

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADOPTION
OF RULES FOR FORECLOSURE
MEDIATION

ADKT No. 435

FILED

JUN 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

PETITION

COMES NOW the Honorable James W. Hardesty, Chief Justice of the Nevada Supreme Court, and petitions the Nevada Supreme Court on its administrative docket to adopt rules for foreclosure mediation. In support of the petition, Chief Justice Hardesty alleges that:

1. The Nevada Legislature recently considered and passed Assembly Bill 149, which amends NRS 107.080 and NRS 107.085 concerning non-judicial foreclosures. Assembly Bill 149 was signed into law by Governor Jim Gibbons.

2. Assembly Bill 149 creates a foreclosure mediation program which extends to borrowers the right to seek mediation of a mortgage loan concerning owner-occupied housing if the property is the subject of a foreclosure notice.

3. Assembly Bill 149 contemplates a mediation program to be implemented under rules adopted by the Nevada Supreme Court that must include provisions:

(a) Designating an entity to serve as the Mediation Administrator pursuant to this section. The entities that may be so designated include, without limitation, the Administrative Office of the Courts, the District Court of the county in which the property is situated or any other judicial entity.

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(b) Ensuring that mediations occur in an orderly and timely manner.

(c) Requiring each party to a mediation to provide such information as the mediator determines necessary.

(d) Establishing procedures to protect the mediation process from abuse and to ensure that each party to the mediation acts in good faith.

(e) Establishing a total fee of not more than \$400 that may be charged and collected by the Mediation Administrator for mediation services pursuant to this section and providing that the responsibility for payment of the fee must be shared equally by the parties to the mediation.

Assembly Bill 149 further provides that the rules adopted by the Nevada Supreme Court shall become effective within 30 days of the order adopting the rules.

4. In anticipation of the adoption of Assembly Bill 149, I appointed a working group charged with preparing for the implementation of the foreclosure mediation program. The working group was comprised of: Hon. Ron Parraguirre, Hon Mark Gibbons, Hon. Arthur Ritchie, Hon. Steve Dobrescu, Hon. Elizabeth Gonzalez, Hon. Andrew Puccinelli, Hon. Connie Steinheimer, Hon. Timothy Williams, Hon Barbara Finley, Hon. Diana L. Sullivan, Wesley M. Ayres, Chris Beecroft, Charles T. Cook, Karen D. Dennison, David Huston, David Rhamy, John Sande III, and M. Nelson Segel.

5. The working group has prepared a draft set of rules, attached as Exhibit A, for consideration by the court.

Accordingly, I request that the Nevada Supreme Court hold hearings in Carson City and Las Vegas in order to solicit comment on the proposed rules governing the foreclosure mediation program. I further

request that the Nevada Supreme Court consider the adoption of the proposed rules set forth in Exhibit A and take such other actions as are necessary to implement a foreclosure mediation program as contemplated by Assembly Bill 149.

Respectfully submitted,

L. Hardesty, C.J.
Hardesty

FORECLOSURE MEDIATION RULES

I.

SCOPE OF RULES

RULE 1. The Foreclosure Mediation Program.

(a) Authority & Scope.

Pursuant to the jurisdictional authority provided by Chapter 107 of the Nevada Revised Statutes and the Nevada Supreme Court's (Court) inherent power to create rules for the efficient administration of Justice , these rules 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.

(b) Purpose.

The purpose of these rules is to systematically provide for the orderly and timely mediation of owner occupied residential foreclosures in a cost efficient manner which shall take place within 90 days after the recording of the notice of default. This will permit deed of trust beneficiaries (lender) and their representatives and homeowners and their representatives to exchange information and proposals aimed at avoiding foreclosure, and a mediator to oversee the process.

(c) Availability of program.

The foreclosure mediation program is mandatory in the event that the grantor or person who holds title of record timely elects to enter into a mediation, with the exceptions as provided by Rule 5, hereinafter.

RULE 2. Mediation Administrator.

The Mediation Administrator (Administrator) shall be appointed by the Court or their designee.

The Administrator may appoint Mediation Coordinators to assist in the administration of the program. When the efficient administration of justice warrants, the Administrator may contract with a District Court for mediation coordination services.

RULE 3. Presiding Mediator.

A foreclosure mediation may be conducted by either a senior judge, hearing master or other designee.

(a) Assignment of presiding mediator.

No later than ten (10) days after receipt of a notification that a foreclosure case entered the foreclosure mediation program, the Administrator or designee shall randomly select and assign a mediator to preside over the mediation. The Administrator shall notify the selected mediator and the parties to the mediation of the appointment of the mediator. The mediator assigned to the mediation will have two days after receiving the assignment to determine and notify the administrator of a conflict requiring the mediator to recuse from the mediation. Upon such notification, the Administrator shall immediately and randomly select another mediator to conduct the mediation. At his/her discretion the Administrator may cluster several mediations for a lender.

(b) Panel of mediators.

The Administrator shall maintain a list of mediators available to hear foreclosure mediations. The list shall include all senior judges and justices, hearing masters and other designees who have indicated an interest in serving as presiding mediators in the foreclosure mediation program and are qualified pursuant to section c.

(c) Qualifications.

Mediators will meet the following minimum qualifications:

1. (a) Be a graduate of an accredited law school and authorized to practice law; or
(b) Not be a graduate of an accredited law school nor authorized to practice law in any state but experienced as a mediator.

For purposes of subparagraph (c) experienced as a 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 ten (10) mediations as a co-mediator or sole mediator.

2. Additionally, mediators must participate in a training program of at least four (4) hours consisting of education in mortgages, deed of trust, promissory notes, loan modification, Nevada Foreclosure Law and such topics as determined necessary for recommendation to the Court as a presiding mediator.

3. The Court, for good cause shown, may waive the minimum requirements set herein.

(d) Appointment.

1. The administrator shall solicit and assemble a list of proposed mediators. The Administrator, or his designee, shall provide the Supreme Court with the list of individuals who have applied to become mediators, along with qualifications. In

reviewing each applicant's qualifications, the Supreme Court shall take such action as it deems necessary to determine whether to approve, deny or continue the applicant's request to serve as a Mediator. The term of appointment shall be one year.

2. The Administrator shall receive all affidavits and issue all certificates as may be required herein. The list of court approved mediators shall be maintained by the Administrator.

(e) Authority.

- (1) The presiding mediator shall have all requisite authority to conduct each mediation hereunder, including the authority to determine whether the parties have acted in good faith, and shall timely notify the Administrator of the outcome of each mediation.

Rule 4. Disqualification & Recusal

(a) A mediator who would be disqualified for any reason that would disqualify a judge under the Nevada Code of Judicial Conduct shall immediately recuse himself/herself or be withdrawn as a mediator.

(b) Any mediator appointed pursuant to these rules is subject to the Nevada Code of Judicial Conduct.

II.

PARTICIPATION IN THE FORECLOSURE MEDIATION PROGRAM

Rule 5. Eligibility for the Foreclosure Mediation Program.

(a) All grantors or other person holding 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:

- (1) the grantor has previously surrendered the real property that is the subject of the foreclosure proceedings, as evidenced by a letter 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
- (2) 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, and the bankruptcy court has not entered an order closing or dismissing the case, or granting relief from a stay of foreclosure.

(b) A mediation under these Rules shall be commenced by the preparation and delivery of a Request for Mediation on a form provided by the Administrator and payment of the fee required by Rule 14 herein.

(1) The Request for Mediation must be served upon the Administrator and the beneficiary, by certified mail, return receipt requested, no later than thirty (30) days after the date of mailing of the notice recorded pursuant to NRS 108.070 which has commenced the foreclosure against the real property that is subject to the deed of trust.

(2) The beneficiary shall, within ten (10) days of the receipt of the Request for Mediation, deposit with the Administrator, a Consent to Mediation along with the fee required in Rule 14 herein.

(c) Failure by any Eligible Participant to attend and participate at the mediation shall result in the Administrator issuing a certificate indicating no mediation is required.

(d) All beneficiaries of the deed of trust, or their representatives, who are seeking to invoke foreclosure against Eligible Participants, shall participate in the foreclosure mediation program, and shall be represented at all times during a mediation by a person or persons who have the authority to modify the underlying loan, and who shall 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 the mortgage note.

(1) The grantor and lender representatives with authority to modify the underlying loan shall be physically present or, if approved by the mediator, may participate by phone.

(2) Failure by the beneficiaries of the deed of trust, or their representatives to attend and participate at the mediation, or to bring all requisite documents and authorities to the mediation, shall result in the mediator preparing and submitting a petition and recommendation to the Administrator concerning the imposition of sanctions against the beneficiary of the deed of trust or his representative .

(3) The Administrator shall transmit the petition, recommendation and any other applicable document to the District Court in the county where the notice of default was properly recorded , or any part thereof, is located.

Rule 6 Option for Inclusion

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 and the beneficiary of the deed of trust may stipulate to enter the Foreclosure Mediation Program governed by NRS 107 and these Rules. Notice and a copy of the stipulation must be

provided to the Administrator. Contingent upon the approval of the Administrator, the mediation process shall proceed.

III.

MEDIATION PROCEDURES

Rule 7 Documents To Be Presented For the Mediation.

In addition to the documents as set forth in Rule 5, the parties shall prepare such papers, and provide to the mediator and exchange the items required to be exchanged at least seven (7) days prior to the mediation, and other documents or estimates as the mediator may later direct, but which at a minimum shall include the following:

- (a) The homeowner shall prepare a financial statement in such form as to include the information set forth as Exhibit "A" to these rules, and also a Housing Affordability Worksheet in such form as to include the information set forth as Exhibit "B" to these rules.
- (b) The beneficiary of the deed of trust or its representative shall produce any appraisals that it may have with respect to the residence the real property that is subject to the deed of trust upon which the Beneficiary is attempting to foreclose and shall prepare an estimate of the "short sale" value of the residence which it may be willing to consider as a part of the negotiation if loan modification is not agreed upon.
- (c) Both parties to the mediation shall prepare and submit to the mediator under confidential cover a nonbinding proposal for resolving the foreclosure which will be available to assist the mediator in conducting the mediation.

Rule 8. Settlement before mediation.

In the event the foreclosure issues are resolved before the scheduled mediation, the parties must, no later than two days prior to the scheduled mediation date, advise the mediator of their settlement. Failure to abide by this rule may subject the parties to sanctions by the administrator.

Rule 9. Calendaring.

Unless otherwise stipulated to by the parties and approved by the presiding mediator, or for good cause shown, a mediation will be calendared to commence no later than ten days prior to the 90th day following the service of the notice of default.

Rule 10. Continuances.

No request for a continuance of a mediation scheduled in the foreclosure mediation program may be granted, except upon a showing of extraordinary circumstances. A motion for a continuance must be in writing and served on the presiding mediator and must set forth the exceptional 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.

Rule 11. Location of mediation.

The presiding mediator shall designate space for mediations and the time and place for the same in coordination with the parties and shall notice the Administrator of the same. Upon request from the presiding mediator, the Administrator shall assist in designating space.

Rule 12. Time limits and Statement of Agreement or Nonagreement for the mediation

(a) The parties will be allowed a total of four hours to present and conclude the mediation unless some different arrangement is prescribed by the presiding mediator.

(b) Within 10 days of the conclusion of the mediation, the mediator must serve a copy of the Statement of Agreement or Nonagreement on all parties and file the original with the Administrator.

Rule 13. Interpreter Services.

Any party requiring interpreter services is responsible for contacting, scheduling, and insuring an interpreter is present for the mediation. The interpreter's compensation is the responsibility of the party requesting the service. The Administrator shall maintain a list of interpreters qualified to interpret in mediations. The list must be made available to the presiding mediator and parties.

Rule 14. Fees for presiding mediators.

Mediators shall be compensated in the amount of \$400, paid equally by the parties unless otherwise stipulated. Each party must pay its respective fee (\$200.00) at the entry point into the foreclosure mediation program. Payment must occur by cashier check, money order or, when available, electronic payment.

The payment is non-refundable.

Rule 15. Deposits; failure to pay.

If a party to a mediation fails to pay the \$200.00 toward the mediator's fee, the mediation may be terminated and relief awarded to the nondefaulting party, as may be deemed appropriate.

Rule 16. Confidentiality.

All documents and discussions presented during the mediation shall be deemed confidential, and shall be presumed to be inadmissible in any subsequent actions or proceedings. Nothing contained herein shall prevent the disclosure of such limited information by the mediator as required by NRS Chapter 107.