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September 16, 2020

FILED

SEP 17 2020

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

Via Email and Regular Mail

Elisabeth A. Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, Nevada 89701

Re: Written Comments Regarding ADKT 567

Dear Ms. Brown:

Please allow this to serve as written comments concerning ADKT 567, and particularly concerning the proposed alternative mediation rules. Additionally, please allow this to serve as written confirmation that I am interested in participating in the hearing concerning these matters on September 22, 2020.

I. ADKT 567

A. THE 30 AND 60 DAY PERIOD FOR THE IMPLEMENTATION OF THE ALTERNATIVE MEDIATION RULES AND RULES OF CIVIL PROCEDURE CANNOT BE WAIVED OR SHORTENED.

ADKT 567 seeks to adopt rules relating to the mandatory mediation of summary residential evictions and to amend the Justice Court Rules of Civil Procedure respecting summary eviction notices. The ability to do both of these things is provided for by NRS 2.120. That statute provides as follows:

> **NRS 2.120 Adoption of rules for government of courts and State Bar of Nevada; adoption of rules for civil practice and procedure.**
>
> 1. The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for its own government, the government of the district courts, and the government of the State Bar 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 30 days after entry of an order adopting such rules.

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> 2. 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.

Although numerous public comments have been made by the Governor and other government officials of the desire to quickly implement this mandatory mediation program and to enact the corresponding changes to the JCRCP, the plain language of NRS 2.120 does not allow for the waiver of the applicable timelines for implementation of rule changes or revisions to rules of civil procedure. There does not appear to be any Nevada case law that allows or authorizes the court to summarily waive either of the above timeframes either. To the contrary, since 1875, the Nevada Supreme Court has held that "courts are not allowed to enforce rules of their own making until thirty days after their adoption and publication." Smith v. Lee, 10 Nev. 208, 211 (1875).

Accordingly, regardless of what rules may be adopted or what rules of civil procedure are modified, they cannot, under precedent or statutory authority, go into effect before the expiratoni of the time lines set forth in NRS 2.120.

B. THERE ARE NUMEROUS CONCERNS REGARDING THE EFFICACY OF MANDATORY MEDIATION IN EVICTION PROCEEDINGS.

Another concern with the implementation of the proposed mandatory mediation proposal and the concurrent rule changes is that the purpose of such rule changes are, as set forth in NRS 2.120, for the purpose of simplifying judicial proceedings and to promote the speedy determination of litigation upon its merits. The proposed mediation rules and the JCRCP changes accomplish neither of these goals. Indeed, they do exactly the opposite by creating an entirely new layer of hoops that every landlord in Nevada will have to jump through in the relatively straightforward situations where a tenant that has failed to pay their rent. Nevada presently has a summary eviction process that is simple and allows for the speedy determination of the matter upon its merits. Forcing parties to engage in a non-binding mediation program does little other than delay the eviction proceeding.

Moreover, there is no evidence that mandatory, non-binding mediation proceedings are effective at resolving eviction proceedings concerning non-payment of rent. In fact, it is highly likely that such mediation proceedings will accomplish little. For example, the average monthly rent in the Las Vegas area is approximately $1,100 per month. Due to the eviction moratoriums that have been in effect, there are many tenants that have not paid rent since April 2020 or earlier. That means that there are tenants that, as of September 2020, owe $6,600 in unpaid rent, with that amount potentially reaching $9,000 by November 2020. It is completely unrealistic to expect any tenant that lost their employment or suffered a reduction in work during those prior months to agree to or even be able to pay any sort of rational repayment plan for that amount of money. Indeed, under the Governor's previous suggested amount of no more than fifteen percent (15%) of the monthly rental amount, it would take a tenant 54 months to repay a $9,000 debt. Why would any tenant agree to that? Moreover, it is unreasonable to expect landlords to wait that long to be repaid by someone that is most likely not going to be a tenant for that period of time.

Additionally, the mediation program will serve little purpose if there is no money available to be distributed to landlords that participate. The amounts of money that are being earmarked for the mediation program are purportedly between $10 and $20 million. At an average of $5,000 per tenant/landlord dispute, that amount of money will only help between 2,000 and 4,000 renters. Once those funds are depleted, there will be little impetus for landlords to participate in mediation proceedings.

It is also unrealistic to expect tenants who are owed unpaid unemployment funds are going to voluntarily agree to turn over significant portions of those funds to their landlords. Why would they agree to do that? Furthermore, while statements have been made that there are going to be millions of dollars in rental assistance made available to landlords that participate in the mediation program, there is absolutely nothing set forth in the mediation proposal or the JCRCP which provide for the efficient administration of those funds. Indeed, it cannot be emphasized enough that the current rental assistance programs have, for many reasons, been largely ineffective at distributing the amounts already allocated. Nothing in the current proposal or rule changes resolve or address those problems or ensure that the funds will actually be timely or efficiently distributed to any landlord that participates in the program.

All of these reasons practically demonstrate why the mediation proposal is unlikely to solve the problems or accomplish the goals as stated in the ADKT Petition.

C. CONCERNS REGARDING THE TWO PROPOSALS.

1. Comments concerning Proposal Exhibit A

The first concern with this proposal involves sections (e) and (f). The proposal provides upon the filing of the landlord's complaint the matter will be automatically assigned to a mediator but it does not provide that a hearing will be set within 30 days of the filing of the complaint. SB1 provided for the eviction matter to be stayed "for not more than 30 days" so

there needs to be language ensuring that the hearing is set to occur no more than 30 days after the landlord's complaint is filed.

Additionally, there is a discrepancy with how the 30 day mandatory hearing is to be reconciled with subsection (i)'s requirement that the mediator "shall file with the court the results of the mediation" at least two judicial days prior to the scheduled court date. What happens if the mediator does not file the results two judicial days before the scheduled court date? That is unclear from the proposal.

Subsection (j)'s terms are equally problematic and one-sided. If the landlord fails to appear at the mediation, the proposal requires the court to dismiss the eviction, but if the tenant fails to appear at the mediation, the proposal requires the Court to proceed with the hearing. That does not make any sense. If the tenant fails to appear at the mediation then the eviction should be granted.

Additionally, there are no provisions or terms which address the situations where a tenant and landlord entered into a repayment plan prior to the commence of the eviction proceeding. A landlord should not be required to participate in mediation if they previously entered into a payment plan with the tenant and the tenant subsequently failed to pay their rent. This is a large flaw in the Exhibit A proposal.

Similarly, there are no provisions or limitations concerning serial mediation requests by the same tenant, nor is there any requirement for tenants to demonstrate that they have attempted to obtain rental assistance prior to requesting the mediation.

2. <u>Comments Concerning Exhibit B Proposal.</u>

The requirements in subsection (d)(1) address several of the concerns identified with the first proposal.

Similarly, the provisions of subsection (f) are a fair basis to disallow a tenant to request mediation.

However, the same problems noted above with Exhibit A's proposal regarding ensuring that the eviction hearing is not delayed more than 30 days are still present in Exhibit B's subsections (g) and (k).

Similarly, while the landlord's ability to oppose mediation in subsection (i) is a good idea, unless there is a provision requiring the court to rule on such a motion within an expedited period of time, the mediation could be scheduled to occur prior to the motion being decided and/or if the mediation is halted until the court decides the motion, then that too could delay the eviction hearing from occurring within the proscribed 30 days after the filing of the landlord's complaint.

Given the stated reasoning for why this program is being implemented, the automatic sunset provision of subsection (s) and the discretionary provisions of subsection (r) should absolutely be included in whatever rules are adopted. Giving the courts charged with implementing and working with these rules, the leeway to determine whether they are no longer needed accomplishes the ultimate goals of NRS 2.120.

D. THE AMENDMENT TO RULE 101 OF THE JUSTICE COURT RULES OF CIVIL PROCEDURE CANNOT BE IMPLEMENTED UNTIL AT LEAST 60 DAYS FROM THE ORDER.

The amendment to Rule 101 that Exhibit C requires adds additional statutory language that landlords will be required to provide to tenants in notices given pursuant to NRS 40.253. This appears to be more than a simple change to the Justice Court Rules of Civil Procedure. Rather, by its very terms, this amendment appears to be amending NRS 40.253 to require additional language that Landlords must inform tenants of. Under Article 4 of the Nevada Constitution, the Legislative Branch is the department of government with the authority to revise statutes and implement changes to Nevada's statutes.

Consequently, the Court does not have the authority to make revisions to NRS 40.253 that implement additional notification requirements.

However, even if the proposed amendment was allowed to be made, the amendment could not be implemented earlier than 60 days after the order thus, at the earliest, the rule could not go into effect until late November 2020.

Sincerely,

MARQUIS AURBACH COFFING

Terry A. Moore, Esq.

TAM:cjh