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VIA FACSIMILE & US MAIL

Judge Donald Mosley
Department 14
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Fax: 702-671-4418

Re: State of Nevada Foreclosure Mediation Program

Dear Judge Mosley:

In 2009, the Legislature enacted AB149 which added the Foreclosure Mediation Program to the foreclosure process of owner-occupied residential properties. As part of this program, the Legislature implemented a requirement for a lender to obtain a certificate from the Supreme Court before they may pursue a trustee's sale of a property. A certificate may be issued in various ways. If the homeowner does not elect to mediate within 30 days of receipt of the Notice of Default, a certificate may issue. If the parties attend the mediation, provide the requisite documentation and negotiate in good faith, a mediator recommends that a certificate issue, regardless of the outcome of the mediation. Additionally, both parties have the right to bring the matter before the district court on a petition for judicial review, at which time, the court may issue a certificate. Once the homeowner elects to mediate, a stay on all other foreclosure activities goes into effect until/unless the certificate is used.

If, however, a lender "fails to attend the mediation, fails to participate in the mediation in good faith or does not bring to the mediation each document required by [the Foreclosure Mediation Rules] or does not have the authority or access to a person with the authority required by [the Foreclosure Mediation Rules]... The court may issue an order imposing such sanctions against the beneficiary of the deed of trust or the representative as the court determines appropriate, including, without limitation, requiring a loan modification in the manner determined proper by the court." NRS §107.086(5).

Upon information and belief, your department is assigned most, if not all, of the petitions for judicial review which stem from the Foreclosure Mediation Program on behalf of the Eighth Judicial District Court of the State of Nevada.[1]

Yesterday, you heard the judicial review case of CitiMortgage v. Piazza, Case No. A-10-620274-J. In open court,[2] you adamantly stated that when the Foreclosure Mediation Program was first implemented, you and your colleagues[3] agreed **never** to implement a loan modification from the bench. You further stated that you have no intentions of ever considering enacting such a sanction in these cases. You further recognized that such was the sole express sanction listed by the legislature for this program. Moreover, you commented that if you were to start implementing loan modifications, you would "be here all day."[4]

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[1] Traditionally, case assignments are made based upon a random assignment of judges. It is unclear under what authority such a deviation from the traditional assignment policy supports the decision to solely assign these cases to Department 14.

[2] We are currently in the process of ordering the official transcript.

[3] You did not identify the identity of these people.

[4] Your commitment to providing one a full opportunity to be heard, as required under Code of Judicial Conduct Rule 2.6, has already been questioned in this case when you stated in an order that "the Court **refused to entertain** the matter of the requested injunction in that such proceedings are not contemplated under the rules governing the Foreclosure Mediation Program." Order dated September 23, 2010, Citimortgage v. Piazza, A-10-620274-J. This is an erroneous position as the only rule governing the Foreclosure Mediation Program related to judicial review is Rule 6.

Rule 6 is does not limit the court's power in engaging in judicial review. Foreclosure Mediation Rule 6(1) states that "[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." Judicial review is a specific judicial proceeding governed under statute. See NRS 233B.130 to 233B.140. Courts have issued injunctive relief as part of the judicial review process. See Commission on Ethics v. Hardy, 212 P.3d 1098 (2009); Citizens for Public Train Trench Vote v. City of Reno, 118 Nev. 574, 53 P.3d 387 (2002); Department of Motor Vehicles and Public Safety v. Jones-West Ford, Inc., 114 Nev. 766, 962 P.2d 624 (1998); Southern Nevada Homebuilders Ass'n, Inc. v. City of North Las Vegas, 112 Nev. 297, 913 P.2d 1276 (1996); O'Callaghan v. Eighth Judicial Dist. Court In and For Clark County, 89 Nev. 33, 505 P.2d 1215 (1973). There is nothing within Chapter 233B which would prevent a court from issuing injunctive relief as part of a judicial review proceeding.

Moreover, any such limitation that may be implied would be unconstitutional. The Nevada Constitution vests the state's judicial power in a Judiciary comprised of a Supreme Court, district courts, and justices of the peace. Nev. Const. art. 6, § 1. Specifically, with respect to the instant action, the "District Courts … have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." Nev. Const. art. 6, § 6. Further, the "District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, ***Injunction***, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction." Id (***emphasis added***). Such powers are separate and independent of the legislature and cannot be limited or redacted without an amendment to the Nevada Constitution.

Specifically, a court's powers to issue injunctive relief have been elaborated upon in NRS Chapter 33. NRS 33.010 provides the framework for when an injunction may be issued. Such framework places the question on the nature of the harm alleged by the parties, not the specific proceeding in which the request for relief is made. There is nothing within NRS Chapter 33 which prohibits a court from issuing injunctive relief during a judicial review.

More concerning, it is our understanding that this was not the first time you have made such comments. Upon information and belief, you recently made such comments in Countrywide v. Santos, A-10-620515-J on September 23, 2010. [5] I have also confirmed with other members of the Bar, that they have heard you make such comments.

I have no idea why you allegedly colluded with your fellow colleagues, the identity of whom is still unknown, and decided at the beginning of the implementation of the Foreclosure Mediation Program never to exercise the sole and express sanction which the Legislature directed to be considered as part of this program. While I have some ideas, I will reserve those thoughts for the time being.

In fact, the rational for such a decision is irrelevant; what is important is the effect of your statements. By making the advanced decision on how you (and your unidentified collages) would rule in these cases, you single handedly eviscerated any value that the Foreclosure Mediation Program may have. The heavy hammer that banks have hanging over their heads in the Foreclosure Mediation Program of a judicially implemented loan modification, or other comparable sanction, is the only mechanism to ensure that lenders provide homeowners with a de minimis amount of respect during these difficult times.[6] Sadly, this hammer no longer exists.

Moreover, your statement on the record yesterday is particularly concerning in light of your obligations as a judge. As background, it is important to note a few of the rules from the Code of Judicial Conduct for the State of Nevada.

Again, when it is related to this issue, you have stated that you would not engage in consideration of such outside motions because of the time and stress it would place on the court. With all due respect, a judge's caseload does not trump a person's rights to be heard under the Due Process Clause of the U.S. Constitution! Moreover, Rule 2.6 of the Code of Judicial Conduct expressly states that "[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." Hence, such approach to the administration of these cases is not only violative of the people's rights, it is an egregious violation of the Code of Judicial Conduct.

[5] This transcript has been ordered, as well.

[6] The fact that most of these cases stem from banks advising homeowners to stop paying their mortgages so that they can qualify for a loan modification and then, irrespective of such statements, refusing to provide any help is shameful. Many homeowners are losing their homes and destroying their credit only because a bank indicated that being in default on their mortgage was a pre-requisite for a loan modification. But why should the banks help? Banks can either modify a loan, taking smaller monthly payments, or immediately receive 110% of the loan value as a cash out payment when the home is foreclosed as a result of bailout dollars or other federal guarantee. Clearly, the banks know which the better business decision is. Accordingly, the motivation of the banks in this entire process is suspect, at best.

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

Rule 1.1. Compliance With the Law. A judge shall comply with the law, including the Code of Judicial Conduct.

Rule 1.2. Promoting Confidence in the Judiciary. A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.

[3] **Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.** Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] **Actual improprieties include violations of law, court rules, or provisions of this Code.** The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. Ordinarily, judicial discipline will not be premised upon appearance of impropriety alone, but must also involve the violation of another portion of the Code as well.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Rule 2.2. Impartiality and Fairness. A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

COMMENT

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

Rule 2.10. Judicial Statements on Pending and Impending Cases.

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) **A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.**

Clearly, you have made comments about how you (and your unidentified colleagues) will rule in future cases. This pledge, promise and/or commitment to refusing to consider modifying one's loan in a judicial review proceeding is a violation of Rule 2.10. The fact that your decision is in direct contradiction to the express words and spirit of NRS §107.086 (5) violates numerous other Rules, including Rule 1.1, 1.2, and 2.2.

The most unfortunately part, however, is the fact that hundreds, if not thousands of homeowners have come before you (and your unidentified colleagues) to date with the reasonable belief, grounded in statute, that a judicial modification was a possibility. Imagine their reaction when they realize that they never had a shot at such a remedy. Worse, however, how can a homeowner come before you in the future, with any belief in your judicial integrity or impartiality, knowing your predetermined beliefs on how you will rule, or what sanctions may be available to the homeowner?

Accordingly, I must point your attention to Rule 2.11(A) of the Code of Judicial Conduct. Rule 2.11(a) states, in part, that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Accordingly, in the interest of justice, and, in an attempt to restore some integrity back to the judiciary and the Foreclosure Mediation Program, I am hereby requesting that you (and the unidentified colleagues whom you have implicated with your comments) immediately disqualify yourselves from ALL judicial reviews of Foreclosure Mediations that are currently pending before your court.

Notwithstanding, I am specifically requesting that you disqualify yourself from the following pending cases:

- BERGENFIELD v. BANK OF AMERICA, A-10-623320-J (hearing scheduled for October 19, 2010)
- RODMAN v. BANK OF AMERICA, A-10-624897-J (hearing scheduled for October 21, 2010)

I represent the homeowners in the above cases. Based upon your comments in open court about your views on judicial review of mediations, these homeowners lack confidence you will provide them fair

consideration, yet alone a favorable decision in their cases. In the alternative, should you refuse, I will be filing an Affidavit of Disqualification pursuant to NRS § 1.235 shortly.

In sum, it is paramount to ensure a fair judiciary that has integrity and impartiality. While I recognize that the courts have been inundated by thousands of people who have been turning to the judiciary for assistance as part of the current foreclosure crisis, each and every person not only deserves an opportunity to be heard to the fullest extent of the law, but is entitled to have the full resources of the law available to them in the administration of their case. Your repeated and open remarks about how you (and the unidentified other judges) have pre-determined your rulings in these judicial review cases, may have violated the rights of all of those who came before your court in the past and significantly jeopardizes the judicial process of all of the people whose cases are pending.

Again, in the interest of justice, I strongly reiterate my request for you to disqualify yourself from all judicial reviews stemming from the Foreclosure Mediation Program. Specifically, I am requesting that you immediately recuse yourself from the two remaining cases which I have before you, BERGENFIELD v. BANK OF AMERICA, A-10-623320-J and RODMAN v. BANK OF AMERICA, A-10-624897-J.

Thank you for your prompt attention to this matter.

Very truly yours,

Jacob L. Hafter, Esq.

cc: Chief Judge Arthur Ritchie, Jr. (Fax: 671-0823)
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