M NELSON SEGEL, MEDIATOR

6440 SKY POINTE DRIVE, STE 140-238
LAS VEGAS, NEVADA 89131

TELEPHONE (702) 385-5266
EMAIL: mediator@nelsonsegel.com

April 22, 2020

VIA EMAIL

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY _____ DEPUTY CLERK

Elizabeth Brown, Clerk
Supreme Court of Nevada
201 South Carson Street
Carson City, Nevada 89701-4702

Re: ADKT 435 Comment

Ms. Brown:

This letter is being sent in support of ADKT 435, which proposes to change Foreclosure Mediation Rule 3 regarding appointment and training of mediators in the Foreclosure Mediation Program ("FMP"). Suggested changes to the language of ADKT 435 are attached hereto as Exhibit "1" and a redlined version of the original FMP Rule 4(3), the language of ADKT 435 and the proposed changes set forth herein is attached as Exhibit "2." The exhibits and this comment address the provisions of FMP Rule 3(4) only since that is the subject of ADKT 435.

I first became involved with the FMP as a member of the Advisory Committee that helped the Supreme Court create the FMP and on Justice Gibbons' "Rules Subcommittee." I have been a mediator in the FMP since its creation and was also a member of the FMP Advisory Committee prior to the closure of the original program.

Under the original program, mediators were provided training through the FMP. The new program requires mediators to find training that satisfies the requirement of FMP Rule 3. The scope of acceptable training has not changed since the original rules were adopted.

In December 2017, the State Bar and the ADR Section presented a seminar that was approved by the Supreme Court to satisfy the requirements of FMP Rule 3. Another seminar was presented in 2018. However, in 2019, the State Bar of Nevada did not present a seminar for FMP Mediators.

An informal committee ("Committee") was formed consisting of homeowner attorneys, lender attorneys, mediators and ADR Commissioner Erin Truman to consider modifications to the FMP Rules based upon changes that occurred when the new program was created by the Legislature. In light of the training issue that arose, the Committee submitted suggested changes to the Supreme Court that became ADKT 435. Although the suggestions presented to the Supreme Court were the effort of multiple people, it is clear that there were oversights.

A number of individuals have provided the Court with their concerns. The broadest comment was from Robin Sweet, Director of the Administrative Office of the Courts, where she provided the Supreme Court with her concerns regarding the proposed changes set forth in ADKT 435. Additional submissions to the Court have addressed the proposed language that the mediators be limited to attorneys licensed to practice in Nevada.

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The Committee reviewed the comments submitted to the Supreme Court which are addressed herein.

Mediators Licensed to Practice Law in Nevada

The thrust of the comments regarding licensed attorneys included a concern that it would be difficult to find attorneys to act as mediators in the "rurals" which is considered to be outside of Clark and Washoe Counties and the fact that non-attorneys can be competent mediators. Rule 3(4)(c) authorizes the Supreme Court to "waive the minimum requirements set forth above." This language would allow the Supreme Court to appoint non-attorney mediators, where appropriate.

Notwithstanding this existing authority, the Committee has suggested that the modification of FMP Rule 3(4)(a) limiting the language requiring mediators to be licensed attorneys in the State of Nevada to counties in which the population is in excess of 100,000 people. Proposed revised language is attached. This language would not prohibit the Supreme Court from (1) renewing the appointment of non-attorneys or attorneys not licensed to practice law in Nevada; or (2) appointing new mediators who are non-attorneys or not attorneys licensed to practice law in Nevada.

Unlike the original FMP, the current program is a court proceeding. This requires the familiarity with court procedures and interface with the District Courts electronically. This may be an issue if the mediator is not a licensed attorney.

A foreclosure mediation is commenced through the filing of a petition with the District Court, an Answer is filed and a mediator is appointed. The mediator is obligated to communicate with the parties, file the Mediation Scheduling Notice and file a Mediator's Statement with the Court. Additionally, service of papers on the parties can be expeditiously completed thought the Court's electronic filing system. The process is benefitted by individuals who are familiar with the court system and its procedures and has access to the electronic filing system.

It should be noted that the Committee included representatives of each of the stakeholders in these proceedings. The Committee presented the licensed attorney only provision based upon the members' experiences and belief that the FMP process would be benefitted by limiting the appointment of new mediators to attorneys licensed in Nevada, unless the Court, under 3(4)(c) believes the appointment of an individual who is not licensed to practice in Nevada would be appropriate. The modified language limits this requirement to counties with a population in excess of 100,000 people.

Continuing Education Hours

Ms. Sweet questioned the propriety of requiring FMP mediators to only obtain 4 hours of continuing education biennially. It is her belief that the training should be at least 8 hours every two years. She refers to the amount of continuing education required for attorneys and personnel professionals.

The question should be what is necessary to enable the mediators to meaningfully provide assistance to the parties in reaching a resolution. First, it should be understood there is nothing about the FMP Program that is "mediation." It is impossible for a FMP mediator to persuade a lender to modify

its position in a manner that it deems unacceptable. Unlike most parties in a mediation who have motivation to reach resolution, the lenders operate on guidelines, some federally required and others internal, that limit the "flexibility" of the "authorized" agent. The process is facilitation, at best.

The purpose of continuing education is to assure that the individual is staying current with developments in the area in which they are working. There has not been a lot of change in the foreclosure mediation area under Nevada law. The legal principles of promissory notes and deeds of trusts have seen little change. The federal government, and the federal entities that deal with mortgage and loan modifications, have continued to change their policy and procedures.

The impetus for the change of Rule 3 regarding continuing education was to link the training to the appointment time; two years. It was the belief of the Committee that four (4) hours of training related to foreclosure mediations was adequate to assure that the mediators were qualified to handle cases in the FMP. However, the question of the number of hours needed to stay competent is an issue for the Supreme Court to address.

Scope of Continuing Education

Another issue was addressed by Ms. Sweet's letter wherein she stated,

> Discussions and emails regarding training have been the single biggest time sink to our Personnel Officer in the collateral assignment of mediator application processing. Consistently, many foreclosure mediators wait until the last minute, usually November or December, and then complain because we did not offer a course for them to complete nor have a list of approved courses for them to take. We do not have the funding nor staffing resources to meet those expectations once the Program was moved out of the Administrative Office of the Courts.
>
> We are pleased that the Court is entertaining a petition to change the requirements.

Rule 3 provides ". . . all mediators must participate in **approved** continuing education . . ." (Emphasis added). This language requires the Supreme Court to approve continuing education. An issue is that the Administrative Office of the Courts does not appear to have staffing to review and evaluate continuing education to determine whether it satisfies the requirements of Rule 3. This issue has not been addressed in ADKT 435.

Ms. Sweet's letter questioned the scope of the proposed continuing education. The intent of the proposed language was to broaden the type of education that would satisfy the requirements, not narrow it. As Ms. Sweet mentioned in her letter, the scope of appropriate continuing education was an issue for all mediators in the FMP. The language should be interpreted to expand the scope. Proposed language that addressed Ms. Sweet's concerns is attached.

The underlying issue regarding "approved" continuing education is the need for the Supreme Court, or AOC, to make a determination whether a program is appropriate. The ADR Section of the State Bar of Nevada has committed to holding continuing education classes to satisfy the requirements of FMP Rule 3. Whether the Supreme Court can, or would, provide a rule that a program presented

by the State Bar of Nevada be considered approved should be considered. Without some rule of this nature, the AOC will be required to make determinations whether a seminar proposed by a FMP mediator is appropriate to be "approved," a burden that it does not appear to want or is able to carry.

As the Court May Approve

Ms. Sweet objected to the addition of the words, "as the court may approve". With the revised and broadened language that is set forth in the attachment hereto, this language may not be necessary. However, it does not eliminate the need of the Court or AOC to "approve" continuing education unless further language is inserted into the proposed rule to make it clear what is acceptable.

Effective Date

An issue that was not addressed in the ADKT is when it is effective. Since the State Bar of Nevada did not present a program in 2019, the Court's order implementing the changes in ADKT 435, should make it clear that obtaining training by December 31, 2020, will satisfy the continuing education requirement for 2019. If the Court accepts the four (4) hour requirement for the biennial period, anyone who obtained approved training in 2019 would be considered to have satisfied the training requirement for 2019-2020. If the Supreme Court determines that more than four (4) hours of continuing education is needed, those people who took "approved" classes in 2019 would simply have to obtain the balance of the time needed. This does raise an issue of what was "approved".

Closing

We hope this letter has provided the Supreme Court with more insight into the changes needed in FMP Rule 3 to make it work for the mediators, the FMP and the Supreme Court.

Respectfully,

M Nelson Segel

MNS:bc

cc: Chief Justice Kristina Pickering
Justice Mark Gibbons

Attachments

EXHIBIT "1"
PROPOSED MODIFICATIONS TO ADKT 435 LANGUAGE

4. Mediator qualifications.

(a) Mediators must meet the following minimum qualifications and provide proof as part of the application process:

(1) Be an experienced mediator. For purposes of this subsection, an experienced mediator shall mean an individual who has participated in a mediation training program consisting of at least 40 hours of classroom and role playing and has conducted 10 mediations as a co-mediator or sole mediator; and

(2) In judicial districts that include counties whose populations is 100,000 or more, be licensed to practice law in the State of Nevada; or

(3) In judicial districts that include counties whose populations less than 100,000, mediators need not be licensed to practice law in the State of Nevada.

(b) Additionally, all mediators must participate in approved biennial continuing education of at least 4 hours consisting of education in Nevada foreclosure law, Nevada Supreme Court updates and rulings on foreclosure mediation, District Court mediation process and procedures, use and operation of any portal operated by Home Means Nevada, Inc., (or its successor), the area of real property law, including but not limited to, deeds of trust, promissory notes, and loan modifications, or other related topics. Proof of this continuing education must be submitted with the application.

(c) The Court, for good cause shown, may waive the minimum requirements set forth herein.

EXHIBIT "2"
REDLINE OF ORIGINAL FMP RULE 4(3) LANGUAGE,
PENDING ADKT 435 LANGUAGE AND
PROPOSED MODIFIED LANGUAGE

Language in red was the modification of Rule 3(4) as set forth in ADKT 435

Language in blue is the proposed change of Rule 3(4) as presented in ADKT 435

4. Mediator qualifications.

(a) Mediators must meet the following minimum qualifications and provide proof as part of the application process:

~~(1) Be licensed to practice law in the State of Nevada; [or] and~~

(~~2~~1) Be an experienced mediator. For purposes of this subsection, an experienced mediator shall mean an individual who has participated in a mediation training program consisting of at least 40 hours of classroom and role playing and has conducted 10 mediations as a co-mediator or sole mediator; and

(2) In judicial districts that include counties whose populations is 100,000 or more, be licensed to practice law in the State of Nevada; or

(3) In judicial districts that include counties whose populations less than 100,000, mediators need not be licensed to practice law in the State of Nevada.

(b) Additionally, all mediators must participate in ~~[an]~~ approved ~~[annual]~~ ~~biannual~~ biennial continuing education of at least 4 hours ~~and~~ consisting of education in ~~the area of real Property law, including but not limited to the following: deeds of trust, promissory notes, loan modifications,~~ Nevada foreclosure ~~[laws,]~~ law, Nevada Supreme Court updates and rulings on foreclosure mediation, ~~d~~District ~~c~~Court mediation process and procedures, use and operation of any ~~P~~portal operated by Home Means Nevada, Inc., (or its successor), ~~mediation process and procedures and such other [topics,] related topics as the court may approve.~~ the area of real property law, including but not limited to, deeds of trust, promissory notes, and loan modifications, or other related topics. Proof of this continuing education must be submitted with the application.

(c) The Court, for good cause shown, may waive the minimum requirements set forth herein.