation Administrator shall take no further action with regard to the matter.

3. Within 10 days of the mediator submitting to the Mediation Administrator pursuant to Rule 17(1)(b) a statement that the homeowner failed to attend the mediation and a recommendation that the matter be terminated, the Mediation Administrator shall provide to the trustee a certificate pursuant to NRS 107.086(6) which states that no mediation is required in the matter.

4. Within 10 days of the mediator submitting to the Mediation Administrator pursuant to Rule 17(1)(c) a statement that the parties, while participating in good faith, were unable to reach an agreement to resolve the foreclosure, the Mediation Administrator shall provide to the trustee a certificate pursuant to NRS 107.086(7)which provides that the mediation has been completed in the matter.

5. Within 10 days of the mediator submitting to the Mediation Administrator pursuant to Rule 17(1)(d) a petition and recommendation pursuant to NRS 107.086(5) concerning the imposition of sanctions against the beneficiary or his representative, the Mediation Administrator shall file the petition and recommendation with the district court where the property is located. The mediator's recommendation shall become the order of the court unless any party files a petition for judicial review with the district court pursuant to Rule 21.

6. Any petition and recommendation pursuant to NRS 107.086(5) concerning the imposition of sanctions against the beneficiary or his representative shall state with particularity the sanctions the mediator considers proper.

Advisory Committee on the Foreclosure Mediation Program:

The Supreme Court created the Advisory Committee on the Foreclosure Mediation Program over a year ago. Among other things, the Committee is required to "evaluate the effectiveness, operation, policies and practices of the Foreclosure Mediation Program." FMR 22(5)(b).

Any objective evaluation of the Program must be independent of the Mediation Administrator. However, under the current version of the rule, the Program Manager chairs the committee.

To my disappointment, the Advisory Committee has not yet conducted any evaluation of the effectiveness of the Program either by analyzing mediation outcomes or otherwise. In particular, the committee has not undertaken to determine how many permanent loan modifications have been achieved, even though this information would be readily ascertainable through examination of Program records.[7]

I therefore propose that the Committee become independent of the Foreclosure Mediation Program by replacing the current chair with someone who is not associated with the Mediation

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[7] Statistics published by the Administrative Office of the Courts indicate that 82% of the cases resulted in "no foreclosure." But in over half of those cases, the beneficiary was free to initiate a new foreclosure immediately (*Holt v. Regional Trustee Services Corp.*, 266 P.3d 602, 127 Nev. Adv. Op. 80 (Dec. 15, 2011)). In a significant percentage of the remaining cases, foreclosure was avoided because the homeowner simply agreed to vacate the home. In the cases where an agreement was reached under which the homeowner remained in the home, the published statistics do not show how many such agreements permitted the homeowner to remain permanently as a result of an agreement permanently modifying the loan as opposed to merely as a temporary accommodation. http://foreclosure.nevadajudiciary.us/index.php/statistics

Administrator.

Proposed amendment to FMR 22(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,~~ ***A senior justice, judge, hearing master or other person designated by the Supreme Court, who shall be independent of the Administrative Office of the Courts, and*** 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 the State of Nevada;
e. Two person 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;
h. Two persons who are licensed real estate agents in the State of Nevada.

Thank you for your consideration.

Respectfully submitted,

Philip A. Olsen