

NEVADA FORECLOSURE MEDIATION PROGRAM

A MEDIATORS PERSPECTIVE

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BACKGROUND

During the 2009 legislative session, Assembly Bill 149 was passed and signed by Governor Gibbons. AB 149 was passed to address the foreclosure problem in Nevada. After July 1, 2009, homeowners that receive a notice of default concerning their primary residence are entitled to mediate their dispute. If homeowners elect to mediate they must provide the proper forms together with a fee to the Nevada Foreclosure Mediation Program (the "Program").ⁱⁱ The program then assigns the case to a foreclosure mediator who contacts the parties and schedules a mediation date and time.

Mediation is generally a facilitative process wherein the parties meet and try to work out the dispute through an impartial third-party mediator.

Once parties elect to mediate, a foreclosure mediation is scheduled to occur within eighty (80) days of the notice of default. Additionally, the parties are required to submit and exchange documents seven (7) days prior to the mediation. The homeowner is required to provide the following documents: (1) completed financial statement and housing affordability forms, (2) bank statements for the two most recent months, (3) most recent tax returns, (4) proof of income, and (5) a confidential non-binding proposal for resolving the foreclosure. The lender is required to provide: (1) original or certified copy of the deed of trust, mortgage note, and any assignments of the same, (2) an appraisal of the property, (3) an estimate of the "short sale" value of the property, (4) a confidential non-binding proposal for resolving the foreclosure, and (5) the evaluative methodology used in determining eligibility for loan modification. Additionally, the lender representative attending the mediation must have the authority to modify the loan.

During the mediation the parties negotiate a resolution to the foreclosure in light of their respective interests and goals. At the conclusion of the mediation, the mediator is charged with the responsibility of issuing a mediator's statements which reports whether the parties appeared, whether the parties produced documents, whether the parties had the proper authority, and whether the parties acted in good faith.

SUCCESS RATE AND EFFECTIVENESS

Gauging the success of the Program will depend upon the criterion used. About ninety percent (90%) of the mediations I have conducted have resulted in some type of agreement, however nearly all the participants would agree that attending the mediation was more advantageous than not. Currently, statistics regarding the success rate of the program have not been released, but the mediations I have conducted have been overwhelmingly successful and entirely because of the preparation and efforts of the parties involved. Preparation and open communication prior to the mediation enhances the positive dynamics of the process.

Prior to the Program, homeowners repeatedly expressed frustration with their inability to reach a lender's representative with authority to modify their loans. Today, both lenders and homeowners who have participated in the mediation have found the forum constructive whether an

agreement was reached or not.

EXPERIENCES

While, some mediators have become frustrated with the positions taken by the parties and their inability to reach an agreement, in general, the parties have negotiated in good faith, and sought viable solutions to avoid foreclosure. Every case I have ever mediated has raised its own particular set of circumstances. To me, the different circumstances are a testament to the importance of a case-by-case review of every foreclosure. Some homeowners look for a way to save their homes from foreclosure, while others simply want a graceful exit from the property and are not in a financial position to sustain any type of mortgage. However, the parties must ultimately decide whether an arrangement is right for them. A party is never forced to take a position or settlement to which they do not agree to be bound. Some homeowners do not have the ability to afford a mortgage on a property that is underwater, while some lenders prefer to take a loss in the foreclosure sale and move past this period. Regardless of the direction the parties take, the ability to discuss the interest of each party is helpful in facilitating the process and, generally, the parties embrace this approach.

Moreover, the process of mediation has not served to reinvent the wheel of foreclosure solutions, nor should it. Rather, the process serves as an avenue for discussion and understanding; making sure the parties feel comfortable with their choices and the alternatives. As a mediator, my theme throughout the process is risk and sustainability. With the overwhelming high default rate on loan modifications I always ask the parties to consider whether they are entering into an agreement that is sustainable and whether the risks involved with foreclosure are still a better alternative than any offers made between the parties. As the mediator I help the parties consider the risks involved with the different alternatives and aid in searching and crafting a resolution that is mutually agreeable to all involved.

As of January 2009, over 1,000 mediations were successfully completed. I served as the mediator for nearly five (5%) of those cases. Of those I have conducted, rarely have both parties come fully prepared with an open and willing attitude. Ultimately however, an open dialogue between the homeowner and the lender was possible and a resolution was reached. Was every resolution ground breaking and beyond the normal programs offered by the lenders? No. However, given the structure of the sessions, parties were able to reach resolutions that were catered to the specific homeowner in each case.

i. Royi Moas has been an associate with the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP for nearly three (3) years. Prior to joining the legal field, he volunteered briefly as a neighborhood mediator for the Clark County Neighborhood Justice Center. He attended law school at Pepperdine University School of Law in Malibu, California. While obtaining his law degree he completed his Master's in Dispute Resolution at the Straus Institute for Dispute Resolution at Pepperdine University. As part of his studies he conducted hundreds of mediations for the California Center of Academic Mediation Professionals, the Los Angeles Superior Court, and as Law Clerk for the Honorable Judge Alexander H. William, III in Downtown, Los Angeles.

ii. The Nevada Foreclosure Mediation Program is self-sustaining. A fee that has been added to each foreclosure goes to the administration expenses and the \$200.00 fee that the lender and the homeowner pay to attend the mediation go directly to the mediator.