

March 10, 2010

FILED

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

MAR 12 2010
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

In Re: AKDT No. 435, IN THE MATTER OF THE ADOPTION OF RULES FOR FORECLOSURE MEDIATION

Please see my response to the Court's invitation to submit written comment regarding the proposed rule amendments and forms. I have submitted the required original and 8 copies.

1. My name is David C. Eisenberg and I reside at 2389 Luberon Drive, Henderson, NV 89044.
2. I am an experienced mediator and have been appointed by the Nevada Supreme Court as one of the Foreclosure Mediation Program mediators. I have conducted more than 75 foreclosure mediations to date.
3. Having reviewed the proposed amendments to the "AMENDED FORECLOSURE MEDIATION RULES (Revised 2/25/2010)" under ADKT No. 435, I offer the following comments:
 - A. Under "Rule 2. Mediation Administrator, 2. Authority" it would seem more appropriate to have the *Administrator*, rather than the mediators, responsible for ensuring that all program-approved forms are in compliance with the rules.

Suggested Changes

Rule 2. Mediation Administrator.

...
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-Administrator~~ 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.

- B. Under "Rule 3. Presiding Mediator, 1. Assignment of presiding mediator" I believe that the "clock" for assignment of a presiding mediator should begin not after the receipt of the Election for Mediation, but after the receipt of the Election for Mediation *and all mediation fees*. This would be consistent with Rule 5. Also, I believe that the reference to Rule 5 in this section would most appropriately be to Rule 5 Para 6 rather than Para 5 as indicated in the proposed amendments. Lastly, the Rules should be amended to reflect

that the FMP requires that mediators either recuse themselves from an assignment or affirmatively accept the assignment by affirming that no conflict of interest exists. This requirement is effected through "FMP Form #4" aka "Selection of Mediator" (attached).

Suggested Changes

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 and all mediation fees, as provided in Rule 5[(4)(b)] (56), 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 or, alternatively, to accept the assignment with an affirmation of no conflict. 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.

- C. Under "Rule 5. Eligibility for the Foreclosure Mediation Program, Para 7." parties should be expected to timely deliver an Election of Mediation *and mediation fees*.

Suggested Changes

Rule 5. Eligibility for the Foreclosure Mediation Program.

...
[6]7. Failure by any eligible participant to timely deliver an Election of Mediation and mediation fees 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.

- D. As related to "Rule 7. Documents to Be Presented for the Mediation", the Mediator's Statement (FMP Form #9, attached) should be modified to reflect the requirement that parties timely submit documents. The form currently speaks to bringing the documents to the mediation which does not parallel the requirement under the Rules to provide certain documents under prescribed timelines *in advance of* the mediation. Providing documents in advance is critical to allow all parties to efficiently prepare for the mediation.

Suggested Changes to the Mediator's Statement

...
The beneficiary failed to provide ~~bring to the mediation~~ each document required under the timelines required by Rule 7. No further action is required.

...
The Grantor or person who holds the title of record (homeowner) failed to ~~bring to the mediation~~ provide each document required under the timelines required by Rule 7.

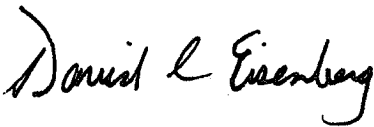
E. Also under "Rule 7 Documents to Be Presented for the Mediation" the proposed amendment to paragraph "2" might be rewritten as follows to add clarity.

Suggested Changes

Rule 7. Documents to Be Presented for the Mediation.

...
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) in lieu of an appraisal. The BPO must comply with the new provisions of NRS 645.2515., and in lieu of an appraisal.

Respectfully submitted,



David C. Eisenberg

Attachments: Selection of Mediator (FMP Form #4 rev 9.09.09)
Mediator's Statement (FMP Form #9 rev 9-03-09)

Copy to: Verise Campbell, Mediation Administrator

STATE OF NEVADA
FORECLOSURE MEDIATION PROGRAM

SELECTION OF MEDIATOR

Assessor Parcel Number (APN): _____
Property Owner(s) _____ Beneficiary _____
Trustee _____
Property Address _____ TS No. _____
DoT _____ Book/Instr. No. _____
TO: _____, Mediator

You have been randomly selected to mediate the above-described dispute in _____ County. This mediation must be completed by: _____ (DATE).

If you have a conflict or cannot mediate this matter, you must return the Notice of Recusal by facsimile to (702) 486-9339 within two (2) days.

FORECLOSURE MEDIATION COORDINATOR
Carson/Reno: (775) 684-1760
Las Vegas: (702) 486-9380

IT IS MEDIATOR'S RESPONSIBILITY TO RUN A CONFLICT OF INTEREST CHECK AGAINST ALL PARTIES LISTED ON THE RECORDED NOTICE OF DEFAULT AND ELECTION OF MEDIATION FORM. MEDIATOR ACKNOWLEDGES HE HAS NO CONFLICT OF INTEREST IN SERVING AS MEDIATOR IN THIS MATTER.

Mediator signs, dates, and returns this form!

DATED: _____
MEDIATOR
ORIGINAL TO: Foreclosure Mediation Program Supervisor

"OR"

NOTICE OF RECUSAL

Please be advised the undersigned must recuse him/herself from this mediation. This recusal and notice thereof is done in accordance with the Nevada Foreclosure Mediation Rule 4.

DATED this _____ day of _____, 20____

MEDIATOR

STATE OF NEVADA
FORECLOSURE MEDIATION PROGRAM

MEDIATOR'S STATEMENT

Assessor Parcel Number (APN) _____

Property Owner _____ Beneficiary _____

Property Address _____ TS# _____

Trustee _____ DoT Book/Inst _____

A Foreclosure Mediation conference was held on _____

The Mediator files the following report of the proceedings:

_____ The parties resolved this matter. No further action is required.

_____ The parties participated but were unable to agree to a loan modification or make other arrangements.

_____ The beneficiary or his representative failed to attend the mediation. No further action is required.

_____ The beneficiary or his representative failed to participate in good faith. No further action is required. Please explain: _____

_____ The beneficiary failed to ^{provide} bring to the mediation each document required. No further action is required. *under the timelines required by Rule 7*

_____ The beneficiary did not have the required authority or access to a person with the required authority. No further action is required.

_____ The Grantor or person who holds the title of record (homeowner) failed to attend the mediation.

_____ The Grantor or person who holds the title of record (homeowner) failed to participate in good faith. Please explain: _____

STATE OF NEVADA
FORECLOSURE MEDIATION PROGRAM

_____ The Grantor or person who holds the title of record (homeowner) failed to ^{provide} ~~bring to the~~ mediation each document required

under the timelines required by Rule 7

Other _____

The Mediator hereby certifies, under the penalty of perjury, that the foregoing is a true and accurate report of the proceedings as required by NRS Chapter 107.

DATED this _____ day of _____, 20____.

MEDIATOR

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Mediator's Statement on the _____ day of _____, 20____, by placing true and correct copies thereof in the U. S. mail, postage prepaid, addressed to the following:

By: _____
MEDIATOR