ADKT 435

Statement of Robert Monks Regarding Proposed Changes

To the Foreclosure Mediation Rules

As a foreclosure mediator I have the following comments as to the proposed rules:

I support the changes to Rule 1 and Rule 3 Sections . The time limits in the current rule are impractical. The tremendous demand for mediations I am sure exceeds all expectations and the Rules must be modified to make them practical.

I do not support the proposed change to Rule 2. The proposed change first would seem to require some rule regarding the adoption of "program-approved forms." The Statute by its own terms sets out the reports which are to be prepared by the mediator.

If the beneficiary fails to attend the mediation, fails to participate in good faith, fails to have authority or fails to bring the documents "The mediator shall submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions." The clear language of the rule makes this a mandatory duty of the mediator.

If the grantor fails to appear the Mediation Administrator is to issue a certificate of no mediation. This would envisage a short communication from the mediator to the Administrator.

If the parties can not agree while acting in good faith the Mediator shall prepare and submit to the Mediation Administrator a recommendation that the matter be terminated.

The three above possibilities would seem to exhaust the possible outcomes of a mediation.

No one could object to a report reflecting the administration of the mediations. That is the Administrator should be able to obtain a report from the mediators as to how long the mediation took, what date it was held and similar information.

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I would object, however, to any rule which would provide for the mediator to make a report intended to have legal effect between the parties. If the mediator is to reduce the agreement of the parties to writing he is preparing a contract for two parties in conflict, by definition a conflict of interest. If the parties themselves prepare an agreement, that agreement should reflect their will, not their will provided it can be expressed as an option on a pre-printed form.

I oppose the proposed change to Rule 5 (f). Since the mediators are not judges a non-evidentiary hearing before the imposition of sanctions would seem to violate the due process of the sanctioned. The sanctioned party would never get the opportunity to present evidence of good faith. My interpretation of the statute as it stands is that is that the mediator makes the finding of bad faith, the aggrieved party prepares the application for sanctions which is then signed and submitted by the mediator, and then the real parties in interest have a trial de novo in district court as to good faith and the imposition of sanctions.

I oppose the proposed rule 9. Rule 9 appears to have no support in the statutory scheme. In addition Rule 9 takes the mediation program away from a simple and workable scheme, that is that a good faith negotiation must be held before a non-judicial foreclosure can take place on an owner occupied residence.

The statute can be interpreted to allow the mediators and district judges to essentially rewrite mortgages on a wholesale basis, I think that without a clear direction from either the legislature or the supreme court, it would be unwise for mediators to take too great a role in the substantive disputes between the parties.