Thomas J. Holthus	CA NV NE
Kevin R. McCarthy	CA
Paul M. Levine	AZ CA
Matthew Silverman	AZ NM
JaVonne M. Phillips	CA
Matthew E. Podmenik	CA
David C. Scott	CA
Jennifer C. Wong	CA
Angela M. Michael	WA OR ID AK PA
Kristin Schuler-Hintz	CA NV
Gayle Jameson	CA
Seth Harris	CA
James Hester	CA
Charles E. Bell	CA
Kelly M. Raftery	CA
Matthew B. Learned	CA
Andrew E. Hall	CA
Seth J. Adams	NV
Melissa Robbins Coutts	CA AZ
Kristin Zilberstein	CA
Merdaud Jafarnia	CA
Thomas J. Ruhrup	CA
Roshni V. Patel	CA
Jessica R. Kenney	CA
Rebecca L. Lang	CA
Mishaela J. Graves	CA

McCarthy ◆ Holthus
A Limited Liability Partnership
9510 West Sahara Avenue, Suite 110
Las Vegas, NV 89117
Telephone (702) 685-0329
Facsimile (866) 339-5691
www.McCarthyHolthus.com
Email to all personnel:
First initial and last name@mccarthyholthus.com

CA	Brielyn G. Atwater
CA	Rami N. Haddad
CA	Michelle Ann Hoskinson
CA	Christelle N. Ramseyer
NV FL	Christopher Hunter
CA	Terry Loftus
CA	Laszlo Ladi
NV	Sherry A. Moore
CA	Paul H. Kang
WA	Mary Stearns
NV	Janice Jacovino
NV	Bonty Lonardo
CA IL	Anne Ogle-Knee
CA OH	Ann M. Eberts
NV	Lindsey Bennett
OR	Matthew Booth
WA	Joseph McIntosh
WA	Mathew LaCroix
CA	Summer Eberhard
CA	Deborah Cochran
CA	Julie Corriveau
WA	Robert McDonald
OR	John R. Whittaker
CA	Joshua Moyer

July 2, 2012

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TRACIE K. LINDEMAN
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BY [signature]
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Tracie K. Lindeman
Clerk of the Supreme Court
201 South Carson Street
Carson City, NV 89701

RE: Comments on Changes to Foreclosure Mediation Rules

Please see below the comments generated by this office and in discussion with our client's regarding the proposed changes. Attorney Seth Adams from our office is requested to be permitted to speak publically as to the proposed changes.

Page 3, Rule 3.1 – This program was originally designed to permit mediation to be commenced and concluded within the 90 day period that the Notice of Default was pending, each subsequent rule change has extended the mediation time frames, rather than requiring the program to provide a higher standard of service. While extending the time frames can be beneficial when a modification is possible; extending the time frames when the goal is merely to delay foreclosure or a loan is non-modifiable is fruitless and costly to the State and community as a whole and increases the burden on taxpayers and citizens who are not in default.

Page 4, Rule 4(b) – no guideline as to whom will be providing or approving "approved annual continuing education." There are a variety of programs available, and the mediator's, program and public may be better served by ensuring that the training received by the mediator's comes from a variety of sources to prevent and discourage bias. No issue with the removal of the word *mortgage*.

Page 4, Rule 4(c) – What is the proposed code of conduct? It should be spelled out and made part of the rules and a procedure needs to be in place which insures that grievances and mediator behavior is addressed, appropriately and confidentiality. I am aware of at least one mediator who has been the subject of numerous complaints, from both sides of the table, and yet the mediator continues to receive assignments, and be assigned to mediate with parties who have

Washington State Office
19735 10th Avenue NE, Suite N-200
Poulsbo, WA 98370
(206) 319-9100
Facsimile (206) 780-6862

Oregon Office
8995 SW Miley Rd., Ste 103
Wilsonville, OR 97070
(503) 694-1145
Facsimile (503) 694-1460

San Diego Office
1770 Fourth Avenue
San Diego, CA 92101
(877) 369-6122
Facsimile (619) 685-4811

Reno Office
200 S. Virginia St., 8th Floor
Reno, NV 89501
(702) 685-0329
Facsimile (866) 339-5691

Arizona Office
8502 E. Via De Ventura Blvd.
Scottsdale, AZ 85258
(480) 302-4100
Facsimile (480) 302-4101

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registered complaints against said mediator, thereby creating an appearance of impropriety and bias.

Page 4 – 5, Rule 4.2, 4.3, 4.4, 4.5 – same comment as above, the code of conduct needs to be specifically spelled out and readily available to all parties; a procedure needs to be put into place to ensure that complaints regarding improper conduct is addressed. When the mediator fails to follow the law, or uses their own interpretation of the law, or uses the interpretation of the law that they say they were told to use, the burden of rebutting this behavior is on the beneficiarys side as they are required to bring action to obtain a certificate, or restart foreclosure, while continuing to advance taxes and insurance for a property that is occupied by a party with no requirement to pay to stay or to maintain the property. For example, is it proper for a mediator who also acts as a homeowner representative to appear on the news opining as to mediation events, rules and lawsuits while acting as a homeowners representative and continuing to act as a mediator, or does that evidence a bias and appearance of impropriety. Or, when a mediator states "MERS assignments are invalid; the program told us that." Three months later the beneficiary obtains the certificate, the Court shakes it head, and the mediator continues to make findings that are not in accord with Nevada law, without repercussion.

Page 7, Rule 8 – The Trustee should not be the party responsible for designating and obtaining approval of documents that may be required for modification or other alternatives to foreclosure. The Trustee is responsible for providing statutory notices as required by law and is generally not part of the mediation/modification process.

We do not support the removal of the requirement to provide the basic financial and/or housing affordability worksheets. In some cases this is all the financial information we receive for a mediation which can be an invaluable tool in preventing mediation from being a waste of time due to lack of information. In addition the worksheet can provide information regarding homeowner's changed (or lack of change) in circumstances which can assist in negotiating a resolution. Mediators have also commented that they find the forms useful in permitting them to prepare for the mediation as it gives them initial insight into the circumstances and parties they are addressing and working with.

Page 8, Rule 5 – Bankruptcy presents an issue as there are no rules to address the effect of bankruptcy on the mediation; for example, if the homeowner elects to mediate, then files a chapter 13 bankruptcy and remains in that bankruptcy for an extended period the mediation remains open throughout the pendency of the bankruptcy. From the history it appears that mediation and bankruptcy were intended to be mutually exclusive. The rule should provide that if the bankruptcy provides for the surrender of the subject real property either by plan or statement of intent, the mediation should be terminated upon discharge or confirmation and the certificate should issue upon notice to the homeowner. (The automatic stay would be terminated as to the homeowner by operation of law in each case.) No issues as to the proposed rule otherwise.

Re: Rationale for Change – Rule needs to be clarified to provide that the financial information must be provided to the beneficiaries counsel or as directed. Instances have occurred where

Homeowner's have stated they are not required to provide information to counsel and were unable to verify where or when to beneficiary it was sent.
Page 9, Rule 9 – no comments.

Page 10, Rule 10(a) – parties who work out modifications are required to have specific training addressing the requirements of the modification programs, said training is not the same as the training required to determine eligibility for short sales or deed in lieu of foreclosure which has specific requirements. If the homeowner has asserted that they are only interested in a modification and will not consider any other alternatives until 2 hours into the mediation, the same paperwork, forms and training as required for modification is not required to determine deed in lieu eligibility.

The rule should clarify that the beneficiary is allowed to appear via telephone as long as a representative is physically present, unless instructed otherwise by the mediator for good cause shown. Beneficiaries access information systems with millions of pieces of personal identifiable information available. That information should only be accessed in controlled environments subject to adequate safety precautions.

Page 11, Required mediation documents rule 11: The requirement for the homeowner to provide financial documents was removed. If the homeowner genuinely desires a resolution to foreclosure than the beneficiary must have a firm understanding of the homeowners financial picture in order to offer a reasonable foreclosure alternative. The removal of this requirement undermines the ability to offer a solution in the mediation hearing. Many times until you actually sit down in the mediation with the homeowner, and review their financial situation, line by line, and discuss face to face with the homeowner what they really want to achieve in both mediation and their life, you are unable to reach a resolution.

Page 11, Rule 11.1: There is great ambiguity in the expected timeline for exchange of information based upon the description of "as soon as practicable." A definitive time line for exchange of information that supports the ability to conduct and conclude the mediation hearing per rule three should be outlined. What happens if either party cannot be contacted on the 1st, 3rd, 5th, 20th attempt?

Page 11, Rule 11.2: Documents will always be required to determine homeowner eligibility for foreclosure alternatives, however, it is almost impossible to provide a comprehensive list of required documents that addresses every single alternative to foreclosure and every single homeowner financial situation, until you have actually sat down with the homeowner to discuss what their circumstances are and what they would like to achieve. If a modification was not accomplished prior to the mediation there is generally a reason, including lack of information, lack of understanding of required information, relevant information that is not being disclosed.

Page 11, Rule 11-3: A rule that merely requires the homeowner "shall use his or her best efforts to submit the requirement document in his or her possession to the mediator and beneficiary of the deed of trust" does not hold the homeowner accountable to equal participation in the mediation hearing; if the homeowner does not provide the beneficiary with the required documents (or withholds information) to conduct a full financial and collateral evaluation than it

thwarts the ability to provide a meaningful solution at the mediation hearing. The beneficiary and homeowner should have the same level of accountability for participation in the mediation hearing. If the homeowner fails to provide the required documentation than the beneficiary is not in a position to provide the required alternatives per rule 10; bottom line, the homeowner must have an expectation of accountability similar to the beneficiary.

Page 11, Rule 11.4 - The feedback on this suggested rule is similar to the previous comments in that the homeowner must have accountability to provide beneficiary with the requested documents that allow the beneficiary to conduct an evaluation for foreclosure alternatives; if the homeowner fails to provide the requested documents, the beneficiary must still review for a modification or other alternatives. Homeowner non-participation subjects the homeowner only to the penalty the Borrower contracted to, the right to foreclose for non-payment, but now after the proceeding has been substantially delayed.

Page 12, Rule 11.4 and 11.5 - The number of days remains undefined, is this business days or calendar days? This can lead to mediator interpretation of expected beneficiary action and leads to inconsistency in the application of the rules. What if the homeowner alleges non-receipt of the request? What if the Homeowner alleges compliance with the request but nothing is received? What if the documents raise more questions than answers? What if the Homeower is not the borrower? They are providing personally identifiable information to a third party with whom they have no contractual or other relationship. The expectations as to each party and the accountability is significantly one sided.

Page 12, Rule 11.6 - The feedback on this suggested rule is similar to the previous comments in that the homeowner must have accountability to provide the beneficiary with the requested documents. The rule does not allow the beneficiary to ask for additional documentation or clarification if the review elicits additional underwriting questions during the evaluation for foreclosure alternatives. Again, this thwarts the ability of the beneficiary to offer a meaningful resolution. Beneficiaries have the right to utilize their business judgment with respect to the modification of a contract.

Page 12, Rule 11.7 – AB284 requires an affidavit under penalty of perjury, which establishes the identity of all relevant parties, and which subjects the signator to potential civil and criminal penalties. Rule 11.7(a) – (d) requests the same information as that which is set forth in the affidavit of authority, it is duplicative and unnecessary as under the law all parties should be entitled to rely on the authority as stated in the affidavit without further documentation. The required standing to foreclose and attend mediation and modify was addressed by the legislation in AB284.

Page 13, Rule 11.7(e) - An appraisal or BPO is required, but it remains undefined if the valuation is to be provided as an exterior or interior review. Because this remains undefined, it can lead to mediator interpretation of expected beneficiary action and inconsistency in the application of the rules. Furthermore, if an interior evaluation is expected, it remains undefined if the homeowner must cooperate with the scheduling of an interior evaluation. No actual determination of what is most beneficial, ie, BPO, exterior value or interior value can be made until the homeowner makes a final determination as to the option they wish to pursue.

Page 13, Rule 11.7(f) – it is not appropriate for the foreclosure mediation rules to attempt to bypass the cases pending before the Supreme Court, and insert a requirement to provide information which is not required by law and which is not part of the actual deficiency judgment calculation.

Page 13, Rule 11.8(a) – the general math utilized to determine ability to modify is not the only calculation utilized to determine modifiability; Beneficiaries are entitled to utilize sound business judgment where applicable to determine modifiability. Principal reduction is a privilege not a right and the Court and program should bear in mind the hundreds and thousands of homeowners who made conservative financial choices to meet their obligations and may be doubting the soundness of their decisions based on the deference shown where any default has occurred.

Page 13, Rule 11.8(b) and 11.8(c) – Net present value does not address the entirety of the beneficiaries required review and responsibilities to all consumers. What the analysis fails to take into consideration is the homeowner financial performance. For example, has the homeowner failed previous loan modifications or loss mitigation treatments despite the financial capacity to support the loss mitigation solution? Beneficiaries to a contract are entitled to utilize sound business judgment rules which may not be part of a Net Present Value Test.

Page 13, Rule 11.8(d) - The suggested rule does not define the word "relevant" with respect to the pooling or service agreements. Because this remains undefined, it can lead to mediator interpretation of expected beneficiary action and inconsistency in the application of the rules. Furthermore, elements of the pooling and/or servicing agreement are proprietary to the beneficiary and not applicable to the loss mitigation solution offerings. The borrower is not a party to said agreements.

Page 13, Rule 11.8(e) - The word "refuses" is used to describe the action of the beneficiary for the inability to offer a modification; however, it should be described as a request for the explanation of a homeowner's financial capacity to support a loan modification. The rule implies that the beneficiary does not have a willingness to offer a modification when it is based upon the homeowner's financial ability to support a loan modification. The tone of the rule implies an inappropriate assumption of the beneficiary's willingness to negotiate a foreclosure alternative. Beneficiaries are entitled to exercise their business judgment relative to contract modifications and must answer to their principals for their decisions.

Page 14, Rule 11.8(f)(1)-(4) - First, this rule intimates that there **must** be an agreement proposed by the beneficiary, however such a rule is tantamount to requiring the beneficiary to offer to modify the contract, even if no such alternative is available. (In cases such a loan origination fraud, deceased borrowers, unauthorized title transfers, or multiple prior failed modifications, no alternative to foreclosure may exist.)

This rule outlines requirements of the beneficiary to provide a short sale timeline and conditions. In a short sale or deed in lieu scenario, multiple parties of interest can be involved. Each party has a vested interest in the transaction and must agree to the short sale approval. While, the beneficiary of beneficiary of the 1st Deed of Trust may be present at the mediation hearing and

agree to short sale offer this does not implicitly equate to the ability to successfully execute a short sale transaction. All parties of interest must agree to the terms in order for the seller to take title possession of the subject property. To elaborate on this point, the suggested rule does not outline the requirements of the homeowner to satisfy or disclose any other liens on the property for nonpayment of obligations such as Homeowner Association dues, water lines, sewer liens, contractor liens, civil action liens or other mortgage liens that can thwart the ability to successfully execute a short sale transaction. If the borrower has insisted that they will consider no alternative but a modification with a principal reduction, the necessary information may not have been provided.)

Page 14, Rule 11.10 – Notes are only extremely infrequently assigned, as such transfers of negotiable instruments are documented via endorsement or allonge (which are required to be part of the Note itself). The phrasing of the Rule has created confusion as parties request documentation that does not exist and multiple certifications of the same document.

Page 14, Rule 11.11 – NRS 104.3309 applies to negotiable instruments, the Deed of Trust and Assignment are publically recorded documents, the possession of the original is not required to establish authority. There is no procedure for obtaining a Court order to enforce a lost original Deed of Trust or Assignment, unless the document was not recorded, recorded documents are recognized by the rules of evidence. As such, copies of recorded documents certified by the appropriate County Recorder should be deemed sufficient.

Page 15, Rule 11.12 - The rule does not address the homeowner expectations for participation in the short sale such as: marketing efforts, maintenance of the property during the listing period, payment of HOA dues and other property obligations. Most importantly, there is a presumption that the homeowner can execute a short sale transaction with the approval of only the 1st Deed of Trust implicitly. The homeowner may have other parties of interest, which they are not required to disclose, that may not agree to the terms set forth by the beneficiary. Listing price is usually best determined by a licensed real estate agent who has viewed the interior of the property, can compare the property against other similar properties, and can set the listing price to compete in the neighborhood and based on the parties established marketing time frame.

Determination of waiver of deficiency cannot be made until an offer is presented and the borrowers financial circumstances are reviewed. Changes in circumstances (such as increased income or a windfall) may make a waiver of a deficiency judgment inappropriate; while decreased income or further hardship may make a previously declined waiver reverse.

If the homeowner has other liens or obligations associated with the property and those parties of interest do not agree to the short sale terms established by the beneficiary of the 1st Deed of Trust, a short sale transaction will not be completed. The beneficiary should have ability to obtain a foreclosure certificate in the event the short sale transaction cannot be completed based upon other parties of interest and/or homeowner inaction to complete short sale conditions agreed upon in the mediation hearing.

This rule like others, has unequal penalties and provisions for enforcement. If the homeowner does not comply then the beneficiary can request a certificate, no provisions address how or

when the FMP may issue the certificate, which will then permit the beneficiary to obtain its contractually agreed upon penalty for failure to pay. If the homeowner has issues, the homeowner can seek sanctions, there is no reciprocal ability to permit the beneficiary to obtain sanctions.

Page 15, Rule 11.13 – the mediator is not the best person to determine what type of valuation is necessitated as it is unknown what type of value is required until a final determination re retention or none is reached.

Page 15 - Rationale for change – The proposed amendments to the rule do not correctly address the issues, which is the necessity of obtaining all required information in a timely fashion and sitting face to face to review the questions, issues and concerns which are uncovered when the review is conducted. Homeowners are frequently concerned about their finances and defensive as to the decisions and expense evidenced by a financial statement; face to face discussion and explanation alleviate confusion and defensiveness and allow workable situations to be uncovered.

The proposed changes misinterpret the issue regarding authority. The beneficiary has full authority to consider alternatives, however, given the number and specificity of programs different experts may be required depending on various alternatives.

Page 16, Rule 12.1 – Mediator contact with parties should be through agreed upon, expeditious, means, which may include, phone, fax, email and telephone.

Page 16, Rule 13.1 – "as soon as practicable" should be defined. As long as the mediator's are trained to utilize good judgment as to whether the 90 day conclusion is practicable (failure to timely provide documents, emergency, changed financial circumstances) and those specific instances are addressed, the 90 day time frame is probably workable.

Page 16, Rule 13.3 – said Rule does not take into account the amount of time and effort required to schedule mediation, coordinate document exchange, address compliance concerns and issues. There is likely to be at least one to two hours of work prior to scheduling the actual mediation, and if done properly the actual mediation should take less than two hours. The program would be better served by keeping the existing document exchange rules, permitting the parties to meet for an hour for a premediation reviewing and establishing goals and needs, then returning for a mediation approximately 45 days later. This format is usually successful as it is easier to establish goals, parameters, level of understanding, communication and objectives.

Page 17, Rule 13.4 – Said Rule again, ignores the realities of mediation. Properly prepared for with all required information, the actual mediation rarely lasts longer than two hours. The majority of time in long mediations is spent obtaining documents where were requested but not received, answering questions arising from newly received documentation, and arguing over whether lenders documents comply with the rules.

Page 17, Rule 14.2 – The mediator has 90 days to conclude the mediation and a variety of circumstances which may not be extraordinary, may arise which justify rescheduling the

mediation, including job interviews, minor emergencies, and other required appearances. As long as all parties consent to the new date, excessive strictures and rules regarding such rescheduling are unnecessary. If those continuances result in a failure to conclude the mediation within 90 days of assignment it should indicate an issue with the mediator to the program which may warrant further review.

Page 17, Rule 14.3, and 14.4 – appropriately address the goal of obtaining a workable resolution.

Page 18, Rule 15 - Mediations should be cancelled upon receipt of a loan modification and recession of Notice of Default or Deed evidencing sale. Both circumstance have occurred with an inability to obtain a response from the party electing mediate, resulting in being required to attend a mediation which was otherwise unnecessary.

Page 18, Rule 16 - it should be made clear that the certificate issuance date will be the date the certificate will actually issue, not the date it will be looked at for issuance, or the date a letter advising that the certificate will issue will be sent.

Page 19, Rule 18 – it should be clarified that as long as the program can provide an interpreter that no other interpreter will be authorized. It will greatly reduce the ability of unlicensed modification "experts" and consultants to participate under the guise of interpreters.

Page 19, Rule 19 – The rule should expressly address that mediator's cannot be called upon to testify or provide confidential mediation information.

Page 20, Rule 21.1 – the final line needs to be drafted more carefully. As drafted it implies that any time in the future a petition for review could be brought for any breach of an agreement. Would more appropriately read, "or date of breach of a condition in the temporary mediation agreement."

Page 20, Rule 21.2 – the Rule should make it clear that BOTH parties and the mediator's compliance is required. Homeowners have responsibilities to participate in good faith and supply required document, however the utilization of the mediation program as a delaying tactic is routinely accepted with no fear of reprisal.

Page 20, Rule 21.3 – the Rule should more carefully define the timing; Mediator's statements are generally received at mediation by in person delivery. Defining a deadline by a party's receipt of a document of which no affidavit of mailing is required, leads to disputes over receipt; the rule also appears to change the requirement of the Court to analyzing the FMP's determination as to whether to issue a certificate instead of the mediator's statement. Is it the intent of the rule to permit a new class of review relative to the decision of whether or not to issue a certificate?

Page 23, Rule 24 – the Rule only addresses bad faith participation by the beneficiary; which indicates that the actual original goal of the program to provide a neutral environment to discuss potential alternatives to foreclosure is not being observed. If the homeowners fails to provide requested documentation in a timely fashion is that not bad faith? Each of the examples of bad faith utilized to describe beneficiary conduct could be applied to homeowners.

Further the listed programs may not be available to the party who elects to mediate. Most of the programs listed are only available to borrowers; borrowers and homeowners and not always the same individual. Additionally, the borrower may not qualify for a particular program at the time the mediation is first discussed or scheduled but due to a change of circumstances may later qualify, however, if the beneficiary only discovers the information at the mediation they cannot review for the program or have requested the necessary documents.

The rule uses "de minimus" change without defining; what is de minimus to one may not be as minimus to another. Circumstances may change making a mediation agreement impossible to comply with.

Page 24, Rule 25 – First, the rule requires the documents to be reviewed as a precursor to commencing negotiations, in these circumstances where documents are put over negotiation, settlement is rarely achieved as if the borrower believes there is a deficiency to be found they are rarely interested in negotiating. Second, when the question of authority is put over negotiation of resolution settlement again takes a back seat to resolution. In all other types of mediation and arbitration the parties are accepted at face value in the interest of pursuing a resolution. In the event a resolution isn't forthcoming, documents and authority can then be determined.

Finally, Mediator's are not experts in the wide array and variety of modification programs available nor can they be expected to keep up with each change in the rules. Mediators are not the party who is appropriate to determine whether a borrower meets program requirements and the mediator's actions, as a neutral should not be colored by the mediator's believe or conclusion as to whether there is a program out there that the borrower may qualify for, especially prior to hearing both sides. The mediator may be unaware of prior multiple modifications or performance failure or other types of issues that may affect eligibility. Please see additional comments attached.

While the goal of the proposed amendments is to provide additional clarity to the Rules, the changes proposed are in many cases, overbroad, burdensome, and have a disparate impact on the parties to the mediation. The numerous changes proposed are simply not justified by the actual events at mediation.

Very truly yours,

McCarthy & Holthus, LLP

/s/ Kristin A. Schuler-Hintz

Kristin A. Schuler-Hintz, Esq.

ATTACHMENT - ADDITIONAL COMMENTS

Proposed Mediation Rule Objections

Rule 3(4)(b): Mediator training on substantive subjects related to foreclosure (for example, Deeds of Trust, Assignments, or Endorsements) should be conducted by an experienced neutral third party with legal expertise in this area, not an employee of the FMP or a non-attorney. Mediators should not be issued directives to "use their best judgment" in regards to issues where there is clear legal precedent upon which to rely (for example, the question of whether a blank endorsement is acceptable).

The majority of lenders attempt to comply with the FMP Rules regarding documents. However, it is common for a lender's attempts to be dashed by a mediator who interprets the Rules differently than his or her peers. The inconsistent expectations make lenders feel as though they are attempting (and failing) to hit a moving target. This frustrates the purpose of mediation and ultimately results in lenders making fewer modification offers, due to a feeling that document deficiencies and thus postponed foreclosure are inevitable.

Rule(4)(3) – Rule(4)(4): The Code of Conduct should be made publicly available. A mediator who violates the Code or fails to follow NV Supreme Court decisions, statutes, or the FMP Rules should be able to be named in any subsequent Petition for Judicial Review.

Rule 11: So long as lenders and/or trustees provide homeowners with detailed, complete instructions on what must be provided (and how it must be provided), there should be no reason the homeowner cannot independently submit a completed document package. In cases where unique circumstances exist, such as if one of the homeowner cannot be located or the loan is a VA/FHA loan, the lender can follow up as needed to obtain the additional information. Generally, however, the homeowner is requesting the lender modify his or her mortgage and must bear the burden in providing all the information needed by the lender.

Additionally, although the FMP has not been sympathetic to this argument in the past, lender firms juggle large number of mediation files when the NODs are being recorded at usual speed. It's unreasonable to expect each creditor firm to hold the hands of thousands of separate homeowners during the early stages of this process.

Finally, homeowners must be accountable for the information they provide during this process. It is very common for homeowners, both intentionally and unintentionally, to provide inaccurate information to the lender. Without interviewing the homeowner extensively, which does not happen prior to the mediation, it is impossible to determine whether this has occurred. When it has, corrected information is needed in order for the lender to proceed. Under this rule, the lender would be found in bad faith in this circumstance and the foreclosure would be halted, despite the homeowne's failure.

Rule 11(7)(a) – (c):

NRS 40.451

Per the NV Supreme Court's ruling in *In re Volkes*, NRS 40.451 does not limit the amount of debt

a lienholder is permitted to collect. Given that the statute does not, therefore, affect the amount the homeowner would be expected to pay under a deficiency judgment, there is no need for this information – which does not affect the homeowner or the foreclosure in any other way – to be revealed in mediation.

NPV

An analysis of the NPV test, especially the FDIC's generic NPV test, is unnecessary in most mediations and a red herring for homeowners in others. The NPV test is not definitive. In other words, a homeowner who fails an NPV test is not barred from receiving a loan modification. The homeowner will not qualify for HAMP, but may still receive an internal modification at the lender's discretion. Conversely, a homeowner who passes an NPV test is not guaranteed a loan modification. The homeowner must still demonstrate an ability and willingness to pay, as well as meet all of the other qualifications, to qualify for HAMP or any other modification.

The NPV test is only designed to show whether it is more financially viable to a lender to modify or foreclose. Yet even if the homeowner passes the test, the lender may still determine it's against its best judgment to modify. The NPV test is just one of the internal, private factors lenders use to make this decision. By requiring its production

Additionally, in my personal experience, it is rare for the NPV results to be the sole factor determining whether modification is possible in mediation. If the NPV results are presented at the mediation as the reason a modification is not possible, it may be expected that the test itself be discussed at length. If that discussion does not take place or the homeowner feels the lender did not run the test with the correct variables, the homeowner may petition the mediator to find the lender in bad faith or ultimately file a Petition for Judicial Review. However, if the NPV test was not used or the NPV results did not result in the homeowner being denied a modification, there is no purpose in discussing it. Requiring the NPV test to be run/dissected in those scenarios only invites unnecessary delay and confusion into a mediation.

POA/PSA

The 8th District Court in NV has previously ruled that Pooling & Servicing Agreements fall outside the documents required under the current FMP Rules and has been very hesitant to order their production at mediation or during the course of a Petition for Judicial Review, for good reason.

First, the homeowner is not a party the PSA (or the POA). That said, many PSAs are publicly available documents, which a homeowner may obtain independently of the mediation program. In this case, there is no need for the lender to present a copy. When a PSA is not publicly available, the homeowner is not "owed" an opportunity to examine it. This is particularly true because many private PSAs contain sensitive information which does not pertain to any one homeowner's loan and will not assist either the homeowner or lender in determining if foreclosure can be avoided.

Second, PSAs are extremely technical documents that are often hundreds of pages. The language specifically pertaining to loan modification typically consists of a paragraph or less. Locating this

paragraph correctly, not to mention interpreting it correctly, falls far outside the realm of an average homeowner or mediator's understanding. It's very important to have an accurate understanding of the terms, as well. The terms of a PSA are non-negotiable – and, per the NV Supreme Court's ruling in *Murray v. Suntrust,* a servicer is not obligated to violate the terms of the PSA in order to modify a loan.

Applying the terms of a PSA requires intimate knowledge of not just loan modifications or mortgages generally, but the creation/transfer of residential mortgage-backed securities specifically. For example, how a loan may be modified frequently depends on the other loans it is pooled with. One must be able to understand the details of the loan pool generally to know if a modification is possible. Given the complexity of this task, it's extremely likely the participating servicer representative will be the only party at the mediation able to understand the document. In other words, we will be recreating the situation as it currently exists at mediation. Except by inviting a homeowner and mediator untrained in this field to interpret the document, we are doing so with added confusion, a much higher potential for misunderstanding, and an increased likelihood for Petitions for Judicial Review.

Value

There is no purpose in allowing a Foreclosure Mediation to become a duel between the lender and homeowner's separate valuations of the property. Each party will inevitably suspect bias on the part of the person who conducted the valuation, regardless of whether any basis for concern exists – likely leading to a need for the mediator to rule on the viability of the valuations presented. With a few exceptions, mediators are not real estate agents or brokers and therefore do not possess the knowledge needed to fully evaluate which of the two appraisals presented is more accurate. Even those mediators who do have training in these areas would need a working knowledge of the homeowner's exact neighborhood and the state of the homeowner's property in order to make a fully informed decision. The scenario places the mediator in a role he or she is unprepared for. Inevitably, mediators will begin to make these determinations anyway, resulting in a substantial increase of non-agreements followed by Petitions for Judicial Review.

Rule 11(12):

- Lenders cannot negotiate a listing price without the involvement of the homeowner's realtor or a separate property inspection. For certain loan types, such as FHA loans, an interior inspection is required before a listing price can be agreed upon.
- Restricting the time period a beneficiary has to consider an offer is likely to harm homeowners, not improve their odds of successfully completing a Short Sale. Often times, during the consideration period, the homeowner is asked to produce additional information and negotiations are occurring; cutting this short will result in fewer closings, not more. Potential buyers should be made aware, by the homeowner and their realtor, that Short Sales may take a significant period of time.
- Lenders cannot control the escrow period, which depends upon parties not present at the mediation.
- Lenders cannot make a fully informed decision as to whether the deficiency will be waived until an offer is received, the deficiency amount is determined, and it is made clear whether

the purchaser/seller will be contributing any funds.

Proposed Rule 24

1(b): See Rule 11
1(c): HAMP, the Hardest Hit Fund, and the AG Settlement Programs all have mandatory guidelines that both homeowners and lenders must comply with. If these guidelines are at odds with the FMP's demands, as they frequently already are with HAMP, then lenders will be unable to comply with this rule. Especially when considering the AG Settlement Program: a lender should not be put into the position of either be found in de facto "bad faith" *or* having to knowingly violate the terms of the Settlement. Additionally, to my knowledge, very little information as to how these programs (excluding HAMP) are to be implemented has been released at this point.
1(d): There are multiple reasons why a lender might be unable or unwilling to proceed with the agreement reached at mediation, including information about a homeowner discovered after the mediation. The lender must have the opportunity to present its reasoning to the Judge and not be subject to an automatic bad faith finding in order for this rule not to have a chilling effect on lenders' offers at mediation.