

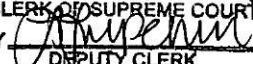


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Nevada Supreme Court c/o  
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Clerk of the Supreme Court  
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ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

Re: In the matter of the adoption of rules for foreclosure mediation  
ADKT 0435

Dear Justices:

This letter is on behalf of the Nevada Dispute Resolution Coalition ("NDRC"). NDRC's membership consists of numerous attorney and non-attorney mediators. Many of NDRC's members are current or former panelists for the Foreclosure Mediation Program ("FMP"). We write in opposition to the Petition proposing changes to Nevada Foreclosure Mediation Rule 3(4). Specifically, NDRC opposes the change proposed in Nevada Foreclosure Mediation Rule 3(4)(a)(1) which seeks to require mediators be licensed to practice law in the State of Nevada.

**Other states have considered this issue and determined law licensure is unnecessary.**

Often, creators or administrators of mediation programs seek to add quality and credibility to those programs by requiring mediators be licensed attorneys. While that requirement may initially appear to have practical foundation, as attorneys are trained in the law and are thus assumed to have superior ability in resolving disputes involving legal issues, those apparent benefits begin to fail when explored in earnest. Other states have imposed licensure requirements on mediators, only to later reverse that restriction. In 1987, Florida excluded non-attorney mediators from their circuit court mediation programs, on the assumption that if only attorneys were allowed to mediate circuit cases that judges would be more inclined to utilize the program. However, in 2005, Florida underwent a thorough review of this requirement. *In re Petition of the Alternative Dispute Resolution Rules and Policy Comm. on Amendments to Fla. Rules for Certified and Court-Appointed Mediators*, 931 So.2d 877 (Fla.2006). The petitioning committee asserted, and the Florida Supreme Court concluded, that: 1) competency as a mediator is not inextricably linked to any specific academic degree or professional license and 2) reliance on mandatory academic pre-requisites may not continue to have an entirely rational basis. *Id.* The Florida Supreme Court, however, initially maintained licensure requirements for circuit court mediators, pending further study and review. *Id.*

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In 2007, after completing that further study and review, the Florida Supreme Court concluded that law licensure should not be a requirement for any court appointed mediator. *In re Petition of the Alternative Dispute Resolution Rules & Policy Comm. on Amendments to Fla. Rules for Certified & Court-Appointed Mediators*, 969 So. 2d 1003, (Mem)–1004 (Fla. 2007).

Florida underwent a multi-year study on the issue of whether mediators should be required to have a law license. Florida ultimately concluded that licensure was not a necessary requirement to serve as a mediator even for litigation, appellate disputes, or other disputes involving the law. Florida's efforts provide a strong guidepost for Nevada. As such, we urge the Nevada Supreme Court to reject the petition's requirement mandating licensure for FMP mediators.

Florida did not reach this conclusion in a vacuum. As noted by the Florida Supreme Court, beginning in 1988, the Society of Professionals in Dispute Resolution Commission on Qualifications began exploring the idea that possession of certain academic degrees does not accurately predict whether someone will be a good a mediator. *In re ADR Rules*, 931 So.2d 877 (2006). In keeping with this, the American Bar Association in 1999, adopted a resolution providing that all individuals with appropriate training and qualifications should be permitted to serve as mediators and arbitrators, regardless of whether they are attorneys. *Id.* The American Bar Association, American Arbitration Association, and Association for Conflict Resolution also promote fostering diversity within the field of mediation and adopted such language in their Model Standards of Conduct for Mediators in 2005. *Id.* In doing this, these organizations have provided guidance in this area that should be considered when making decisions regarding restricting access to the profession of mediation. We note, consistent with the underlying petition in the Florida matter, that if law licensure is a requirement to serve as a mediator, notable mediators such as William Ury, an author of Getting to Yes, would be presumptively deemed ineligible to serve as an FMP mediator. Likewise, Nancy Neal Yeend, who teaches mediation skills to judges at the National Judicial College, would be ineligible. This seems unwise.

### **Mediation is not the practice of law**

Mediation is the use of a third-party neutral to facilitate an agreement between parties in conflict. Functionally, the practice of law relates to services for others that call for the professional judgment of a lawyer including, but not limited to, giving legal advice, drafting legal documents for clients and representing clients in court. By contrast, in mediation a neutral third-party helps parties resolve their dispute by exploring creative solutions through thoughtful question asking, separating interests from positions, and helping the parties evaluate the relative risk of those positions<sup>1</sup>. None of this is the practice of law. As such, there appears no rational basis for imposing a law licensure requirement.

To the extent that the FMP calls for the mediator to make decisions concerning the sufficiency of document production or good faith participation we note that this arbitative function is also not the practice of law. Indeed, the Nevada Court Annexed Arbitration programs allow non-attorney arbitrators on their panels. As with the Arbitration Program, FMP mediator decisions are reviewable by the courts.

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<sup>1</sup> It is worth noting that in a large number of mediations parties are represented by their own counsel.

As a result, the risk of a party being harmed due to a non-attorney reaching an incorrect decision is significantly reduced.

**Access to services**

The spirit of the Foreclosure Mediation Program is to ensure that residents of this State who have fallen on hard times are 1) able to have an opportunity to negotiate an alternative to foreclosure and, 2) are able to do so within a reasonable amount of time. The rules governing the Nevada Foreclosure Mediation program provide strict guidelines related to timing which are imposed on the program's participants and the mediator overseeing the process.

Limiting the number of individuals who are able to serve will likely create a shortage of mediators, especially during an economic downturn. This will negatively impact the public's ability to obtain timely and effective services from the FMP. We note that comments to the petition already indicate that approximately 14% of the mediator pool would be presumptively disqualified with this rule change with disparate impacts in the rural counties, which already face substantial access to justice issues.

**Foreclosure Mediation Program has traditionally allowed broad participation.**

The proposed rule change is inconsistent with the historic practice of the rule. The rule has never solely required mediators be licensed to practice in law in the State of Nevada or to be licensed attorneys at all. In fact, the program has traditionally allowed non-attorney participation both as mediators and as homeowner representatives. NFMR12(b)(2)(3). Rule changes, such as the one proposed, will mean that a number of mediators who are otherwise well qualified to serve will not be permitted absent special dispensation under subsection(c).

To the extent that there are quality concerns related to specific neutrals within the program, the remedy is to remove them in accordance with NFMR 4(7), not to implement a blanket exclusion of *any* individual not holding a law license. We respectfully suggest that the FMP is better served by maintaining the broad and diverse array of individuals permitted to participate in various capacities, while utilizing the traditional enforcement mechanism when necessary. NFMR4(7).

In conclusion, we strongly urge this Court to reject the proposed rule change concerning licensure for the reasons stated above.

Sincerely,



Courtney Young  
President, Nevada Dispute Resolution Coalition