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Reply to: Las Vegas

September 16, 2020

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

Via E-mail
Ms. Elizabeth Brown
Nevada Supreme Court Clerk
201 South Carson Street
Carson City, Nevada 89701
nvscclerk@nvcourts.nv.gov

Re: Comments on ADKT 567 (Proposed Mediation Rules in the Matter of Residential Summary Eviction Actions and Notices During COVID-19)

Dear Ms. Brown:

On behalf of the Nevada State Apartment Association (the "Apartment Association") and the Manufactured Housing Community Owners Association ("MHCOA"), I write to submit written comments with respect to the Nevada Supreme Court's adoption of Supreme Court Rules ("SCR") relating to mediation of residential summary evictions. These comments are submitted with a reservation of rights to submit further, additional, or different comments with respect to the proposed or adopted SCR. We welcome the opportunity to provide further information or clarification that the Court may request.

In advance of the Court's September 22, 2020 Public Hearing, my clients would like to thank the Nevada Access to Justice Commission Co-Chairs – Chief Justice Kristina Pickering and the Honorable Justice James Hardesty – for their diligent efforts in facilitating a robust working group that included the voices of Nevadans spanning legal aid, landlord, apartment and realtor representatives, members of the Nevada Judges of Limited Jurisdiction Association and beyond. The proposed alternative mediation rules are a culmination of hours of diligent negotiations as we all work together to assist Nevada residents and business owners, alike, to combat the economic and public health ramifications of the novel coronavirus.

The Apartment Association and MHCOA generally opposes the proposed mediation rules based on procedural grounds, however, we favor Exhibit B over Exhibit A for the reasons enumerated below.

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1. **The Court cannot waive the statutorily mandated 60-day period to implement the proposed mediation rules.**

As a practical matter, irrespective of which proposed alternative mediation rule this Court adopts, Nevada Revised Statute prevents the Court from implementing the same in less than 60 days after entry of an order adopting such rule(s). Administrative Docket 567 cites to the Court's inherent authority in an emergency to "take actions reasonably necessary to administer justice efficiently, fairly, and economically." *Halverson v. Hardcastle*, 123 Nev. 245, 260 (2007) (internal quotation omitted). Yet, this interpretation places the Court squarely within NRS 2.120(2), which mandates:

> "The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, **for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits**. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. **Such rules shall** be published promptly upon adoption and **take effect on a date specified by the Supreme Court which in no event shall be less than 60 days after entry of an order adopting such rules**." (emphasis added).

Therefore, presuming the Court adopts one of the proposed mediation rules at its Public Hearing on September 22, NRS dictates the soonest the SCR could take effect would be November 21, 2020. The Nevada Constitution's "separation of powers" clause supports this distinction, which divides government power into three separate departments – legislative, executive and judicial. *See* Nev. Const. art. 3, § 1. The Governor, or executive branch, does not have authority to grant a separate branch of government – in this case, the judiciary – the power to override the power of the Nevada Legislature.

Specifically, the permissive language in Governor Sisolak's Emergency Declaration 031 issued on August 31, 2020 does not supersede the statutory authority of the Legislature:

> The Supreme Court of Nevada **may** exercise its inherent authority as a separate branch of government to waive the provision of NRS 2.120 requiring 60 days between the notice of entry of new rules and its implementation for the purpose of adopting new rules to implement SB1. (emphasis added).

Emergency Declaration 031 does not permit the Court to ignore the plain language of NRS 2.120(2), as basic separation of powers "ensure that each power remains independent from influences by other branches of government..." so as not to "become a subordinate branch of

government." *Blackjack Bonding v. City of Las Vegas Municipal Court,* 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). Emergency Declaration 031 does not supplant statute.

2. The Court's inherent judicial power have limitations that do not justify enactment of the proposed mediation rules.

The Court's inherent judicial powers have limits, which do not support the implementation of the proposed mediation rules because there is no requisite connection to the administration of justice in the voluntary mediation program set up by the proposed rules. *Blackjack Bonding* is instructive here, in which this Court relied on the separation of powers doctrine, in part, to hold that while each branch of government should be "exercised without intrusion," each branch has inherent powers that are "ministerial" in nature. *Blackjack*, 116 Nev. at 1221. This Court defined such ministerial functions as "methods of implementation to accomplish or put into effect the **basic function**" of each branch of government. *Id.* (emphasis added). *Blackjack* looked at the municipal court's ability to assess and collect fees on bail bonds and determined it had such inherent power because this "ministerial" function pertained to internal, judicial department business. The collection of fees was "inherent or incidental" to a judicial function, which would properly fall under a court's inherent authority. *Id.* at 1221.

The question at hand is whether the proposed eviction mediation rule is "ministerial" – in other words, necessary to the court's functions – in order to confer proper inherent authority. In this case, propping up the proposed mediation program by SCR does not seem to be construed as a "ministerial" function nor is it inherent or incidental to the Court's core judicial function. The proposed mediation rules hardly seem related to internal, judicial department business, and therefore, implementation of the same invites the Court to potentially exceed both its statutory and inherent authority.

Similarly, *Halverson* recognizes that inherent judicial power is not infinite and is generally limited "to acts that are reasonably necessary for the judiciary's proper operation." *Halverson* 123 Nev. at 263. Yet, the proposed mediation rules meant to facilitate a program to "connect landlords and tenants to untapped residential assistance funds and unemployment compensation" is not necessary for the judiciary's proper function. ADKT 567, Order, Aug. 31, 2020. While aspirational, the proposed rules seem results-oriented and arguably exceed the judicial department function, which is to administer justice by applying the law.

Even considering for argument's sake that the expiration of the current eviction moratorium will "result in increased traffic in courthouses across the State, posing a threat to public health and safety," that premise assumes the proposed, voluntary mediation program will decrease the number of evictions and subsequent burden on the courts. *Id.* Such presupposition is tenuous, at best, akin to the assumption that Nevada will experience a "tsunami" of evictions, discussed further below. Still, thrusting a mediation program that will undoubtedly require additional judicial review,

intervention and coordination by the courts seems to undercut the argument that the proposed mediation program is "reasonably necessary for the judiciary's proper operation ... in an emergency situation." *Halverson*, 123 Nev. at 263 (internal citations omitted). The mediation program is hardly necessary for the court's operation during the COVID-19 pandemic and inherent authority cannot support implementation of the same.

3. **Assuming, *arguendo*, that inherent authority is proper, the proposed mediation rule must terminate at the conclusion of the COVID-19 emergency, which Exhibit B considers.**

Assuming the Court has the inherent authority to adopt the proposed mediation rule, at a minimum, we would urge the Court to include an expiration of the rule as Exhibit B, Sections (q) and (r) contemplate. The mediation program should expire when the COVID-19 emergency expires. Troublingly, Exhibit A does not include a sunset date of the mediation rule. This omission defies the Court's inherent powers, which "cease when the court's ability to carry out its constitutional duty to ensure the administration of justice no longer is in jeopardy." *Halverson*, Nev. 123 at 263. When the pandemic is over, the Court's purported administrative of justice will no longer be threatened, and therefore the rule should sunset.

4. **Exhibit B better facilitates the goal of the mediation program – to connect truly impacted tenants to precious rental assistance dollars, while preventing the disruption of existing payment plans with landlords.**

Should the Court implement a proposed mediation rule, Exhibit B presents a more comprehensive approach to ensure the intended goals of the mediation program are met. To begin, Exhibit A does not contain an eligibility clause, thereby enabling tenants who are not truly impacted by COVID-19 to arguably prolong the eviction process and further evade their contractual duties. Exhibit B requires tenants to include a sworn statement indicating how they are unable to fulfill their rental obligations because of the coronavirus, which we view as a critical threshold to mediation. Ex. B, Section (d)(1)(D). Only those impacted by the emergency should be able to request mediation assistance.

Next, Exhibit B properly requires applicants to indicate whether the tenant has attempted to or entered into a repayment plan with their landlord for rental arrearages and asks the applicant to attach a copy of any written repayment plan. Ex. B, Section (d)(1)(E),(H). Exhibit B further clarifies that a tenant is not entitled to mediation of the case if the tenant has previously entered into a written payment arrangement or lease addendum negotiated in good faith with the landlord for rental arrearages. Ex. B, Section (f)(1). At a minimum, landlords and tenants alike, that took time to negotiate a payment plan should be entitled to receive the benefit of that bargain. The proposed mediation rules should not uproot valid agreements negotiated and entered into by both

parties. These payment plans are the common sense result of tenants and landlords working together and do not require paying a mediator to facilitate.

As a practical matter, the purported "eviction tsunami" seems unlikely given the number of tenants that have entered into payment plans. To be sure, the Apartment Association and MHCOA are not in the business of evicting our residents. In fact, occupancy is critical to our business model. The eviction moratorium has, however, prevented us from evicting those tenants that were "in the queue," evading their rental obligations pre-pandemic and entirely unrelated to COVID-19. Therefore, there is a backlog of tenants that will be evicted, but our statistics do not support the alleged "tsunami" proclaimed by some. In Clark County, for example, the Apartment Association is experiencing a 12% delinquency rate, yet importantly more than half of those tenants are in negotiated payment arrangements with their landlords – 8,184 households. These 8,184 contracts, in Clark County alone, should not be disrupted or ignored as Exhibit A allows. Only a small fraction of those tenants in payment plans are expected to default, some 1,300 households or so. However, it is the larger share of tenants, some 2,500 tenants, that are presumably not impacted by COVID because they not communicating with their landlords at all, which Exhibit B appropriately addresses. Exhibit B better ensures that precious rental assistance dollars go toward assisting those truly in need without uprooting existing contracts.

Thank you for your time and your consideration.

Sincerely,

Mackenzie Warren