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Clerk's Office Drop Box
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Dear Justices:

Thank you for the opportunity to submit additional comments on the rules submitted by the Foreclosure Mediation Advisory Committee. As a member of the Foreclosure Mediation Advisory Committee, and sponsor of the original legislation, I appreciate the Court's efforts to constantly improve and refine the process governing Nevada's Foreclosure Mediation process.

There were many comments submitted in response to the suggested rules. Some of the people who provided comments did not participate in the many meetings and hearings devoted to an examination of the foreclosure mediation process and did not learn of the rationale behind some of the proposed changes. The comments below address a few of the most important issues raised in the submissions received by the Court.

1. Comments submitted regarding Proposed Rule 11's document exchange process:

The intent behind the proposed changes to Rule 11 is to provide an improved process that will lead to more expedient and fruitful mediations. The Financial Statement and Housing Affordability Worksheet required under the current rules are not accepted at current mediations because the information is more than one or two months old by the time of the scheduled mediation, and lenders refuse to use stale information. The Financial Statement and Housing Affordability Worksheet are not acceptable substitutes for the information the documents request and provide because the lender (or more likely, the servicer) has specific forms which need to be filled out. For example, a Request for Modification Affidavit (RMA) for most servicers or the Form 710 for Fannie Mae and Freddie Mac loans are required for review for a loan modification. The information, duplicated on the Financial Statement and Housing Affordability Worksheet, is not an accepted by the servicers. Requiring both the affidavit and the statement/worksheet is duplicative, causes unnecessary paperwork, and leads homeowners to believe they have met the document requirements for mediation. Having a predetermined list of documents provided by the loan servicers is more efficient for the

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mediation process and should lead to a modification review *prior* to the mediation, not at the mediation when new requests are made too late to be satisfied.

A large number of mediations undergone so far have been stymied as a result of missing documentation needed for a final review of a homeowner's documents. Whether it is the lender/servicer's fault, or the homeowner's fault, is irrelevant. The process should set forth the list of documents needed by a lender/servicer, the homeowner should be given a date to provide them, and the mediation should occur with both parties being able to discuss all possibilities. There is no more frustrating result, for the lender/servicers, homeowner, or mediator, to not have the paperwork needed for a decision to be made. The homeowner is frustrated: they have exchanged an updated Housing Affordability Worksheet, Financial Statement and other financial documents prior to the mediation and have waited months to speak with someone representing the beneficiary. This results in the homeowners leaving the mediation, criticizing the process.

Proposed Rule 11 and its subsections were carefully crafted and make up the largest section of the proposed rules for a reason: we realize it is critically important for the banks to have all of a borrower's financial documentation upfront before there can be any hope of a loan modification. What is challenging about providing homeowner documents to the banks is that different banks may require different documents. For example, Bank A may require three months of past bank statements while Bank B may only require two. Proposed Rule 11 addresses this challenge by including a system to ensure that both parties (homeowners and banks) openly communicate with each other through the mediator [see Proposed Rule 11(1)] and via list [see Proposed Rule 11(2)] about the documents required for review along with a cut off timeframe for the demand and submission of all documents [see Proposed Rule 11 (4-6)].

Some of the people who provided comments criticized the "best efforts" language as it applies to homeowners and the production of information, and suggested that this information be eliminated. At the outset, it should be noted that there is no statutory requirement for production of any documents by the homeowner. However in order to have successful mediations and obtain loan modifications, under the current rules and practice, lenders request and homeowners provide certain necessary documents. As stated above, the Advisory Committee, in great detail, discussed the document exchange process and determined that document exchange prior to the mediation is integral in having a successful mediation. The consensus was that the early production of documents to the lender would allow the process of loan modification to proceed more efficiently.

Homeowners are given an initial list of documents which are necessary in order to consider loan modification (see Rule 8(1)). Obtaining some documents is more burdensome than others. While it may not be an issue for a homeowner to obtain a month's worth of paycheck stubs, it may be quite difficult to obtain things such as divorce decrees, tax returns, or copies of social security checks, which do not have stubs and need to be collected and copied one month at a time.

The requirement that the homeowner shall use his or her "best efforts" is designed to keep the spirit of the law. Homeowners should not be penalized and seen as non-compliant because they cannot obtain a document within the initial timeframe or, in some cases, at all. Because the statute never requires the production of documents, it would be unfair to impose sanctions on the homeowner for inability to obtain a requested document while being in compliance with producing all other documents. If some of the people who provided comments are concerned homeowners will not comply with the document submission or will not use their "best efforts" to submit documents, then the bank may require a "letter of explanation" from the homeowner as to why they have not produced the requested documents. Perhaps that particular document is not available to the homeowner. Perhaps the homeowner is encountering difficulties acquiring the documents. The proposed rule has built-in timeframes for the parties to communicate back and forth with each other about the documentation. Comments were made by lenders arguing against being "estopped" from requesting additional documents in situations where the homeowner decides they want to sell their home rather than save it through a loan modification. Homeowners submit the documentation the banks request and it is not substantially different where the request is for a loan modification or a short sale. The solution can be as simple as putting down all documentation requirements for the various work-out options on the list that is initially sent to the homeowner so the homeowner is aware of what may be required.

Under this proposed rule, there is also a change providing that it will no longer be necessary for the Foreclosure Mediation Program to receive a homeowner's time sensitive and confidential financial information. Proposed Rule 11 (1-6) allows both parties to clearly set forth and ascertain what documents are required from the homeowner for a loan modification, short sale, or other alternative to foreclosure; provides timeframes for both parties to perfect the documents and shuts down any opportunity for either side to request previously unrequested documents at the mediation when such documents are likely unavailable.

Finally, it should be noted that this proposed rule change was agreed to unanimously by the committee, both by representatives representing lenders and homeowners. Both were convinced that the process would benefit by "frontloading" the documentation process, by

eliminating the submission of forms that were not being utilized, and by establishing a checklist of forms that are truly needed in order for the mediation to be fruitful.

2. Comments submitted regarding proposed Rule 11(7) language requiring separate certification for the endorsement or allonge.

Some suggested that lenders should not have to provide a separate certification for the endorsement or allonge to a promissory note. Lenders submit they should be allowed to provide "ordinary (not certified)" copies of the note and other documents and that certified copies presented by lenders will satisfy the rule. Other requests seemingly go against *Leyva v. Nat'l Default Servicing Corp.*, 255 P.3d 1275 (Nev. 2011) and *Pasillas v. HSBC Bank USA*, 255 P.3d 1281 (Nev. 2011) wherein the Nevada Supreme Court found that the document requirements of NRS 107.086 (4) require strict compliance. As NRS 107.086 (4) requires the beneficiary of a deed of trust to produce the original or a certified copy of the deed of trust, note and each assignment of the deed of trust or note (otherwise referred to as an allonge or endorsement), the logic behind these comments is not legally sound.

3. Comments submitted regarding proposed Rule 11(7) regarding authority of third parties:

Rule 11(7)(c) was written in compliance with NRS 107.086(4), which states:

> If the beneficiary of the deed of trust is represented at the mediation by another person, that person must have authority to negotiate a loan modification on behalf of the beneficiary of the deed of trust or have access at all times during the mediation to a person with such authority.

Since the beginning of the foreclosure mediation program, attorneys for servicers of loans have attended mediations on behalf of the beneficiaries. Such representation is appropriate if the servicer has been authorized to attend the mediation and was specifically granted the authority to negotiate alternatives to foreclosure. The homeowner needs be aware of the grant and scope of authority which is given to the third party. In many cases it is unclear whether or not authority has been granted. If there is no grant of authority, it renders the mediation senseless. This proposed rule change requires documentation, a reasonable requirement that furthers the intent of the statute.

Comments were submitted indicating that the proposed changes to Rule 11(7)(c) were inappropriate in that it would be burdensome to representatives for the beneficiary to

demonstrate that they have authority to participate in the mediation. One person said that providing pooling and servicing agreements, which document the authority, would be burdensome to produce. It should be noted that the proposed rule allows for a servicer to submit only those pages of the pooling and servicing agreements that outline the authority that was granted to the servicer. Other comments seem to indicate that authorized third parties should not have to provide any evidence whatsoever. Since the statute requires authority to be demonstrated, it is reasonable to establish a clear evidence of that authority. Such a rule change would eliminate future litigation regarding this requirement and lead to clearer, more consistent results in mediations.

This rule was unanimously agreed upon by the Advisory Committee due to the fact that there is a potential conflict between servicers and lenders in that servicers may have an interest in charging extra fees, e.g. late fees, rather than simply modifying the loan. If the homeowner has a proof of the servicer's authority, there is no question left in the homeowner's mind about authority.

4. Comments submitted regarding proposed Rule 11(12)

Rule 11(12) proposes a process enabling short sale agreements in the mediation. Comments made during the hearing and in writing argue against proposed Rule 11(12), or request the rule be watered down. However, the proposed Rule should be adopted because it benefits homeowners who are unable to obtain a modification to save their home. The lender also benefits because the home can be sold without the additional costs of a foreclosure. The community also benefits from fewer empty and abandoned homes.

In the first year of the Foreclosure Mediation program, agreements allowing additional time to short sale the home were common. About a year or so ago, servicer's attorneys stopped agreeing to additional time to arrange for a short sale because they claimed the Foreclosure Mediation Program refused to give certificates allowing foreclosure on those homes, even when the short sale was never achieved. Instead of working with the Program to come to a resolution, servicer's attorneys stopped making any agreements dealing with short sales unless the homeowner had an offer "in hand" at the mediation. In several of those cases, short sale agreements were made at the mediation, which illustrates that such agreements are possible.

Currently, when the servicer denies a loan modification to a homeowner, the servicer's attorney suggests putting the home up for a short sale. No agreement for a time period (90 days, for example), an acceptable offer amount, or list of required documents is allowed by the

servicer's attorney. The servicer's attorney explains they are not 'allowed' to enter into agreements concerning short sales, but the homeowner should obtain a realtor, put the home up for sale, and then contact their servicer for the next step. Therefore, the homeowner has an unknown amount of time from the end of the mediation until the Trustee's Sale to follow through with a short sale. This diminishes the chances for a short sale.

The servicer's attorney also refuses to give the homeowner the forms required for a short sale or a list of the documents necessary to complete a short sale, stating the servicer will not request the information unless an offer is made. The servicer's attorney will not stand by the appraisal or BPO documents they brought to the mediation, stating the amount the lender is willing to accept will not be decided until an offer is made. This moves the opportunity to discuss and achieve a short sale outside the mediation completely and makes it clear that the appraisal or BPO requirement is not considered a reliable or useful document by the very entity who supplied it, even though the cost for that document is added to the homeowner's mortgage.

The document list created by the servicers and required under proposed Rule 11 should include the necessary information for a short sale. The documents currently required to obtain a proper review for a loan modification include a full spectrum of proof of the financial situation of the homeowner, including bank statements, pay stubs, tax returns, 4506-T, benefits letters, RMA or Form 710, utility bills, hardship & explanatory letters, and HOA statements. Information on liens and second mortgages is requested in the RMA and Form 710, and this information is also publicly available on the county Recorder's Page. If this information is not sufficient, the proposed Rule 11 allows the servicer to request additional information.

The lender submits the checklist of documents to the Foreclosure Mediation Program and that list is forwarded to the homeowner who elects mediation through the Foreclosing Trustee. The homeowner who is contemplating a short sale, or more likely, is afraid they will not obtain a loan modification and is therefore prepared to discuss a short sale, will provide the documents on the checklist if they believe the foreclosure will be resolved at the mediation.

Because of the enhanced communication resulting from the adoption of proposed Rule 11, both the homeowner and the servicer will be aware that a short sale will be discussed and both sides will have traded the proper documents prior to the mediation. This should allow a short sale agreement to be reached at the mediation.

In cases where a homeowner only hopes to obtain a loan modification and the lender is unable to offer the modification, the full financial picture of the homeowner is already known by the servicer. What is unknown is the time frame for an offer to be received on a short sale.

In those situations, the lender may be unable to agree to all of the particulars of the short sale, but an agreement can still be reached, albeit with conditions. For example, if a homeowner is eligible for consideration under HAMP (Home Affordable Modification Program) but fails the review and is not eligible for a loan modification, the homeowner is eligible for HAFA (Home Affordable Foreclosure Alternative – the short sale program). HAFA short sale includes an automatic deficiency release, money to help move, and a defined timeline to respond to an offer. Therefore, an agreement for a HAFA short sale can be written on the Mediator's Statement, but specifics on the date the home is listed for sale or the response time for an offer can be listed as conditions. There is no reason for being unable to negotiate some type of agreement for a short sale if both parties are willing.

In any case, the attendees to the mediation should be able to discuss all the options available to resolve the foreclosure. Short sales have become so prevalent in our community that representatives with authority at the mediation should be prepared and able to discuss details on potential short sales and make agreements with homeowners when possible. Proposed Rule 11(12) should be adopted.

5. Comments submitted regarding proposed Rule 21(2) removal of "bad faith" and insertion of statutory language.

NRS 107.086(5) states:

> If the beneficiary of the deed of trust or the representative 1) fails to attend the mediation, 2) fails to participate in the mediation in good faith or 3) does not bring to the mediation each document required by subsection 4 or 4) does not have the authority or access to a person with the authority required by subsection 4, the mediator shall prepare and submit to the Mediation Administrator a petition and recommendation concerning the imposition of sanctions against the beneficiary of the deed of trust or the representative. The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court. (Numbering added).

The proposed rule change merely removes the term "bad faith" and replaces it with the four specific beneficiary requirements laid out by NRS 107.086(5). In doing so, the Advisory Committee attempted to provide greater clarity as to what is sanctionable under the statute.

Nothing in this language removes the lender's ability to file a Petition for Judicial Review. And while sanctions are envisioned only against the beneficiary, the sanction language was enacted by the legislature to specifically address the concern that lenders would not meaningfully participate in the foreclosure mediation process. The homeowner does receive a sanction if they do not participate in the Nevada foreclosure mediation process: they lose their home.

6. Comments submitted regarding proposed Rule 23(1) rescission of Notice of Default making certificate null and void.

The proposed rule changes specifically provide that once a lender rescinds the Notice of Default, there should never be a certificate issued against that Notice of Default. The act of rescinding essentially "kills off" that Notice. In order to proceed with the non-judicial foreclosure, the lender must restart the process by issuing a new Notice of Default.

Comments submitted suggest that a rescinded Notice of Default should be permitted to be "reinstated". Such a "reinstatement" would create confusion to the parties involved and to the Nevada Foreclosure Mediation Program that tracks such Notices. Further, the Nevada Foreclosure Mediation Program will be deprived of revenue despite having to perform additional ministerial tasks.

Sincerely,

Barbara E. Buckley, Esq.
Executive Director

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