

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ADOPTION
OF RULES FOR FORECLOSURE
MEDIATION

ADKT No. 435

FILED

JUN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
CHIEF DEPUTY CLERK

ORDER ADOPTING FORECLOSURE MEDIATION RULES

WHEREAS, on June 5, 2009, the Hon. James W. Hardesty, Chief Justice of the Nevada Supreme Court, filed a petition in this court requesting the adoption of rules for the foreclosure mediation program established by AB 149, and

WHEREAS, this court conducted public hearings on the proposed rules on June 16, 2009, and June 26, 2009, and

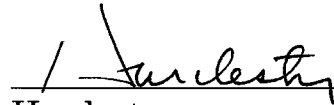
WHEREAS, this court has concluded that adoption of the rules is warranted, accordingly

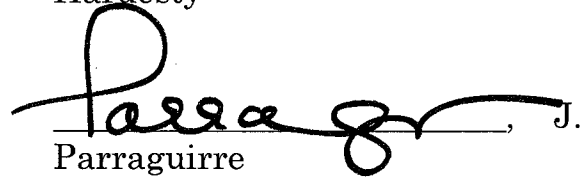
IT IS HEREBY ORDERED that the Foreclosure Mediation Rules are adopted as set forth in Exhibit A.

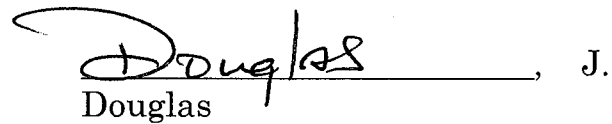
IT IS FURTHER ORDERED that these rules shall be effective July 31, 2009. The clerk of this court shall cause a notice of entry of this order to be published in the State Bar of Nevada's official publication. The clerk shall publish this order by disseminating copies of it to all subscribers of the advance sheets of the Nevada Reports and all persons and agencies listed in NRS 2.345, and to the executive director of the State Bar of Nevada. The certificate of the clerk of this court that she has accomplished the above-described

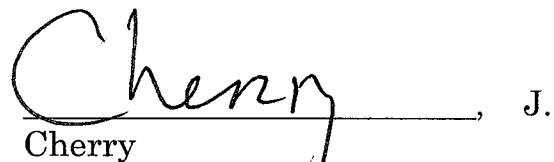
publication of notice of entry and dissemination of this order shall be conclusive evidence of the adoption and publication of the foregoing rules.

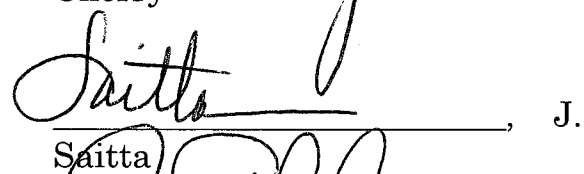
Dated this 30th day of June, 2009.

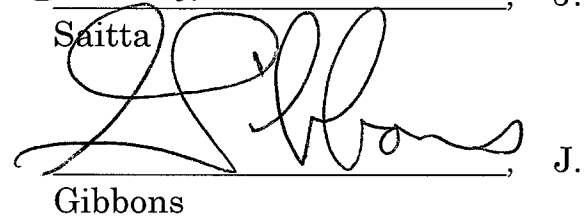
, C.J.
Hardesty

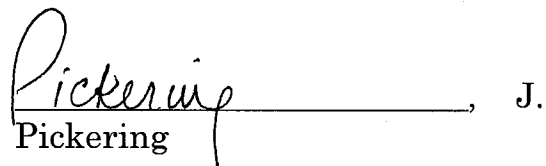
, J.
Parraguirre

, J.
Douglas

, J.
Cherry

, J.
Saitta

, J.
Gibbons

, J.
Pickering

cc: Hon. Jim Gibbons, Governor
Senator Steven Horsford
Senator William Raggio
Assemblywoman Barbara Buckley
Assemblywoman Heidi Gansert
All District Court Judges
Kathleen J. England, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
Board of Governors, State Bar of Nevada
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Nevada Justice Association
Legal Aid Center of Southern Nevada
Nevada Legal Services
Washoe Legal Services
Volunteer Attorneys for Rural Nevadans
Nevada Association of Counties
Nevada Bankers Association
Nevada Land Title Association
Administrative Office of the Courts

EXHIBIT A

FORECLOSURE MEDIATION RULES

I. SCOPE OF RULES

Rule 1. The Foreclosure Mediation Program.

1. *Authority and scope.* Pursuant to the jurisdictional authority provided by Chapter 107 of the Nevada Revised Statutes and the Nevada Supreme Court's inherent power to create rules for the efficient administration of justice, these rules are enacted to apply to the mediation of any owner-occupied residential foreclosure arising from the recording of a notice of default and election to sell on or after July 1, 2009.

2. *Purpose.* The purpose of these rules is to provide for the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures which shall take place within 90 days after the recording of the notice of default and election to sell. The Foreclosure Mediation Program will permit deed of trust beneficiaries (lenders) and homeowners, with the assistance of a mediator, to exchange information and proposals that may avoid foreclosure.

3. *Availability of program.* Subject to limited exceptions set forth in Rule 5 hereafter, the Foreclosure Mediation Program is mandatory when the grantor or person who holds title of record of an owner-occupied residence timely requests mediation.

Rule 2. Mediation Administrator. The Mediation Administrator (Administrator) shall be appointed by the Court or its designee. The Administrator may appoint staff, including a Mediation Supervisor, to assist in the administration of the program. When the efficient administration of the program warrants, the Administrator may contract for training and other mediation-related services.

Rule 3. Presiding Mediator. A foreclosure mediation may be conducted by either a senior judge, Supreme Court settlement conference judge, or other person designated by the Supreme Court.

1. *Assignment of presiding mediator.* No later than 10 days after receipt of notification of an election for foreclosure mediation, as provided in Rule 5(4)(b), the Administrator or designee shall randomly select and assign from the applicable geographic area a mediator to preside over the mediation. The Administrator shall notify the selected mediator and the parties to the mediation of the mediator's appointment. The assigned mediator will have 2 days after receiving the assignment to determine and notify the Administrator of a conflict requiring his or her recusal. Upon such notification, the Administrator shall immediately and

randomly select another mediator to conduct the mediation. The Administrator may direct a mediator to cluster several mediations for a lender.

2. *Panel of mediators.* The Administrator shall maintain a list of mediators by geographic area available to hear foreclosure mediations. The list shall include all senior judges, Supreme Court settlement conference judges, and other designees who are appointed by the Court to serve as presiding mediators in the Foreclosure Mediation Program and are qualified pursuant to subsection 3.

3. *Mediator qualifications.*

(a) Mediators must meet the following minimum qualifications:

(1) Be authorized to practice law in the State of Nevada; or

(2) Be an experienced mediator. For purposes of subsection 3, 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.

(b) Additionally, all mediators must participate in a training program of at least 4 hours consisting of education in mortgages, deeds of trust, promissory notes, loan modifications, Nevada foreclosure laws, and such other topics as determined necessary by the Court.

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

4. *Appointment of mediators.*

(a) The Administrator, or designee, shall solicit and provide the Court with the names and qualifications of persons who have applied to become mediators. The Court shall review the qualifications and approve, deny, or continue the applicant's request to serve as a mediator. The term of appointment shall be 1 year.

(b) The Administrator shall receive all affidavits and issue all certificates as may be required herein. The list of court-approved mediators shall be maintained by the Administrator.

5. *Authority.* The presiding mediator shall have all requisite authority to conduct a foreclosure mediation. The mediator shall timely schedule a mediation and notify the Administrator of the outcome of each mediation.

Rule 4. Conduct, Disqualification, and Recusal.

1. Any mediator appointed pursuant to these rules is subject to the Nevada Code of Judicial Conduct as adopted or amended by the Supreme Court of Nevada.

2. A mediator who would be disqualified for any reason that would disqualify a judge under the Nevada Code of Judicial Conduct shall immediately recuse himself or herself as a mediator in the particular case.

II. PARTICIPATION IN THE FORECLOSURE MEDIATION PROGRAM

Rule 5. Eligibility for the Foreclosure Mediation Program.

1. The program applies to any grantor or person who holds the title of record and is the owner-occupant of a residence as to which a notice of default and election to sell has been recorded on or after July 1, 2009.

2. Owner-occupied housing means housing that is occupied by an owner as his or her primary residence. This term does not include any time-share or other property regulated under NRS Chapter 119A.

3. All grantors or persons who hold the title of record who have timely elected to participate in the program may do so and are herein referenced as the eligible participants, except where:

(a) The grantor or the person who holds title of record has previously surrendered the real property that is the subject of the foreclosure proceedings, as evidenced by a letter signed by the grantor or the person who holds title of record confirming the surrender or delivery of the keys to the property to the trustee, the beneficiary of the deed of trust, or the mortgagee, or an authorized agent of any of these recipients; or

(b) A petition in bankruptcy under Chapters 7, 11, 12, or 13 of Title 11 of the United States Code has been filed with respect to the grantor or the person who holds title of record on or after July 1, 2009, and the bankruptcy court has not entered an order closing or dismissing the case, or granting relief from the automatic stay of the foreclosure.

4. The mediation process under these rules shall be initiated by the preparation and delivery of an Election of Mediation by a grantor or person who holds title of record of an owner-occupied residence on a form provided by the Administrator and payment of the fee required by Rule 14 herein.

(a) The eligible participant shall, not later than 30 days after the service upon him or her in the manner required by NRS 107.080 of the notice of default and election to sell, complete the Election/Waiver of Mediation Form and deliver the form to the trustee, by certified mail, return receipt requested. The eligible participant shall also mail a copy of the Election/Waiver of Mediation to the Administrator.

(b) The trustee shall, within 10 days of the receipt of the Election of Mediation, deposit with the Administrator a Consent to Mediation on a form provided by the Administrator, together with the fees required in Rule 14 herein. Any delay by the trustee in notifying the Administrator of an Election of Mediation shall extend the time for mediation set forth in Rule 1(2).

5. Failure by any eligible participant to timely deliver an Election of Mediation to the trustee or to attend and participate at a mediation scheduled under these rules shall result in the Administrator issuing a certificate stating no mediation is required.

6. All beneficiaries of a deed of trust sought to be foreclosed against an eligible participant who has timely delivered an Election of Mediation shall

participate in the Foreclosure Mediation Program, be represented at all times during a mediation by a person or persons who have the authority to modify the loan secured by the deed of trust sought to be foreclosed, and bring to the mediation the original or a certified copy of the deed of trust, the mortgage note, and each assignment of the deed of trust and the mortgage note.

(a) The eligible participant and lender representatives with authority to modify the underlying loan shall be physically present or, if approved by the mediator for good cause shown, may participate in the mediation by phone.

(b) Unless extended by the presiding mediator, the mediation shall be conducted within 90 days of the recording of the notice of default and election to sell. Upon the completion of the mediation, the mediator shall prepare the Mediator's Statement in accordance with Rule 12 herein.

(c) For purposes of this rule, a certified copy of the original mortgage note, deed of trust, and each assignment of the deed of trust and mortgage note is only satisfied when the mediator receives a statement under oath signed before a notary public that must include:

(1) The name, address, capacity, and authority of the person making the certification;

(2) The person making the certification is in actual possession of the original mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust; and

(3) The attached copy of the mortgage note, deed of trust, and each assignment of the mortgage note and deed of trust are a true and correct copy of the original mortgage note, deed of trust, and assignment of the deed of trust in the possession of the person making the certification.

(d) In the event of the loss or destruction of the original mortgage note, deed of trust, or assignment of the mortgage note or deed of trust, the mediator shall recognize a judicial order entered pursuant to NRS 104.3309 providing for the enforcement of a lost, destroyed, or stolen instrument.

(e) A party to the mediation may file a petition for judicial review with the district court in the county where the notice of default was properly recorded seeking a determination of bad faith participation and sanctions pursuant to NRS Chapter 107 as amended. All such petitions shall be reviewed by the district court in accordance with the Nevada Rules of Civil Procedure and NRS Chapter 107.

Rule 6. Option for Inclusion. For any owner-occupied property located in Nevada where a Notice of Default is recorded prior to July 1, 2009, the grantor or person who holds the title of record (eligible participant) and the beneficiary of the deed of trust may agree in writing to enter the Foreclosure Mediation Program governed by NRS Chapter 107 and these rules. Notice and a copy of the agreement must be provided to the Administrator. Subject to the approval of the Administrator, the mediation process shall be conducted with the appointment of a mediator within 10 days of the Administrator's acceptance of the parties agreement to mediate.

III. MEDIATION PROCEDURES

Rule 7. Documents to Be Presented for the Mediation. In addition to the documents set forth in Rule 5, the parties shall prepare such papers and provide to the mediator, and exchange the items required to be exchanged, using the most expeditious method available, at least 7 days prior to the mediation, and such other documents or estimates as the mediator may later direct, but which at a minimum shall include the following:

1. The homeowner shall prepare a Financial Statement and Housing Affordability Worksheet to include the information set forth in forms provided by the Administrator.

2. The beneficiary of the deed of trust or its representative shall produce the most current and appropriate appraisals that it has with respect to the real property that is the subject of the notice of default and shall prepare an estimate of the "short sale" value of the residence that it may be willing to consider as a part of the negotiation if loan modification is not agreed upon.

3. Both parties to the mediation shall prepare and submit to the mediator under confidential cover a nonbinding proposal for resolving the foreclosure. Additionally, the beneficiary of the deed of trust shall, under confidential cover, provide to the mediator the evaluative methodology used in determining the eligibility or noneligibility of the grantor or the person who holds the title of record for a loan modification.

Rule 8. Settlement Before Mediation. In the event the foreclosure issues are resolved before the scheduled mediation, the parties must, no later than 2 days prior to the scheduled mediation date, advise the mediator of their settlement. Any settlement will not result in the refund of fees.

Rule 9. Calendaring. Unless otherwise stipulated by the parties and approved by the presiding mediator, or for good cause shown, a mediation will be calendared to commence no later than 10 days prior to the 90th day following the service of the notice of default, pursuant to NRS 107.080.

Rule 10. Continuances. No request for a continuance of a mediation scheduled in the Foreclosure Mediation Program may be granted, except upon a showing of extraordinary circumstances. A motion for a continuance must be in writing, served on the presiding mediator and opposing party, and set forth the extraordinary circumstances with particularity. A ruling by the presiding mediator granting a continuance must state the nature of the extraordinary circumstances and provide at least 3 dates within the ensuing 10 days when the parties can conduct the mediation. The presiding mediator will then calendar the case for

mediation on one of the specified dates. Conflicts in the schedule of counsel shall not constitute extraordinary circumstances.

Rule 11. Location of Mediation. The presiding mediator shall designate the location, time, and place for the mediation in coordination with the parties and shall notify the Administrator of the same. Upon request from the presiding mediator, the Administrator shall assist in designating a location for the mediation.

Rule 12. Time Limits and Mediator's Statement.

1. Unless extended by the presiding mediator, the parties will be allowed a total of 4 hours to present and conclude the mediation.

2. Within 10 days after the conclusion of the mediation, the mediator must file with the Administrator and serve on all parties a copy of the Mediator's Statement on a form provided by the Administrator.

Rule 13. Interpreter Services. Any party requiring interpreter services is responsible for contacting, scheduling, and insuring an interpreter is present for the mediation. The interpreter's compensation is the responsibility of the party requesting the service. The Administrator shall maintain a list of interpreters qualified to interpret in mediations. The list must be made available to the presiding mediator and parties.

Rule 14. Fees for Presiding Mediators. Mediators shall be compensated in the amount of \$400, paid equally by the parties unless otherwise stipulated. Each party must pay its respective fee (\$200) at the entry point into the Foreclosure Mediation Program. Payment must occur by cashier check, money order, or, when available, electronic payment. The payment is nonrefundable.

Rule 15. Deposits; Failure to Pay. If a party to a mediation fails to pay the \$200 toward the mediator's fee, the mediation may be terminated and relief awarded to the nondefaulting party, as may be deemed appropriate.

Rule 16. Confidentiality. All documents and discussions presented during the mediation shall be deemed confidential and, except in an action to review a petition for judicial review for sanctions under these rules, shall be presumed to be inadmissible in any subsequent actions or proceedings. Nothing contained herein shall prevent the disclosure of such limited information by the mediator or parties as required by NRS Chapter 107.