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FILED

MAR 12 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

March 12, 2010

Supreme Court of Nevada
201 S. Carson Street, Suite 250
Carson City, Nevada

Re: Rules for Foreclosure Mediations, ADKT No. 435

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF NEVADA:

I respectfully offer my comments to the proposed changes to the Foreclosure Mediation Rules (FMR) currently under consideration by the Court. I further request an opportunity to participate in the hearing scheduled for March 16, 2010.

In addition, I am suggesting additional rule changes and additions as set forth in the latter part of this letter.

I am a Supreme Court settlement conference judge who serves as a foreclosure mediator pursuant to FMR 3. To date I have conducted approximately 35 foreclosure mediations under AB 149.

COMMENTS REGARDING PENDING PROPOSED RULE CHANGES:

Pending proposed change to FMR 2: (2) Authority . . . 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 approved form.

Comment:

The mediators are not involved in the form-approval process except for being permitted to make suggestions. Therefore, they cannot "ensure" that the forms comply with the rules as this proposed change would require.

Even if the word "Administrator" is substituted for the word "mediator" in the first sentence of

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this proposed change, the requirement that the mediators utilize program-approved forms without alteration usurps their discretionary function and may unnecessarily expose them to liability.

As independent contractors, mediators perform their services "without subjection to the supervision or control of the other contracting party, except as to the results of the work, and not as to the means by which the services are accomplished." NRS 284.173(2). Requiring the mediators to use program-approved forms effectively permits the entity that approves the forms to control the means by which the mediators perform their services.

There are numerous problems with the current program-approved forms. In some circumstances, use of the forms without alteration precludes the mediator from complying with his or her duties under AB 149 and the Foreclosure Mediation Rules. In other situations, use of the forms without alteration may expose the mediator to liability for other reasons or interfere with the mediators' ability to conduct the mediations efficiently and effectively.

Unlike other judicial officers in this State, foreclosure mediators enjoy only limited judicial immunity. Mediators are immune only if they "act[] pursuant to [AB 149] in good faith and without gross negligence." AB 149, sec. 1, subsection 11. A mediator who ignores a specific statutory duty imposed on him or her by AB 149 arguably does not act pursuant to AB 149 in good faith.

Compounding the problem from the mediator's point of view is the fact that independent contractors are not entitled to indemnity for liabilities they incur in connection with their services. NRS 41.0349.

Here are some examples of the problems with the current program-approved forms:

- Under certain circumstances described in AB 149, "the mediator *shall* [emphasis added] prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions . . ." See, AB 149, sec. 1, subsection 5. The program-approved Mediator's Statement form provides no mechanism for the mediator to comply with this statutorily-imposed obligation.

- If the mediator is of the opinion that one of the parties has failed to participate in the mediation in good faith, the Program Manager requires the mediator to provide specific information on the Mediator's Statement explaining the reason for the mediator's opinion. See, Memorandum from Ms. Campbell, December 18, 2009, copy attached. However, FMR 16 [proposed to be renumbered FMR 17] requires that the "discussions

presented at the mediation" are confidential. In many cases it is difficult to comply with the Program Manager's requirement without disclosing the content of the parties' discussions.

- According to the Program Manager, the mediator must require parties who reach agreements to execute a "Mediation Agreement" on the program-approved form, which the mediator must provide to the Program Manager's staff. This requirement applies even if the parties reach agreement outside of the mediation. See attached memorandum. Agreements between private parties on private matters are normally private. There is no provision in AB149 or the Rules authorizing the mediator to require the parties to disclose the terms of their agreement to an agency of the State of Nevada.

- The program-approved "Mediation Agreement" may expose the mediator to liability in that, while it is labeled an "agreement," it states contradictorily in small print on its face that it is "not a binding contract." Is it an agreement, or isn't it? The form goes on to state that it is the work-product of the mediator, which it is not. This language on the form may unfairly shift the responsibility for the form's ambiguity from the entity that developed the form to the mediator who would have no choice under the proposed rule change but to use the form without alteration.

- The "Notice of Hearing" form incorrectly states that the lender's representative who participates in the mediation must only possess "authority to modify the underlying loan," rather than "authority to negotiate to modify the underlying loan," as required by AB 149, sec. 1, subsection 4.

- The program-approved Mediator's Statement form requires that it must be served on the parties by mail, but AB 149 and the rules presumably permit the mediator to serve the statement in person. Obviously, this is a relatively minor point, but in many cases, it would be much easier to serve the parties with the Mediator Statement in person at the conclusion of the mediation, rather than serving them by mail as the form requires.

Suggested alternative:

FMR 2(2). Authority . . . The Administrator ~~mediator~~ shall ensure all program-approved forms are in compliance with these rules. The mediator may use the program-approved forms as the mediator deems appropriate. ~~The Administrator may reject any program-approved form substantially altered by a borrower, lender, trustee, or mediator and require resubmission on the appropriate approved form~~.

Pending proposed change to FMR 8(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 the he or she is licensed to practice law in the State of Nevada.

Comments:

1. The term "FMP" is not defined. Elsewhere in the rules, the mediations are simply referred to as mediations.

2. The term "legal representative" is not defined. Presumably it does not include an employee of a corporate beneficiary. AB 149 seems to imply that corporate parties may be represented at the mediations by employees who are not attorneys, as long as they possess the required authority.

3. The proposed rule does state what the mediator should do if the representative cannot prove he or she is licensed to practice law in the State of Nevada. The proposal implies but does not state that a person who is not an attorney in Nevada may not represent a party at the mediation. Does participation in a mediation under AB 149 constitute the practice of law? Are "loan modification consultants" licensed as such under the provisions of AB 152, effective August 25, 2009, who are not attorneys, permitted to represent clients at mediations?

Guidance from the Court on this point would be helpful to the mediators.

Suggested alternative:

> If a legal representative appears ~~either a lender and/or a borrower has a legal representative appearing on their behalf~~ at the ~~FMP~~ mediation on behalf of any party, and that legal representative has or will receive compensation, the mediator may request that the representative provide proof that he or she is either an employee of a corporate party or licensed to practice law in the State of Nevada. If the legal representative is unable to provide such proof, the legal representative shall not participate in the mediation.

Pending proposed change to FMR 7:

> 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 the express written approval of the Administrator . . .

Comment:

Experience shows that most foreclosure mediations under AB 149 can be conducted in less than two hours. Indeed, none of the 35 mediations I have conducted has required more than two hours of mediation time. The main reason for this is that most lenders prepared to modify the underlying loan will make only a single take-it-or-leave offer to the borrower.

Therefore, in my experience, it is perfectly reasonable to schedule up to four cases per day. The proposed rule unnecessarily restricts the mediators' discretion to conduct mediations in a cost-effective manner and therefore may affect some mediators' willingness to continue with the program.

Here, my situation may be unique. As I understand it, there is an excess of cases and a shortage of mediators in Southern Nevada. In response to the need for mediators in the South, I volunteered to travel to Las Vegas at my own expense to conduct foreclosure mediations there, as long as I was assigned cases in groups large enough to make such trips economically feasible.

In the months of November and December, I made two three-day trips to Las Vegas, during which I conducted ten mediations on each trip. On the first two days of each trip, I scheduled four cases at two-hour intervals. On the third morning, I scheduled two additional cases. I kept the third afternoon open in order to accommodate any parties whose mediations I was unable to complete during their initial sessions.

This scheduling worked very well for me, for the parties, and in my opinion for the program. However, the Program Manager informed me that she interpreted FMR 12(2) to require me to schedule cases to take place in a single, four-hour session. Therefore, at most I could conduct two cases per day. This restriction meant that if I continued to accept cases in Las Vegas, I would find myself with long periods of unproductive time between mediations. It became financially unfeasible for me to accept cases in Las Vegas.

I am still willing to accept cases in Las Vegas if I can conduct them as I have in the past. I believe

I can make a valuable contribution to the program.

Suggested alternative:

> 4. The mediator may conduct more than one mediation in a day, but in no case shall the mediator conduct more than four (4) mediations in a day without the express written approval of the Administrator . . .

ADDITIONAL PROPOSED RULE CHANGES.

In addition to the pending proposed rule changes, I propose additional rule changes as follows:

Mediation Sessions:

> FMR 12(1) [to be renumbered 13(1)]. Unless extended by the presiding mediator, the parties will be allowed up to 4 hours to present and conclude the mediation. The mediator is not required to schedule the mediation to take place in a single, uninterrupted session.

Comment:

This amendment is necessary to avoid any conflict with FMR 7(4) discussed above. The Program Manager reads into the current FMR 12(1) a requirement that each mediation be scheduled for a single, uninterrupted four-hour session. She has instructed the mediators that they must schedule mediations in accordance with her interpretation.

The Program Manager's interpretation creates practical problems for the mediators in addition to those mentioned in my comments to the proposed changes to FMR 7(4). Occasionally, issues arise during a mediation that make a continuance of the mediation appropriate. But if the mediator has already set aside four hours for a scheduled mediation, the mediator is reluctant to set aside additional time for a future mediation session, even if it would be appropriate.

Appointment of Mediation Administrator:

> FMR 2(1): Appointment: The Court hereby designates the Administrative Office of the Courts to serve as Mediation Administrator (Administrator). ~~The Mediation Administrator (Administrator) shall be appointed by the Court or its designee~~.

Comment:

AB 149 requires the Supreme Court to adopt a rule designating an entity to serve as the Mediation Administrator. AB 149, sec. 1, subsection 8(a). The Mediation Administrator must be either the Administrative Office of the Courts, the district court where the property in located, or another judicial entity.

Unfortunately, there is some confusion as to who the Mediation Administrator is.
For example the Court's Order Scheduling Public Hearing identifies Ms. Campbell as the Mediation Administrator, which cannot be the case as the Administrator must be an entity, not an individual While I assume the Administrative Office of the Courts is the Mediation Administrator, it does not appear that the court has provided for this designation by rule, as AB 149 requires.

Authority of beneficiary's representative:

> FMR 5(7) [to be renumbered FMR 5(8)].
>
> (a) All beneficiaries of the 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 negotiate to modify the loan secured by the deed of trust sough to be foreclosed, and bring to the mediation the original or 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 negotiate 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.

Comment:

AB 149 requires the participation of a person with "authority to negotiate a loan modification." AB 149, sec. 1, subsection 4. But the current rule only requires the participation of a person with "authority to modify the loan."

The difference is significant. In the vast majority of the mediations I have conducted, the lender representative who participates in the mediation possesses 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.

Arguably this is impermissible under AB 149 but permissible under the current rules. I propose bring the rule into conformity with the statute.

Mediation scheduling process:

> FMR 12. Location of mediation. The presiding mediator shall designate the ~~location~~ date, time, and place for the mediation ~~in coordination with the parties~~ and shall notify the parties in writing at least thirty (30) days in advance of the mediation and forward a copy of the Scheduling Notice to the Administrator. . . .

Comment:

1. The current rule requires the mediator to designate both the "location" and the "place" of the mediation but not the date.

2. On its face, the requirement that the mediator schedule the mediation in "coordination with the parties" is perfectly reasonable. In practice, it imposes a significant unnecessary administrative burden on the mediator. It is very difficult for the mediator to juggle his or her own schedule, arrange a location for the mediation (which according to the new directive from the Program Manager must be in the county where the property is located), accommodate the scheduling requests of both or all parties to the mediation, consider as well the scheduling requests of the parties' attorneys, whose identities often are not known at the time of the initial assignment, all within the very short time frame between the time of the assignment and date on which the mediation must be concluded. Very often, the

parties are difficult to reach. Sometimes they have unreasonable requests, such as that the mediation not conflict with a yoga class or other commitment. Moreover the mediators often are assigned cases in groups of five or ten at a time. Very often, I find that I spend more time coordinating with the parties regarding scheduling than conducting the mediation.

3. At present there is no minimum period for the Scheduling Notice. In order to lessen any burden on the parties that may result from eliminating the "coordination-with-the-parties" rule, I suggest that the mediators must give the parties at least 30 days' notice of the mediation. This should permit most parties to rearrange their schedules and find counsel who are available on the appointed date. In legitimate cases where a party cannot attend on the appointed date, the party may request a continuance under FMR 10 [to be renumbered FMR 11].

Proposed new rule regarding use of email:

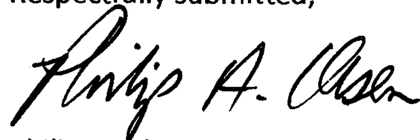
> <u>Service by electronic means. The Administrator shall offer all parties the option of receiving notices and other papers from the mediator by email and shall obtain email addresses from all parties who choose this option. In such cases, the mediator may provide all notices and serve all papers required by these rules by email.</u>

Comment:

Email communication is fast and efficient. For some participants, it is the preferred means of communication. The current forms require service by U.S. Mail.

Permitting the mediator to communicate with the parties by email would significantly decrease administrative burden on mediators without compromising the quality of the program.

Respectfully submitted,



Philip A. Olsen
Foreclosure Mediator

STATE OF NEVADA
FORECLOSURE MEDIATION PROGRAM

MEMORANDUM

To: All Mediators

From: Verise Campbell, Program Administrator

Date: December 18, 2009

Re: Mediator Issues

As we move forward in the operation of the FMP, we have been conducting quality assurance checks to enhance our procedures. We have concerns about mediators who are improperly conducting case management procedures, improperly completing mediator's statements and agreements, or improperly conducting the mediations. To ensure that the Rules and procedures are being followed, we have provided actual examples below of what NOT to do, and followed by a list of things you MUST do. If these procedures and those stated in the Rules are not followed, it may delay or discontinue the assignment of mediation cases in the future, and in some cases, delay compensation payment.

The mediators' actions below are not in line with the FMP procedures and must cease immediately:

- Notification letters to parties are being listed as "Mandatory Notice to Appear."
- Notification letters are mirroring legal documents using terminology as "Order" with corresponding numbers, and forms are being created to apply to individual situations. For example, new criteria are added to the agreement check-off boxes, such as "Employment Moratorium," which does not exist on the FMP-created document.
- Submitting incomplete mediator statements. Appropriate boxes in addition to "Other" must be checked to conclude a case.
- Agreements outlining specifics are not being attached when mediators claim that "parties resolved the matter," on the statement.
- Arbitrarily scheduling mediations without prior notification or coordination with parties.
- Scheduling mediations outside normal working hours (9:00 am-5:00pm, Monday-Friday, without agreement of all parties).
- Scheduling mediations at "staggered" times, such as one-half hour or one hour apart; or scheduling two mediations simultaneously.
- Scheduling mediation continuances beyond the 10-day limit.
- Corresponding directly with lenders regarding the quality of their representatives.
- Criticizing homeowners for their spending habits.
- Negotiating with lenders to resolve homeowner loans.

- Submitting illegible signatures on mediator statements and agreements, without providing a printed name below signature line (requiring extra work by the FMP staff to seek mediator identity).
- Sending original billing statements, mediator statements and agreements to the FMP separately, instead of all being included in one packet.

Below is a list of the procedures mediators MUST adhere to:

- Mediators must remain neutral and unbiased in mediations.
- Only designated program forms located on the FMP website may be used. Adding extra pages to explain the terms of the loan agreement is acceptable.
- Attach the agreement to the statement when parties resolved the matter, whether during the mediation or outside the mediation.
- Obtain approval by both parties when scheduling mediations outside of normal working hours or on weekends.
- All mediations MUST be scheduled for four hours.
- Original billing statements, mediator statements and agreements should be compiled in one packet and sent to:

  Janice Terry
  Mediation Coordinator
  Foreclosure Mediation Program
  200 Lewis Avenue, 17th Floor
  Las Vegas NV 89101
- Provide specific information on mediator statements and agreements as follows:
  1) Outcome and agreed-upon loan modification terms.
  2) Clear and concise explanations of why a party is in bad faith.
  3) Description of the extenuating circumstances that determine continuances.
  4) Identifying the reasons for cancellations (homeowner must provide a written and signed notification to cancel a mediation).
  5) Determination and explanation of ineligibility for the program.
- Check the appropriate box to determine the case conclusion. The purpose of the box labeled "Other" is only for supplemental information to the statement.
- Mediations should be conducted in the county where the NOD was filed unless a different venue is agreed upon by the parties.

If you are conducting a mediation, and are not certain of how to complete a box or agreement, or have any other questions about the above information, please contact either Janice Terry, Coordinator in Las Vegas, at 702-486-9384, Kathie Malzahn-Bass, Coordinator in Carson City, at 775-684-1761, or Sandy Reed Bottino, Supervisor, at 702-486-9383, for assistance.