

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADOPTION  
OF RULES FOR FORECLOSURE  
MEDIATION

ADKT No. 435

**FILED**

**FEB 26 2010**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
by *S. Young*  
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 and forms. The hearing will be held on Tuesday, March 16, 2010, at 4:00 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.

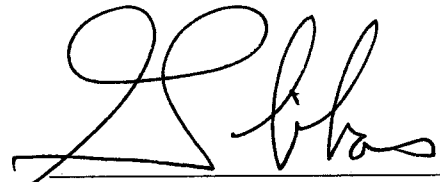
Further, this court invites written comment from the bench, bar and public regarding the proposed rule amendments and forms. An original and 8 copies of written comments are to be submitted to: Tracie K. Lindeman, Clerk of the Supreme Court, 201 South Carson Street, Carson City, Nevada 89701 by 5:00 p.m., March 12, 2010. Persons

interested in participating in the hearing must notify the Clerk no later than March 12, 2010.

**Hearing date:** March 16, 2010, at 4:00 p.m.  
Supreme Court Courtroom  
201 S. Carson Street  
Carson City, Nevada

**Comment deadline:** March 12, 2010, at 5:00 p.m.  
Supreme Court Clerk's Office  
201 South Carson Street  
Carson City, Nevada 89701

DATED this 26 day of February, 2010.

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Jim Gibbons, Governor  
Senator Steven Horsford  
Senator William Raggio  
Assemblywoman Barbara Buckley  
Assemblywoman Heidi Gansert  
All District Court Judges  
Bruce Beesley, 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  
Administrative Office of the Courts  
Verise Campbell, Mediation Administrator

## EXHIBIT A

### AMENDED FORECLOSURE MEDIATION RULES

(Revised 2/25/2010)

#### 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 [90] 135 days following actual receipt by the Administrator of the mediation fee provided on behalf of the lender~~after the recording of the notice of default and election to sell~~. The Foreclosure Mediation Program will permit deed of trust beneficiaries (lenders) and homeowners, with the assistance of a mediator, to exchange information and proposals that may avoid foreclosure.

3. *Availability of program.* Subject to limited exceptions set forth in Rule 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 (NRCP) shall apply. These rules, as amended, apply to all mediations which have not yet been scheduled by the mediator.

##### **Rule 2. Mediation Administrator.**

1. *Appointment.* The Mediation Administrator (Administrator) shall be appointed by the Court or its designee.

2. *Authority.* The Administrator may appoint staff, including a Mediation Supervisor, to assist in the administration of the program. When the efficient administration of the program warrants, the Administrator may contract for training and other mediation-related services. The mediator shall ensure all program-approved forms are in compliance with these rules. The Administrator may reject any program-approved form substantially altered by a borrower, lender, trustee, or mediator and require resubmission on the appropriate program-approved form.

**Rule 3. Presiding Mediator.** A foreclosure mediation may be conducted by either a senior judge, Supreme Court settlement conference judge, or other person designated by the Supreme Court.

1. *Assignment of presiding mediator.* No later than 10 days after receipt of the Election for Mediation, as provided in Rule 5~~[(4)(b)]~~(5), 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 of a conflict requiring his or her recusal. Upon such notification, the Administrator shall immediately and randomly select another mediator to conduct the mediation. The Administrator may direct a mediator to cluster several mediations for a lender. Upon final selection of a mediator, the Administrator shall send notice of the assignment to the parties.

2. *Panel of mediators.* The Administrator 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 designees who are appointed by the Court to serve as presiding mediators in the Foreclosure Mediation Program and are qualified pursuant to subsection 3 herein.

3. *Mediator qualifications.*

(a) Mediators must meet the following minimum qualifications:

(1) Be **[authorized]** licensed to practice law in the State of Nevada; or

(2) Be an experienced mediator. For purposes of subsection 3, 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 program of at least 4 hours 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.

4. *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 review the qualifications and approve, deny, or continue the applicant's request to serve as a mediator. The term of appointment shall be 1 year.

(b) 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.

5. *Authority.* The presiding mediator shall have all requisite authority to conduct a foreclosure mediation. The mediator shall **[timely]** schedule **[a]** each mediation to commence within forty-five (45) days of assignment and shall notify the Administrator of the outcome of each mediation.

#### **Rule 4. Conduct, Disqualification, and Recusal.**

1. Any mediator appointed pursuant to these rules is subject to Canons 1, 2, 3(B)2-6, 3(B)12, 3(C), and 3(D) of the Nevada Code of Judicial Conduct as adopted or amended by the Supreme Court of Nevada.

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.

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

#### **Rule 5. Eligibility for the Foreclosure Mediation Program.**

1. The program applies to any grantor or person 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.

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.

3. A Certificate from the Foreclosure Mediation Administrator must be recorded prior to a trustee's sale being conducted on any owner-occupied housing. A certificate may be requested by the Trustee and, if requested, may be issued by the Foreclosure Mediation Administrator 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.

4. 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.

[4.] 5. Any trustee or other person presenting a notice of default and election to sell for recording in the Office of a County Recorder shall, no 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, two copies of the Election of Mediation and instructions, on a form provided by the Administrator with the information indicated on the form to be provided by the trustee filled in, and two envelopes: one pre-addressed to the Administrator and the other pre-addressed to the Trustee.

~~[5.]~~ 6. 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 a form provided by the Administrator and payment of the fee required by Rule ~~[14]~~15 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 the form to the Administrator together with the fees required under Rule ~~[14]~~15. 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.

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

(c) The trustee shall, within 10 days of notice of the receipt of the Election of Mediation, deposit with the Administrator 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, 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 14 herein, including any fees received from the grantor. Any delay by the trustee in providing the required documents and information to the Administrator shall extend the time for mediation set forth in Rule 1(2).

~~[6.]~~ 7. Failure by any eligible participant to timely deliver an Election of Mediation to the Administrator 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.

~~[7.]~~ 8. (a) 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 modify the loan secured by the deed of trust sought to be foreclosed, and 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.

(b) The eligible participant and lender representatives with authority to modify the underlying loan shall be physically present or, if approved by the mediator for good cause shown, may participate in the mediation by phone.

(c) If either a lender and/or a borrower has a legal representative appearing on their behalf at the FMP mediation, and that legal representative has or will receive compensation, the mediator may request that the representative provide proof that he or she is licensed to practice law in the State of Nevada.

~~[(e)]~~ (d) Unless extended for good cause by the presiding mediator or Administrator, the mediation shall be ~~[conducted]~~ concluded within ~~[90]~~ 135 days ~~[of the recording of the notice of default and election to sell]~~ following actual receipt by the Administrator of the mediation fee provided on behalf of the lender. Upon the completion of the mediation, the mediator shall prepare the Mediator's Statement in accordance with Rule ~~[12]~~ 13 herein.

~~[(d)]~~ (e) For purposes of this rule, a certified copy of the original mortgage note, deed of trust, and each assignment of the deed of trust and mortgage note 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), and that [must] includes:

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

(2) The person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust; and

(3) The attached copy of the mortgage note, deed of trust, and each assignment 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.

~~[(e)]~~ (f) 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.

~~[(f)]~~ (g) 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 ~~[seeking a determination of bad faith participation and]~~ A non-evidentiary hearing shall be held for the limited purpose of determining bad faith and appropriate sanctions pursuant to NRS Chapter 107 as amended. All such petitions shall be filed within 15 days of the date of actual receipt of the mediator's statement and 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. Petitions for judicial review shall be served on any party by certified or registered mail, return receipt requested.

**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 (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 agreement must be provided to the Administrator. If the Administrator in his or her discretion accepts the stipulation for mediation, the Administrator will notify the parties who shall, within 10 days, forward the fees required in Rule ~~[14]~~ 15 herein to the



Administrator. Upon acceptance of the mediation and receipt of the required fees, the Administrator shall appoint a mediator and the mediation process shall be conducted [~~within 10 business days~~]consistent with these rules.

### III. MEDIATION PROCEDURES

**Rule 7. Documents to Be Presented for the Mediation.** In addition to the documents set forth in Rule 5, the parties shall prepare such papers and provide to the mediator, and exchange the items required to be exchanged with each other party, using the most expeditious method available, at least ~~[7]~~10 days prior to the mediation, and such other documents or estimates as the mediator may later direct, but which at a minimum shall include the following:

1. The homeowner shall prepare a Financial Statement and Housing Affordability Worksheet to include the information set forth in forms provided by the Administrator.

2. 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. The mediator may accept a broker's price opinion letter (BPO). The BPO must comply with the new provisions of NRS 645.2515, and in lieu of an appraisal.

3. Both parties to the mediation shall prepare and submit to the mediator under confidential cover a nonbinding proposal for resolving the foreclosure. Additionally, 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.

4. The mediator may conduct more than one mediation in a day, but in no case shall the mediator conduct more than three (3) mediations in a day without express written approval by the Administrator. Mediations shall take place between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday, unless otherwise agreed by the parties.

**Rule 8. Settlement/Resolution Before Mediation.** In the event the foreclosure issues are resolved before the scheduled mediation, the parties must, no later than 2 days prior to the scheduled mediation date, advise the mediator of their settlement. Any settlement will not result in the refund of fees.

**Rule 9. Temporary Modification Agreements; New Mediation.** If, as a result of a mediation, the parties enter into a temporary modification agreement, and the borrower fulfills all obligations of that agreement, the question of whether the lender has acted in bad faith by not providing the borrower with a permanent

modification agreement may be brought before a mediator as a new mediation, requiring the parties to deposit a second/subsequent \$200 fee and follow all procedures consistent with these rules. The borrower's election for a new mediation as described herein must be brought within ten (10) days of the fulfillment of all obligations under the temporary modification agreement.

**Rule [9]10. Calendaring.** Unless otherwise stipulated by the parties and approved by the presiding mediator, or for good cause shown, a mediation will be calendared to ~~[commence no later than 10 days prior to]~~ conclude on the ~~[90<sup>th</sup>]~~ 135<sup>th</sup> day following ~~[the recording of the notice of default, pursuant to NRS 107.080.]~~ actual receipt by the Administrator of the mediation fee provided on behalf of the lender.

**Rule [10]11. 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[,] 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. Absent such written agreement, [A motion] a request for a continuance must be in writing, served on the presiding mediator and opposing party, and 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 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.

**Rule [11]12. Location of Mediation.** The presiding mediator shall designate the location, time, and place for the mediation in coordination with the parties and shall notify the parties in writing and forward a copy of the Mediation Scheduling Notice to the Administrator. Upon request from the presiding mediator, the Administrator shall assist in designating a location for the mediation.

**Rule [12]13. Time Limits and Mediator's Statement.**

1. Unless extended by the presiding mediator, the parties will be allowed ~~[a total of]~~ up to 4 hours to present and conclude the mediation.
2. Within 10 days after the conclusion of the mediation, the mediator must file with the Administrator and serve on all parties a copy of the Mediator's Statement on a form provided by the Administrator.

**Rule [13]14. 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]15. 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) at the entry point into the Foreclosure Mediation Program. The payments are nonrefundable. Payment by the grantor or person who holds title of record must occur by cashier check, money order made out to the "State of Nevada Foreclosure Mediation Program," or, when available, electronic payment, or from an attorney's trust account and be made directly to the Administrator. 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, 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 together with the beneficiary of the deed of trust's portion of the fees.

**Rule [15]16. 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.

**Rule [16]17. Confidentiality.** All documents and discussions presented during the mediation shall be deemed confidential and, except in an action to review a petition for judicial review for sanctions under these rules, 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 or parties as required by NRS Chapter 107.

**Rule 18. Facsimiles.** A facsimile of the FMP Administrator's signature for purposes of filing FMP documents with the County Recorder may be accepted as an original.