ORIGINAL

Gregory L. Wilde*
Michael A. Keller

* Licensed in Nevada and Utah

WILDE & ASSOCIATES
ATTORNEYS AT LAW

212 South Jones Boulevard
Las Vegas, Nevada 89107
(702) 258-8200 (Fax) 258-8787

Kevin S. Soderstrom
Matthew K. Schriever

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MAR 15 2010

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

March 12, 2010

Supreme Court Clerk's Office
201 S. Carson Street
Carson City, NV 89701
Fax: (775) 684-1601

ADKT 435

Attn: Tracie K. Lindeman

Re: Foreclosure Mediation Program Proposed Rule Changes and Forms

Dear Sir or Madam:

The Order Scheduling Public Hearing from the Supreme Court of Nevada, filed February 26, 2010, states that a public hearing will be conducted on the Foreclosure Mediation Program's proposed amendments and forms. The following is a list of comments regarding the proposed revised rules and mediation forms, which are submitted for your consideration.

Rule 1(2) – Purpose:

- The Proposed Rules state that the mediation is to take place within 135 days following actual receipt by the Administrator of the mediation fee provided on behalf of the lender.
- Allowing mediators 45 days to conduct the mediation (as found in Proposed Rule 3(5)) should help to alleviate some of the pressures faced in terms of document production and financial analysis, which often occur because mediators feel pressure to complete the mediation on a much shorter timeframe.

Rule 1(3) – Availability of Program:

- Borrowers should be precluded from electing to mediate with respect to a home loan where the borrower has recorded a homestead against a different piece of real property or where other documentation shows that the property in mediation is not the borrower's

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primary residence. The Proposed Rules should be revised to require that borrowers first satisfy the mediator that the property is in fact the borrower's primary residence

Rule 3(3) – Mediator Qualifications:

- The Proposed Rules should include language precluding individuals from acting both as borrowers' representatives and mediators. As stated in Proposed Rule 4(1), mediators are subject to Canons 1, 2, 3(B)12, 3(C), and 3(D) of the Nevada Code of Judicial Conduct. Acting in a dual capacity gives rise to a high number of conflicts of interest, which have repeatedly been overlooked. A suggestion would be to implement a cooling off period. For example, individuals should not be permitted to act as a mediator within 180 days of either representing a borrower in a mediation or representing in a party in litigation pending against a mortgage lender during that time period.

Rule 5(3):

- Proposed Rule 5(3) states that a trustee may request a certificate to proceed with foreclosure on any residential real property for which a request for mediation was not filed. The Proposed Rules should be revised to state that the certificate will automatically be issued where no timely election to mediate is submitted. That would be consistent with the purpose of AB 149 and would clearly promote a more efficient system. There is no reason to impose a requirement that a trustee request a certificate from the mediation program where the borrower(s) did not even elect to mediate. The language of Proposed Rule 5(7) comes close but is still problematic (besides seeming to be inconsistent with Proposed Rule 5(3)).

Rule 5(8)(a):

- Section 1 of Proposed Rule 1 states that the rules are enacted pursuant to Chapter 107 of the Nevada Revised Statutes and the Nevada Supreme Court's inherent power to create rules for the efficient administration of justice. Section 7 of AB 149 states that "[t]he Supreme Court or an entity designated by the Supreme Court shall adopt rules **necessary to carry out the provisions of this section**". (Emphasis added.)
- Section 4 of AB 149 also states that "[t]he trustee shall bring a copy of the deed of trust and the mortgage note to the mediation". The statute does not state that either document must be either the original or a certified copy of the original. The fact that the plain language of the statute simply calls for "a copy of the deed of trust and the mortgage note" suggests that the legislature did not intend to impose the "original or certified copy"

requirement which the Proposed Rules impose. Therefore, the imposition of the "original or a certified copy" requirement in the Proposed Rules does not simply carry out the provisions of the statute but instead exceeds the statutory requirements.

Rule 5(8)(b):

- Section 4 of AB 149 states that "[i]f the trustee is represented at the mediation by another person, that person must have authority to negotiate a loan modification on behalf of the trustee **or have access at all times during the mediation to a person with such authority**." (Emphasis added.)

- The statute clearly allows trustee or lender participants to appear by telephone. In fact, the statute merely requires that a lender's or trustee's representative have access to a person with authority during the mediation. To require certain individuals with authority to be physically present unless their non-presence is approved by the mediator for good cause shown is not only in excess of the statute but also in contradiction with it.

Rule 5(8)(e):

- As discussed above, the imposition of the "original mortgage note, deed of trust, and each assignment" requirement goes beyond the statute, and, therefore, so does the notarization requirement in Proposed Rule 5(8)(e)

Rule 7(2):

- The language should be changed from "may" accept a BPO to "shall" accept a BPO. We have already had experiences wherein we have properly attempted to negotiate loan modifications for more than an hour, without being able to reach a resolution for mutually legitimate reasons, and then had mediators reject the use of a BPO finding that a lender has not properly brought all necessary items to the mediation.

Rule 8(g):

- This subsection of Rule 8 should have additional language that a party can also seek judicial review disputing a finding of; 1) bad faith, 2) failure to participate in good faith, or c) failure to provide all necessary documents. Excluding these additional reasons essentially leaves a party without any redress when a mediator does not properly fullfill its obligations. Also, as a practical matter, my office has filed petitions for judicial

review under these additional circumstances and obtained favorable findings from Judge Mosely.

Finally, we recognize the purpose of the proposed rule change regarding "trial modification periods" but ask that certain provisions be added in this section. The problem we have faced is, many borrowers are entering into trial modification periods or moratoriums and then not performing thereon. We have attempted to add language that a "certificate shall issue if the borrowers do not perform" but have faced a lot of resistance from certain mediators and the program administrator. Without this language, or the enforcement thereof, it creates an unfair advantage against the lenders. A homeowner can simply make an agreement, with the intention of not perofrming, resulting in the lender being required to start a foreclosure over again and the borrower obtaining several more months in the property. This language was developed with the program administrator but she later informed us that she could not enforce the language.

Yours Truly,

Wilde & Associates

Kevin S. Soderstrom, Esq.