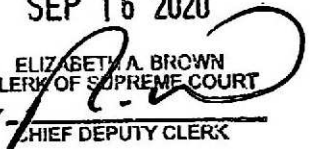




FILED

SEP 16 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  CHIEF DEPUTY CLERK

TO THE JUSTICES OF THE
SUPREME COURT OF NEVADA
c/o Elizabeth A. Brown
Clerk of the Supreme Court of Nevada
201 South Carson Street
Carson City, NV 89701

via electronic service:
nvscclerk@nvcourts.nv.gov

September 16, 2020

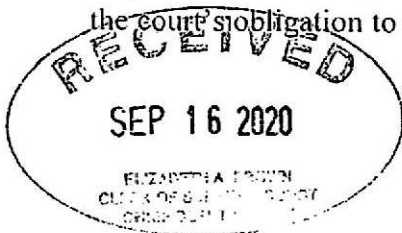
Re: ADKT 567

To the Justices of the Supreme Court:

The Nevada Judges of Limited Jurisdiction's ("NJLJ") Board, Legislative Committee, and general membership have reviewed ADKT 567 and the two optional/alternative proposed rules for the Justice Court Rules of Civil Procedure attached thereto as Exhibits A and B, which if enacted would establish a mandatory mediation program for nonpayment residential evictions. While NJLJ certainly has no desire or intent to involve itself or opine on policy-making decisions, we do want to herein outline the concerns we have with proposals Exhibit A and B and how either, if enacted, will affect our judges and courts across the state.

In general, NJLJ is in favor of litigants resolving real legal disputes outside of court and to the mutual satisfaction of the parties. However, as the justice courts will ultimately be tasked with implementation and administration of these mediations, we are concerned that this proposed program might inundate our already understaffed courts to the point that the courts will be unable to provide access to justice for litigants in a timely fashion. NRS 2.120 authorizes rules of civil practice and procedure "for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits." Collectively, there is concern that this proposal runs afoul of this clear statutory language. If enacted, the rule's purpose and effect will contravene the speedy determination of nonpayment evictions upon their merits in favor of mediation that appears to promote, at least in part, an extrajudicial policy of providing access to rental assistance.

At the forefront of our ethical obligations and oath of office is the requirement to uphold and apply the law and perform all duties of the judicial office fairly and impartially. See Rule 1.2, Promoting Confidence in the Judiciary; Rule 2.2, Impartiality and Fairness; Rule 2.3, Bias, Prejudice and Harassment. The mandated mediation program does not appear to be focused on the court's obligation to timely uphold and apply the law. Instead the program seems to be driven



by a process that places the court in a position of indirectly advocating for the tenant by forcing a mediation in which a mediator will in essence take on the role of a social worker and financial advisor whose sole focus is to allow the tenant to maintain occupancy of the dwelling unit instead of mediating a bona fide legal dispute on the merits of the summary eviction action. This has, at a minimum, the danger of putting the court in the position of having an unintended, implied, or at least a perceptual bias toward parties (i.e. tenants) based on socioeconomic status, which is prohibited by Rule 2.3 of the Code of Judicial Conduct. More so, though, the judiciary risks completely abandoning its role of neutral arbiter of disputes and instead putting its thumb on the scales of justice to tip them against the landlords.

While delaying the court's role in the eviction process in nonpayment evictions might be enjoyed by one litigant, it leaves the other with no equal access to the court to review the legal issues presented in the case. The mandatory mediation rule could be construed as a denial of an entire segment or group of litigants (i.e. landlords) from timely access to justice, as envisioned under the statutory body of law via the "summary eviction."

Further ethical concerns have been expressed that mandated mediation by the justice courts (in which one litigant does not *want* to mediate) could be construed as a potential violation Rule 2.6 (Ensuring the Right to be Heard and (B) a judge shall not act in a manner that coerces any party into settlement). NJLJ favors a process in which both parties request mediation and come to the table with an honest effort to resolve the case; however, a program that forced unwilling participants to mediate seems like it would be unsuccessful and in most instances a waste of mediation resources and time. This has been the result of other court efforts to mandate mediation in small claims cases, both in northern and southern Nevada, causing courts to abandon those programs.

To the extent that this program is also being proposed to "ease the burden on our courts," the proposal actually does the opposite. Both proposals require additional obligations and work for our courts' staff. Just some of these additional obligations include: providing mandatory information on court websites, even though some courts do not currently have websites; requiring e-filing capabilities where none currently exist in most townships; assigning mediators and scheduling mediations, which would require court staff to keep track of mediators' schedules and availability; receiving, filing, and monitoring mediation reports; consulting with the judge on the next appropriate step needed; creating court forms which currently don't exist; and gathering/maintaining additional statistical data. The proposal is also devoid of any procedure for the practical reality that while some cases might resolve at mediation, many of those "resolved" cases will inevitably require subsequent judicial involvement and action, anyway, when a party has failed to comply with their obligation(s) under the mediation agreement (i.e. failed to make a payment, failed to vacate the property on an agreed-upon date, etc.).

For instance, we have at least 25 townships that have less than 25 evictions per year, and another 12 townships that have between 26-50 evictions per year. The consensus of these rural judges is that they do not need a mediation program to “ease a burden,” they can handle any increase in cases that might be filed, and the mandatory obligations of this program place more work on them and their very limited staff.¹

Specifically to the two proposed rules Exhibits A and B, both proposals place the responsibility *on each court* to approve and maintain a list of mediators. Instead, if mandated we request that the rule provide for a statewide list of mediators proposed by the Access to Justice Commission and approved by NJLJ as a resource for our rural courts. As you know, many of our rural townships have no pro tem judges and certainly no mediators, and many of the rural judges are very concerned about availability of mediators for their townships. Also, any rule should make clear that a judge from another township is authorized to act as a mediator.

There are likewise concerns as to the method of the mediations. While the proposals provide for in-person, telephone, or video conferences, video platforms such as Zoom might be cumbersome, and the mediators would all have to have a Zoom accounts. If the accounts were going to be used over and above the minimal features of the “free” account (40 minutes), who is going to pay for their accounts? Are the users/litigants going to be able to access these platforms? These are all important logistical questions that have yet to be answered in either proposal.

Specifically as for Exhibit A, it has no termination or sunset clause thereby making it a permanent rule. It seems that this mediation program is being considered because of the COVID-19 pandemic and resulting unemployment crisis, which is temporary in nature. Respectfully, the eviction courts did not need a mandatory mediation program prior to the pandemic and should not need one when the pandemic subsides – especially with no additional resources. Moreover, the permanency of the proposed rule is of concern because as the pandemic dissipates, so will the federal and state rental assistance funds available to tenants – and so will any limited funding that is being made available for the mediation program itself. Thus, once the pandemic dissipates the remaining mandatory mediation program will frankly be an unfunded mandate.²

Specifically as for Exhibit B, it requires the tenant to satisfy eligibility requirements in order to enter into mediation. As the proposed rule is drafted, a judicial review of every tenant answer will be necessary to determine whether the case is appropriate for mediation. This additional judicial review might very well result in overall delay in processing cases, especially in townships with large eviction caseloads. Exhibit B also provides a 5-day opportunity for a landlord to oppose a mediation request. This, too, will require additional judicial oversight of all of those cases and will just further delay the entire process. This level of repeated judicial review at an intermediary level of the case would make it impossible for our higher volume courts to get

¹ As a side note, we are perplexed at why this is being pushed as a JCRCP and not a Supreme Court rule. Some have made mention that this crisis is similar to the foreclosure crisis years ago. In that crisis, the Nevada Supreme Court promulgated its own set of rules of mandatory foreclosure mediation, and through additional resources administered the program itself for years.

² We would be agreeable that *if* this mandatory mediation program is enacted, once the State of Emergency expires each individual court could determine whether it has a need or funding to continue with the same or similar program indefinitely.

the case mediated before the thirty-day time constraint from SB-1. Furthermore, it would completely obliterate the "summary" process outlined in the statute.

Lastly, if the Supreme Court does enact a rule similar to that outlined in Exhibit C adding additional requirements for eviction notices, we obviously request that the rule be implemented with a full 60 days' notice to the public as required by NRS 2.120, with no waiver of said time frame. Otherwise, if the landlords do not have adequate notice of new requirements for their eviction notices, many of the eviction cases will have to be denied upon judicial review. Again, this will create additional work for our staff and courts in that eviction complaints will be rejected, the notices will need to be re-served, and our staff will have to process those same eviction requests for those same properties an additional time. Because we want to avoid that, the landlords should be given the statutory requisite time to learn about the new rules and implement changes to their notices accordingly. Despite the belief of some, the law does not require a *specific eviction form* or *court form* be used, as long as the notice satisfies all statutory and/or rule requirements.

In closing, we certainly realize and appreciate that we are in uncharted territory this year and we thank all of the Justices for their consideration of NJLJ's concerns. The justice courts in this state are diverse and sit in communities that differ in many respects from one another. Our rural courts are situated far differently than our larger urban courts. This proposed program does not account for our diversity and the ability of each of our judges to determine whether such a mediation program is warranted by its caseload or needs of its community, including both landlords and tenants. These judges are best positioned to make these decisions.

Generally speaking, in many eviction cases (especially residential) the judge already tries to informally mediate the case before rendering a decision. The judges often times ask the tenant if they have sought rental assistance, when will they be able to pay the rent, when can they be out, etc., and then try to reach a middle ground with the landlord – basically a result amendable to both parties. In the end, we would favor adoption of rules that allow individual courts the discretion to create a voluntary mediation program where needed, and one that does not run afoul of Nevada's constitution, statutes, or judicial canons. In the event the Supreme Court is going to adopt a rule forcing mandatory mediation upon the parties, attached hereto is a draft rule that mitigates some of our concerns raised herein, and allows justice courts throughout the state to opt into the mediation program where needed.

Sincerely,

A handwritten signature in cursive script that reads "Diana L. Sullivan".

Judge Diana L. Sullivan
President, Nevada Judges of Limited Jurisdiction

(Note: Per JCRC 2, "summary eviction actions" are governed by Rule 101 forward. Rule 106 is now "reserved" and could possibly be used. Otherwise, unless the new provision is added to one of the existing rules (106 to 105 or 110), it would be added after somewhere after Rule 110.)

Rule _____. Mediation of Summary Eviction Actions

- (a) If a justice court determines that its caseload or community need warrants a summary eviction mediation program, the chief judge of the court may, by administrative order, establish such a program following this rule and any local rules that the court may implement that are not in conflict with this rule. The chief judge of the court may terminate such a mediation program should the caseload or community need no longer warrant it.
- (b) This rule applies to summary eviction actions filed pursuant to NRS 40.253. The court may, at its discretion, refer summary eviction actions filed pursuant to NRS 40.254 to mediation under this rule.
- (c) "Mediation" mean a process in which a neutral third party acts to encourage and facilitate the resolution of a dispute between the landlord and tenant. It is an informal and nonadversarial process with the objective of helping the landlord and tenant reach a mutually acceptable and voluntary agreement to resolve the legal dispute, if possible. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues and resources, exploring settlement alternatives and evaluating settlement proposals, and fostering communication and joint problem solving.
- (d) If the court has a website, the court must provide on its website information concerning the availability of:
 - (1) An existing mediation program, if any;
 - (2) Known government-sponsored rental assistance programs;
 - (3) An electronic option for the filing of the tenant's affidavit, if available; and
 - (4) Civil legal aid programs, court self-help centers, or similar programs in the jurisdiction, if any, that may be able to assist the tenant with completing and filing a tenant's affidavit.
- (e) (1) A tenant may request mediation of a summary eviction action by stating that request in the affidavit filed by the tenant in the matter. Such request must include:
 - (A) A preferred method of mediation, whether in-person, by telephone, or by video-teleconferencing;
 - (B) The name of the tenant(s) that will be participating in the mediation;
 - (C) Accurate contact information including telephone number and e-mail address for receiving notices from the Court and Mediator;
 - (D) How COVID-19 has impacted the tenant's ability to meet the rental obligations;

(E) A statement indicating whether the tenant has previously applied for rental assistance through housing.nv.gov and if such application was approved, denied, or pending;

(F) A statement as to whether the tenant has previously entered into a repayment plan with the landlord for rental arrearages and attach a copy of any written repayment plan.

(2) A landlord may request mediation of a summary eviction action by stating that request in the complaint for eviction filed by the landlord in the matter. Regardless of a landlord's lack of request for mediation, the complaint for eviction must include:

(A) A preferred method of mediation, whether in-person, by telephone, or by video-teleconferencing;

(B) The name of the individual who has authority to settle the case that will be participating in the mediation; and

(C) Accurate contact information for the individual with authority to settle the case, including address, telephone number and e-mail address for receiving notices from the Court and Mediator.

(f) If the landlord or tenant requests mediation of the summary eviction action, immediately upon the filing of the complaint by the landlord the court clerk will assign the matter to a mediator selected from a list of mediators approved and maintained by the Nevada Judges of Limited Jurisdiction for that purpose. Justices of the peace and municipal court judges may serve as mediators for summary eviction actions outside of their townships or municipalities. The court clerk will schedule a date and time for the assigned mediator to conduct mediation of the matter not more than thirty days from the request for mediation.

(g) No hearing shall be held in the summary eviction action until:

(1) Thirty days following the request for mediation; or

(2) The court receives the result of the mediation from the assigned;

Whichever is sooner.

(h) The court will serve a written order to the landlord, tenant and the assigned mediator setting the date, time, location, and method of the mediation and subsequent summary eviction hearing.

(1) The order must provide:

(A) The contact information of the mediator and the landlord and tenant and require the landlord and tenant to contact the mediator immediately if the listed contact information has changed or another method of contact is preferred; and

(B) The consequences of failing to appear for the mediation.

(2) The assigned mediator is responsible for:

(A) Initiating the call to the parties at the phone numbers provided in the pleadings, when mediation is ordered by telephone; or

(B) Selecting the video-teleconferencing platform, paying for any video-teleconferencing fees, and sending the teleconference invitation to the parties at the e-mail addresses provided in the pleadings, when mediation is ordered by video-teleconferencing; or

(C) Providing an office or other comparable space to conduct the mediation.

(i) At the mediation, the mediator must discuss with the parties and counsel, if any, the facts and issues involved and assist the parties in identifying and resolving issues and exploring settlement alternatives and resources. The mediation will continue until a settlement is reached or the mediator determines that a settlement is not likely to be reached. If settlement is reached, the mediator will assist the parties in reducing their settlement agreement to writing, which writing shall be signed by both landlord and tenant.

(1) Settlement agreements resulting in a payment arrangement between the landlord and tenant must specify the terms of the payment arrangement, to include:

(A) When, where, and how payments are to be made;

(B) The amount of payments; and

(C) The acceptable method of such payments, i.e. – cash, check, money order.

(2) Settlement agreements resulting in a tenant's surrender of the property must specify the date and time such surrender is to be complete.

(3) All settlement agreements must inform the parties that any allegations of non-compliance of the opposing party must be addressed by the court by way of a motion to enforce the settlement agreement. Such motion must be accompanied by an affidavit or declaration under the penalty of perjury setting forth the details of the non-compliance. Such motions must be served on the opposing party.

(j) At least two judicial days prior to the scheduled court date, the mediator must file either:

(1) A copy of the written settlement agreement with the court; or

(2) A document identifying that no settlement was reached and include whether either party failed to appear.

(k) At or before the scheduled summary eviction hearing, the court must review any written settlement agreement or report of the mediator indicating whether a party failed to appear for mediation.

(1) If the Landlord fails to appear at mediation, the court may dismiss the complaint.

(2) If the Tenant fails to appear at mediation, the court must proceed with the hearing on the summary eviction.

(3) If the parties entered into a written settlement agreement, the court must review the terms of the agreement and determine how the case should proceed.

(l) Statements and communications made during mediation are confidential, are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than the participants in the mediation unless all mediation participants agree in writing or a statute or court rule requires disclosure.

(m) Mediation shall be conducted at no cost to the landlord or tenant. Mediators shall be paid a fee established by the Access to Justice Commission and shall prepare an invoice outlining their services and submit such invoice to the Administrative Office of the courts for payment.

(n) Motions to enforce settlement agreements arising through mediation must be heard within 7-10 judicial days. After hearing, should the court issue an eviction order, the tenant is not eligible for a further stay of execution of the order.

(o) Notwithstanding the requirements of NRS 40.2545, the court shall gather and maintain statistical information sufficient to determine the number of summary evictions actions in which mediation was requested and whether requested by landlord or tenant, the number of actions submitted to mediation, the number of actions in which a settlement was reached, the number of actions in which no settlement was reached, the number of actions in which a settlement was reached but required subsequent judicial action for a breach of the settlement agreement, and the number of evictions ultimately granted where no settlement was reached.

ALTERNATE TO PROPOSED PARAGRAPH (a) ABOVE:

(p) This rule is created for the purpose of allowing courts to handle a potential increased caseload due to financial hardship created by the COVID-19 pandemic, the lifting of various national and state moratoriums on summary eviction actions, and to assist and encourage landlords and tenants to resolve summary eviction actions through available rental assistance programs. This rule is effective sixty (60) days from the date it is adopted and will remain in effect until the latter of:

(1) The Governor issues an order terminating the March 12, 2020 Declaration of Emergency for COVID-19; or

(2) A justice court determines that its caseload or community need no longer warrants a mandatory mediation program.