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Nevada Foreclosure Mediation Program
200 W. Lewis Ave., 17th Floor
Las Vegas, NV 89101

ADKT 435

Dear Verice:

I have now completed 27 foreclosure mediations in both Northern and Southern Nevada. In the course of those mediations, several issues have arisen that may merit your attention, as described below. I hope that sharing my ideas with you on these issues will enable us to improve our program so as to serve the public better. I am sharing this letter with other foreclosure mediators and with Justice Hardesty as well.

Pre-mediation exchange of documents:

Amended Foreclosure Mediation Rule 7 requires the parties to exchange certain documents *with each other* at least seven days in advance of the hearing. However the official Notice to Appear form only advises the parties to submit the documents *to the presiding mediator*. While the form makes reference to Rule 7, it does not mention Rule 7's requirement that documents be exchanged with the other parties, does not explain what documents must be exchanged, and does not advise the parties where they can obtain a copy of Rule 7.

In my personal experience, it is rare for the parties to have exchanged the documents required by Rule 7 in advance of the mediation. From the borrower's side, this is usually because the borrower is unaware of the requirement. This often causes delay in the proceedings in that the lender must first review and analyze the borrower's financial information before it can proceed with the mediation. Can the Notice to Appear form be modified to state clearly that the parties must exchange documents with each other at least seven days in advance of the mediation? Can the form also state exactly what information must be exchanged?

09-31804

Authority:

AB 149 requires the presence at the mediation of either a person with "authority to *negotiate* [emphasis added] a loan modification" or a person "with access at all times during the mediation to a person with such authority." See, AB 149, sec. 1(4). In contrast, the Amended Foreclosure Mediation Rules only require the participation of a person with "authority to modify the loan." FMR 5(7).

In my opinion there is a significant difference between these two requirements. In many, many of the cases I have handled, the lender representatives possess authority to modify the loan but no authority to negotiate. Typically these persons' authority is limited to offering a loan modification only on certain very strict criteria evidently determined by an undisclosed mathematical formula. The formula usually results in a single take-it-or-leave-it offer to the borrower. These representatives have no discretion to consider special circumstances, to engage in an exchange of ideas, to evaluate the other party's proposals, to compromise, etc.

On the Mediator's Statement I am asked to indicate whether the "The beneficiary [had] the required authority or access to a person with the required authority." What is the required authority? Is authority to modify the underlying loan, as required by the Amended Foreclosure Rules, enough? Or must the beneficiary's representative possess "authority to negotiate" as required by AB 149?

As a mediator, I strongly prefer the latter standard.

Attendance by phone:

FMR 5(7)(b) provides that a lender representative with authority to modify the underlying loan be physically present unless the mediator permits the person to participate by phone "for good cause shown." I interpret this rule to require my *advance permission* for a lender's representative to participate by telephone.

Without exception, no beneficiary representative with authority to modify the underlying loan has been physically present at any of the twenty-seven mediations I have conducted. Instead the beneficiary sends a representative to the mediation who has no authority but has the phone number of someone who does. In only one case did the lender request in advance of the mediation permission to participate by telephone, which I granted.

Telephonic participation has proved problematic in many, many of the cases I have handled. In some cases, the majority of the time spent in the mediation was consumed while the physically

present lender representative attempted to reach the remote representative on the phone, while the parties waited "on hold" for the remote representative to return to the phone, or while the parties waited for the remote representative to return the physically present representative's call. Often proceedings are interrupted while the remote representative conducts business unrelated to the mediation in which he or she is supposedly participating by phone. This would appear to be in blatant disregard of AB 149's requirement that the physically present representative have "access at times during the mediation" to a person with the required authority. AB 149, sec. 1(4).

I have adopted my own policy, which I suggest other mediators consider. In advance of the mediation, I will approve telephonic participation based on a showing of good cause if I am assured that the telephonic participant will set aside the time necessary for the specific mediation in advance, will familiarize himself/herself with the case in advance, and will devote his/her entire attention to the case during the mediation session. If these criteria are not met, or if there is no advance request for telephonic participation, and if the parties are not successful in resolving the matter, I will indicate on the Mediator's Statement that the party participating by phone did not participate in good faith.

Accessibility or Participation?

When the person with the required authority is not physically present, the Rules require that person to "participate" in the mediation. FMR 5(7). AB 149, however, only requires that the physically present person have "access at all times during the mediation" to a person with the required authority. AB 149, sec. 1(4).

In a small number of my cases, the physically present representative has insisted that all communication to the person with authority be through the physically present representative. In these cases, the person with authority did not participate in the mediation, but instead communicated with the physically present representative in private, who then passed the information on to me and the homeowner, essentially playing the role of a messenger. Since the physically present person had access at all times to person with authority, the beneficiary was in compliance with AB 149, but since the person with authority did not participate in the mediation, the beneficiary was not in compliance with the Amended Foreclosure Mediation Rules. Did the beneficiary in these cases participate in good faith? In other words, is access to the person with authority enough or is participation by such person required?

Sanctions:

AB 149 requires the Mediator to prepare and submit a petition and recommendation concerning sanctions in cases involving beneficiary bad faith or other specified non-compliance. The District Court's power to impose sanctions, which may include requiring a loan modification, appears to be triggered by the Mediator's petition and recommendation. See AB 149, sec. 1(5).

The official forms do not include a form for such a petition and recommendation. Nor do I recall this issue being discussed at any of the Mediators' training sessions or roundtables. Nor do the Amended Foreclosure Mediation Rules appear to address this procedures related to such petitions and recommendations.

Yet the requirement that the Mediator prepare and submit such a petition and recommendation appears mandatory in the situations described in Section 1(5).

How would you like the Mediators to proceed in cases where a petition and recommendation for the imposition of sanctions is required?

Unauthorized practice of law:

In many of my cases, I have observed what may amount to the unauthorized practice of law. Here are several examples. These are not hypotheticals but describe actual situations that have arisen in my cases, some of them more than once.

> Case No. 1 – The beneficiary's representative who was physically present at the mediation was neither an employee of the beneficiary nor an attorney. Instead, the representative worked for a company that specializes in representing lenders at foreclosure mediations for a fee. Was the representative practicing law?
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> Case No. 2 – The borrower was accompanied at the mediation by a "loan modification consultant" licensed as such under the provisions of AB 152, effective August 25, 2009. The loan modification consultant negotiated on behalf of the borrower, presumably for a fee. Is a licensed loan modification consultant authorized to represent a borrower at the mediation?
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> Case No. 3 – The borrower was accompanied at the mediation by a non-attorney employee of a law firm who described herself as a "home retention specialist." She reported that her supervisor was an attorney but her supervisor was not present. She

assisted the homeowner in evaluating the beneficiary's offer. Was the employee of the law firm engaged in the unauthorized practice of law?

Case No. 4 – The borrower was accompanied at the mediation by a friend. The borrower relied on the friend for advice. The friend happened to be a real estate salesperson but emphasized that she was there only in the capacity of a friend. I assume the friend did not charge the homeowner a fee for her advice. Was the friend engaged in the unauthorized practice of law?

How should the mediators to proceed in these cases? Under what circumstances, if any, should we prohibit a non-attorney from representing a party or otherwise participating in the mediations? Should we report instances of possible unauthorized practice of law? If so, do you prefer that we report these instances to you, to the State Bar, or to the Attorney General?

Thank you for your consideration of these issues. Naturally, if there are questions please give me a call.

Happy New Year!

Philip A. Olsen
Foreclosure Mediator

cc: Justice Hardesty