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A MULTIJURISDICTIONAL LAW FIRM

MAR 22 2010
TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

March 18, 2010

ADKT 435

Office of the Clerk
Nevada Supreme Court
201 South Carson Street
Suite 250
Carson City, Nevada 89701

Re: **Foreclosure Mediation Program Recommendations**

To The Office of the Clerk of the Supreme Court of the State of Nevada:

On or about March 16, 2010, the Nevada Supreme Court conducted a public hearing on recommended changes to the Nevada Foreclosure Mediation Program. Pursuant to the Court's request for written recommendations, made during the hearing, The Cooper Castle Law Firm, LLP hereby presents its suggested amendments to the program.

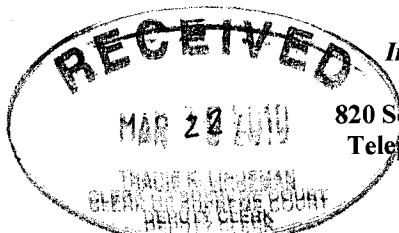
1. Judicial Days

Mediations should only be conducted on judicial days. For example, mediations could not be conducted on weekends, holidays, and evenings under this rule.

2. Time Frame for Mediations

If the inside track time frame for mediation is extended from 90 to 135 days any time line extension should be with an inside timeline expansion to allow a longer period of time for the appointment of a mediator, the potential disqualification of mediators (i.e. the arbitration commission rules) and time for preparation for mediation) so that the Borrower, Lender and Trustee have additional time to prepare and gather the necessary documents to make mediation a more productive process. The time limit extension

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In that same respect, with regards to the time delay in receiving certificates of foreclosure on non-owner occupied properties, perhaps a rule could be devised that allows the current occupants a specified time frame (i.e. 30 days) to submit an affidavit or declaration to the foreclosure mediation program administrator. The affidavit should require an affirmative statement of ownership, as well as affirmative proof of ownership (i.e. utility bill, car insurance statement, etc.), attached as evidence. The occupants will only be required to file the affidavit after receipt. The affidavit may be included in the package required to be sent by the trustee. If the occupants fail to comply with this rule within the allotted time by affirming that they own the subject property, and that they do wish to participate in the mediation program, it will be deemed admitted that the property is not owner-occupied and/or that they do not wish to mediate. Thereafter, the lender should be permitted to either issue a certificate, or foreclose without a certificate from the foreclosure mediation program administrator.

What follows is an example of how the rule could be drafted to accomplish the aforementioned goals:

Determining Owner-Occupancy.

(a) A lender or his agent may submit a written request for proof of occupancy status to the [Mediator/Foreclosure Mediation Program Administrator] of the [county/township] in which the property subject to the foreclosure mediation program is located. The lender or his agent must serve a copy of the request for proof of occupancy status upon the residents of the property subject to the foreclosure mediation program by certified mail, return receipt requested. The request must:

(1) Identify the party or parties making such request;

(2) Advise the resident(s) that an affidavit must be submitted to the Mediator, and a copy served upon the requesting party or parties, stating that the property subject to the foreclosure mediation program is presently occupied by its owners.

(3) Provide an explanation of what the lender and/or the lender's representative will accept as proof of owner-occupancy;

(4) Advise the resident(s) that the affidavit and proof must be received by the mediator, and served upon the lender and/or the lender's representative, within 30 days of the date that the request was originally served upon the resident(s).

(b) Except when the resident(s) has timely submitted the affidavit and proof described in subsection (a) and a copy of it has been received by the lender or his agent, it shall be deemed admitted that the property subject to the foreclosure mediation program is not owner-occupied, and

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the lender or his agent is thereby permitted to [proceed with the foreclosure process].

5. Option for Preemptory Challenge of Assigned Mediator

One of the issues confronting the foreclosure mediation program takes for the form of mediators who do not approach the mediation with an attitude towards neutrality. For example, some of the lenders' representatives have encountered mediators who take on the role of borrower's advocate, instead of respecting the mediator's role as a neutral intermediary. The issue has also arisen in situations where the mediator has assumed a "hands off" attitude and does little to encourage the mediation process.

There are at least two potential ways to address this issue. The first recommendation, and the one that may be easiest to implement, is to model a rule after Nevada's Rules Governing Alternative Dispute Resolution. According to these rules, the parties are served with identical lists of five (5) arbitrators. Thereafter the parties have 10 days to strike no more than two of the candidates. One possible issue with this method is that mediators may feel compelled to favor the lending institutions in an effort to avoid being stricken from the list. The following is the proposed text of how the rule could be drafted:

Assignment to Mediator.

The Foreclosure Mediation Program Administrator shall serve the two adverse appearing parties with identical lists of 5 mediators selected at random from the panel of mediators assigned to the program.

(1) Thereafter, the parties shall, within 10 days, file with the Foreclosure Mediation Program Administrator the selection list with no more than two (2) names stricken.

(2) If both parties respond, the Foreclosure Mediation Program Administrator shall appoint a mediator from among those names not stricken.

(3) If only one party responds within the 10-day period, the Foreclosure Mediation Program Administrator shall appoint a mediator from among those names not stricken.

(4) If neither party responds within the 10-day period, the Foreclosure Mediation Program Administrator will appoint one of the 5 mediators.

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Another option, and a potential source of funding for the administrative aspects of the program, is to draft a rule allowing one preemptory challenge of the appointed mediator by both sides. The rule can be modeled after the Nevada Supreme Court rule that allows one preemptory challenge of a judge to each side to a civil action. See SCR 48.1. In this rule, the party asserting the challenge must send notice to the clerk of the court and serve a copy upon the opposing party. If adopted by the foreclosure mediation program, each side (lender and borrower) would be allowed to experience more neutrality within the tenor of the mediation, especially in situations in which one party is familiar with the mediator and feels their client's interest would be impeded during mediation.

The following is the proposed text of how the rule could be drafted:

Procedure for change of assigned mediator by preemptory challenge.

1. Any party participating in a foreclosure mediation shall be entitled to one change of mediator by preemptory challenge. A party wishing to exercise the right to change of mediator shall submit a written request entitled "Preemptory Challenge of Mediator," within 10 days of the date that the mediator is assigned. The request may be signed by a party or by an attorney, it shall state the name of the mediator to be changed, and it shall neither specify grounds, nor be accompanied by an affidavit. If one of two or more parties on one side of an action files a preemptory challenge, no other party on that side may file a separate challenge.

2. The request for preemptory challenge of mediator shall be sent in writing to the Foreclosure Mediation Program Administrator, and a copy served on the opposing party. The request shall be accompanied by a fee of \$50 payable to the Nevada Foreclosure Mediation Program. The fee shall be collected by the Foreclosure Mediation Program Administrator and shall be deposited in the state treasury for the support of the Nevada Foreclosure Mediation Program.

3. The mediator against whom a preemptory challenge is filed shall not contact any party or the attorney representing any party, nor shall the mediator direct any communication to the Foreclosure Mediation Program Administrator with respect to reassignment of the mediation in which the preemptory challenge was filed.

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6. BPO Statute

Nevada Senate Bill No. 184 (NRS 645) defines and specifies the minimum required contents of a broker's price opinion (BPO), limits the use of BPOs, and sets forth requirements governing BPOs that are submitted electronically or on a form supplied by a requesting party. First, a broker must have an active license in good standing before they may charge a fee for their opinion. Additionally, brokers may only prepare BPOs for certain customers. The list includes both existing and potential lienholders, however, the BPO created for these parties "may not be used in lieu of an appraisal for the purpose of determining whether to approve a mortgage loan."

The language of this statute does not specifically limit the use of BPOs in determining whether or not a loan should be *modified*. It only states that these opinions can't be used when the loan is approved. Arguably this could mean that, since the loan was approved at its inception, a modification is just that- a modification on an existing contract, approval for which was already granted. Contingent with this view, however, is the underlying truth that even a modification of a loan must eventually be "approved" before it is considered final. Lenders even utilize the term "approved" when discussing the status of a loan modification. Therefore, although a small amount of wiggle room exists as to whether BPOs may be utilized during *modification* of existing loans, a court would likely find that the statute forbids the use of BPOs during this process. We would support the acceptance of BPOs for purposes of loan modifications and/or short sales.

7. Mediator's Duty to Issue Certificate and Making Findings of Bad Faith

It has been recommended that the mediators should be charged with the duty to issue or deny the certificate of foreclosure in place of the program administrator. This is akin to Nevada's rules regarding arbitration awards in the mandatory non-binding arbitration program. The rules for this existing program could be drawn upon to generate appropriate language. ADR 17 states in pertinent part:

(A) Within 7 days after the conclusion of the arbitration hearing, or 30 days after the receipt of the final authorized memoranda of counsel, the arbitrator shall file the award with the commissioner, and also serve copies of the award on the attorneys of record, and on any unrepresented parties. Application must be made by the arbitrator to the commissioner for an extension of these time periods.

This rule could be used as a template to devise a rule giving the individual mediators the authority to issue foreclosure certificates, as well as issue rulings of "bad faith." The following is the proposed text of how this rule could be drafted:

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Filing of Foreclosure Certificate.

Within 7 days after the conclusion of the foreclosure mediation, the mediator shall file the Certificate with the Foreclosure Mediation Program Administrator, and also serve copies of the award on the attorneys of record, and on any unrepresented parties. Application must be made by the mediator to the Foreclosure Mediation Program Administrator for an extension of these time periods.

8. Conclusion

Thank you for the opportunity to present these recommendations for consideration and implementation. Please feel free to contact the undersigned should you have any questions or comments.

Very Truly Yours,

*Dictated but not signed to
avoid delay.*

Stephanie Cooper Herdman, Esq.
Managing Partner

SCC

Cc: Honorable Chief Justice Ron D. Parraguirre
Honorable Justice James W. Hardesty
Honorable Justice Michael L. Douglas
Honorable Justice Michael A. Cherry
Honorable Justice Nancy M. Saitta
Honorable Justice Mark Gibbons
Honorable Justice Kristina Pickering

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