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Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Proposed Foreclosure Rule Amendments
Hughes Justice Complex: P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Comments on Rule Amendments Proposed by the Special Committee on Residential Foreclosure

Dear Judge Grant:

Please accept these comments of Legal Services of New Jersey (LSNJ) on rule amendments proposed by the Special Committee on Residential Foreclosure (Committee) in the November 14, 2018, Notice to the Bar. LSNJ appreciates the Court's goal to extend mediation proceedings to foreclosure actions, and in general we concur with the proposal to the extent it addresses the needs of homeowners in New Jersey facing foreclosure who, too often, face a forbidding foreclosure process and impending homelessness without legal counsel. We do however, have several major concerns with the mediation program as proposed. Staff from LSNJ committed over 200 staff hours to the Committee process and with one exception all of the concerns raised in these comments were raised during the Committee process. Unfortunately, that Committee process variously failed to discuss, consider or vote upon these concerns that we raised during the process, and thus we must raise them, with emphasis, below. We note that the proposed draft rule initially proposed to the Committee by the AOC is essentially identical to the wording now proposed for public comment, except for several non-substantive minor edits.

As background, LSNJ's Foreclosure Defense Project (FDP), in existence since 2002, is by far New Jersey's largest provider of free legal representation to families facing foreclosure. Through our statewide LSNJLAW Hotline and website, we have provided legal assistance in nearly 8,600 cases in the past 10 years, and assisted even more residents through our educational materials. Unfortunately,

the FDP's resources are limited, and the project is able to meet only a fraction of the true need for representation.

LSNJ's extensive experience has revealed that many foreclosure defendants have meritorious state and federal claims, defenses, and counterclaims which are almost certain to remain unidentified and unconsidered unless foreclosure defendants are represented by competent counsel. The current judicial practice of segregating cases into "contested" and "uncontested", without regard to the fact that defendants are unrepresented, exacerbates this pattern of neglect. These claims and defenses include:

- violations of the Fair Foreclosure Act (FFA) at N.J.S.A. 2A:50-53 et seq., including but not limited to servicer refusal to accept the accurate cure amount to bring a borrower's loan current;
- violations of the Consumer Fraud Act (CFA) at N.J.S.A.56:8-1 et seq., including but not limited to inclusion of unlawful charges in communications with homeowners;
- violations of the Truth in Lending Act (TILA) at 15 U.S.C. 1601 et seq.;
- violations of the Real Estate Settlement Procedures Act (RESPA) at 12 CFR 1024.1 et seq.;
- violations of the Fair Debt Collections Practices Act (FDCPA) at 15 U.S.C. §§ 1692-1692p, including but not limited to unlawfully stating amounts and nature of debt in communication with borrowers;
- violations of due process concerning void actions against decedents or heirs who were not made parties to the action;
- fraud in single or multiple aspects of underlying transactions;
- unlawful denials of permanent loan modifications in violation of common law governing good faith, fair dealing and other contract law;
- unlawful delays or requests when processing of loss mitigation applications in violation of 12 CFR 1024.41; and
- various issues related to Home Equity Conversion Mortgages (HUD-insured HECM a/k/a Reverse Mortgages) that often give rise to protections available to senior and disabled individuals who, without representation from LSNJ or other legal counsel, would be unlikely to claim those available protections.

Our comments are in three parts: Section I contains LSNJ's renewed comments to the new foreclosure mediation rule and the proposed amendments to the service of process upon junior creditors in foreclosure actions; Section II includes a recommendation for a new rule to address a current gap in the process for writs of possessions and a revision to the foreclosure summons and complaint; and specific language proposals are set forth in detail in Section III.

We urge the Court to make the changes set forth in these comments.

Section I. Comments on Amendments Proposed by the Special Committee

A. Proposed New Foreclosure Mediation Rule.

As noted above, LSNJ's Foreclosure Defense Project receives applications for assistance which far surpass our available resources, and we are able to provide representation only to a small fraction of those that actually need our help. Also as noted, a number of cases have meritorious claims and defenses which are not raised because the defendants are unrepresented by legal counsel in a system that is not designed for lay persons. While a well-functioning and fair mediation process can provide unrepresented homeowners with more equitable access and a meaningful forum to save their homes, as proposed the rule falls short of these goals and raises several concerns:

- The draft rule grossly overstates the lack of defenses and claims which may be available to defendant homeowners (by editorializing, without foundation, "there is *typically no dispute* between the parties") and therefore unjustifiably limits the focus of the mediation process. The rule proposal also fails to address whether mediation will be available in situations in which a valid legal claim or defense has been asserted and the matter is "contested". LSNJ urges that all residential foreclosure cases be eligible for mediation and that the foreclosure mediation process encompass comprehensive settlement discussions.

- The draft rule exposes homeowners to a presumptively flawed process because, unlike R. 1:40 (Complementary Dispute Resolution), the proposed foreclosure mediation process is devoid of requirements addressing mediator training or qualifications, conduct of the proceedings, disclosure of conflicts of interests, and other such important concerns. At minimum, LSNJ urges the foreclosure mediators to comply in all respects with the requirements and procedures consistent with applicable existing CDR rules and urges the Court to include requirements for such mediators to obtain substantive foreclosure training.

- The draft rule does not include definitions of material terms used repeatedly throughout the proposal, such as "residential"; "homeowner"; "borrower"; "lender"; etc. The Rule must include definitions of such material terms, or, alternatively, references to relevant state laws which precisely define those terms such as N.J.S.A. 2A:50-55 (the Fair Foreclosure Act), which defines "residential mortgage".

- The rule requires homeowners to "opt in" – a procedure proven nationally to create an access to justice barrier for homeowners, especially true for low income, elderly, disabled, those with limited reading or writing proficiency, homeowners who are likely to be confused by the different requirements for filing an answer versus requesting mediation, all of whom are likely to be in a heightened state of anxiety and fear of losing their home. In states where mediation is most effective, the foreclosure mediation procedure is an "opt out" process. (*See*, citations in Section III, FN 4 below). As previously proposed by LSNJ to the Committee, we urge the Court adopt an "opt out" procedure, consistent with a variety of other state courts, such as New York. (*See,* additional citations in Section III below).

- Whether the procedure is "opt out" or "opt in", greater clarity is needed because once the summons and complaint have been served, mediation and filing of an answer are simultaneous. The parallel timing is both confusing and unworkable, especially to those without representation, and the timing must be adjusted.

B. Proposed Amendments to R. 4:4-4:

The LSNJ Hotline receives thousands of calls about foreclosures each year, frequently from panic ridden and frightened defendants who have been served with a summons in a foreclosure action. The currently prescribed summons language is misleading particularly to unrepresented defendants, as it fails to distinguish among different types of defendants, such as heirs, tenants, junior creditors and others to whom a debt is owed, and incorrectly states the potential consequences of a foreclosure action. All such defendants are served with the same summons that reads: "If *you* do not file and serve a written answer or motion within 35 days, the court may enter a judgment *against you* for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered *against you,* the Sheriff *may seize your money, wages or property to pay all or part of the judgment* (emphasis added)." LSNJ has been contacted by co-defendants who have been misled in the following ways: parents of deceased children and other relatives named as heirs on the summons and complaint, obviously distraught over the loss of their relative and needlessly frantic over whether they are obligated to pay for the mortgage; tenants who believe they will somehow be financially obligated and in any event must vacate the premises in 35 days; junior creditors who have child support judgments and have absolutely no understanding of the document other than it is a serious legal matter; and homeowners who are unclear about what will happen to them after the 35 days and often believe they will be physically removed and locked out of their homes. Those who are able to contact LSNJ are relieved when they receive information about the legal process. Several actions are necessary to address this lack of clarity and unnecessary consequent alarm.

1. Comments to amendments for service of process to junior creditors.

The Rule amendments provide for service to be made to all junior creditors by mailed service. LSNJ urges the court to consider mail service only upon corporate judgment creditors. Individual judgment creditors who have liens for child support judgments or litigated claims against bad actors may be harmed by discharge of the lien without ever having known about the action. Personal service still should be made upon non-corporate judgment creditors.

2. Proposed rule for revised foreclosure summons and complaint.

LSNJ urges the Court to consider the creation of a specific summons for foreclosure actions which addresses the potential consequences for junior creditors and others. This specific summons model is currently employed in tenancy eviction actions and should

differentiate the potential consequences of failure to answer the summons for homeowners and non-homeowner defendants, including judgment creditors. We further recommend that the caption for the foreclosure complaint and summons include the same designation of parties in interest as required by R. 4:64-1(b)(11). In addition, the language contained within the body of the foreclosure complaint should be very clear as to the status of junior creditors, tenants and other named defendants who are not obligors on the mortgage or otherwise not financially obligated to the plaintiff.

Because in our experience, foreclosure complaints raise such uncertainty and angst from individual defendants, LSNJ believes the contents of foreclosure summons must contain three additional items: 1) the notice language required by law to be provided to tenants advising them of their rights to remain; 2) information about the foreclosure mediation program; and 3) a reference to R. 1:13-2(a) advising indigent litigants of their right to apply for a fee waiver.

Section II. New amendments to R. 4:64-1.

LSNJ recommends the Court review two additional problems which are frequently encountered by our clients. First, there is a current gap in Court rules and legislation – nowhere is it explicitly stated that a *Writ of Possession against a foreclosed homeowner must be filed in the Chancery Division under the underlying foreclosure docket.* Third-party buyers frequently take advantage of this omission by incorrectly filing for a Writ of Possession in the Special Civil Part, generally under a civil action ("DC") docket, which creates an eviction process through the Sheriff's office that moves much faster and differently than a Writ of Possession issued through the foreclosure docket.

Second, the current process which bifurcates contested and uncontested foreclosures should be eliminated. Making such a bifurcation when defendants are unrepresented greatly increases the likelihood that meritorious claims and defenses will not be brought to light, and justice consequently denied.

Section III. Specific language suggestions with additional relevant comments.

Original language proposed by the Court which is proposed to be deleted appears as a strikeout. LSNJ proposed new language is underlined. Additional LSNJ comments are bracketed.

Rule 4:64-1B. Mediation of Eligible Residential Foreclosure Cases

(a) ~~Purpose~~ Scope.

Residential Foreclosure Mediation ~~differs from other types of court-sponsored mediation. Foreclosures are contractual disputes that arise from a homeowner's default of mortgage obligations. Because there is typically no dispute between the parties that the homeowner has~~

~~defaulted on the note,~~[1] ~~the mediation shall not focus on the reasons underlying the default, but rather~~ shall ~~explore~~ address whether ~~an alternative~~ mutually agreeable resolution is ~~available~~ acceptable to the parties, including but not limited to a reinstatement, loan modification, repayment plan or a deed in lieu of foreclosure. ~~Although the parties are not required to accept a loan modification or other alternative resolution, mediation may provide an opportunity for the homeowner to continue to reside in the mortgaged premises and may afford the lender an opportunity to avoid foreclosure costs and carrying charges and to reduce the number of non-performing loans in their portfolio.~~

[Comment – the deleted wording amounts to editorial comment, not appropriate for a rule.]

(b) Notification.

Plaintiff's attorney shall provide notice to the homeowner of the Residential Foreclosure Mediation Program when the summons and complaint are served.[2]

(c) Referral to Mediation.

(1) In any residential foreclosure action, in which the defendant homeowner is a resident of the property subject to foreclosure, plaintiff shall file proof of service within 20 days of such service, however service is made.

(2) Upon the filing of the proof of service, the Superior Court Clerk's Office shall issue a Notice of Mediation to each eligible homeowner and shall schedule an Initial Conference between the parties no later than 45 days from the date of the filing of proof of service, or on such adjourned date as has been agreed to by the parties.[3]

(3) ~~A homeowner may apply to participate in the Residential Foreclosure Mediation Program by submitting a completed Mediation Request Statement to the Superior Court Clerk's Office, Foreclosure Mediation, P.O. Box 971, 25 Market Street, Trenton, New Jersey 08625-0971, no later than 60 days from the date the homeowner is served with the summons and complaint.~~

(4) ~~After 60 days from the date a homeowner is served with the summons and complaint, and at any time prior to the sale of the property, a homeowner may apply to participate in the Residential Foreclosure Mediation Program only by filing a Motion to Participate in Mediation. The homeowner shall file the motion with the Superior~~

[1] As noted above, borrowers may have defenses and claims concerning disputes about whether they defaulted on the Note; typically there is an allegation that a practice or act perpetrated by the lender or the servicer caused them to default.

[2] The proposed notice would provide the defendant with an overview of the Residential Foreclosure Mediation Program. As explained more fully below, LSNJ believes that mediation should be automatically scheduled and no longer require borrowers to opt in to the mediation.

[3] The proposed language in (1) and (2) come from the New York mediation program. See C.P.L.R. Rule 3408 (a)(1).

~~Court Clerk's Office in Trenton and provide notice of the motion to the vicinage where the case is venued.~~

(5) ~~A Superior Court Judge may enter an order that requires the parties to attend Residential Foreclosure Mediation at any time following the filing of a complaint.~~[4]

(d) Eligibility.

Participation in the Residential Foreclosure Mediation Program is available only to eligible homeowners. To qualify, the homeowner must satisfy the following criteria:

~~(1)~~ (1) The mortgaged premises must be the subject of an active and open residential mortgage foreclosure case. ~~Mediation is not offered in connection with any other type of foreclosure litigation.~~

~~(2) The homeowner must apply to participate in the Residential Foreclosure Mediation Program no later than 60 days from the date they are served with the summons and complaint, unless a court order is entered directing the parties to attend the mediation.~~

~~(3)~~ (2) The mortgaged premises subject to foreclosure must be the homeowner's primary place of residence.

~~(4)~~ (3) The mortgaged premises subject to foreclosure must be a one, two or three family dwelling.

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[4] Although Legal Services of New Jersey understands that the court's resources are limited, we strongly recommend that participation in foreclosure mediation be scheduled automatically upon the filing of the proofs of service on an eligible homeowner. As discussed in two separate reports from the National Consumer Law Center (NCLC), mediation programs in which borrowers are automatically enrolled have greater borrower participation rates than those programs which require borrowers to opt in to mediation. See National Consumer Law Center, *Rebuilding America: How States Can Save Millions of Homes Through Foreclosure Mediation* (Feb. 2012), p. 21, available at https://www.nclc.org/foreclosures-and-mortgages/rebuilding-america.html (citing a study showing a borrower participation rate of 70% and settlement rate of 35% in Philadelphia's foreclosure mediation program, which assigns a date for a conference when the foreclosure complaint is filed); National Consumer Law Center, *Recent Developments in Foreclosure Mediation* (Jan. 2011), pp. 20-27, available at https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/rpt-mediation-2011.pdf (compare borrower participation rates of 75% to 80% in New York State with a modification reached in 31.6% of the cases mediated in Richmond County, which automatically set mediation sessions, with a borrower participation rate in New Jersey which showed 13,672 mediations were pending or completed between January 2009 through October 2010, a time in which roughly 122,808 foreclosures were filed, which translates to mediations in roughly 11% of all foreclosures filed and a permanent settlement reached in 24.3% of the cases mediated). An increased number of participants may result in a greater likelihood of settlements reached thereby potentially decreasing the number of foreclosure cases that would otherwise proceed through the Office of Foreclosure or Chancery Courts. Thus, while automatically assigned conferences may require resources of the mediation program, there would likely be a corresponding decrease of the administrative and court costs of processing foreclosures in New Jersey.

~~(5) All borrowers on the note must agree to participate in mediation. Absent a court order that provides otherwise, Residential Foreclosure Mediation is not available unless each borrower is willing to participate.~~[5]

~~(6)~~ (4) The homeowner is not presently in bankruptcy.

~~(7) The homeowner desires to continue to reside in the mortgaged premises.~~[6]

(e) Initial Conference

(1) The Superior Court Clerk's Office shall issue a Notice of mediation to each homeowner deemed eligible to participate in the Residential Foreclosure Mediation

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[5] There are situations in which only one person on the Note or individuals who were never on the Note may be entitled to be reviewed for loss mitigation options. For example, the Real Estate Procedure and Settlements Act ("RESPA") currently requires servicers to communicate with successors in interest upon notification of the death of a borrower. 12 C.F.R. § 1024.38(b)(1)(vi). The Consumer Financial Protection Bureau ("CFPB") has promulgated amendments to RESPA, effective April 19, 2018, which will significantly increase the scope of RESPA's rules regarding successors in interest. A new subsection in 1024.30, which addresses the scope of the RESPA servicing rules, provides, "A confirmed successor in interest shall be considered a borrower for purposes of 1024.17 and this subpart." 81 Fed. Reg. 72160, at 72370; future 12 C.F.R. § 1024.30(d) (eff. April 19, 2018). "Successor in interest" is defined as "a person to whom an ownership interest in a property securing a mortgage loan subject to this subpart is transferred from a borrower," provided that the transfer falls under one of the following scenarios:
(1) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
(2) A transfer to a relative resulting from the death of a borrower;
(3) A transfer where the spouse or children of the borrower become an owner of the property;
(4) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or
(5) A transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.
81 Fed. Reg. 72160, at 72371; future 12 C.F.R. §§ 1024.31 and 1026.2(27) (eff. April 19, 2018). Thus, once these rules become effective, servicers will be required to review successors in interest for loss mitigation options in compliance with section 1024.41.

The rules which govern reverse mortgages also provide specific protections for non-borrowing surviving spouses. See Mortgagee Letter 2015-15. Similarly, the rules which govern Fannie Mae, Freddie Mac, VA, USDA, and FHA loans all currently allow for one borrower on the Note to obtain loss mitigation options in certain situations. Given the above, it is unduly restrictive to require all borrowers on the Note to participate in New Jersey's Residential Foreclosure Mediation Program.

Further, it is unnecessarily burdensome to put the onus on defendants, the vast majority of whom are pro se, to file a motion to be able to participate in mediation. The suggested changes would decrease the barriers for entrance into mediation, and therefore, likely increase the number of settlements reached therein.

[6] This language conflicts with the purpose of the program stated in section (a) which allows for the parties to negotiate a "loan modification agreement or a deed in lieu of foreclosure." This section also mentions "other alternative resolution[s]", which would suggest that borrowers who wish to be considered for short sales could do so in the Residential Foreclosure Mediation Program. This language also conflicts with section (f)(2) of the proposed Rule, which also specifically mentions a deed in lieu as an alternative to foreclosure. Given that Fannie Mae, Freddie Mac, FHA, USDA and VA loans all provide for short sale and/or deed in lieu options in the event the borrower does not qualify for or does not want a modification, we strongly recommend that this section be stricken.

Program and shall schedule an Initial Conference between the parties no later than 45 days from the date of the ~~letter~~ filing of proof of service.

(2) Prior to the date of the Initial Conference the plaintiff shall mail the defendant homeowner the following loss mitigation documents by regular and certified mail:

a. An itemized loan transaction history with accompanying information, written in plain language, to explain any codes used in the history which are not otherwise self-explanatory;

b. An itemized statement of the amount necessary to reinstate the mortgage loan;

c. A statement of the amount necessary to pay off the mortgage loan;

d. Copies of the note, mortgage, and any agreements modifying such documents;

e. Current versions of all reasonably necessary forms and a list of all documentation reasonably necessary for the mortgagee to evaluate the mortgage for alternatives to foreclosure. This includes providing summaries of the requirements for hardship letters, contribution letters, or any other required form; and

f. The name, business mailing address, electronic mailing address, facsimile number and direct telephone number of an individual able to respond with reasonable adequacy and promptness to questions relative to the loss mitigation process.[7]

~~(2)~~ (3) A law clerk or other designated personnel assigned to the Superior Court Clerk's Office shall conduct the Initial Conference by telephone or other electronic means. The purpose of the Initial Conference is to facilitate the ~~timely~~ completion of the exchange of relevant financial documentation between the eligible homeowner and the lender. The law clerk or other designated personnel should confirm with both parties that the loss mitigation documents the plaintiff is required to provide the homeowner have been sent to and received by the homeowner. If the homeowner has received the documentation, the law clerk or other designated personnel shall advise the homeowner to provide the requested loss mitigation documents to the plaintiff no less than 30 days from the Initial Conference date and shall deem the Initial Conference

[7] Similar requirements can be found in other states' foreclosure mediation programs. See C.G.S.A. § 49-31*l*(c)(4) (Connecticut); C.P.L.R. Rule 3408(e)(1) (New York); N.R.S. 107.086(5) (Nevada); RCWA 61.24.163(5) (Washington). Having the plaintiff provide this documentation to the defendant prior to the Initial Conference should speed up the loss mitigation process. Also, the documents requested at (a)-(d) will assist the defendants, housing counselors and defendants' attorneys in calculating what loss mitigation options may be available to them.

Complete and refer the matter to Residential Foreclosure Mediation.

~~(3) If, following the Initial Conference, the parties have not exchanged all of the relevant financial documentation or are not otherwise ready to proceed to Residential Foreclosure Mediation, the Superior Court Clerk's Office shall schedule a Second Conference no later than 15 days from the date of the Initial Conference. No Third Conference shall be scheduled.~~[8]

(4) In the event that a homeowner misses the Initial Conference due to an emergency or other unforeseen circumstance, the Superior Court Clerk's Office may, at its discretion, schedule another Initial Conference for the homeowner.

(5) A Superior Court Judge may enter an order that requires the parties to attend Residential Foreclosure Mediation at any time following the filing of the proofs of service.

~~(4)~~ (6) If, at the Initial Conference, the parties are not ready to proceed to Residential Foreclosure Mediation ~~at the conclusion of a Second Conference~~ due to a failure of the homeowner ~~to provide complete financial documentation or~~ to attend the Initial Conference, ~~scheduled session(s),~~ the case shall be removed from the Residential Foreclosure Mediation Program.

~~(5)~~ (7) If, at the Initial Conference, the parties are not ready to proceed to Residential Foreclosure Mediation ~~at the conclusion of a second conference~~ due to a failure of the plaintiff to a) provide the loss mitigation documents required in subsection (e)(2) herein; ~~review the homeowner's financial documentation;~~ or b) attend the scheduled session(s); or c) otherwise participate in good faith during the Initial Conference, the case ~~shall be deemed a contested foreclosure and~~ shall be referred to a Superior Court Judge ~~for~~ to review what sanctions are appropriate against the plaintiff.

(f) Residential Foreclosure Mediation.

(1) Upon timely submission of the ~~necessary~~ required loss mitigation documentation to the homeowner ~~lender~~ and the completion of the Initial Conference, the Superior Court Clerk's Office shall enter an Administrative Order scheduling a Residential Foreclosure Mediation no later than 45 days from the date ~~of issuance of the~~

[8] The way the Rule is currently drafted, the parties have a total of 15 days from the date of the Initial Conference to exchange information and for the plaintiff to reach a decision thereon or the parties will not be allowed further mediation. This is not a reasonable timeline for either party. In our experience, servicers usually provide borrowers with at least 30 days to gather the requested information and provide the complete application and supporting documents to the servicer. Pursuant to RESPA, upon receipt of a loss mitigation application, the servicer must review the documents and let the borrower know within 5 business days if the application is complete or if any additional documentation that is needed. 12 C.F.R. § 1024.41(b)(2)(i)(B). After the servicer has received a complete loan modification application, within 30 days the servicer must review the application and provide the borrower with a written decision thereon. Id. § 1024.41(c)(1).

~~acceptance letter~~ the Initial Conference was completed. The Superior Court Clerk's Office shall provide the parties with a copy of the Administrative Order and shall upload the order to the electronic case jacket.

(2) The purpose of the mediation is to provide the parties with a forum to explore whether an alternative to foreclosure litigation is available, including but not limited to a reinstatement, loan modification agreement, repayment plan or a deed in lieu of foreclosure. The mediation shall be attended by a representative of the lender and by ~~each homeowner who executed the Note~~ at least one homeowner unless otherwise ordered by the court. Any party or representative who appears at mediation must have complete settlement authority.

(3) Residential Foreclosure Mediation may be conducted by phone or in person at the courthouse in the county where the case is venued. The parties are required to communicate special needs, such as an interpreter or handicapped access, to the Superior Court Clerk's Office prior to the commencement of the mediation.

(4) If the parties are unable to reach a mediated resolution ~~at the conclusion of a second mediation session~~ due to a failure of the lender to a) timely review the homeowner's financial documentation, b) attend the scheduled session(s), or c) otherwise participate in good faith during mediation, the case ~~shall be deemed a contested foreclosure and~~ shall be referred to a Superior Court Judge ~~for~~ to review what sanctions are appropriate against the lender.

(5) If, following a scheduled mediation session, the parties have been unable to agree to an alternative resolution, the mediator may in his or her discretion schedule another mediation session no later than 15 days from the date of the first scheduled mediation. Additional mediation sessions may be scheduled or held at the discretion of the mediator or by court order.[9]

(6) At the conclusion of each Residential Foreclosure Mediation session, the mediator shall complete a Residential Foreclosure Mediation Report. The Report shall identify each mediation participant and shall set forth whether the parties were able to agree to a mediated resolution. If the parties were able to reach an agreement, the Report shall set forth the terms of the agreement in full detail. If the parties agree to a trial modification or some other interim settlement, the Report shall set forth the terms of the agreement in full detail and the mediator shall set another mediation session to take place at the end of the trial period plan or interim settlement. The purpose of this session will be to determine whether both parties have complied with the terms of the

[9] Mediators should have discretion to schedule additional sessions as needed to facilitate effective settlement negotiations.

trial period plan or interim settlement. If the homeowner did not comply with the terms of the plan or interim settlement, the case may be released from Residential Foreclosure Mediation. If the plaintiff did not comply with the terms of the plan or interim settlement, the case shall be referred to a Superior Court Judge to review what sanctions are appropriate against the plaintiff.[10] If the parties were unable to reach an agreement, the Report shall briefly describe the obstacles the parties were unable to overcome and shall state that the foreclosure litigation shall proceed to conclusion. In the event the parties are scheduled to attend another mediation session, the Report shall set forth the new date. The mediator shall cause the Report to be uploaded to the electronic case jacket.

(g) Stay of Proceedings.

Absent a court order to the contrary, the commencement of Residential Foreclosure Mediation proceedings shall not stay the underlying foreclosure litigation. Residential Foreclosure Mediation shall ~~not~~ stay the underlying foreclosure proceedings including sheriff's sales.

(h) Good Faith.[11]

Both the lender and homeowner shall negotiate in good faith to reach a mutually agreeable resolution. At a minimum good faith requires:

(1) Compliance with this rule and applicable court rules, court orders, and directives by the court or its designee pertaining to the Residential Foreclosure Mediation Program;

[10] This language was added specifically to address the Willoughby problem, which is when a defendant reaches an agreement in mediation with the plaintiff and is released from mediation but thereafter the plaintiff/lender fails to ever provide the promised modification. See GMAC Mortg., LLC v. Willoughby, No. 076006, 2017 WL 3224510 (N.J. July 31, 2017). Although neither the New York or Philadelphia mediation programs specifically address whether homeowners who are in trial modifications shall remain in mediation, we are aware that at least some New York mediators did agree to keep cases in mediation when a trial modification had been entered into. The purpose of keeping the cases in mediation was to ensure that borrowers who complied with the agreements received permanent modifications. The issue of servicers not providing permanent modifications to borrowers, even when the borrower completely complies with all the trial modification terms, remains a pervasive problem nationally and in New Jersey. The defendant in Willoughby had to litigate for years before she was able to get any relief. By keeping these cases in mediation and ensuring that permanent modifications are received by homeowners, the mediation program would be reducing lengthy litigation, thereby reducing drains on valuable court resources.

[11] Specifically requiring parties to participate in good faith is a common element of foreclosure mediation programs nationwide. See, e.g., C.P.L.R. Rule 3408(f) (New York); 12 V.S.A. § 4633(c) (Vermont); N.R.S. 107.086(6) (Nevada); 14 M.R.S.A. § 6321-A(12) (Maine); W.R.C.A. § 61.24.163(10) (Washington); 10 Del.C. § 5062C (f) (Delaware); DC ST § 42-815.02(a)(2A) (District of Columbia). This particular language was modeled in large part on New York's mediation program. See C.P.L.R. Rule 3408 (f).

(2) Compliance with applicable mortgage servicing laws, rules, regulations, and investor directives;

(3) Conduct consistent with efforts to reach a mutually agreeable resolution, including but not limited to, avoiding unreasonable delay, appearing at the mediation with complete settlement authority and providing accurate information to the court and the parties.

(i) Sanctions or Other Actions.[12]

(1) The law clerk or other designated personnel who conducts the Initial Conference or any mediation pursuant to this Rule has authority to refer the case to a Superior Court Judge to review for appropriate sanctions or other actions. In the mediation Report, the law clerk or other designated personnel shall include details concerning any party's failure to negotiate in good faith.

(2) The court may determine whether either party fails to comply with the duty to negotiate in good faith either on motion of any party or *sua sponte* on notice to the parties.

(3) The court may impose appropriate sanctions against the noncomplying lender, including:

a. Tolling of interest, fees and costs;

b. Reasonable attorney's fees;

c. Monetary sanctions;

d. Any other relief that the court deems just and proper.

(4) The court may order appropriate actions against the noncomplying homeowner, including removing the case from the conference calendar. In considering such a finding, the court shall take into account equitable factors including, but not limited to, whether the defendant was represented by counsel.

[12] Specifically allowing for sanctions is another common element of foreclosure mediation programs nationwide. See, e.g., C.P.L.R. Rule 3408(j) (New York); 12 V.S.A. § 4635(b) (Vermont); N.R.S. 107.086(6) (Nevada); 14 M.R.S.A. § 6321-A(12) (Maine); W.R.C.A. § 61.24.163(14)(a) (Washington); 10 Del.C. § 5062C (i)(9)(h) (Delaware); DC ST § 42-815.02(e)(1)(A)-(C) (District of Columbia); H.R.S. § 667-82(b) (Hawaii). This particular language was modeled in large part on New York's mediation program. See C.P.L.R. Rule 3408 (i), (j).

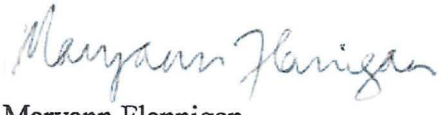
(j) Attorney's Fees.

A party to a foreclosure action may not charge, impose, or otherwise require payment from the other party for any cost, including but not limited to attorney's fees for the participation at or in the Residential Foreclosure Mediation Program, except by court order pursuant to subsection (h) herein.

Respectfully yours,

Melville D. Miller, Jr.
President

Dawn K. Miller
Executive Vice President



Maryann Flannigan
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